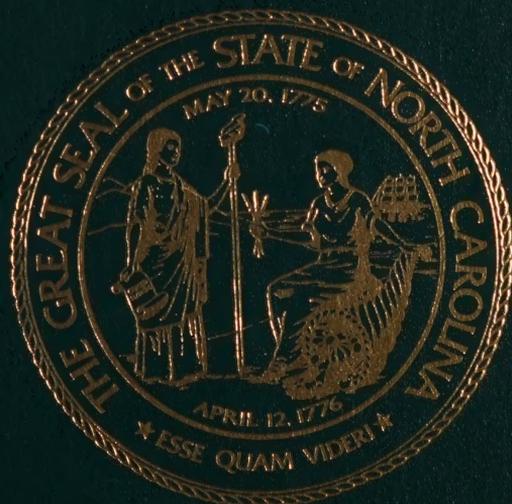


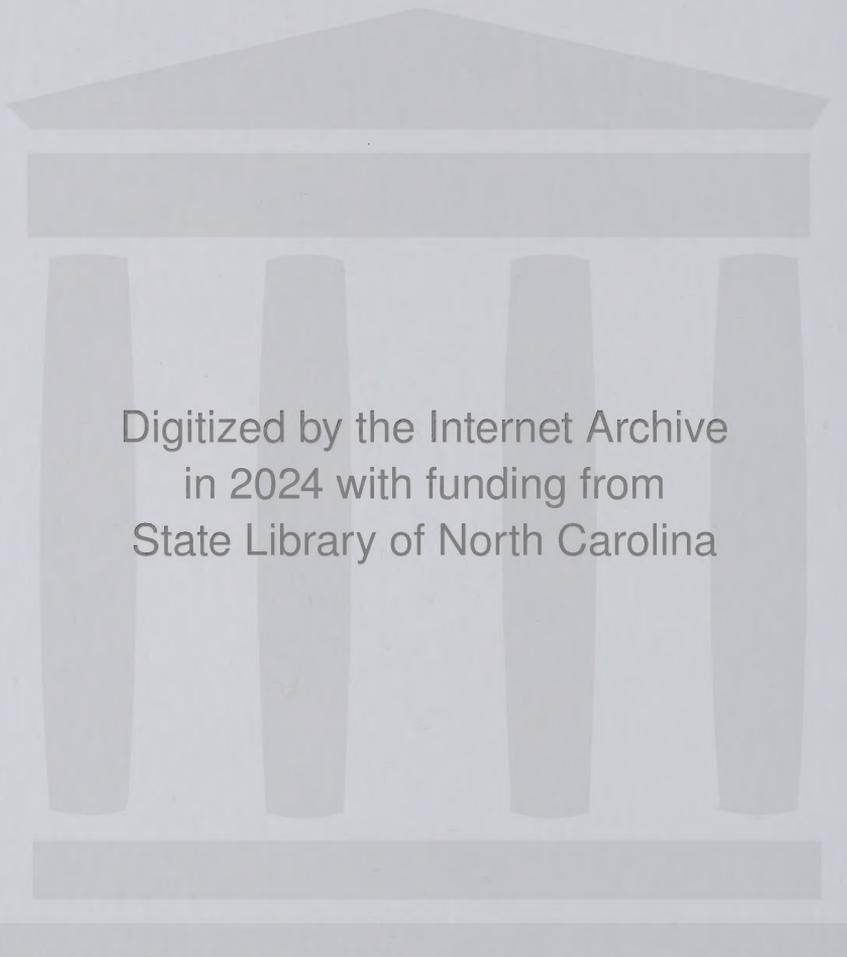
GENERAL STATUTES  
OF  
NORTH CAROLINA

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ANNOTATED



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**GENERAL STATUTES  
OF NORTH CAROLINA**

**ANNOTATED**

**Volume 17**

**Chapters 143A Through 159**

*Prepared Under the Supervision of*  
THE DEPARTMENT OF JUSTICE  
OF THE STATE OF NORTH CAROLINA  
*by*  
*the Editorial Staff of the Publisher*



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## Preface

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This volume contains the general laws of a permanent nature enacted by the General Assembly through the 2001 Regular Session that are within Chapters 143A through 159, and brings to date the annotations included therein.

A majority of the Session Laws are made effective upon becoming law, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 60 days after the adjournment of the session" in which passed.

A ready reference index is included at the back of this volume. This index is intended to give the user a quick reference to larger bodies of statutes within this volume only. For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. For a copy of an opinion or of its headnotes, write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any suggestions they may have for improving the General Statutes to the Department, or to LexisNexis, Charlottesville, Virginia.

ROY COOPER  
*Attorney General*

## Scope of Volume

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### **Statutes:**

Permanent portions of the General Laws enacted by the General Assembly through the 2001 Regular Session affecting Chapters 143A through 159 of the General Statutes.

### **Annotations:**

This publication contains annotations taken from decisions of the North Carolina Supreme Court posted on LEXIS through October 5, 2001, decisions of the North Carolina Court of Appeals posted on LEXIS through October 16, 2001, and decisions of the appropriate federal courts posted through September 10, 2001. These cases will be printed in the following reporters:

- South Eastern Reporter 2nd Series.
- Federal Reporter 3rd Series.
- Federal Supplement 2nd Series.
- Federal Rules Decisions.
- Bankruptcy Reports.
- Supreme Court Reporter.

Additionally, annotations have been taken from the following sources:

- North Carolina Law Review through Volume 79, no. 4, p. 1201.
- Wake Forest Law Review through Volume 36, Pamphlet No. 1, p. 215.
- Campbell Law Review through Volume 22, no. 2, p. 447.
- Duke Law Journal through Volume 49, no. 2, p. 599.
- North Carolina Central Law Journal through Volume 23, no. 1, p. 83.
- Opinions of the Attorney General.

# APPLICABLE STATE User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

## Abbreviations

(The abbreviations below are those found in the General Statutes that refer to prior codes.)

P.R. ....	Potter's Revision (1821, 1827)
R.S. ....	Revised Statutes (1837)
R.C. ....	Revised Code (1854)
C.C.P. ....	Code of Civil Procedure (1868)
Code .....	Code (1883)
Rev. ....	Revision of 1905
C.S. ....	Consolidated Statutes (1919, 1924)

# STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

April 1, 2002

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 2001 Replacement Code to the General Statutes of North Carolina was prepared and published by LexisNexis under the supervision of the Department of Justice of the State of North Carolina.

ROY COOPER

*Attorney General of North Carolina*

## Table of Contents

For complete listing of chapters set out in the North Carolina General Statutes, see the Table of Contents included in Volume 1.

### VOLUME 17

- Chapter 143A. State Government Reorganization, §§ 143A-1 to 143A-245
- Art. 1. General Provisions, §§ 143A-1 to 143A-18
  - Art. 2. Department of the Secretary of State, §§ 143A-19 to 143A-23
  - Art. 3. Department of State Auditor, §§ 143A-24 to 143A-29
  - Art. 4. Department of State Treasurer, §§ 143A-30 to 143A-38.1
  - Art. 5. Department of Public Instruction, §§ 143A-39 to 143A-48
  - Art. 6. Department of Justice, §§ 143A-49 to 143A-55.7
  - Art. 7. Department of Agriculture and Consumer Services, §§ 143A-56 to 143A-66
  - Art. 8. Department of Labor, §§ 143A-67 to 143A-72
  - Art. 9. Department of Insurance, §§ 143A-73 to 143A-79.2
  - Art. 10. Department of Administration, §§ 143A-80 to 143A-96.1
  - Art. 11. Department of Transportation and Highway Safety [Repealed.]
  - Art. 12. Department of Natural and Economic Resources [Repealed.]
  - Art. 13. Department of Human Resources [Repealed.]
  - Art. 14. Department of Social Rehabilitation and Control [Repealed.]
  - Art. 15. Department of Commerce [Repealed and Recodified.]
  - Art. 16. Department of Revenue [Repealed.]
  - Art. 17. Department of Art, Culture and History [Repealed.]
  - Art. 18. Department of Military and Veterans' Affairs [Repealed.]
  - Art. 19. Transfers to Department of Crime Control and Public Safety, §§ 143A-239 to 143A-245
- Chapter 143B. Executive Organization Act of 1973
- Art. 1. General Provisions, §§ 143B-1 to 143B-48
  - Art. 2. Department of Cultural Resources, §§ 143B-49 to 143B-135
  - Art. 3. Department of Health and Human Services, §§ 143B-136 to 143B-216.51
  - Art. 4. Department of Revenue, §§ 143B-217 to 143B-245
  - Art. 5. Department of Military and Veterans Affairs [Repealed, Transferred and Reserved.]
  - Art. 6. Department of Correction, §§ 143B-260 to 143B-272
  - Art. 6A. North Carolina State-County Criminal Justice Partnership Act, §§ 143B-273 to 143B-274
  - Art. 7. Department of Environment and Natural Resources, §§ 143B-275 to 143B-344.33
  - Art. 8. Department of Transportation, §§ 143B-345 to 143B-365
  - Art. 9. Department of Administration, §§ 143B-366 to 143B-426.40
  - Art. 10. Department of Commerce, §§ 143B-427 to 143B-472.70
  - Art. 11. Department of Crime Control and Public Safety, §§ 143B-473 to 143B-510
  - Art. 12. Department of Juvenile Justice and Delinquency Prevention, §§ 143B-511 to 143B-557
- Chapter 144. State Flag, Motto and Colors, §§ 144-1 to 144-6
- Chapter 145. State Flower, Bird, Tree, Shell, Mammal, Fish, Insect, Stone, Reptile and Rock, Beverage, Historical Boat, Language, Dog, Military Academy, Tartan, Watermelon Festival and Other Official Adoptions, §§ 145-1 to 145-18

TABLE OF CONTENTS

Chapter 146. State Lands, §§ 146-1 to 146-83

*SUBCHAPTER I. UNALLOCATED STATE LANDS*

- Art. 1. General Provisions, §§ 146-1 to 146-2
- Art. 2. Dispositions, §§ 146-3 to 146-15
- Art. 3. Discovery and Reclamation, §§ 146-16 to 146-17.1
- Art. 4. Miscellaneous Provisions, §§ 146-18 to 146-20.1

*SUBCHAPTER II. ALLOCATED STATE LANDS*

- Art. 5. General Provisions, § 146-21
- Art. 6. Acquisitions, §§ 146-22 to 146-26.1
- Art. 7. Dispositions, §§ 146-27 to 146-30
- Art. 8. Miscellaneous Provisions, §§ 146-31 to 146-36

*SUBCHAPTER III. ENTRIES AND GRANTS*

- Art. 9. General Provisions, §§ 146-37 to 146-39
- Art. 10. Surveys, §§ 146-40 to 146-42
- Art. 11. Grants, §§ 146-43 to 146-45
- Art. 12. Correction of Grants, §§ 146-46 to 146-60.1
- Art. 13. Grants Vacated, §§ 146-61 to 146-63

*SUBCHAPTER IV. MISCELLANEOUS*

- Art. 14. General Provisions, §§ 146-64 to 146-70
- Art. 15. State Land Fund, §§ 146-71 to 146-73
- Art. 16. Form of Conveyances, §§ 146-74 to 146-78
- Art. 17. Title in State, §§ 146-79 to 146-82
- Art. 18. Miscellaneous, § 146-83
- Chapter 147. State Officers, §§ 147-1 to 147-89
  - Art. 1. Classification and General Provisions, §§ 147-1 to 147-5
  - Art. 2. Expenses of State Officers and State Departments, §§ 147-6 to 147-9.1
  - Art. 2A. Annuities and Deferred Compensation for Teachers and State Employees, §§ 147-9.2 to 147-9.4
  - Art. 3. The Governor, §§ 147-10 to 147-33
  - Art. 3A. Emergency War Powers of Governor, §§ 147-33.1 to 147-33.11
  - Art. 3B. North Carolina Housing Commission [Repealed.]
  - Art. 3C. Office of Juvenile Justice [Repealed and Reserved.]
  - Art. 3D. Office of Information Technology Services., §§ 147-33.75 to 147-33.103
  - Art. 4. Secretary of State, §§ 147-34 to 147-54.7
  - Art. 4A. Constitutional Amendments Publication Commission, §§ 147-54.8 to 147-54.10
  - Art. 4B. Business License Information Office, §§ 147-54.11 to 147-54.19
  - Art. 5. Auditor [Repealed and Recodified.]
  - Art. 5A. Auditor, §§ 147-64.1 to 147-64.14
  - Art. 6. Treasurer, §§ 147-65 to 147-86.9
  - Art. 6A. Cash Management, §§ 147-86.10 to 147-86.19
  - Art. 6B. Statewide Accounts Receivable Program, §§ 147-86.20 to 147-86.27
  - Art. 6C. Health and Wellness Trust Fund, §§ 147-86.30 to 147-86.36
  - Art. 7. Secretary of Revenue, §§ 147-87 to 147-88
  - Art. 8. District Attorneys, § 147-89

TABLE OF CONTENTS

- Chapter 148. State Prison System, §§ 148-1 to 148-121
  - Art. 1. Organization and Management, §§ 148-1 to 148-10.2
  - Art. 2. Prison Regulations, §§ 148-11 to 148-25
  - Art. 3. Labor of Prisoners, §§ 148-26 to 148-49
  - Art. 3A. Facilities and Programs for Youthful Offenders [Repealed.]
  - Art. 3B. Facilities and Programs for Youthful Offenders [Repealed.]
  - Art. 4. Paroles, §§ 148-50 to 148-65
  - Art. 4A. Out-of-State Parolee Supervision, §§ 148-65.1 to 148-65.3
  - Art. 5. Farming Out Convicts, §§ 148-66 to 148-70
  - Art. 5A. Prison Labor for Farm Work [Repealed.]
  - Art. 6. Reformatory [Repealed.]
  - Art. 7. Records, Statistics, Research and Planning, §§ 148-74 to 148-81
  - Art. 8. Compensation to Persons Erroneously Convicted of Felonies, §§ 148-82 to 148-84
  - Art. 9. Prison Advisory Council [Repealed.]
  - Art. 10. Interstate Agreement on Detainers [Transferred and Reserved.]
  - Art. 11. Inmate Grievance Commission [Repealed.]
  - Art. 11A. Corrections Administrative Remedy Procedure, §§ 148-118.1 to 148-118.9
  - Art. 12. Interstate Corrections Compact, §§ 148-119 to 148-121
- Chapter 149. State Song and Toast, §§ 149-1 to 149-2
- Chapter 150. Uniform Revocation of Licenses [Repealed.]
- Chapter 150A. Administrative Procedure Act [Recodified.]
- Chapter 150B. Administrative Procedure Act, §§ 150B-1 to 150B-57
  - Art. 1. General Provisions, §§ 150B-1 to 150B-8
  - Art. 2. Rule Making [Repealed and Recodified.]
  - Art. 2A. Rules, §§ 150B-18 to 150B-21.28
  - Art. 3. Administrative Hearings, §§ 150B-22 to 150B-37
  - Art. 3A. Other Administrative Hearings, §§ 150B-38 to 150B-42
  - Art. 4. Judicial Review, §§ 150B-43 to 150B-57
  - Art. 5. Publication of Administrative Rules [Repealed.]
- Chapter 151. Constables [Repealed.]
- Chapter 152. Coroners, §§ 152-1 to 152-11
- Chapter 152A. County Medical Examiner [Repealed.]
- Chapter 153. Counties and County Commissioners [Repealed.]
- Chapter 153A. Counties, §§ 153A-1 to 153A-450
  - Art. 1. Definitions and Statutory Construction, §§ 153A-1 to 153A-9
  - Art. 2. Corporate Powers, §§ 153A-10 to 153A-16
  - Art. 3. Boundaries, §§ 153A-17 to 153A-24
  - Art. 4. Form of Government, §§ 153A-25 to 153A-75
  - Art. 5. Administration, §§ 153A-76 to 153A-120
  - Art. 6. Delegation and Exercise of the General Police Power, §§ 153A-121 to 153A-145
  - Art. 7. Taxation, §§ 153A-146 to 153A-156
  - Art. 8. County Property, §§ 153A-157 to 153A-184
  - Art. 9. Special Assessments, §§ 153A-185 to 153A-210
  - Art. 10. Law Enforcement and Confinement Facilities, §§ 153A-211 to 153A-232
  - Art. 11. Fire Protection, §§ 153A-233 to 153A-237
  - Art. 12. Roads and Bridges, §§ 153A-238 to 153A-246
  - Art. 13. Health and Social Services, §§ 153A-247 to 153A-260
  - Art. 14. Libraries, §§ 153A-261 to 153A-273
  - Art. 15. Public Enterprises, §§ 153A-274 to 153A-299.6
  - Art. 16. County Service Districts; County Research and Production Service Districts, §§ 153A-300 to 153A-317
  - Art. 17. [Reserved.]

TABLE OF CONTENTS

- Art. 18. Planning and Regulation of Development, §§ 153A-320 to 153A-390
- Art. 19. Regional Planning Commissions, §§ 153A-391 to 153A-400
- Art. 20. Consolidation and Governmental Study Commissions, §§ 153A-401 to 153A-405
- Art. 21. [Reserved.]
- Art. 22. Regional Solid Waste Management Authorities, §§ 153A-421 to 153A-434
- Art. 23. Miscellaneous Provisions, §§ 153A-435 to 153A-450
- Chapter 154. County Surveyor [Repealed.]
- Chapter 155. County Treasurer [Repealed.]
- Chapter 156. Drainage, §§ 156-1 to 156-141

*SUBCHAPTER I. DRAINAGE BY INDIVIDUAL OWNERS*

- Art. 1. Jurisdiction in Clerk of Superior Court, §§ 156-1 to 156-31
- Art. 2. Jurisdiction in County Commissioners, §§ 156-32 to 156-36

*SUBCHAPTER II. DRAINAGE BY CORPORATION*

- Art. 3. Manner of Organization, §§ 156-37 to 156-43
- Art. 4. Rights and Liabilities in the Corporation, §§ 156-44 to 156-53

*SUBCHAPTER III. DRAINAGE DISTRICTS*

- Art. 5. Establishment of Districts, §§ 156-54 to 156-78.1
- Art. 6. Drainage Commissioners, §§ 156-79 to 156-82.3
- Art. 7. Construction of Improvement, §§ 156-83 to 156-93
- Art. 7A. Maintenance, § 156-93.1
- Art. 7B. Improvement, Renovation, Enlargement and Extension of Canals, Structures and Boundaries, §§ 156-93.2 to 156-93.7
- Art. 8. Assessments and Bond Issue, §§ 156-94 to 156-124.1
- Art. 9. Adjustment of Delinquent Assessments, §§ 156-125 to 156-129
- Art. 10. Reports of Officers, §§ 156-130 to 156-134
- Art. 11. General Provisions, §§ 156-135 to 156-138.4

*SUBCHAPTER IV. DRAINAGE BY COUNTIES*

- Art. 12. Protection of Public Health, §§ 156-139 to 156-141
- Chapter 157. Housing Authorities and Projects, §§ 157-1 to 157-70
  - Art. 1. Housing Authorities Law, §§ 157-1 to 157-39.8
  - Art. 2. Municipal Cooperation and Aid, §§ 157-40 to 157-47
  - Art. 3. Eminent Domain, §§ 157-48 to 157-51
  - Art. 4. National Defense Housing Projects, §§ 157-52 to 157-65
  - Art. 5. Indian Housing Authority, §§ 157-66 to 157-70
- Chapter 157A. Historic Properties Commissions [Transferred.]
- Chapter 158. Local Development, §§ 158-1 to 158-42
  - Art. 1. Local Development Act of 1925, §§ 158-1 to 158-7.3
  - Art. 2. Economic Development Commissions, §§ 158-8 to 158-15
  - Art. 2A. Multi-County Water Conservation and Infrastructure District, §§ 158-15.1 to 158-15.9
  - Art. 3. Tax Elections for Industrial Development Purposes, §§ 158-16 to 158-29
  - Art. 4. Global TransPark Development Zone, §§ 158-30 to 158-42
- Chapter 159. Local Government Finance, §§ 159-1 to 159-188

TABLE OF CONTENTS

*SUBCHAPTER I. SHORT TITLE AND DEFINITIONS*

- Art. 1. Short Title and Definitions, §§ 159-1 to 159-2

*SUBCHAPTER II. LOCAL GOVERNMENT COMMISSION*

- Art. 2. Local Government Commission, §§ 159-3 to 159-6

*SUBCHAPTER III. BUDGETS AND FISCAL CONTROL*

- Art. 3. The Local Government Budget and Fiscal Control Act, §§ 159-7 to 159-42

*SUBCHAPTER IV. LONG-TERM FINANCING*

- Art. 4. Local Government Bond Act, §§ 159-43 to 159-79  
Art. 5. Revenue Bonds, §§ 159-80 to 159-98  
Art. 5A. Capital Appreciation Bonds, §§ 159-99 to 159-100  
Art. 6. Economic Development Financing Act [Not in Effect and Reserved.]  
Art. 7. Issuance and Sale of Bonds, §§ 159-120 to 159-147  
Art. 8. Financing Agreements and Other Financing Arrangements, §§ 159-148 to 159-159  
Art. 9. Bond Anticipation, Tax, Revenue and Grant Anticipation Notes, §§ 159-160 to 159-175  
Art. 10. Assistance for Defaulting Units in Refinancing Debt, §§ 159-176 to 159-180  
Art. 11. Enforcement of Chapter, §§ 159-181 to 159-187  
Art. 12. Borrowing by Development Authorities Created by General Assembly, § 159-188



# Chapter 143A.

## State Government Reorganization.

### Article 1.

#### General Provisions.

Sec.

- 143A-1. Short title.
- 143A-2. Head of department defined.
- 143A-3. Agency defined.
- 143A-4. Policy-making authority and administrative powers of Governor; delegation.
- 143A-5. Office of the Lieutenant Governor.
- 143A-6. Types of transfers.
- 143A-7. Agencies not enumerated; continuation.
- 143A-8. Internal organization of departments; allocation and reallocation of duties and functions; limitations.
- 143A-9. Appointment of officers and employees; salaries of department heads.
- 143A-10. Governor; continuation of powers and duties; staff.
- 143A-11. Principal departments.
- 143A-12. Office of the Governor; creation.
- 143A-13. Office of the Lieutenant Governor; creation.
- 143A-14. Creation of new departments by executive order.
- 143A-15. Date of transfer of agencies into existing departments.
- 143A-16. Transfer of funds by Governor.
- 143A-17. [Repealed.]
- 143A-18. Additional funds for reorganization.

### Article 2.

#### Department of the Secretary of State.

- 143A-19. Creation.
- 143A-20. Secretary of State; powers and duties.
- 143A-21. Secretary of State; transfer of powers and duties to Department.
- 143A-22. [Repealed.]
- 143A-23. Notaries public; powers, duties and functions; transfer.

### Article 3.

#### Department of State Auditor.

- 143A-24. Creation.
- 143A-25. State Auditor; powers and duties.
- 143A-26. State Auditor; transfer of powers and duties to Department.
- 143A-27. North Carolina Firemen's Pension Fund; transfer.
- 143A-27.1. North Carolina Firemen's and Rescue Squad Workers' Pension Fund; transfer.
- 143A-28. [Repealed.]

Sec.

- 143A-29. State Board of Pensions; transfer.

### Article 4.

#### Department of State Treasurer.

- 143A-30. Creation.
- 143A-31. State Treasurer; powers and duties.
- 143A-32. State Treasurer; transfer of powers and duties to Department.
- 143A-33. Local Government Commission; transfer.
- 143A-34. Teachers' and State Employees' Retirement System; transfer.
- 143A-35. North Carolina Local Governmental Employees' Retirement System; transfer.
- 143A-36. Public Employees' Social Security Agency; powers, duties and functions; transfer.
- 143A-37. Legislative Retirement Fund; transfer.
- 143A-38. Tax Review Board; transfer.
- 143A-38.1. The Law-Enforcement Officers' Benefit and Retirement Fund; transfer.

### Article 5.

#### Department of Public Instruction.

- 143A-39 through 143A-44. [Repealed.]
- 143A-44.1. Creation.
- 143A-44.2. State Board of Education; transfer of powers and duties to State Board.
- 143A-44.3. Superintendent of Public Instruction; creation; transfer of powers and duties.
- 143A-45. Interstate Compact for Education; rights, duties and privileges.
- 143A-46. [Repealed.]
- 143A-47. Interstate Agreement on Qualifications of Educational Personnel; rights, duties and privileges.
- 143A-48. Textbook Commission; transfer.

### Article 6.

#### Department of Justice.

- 143A-49. Creation.
- 143A-49.1. Attorney General; powers and duties.
- 143A-50. Attorney General; transfer of powers and duties to Department.
- 143A-51. State Bureau of Investigation; transfer.
- 143A-52. Fire investigations; transfer.

CH. 143A. STATE GOVERNMENT REORGANIZATION

Sec.

- 143A-53. General Statutes Commission; transfer.
- 143A-54. Company police; powers, duties and functions; transfer.
- 143A-55. Police information Network; transfer.
- 143A-55.1. North Carolina Criminal Justice Training and Standards Council; transfer.
- 143A-55.2. North Carolina Sheriffs' Education and Training Standards Commission; transfer.
- 143A-55.3 through 143A-55.7. [Not effectuated.]

**Article 7.**

**Department of Agriculture and Consumer Services.**

- 143A-56. Creation.
- 143A-57. Commissioner of Agriculture; powers and duties.
- 143A-58. Commissioner of Agriculture; transfer of powers and duties to Department.
- 143A-59. Board of Agriculture; transfer.
- 143A-60. Structural Pest Control Division; transfer.
- 143A-61. The North Carolina Agricultural Hall of Fame; transfer.
- 143A-62. Gasoline and Oil Inspection Board; transfer.
- 143A-63. North Carolina Rural Rehabilitation Corporation; transfer.
- 143A-64. North Carolina Board of Crop Seed Improvement; transfer.
- 143A-65. North Carolina Public Livestock Market Advisory Board; transfer.
- 143A-66. [Repealed.]

**Article 8.**

**Department of Labor.**

- 143A-67. Creation.
- 143A-68. Commissioner of Labor; powers and duties.
- 143A-69. Commissioner of Labor; transfer of powers and duties to Department.
- 143A-70. Board of Boiler Rules and Bureau of Boiler Inspection; transfer.
- 143A-71. Apprenticeship Council; transfer.
- 143A-72. Voluntary arbitration of labor disputes; appointment of arbitrator or panel; Commissioner of Labor; transfer.

**Article 9.**

**Department of Insurance.**

- 143A-73. Creation.
- 143A-74. Commissioner of Insurance; powers and duties.

Sec.

- 143A-75. Commissioner of Insurance; transfer of powers and duties to Department.
- 143A-76, 143A-77. [Repealed.]
- 143A-78. Building Code Council; transfer.
- 143A-79. State Volunteer Fire Department; transfer.
- 143A-79.1. Public Officers and Employees Liability Insurance Commission; transfer.
- 143A-79.2. State Fire Commission; transfer.

**Article 10.**

**Department of Administration.**

- 143A-80 through 143A-96. [Repealed.]
- 143A-96.1. Transfer of Department of Veterans Affairs.

**Article 11.**

**Department of Transportation and Highway Safety.**

- 143A-97 through 143A-108. [Repealed.]

**Article 12.**

**Department of Natural and Economic Resources.**

- 143A-109 through 143A-129. [Repealed.]

**Article 13.**

**Department of Human Resources.**

- 143A-130 through 143A-162. [Repealed.]

**Article 14.**

**Department of Social Rehabilitation and Control.**

- 143A-163 through 143A-170. [Repealed.]

**Article 15.**

**Department of Commerce.**

- 143A-171 through 143A-180. [Repealed.]
- 143A-180.1 through 143A-181. [Recodified.]
- 143A-182 through 143A-185.1. [Repealed.]

**Article 16.**

**Department of Revenue.**

- 143A-186 through 143A-190. [Repealed.]

**Article 17.**

**Department of Art, Culture and History.**

- 143A-191 through 143A-230. [Repealed.]

**Article 18.**

**Department of Military and Veterans' Affairs.**

- 143A-231 through 143A-238. [Repealed.]

**Article 19.****Transfers to Department of Crime  
Control and Public Safety.**

Sec.

143A-239. North Carolina national guard.  
143A-240. North Carolina Civil Preparedness  
Agency.

Sec.

143A-241. State Civil Air Patrol.  
143A-242. State Highway Patrol.  
143A-243. North Carolina Alcoholic Beverage  
Control Commission Enforcement  
Division.  
143A-244. Governor's Crime Commission.  
143A-245. Crime Control Division.

**ARTICLE 1.***General Provisions.***§ 143A-1. Short title.**

This Chapter shall be known and may be cited as the "Executive Organization Act of 1971." (1971, c. 864, s. 1.)

**CASE NOTES**

**Stated** in *Tice v. DOT*, 67 N.C. App. 48, 312  
S.E.2d 241 (1984).

**§ 143A-2. Head of department defined.**

Whenever the term "head of the department" is used it shall mean the head of one of the principal departments created by this Chapter. (1971, c. 864, s. 1.)

**§ 143A-3. Agency defined.**

Whenever the term "agency" is used it shall mean and include, as the context may require, an existing department, institution, commission, committee, board, division, bureau, officer or official. (1971, c. 864, s. 1.)

**§ 143A-4. Policy-making authority and administrative powers of Governor; delegation.**

The Governor, in accordance with Article III of the Constitution of North Carolina, shall be the chief executive officer of the State. Subject to the Constitution and laws of this State, the Governor shall be responsible for formulating and administering the policies of the executive branch of the State government. Where a conflict arises in connection with the administration of the policies of the executive branch of the State government with respect to the reorganization of State government, such conflict shall be resolved by the Governor, and the decision of the Governor shall be final. (1971, c. 864, s. 1.)

**§ 143A-5. Office of the Lieutenant Governor.**

The Lieutenant Governor shall maintain an office in a State building in the City of Raleigh which office shall be open during normal working hours throughout the year. The Lieutenant Governor shall serve as President of the Senate and perform such additional duties as the Governor or General Assembly may assign to him. This section shall become effective January 1, 1973. (1971, c. 864, s. 1.)

## § 143A-6. Types of transfers.

(a) Under this Chapter, a Type I transfer means the transferring of all or part of an existing agency to a principal department established by this Chapter. When all or part of any agency is transferred to a principal department under a Type I transfer, its statutory authority, powers, duties, and functions, records, personnel, property, unexpended balances of appropriations, allocations or other funds, including the functions of budgeting and purchasing, are transferred to the principal department.

When any agency, or part thereof, is transferred by a Type I transfer to a principal department under the provisions of this Chapter, all its prescribed powers, duties, and functions, including but not limited to rule making, regulation, licensing, and promulgation of rules, rates, regulations, and standards, and the rendering of findings, orders, and adjudications are transferred to the head of the principal department into which the agency, or part thereof, has been transferred.

(b) Under this Chapter, a Type II transfer means the transferring intact of an existing agency, or part thereof, to a principal department established by this Chapter. When any agency, or part thereof, is transferred to a principal department under a Type II transfer, that agency, or part thereof, shall be administered under the direction and supervision of that principal department, but shall exercise all its prescribed statutory powers independently of the head of the principal department, except that under a Type II transfer the management functions of any transferred agency, or part thereof, shall be performed under the direction and supervision of the head of the principal department.

(c) Whenever the term "management functions" is used it shall mean planning, organizing, staffing, directing, coordinating, reporting and budgeting. (1971, c. 864, s. 1.)

### CASE NOTES

**Power to Fire Within Scope of Subsection (c).** — When an agency is transferred to a new department by a "Type II transfer," subsection (b) of this section provides that the management functions of the agency, which includes staffing pursuant to subsection (c) of this section, shall be performed not only under the "supervision" but also the "direction" of the head of the principal department. The power to fire clearly falls within the scope of subsection (c) of this section; therefore, the Secretary of Human Resources had the power to fire the superintendent of a state hospital for the mentally disordered before his six-year term expired, and it was not required that he be dismissed by the State Board of Mental Health. *Smith v. State*, 298 N.C. 115, 257 S.E.2d 399 (1979).

**Effect of Shift of Power to Fire on Em-**

**ployment Contract.** — The transfer of the power to dismiss from the State Board of Mental Health to the Department of Human Resources makes no change in either the obligations of the parties or the remedies available to plaintiff superintendent of a state hospital for the mentally disordered in enforcing his agreement. Plaintiff's contract of employment was not with the agency which appointed him but with the State, and the essential terms of that contract, namely, duration, dismissal for cause, and salary, remain unaffected by any shift of the power to fire from one agency of the State to another. *Smith v. State*, 298 N.C. 115, 257 S.E.2d 399 (1979).

**Applied** in *Stanley v. Retirement & Health Benefits Div.*, 66 N.C. App. 122, 310 S.E.2d 637 (1984).

### OPINIONS OF ATTORNEY GENERAL

**This Section Incorporated in Former § 143B-471.** — By the reference in former § 143B-471 to "Type II" transfers, the General Assembly incorporated the provisions of this

section and § 143A-9, which clearly place the authority for personnel decisions within the Department of Commerce. See opinion of Attorney General to Mr. Brent Lane, Executive Di-

rector, North Carolina Technological Development Authority, 59 N.C.A.G. 34 (1989).

**Direction of Staffing of Positions at NCTDA.** — Notwithstanding the provisions of former § 143B-471.3A(2), the Department of Commerce has the authority to manage and direct the staffing of positions and hiring and firing of the employees of all agencies transferred to the department as “Type II” transfers, including the North Carolina Technological Development Authority. See opinion of Attorney

General to Mr. Brent Lane, Executive Director, North Carolina Technological Development Authority, 59 N.C.A.G. 34 (August 14, 1989).

**As to transfer under Type II transfer of burial commission records and administrative personnel** to Department of Commerce (now Economic and Community Development), see opinion of Attorney General to Mr. Irvin Aldridge, Secretary, Department of Commerce, 41 N.C.A.G. 921 (1972).

### **§ 143A-7. Agencies not enumerated; continuation.**

Any existing department, institution, board or commission not enumerated in this Chapter but established or created by the General Assembly shall continue to exercise all its powers, duties and functions. (1971, c. 864, s. 1.)

### **§ 143A-8. Internal organization of departments; allocation and reallocation of duties and functions; limitations.**

The Governor shall cause the administrative organization of each department to be examined with a view to promoting economy and efficiency. The Governor may reorganize and organize the principal departments and assign and reassign the duties and functions among the divisions and other units, division heads, officers, and employees; except as otherwise expressly provided by statute. When such changes affect existing law they must be submitted in accordance with Article III, Sec. 5 of the Constitution. The head of a principal department shall have legal custody of all books, papers, documents and other records of the department. The head of a principal department shall be responsible for the preparation and presentation of the department budget request which shall include all funds requested and all receipts expected for all elements of the department. (1971, c. 864, s. 1.)

### **§ 143A-9. Appointment of officers and employees; salaries of department heads.**

Any provisions of law to the contrary notwithstanding, and subject to the provisions of the Constitution of the State of North Carolina, the head of a principal department, except those departments headed by elected officials who are constitutional officers, shall be appointed by the Governor and serve at his pleasure.

The head of a principal department shall appoint the chief deputy or chief assistant and such chief deputy or chief assistant shall be subject to the State Personnel Act. Except where appointment by the Governor is prescribed by existing statute, the head of the principal department shall appoint the administrative head of each transferred agency and, subject to the provisions of the State Personnel Act, appoint all employees of each division, section or other unit under a principal department.

In establishing the position of secretary, and the supporting staff for the principal departments, the cost of such staff positions will be met insofar as possible by utilizing existing positions or funds available from vacant positions within agencies assigned to the principal departments. (1971, c. 864, s. 1; 1983, c. 717, s. 50.)

**OPINIONS OF ATTORNEY GENERAL**

**This Section Incorporated in Former § 143B-471.** — By the reference in former § 143B-471 to “Type II” transfers, the General Assembly incorporated the provisions of § 143A-6 and this section which clearly place

the authority for personnel decisions within the Department of Commerce. See opinion of Attorney General to Mr. Brent Lane, Executive Director, N.C. Technological Development Authority, 59 N.C.A.G. 34 (1989).

**§ 143A-10. Governor; continuation of powers and duties; staff.**

All powers, duties and functions vested by law in the Governor or in the office of Governor are continued, except as otherwise provided by this Chapter.

The immediate staff of the Governor shall not be subject to the State Personnel Act; however, salaries for these positions shall be filed with the General Assembly pursuant to G.S. 143-34.3 commencing with the 1973 General Assembly. (1971, c. 864, s. 1.)

**Editor’s Note.** — Section 143-34.3, referred to in the second paragraph of this section, was repealed by Session Laws 1977, c. 802, s. 15.20.

**§ 143A-11. Principal departments.**

Except as otherwise provided by this Chapter, or the State Constitution, all executive and administrative powers, duties and functions, not including those of the General Assembly and the judiciary, previously vested by law in the several State agencies, are vested in the following principal offices or departments:

- (1) Office of the Governor.
- (2) Office of the Lieutenant Governor.
- (3) Department of the Secretary of State.
- (4) Department of State Auditor.
- (5) Department of State Treasurer.
- (6) Department of Public Instruction.
- (7) Department of Justice.
- (8) Department of Agriculture and Consumer Services.
- (9) Department of Labor.
- (10) Department of Insurance.
- (11) through (13) Repealed by Session Laws 1995, c. 509, s. 96.
- (14) Repealed by Session Laws 1973, c. 476, s. 6.
- (15), (16) Repealed by Session Laws 1995, c. 509, s. 96.
- (17), (18) Repealed by Session Laws 1973, c. 476, s. 6.
- (19) Repealed by Session Laws 1973, c. 620, s. 9. (1971, c. 864, s. 1; 1973, c. 476, s. 6; c. 620, s. 9; 1975, c. 716, s. 7; 1977, c. 771, s. 4; 1989, c. 727, s. 218(120); c. 751, s. 7(17); 1991 (Reg. Sess., 1992), c. 959, s. 36; 1993, c. 522, s. 12; 1995, c. 509, s. 96; 1997-261, s. 93.)

**Cross References.** — As to the transfer of the Division of Veterans Affairs of the Department of Military and Veterans Affairs to the Department of Administration, see § 143A-

96.1. As to the Department of Cultural Resources, see § 143B-49 et seq. As to the Department of Revenue, see § 143B-217 et seq.

**§ 143A-12. Office of the Governor; creation.**

There is hereby created an office of the Governor. (1971, c. 864, s. 2.)

**§ 143A-13. Office of the Lieutenant Governor; creation.**

There is hereby created an office of the Lieutenant Governor. (1971, c. 864, s. 3.)

**§ 143A-14. Creation of new departments by executive order.**

All departments not now in existence which this Chapter directs to be created shall be made operative by executive order of the Governor; provided that all new departments shall be activated by executive order not later than July 1, 1972. (1971, c. 864, s. 21.)

**§ 143A-15. Date of transfer of agencies into existing departments.**

The transfer of all agencies into departments of State government which now exist shall take place not later than October 1, 1971. (1971, c. 864, s. 21.)

**§ 143A-16. Transfer of funds by Governor.**

To implement this Chapter, the Governor shall have authority to transfer all or a part of any appropriations or funds of an agency to the department to which such agency is transferred. (1971, c. 864, s. 21.)

**§ 143A-17:** Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 11.

**§ 143A-18. Additional funds for reorganization.**

When adequate funds to implement reorganization are not available from the budgets of the transferred agencies, the Governor and the Council of State may make other funds available for these purposes, not to exceed a total of five hundred thousand dollars (\$500,000) per year for all departments created by this Chapter. (1971, c. 864, s. 21.)

**ARTICLE 2.***Department of the Secretary of State.***§ 143A-19. Creation.**

There is hereby created a Department of the Secretary of State. The head of the Department of the Secretary of State is the Secretary of State. (1971, c. 864, s. 4.)

**§ 143A-20. Secretary of State; powers and duties.**

The Secretary of State shall have such powers and duties as are conferred on him by this Chapter, delegated to him by the Governor, and conferred by the Constitution and laws of this State. (1971, c. 864, s. 4.)

**§ 143A-21. Secretary of State; transfer of powers and duties to Department.**

Except as otherwise provided in the Constitution or in this Chapter, all powers, duties and functions vested by law in the Secretary of State are

transferred by a Type I transfer to the Department of the Secretary of State. (1971, c. 864, s. 4.)

§ **143A-22:** Repealed by Session Laws 1973, c. 1409, s. 1.

§ **143A-23. Notaries public; powers, duties and functions; transfer.**

All of the powers, duties and functions of the Governor under G.S. 10-1 of the General Statutes are transferred by a Type I transfer to the Department of the Secretary of State. (1971, c. 864, s. 4.)

**Editor's Note.** — The reference in this section to § 10-1 is to former § 10-1 as it stood before the revision of former Chapter 10 in 1973.

ARTICLE 3.

*Department of State Auditor.*

§ **143A-24. Creation.**

There is hereby created a Department of State Auditor. The head of the Department of the State Auditor is the State Auditor. (1971, c. 864, s. 5.)

§ **143A-25. State Auditor; powers and duties.**

The State Auditor shall have such powers and duties as are conferred on him by this Chapter, delegated to him by the Governor, and conferred by the Constitution and laws of this State. (1971, c. 864, s. 5.)

§ **143A-26. State Auditor; transfer of powers and duties to Department.**

Except as otherwise provided in the Constitution or by this Chapter, all powers, duties and functions of the State Auditor are transferred by a Type I transfer to the Department of the State Auditor. (1971, c. 864, s. 5.)

§ **143A-27. North Carolina Firemen's Pension Fund; transfer.**

The North Carolina Firemen's Pension Fund, as contained in Article 3 of Chapter 118 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of State Auditor. (1971, c. 864, s. 5.)

**Editor's Note.** — Article 3 of Chapter 118, referred to in this section, was rewritten by Session Laws 1981, c. 1029, s. 1, and recodified as Article 4 of Chapter 118, relating to the North Carolina Firemen's and Rescue Squad

Workers' Pension Fund, which was in turn recodified and incorporated as Article 86 of Chapter 58 pursuant to Session Laws 1987, c. 752, s. 9, as amended by Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

§ **143A-27.1. North Carolina Firemen's and Rescue Squad Workers' Pension Fund; transfer.**

The "North Carolina Firemen's and Rescue Squad Workers' Pension Fund", as contained in Article 3 of Chapter 118 of the General Statutes is hereby

transferred by a Type II transfer to the Department of State Auditor. (1981, c. 1029, s. 3.)

**Editor's Note.** — Article 3 of Chapter 118, referred to in this section, was rewritten by Session Laws 1981, c. 1029, s. 1, and recodified as Article 4 of Chapter 118, relating to the North Carolina Firemen's and Rescue Squad Workers' Pension Fund, which was in turn recodified and incorporated as Article 86 of Chapter 58 pursuant to Session Laws 1987, c. 752, s. 9, as amended by Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

Session Laws 1991 (Reg. Sess., 1992), c. 833, s. 1 provides: "The statutory authority, powers, duties, and functions, records, personnel, property, unexpended balances of appropriations, allocations or other funds, including the functions of budgeting and purchasing, of the Department of State Auditor to administer the North Carolina Firemen's and Rescue Squad Workers' Pension Fund are transferred to the Department of State Treasurer."

§ **143A-28:** Repealed by Session Laws 1977, 2nd Sess., c. 1204, s. 2.

### § **143A-29. State Board of Pensions; transfer.**

The State Board of Pensions, as contained in Article 2 of Chapter 112 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of State Auditor. (1971, c. 864, s. 5.)

## ARTICLE 4.

### *Department of State Treasurer.*

### § **143A-30. Creation.**

There is hereby created a Department of State Treasurer. The head of the Department of State Treasurer is the State Treasurer. (1971, c. 864, s. 6.)

### § **143A-31. State Treasurer; powers and duties.**

The State Treasurer shall have such powers and duties as are conferred on him by this Chapter, delegated to him by the Governor, and conferred by the Constitution and laws of this State. (1971, c. 864, s. 6.)

### § **143A-32. State Treasurer; transfer of powers and duties to Department.**

Except as otherwise provided in the Constitution or in this Chapter, all powers, duties and functions vested by law in the State Treasurer are transferred by a Type I transfer to the Department of State Treasurer. (1971, c. 864, s. 6.)

### § **143A-33. Local Government Commission; transfer.**

The Local Government Commission, as contained in Article 1 of Chapter 159 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of State Treasurer. (1971, c. 864, s. 6.)

**Editor's Note.** — The Local Government Commission is now provided for in Article 2 of Chapter 159.

### **§ 143A-34. Teachers' and State Employees' Retirement System; transfer.**

The Teachers' and State Employees' Retirement System, and the board of trustees, as contained in Article 1 of Chapter 135 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of State Treasurer. (1971, c. 864, s. 6.)

### **§ 143A-35. North Carolina Local Governmental Employees' Retirement System; transfer.**

The North Carolina Local Governmental Employees' Retirement System, as contained in Article 3 of Chapter 128 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of State Treasurer. (1971, c. 864, s. 6.)

### **§ 143A-36. Public Employees' Social Security Agency; powers, duties and functions; transfer.**

All of the powers, duties and functions of the Public Employees' Social Security Agency as contained in Article 2 of Chapter 135 of the General Statutes and the laws of this State, are transferred by a Type I transfer to the Department of State Treasurer. (1971, c. 864, s. 6.)

### **§ 143A-37. Legislative Retirement Fund; transfer.**

The Legislative Retirement Fund, as provided for in G.S. 120-4.1 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of State Treasurer. (1971, c. 864, s. 6.)

**Editor's Note.** — Section 120-4.1, referred to in this section, was repealed by Session Laws 1973, c. 1482, s. 3. For the conditions of the repeal, see § 120-4.2.

### **§ 143A-38. Tax Review Board; transfer.**

The Tax Review Board, as created by G.S. 105-269.2 of the General Statutes and the laws of this State, is transferred by a Type II transfer to the Department of State Treasurer. (1971, c. 864, s. 6.)

### **§ 143A-38.1. The Law-Enforcement Officers' Benefit and Retirement Fund; transfer.**

The Law-Enforcement Officers' Benefit and Retirement Fund, as contained in Article 12 of Chapter 143 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of State Treasurer. (1977, 2nd Sess., c. 1204, s. 1.)

**Editor's Note.** — Article 12 of Chapter 143, referred to in this section, was repealed by Session Laws 1985, c. 479, s. 196(t). See now Articles 12A to 12G, § 143-166.1 et seq.

## ARTICLE 5.

*Department of Public Instruction.*

**§§ 143A-39 through 143A-42:** Repealed by Session Laws 1993, c. 522, s. 14.

**§ 143A-43:** Repealed by Session Laws 1983, c. 768, s. 14.

**§ 143A-44:** Repealed by Session Laws 1993, c. 522, s. 14.

**§ 143A-44.1. Creation.**

There is hereby created a Department of Public Instruction. The head of the Department of Public Instruction is the State Board of Education. Any provision of G.S. 143A-9 to the contrary notwithstanding, the appointment of the State Board of Education shall be as prescribed in Article IV, Section 4(1) of the Constitution. (1995, c. 72, s. 3.)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1995, c. 72, s. 3 having been § 143A-39.

**§ 143A-44.2. State Board of Education; transfer of powers and duties to State Board.**

The State Board of Education shall have all powers and duties conferred on the Board by this Article, delegated to the Board by the Governor, and conferred by the Constitution and laws of this State. (1995, c. 72, s. 3.)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1995, c. 72, s. 3 having been § 143A-40.

**§ 143A-44.3. Superintendent of Public Instruction; creation; transfer of powers and duties.**

The office of the Superintendent of Public Instruction, as provided for by Article III, Section 7 of the Constitution, and the Department of Public Instruction are transferred to the Department of Public Instruction. The Superintendent of Public Instruction shall be the Secretary and Chief Administrative Officer of the State Board of Education, and shall have all powers and duties conferred by the Constitution, by the State Board of Education, Chapter 115C of the General Statutes, and the laws of this State. (1995, c. 72, s. 3.)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1995, c. 72, s. 3 having been § 143A-42.

**§ 143A-45. Interstate Compact for Education; rights, duties and privileges.**

All of the rights, duties and privileges of this State obtained as a party to the Interstate Compact for Education as contained in Part 5 of Article 8 of Chapter 115C of the General Statutes and the laws of this State, shall be supervised

and administered by the Superintendent of Public Instruction. (1971, c. 864, s. 7; 1983, c. 768, s. 16.)

§ **143A-46:** Repealed by Session Laws 1983, c. 768, s. 14.

§ **143A-47. Interstate Agreement on Qualifications of Educational Personnel; rights, duties and privileges.**

All of the rights, duties and privileges of this State obtained as a party to the Interstate Agreement on Qualifications of Educational Personnel as contained in Article 24 of Chapter 115C of the General Statutes and the laws of this State shall be supervised and administered by the Superintendent of Public Instruction. (1971, c. 864, s. 7; 1983, c. 768, s. 17.)

§ **143A-48. Textbook Commission; transfer.**

The Textbook Commission, as created by G.S. 115C-87 and the laws of this State, is hereby transferred by a Type I transfer to the Department of Public Instruction. (1971, c. 864, s. 7; 1983, c. 768, s. 18; 1993, c. 522, s. 15.)

ARTICLE 6.

*Department of Justice.*

§ **143A-49. Creation.**

There is hereby created a Department of Justice. The head of the Department of Justice is the Attorney General. (1971, c. 864, s. 8.)

CASE NOTES

**The Governor has the duty to supervise the official conduct of all executive officers.** The constitutional independence of the executive offices, and their differing functions and duties, create clear potential for conflict between their respective holders. In the event of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the

supervision of the Governor could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers. The General Assembly, in the enactment of § 114-2(2), did not intend to create such potential. *Tice v. DOT*, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

§ **143A-49.1. Attorney General; powers and duties.**

The Attorney General shall have such powers and duties as are conferred on him by this Chapter, delegated to him by the Governor, and conferred by the Constitution and laws of this State. (1971, c. 864, s. 8.)

**Legal Periodicals.** — For survey of 1984 administrative law, "A Declining Role for the Attorney General," see 63 N.C.L. Rev. 1051 (1985).

§ **143A-50. Attorney General; transfer of powers and duties to Department.**

Except as otherwise provided in the Constitution or in this Chapter, all powers, duties and functions vested by law in the Attorney General are

transferred by a Type I transfer to the Department of Justice. (1971, c. 864, s. 8.)

### **§ 143A-51. State Bureau of Investigation; transfer.**

The State Bureau of Investigation, as contained in Article 4 of Chapter 114 of the General Statutes and the laws of this State, is hereby transferred by a Type I transfer to the Department of Justice. (1971, c. 864, s. 8.)

### **§ 143A-52. Fire investigations; transfer.**

The duties of the Commissioner of Insurance with respect to the investigation of all fires, including forest fires, as contained in Article 1 of Chapter 69 of the General Statutes and the laws of this State, are hereby transferred by a Type I transfer to the Department of Justice; provided, however, that the duties of the Commissioner of Insurance with respect to the inspection of buildings, the removal of dangerous materials therefrom, hospital insurance, insurance regulation, and the preparation of annual reports, as contained in Chapters 57 and 58 of the General Statutes and G.S. 69-4, shall continue to be among the duties of the Commissioner of Insurance. (1971, c. 864, s. 8; 1977, c. 596, s. 3.)

**Editor's Note.** — Article 1 of Chapter 69, Chapters 57 and 58, and § 69-4, referred to in this section, have been recodified as Article 79 of Chapter 58, Articles 65 and 66 of Chapter 58,

Articles 1 to 64 of Chapter 58, and § 58-70-20, respectively, under the authority of Session Laws 1987, c. 752, s. 9 and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

### **§ 143A-53. General Statutes Commission; transfer.**

The General Statutes Commission as contained in Article 2 of Chapter 164 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of Justice. (1971, c. 864, s. 8.)

### **§ 143A-54. Company police; powers, duties and functions; transfer.**

All of the powers, duties and functions of the Governor contained in Chapter 74A of the General Statutes and the laws of this State relating to the appointment and commission of special police are hereby transferred by a Type I transfer to the Department of Justice. (1971, c. 864, s. 8.)

#### **CASE NOTES**

**Applied** in North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

### **§ 143A-55. Police information Network; transfer.**

The Police Information Network, as created by G.S. 114-10.1 and the laws of this State, is hereby transferred by a Type I transfer to the Department of Justice. (1971, c. 864, s. 8.)

### **§ 143A-55.1. North Carolina Criminal Justice Training and Standards Council; transfer.**

The North Carolina Criminal Justice Training and Standards Council, as created by Chapter 17A of the General Statutes and laws of this State, is

hereby transferred by a Type II transfer to the Department of Justice. (1975, c. 372, s. 1.)

**Editor's Note.** — Chapter 17A, referred to in this section, has been recodified as Chapter 17C by Session Laws 1979, c. 763, s. 1.

### § 143A-55.2. North Carolina Sheriffs' Education and Training Standards Commission; transfer.

The North Carolina Sheriffs' Education and Training Standards Commission, as created by Chapter 17E of the General Statutes and laws of this State, is hereby transferred by a Type II transfer as defined in G.S. 143A-6(b) to the Department of Justice. (1983, c. 558, s. 4.)

### §§ 143A-55.3 through 143A-55.7: Not effectuated.

**Cross References.** — As to the Rules Review Commission, see now § 143B-30.1 et seq.

**Editor's Note.** — Section 18.2 of Session Laws 1985, c. 746, provided: "The President of the Senate and the Speaker of the House of Representatives shall request the Supreme Court to issue an advisory opinion on the constitutionality of Sections 5 and 6 of this act and the appointment of the chief hearing officer by the Chief Justice as provided in G.S. 7A-752 in Section 2 of this act."

Section 19 of Session Laws 1985, c. 746, provided that sections 5 and 6 of the act, which added §§ 143A-55.3 through 143A-55.7 and amended § 120-123, should become effective 30 days from the date the Supreme Court issued an advisory opinion on the constitutionality of those sections unless the opinion stated that those sections were unconstitutional, in which event those sections would not become effective.

In addition, s. 19 of Session Laws 1985, c. 746, provided that the act would expire Jan. 1, 1992, and would not be effective on or after that date. However, Session Laws 1991, c. 103, s. 1

amended Session Laws 1985, c. 746, s. 19 by deleting the January 1, 1992 Sunset Provision.

Section 19 of Session Laws 1985, c. 746, further provided that the act would not affect contested cases commenced before Jan. 1, 1986.

By letter of October 28, 1985, addressed to the President of the Senate and the Speaker of the House, the Supreme Court declined to issue an advisory opinion as contemplated by Session Laws 1985, c. 746, on the grounds that to issue such an opinion would be to place the Court directly in the stream of the legislative process, and in view of the prerogative of the General Assembly to first address and determine the constitutionality of its own legislation. See In re Advisory Opinion, 314 N.C. 330, 335 S.E.2d 890 (1985).

Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 7 deleted the word "advisory" preceding "opinion" in the third sentence of Session Laws 1985, c. 746, s. 19.

At the direction of the Revisor of Statutes, §§ 143A-55.3 through 143A-55.7 are shown as not effectuated.

## ARTICLE 7.

### *Department of Agriculture and Consumer Services.*

#### § 143A-56. Creation.

There is hereby created a Department of Agriculture and Consumer Services. The head of the Department is the Commissioner of Agriculture. (1971, c. 864, s. 9; 1997-261, s. 95.)

#### § 143A-57. Commissioner of Agriculture; powers and duties.

The Commissioner of Agriculture shall have such powers and duties as are conferred on him by this Chapter, delegated to him by the Governor, and conferred by the Constitution and laws of this State. (1971, c. 864, s. 9.)

**§ 143A-58. Commissioner of Agriculture; transfer of powers and duties to Department.**

Except as otherwise provided in the Constitution or in this Chapter, all powers, duties and functions vested by law in the Commissioner of Agriculture are transferred by a Type I transfer to the Department of Agriculture and Consumer Services. (1971, c. 864, s. 9; 1997-261, s. 96.)

**§ 143A-59. Board of Agriculture; transfer.**

The Board of Agriculture, as contained in Article 1 of Chapter 106 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of Agriculture and Consumer Services. (1971, c. 864, s. 9; 1997-261, s. 97.)

**§ 143A-60. Structural Pest Control Division; transfer.**

The Structural Pest Control Division of the Department of Agriculture, as contained in Article 4C of Chapter 106 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of Agriculture and Consumer Services. (1971, c. 864, s. 9; 1997-261, s. 98.)

**§ 143A-61. The North Carolina Agricultural Hall of Fame; transfer.**

The North Carolina Agricultural Hall of Fame, as contained in Article 50B of Chapter 106 of the General Statutes and the laws of this State, is hereby transferred by a Type I transfer to the Department of Agriculture and Consumer Services. (1971, c. 864, s. 9; 1997-261, s. 99.)

**§ 143A-62. Gasoline and Oil Inspection Board; transfer.**

The Gasoline and Oil Inspection Board, as contained in Article 3 of Chapter 119 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of Agriculture and Consumer Services. (1971, c. 864, s. 9; 1997-261, s. 100.)

**§ 143A-63. North Carolina Rural Rehabilitation Corporation; transfer.**

The North Carolina Rural Rehabilitation Corporation, and board of directors, as contained in Chapter 137 of the General Statutes and the laws of this State, is transferred by a Type I transfer to the North Carolina Agricultural Finance Authority in the Department of Agriculture and Consumer Services. (1971, c. 864, s. 9; 1997-261, s. 101; 2001-424, s. 17.2(a).)

**Editor’s Note.** — Session Laws 2001-424, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2001.’”

Session Laws 2001-424, s. 17.2(c), provides: “No later than January 15, 2002, the North Carolina Agricultural Finance Authority shall report to the Joint Legislative Commission on Governmental Operations, the Appropriations Subcommittees on Natural and Economic Resources in both the Senate and the House of

Representatives, and the Fiscal Research Division on the status of the transfer required under this section [s. 17.2 of Session Laws 2001-424]. This report shall include any statutory changes that are needed to implement the transfer required under this section [s. 17.2 of Session Laws 2001-424].”

Session Laws 2001-424, s. 36.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium,

the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium.”

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws

2001-424, s. 17.2(a), effective September 26, 2001, deleted “hereby” preceding “transferred by,” substituted “Type I” for “Type II,” and inserted “the North Carolina Agricultural Finance Authority in.”

### **§ 143A-64. North Carolina Board of Crop Seed Improvement; transfer.**

The North Carolina Board of Crop Seed Improvement, as contained in Article 30 of Chapter 106 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of Agriculture and Consumer Services. (1971, c. 864, s. 9; 1997-261, s. 102.)

### **§ 143A-65. North Carolina Public Livestock Market Advisory Board; transfer.**

The North Carolina Public Livestock Market Advisory Board, as contained in Article 35 of Chapter 106 of the General Statutes and the laws of this State, is hereby transferred by a Type I transfer to the Department of Agriculture and Consumer Services. (1971, c. 864, s. 9; 1997-261, s. 103.)

**§ 143A-66:** Repealed by Session Laws 1993, c. 561, s. 116.

## ARTICLE 8.

### *Department of Labor.*

### **§ 143A-67. Creation.**

There is hereby created a Department of Labor. The head of the Department of Labor is the Commissioner of Labor. (1971, c. 864, s. 10.)

### **§ 143A-68. Commissioner of Labor; powers and duties.**

The Commissioner of Labor shall have such powers and duties as are conferred on him by this Chapter, delegated to him by the Governor, and conferred by the Constitution and laws of this State. (1971, c. 864, s. 10.)

### **§ 143A-69. Commissioner of Labor; transfer of powers and duties to Department.**

Except as otherwise provided in the Constitution or in this Chapter, all powers, duties and functions vested by law in the Commissioner of Labor are transferred by a Type I transfer to the Department of Labor. (1971, c. 864, s. 10.)

### **§ 143A-70. Board of Boiler Rules and Bureau of Boiler Inspection; transfer.**

The Board of Boiler Rules and the Bureau of Boiler Inspection, as contained in Article 7 of Chapter 95 of the General Statutes and the laws of this State, are hereby transferred by a Type I transfer to the Department of Labor. (1971, c. 864, s. 10.)

**Editor's Note.** — Article 7 of Chapter 95, Session Laws 1981 (Regular Session 1982), c. 1187, s. 1, referred to in this section, has been repealed by

**§ 143A-71. Apprenticeship Council; transfer.**

The Apprenticeship Council, as contained in Chapter 94 of the General Statutes and the laws of this State, is hereby transferred by a Type I transfer to the Department of Labor. (1971, c. 864, s. 10.)

**§ 143A-72. Voluntary arbitration of labor disputes; appointment of arbitrator or panel; Commissioner of Labor; transfer.**

All of the powers, duties and functions of the Commissioner of Labor under Article 4A of Chapter 95 of the General Statutes and the laws of this State, are transferred by a Type I transfer to the Department of Labor. (1971, c. 864, s. 10.)

ARTICLE 9.

*Department of Insurance.*

**§ 143A-73. Creation.**

There is hereby created a Department of Insurance. The head of the Department of Insurance is the Commissioner of Insurance. (1971, c. 864, s. 11.)

**§ 143A-74. Commissioner of Insurance; powers and duties.**

The Commissioner of Insurance shall have such powers and duties as are conferred on him by this Chapter, delegated to him by the Governor, and conferred by the Constitution and laws of this State. (1971, c. 864, s. 11.)

**§ 143A-75. Commissioner of Insurance; transfer of powers and duties to Department.**

Except as otherwise provided in the Constitution or in this Chapter, all powers, duties and functions vested in the Commissioner of Insurance are transferred by a Type I transfer to the Department of Insurance. (1971, c. 864, s. 11.)

**§ 143A-76:** Repealed by Session Laws 1985, c. 666, s. 11.

**§ 143A-77:** Repealed by Session Laws 1985, c. 666, s. 12.

**§ 143A-78. Building Code Council; transfer.**

The Building Code Council, as contained in Article 9 of Chapter 143 of the General Statutes and the laws of this State, is hereby transferred by a Type II transfer to the Department of Insurance. (1971, c. 864, s. 11.)

### § 143A-79. State Volunteer Fire Department; transfer.

The State Volunteer Fire Department, as contained in Article 3 of Chapter 69 of the General Statutes and the laws of this State, is hereby transferred by a Type I transfer to the Department of Insurance. (1971, c. 864, s. 11.)

**Editor's Note.** — Article 3 of Chapter 69, referred to in this section, has been recodified as Article 80 of Chapter 58 under the authority

of Session Laws 1987, c. 752, s. 9 and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

### § 143A-79.1. Public Officers and Employees Liability Insurance Commission; transfer.

The Public Officers and Employees Liability Insurance Commission, as contained in Part 20 of Article 9 of General Statutes Chapter 143B, is transferred by a Type II transfer to the Department of Insurance. (1985, c. 666, s. 78.)

**Editor's Note.** — Part 20 of Article 9 of Chapter 143B, referred to in this section, was recodified as §§ 58-27.20 through 58-27.26 by

Session Laws 1985, c. 666, s. 79. See now §§ 58-32-1 through 58-32-30.

### § 143A-79.2. State Fire Commission; transfer.

The State Fire Commission, described in Part 4 of Article 11 of Chapter 143B of the General Statutes, is transferred from the Department of Crime Control and Public Safety to the Department of Insurance. This transfer shall include all elements of a Type I transfer as defined in G.S. 143A-6. (1985, c. 757, s. 167(a).)

**Editor's Note.** — Part 4 of Article 11 of Chapter 143B, referred to in this section, was recodified as §§ 58-27.30 through 58-27.34 by

Session Laws 1985, c. 757, s. 167(b). See now §§ 58-78-1 through 58-78-20.

## ARTICLE 10.

### *Department of Administration.*

§§ 143A-80 through 143A-96: Repealed by Session Laws 1975, c. 879, s. 46.

**Cross References.** — For present provisions as to the Department of Administration, see § 143B-366 et seq.

### § 143A-96.1. Transfer of Department of Veterans Affairs.

The Division of Veterans Affairs of the Department of Military and Veterans Affairs as described in Article 5 of Chapter 143B is hereby transferred by a Type I transfer, as defined in G.S. 143A-6, to the Department of Administration. The Secretary of Administration is hereby empowered and directed to employ within the Department of Administration an additional assistant secretary as Assistant Secretary for Veterans Affairs. (1977, c. 70, s. 26.)

**Editor's Note.** — The provisions of Article 5 of Chapter 143B relating to Veterans Affairs, referred to in this section, were repealed and

transferred by Session Laws 1977, cc. 23 and 70. As to the Veterans' Affairs Commission, see now §§ 143B-399, 143B-400.

ARTICLE 11.

*Department of Transportation and Highway Safety.*

§§ 143A-97 through 143A-108: Repealed by Session Laws 1975, c. 716, s. 5.

**Cross References.** — For present provisions as to the Department of Transportation, see § 143B-345 et seq.

ARTICLE 12.

*Department of Natural and Economic Resources.*

§§ 143A-109 through 143A-129: Repealed by Session Laws 1973, c. 1262, s. 86.

**Cross References.** — For present provisions as to the Department of Environment and Natural Resources, see § 143B-279.1 et seq.

ARTICLE 13.

*Department of Human Resources.*

§§ 143A-130 through 143A-162: Repealed by Session Laws 1973, c. 476, s. 183.

ARTICLE 14.

*Department of Social Rehabilitation and Control.*

§§ 143A-163 through 143A-170: Repealed by Session Laws 1973, c. 1262, s. 10.

**Cross References.** — As to transfer of the functions of the Department of Social Rehabilitation and Control to the Department of Correction, see § 143B-262.

ARTICLE 15.

*Department of Commerce.*

§§ 143A-171 through 143A-180: Repealed by Session Laws 1977, c. 198, s. 25.

§§ 143A-180.1, 143A-180.2: Recodified as §§ 143B-448, 143B-449 by Session Laws 1977, c. 198, s. 26.

**Cross References.** — For statute prohibiting master electric and natural gas meters in residential buildings, enacted as § 143A-180.4 by Session Laws 1977, c. 792, s. 9, see § 143-151.42.

**Editor's Note.** — G.S. 143B-448, 143B-449

were repealed by Session Laws 2000-140, s. 76(k), effective September 30, 2000.

§ **143A-181:** Recodified as § 143B-439 by Session Laws 1977, c. 198, s. 26.

§§ **143A-182 through 143A-185.1:** Repealed by Session Laws 1977, c. 198, s. 25.

## ARTICLE 16.

### *Department of Revenue.*

§§ **143A-186 through 143A-190:** Repealed by Session Laws 1973, c. 476, s. 193.

**Cross References.** — For present provisions as to the Department of Revenue, see § 143B-217 et seq.

## ARTICLE 17.

### *Department of Art, Culture and History.*

§§ **143A-191 through 143A-230:** Repealed by Session Laws 1973, c. 476, s. 16.

**Cross References.** — As to the Department of Cultural Resources, see § 143B-49 et seq.

## ARTICLE 18.

### *Department of Military and Veterans' Affairs.*

§§ **143A-231 through 143A-238:** Repealed by Session Laws 1973, c. 620, s. 9.

**Cross References.** — As to the transfer of the Division of Veterans Affairs of the Department of Military and Veterans Affairs to the Department of Administration, see § 143A-96.1.

## ARTICLE 19.

### *Transfers to Department of Crime Control and Public Safety.*

#### § **143A-239. North Carolina national guard.**

The North Carolina national guard as provided for in Chapter 127A is hereby transferred by a Type I transfer, as defined in G.S. 143A-6, to the Department of Crime Control and Public Safety. (1977, c. 70, s. 1.)

### § 143A-240. North Carolina Civil Preparedness Agency.

The State Civil Preparedness Agency as provided for in Chapter 166 is hereby transferred by a Type I transfer, as defined in G.S. 143A-6, to the Department of Crime Control and Public Safety. (1977, c. 70, s. 1.)

**Editor's Note.** — Chapter 166, referred to in this section, was repealed by Session Laws 1977, c. 848, s. 1. For present provisions as to civil preparedness, see now Chapter 166A.

### § 143A-241. State Civil Air Patrol.

The State Civil Air Patrol as provided for in G.S. 167-2 is hereby transferred by a Type I transfer, as defined in G.S. 143A-6, to the Department of Crime Control and Public Safety. (1977, c. 70, s. 1.)

**Editor's Note.** — Section 167-2, referred to in this section, was repealed by Session Laws 1979, c. 516, s. 6. See §§ 143B-490 through 143B-492.

### § 143A-242. State Highway Patrol.

The State Highway Patrol as provided for in Article 4 of Chapter 20 is hereby transferred by a Type I transfer, as defined in G.S. 143A-6, to the Department of Crime Control and Public Safety. (1977, c. 70, s. 1.)

### § 143A-243. North Carolina Alcoholic Beverage Control Commission Enforcement Division.

The North Carolina Alcoholic Beverage Control Commission Enforcement Division as provided for in Part 2 of Article 2 of Chapter 18A is hereby transferred by a Type I transfer, as defined in G.S. 143A-6, to the Department of Crime Control and Public Safety. (1977, c. 70, s. 1; 1981, c. 412, s. 4.)

**Editor's Note.** — Part 2 of Article 2 of Chapter 18A, referred to in this section, was repealed by Session Laws 1981, c. 412. See now Chapter 18B.

### § 143A-244. Governor's Crime Commission.

The Governor's Crime Commission as provided for in Part 23 of Article 7 of Chapter 143B and 1977 Session Laws, Chapter 11 is hereby transferred by a Type II transfer, as defined in G.S. 143A-6, to the Department of Crime Control and Public Safety. (1977, c. 70, s. 1.)

**Editor's Note.** — Part 23 of Article 7 of Chapter 143B, referred to in this section, has been recodified as §§ 143B-478 through 143B-480.

### § 143A-245. Crime Control Division.

The Crime Control Division, Department of Natural and Economic Resources, as provided for in Part 23 of Article 7 of Chapter 143B and 1977 Session Laws, Chapter 11 is hereby transferred by a Type I transfer, as defined in G.S. 143A-6, to the Department of Crime Control and Public Safety. (1977, c. 70, s. 1.)

**Editor's Note.** — Because this section relates to past events, no changes have been made in it pursuant to Session Laws 1977, c. 771, s. 4, which substituted "Natural Resources and Community Development" for "Natural and Economic Resources." Part 23 of Article 7 of Chapter 143B, referred to in this section, has been recodified as §§ 143B-478 through 143B-480.



# Chapter 143B.

## Executive Organization Act of 1973

### Article 1.

#### General Provisions.

##### Part 1. In General.

Sec.

- 143B-1. Short title.
- 143B-2. Interim applicability of the Executive Organization Act of 1973.
- 143B-3. Definitions.
- 143B-4. Policy-making authority and administrative powers of Governor; delegation.
- 143B-5. Governor; continuation of powers and duties.
- 143B-6. Principal departments.
- 143B-7. Continuation of functions.
- 143B-8. Unassigned functions.
- 143B-9. Appointment of officers and employees.
- 143B-10. Powers and duties of heads of principal departments.
- 143B-11. Subunit nomenclature.
- 143B-12. Internal organization of departments; allocation and reallocation of duties and functions; limitations.
- 143B-13. Appointment, qualifications, terms, and removal of members of commissions.
- 143B-14. Administrative services to commissions.
- 143B-15. Compensation of members of commissions.
- 143B-16. Appointment and removal of members of boards, councils and committees.
- 143B-17. Commission investigations and orders.
- 143B-18. [Repealed.]
- 143B-19. Pending actions and proceedings.
- 143B-20. [Repealed.]
- 143B-21. Affirmation of prior acts of abolished agencies.
- 143B-22. Terms occurring in laws, contracts and other documents.
- 143B-23. Completion of unfinished business.
- 143B-24. Cooperative agreements.
- 143B-25. Agencies not enumerated.
- 143B-26. Constitutional references.
- 143B-27. [Repealed.]
- 143B-28. Goals of continuing reorganization.
- 143B-29. [Reserved.]

##### Part 2. Governor's Administrative Rules Review Commission.

- 143B-29.1 through 143B-29.5. [Repealed.]

##### Part 3. Rules Review Commission.

Sec.

- 143B-30. [Repealed.]
- 143B-30.1. Rules Review Commission created.
- 143B-30.2. Purpose of Commission.
- 143B-30.3. [Repealed.]
- 143B-30.4. Evidence.
- 143B-31 through 143B-48. [Reserved.]

### Article 2.

#### Department of Cultural Resources.

##### Part 1. General Provisions.

- 143B-49. Department of Cultural Resources — creation, powers and duties.
- 143B-50. Duties of the Department.
- 143B-51. Functions of the Department.
- 143B-52. Head of the Department.
- 143B-53. Organization of the Department.

##### Part 2. Art Commission.

- 143B-54 through 143B-57. [Repealed.]

##### Part 3. Art Museum Building Commission.

- 143B-58 through 143B-61.1. [Repealed.]

##### Part 4. North Carolina Historical Commission.

- 143B-62. North Carolina Historical Commission — creation, powers and duties.
- 143B-63. Historical Commission — members; selection; quorum; compensation.
- 143B-64. Historical Commission — officers.
- 143B-65. Historical Commission — regular and special meetings.

##### Part 5. Archaeological Advisory Committee.

- 143B-66. [Repealed.]

##### Part 6. Public Librarian Certification Commission.

- 143B-67. Public Librarian Certification Commission — creation, powers and duties.
- 143B-68. Public Librarian Certification Commission — members; selection; quorum; compensation.
- 143B-69. Public Librarian Certification Commission — officers.
- 143B-70. Public Librarian Certification Commission — regular and special meetings.

## CH. 143B. EXECUTIVE ORGANIZATION

- Part 7. Tryon Palace Commission.
- Sec.  
143B-71. Tryon Palace Commission — creation, powers and duties.  
143B-72. Tryon Palace Commission — members; selection; quorum; compensation.
- Part 8. U.S.S. North Carolina Battleship Commission.
- 143B-73. U.S.S. North Carolina Battleship Commission — creation, powers and duties.  
143B-73.1. U.S.S. North Carolina Battleship Commission — duties.  
143B-74. U.S.S. North Carolina Battleship Commission — members; selection; quorum; compensation.  
143B-74.1. U.S.S. North Carolina Battleship Commission — funds.  
143B-74.2. U.S.S. North Carolina Battleship Commission — employees.  
143B-74.3. U.S.S. North Carolina Battleship Commission — employees not to have interest.
- Part 9. Sir Walter Raleigh Commission.
- 143B-75 through 143B-78. [Repealed.]
- Part 10. Executive Mansion Fine Arts Committee.
- 143B-79. Executive Mansion Fine Arts Committee — creation, powers and duties.  
143B-80. Executive Mansion Fine Arts Committee — members; selection; quorum; compensation.  
143B-80.1. Regular and special meetings.  
143B-80.2 through 143B-80.4. [Reserved.]
- Part 10A. State Capitol Preservation Act.
- 143B-80.5 through 143B-80.14. [Repealed.]
- Part 11. American Revolution Bicentennial Committee.
- 143B-81, 143B-82. [Repealed.]
- Part 12. North Carolina Awards Committee.
- 143B-83. North Carolina Awards Committee — creation, powers and duties.  
143B-84. North Carolina Awards Committee — members; selection; quorum; compensation.
- Part 13. America's Four Hundredth Anniversary Committee.
- 143B-85. America's Four Hundredth Anniversary Committee — creation, powers and duties.  
143B-86. America's Four Hundredth Anniversary Committee — members; selection; quorum; compensation.
- Part 14. North Carolina Arts Council.
- 143B-87. North Carolina Arts Council — creation, powers and duties.  
143B-88. North Carolina Arts Council — members; selection; quorum; compensation.
- Part 15. North Carolina Art Society, Incorporated.
- 143B-89. North Carolina Art Society, Incorporated.
- Part 16. State Library Commission.
- 143B-90. State Library Commission — creation, powers and duties.  
143B-91. State Library Commission — members; selection; quorum; compensation.
- Part 17. Roanoke Island Historical Association.
- 143B-92. Roanoke Island Historical Association — creation, powers and duties.  
143B-93. Roanoke Island Historical Association — status.
- Part 18. North Carolina Symphony Society.
- 143B-94. North Carolina Symphony Society, Inc.
- Part 19. Edenton Historical Commission.
- 143B-95. Edenton Historical Commission — creation, purposes and powers.  
143B-96. Edenton Historical Commission — status.  
143B-97. Edenton Historical Commission — reports.  
143B-98. Edenton Historical Commission — members; selection; compensation; quorum.
- Part 20. Historic Bath Commission.
- 143B-99. Historic Bath Commission — creation, powers and duties.  
143B-100. Historic Bath Commission — status.  
143B-101. Historic Bath Commission — reports.  
143B-102. Historic Bath Commission — members; selection; quorum; compensation.
- Part 21. Historic Hillsborough Commission.
- 143B-103. Historic Hillsborough Commission — creation, powers and duties.

CH. 143B. EXECUTIVE ORGANIZATION

- Sec.  
143B-104. Historic Hillsborough Commission — status.  
143B-105. Historic Hillsborough Commission — reports.  
143B-106. Historic Hillsborough Commission — members; selection; quorum; compensation.

Part 22. Historic Murfreesboro Commission.

- 143B-107. Historic Murfreesboro Commission — creation, powers and duties.  
143B-108. Historic Murfreesboro Commission — status.  
143B-109. Historic Murfreesboro Commission — reports.  
143B-110. Historic Murfreesboro Commission — members; selection; quorum; compensation.

Part 23. John Motley Morehead Memorial Commission.

- 143B-111. John Motley Morehead Memorial Commission — creation, powers and duties.  
143B-112. John Motley Morehead Memorial Commission — status.  
143B-113. John Motley Morehead Memorial Commission — authorization for counties to assist.  
143B-114. John Motley Morehead Memorial Commission — reports.  
143B-115. John Motley Morehead Memorial Commission — members; selection; quorum; compensation.  
143B-116 through 143B-120. [Reserved.]

Part 24. Grassroots Arts Program.

- 143B-121. Program established.  
143B-122. Distribution of funds.  
143B-123. Rules and procedures; standards for qualification for funds.  
143B-124. Designation of organization as official distributing agent; duties.  
143B-125. Disposition of funds for counties without organizations meeting Department standards.

Part 25. Historical Military Reenactment Groups.

- 143B-126. Voluntary registration; designation of names; registration symbol.  
143B-127. Contracts with registered groups.

Part 26. Advisory Committee on Abandoned Cemeteries.

- 143B-128. Advisory Committee on Abandoned Cemeteries; members; selections; compensation; terms; vacancy; duties.

Part 27. Roanoke Voyages and Elizabeth II Commission.

- Sec.  
143B-129 through 143B-131. [Repealed.]

Part 27A. Roanoke Island Commission.

- 143B-131.1. Commission established.  
143B-131.2. Roanoke Island Commission — Purpose, powers, and duties.  
143B-131.3. Assignment of property; offices.  
143B-131.4. Commission reports.  
143B-131.5. Roanoke Island Commission — Additional powers and duties; transfer of assets and liabilities.  
143B-131.6. Roanoke Island Commission — Members; terms; vacancies; expenses; officers.  
143B-131.7. Roanoke Island Commission — Counsel.  
143B-131.8. Roanoke Island Commission Fund; Roanoke Island Commission Endowment Fund.  
143B-131.9. Roanoke Island Commission staff.  
143B-131.10. Exceptions.

Part 28. Andrew Jackson Historic Memorial Committee.

- 143B-132. Andrew Jackson Historic Memorial Committee.

Part 29. Veterans' Memorial Commission.

- 143B-133. Commission established.  
143B-133.1. Powers of Commission.  
143B-134, 143B-135. [Reserved.]

**Article 3.**

**Department of Health and Human Services.**

Part 1. General Provisions.

- 143B-136. [Repealed.]  
143B-136.1. Department of Health and Human Services — creation.  
143B-137. [Repealed.]  
143B-137.1. Department of Health and Human Services — duties.  
143B-138. [Repealed.]  
143B-138.1. Department of Health and Human Services — functions and organization.  
143B-139. Department of Health and Human Services — head.  
143B-139.1. Secretary of Health and Human Services to adopt rules applicable to local health and human services agencies.  
143B-139.2. Secretary of Health and Human Services requests for grants-in-aid from non-State agencies.  
143B-139.3. Department of Health and Hu-

CH. 143B. EXECUTIVE ORGANIZATION

- Sec. man Services — authority to contract with other entities.
- 143B-139.4. Department of Health and Human Services; authority to assist private nonprofit organizations.
- 143B-139.5. Department of Health and Human Services; adult care State/county share of costs.
- 143B-139.5A. Collaboration between Division of Social Services and Commission of Indian Affairs on Indian Child Welfare Issues.
- 143B-139.5B. Department of Health and Human Services — provision for joint training.
- 143B-139.6. Confidentiality of records.
- 143B-139.6A. (Effective July 1, 2002) Secretary's responsibilities regarding availability of early intervention services.
- Part 1A. Consolidated County Human Services.
- 143B-139.7. Consolidated county human services funding.
- 143B-140. [Repealed.]
- Part 2. Board of Human Resources.
- 143B-141. [Repealed.]
- Part 3. Commission for Health Services.
- 143B-142 through 143B-146. [Recodified.]
- Part 3A. Education Programs in Residential Schools.
- 143B-146.1. Mission of schools; definitions.
- 143B-146.2. ABC's Program in residential schools.
- 143B-146.3. Annual performance goals.
- 143B-146.4. Performance recognition.
- 143B-146.5. Identification of low-performing schools.
- 143B-146.6. Assistance teams; review by State Board.
- 143B-146.7. Consequences for personnel at low-performing schools.
- 143B-146.8. Evaluation of certificated personnel and superintendents; action plans; State Board notification.
- 143B-146.9. Assessment teams.
- 143B-146.10. Development of performance standards and criteria for certificated personnel.
- 143B-146.11. School calendar.
- 143B-146.12. Development and approval of school improvement plans.
- 143B-146.13. School technology plan.
- 143B-146.14. Dispute resolution; appeals to Secretary.

- Sec. 143B-146.15. Duty to report certain acts to law enforcement.
- 143B-146.16. Residential school personnel criminal history checks.
- 143B-146.17 through 143B-146.20. [Reserved.]
- 143B-146.21. Policies, reports, and other miscellaneous provisions.
- 143B-146.22. [Repealed.]
- 143B-146.23 through 143B-146.27. [Reserved.]
- Part 4. Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services.
- 143B-147. (Effective until July 1, 2002) Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services — creation, powers and duties.
- 143B-147. (Effective July 1, 2002) Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services — creation, powers and duties.
- 143B-148. (Effective until July 1, 2002) Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services — members; selection; quorum; compensation.
- 143B-148. (Effective July 1, 2002) Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services — members; selection; quorum; compensation.
- 143B-149. Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services — officers.
- 143B-150. Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services — regular and special meetings.
- 143B-150.1 through 143B-150.4. [Reserved.]
- Part 4A. Family Preservation Act.
- 143B-150.5. Family Preservation Services Program established; purpose.
- 143B-150.6. Program services; eligibility; grants for local projects; fund transfers.
- 143B-150.7 through 143B-150.9. [Repealed.]
- 143B-150.10 through 143B-150.19. [Reserved.]
- Part 4B. State Child Fatality Review Team.
- 143B-150.20. State Child Fatality Review Team; establishment; purpose; powers; duties; report by Division of Social Services.
- Part 5. Eugenics Commission.
- 143B-151, 143B-152. [Repealed.]

## CH. 143B. EXECUTIVE ORGANIZATION

### Part 5A. S.O.S. Program.

Sec.

- 143B-152.1. Establishment of program; purpose; goals.
- 143B-152.2. Definitions.
- 143B-152.3. Administration of the program.
- 143B-152.4. Eligible applicants; application for grants.
- 143B-152.5. Grants review and selection.
- 143B-152.6. Cooperation of State and local agencies.
- 143B-152.7. Program evaluation; reporting requirements.
- 143B-152.8, 143B-152.9. [Reserved.]

### Part 5B. Family Resource Center Grant Program.

- 143B-152.10. Family Resource Center Grant Program; creation; purpose; intent.
- 143B-152.11. Administration of program.
- 143B-152.12. Eligible applicants: applications for grants.
- 143B-152.13. Grants review and selection.
- 143B-152.14. Cooperation of State and local agencies.
- 143B-152.15. Program evaluation; reporting requirements.

### Part 6. Social Services Commission.

- 143B-153. Social Services Commission — creation, powers and duties.
- 143B-153.1. [Repealed.]
- 143B-154. Social Services Commission — members; selection; quorum; compensation.
- 143B-155. Social Services Commission — regular and special meetings.
- 143B-156. Social Services Commission — officers.

### Part 7. Commission for the Blind.

- 143B-157. Commission for the Blind — creation, powers and duties.
- 143B-158. Commission for the Blind.
- 143B-159. Commission for the Blind — regular and special meetings.
- 143B-160. Commission for the Blind — officers.

### Part 8. Professional Advisory Committee.

- 143B-161. Professional Advisory Committee — creation, powers and duties.
- 143B-162. Professional Advisory Committee — members; selection; quorum; compensation.

### Part 9. Consumer and Advocacy Advisory Committee for the Blind.

- 143B-163. Consumer and Advocacy Advisory Committee for the Blind — creation, powers and duties.

Sec.

- 143B-164. Consumer and Advocacy Advisory Committee for the Blind — members; selection; quorum; compensation.

143B-164.1 through 143B-164.9. [Reserved.]

### Part 9A. State School for Sight-Impaired Children.

- 143B-164.10. Incorporation, name and management.
- 143B-164.11. Board of Directors of the Governor Morehead School — creation, powers and duties.
- 143B-164.12. Board of Directors of the Governor Morehead School — members; selection; quorum; compensation.
- 143B-164.13. Admission of pupils; how admission obtained.
- 143B-164.14. Admission of pupils from other states.
- 143B-164.15. Department of Health and Human Services may confer diplomas.
- 143B-164.16. State Treasurer is ex officio treasurer of institution.
- 143B-164.17. When clothing, etc., for pupils paid for by county.
- 143B-164.18. Establishment of private, non-profit corporations.

### Part 10. North Carolina Medical Care Commission.

- 143B-165. North Carolina Medical Care Commission — creation, powers and duties.
- 143B-166. North Carolina Medical Care Commission — members; selection; quorum; compensation.
- 143B-167. North Carolina Medical Care Commission — regular and special meetings.
- 143B-168. North Carolina Medical Care Commission — officers.

### Part 10A

[Child Care Commission.]

- 143B-168.1, 143B-168.2. [Repealed.]
- 143B-168.3. Child Care Commission — powers and duties.
- 143B-168.4. Child Care Commission — members; selection; quorum.
- 143B-168.5. Child Care — special unit.
- 143B-168.6 through 143B-168.9. [Reserved.]

### Part 10B. Early Childhood Initiatives.

- 143B-168.10. Early childhood initiatives; findings.
- 143B-168.11. Early childhood initiatives; purpose; definitions.

CH. 143B. EXECUTIVE ORGANIZATION

Sec.

- 143B-168.12. North Carolina Partnership for Children, Inc.; conditions.
- 143B-168.13. Implementation of program; duties of Department and Secretary.
- 143B-168.14. Local partnerships; conditions.
- 143B-168.15. Use of State funds.
- 143B-168.16. Home-centered services; consent.

Part 11. Council for Institutional Boards.

143B-169 through 143B-172. [Repealed.]

Part 12. Boards of Directors of Institutions.

143B-173 through 143B-176. [Repealed.]

Part 12A. Board of Directors of the Governor Morehead School.

143B-176.1, 143B-176.2. [Recodified.]

Part 13. Council on Developmental Disabilities.

- 143B-177. Council on Developmental Disabilities — creation, powers and duties.
- 143B-178. Council on Developmental Disabilities — definitions.
- 143B-179. Council on Developmental Disabilities — members; selection; quorum; compensation.
- 143B-179.1 through 143B-179.4. [Reserved.]

Part 13A. Interagency Coordinating Council for Handicapped Children from Birth to Five Years of Age.

- 143B-179.5. Interagency Coordinating Council for Children from Birth to Five with Disabilities and Their Families; establishment, composition, organization; duties, compensation, reporting.
- 143B-179.6. Interagency Coordinating Council for Handicapped Children from Birth to Five Years of Age; agency cooperation.

Part 14. Governor's Advisory Council on Aging; Division of Aging.

- 143B-180. Governor's Advisory Council on Aging — creation, powers and duties.
- 143B-181. Governor's Advisory Council on Aging — members; selection; quorum; compensation.
- 143B-181.1. Division of Aging — creation, powers and duties.
- 143B-181.1A. Plan for serving older adults; inventory of existing data; cooperation by State agencies.
- 143B-181.1B. Division as clearinghouse for information; agencies to provide information.

Sec.

- 143B-181.2. Assistant Secretary for Aging — appointment and duties.

Part 14A. Policy Act for the Aging.

- 143B-181.3. Statement of principles.
- 143B-181.4. Responsibility for policy.

Part 14B. Long-Term Care.

- 143B-181.5. Long-term care policy.
- 143B-181.6. Purpose and intent.
- 143B-181.7 through 143B-181.9. [Repealed.]
- 143B-181.9A. [Repealed.]

Part 14C. Respite Care Program.

- 143B-181.10. Respite care program established; eligibility; services; administration; payment rates.
- 143B-181.11 through 143B-181.14. [Reserved.]

Part 14D. Long-Term Care Ombudsman Program.

- 143B-181.15. Long-Term Care Ombudsman Program/Office; policy.
- 143B-181.16. Long-Term Care Ombudsman Program/Office; definition.
- 143B-181.17. Office of State Long-Term Care Ombudsman Program/Office; establishment.
- 143B-181.18. Office of State Long-Term Care Ombudsman Program/State Ombudsman duties.
- 143B-181.19. Office of Regional Long-Term Care Ombudsman; Regional Ombudsman; duties.
- 143B-181.20. State/Regional Long-Term Care Ombudsman; authority to enter; cooperation of government agencies; communication with residents.
- 143B-181.21. State/Regional Long-Term Care Ombudsman; resolution of complaints.
- 143B-181.22. State/Regional Long-Term Care Ombudsman; confidentiality.
- 143B-181.23. State/Regional Long-Term Care Ombudsman; prohibition of retaliation.
- 143B-181.24. Office of State/Regional Long-Term Care Ombudsman; immunity from liability.
- 143B-181.25. Office of State/Regional Long-Term Care Ombudsman; penalty for willful interference.
- 143B-181.26 through 143B-181.49. [Reserved.]

Part 14E. Standards for Alzheimer's Special Care Units.

- 143B-181.50 through 143B-181.54. [Repealed.]

CH. 143B. EXECUTIVE ORGANIZATION

- Part 14F. Senior Tar Heel Legislature.  
Sec.  
143B-181.55. Creation, membership, meetings, organization, and adoption of measures.
- Part 15. Mental Health Advisory Council.  
143B-182, 143B-183. [Repealed.]
- Part 16. Governor's Council on Employment of the Handicapped  
[Transferred.]
- Part 16A. North Carolina Arthritis Program Committee.  
143B-184, 143B-185. [Repealed.]
- Part 17. Governor's Advocacy Council on Children and Youth.  
143B-186, 143B-187. [Transferred.]
- Part 18. Council on Sickle Cell Syndrome.  
143B-188 through 143B-190. [Recodified.]  
143B-191 through 143B-196. [Repealed.]
- Part 19. Commission for Human Skills and Resource Development.  
143B-197 through 143B-203. [Repealed.]
- Part 20. Commission of Anatomy.  
143B-204 through 143B-206. [Recodified.]
- Part 21. Youth Services Advisory Committee.  
143B-207, 143B-208. [Repealed.]
- Part 22. Human Tissue Advisory Council.  
143B-209. [Repealed.]
- Part 23. North Carolina Drug Commission.  
143B-210 through 143B-212. [Repealed.]
- Part 24. North Carolina Council for the Hearing Impaired.  
143B-213 through 143B-216.5B. [Repealed.]
- Part 25. Nutrition Advisory Committee.  
143B-216.6, 143B-216.7. [Repealed.]
- Part 26. Governor's Council on Physical Fitness and Health.  
143B-216.8, 143B-216.9. [Recodified.]
- Part 27. Governor's Waste Management Board.  
143B-216.10 through 143B-216.15. [Recodified.]  
143B-216.16 through 143B-216.19. [Reserved.]

- Part 28. North Carolina Council on the Holocaust.  
Sec.  
143B-216.20. North Carolina Council on the Holocaust; creation; purpose.  
143B-216.21. Membership; selection; quorum.  
143B-216.22. Expenses.  
143B-216.23. Assistance.  
143B-216.24 through 143B-216.29. [Reserved.]
- Part 29. Council for the Deaf and the Hard of Hearing; Division of Services for the Deaf and the Hard of Hearing.  
143B-216.30. Definitions.  
143B-216.31. Council for the Deaf and the Hard of Hearing — creation and duties.  
143B-216.32. Council for the Deaf and the Hard of Hearing — membership; quorum; compensation.  
143B-216.33. Division of Services for the Deaf and the Hard of Hearing — creation, powers and duties.  
143B-216.34. Division of Services for the Deaf and the Hard of Hearing — communication services program established.  
143B-216.35 through 143B-216.39. [Reserved.]
- Part 30. State Schools for Hearing-impaired Children.  
143B-216.40. Establishment; operations.  
143B-216.41. Pupils admitted; education.  
143B-216.42. Free textbooks and State purchase and rental system.  
143B-216.43. Agreements with local governing authorities.  
143B-216.44. Fees for athletic programs; appeal.  
143B-216.45 through 143B-216.49. [Reserved.]
- Part 31. Office of the Internal Auditor.  
143B-216.50. Department of Health and Human Services; office of the Internal Auditor.  
143B-216.51. Department of Health and Human Services office of the Internal Auditor; Department audits.

**Article 4.**

**Department of Revenue.**

Part 1. General Provisions.

- 143B-217. Department of Revenue — creation.  
143B-218. Department of Revenue — duties.  
143B-218.1. [Recodified.]  
143B-219. Department of Revenue — functions.  
143B-220. Department of Revenue — head.  
143B-221. [Repealed.]

## CH. 143B. EXECUTIVE ORGANIZATION

### Part 2. Property Tax Commission.

Sec.

143B-222 through 143B-225. [Repealed.]

143B-226 through 143B-245. [Reserved.]

### Article 5.

#### Department of Military and Veterans Affairs.

##### Part 1. General Provisions.

143B-246 through 143B-251. [Repealed.]

##### Part 2. Veterans Affairs Commission.

143B-252, 143B-253. [Transferred.]

##### Part 3. Energy Division.

143B-254, 143B-255. [Repealed.]

143B-256 through 143B-259. [Reserved.]

### Article 6.

#### Department of Correction.

##### Part 1. General Provisions.

143B-260. Department of Correction — creation.

143B-261. Department of Correction — duties.

143B-261.1. Department of Correction — rules and regulations.

143B-261.2. Repair or replacement of personal property.

143B-262. Department of Correction — functions.

143B-262.1. Department of Correction — Substance Abuse Program.

143B-262.2. Pilot program on sexual assault.

143B-262.3. Report to the General Assembly.

143B-262.4. Deferred prosecution, community service restitution, and volunteer program.

143B-263. Department of Correction — head.

143B-264. Department of Correction — organization.

##### Part 2. Board of Correction.

143B-265. Board of Correction — duties and responsibilities; members; selection; compensation; meetings; quorum; services.

##### Part 3. Parole Commission.

143B-266. Post-Release Supervision and Parole Commission — creation, powers and duties.

143B-267. Post-Release Supervision and Parole Commission — members; selection; removal; chairman; compensation; quorum; services.

143B-268. [Reserved.]

### Part 4. Black Mountain Advancement Center for Women.

Sec.

143B-269. Black Mountain Advancement Center for Women — established; inmates; medical and food services; training; work release.

### Part 5. Substance Abuse Advisory Council.

143B-270. Substance Abuse Advisory Council.

143B-271. Powers and duties of the Council.

143B-272. [Repealed.]

### Article 6A.

#### North Carolina State-County Criminal Justice Partnership Act.

143B-273. Short title.

143B-273.1. Legislative policy.

143B-273.2. Definitions.

143B-273.3. Goals of community-based corrections programs funded under this Article.

143B-273.4. Eligible population.

143B-273.5. State-County Criminal Justice Partnership Account established.

143B-273.6. State Criminal Justice Partnership Advisory Board; members; terms; chairperson.

143B-273.7. Duties of State Criminal Justice Partnership Advisory Board.

143B-273.8. Duties of Department of Correction.

143B-273.9. Election to apply for funding.

143B-273.10. County Criminal Justice Partnership Advisory Boards; members; terms; chairperson.

143B-273.11. County Criminal Justice Partnership Advisory Boards; powers and duties.

143B-273.12. Community-Based Corrections Plan.

143B-273.13. Application for implementation funding.

143B-273.14. Fundable programs; community-based corrections programs.

143B-273.15. Funding formula.

143B-273.16. Continued eligibility.

143B-273.17. Termination of participation in program.

143B-273.18. Private nonprofit agencies participating in program.

143B-273.19. Prohibited uses of funds.

143B-274. [Reserved.]

### Article 7.

#### Department of Environment and Natural Resources.

##### Part 1. General Provisions.

143B-275 through 143B-279. [Repealed.]

143B-279.1. Department of Environment and Natural Resources — creation.

CH. 143B. EXECUTIVE ORGANIZATION

- Sec.  
 143B-279.2. Department of Environment and Natural Resources — duties.  
 143B-279.3. Department of Environment and Natural Resources — structure.  
 143B-279.4. The Department of Environment and Natural Resources — Secretary; Deputy Secretaries.  
 143B-279.5. Biennial State of the Environment Report.  
 143B-279.6. [Repealed.]  
 143B-279.7. Fish kill response protocols; report.  
 143B-279.8. Coastal Habitat Protection Plans.  
 143B-279.9. Land-use restrictions may be imposed to reduce danger to public health at contaminated sites.  
 143B-279.10. Recordation of contaminated sites.  
 143B-279.11. Recordation of residual petroleum from an underground storage tank.  
 143B-279.12 through 143B-279.15. [Reserved.]
- Part 2. Board of Natural Resources and Community Development.
- 143B-280. [Repealed.]
- Part 3. Wildlife Resources Commission.
- 143B-281. [Repealed.]  
 143B-281.1. Wildlife Resources Commission — transfer; independence preserved; appointment of Executive Director and employees.
- Part 4. Environmental Management Commission.
- 143B-282. Environmental Management Commission — creation; powers and duties.  
 143B-282.1. Environmental Management Commission — quasi-judicial powers; procedures.  
 143B-283. Environmental Management Commission — members; selection; removal; compensation; quorum; services.  
 143B-284. Environmental Management Commission — officers.  
 143B-285. Environmental Management Commission — meetings.  
 143B-285.1 through 143B-285.9. [Reserved.]
- Part 4A. Governor's Waste Management Board.
- 143B-285.10 through 143B-285.15. [Repealed.]  
 143B-285.16 through 143B-285.19. [Reserved.]
- Part 4B. Office of Environmental Education.
- 143B-285.20. Short title.  
 143B-285.21. Declaration of purpose.
- Sec.  
 143B-285.22. Creation.  
 143B-285.23. Powers and duties of the Secretary of Environment and Natural Resources.  
 143B-285.24. Grants and awards.  
 143B-285.25. Liaison between the Office of Environmental Education and the Department of Public Instruction.
- Part 5. Marine Fisheries Commission.
- 143B-286 through 143B-289. [Repealed.]
- Part 5A. Marine Fisheries Commission.
- 143B-289.1 through 143B-289.12. [Repealed.]
- Part 5B. Office of Marine Affairs.  
 [Recodified.]
- 143B-289.19 through 143B-289.23.
- Part 5C. Division of North Carolina Aquariums.
- 143B-289.40. Division of North Carolina Aquariums — creation.  
 143B-289.41. Division of North Carolina Aquariums — organization; powers and duties.  
 143B-289.42. North Carolina Aquariums; purpose.  
 143B-289.43. Local advisory committees; duties; membership.  
 143B-289.44. North Carolina Aquariums; fees; fund.  
 143B-289.45 through 143B-289.49. [Reserved.]
- Part 5D. Marine Fisheries Commission.
- 143B-289.50. Definitions.  
 143B-289.51. Marine Fisheries Commission — creation; purposes.  
 143B-289.52. Marine Fisheries Commission — powers and duties.  
 143B-289.53. Marine Fisheries Commission — quasi-judicial powers; procedures.  
 143B-289.54. Marine Fisheries Commission — members; appointment; term; oath; ethical standards; removal; compensation; staff.  
 143B-289.55. Marine Fisheries Commission — officers; organization; seal.  
 143B-289.56. Marine Fisheries Commission — meetings; quorum.  
 143B-289.57. Marine Fisheries Commission Advisory Committees established; members; selection; duties.  
 143B-289.58. Marine Fisheries Endowment Fund.  
 143B-289.59. Conservation Fund; Commission may accept gifts.  
 143B-289.60. Article subject to Chapter 113.  
 143B-289.61. Jurisdictional questions.

## CH. 143B. EXECUTIVE ORGANIZATION

Sec.

143B-289.62 through 143B-289.65. [Reserved.]

Part 6. North Carolina Mining Commission.

143B-290. North Carolina Mining Commission — creation; powers and duties.

143B-291. North Carolina Mining Commission — members; selection; removal; compensation; quorum; services.

143B-292. North Carolina Mining Commission — officers.

143B-293. North Carolina Mining Commission — meetings.

Part 7. Soil and Water Conservation Commission.

143B-294. Soil and Water Conservation Commission — creation; powers and duties; compliance inspections.

143B-295. Soil and Water Conservation Commission — members; selection; removal; compensation; quorum; services.

143B-296. Soil and Water Conservation Commission — officers.

143B-297. Soil and Water Conservation Commission — meetings.

143B-297.1. Soil and Water Conservation Account.

Part 8. Sedimentation Control Commission.

143B-298. Sedimentation Control Commission — creation; powers and duties.

143B-299. Sedimentation Control Commission — members; selection; compensation; meetings.

Part 9. Water Pollution Control System Operators Certification Commission.

143B-300. Water Pollution Control System Operators Certification Commission — creation; powers and duties.

143B-301. Water Pollution Control System Operators Certification Commission — members; selection; removal; compensation; quorum; services.

143B-301.1. Definitions.

143B-301.2 through 143B-301.9. [Reserved.]

Part 9A. Well Contractors Certification Commission.

143B-301.10. Definitions.

143B-301.11. Creation, powers, and duties of the Commission.

143B-301.12. Membership of Commission.

Part 10. Earth Resources Council.

143B-302 through 143B-304. [Repealed.]

Part 11. Community Development Council.

143B-305 through 143B-307. [Recodified.]

Part 12. Forestry Council.

Sec.

143B-308. Forestry Council — creation; powers and duties.

143B-309. Forestry Council — members; chairperson; selection; removal; compensation; quorum.

143B-310. Forestry Council — meetings.

Part 13. Parks and Recreation Council.

143B-311 through 143B-313. [Repealed.]

Part 13A. North Carolina Parks and Recreation Authority.

143B-313.1. North Carolina Parks and Recreation Authority; creation; powers and duties.

143B-313.2. North Carolina Parks and Recreation Authority; members; selection; compensation; meetings.

Part 14. North Carolina Water Safety Council.

143B-314 through 143B-316. [Repealed.]

Part 15. Air Quality Council.

143B-317. Air Quality Compliance Advisory Panel — creation; powers and duties.

143B-318. Air Quality Compliance Advisory Panel — members; chairman; selection; removal; compensation; quorum; services.

143B-319. Air Quality Compliance Advisory Panel — meetings.

Part 16. Water Quality Council.

143B-320, 143B-321. [Repealed.]

Part 17. North Carolina National Park, Parkway and Forests Development Council.

143B-322 through 143B-324. [Recodified.]

Part 17A. North Carolina National Park, Parkway and Forests Development Council.

143B-324.1. North Carolina National Park, Parkway and Forests Development Council; creation; powers; duties.

143B-324.2. North Carolina National Park, Parkway and Forests Development Council — members; selection; officers; removal; compensation; quorum; services.

143B-324.3. North Carolina National Park, Parkway and Forests Development Council — meetings.

Part 18. Commercial and Sports Fisheries Advisory Committee.

143B-325 through 143B-327. [Repealed.]

CH. 143B. EXECUTIVE ORGANIZATION

Part 19. John H. Kerr Reservoir Committee.

Sec.

143B-328 through 143B-330. [Repealed.]

Part 20. Science and Technology Committee.

143B-331, 143B-332. [Recodified.]

Part 21. North Carolina Trails Committee.

143B-333. North Carolina Trails Committee — creation; powers and duties.

143B-334. North Carolina Trails Committee — members; selection; removal; compensation.

Part 22. North Carolina Zoological Park Council.

143B-335. North Carolina Zoological Park Council — creation; powers and duties.

143B-336. North Carolina Zoological Park Council — members; selection; removal; chairman; compensation; quorum; services.

143B-336.1. Special Zoo Fund.

Part 23. Governor's Law and Order Commission.

143B-337 through 143B-339. [Recodified.]

Part 24. North Carolina Employment and Training Council.

143B-340, 143B-341. [Repealed.]

Part 25. Triad Park Commission.

143B-342 through 143B-344.2. [Repealed.]

Part 26. Economic Opportunity Agencies.

143B-344.3 through 143B-344.10. [Repealed.]

Part 27. Employment and Training Act of 1985.

143B-344.11 through 143B-344.15. [Recodified.]

Part 28. North Carolina Aquariums Commission.

143B-344.16, 143B-344.17. [Repealed.]

Part 29. Advisory Commission for North Carolina State Museum of Natural Sciences.

143B-344.18. Commission created; membership.

143B-344.19. Duties of Commission; meetings, formulation of policies and recommendations to Governor and General Assembly.

143B-344.20. No compensation of members; reimbursement for expenses.

143B-344.21. Reports to General Assembly.

Sec.

143B-344.22. Museum of Natural Sciences; disposition of objects.

143B-344.23. North Carolina Museum of Forestry; satellite museum.

143B-344.24 through 143B-344.29. [Reserved.]

Part 30. State Infrastructure Council.

143B-344.30. Council established; purpose; members; terms of office; quorum; compensation; termination.

143B-344.31. Duties of the Council.

143B-344.32. Staff and offices.

143B-344.33. Council reports.

**Article 8.**

**Department of Transportation.**

Part 1. General Provisions.

143B-345. Department of Transportation — creation.

143B-346. Department of Transportation — purpose and functions.

143B-347. [Repealed.]

143B-348. Department of Transportation — head; rules, regulations, etc., of Board of Transportation.

143B-349. [Repealed.]

Part 2. Board of Transportation.

143B-350. Board of Transportation — organization; powers and duties, etc.

143B-351, 143B-352. [Repealed.]

Part 3. North Carolina State Ports Authority Transfer.

143B-353. [Repealed.]

Part 4. Navigation and Pilotage Commissions.

143B-354. [Recodified.]

Part 5. Division of Aeronautics — Aeronautics Council.

143B-355. Division of Aeronautics.

143B-356. Aeronautics Council — creation; powers and duties.

143B-357. Aeronautics Council — Members; selection; quorum; compensation.

Part 6. North Carolina Railroad and Atlantic and North Carolina Railroad.

143B-358. [Repealed.]

Part 7. North Carolina Traffic Safety Authority.

143B-359. [Repealed.]

Part 8. Highway Safety Program.

143B-360. Powers and duties of Department and Secretary.

CH. 143B. EXECUTIVE ORGANIZATION

Part 9. North Carolina Rail Council.

Sec.

- 143B-361. Findings.
- 143B-362. North Carolina Rail Council — creation; powers and duties.
- 143B-363. North Carolina Rail Council — members; selection; compensation.
- 143B-364, 143B-365. [Reserved.]

**Article 9.**

**Department of Administration.**

Part 1. General Provisions.

- 143B-366. Department of Administration — creation.
- 143B-367. Duties of the Department.
- 143B-368. Functions of the Department.
- 143B-369. Head of the Department.
- 143B-370. [Repealed.]

Part 2. State Goals and Policy Board.

- 143B-371, 143B-372. [Repealed.]

Part 2A. North Carolina Progress Board.

- 143B-372.1. North Carolina Progress Board.
- 143B-372.2. Responsibilities.
- 143B-372.3. Staff.

Part 3. North Carolina Capital Planning Commission.

- 143B-373. North Carolina Capital Planning Commission — creation; powers and duties.
- 143B-374. North Carolina Capital Planning Commission — members; selection; quorum; compensation.

Part 4. Child Day-Care Licensing Commission.

- 143B-375, 143B-376. [Recodified.]

Part 5. North Carolina Drug Commission.

- 143B-377, 143B-378. [Repealed.]

Part 6. North Carolina Council on Interstate Cooperation.

- 143B-379 through 143B-384. [Repealed.]

Part 7. Youth Councils.

- 143B-385. State Youth Advisory Council — creation; powers and duties.
- 143B-386. State Youth Advisory Council — members; selection; quorum; compensation.
- 143B-387. State Youth Council.
- 143B-387.1. North Carolina Youth Legislative Assembly Fund.
- 143B-388. Local youth councils.

Part 8. North Carolina Marine Science Council.

Sec.

- 143B-389, 143B-390. [Repealed.]

Part 8A. Office of Marine Affairs.

- 143B-390.1 through 143B-390.4. [Recodified.]
- 143B-390.5 through 143B-390.9. [Reserved.]

Part 8B. North Carolina Council on Ocean Affairs.

- 143B-390.10, 143B-390.11. [Repealed.]
- 143B-390.12 through 143B-390.14. [Reserved.]

Part 8C. North Carolina Aquariums Commission.

- 143B-390.15, 143B-390.16. [Recodified.]

Part 9. North Carolina Human Relations Commission.

- 143B-391. North Carolina Human Relations Commission — Creation; powers and duties.
- 143B-392. North Carolina Human Relations Commission — Members; selection; quorum; compensation.

Part 10. North Carolina Council for Women.

- 143B-393. North Carolina Council for Women — creation; powers and duties.
- 143B-394. North Carolina Council for Women — members; selection; quorum; compensation.

Part 10A. Office of Coordinator of Services for Victims of Sexual Assault.

- 143B-394.1. Office of Coordinator of Services for Victims of Sexual Assault — purpose.
- 143B-394.2. Office of Coordinator of Services for Victims of Sexual Assault — office created.
- 143B-394.3. Office of Coordinator of Services for Victims of Sexual Assault — duties and responsibilities.

Part 10B. Displaced Homemakers.

- 143B-394.4. Definitions.
- 143B-394.5. Establishment of center; location.
- 143B-394.6. Staff for center.
- 143B-394.7. Funding.
- 143B-394.8. Services to be provided.
- 143B-394.9. Rules and regulations; evaluation.
- 143B-394.10. North Carolina Fund for Displaced Homemakers.
- 143B-394.11 through 143B-394.14. [Reserved.]

Part 10C. Domestic Violence Commission.

- 143B-394.15. Commission established; purpose; membership; transaction of business.

CH. 143B. EXECUTIVE ORGANIZATION

Sec.

143B-394.16. Powers and duties of the Commission; reports.

Part 11. North Carolina Manpower Council.

143B-395, 143B-396. [Repealed.]

Part 12. Standardization Committee.

143B-397, 143B-398. [Repealed.]

Part 13. Veterans' Affairs Commission.

143B-399. Veterans' Affairs Commission — creation, powers and duties.

143B-400. Veterans' Affairs Commission — members; selection; quorum; compensation.

143B-401. Veterans' Affairs Commission Advisory Committee — members; compensation.

Part 14. Advocacy Council for the Handicapped.

143B-402, 143B-403. [Repealed.]

Part 14A. Governor's Advocacy Council for Persons with Disabilities.

143B-403.1. Governor's Advocacy Council for Persons with Disabilities — creation; powers and duties.

143B-403.2. Governor's Advocacy Council for Persons with Disabilities — members; selection; quorum; compensation.

Part 15. North Carolina State Commission of Indian Affairs.

143B-404. North Carolina State Commission of Indian Affairs — creation; name.

143B-405. North Carolina State Commission of Indian Affairs — purposes for creation.

143B-406. North Carolina State Commission of Indian Affairs — duties; use of funds.

143B-407. North Carolina State Commission of Indian Affairs — membership; term of office; chairman; compensation.

143B-408. North Carolina State Commission of Indian Affairs — meetings; quorum; proxy vote.

143B-409. North Carolina State Commission of Indian Affairs — reports.

143B-410. North Carolina State Commission of Indian Affairs — fiscal records; clerical staff.

143B-411. North Carolina State Commission of Indian Affairs — executive director; employees.

Part 15A. North Carolina Advisory Council on the Eastern Band of the Cherokee.

Sec.

143B-411.1. North Carolina Advisory Council on the Eastern Band of the Cherokee — creation; membership; terms of office.

143B-411.2. North Carolina Advisory Council on the Eastern Band of the Cherokee — purpose or creation; powers and duties.

143B-411.3. North Carolina Advisory Council of the Eastern Band of the Cherokee — meetings; quorum; compensation; chairman.

143B-411.4. North Carolina Advisory Council on the Eastern Band of the Cherokee — clerical and administrative support.

Part 16. Governor's Council on Employment of the Handicapped.

143B-412, 143B-413. [Repealed.]

Part 17. Governor's Advocacy Council on Children and Youth.

143B-414. Governor's Advocacy Council on Children and Youth — creation; powers and duties.

143B-415. Governor's Advocacy Council on Children and Youth — members; selection; quorum; compensation.

143B-416. Governor's Advocacy Council on Children and Youth — access to information.

Part 18. North Carolina Internship Council.

143B-417. North Carolina Internship Council — creation; powers and duties.

143B-418. North Carolina Internship Council — members; selection; quorum; compensation; clerical, etc., services.

143B-419. North Carolina Internship Council — committees for screening applications.

Part 19. Jobs for Veterans Committee.

143B-420. Governor's Jobs for Veterans Committee — creation; appointment, organization, etc.; duties.

143B-421. Governor's Jobs for Veterans Committee — authority to receive grants-in-aid.

Part 19A. Selective Service Registration.

143B-421.1. Selective Service registration.

## CH. 143B. EXECUTIVE ORGANIZATION

### Part 20. Public Officers and Employees Liability Insurance Commission.

Sec.

143B-422 through 143B-426.1. [Recodified.]

### Part 21. Child and Family Services Interagency Committees.

143B-426.2 through 143B-426.7A. [Repealed.]

### Part 22. North Carolina Agency for Public Telecommunications.

143B-426.8. Definitions.

143B-426.9. North Carolina Agency for Public Telecommunications — Creation; membership; appointments, terms and vacancies; officers; meetings and quorum; compensation.

143B-426.10. Purpose of Agency.

143B-426.11. Powers of Agency.

143B-426.12. Public Radio Advisory Committee — policy; creation; duties; members.

143B-426.13. Approval of acquisition and disposition of real property.

143B-426.14. Issuance of bonds.

143B-426.15. Exchange of property; removal of building, etc.

143B-426.16. Treasurer of the Agency.

143B-426.17. Deposit and disbursement of funds.

143B-426.18. Audit.

143B-426.19. Purchase of supplies, material and equipment.

143B-426.20. Liberal construction of Part.

### Part 23. Information Technology [Resource Management] Commission.

143B-426.21. [Recodified].

### Part 24. Governor's Management Committee.

143B-426.22. Governor's Management Council.

143B-426.23. Meetings; clerical services report.

### Part 25. Board of Trustees of the North Carolina Public Employee Deferred Compensation Plan.

143B-426.24. Board of Trustees of the North Carolina Public Employee Deferred Compensation Plan.

### Part 26. North Carolina Farmworker Council.

143B-426.25. North Carolina Farmworker Council — creation; membership; meetings.

143B-426.26. North Carolina Farmworker Council — duties; annual report.

Sec.

143B-426.27 through 143B-426.29. [Reserved.]

### Part 27. North Carolina Board of Science and Technology.

143B-426.30, 143B-426.31. [Recodified.]

143B-426.32 through 143B-426.34. [Reserved.]

### Part 27A. Martin Luther King, Jr. Commission.

143B-426.34A. Martin Luther King, Jr. Commission — creation; powers and duties.

143B-426.34B. Martin Luther King, Jr. Commission — members; selection; quorum; compensation.

### Part 28. Office of the State Controller.

143B-426.35. Definitions.

143B-426.36. Office of the State Controller; creation.

143B-426.37. State Controller.

143B-426.38. Organization and operation of office.

143B-426.39. Powers and duties of the State Controller.

143B-426.39A. [Recodified].

### Part 28A. State Information Processing Services.

143B-426.40. [Recodified].

## Article 10.

### Department of Commerce.

#### Part 1. General Provisions.

143B-427. Department of Commerce — creation.

143B-428. Department of Commerce — declaration of policy.

143B-429. Department of Commerce — duties.

143B-430. Secretary of Commerce — powers and duties.

143B-431. Department of Commerce — functions.

143B-431.1. Toll-free number for information on housing assistance.

143B-431.2. Department of Commerce — limitation on grants and loans.

143B-432. Transfers to Department of Commerce.

143B-433. Department of Commerce — organization.

#### Part 1A. Housing Coordination and Policy Council.

143B-433.1 through 143B-433.3. [Repealed.]

#### Part 2. Economic Development.

143B-434. Economic Development Board — creation, duties, membership.

CH. 143B. EXECUTIVE ORGANIZATION

Sec.

- 143B-434.01. Comprehensive Strategic Economic Development Plan.
- 143B-434.1. The North Carolina Travel and Tourism Board — creation, duties, membership.
- 143B-434.2. Travel and Tourism Policy Act.
- 143B-434.3. Film Industry Development Account.
- 143B-435. Publications.
- 143B-436. Advertising of State resources and advantages.
- 143B-437. Investigation of impact of proposed new and expanding industry.
- 143B-437.01. Industrial Development Fund.
- 143B-437.02. [Reserved.]
- 143B-437.03. Allocation of economic development responsibilities.
- 143B-437.04. Community development block grants.
- 143B-437.05. Regional Development.

Part 2A. Community Development Council.

- 143B-437.1. Community Development Council — creation; powers and duties.
- 143B-437.2. Community Development Council — members; chairman; selection; removal; compensation; quorum; services.
- 143B-437.3. Community Development Council — meetings.

Part 2B. Reserved.

143B-437.4 through 143B-437.11. [Reserved.]

Part 2C. Reserved.

143B-437.12 through 143B-437.19. [Reserved.]

Part 2D. North Carolina Rural Redevelopment Authority.

- 143B-437.20. Short title and intent.
- 143B-437.21. Definitions.
- 143B-437.22. Creation of Authority and Board.
- 143B-437.23. Powers of the Authority.
- 143B-437.24, 143B-437.25. [Reserved.]
- 143B-437.26. Authority funds.
- 143B-437.27. Rural Investment Fund.
- 143B-437.28. Long-Term Rural Development Fund.
- 143B-437.29. Contracting with minority businesses.
- 143B-437.30. Conflicts of interest.
- 143B-437.31. Cooperation by other State agencies.
- 143B-437.32. Annual and quarterly reports.
- 143B-437.33. Dissolution.
- 143B-437.34 through 143B-347.39. [Reserved.]

Part 2E. North Carolina Rural Internet Access Authority

Sec.

- 143B-437.40. (Repealed effective December 1, 2003) Short title and intent.
- 143B-437.41. (Repealed effective December 1, 2003) Definitions.
- 143B-437.42. (Repealed effective December 1, 2003) Creation of Authority and Commission.
- 143B-437.43. (Repealed effective December 1, 2003) Powers, duties, and goals of the Authority.

Part 3. Labor Force Development.

143B-438. [Repealed.]

Part 3A. Employment and Training Act of 1985.

143B-438.1 through 143B-438.6. [Repealed.]  
143B-438.7 through 143B-438.9. [Reserved.]

Part 3B. Workforce Development.

- 143B-438.10. Commission on Workforce Development.
- 143B-438.11. Local Workforce Development Boards.
- 143B-438.12. Federal Program Administration.
- 143B-438.13. Employment and Training Grant Program.

Part 4. Credit Union Commission.

143B-439. Credit Union Commission.

Part 5. North Carolina Board of Science and Technology.

143B-440, 143B-441. [Recodified.]

Part 6. North Carolina Science and Technology Research Center.

- 143B-442. Creation of Center.
- 143B-443. Administration by Department of Commerce.
- 143B-444. Acceptance of funds.
- 143B-445. Applicability of Executive Budget Act.

Part 7. North Carolina National Park, Parkway and Forests Development Council.

143B-446 through 143B-447.1. [Recodified.]

Part 8. Energy Division.

143B-448 through 143B-450.1. [Repealed.]

CH. 143B. EXECUTIVE ORGANIZATION

Part 9. Navigation and Pilotage Commissions.

Sec.

143B-451. Navigation and pilotage commissions.

Part 10. North Carolina State Ports Authority.

143B-452. Creation of Authority — membership; appointment, terms and vacancies; officers; meetings and quorum; compensation.

143B-453. Purposes of Authority.

143B-454. Powers of Authority.

143B-454.1. Container shipping.

143B-455. Approval of acquisition and disposition of real property.

143B-456. Issuance of bonds and notes.

143B-456.1. Bonds and notes for special user projects.

143B-457. Power of eminent domain.

143B-458. Exchange of property; removal of buildings, etc.

143B-459, 143B-460. [Repealed.]

143B-461. Jurisdiction of the Authority; application of Chapter 20; appointment and authority of special police.

143B-462. Treasurer of the Authority.

143B-463. Deposit and disbursement of funds.

143B-464. Audit.

143B-465. Purchase of supplies, material and equipment and building contracts.

143B-466. Liberal construction of Article.

143B-467. Warehouses, wharves, etc., on property abutting navigable waters.

143B-468. [Reserved.]

Part 11. North Carolina Ports Railway Commission.

143B-469. Creation of Commission.

143B-469.1. Powers of Commission.

143B-469.2. Cooperation with Ports Authority.

143B-469.3. Commission not required to be a common carrier.

Part 11A. North Carolina Hazardous Waste Treatment Commission.

143B-470 through 143B-470.6. [Repealed.]

Part 12. North Carolina Technological Development Authority.

143B-471 through 143B-471.5. [Repealed.]

Part 13. Mutual Burial Associations.

143B-472, 143B-472.1. [Repealed.]

143B-472.2. Duties of Board; meetings.

143B-472.3. Requirements as to rules and by-laws.

143B-472.4. Limitation of soliciting agents; licensing and qualifications; officers

Sec.

exempt from license; issuance of membership certificates.

143B-472.5. Assessments against association for expenses of Board of Mortuary Science.

143B-472.6. Unlawful to operate without written authority of Board.

143B-472.7. Revocation of license.

143B-472.8. Deposit or investment of funds of mutual burial associations.

143B-472.9. Unclaimed funds of defunct burial association.

143B-472.10. Penalty for failure to operate in substantial compliance with by-laws.

143B-472.11. Penalty for wrongfully inducing person to change membership.

143B-472.12. Penalty for making false and fraudulent entries.

143B-472.13. Accepting applications without collecting fee and first assessment.

143B-472.14. Removal of secretary-treasurer for failure to maintain proper records.

143B-472.15. Free services; failure to make proper assessments, etc., made a misdemeanor.

143B-472.16. Right of appeal upon revocation or suspension of license.

143B-472.17. Bond of secretary or secretary-treasurer of burial associations.

143B-472.18. Assessments.

143B-472.19. Making false or fraudulent statement a misdemeanor.

143B-472.20. Statewide organization of associations.

143B-472.21. Article deemed exclusive authority for organization, etc., of mutual burial associations.

143B-472.22. Operation of association in violation of law prohibited.

143B-472.23. Member in armed forces failing to pay assessments; reinstatement.

143B-472.24. Hearing by Board of dispute over liability for funeral benefits; appeal.

143B-472.25. Board authorized to subpoena witnesses, administer oaths and compel attendance at hearings.

143B-472.26. Authority of Board to examine financial records.

143B-472.27. Board authorized to freeze certain funds of Association.

143B-472.28. Authority of foreign or domestic mutual burial association or domestic or foreign insurance company to purchase, merge or consolidate with North Carolina mutual burial associations.

143B-472.29. Acquisition, merger, dissolution,

- Sec. and liquidation of mutual burial associations.
- Part 14. Business Energy Improvement Program.
- 143B-472.30 through 143B-472.34. [Repealed.]
- Part 15. Main Street Financial Incentive Fund.
- 143B-472.35. Establishment of fund; use of moneys; application for grants and loans; disbursal; repayment; inspections; rules; reports.
- 143B-472.36 through 143B-472.39. [Reserved.]
- Part 16. Information Technology Related State Government Functions.
- 143B-472.40 through 143B-472.67. [Repealed.]
- 143B-472.68, 143B-472.69. [Reserved.]
- Part 17. Electronic Procurement in Government.
- 143B-472.70. [Repealed.]
- 143B-472.71 through 143B-472.79. [Reserved.]
- Part 18. North Carolina Board of Science and Technology.
- 143B-472.80. North Carolina Board of Science and Technology; creation; powers and duties.
- 143B-472.81. North Carolina Board of Science and Technology; membership; organization; compensation; staff services.

**Article 11.**

**Department of Crime Control and Public Safety.**

Part 1. General Provisions.

- 143B-473. Department of Crime Control and Public Safety — creation.
- 143B-474. Department of Crime Control and Public Safety — duties.
- 143B-475. Department of Crime Control and Public Safety — functions.
- 143B-475.1. [Recodified.]
- 143B-476. Department of Crime Control and Public Safety — head; powers and duties as to emergencies and disasters.

Part 2. Crime Control Division.

- 143B-477. Crime Control Division of the Department of Crime Control and Public Safety.

Part 3. Governor's Crime Commission.

- 143B-478. Governor's Crime Commission — creation; composition; terms; meetings, etc.

- Sec. 143B-479. Governor's Crime Commission — powers and duties.
- 143B-480. Adjunct committees of the Governor's Crime Commission — creation; purpose; powers and duties.
- Part 3A. Assistance Program for Victims of Rape and Sex Offenses.
- 143B-480.1. Assistance Program for Victims of Rape and Sex Offenses.
- 143B-480.2. Victim assistance.
- 143B-480.3. Reduction of benefits; restitution; actions.

Part 4. State Fire Commission.

- 143B-481 through 143B-485. [Recodified.]
- 143B-486 through 143B-489. [Reserved.]

Part 5. Civil Air Patrol.

- 143B-490. Civil Air Patrol Division — powers and duties.
- 143B-491. Personnel and benefits.
- 143B-492. State liability.
- 143B-493, 143B-494. [Reserved.]

Part 5A. North Carolina Center for Missing Persons.

- 143B-495. North Carolina Center for Missing Persons established.
- 143B-496. Definitions.
- 143B-497. Control of the Center.
- 143B-498. Secretary to adopt rules.
- 143B-499. Submission of missing person reports to the Center.
- 143B-499.1. Dissemination of missing persons data by law-enforcement agencies.
- 143B-499.2. Responsibilities of Center.
- 143B-499.3. Duty of individuals to notify Center and law-enforcement agency when missing person has been located.
- 143B-499.4. Release of information by Center.
- 143B-499.5. Provision of toll-free service; instructions to callers; communication with law-enforcement agencies.
- 143B-499.6. Improper release of information; penalty.

Part 6. Community Penalties Program.

- 143B-500 through 143B-507. [Recodified.]
- 143B-508 through 143B-510. [Reserved.]

**Article 12.**

**Department of Juvenile Justice and Delinquency Prevention.**

Part 1. Creation of Department.

- 143B-511. Creation of the Department of Juvenile Justice and Delinquency Prevention.

Sec.

- 143B-512. Transfer of Office of Juvenile Justice authority to the Department of Juvenile Justice and Delinquency Prevention.
- 143B-513, 143B-514. [Reserved.]

Part 2. General Provisions.

- 143B-515. Definitions.
- 143B-516. Duties and powers of the Department of Juvenile Justice and Delinquency Prevention.
- 143B-517. Authority to contract with other entities.
- 143B-518. Authority to assist private nonprofit foundations.
- 143B-519. Annual report.
- 143B-520. Teen court programs.
- 143B-521 through 143B-524. [Reserved.]

Part 3. Juvenile Facilities.

- 143B-525. Juvenile facilities.
- 143B-526. Authority to provide necessary medical or surgical care.
- 143B-527. Compensation to juveniles in care.
- 143B-528. Visits and community activities.
- 143B-529. Regional detention services.
- 143B-530. State subsidy to county detention facilities.
- 143B-531. Authority for implementation.
- 143B-532 through 143B-534. [Reserved.]

Part 4. Juvenile Court Services.

Sec.

- 143B-535. Duties and powers of chief court counselors.
- 143B-536. Duties and powers of juvenile court counselors.
- 143B-537 through 143B-539. [Reserved.]

Part 5. Comprehensive Juvenile Delinquency and Substance Abuse Prevention Plan.

- 143B-540. Comprehensive Juvenile Delinquency and Substance Abuse Prevention Plan.
- 143B-541, 143B-542. [Reserved.]

Part 6. Juvenile Crime Prevention Councils.

- 143B-543. Legislative intent.
- 143B-544. Creation; method of appointment; membership; chair and vice-chair.
- 143B-545. Terms of appointment.
- 143B-546. Vacancies; removal.
- 143B-547. Meetings; quorum.
- 143B-548. Compensation of members.
- 143B-549. Powers and duties.
- 143B-550. Funding for programs.
- 143B-551 through 143B-555. [Reserved.]

Part 7. State Advisory Council on Juvenile Justice and Delinquency Prevention.

- 143B-556. Creation of Council; purpose; members; duties.
- 143B-557. Powers and duties of the Council.

ARTICLE 1.

*General Provisions.*

Part 1. In General.

**§ 143B-1. Short title.**

This Chapter shall be known and may be cited as the "Executive Organization Act of 1973." (1973, c. 476, s. 1.)

CASE NOTES

**Stated** in *Tice v. DOT*, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

**§ 143B-2. Interim applicability of the Executive Organization Act of 1973.**

The Executive Organization Act of 1973 shall be applicable only to the following named departments:

- (1) Department of Cultural Resources
- (2) Department of Health and Human Services
- (3) Department of Revenue
- (4) Department of Crime Control and Public Safety
- (5) Department of Correction

- (6) Department of Environment and Natural Resources
- (7) Department of Transportation
- (8) Department of Administration
- (9) Department of Commerce
- (10) Department of Juvenile Justice and Delinquency Prevention. (1973, c. 476, s. 2; c. 620, s. 9; c. 1262, ss. 10, 86; 1975, c. 716, s. 5; c. 879, s. 46; 1977, c. 70, s. 22; c. 198, s. 21; c. 771, s. 4; 1989, c. 727, s. 218(121); c. 751, s. 7(18); 1991 (Reg. Sess., 1992), c. 959, s. 37; 1997-443, ss. 11A.118(a), 11A.119(a); 2000-137, s. 4(II).)

**Effect of Amendments.** — Session Laws 2000-137, s. 4.(II), effective July 20, 2000, added subdivision (10) and made a minor punctuation change.

### § 143B-3. Definitions.

As used in the Executive Organization Act of 1973, except where the context clearly requires otherwise, the words and expressions defined in this section shall be held to have the meanings here given to them.

- (1) Agency: whenever the term “agency” is used it shall mean and include, as the context may require, an existing department, institution, commission, committee, board, division, bureau, officer or official.
- (2) Board: a collective body which assists the head of a principal department or his designee in the development of major programs including the tender of advice on departmental priorities.
- (3) Commission: a collective body which adopts rules and regulations in a quasi-legislative manner and which acts in a quasi-judicial capacity in rendering findings or decisions involving differing interests.
- (4) Committee: a collective body which either advises the head of a principal department or his designee or advises a commission in detailed technical areas.
- (5) Council: a collective body which advises the head of a principal department or his designee as representative of citizen advice in specific areas of interests.
- (6) Division: the principal subunit of a principal State department.
- (7) Head of department: head of one of the principal State departments.
- (8) Higher education: State senior institutions of higher learning.
- (9) Principal State department: one of the departments created by the General Assembly in compliance with Article III, Sec. 11, of the Constitution of North Carolina. (1973, c. 476, s. 3.)

#### CASE NOTES

**Division.** — There was no evidence in the record to show that the Internal Audit Section of the Department of Transportation functioned as a “principal subunit” so as to qualify as a division under this section. *North Carolina DOT v. Hodge*, 124 N.C. App. 515, 478 S.E.2d 30 (1996), rev’d on other grounds, 347 N.C. 602, 499 S.E.2d 187 (1998).

The Highway Beautification Program did not function as a “subunit” of a principal state department, such as the Department of Transportation, as specified in the definition of “division” under subdivision (6). *Powell v. North Carolina DOT*, 124 N.C. App. 542, 478 S.E.2d 28 (1996), rev’d on other grounds, 347 N.C. 614, 499 S.E.2d 180 (1998).

### § 143B-4. Policy-making authority and administrative powers of Governor; delegation.

The Governor, in accordance with Article III of the Constitution of North Carolina, shall be the Chief Executive Officer of the State. The Governor shall

be responsible for formulating and administering the policies of the executive branch of the State government. Where a conflict arises in connection with the administration of the policies of the executive branch of the State government with respect to the reorganization of State government, the conflict shall be resolved by the Governor, and the decision of the Governor shall be final. (1973, c. 476, s. 4.)

### § 143B-5. Governor; continuation of powers and duties.

All powers, duties, and functions vested by law in the Governor or in the Office of Governor are continued except as otherwise provided by the Executive Organization Act of 1973.

The immediate staff of the Governor shall not be subject to the State Personnel Act. (1973, c. 476, s. 5.)

### § 143B-6. Principal departments.

In addition to the principal departments enumerated in the Executive Organization Act of 1971, all executive and administrative powers, duties, and functions not including those of the General Assembly and its agencies, the General Court of Justice and the administrative agencies created pursuant to Article IV of the Constitution of North Carolina, and higher education previously vested by law in the several State agencies, are vested in the following principal departments:

- (1) Department of Cultural Resources
- (2) Department of Health and Human Services
- (3) Department of Revenue
- (4) Department of Crime Control and Public Safety
- (5) Department of Correction
- (6) Department of Environment and Natural Resources
- (7) Department of Transportation
- (8) Department of Administration
- (9) Department of Commerce
- (10) Community Colleges System Office
- (11) Department of Juvenile Justice and Delinquency Prevention. (1973, c. 476, s. 6; c. 620, s. 9; c. 1262, ss. 10, 86; 1975, c. 716, s. 5; c. 879, s. 46; 1977, c. 70, s. 23; c. 198, s. 22; c. 771, s. 4; 1979, 2nd Sess., c. 1130, s. 3; 1989, c. 727, s. 218(122); c. 751, s. 7(19); 1991 (Reg. Sess., 1992), c. 959, s. 38; 1997-443, ss. 11A.118(a), 11A.119(a); 1999-84, s. 23; 2000-137, s. 4(mm).)

**Effect of Amendments.** — Session Laws added subdivision (11) and made a minor punctuation change. 2000-137, s. 4(mm), effective July 20, 2000,

#### CASE NOTES

**Stated** in *Shell v. Wall*, 808 F. Supp. 481 (W.D.N.C. 1992).

### § 143B-7. Continuation of functions.

Each principal State department shall be considered a continuation of the former agencies to whose power it has succeeded for the purpose of succession to all rights, powers, duties, and obligations of the former agency. Where a former agency is referred to by law, contract, or other document, that reference

shall apply to the principal State department now exercising the functions of the former agency. (1973, c. 476, s. 7.)

### § 143B-8. Unassigned functions.

All functions, duties, and responsibilities established by law that are not specifically assigned to any principal State department may be assigned by the Governor to that department which, in accordance with the organization of State government, can most appropriately and effectively perform those functions, duties, and responsibilities. This provision shall not apply to professional and occupational licensing boards or to higher education. (1973, c. 476, s. 8.)

### § 143B-9. Appointment of officers and employees.

The head of each principal State department, except those departments headed by popularly elected officers, shall be appointed by the Governor and serve at his pleasure.

The salary of the head of each of the principal State departments and of elected officials shall be as provided by law.

The head of a principal State department shall appoint a chief deputy or chief assistant, and such chief deputy or chief assistant shall not be subject to the State Personnel Act. The salary of such chief deputy or chief assistant shall, upon the recommendation of the Governor, be set by the General Assembly. Unless otherwise provided for in the Executive Organization Act of 1973, and subject to the provisions of the Personnel Act, the head of each principal State department shall designate the administrative head of each transferred agency and all employees of each division, section, or other unit of the principal State department. (1973, c. 476, s. 9; 1977, c. 802, s. 42.20; 1983, c. 717, s. 51.)

#### OPINIONS OF ATTORNEY GENERAL

**The provisions of § 126-5(b) control over the provisions of this section.** See opinion of the Attorney General to Mr. G.C. Davis, Jr.,

Director, Position Analysis Division, Office of State Personnel, 46 N.C.A.G. 148 (1976).

### § 143B-10. Powers and duties of heads of principal departments.

(a) Assignment of Functions. — Except as otherwise provided by this Chapter, the head of each principal State department may assign or reassign any function vested in him or in his department to any subordinate officer or employee of his department.

(b) Reorganization by Department Heads. — With the approval of the Governor, each head of a principal State department may establish or abolish within his department any division. Each head of a principal State department may establish or abolish within his department any other administrative unit to achieve economy and efficiency and in accordance with sound administrative principles, practices, and procedures except as otherwise provided by law. When any such act of the head of the principal State department affects existing law the provisions of Article III, Sec. 5(10) of the Constitution of North Carolina shall be followed.

Each Department Head shall report all reorganizations under this subsection to the President of the Senate, the Speaker of the House of Representatives, the Chairmen of the Appropriations Committees in the Senate and the

House of Representatives, and the Fiscal Research Division of the Legislative Services Office, within 30 days after the reorganization if the General Assembly is in session, otherwise to the Joint Legislative Committee on Governmental Operations and the Fiscal Research Division of the Legislative Services Office, within 30 days after the reorganization. The report shall include the rationale for the reorganization and any increased efficiency in operations expected from the reorganization.

(c) Department Staffs. — The head of each principal State department may establish necessary subordinate positions within his department, make appointments to those positions, and remove persons appointed to those positions, all within the limitations of appropriations and subject to the State Personnel Act. All employees within a principal State department shall be under the supervision, direction, and control of the head of that department. The head of each principal State department may establish or abolish positions, transfer officers and employees between positions, and change the duties, titles, and compensation of existing offices and positions as he deems necessary for the efficient functioning of the department, subject to the State Personnel Act and the limitations of available appropriations. For the purposes of the foregoing provisions, a member of a board, commission, council, committee, or other citizen group shall not be considered an "employee within a principal department."

(d) Appointment of Committees or Councils. — The head of each principal department may create and appoint committees or councils to consult with and advise the department. The General Assembly declares its policy that insofar as feasible, such committees or councils shall consist of no more than 12 members, with not more than one from each congressional district. If any department head desires to vary this policy, he must make a request in writing to the Governor, stating the reasons for the request. The Governor may approve the request, but may only do so in writing. Copies of the request and approval shall be transmitted to the Advisory Budget Commission and to the Joint Legislative Commission on Governmental Operations. The members of any committee or council created by the head of a principal department shall serve at the pleasure of the head of the principal department and may be paid per diem and necessary travel and subsistence expenses within the limits of appropriations and in accordance with the provisions of G.S. 138-5, when approved in advance by the Director of the Budget. Per diem, travel, and subsistence payments to members of the committees or councils created in connection with federal programs shall be paid from federal funds unless otherwise provided by law.

An annual report listing these committees or councils, the total membership on each, the cost in the last 12 months and the source of funding, and the title of the person who made the appointments shall be made to the Advisory Budget Commission and the Joint Legislative Commission on Governmental Operations by March 31 of each year.

Prior to taking any action under this subsection, the Director of the Budget may consult with the Advisory Budget Commission.

(e) Departmental Management Functions. — All management functions of a principal State department shall be performed by or under the direction and supervision of the head of that principal State department. Management functions shall include planning, organizing, staffing, directing, coordinating, reporting, and budgeting.

(f) Custody of Records. — The head of a principal State department shall have legal custody of all public records as defined in G.S. 132-1.

(g) Budget Preparation. — The head of a principal State department shall be responsible for the preparation of and the presentation of the department budget request which shall include all funds requested and all receipts expected for all elements of the department.

(h) Plans and Reports. — Each principal State department shall submit to the Governor an annual plan of work for the next fiscal year prior to the beginning of that fiscal year. Each principal State department shall submit to the Governor an annual report covering programs and activities for each fiscal year. These plans of work and annual reports shall be made available to the General Assembly. These documents will serve as the base for the development of budgets for each principal State department of State government to be submitted to the Governor.

(i) Reports to Governor; Public Hearings. — Each head of a principal State department shall develop and report to the Governor legislative, budgetary, and administrative programs to accomplish comprehensive, long-range coordinated planning and policy formulation in the work of his department. To this end, the head of the department may hold public hearings, consult with and use the services of other State agencies, employ staff and consultants, and appoint advisory and technical committees to assist in the work.

(j) Departmental Rules and Policies. — The head of each principal State department and the Director of the Office of State Personnel may adopt:

- (1) Rules consistent with law for the custody, use, and preservation of any public records, as defined in G.S. 132-1, which pertain to department business;
- (2) Rules, approved by the Governor, to govern the management of the department, which shall include the functions of planning, organizing, staffing, directing, coordinating, reporting, budgeting, and budget preparation which affect private rights or procedures available to the public;
- (3) Policies, consistent with law and with rules established by the Governor and with rules of the State Personnel Commission, which reflect internal management procedures within the department. These may include policies governing the conduct of employees of the department, the distribution and performance of business and internal management procedures which do not affect private rights or procedures available to the public and which are listed in (e) of this section. Policies establishing qualifications for employment shall be adopted and filed pursuant to Chapter 150B of the General Statutes; all other policies under this subdivision shall not be adopted or filed pursuant to Chapter 150B of the General Statutes.

Rules adopted under (1) and (2) of this subsection shall be subject to the provisions of Chapter 150B of the General Statutes.

This subsection shall not be construed as a legislative grant of authority to an agency to make and promulgate rules concerning any policies and procedures other than as set forth herein. (1973, c. 476, s. 10; c. 1416, ss. 1, 2; 1977, 2nd Sess., c. 1219, s. 46; 1983, c. 76, ss. 1, 2; c. 641, s. 8; c. 717, s. 78; 1985 (Reg. Sess., 1986), c. 955, ss. 97, 98; 1987, c. 738, s. 147; c. 827, s. 1; 1991 (Reg. Sess., 1992), c. 1038, s. 15.)

**Editor's Note.** — Session Laws 1995 (Reg. Sess., 1996), c. 743, s. 25, provides: "References in the Session Laws to any division of the Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] that is subdivided or renamed by this act shall be deemed to refer to the successor division. Every Session Law that refers to any division of the Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] to which this act applies or that relates to any power,

duty, function, or obligation of any of those divisions and that continues in effect after this act becomes effective shall be construed so as to be consistent with this act. The repeal by this act of language authorizing the Secretary of Environment, Health, and Natural Resources [now the Secretary of Environment and Natural Resources] to delegate any power, duty, or function is intended to repeal redundant language and does not alter the power of the Secretary of Environment, Health, and Natural Resources [now the Secretary of Environment and Natural Resources] to assign or reassign

any function vested in the Secretary or the Department of Environment, Health, and Natural Resources [now the Secretary of Environment and Natural Resources] under G.S. 143B-10(a). This act shall not be construed to affect any pending action by or obligation due to any division of the Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] that is subdivided or renamed by this act."

Session Laws 1997-443, s. 11A.129, as amended by Session Laws 1998-76, s. 3, provides that the Secretary of Health and Human Services may reorganize the Department of Health and Human Services in accordance with this section and shall report as required, and

that by February 1, 1999, the Department shall report to the Joint Legislative Commission on Governmental Operations or to the General Assembly on incorporating health functions and agencies into the Department, on additional changes, on proposed changes in boards and commissions, and on rule changes.

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

**Legal Periodicals.** — For note on the public's access to public records, see 60 N.C.L. Rev. 853 (1982).

### CASE NOTES

**Cited** in North Carolina Dep't of Justice v. Eaker, 90 N.C. App. 30, 367 S.E.2d 392 (1988).

### OPINIONS OF ATTORNEY GENERAL

**Delegation of Duties by State Council Members.** — Those members of the Council of State who have statutory authority to delegate duties may, in conformity with such statutes, attend and vote at meetings of Boards of which they are ex officio members through delegates or designated subordinates. The remaining members of the Council of State may make similar delegations or designations where, in the member's judgment, other duties necessitate his absence and the statute creating his ex officio membership does not express or clearly imply an intent of the General Assembly that the powers of such membership be exercised personally. See opinion of Attorney General to the honorable James E. Long, Commissioner of Insurance, 55 N.C.A.G. 116 (1986).

**Salary Schedules.** — The Secretary of the Department of Human Resources and the Secretary of the Department of Correction have authority to set the salary schedules for per-

sons employed by their departments in teaching and related educational positions exempt from the State Personnel Act by § 126-5(c3). See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 57 N.C.A.G. 13 (1987).

The salary schedules established by the Department of Human Resources and the Department of Correction for educational personnel exempt from the State Personnel Act must correspond to the salary schedules established by the State Board of Education for public school employees except in cases where the duties of employees do not correspond to the duties of public school employee positions. In such cases the salary schedule should conform as closely as possible to the public school salary schedules. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 57 N.C.A.G. 13 (1987).

### § 143B-11. Subunit nomenclature.

(a) The principal subunit of a department is a division. Each division shall be headed by a director.

(b) The principal subunit of a division is a section. Each section shall be headed by a chief.

(c) If further subdivision is necessary, sections may be divided into subunits which shall be known as branches and which shall be headed by heads, and branches may be divided into subunits which shall be known as units and which shall be headed by supervisors. (1973, c. 476, s. 11.)

**OPINIONS OF ATTORNEY GENERAL**

**The Securities Division is an “occupational licensing agency”** within the meaning of § 150B-2(4b). See opinion of the Attorney

General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

**§ 143B-12. Internal organization of departments; allocation and reallocation of duties and functions; limitations.**

(a) The Governor shall cause the administrative organization of each department to be examined periodically with a view to promoting economy, efficiency, and effectiveness. The Governor may assign and reassign the duties and functions of the executive branch among the principal State departments except as otherwise expressly provided by statute. When the changes affect existing law, they must be submitted to the General Assembly in accordance with Article III, Sec. 5(10) of the Constitution of North Carolina.

(b) The Governor shall report all transfers of departmental functions under this section to the President of the Senate, the Speaker of the House of Representatives, the Chairmen of the Appropriations Committees in the Senate and the House of Representatives, and the Fiscal Research Division of the Legislative Services Office, within 30 days after the transfer if the General Assembly is in session, otherwise to the Joint Legislative Committee on Governmental Operations and the Fiscal Research Division of the Legislative Services Office, within 30 days after the transfer. The report shall include the rationale for the transfer and the increased efficiency in operations expected from the transfer. (1973, c. 476, s. 12; 1985, c. 479, s. 164.)

**§ 143B-13. Appointment, qualifications, terms, and removal of members of commissions.**

(a) Each member of a commission created by or under the authority of the Executive Organization Act of 1973 shall be a resident of the State of North Carolina, unless otherwise specifically authorized by law.

Unless more restrictive qualifications are provided in the Executive Organization Act of 1973, the Governor shall appoint each member on the basis of interest in public affairs, good judgment, knowledge, and ability in the field for which appointed, and with a view to providing diversity of interest and points of view in the membership.

The balance of unexpired terms of existing commission members shall be served in accordance with their most recent appointment.

A vacancy occurring during a term of office is filled in the same manner as the original appointment is made and for the balance of the unexpired term, unless otherwise provided by law or by the Constitution of North Carolina.

(b) A commission membership becomes vacant on the happening of any of the following events before the expiration of the term: (i) the death of the incumbent, (ii) his incompetence as determined by final judgment or final order of a court of competent jurisdiction, (iii) his resignation, (iv) his removal from office, (v) his ceasing to be a resident of the State, (vi) his ceasing to discharge the duties of his office over a period of three consecutive months except when prevented by sickness, (vii) his conviction of a felony or of any offense involving a violation of his official duties, (viii) his refusal or neglect to take an oath within the time prescribed, (ix) the decision of a court of competent jurisdiction declaring void his appointment, and (x) his commitment as a substance abuser under Part 8 of Article 5 of Chapter 122C of the General Statutes; but in that event, the office shall not be considered vacant until the order of commitment has become final.

(c) No member of the State commission may use his position to influence any election or the political activity of any person, and any such member who violates this subsection may be removed from such office by the Governor, if such member was appointed by the Governor, or by the appointing authority, if such member was not appointed by the Governor. Nothing herein shall prohibit such member from publishing the fact of his membership in his own campaign for public office.

(d) In addition to the foregoing, any member of a commission may be removed from office by the Governor for misfeasance, malfeasance, and nonfeasance.

(e) Any appointment by the Governor to a commission, board, council or committee made subsequent to January 5, 1973, and prior to July 1, 1973, for a term that would extend for a period inconsistent with the staggered term provisions of the Executive Organization Act of 1973, may be reduced by the Governor to conform to those staggered term provisions.

(f) Whenever a statute requires that the Governor appoint at least one person from each congressional district to a board or commission, and due to congressional redistricting, two or more members of the board or commission shall reside in the same congressional district, then such members shall continue to serve as members of the board or commission for a period equal to the remainder of their unexpired terms, provided that upon the expiration of said term or terms the Governor shall fill such vacancy or vacancies in such a manner as to insure that as expeditiously as possible there is one member of the board or commission who is a resident of each congressional district in the State.

(f1) Whenever a statute requires that the Governor or any board, commission, council, person, or agency (whether or not that board, commission, council, or agency was established under this Chapter) appoint one or more persons from each congressional district to a board, commission, or council, and due to congressional redistricting, a person no longer resides in the district the member has been appointed to represent, such member or members shall, if otherwise qualified, continue to serve as members of the board or commission for the remainder of their unexpired terms, and shall be considered to meet the residency requirement.

(f2) Whenever a statute requires that the Governor or any board, commission, council, person, or agency (whether or not that board, commission, council, or agency was established under this Chapter) appoint one or more persons from each congressional district to a board, commission, or council, and the statute fails to provide for a procedure to fill the extra position due to the addition of an additional congressional district, then the appointing authority shall appoint a person for a term commencing on January 3rd of the year in which the addition of the additional congressional district becomes effective. Unless the statute provides for persons to serve at the pleasure of the appointing authority, the appointing authority shall set the length of the initial term of office. (1973, c. 476, s. 13; 1975, c. 879, s. 47; 1981, c. 520, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 5; 1985, c. 589, ss. 45, 46; 1991 (Reg. Sess., 1992), c. 1038, s. 16.)

**Legal Periodicals.** — For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

#### CASE NOTES

**Applicability of Administrative Procedure Act to Removals.** — Subsection (d) of this section does not refer to the Administrative Procedure Act. Absent a specific legislative en-

actment requiring removal by the Governor to be subject to the Administrative Procedure Act, the act is not applicable to removals by the

Governor. *James v. Hunt*, 43 N.C. App. 109, 258 S.E.2d 481 (1979), cert. denied, 299 N.C. 121, 262 S.E.2d 6 (1980).

### **§ 143B-14. Administrative services to commissions.**

(a) The head of the principal State department to which a commission has been assigned is responsible for the provision of all administrative services to the commission.

(b) Except as otherwise provided by law, the powers, duties, and functions of a commission are not subject to the approval, review, or control of the head of the department or of the Governor.

(c) The Governor may assign to an appropriate commission created by the Executive Organization Act of 1973 duties of a quasi-legislative and quasi-judicial nature existing in the executive branch of State government which have not been assigned by this Chapter to any other commission. All such assignment of duties by the Governor to a commission shall be made in accordance with Article III, Sec. 5(10) of the Constitution of North Carolina.

(d) All management functions of a commission shall be performed by the head of the principal State department. Management functions shall include planning, organizing, staffing, directing, coordinating, reporting, and budgeting. (1973, c. 476, s. 14; c. 1416, s. 3; 1979, 2nd Sess., c. 1137, s. 41.2; 1981, c. 688, s. 20; 1983, c. 927, s. 11; 1987, c. 827, s. 221; 1991, c. 418, s. 9.)

### **§ 143B-15. Compensation of members of commissions.**

The salary of members of full-time commissions shall be set by the General Assembly upon recommendation of the Governor to be submitted as a part of his budget requests. (1973, c. 476, s. 15.)

### **§ 143B-16. Appointment and removal of members of boards, councils and committees.**

Unless more restrictive qualifications are provided in this Chapter, the Governor shall appoint each member of a board, council, or committee on the basis of his interest in public affairs, good judgment, knowledge and ability in the field for which appointed, and with a view to providing diversity of interest and points of view in the membership. Unless other conditions are provided in the Executive Organization Act of 1973, any member of a board, council, or committee may be removed from office by the Governor for misfeasance, malfeasance, or nonfeasance.

No member of a board, council, or committee may use his position to influence any election or the political activity of any person, and any such member who violates this paragraph may be removed from such office by the Governor, if such member was appointed by the Governor, or by the appointing authority, if such member was not appointed by the Governor. Nothing herein shall prohibit such member from publishing the fact of his membership in his own campaign for public office. (1973, c. 476, s. 16; 1981, c. 520, s. 2.)

### **§ 143B-17. Commission investigations and orders.**

Unless otherwise provided for in the Executive Organization Act of 1973, any commission created by the Executive Organization Act of 1973 may order an investigation into areas of concern over which it has rule-making authority, and the head of the department required to give staff support to such commission shall render such reports and information as the commission may

require. In default of the production of information by the head of the principal department or any employee or agent thereof, the commission may seek the aid of the Wake County Superior Court to require the production of information as hereinafter provided.

In proceedings before any commission or any hearing officer or member of the commission so authorized by the commission, if any person refuses to respond to a subpoena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined or refuses to obey any lawful order of a commission contained in its decision rendered after hearing, the chairman of the commission may apply to the Superior Court of Wake County or to the superior court of the county where the proceedings are being held for an order directing that person to take the requisite action. Should any person willfully fail to comply with an order so issued, the court shall punish him as for contempt. (1973, c. 476, s. 17.)

§ **143B-18:** Repealed by Session Laws 1991, c. 418, s. 10.

**Cross References.** — As to an agency's exercise of its authority to adopt rules, see Article 2A of Chapter 150B, § 150B-18 et seq.

§ **143B-19. Pending actions and proceedings.**

No action or proceeding pending at the time the Executive Organization Act of 1973 takes effect and brought by or against any State agency whose functions, powers, and duties are transferred by the Executive Organization Act of 1973 to a principal State department shall be affected by any provision of the Executive Organization Act of 1973, but the same may be prosecuted or defended in the name of the head of the principal State department. In all such actions and proceedings, the principal State department to which the functions, powers, and duties of a State agency have been transferred shall be substituted as a party upon appropriate application to the courts. (1973, c. 476, s. 19.)

§ **143B-20:** Repealed by Session Laws 1991, c. 418, s. 10.

**Cross References.** — As to an agency's exercise of its authority to adopt rules, see Article 2A of Chapter 150B, § 150B-18 et seq.

§ **143B-21. Affirmation of prior acts of abolished agencies.**

The abolition of certain agencies by the Executive Organization Act of 1973 should not be construed as invalidating any lawful prior act of such agency. (1973, c. 476, s. 21.)

§ **143B-22. Terms occurring in laws, contracts and other documents.**

Any reference or designation in any statute, contract, or other document pertaining to functions, powers, obligations, and duties of a State agency assigned by the Executive Organization Act of 1973 to a principal State department shall be deemed to refer to the principal State department or the head of the principal State department, as may be appropriate. (1973, c. 476, s. 22.)

**§ 143B-23. Completion of unfinished business.**

Any business or other matter undertaken or commenced by any State agency or the commissioners or directors thereof, pertaining to or connected with the functions, powers, obligations, and duties hereby transferred to a principal State department, and pending on July 1, 1973, may be conducted and completed by the principal State department in the same manner and under the same terms and conditions and with the same effect as if conducted and completed by the State agency or commissioners and directors thereof. (1973, c. 476, s. 23.)

**§ 143B-24. Cooperative agreements.**

Except as otherwise provided by law, each principal State department may, with the approval of the Department of Administration, enter into cooperative agreements with the federal government, any state government, any agency of the State government, any local government of the State, jointly with any two or more, or severally, in carrying out its functions. (1973, c. 476, s. 24.)

**§ 143B-25. Agencies not enumerated.**

Any agency not enumerated in the Executive Organization Act of 1973 but established or created by the General Assembly shall continue to exercise all its powers, duties, and functions subject to the provisions of Chapter 143A of the General Statutes of the State of North Carolina. (1973, c. 476, s. 25.)

**§ 143B-26. Constitutional references.**

All references to the Constitution of North Carolina in the Executive Organization Act of 1973 refer to the Constitution of North Carolina as effective July 1, 1973. (1973, c. 476, s. 26.)

**§ 143B-27:** Repealed by Session Laws 1983, c. 717, s. 79.

**§ 143B-28. Goals of continuing reorganization.**

Structural reorganization of State government should be a continuing process, accomplished through careful executive and legislative appraisal of the placement of proposed new programs and coordination of existing programs in response to changing emphases in public needs and should be consistent with the following goals:

- (1) The organization of State government should assure its responsiveness to popular control. It is the goal of reorganization to improve the administrative capability of the executive to carry out these policies.
- (2) The organization of State government should aid communication between citizens and government. It is the goal of reorganization through coordination of related programs in function-oriented departments to improve public understanding of government programs and policies and to improve the relationships between citizens and administrative agencies.
- (3) The organization of State government should assure efficient and effective administration of the policies established by the General Assembly. It is the goal of reorganization to promote efficiency and effectiveness by improving the management and coordination of State services and by eliminating ineffective, overstaffed, obsolete or overlapping activities. (1973, c. 476, s. 28.)

§ **143B-29**: Reserved for future codification purposes.

## Part 2. Governor's Administrative Rules Review Commission.

§§ **143B-29.1 through 143B-29.5**: Repealed by Session Laws 1985, c. 746, s. 7.

## Part 3. Rules Review Commission.

§ **143B-30**: Repealed by Session Laws 1991, c. 418, s. 5.

**Cross References.** — As to an agency's exercise of its authority to adopt rules, see Article 2A of Chapter 150B, § 150B-18 et seq.

### § **143B-30.1. Rules Review Commission created.**

(a) The Rules Review Commission is created. The Commission shall consist of 10 members to be appointed by the General Assembly, five upon the recommendation of the President Pro Tempore of the Senate, and five upon the recommendation of the Speaker of the House of Representatives. These appointments shall be made in accordance with G.S. 120-121, and vacancies in these appointments shall be filled in accordance with G.S. 120-122. Except as provided in subsection (b) of this section, all appointees shall serve two-year terms.

(b) In 1990, two of the appointments made by the General Assembly upon the recommendation of the President of the Senate shall expire June 30, 1991, and two shall expire June 30, 1992. In 1990, two of the appointments made by the General Assembly upon the recommendation of the Speaker of the House of Representatives shall expire June 30, 1992, and two shall expire June 30, 1993. Subsequent terms shall be for two years.

(c) Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, ineligibility, death, or disability of any member shall be for the balance of the unexpired term. The chairman shall be elected by the Commission, and he shall designate the times and places at which the Commission shall meet. The Commission shall meet at least once a month. A quorum of the Commission shall consist of six members of the Commission. The Commission is an independent agency under Article III, Section 11 of the Constitution.

(d) Members of the Commission who are not officers or employees of the State shall receive compensation of two hundred dollars (\$200.00) for each day or part of a day of service plus reimbursement for travel and subsistence expenses at the rates specified in G.S. 138-5. Members of the Commission who are officers or employees of the State shall receive reimbursement for travel and subsistence at the rate set out in G.S. 138-6.

(e) Any other provision of the General Statutes notwithstanding, the appointment of employees of the Commission shall be made by the Commission. Nothing in this Article shall be construed to exempt employees of the Commission from the State Personnel Act.

(f) The Commission shall prescribe procedures and forms to be used in submitting rules to the Commission for review. The Commission may have computer access to the North Carolina Administrative Code to enable the Commission and its staff to view and copy rules in the Code. (1985 (Reg. Sess., 1986), c. 1028, s. 32; 1987 (Reg. Sess., 1988), c. 1111, s. 2; 1989, c. 35, s. 2; 1989

(Reg. Sess., 1990), c. 1038, s. 18; 1991, c. 418, s. 11; 1991 (Reg. Sess., 1992), c. 1030, s. 43; 1995, c. 490, s. 43; 1997-495, s. 90(a), (b).)

**Editor's Note.** — Session Laws 1997-495, s. 90(c), effective September 11, 1997, provides that the initial appointments authorized by s. 90 are for terms expiring June 30, 1999.

#### OPINIONS OF ATTORNEY GENERAL

**Power to Delay Effective Date of Agency Rules Probably Violates This Section.** — An act vesting in the Administrative Rules Review Commission (ARRC), a commission appointed by the General Assembly, the power to delay indefinitely the effective date of duly-adopted agency rules which it deems in excess of statutory authority would likely be held to

violate this section by vesting the ARRC with judicial powers reserved to the court and with supreme legislative powers reserved to the General Assembly. See opinion of Attorney General to Henson P. Barnes, President Pro Tempore, Senate, — N.C.A.G. — (February 25, 1991).

### § 143B-30.2. Purpose of Commission.

The Rules Review Commission reviews administrative rules in accordance with Chapter 150B of the General Statutes. (1985 (Reg. Sess., 1986), c. 1028, s. 32; 1987, c. 285, ss. 1-5; 1991, c. 418, s. 12.)

**Cross References.** — As to an agency's exercise of its authority to adopt rules, see Article 2A of Chapter 150B, § 150B-18 et seq.

#### OPINIONS OF ATTORNEY GENERAL

**Delegation of Power to Delay Effective Date of Agency Rules Probably Violates This Section.** — An act vesting in the Administrative Rules Review Commission (ARRC), a commission appointed by the General Assembly, the power to delay indefinitely the effective date of duly adopted agency rules which it deems in excess of statutory authority would

likely be held to violate this section by vesting the ARRC with judicial powers reserved to the court and with supreme legislative powers reserved to the General Assembly. See opinion of Attorney General to Henson P. Barnes, President Pro Tempore, Senate, 60 N.C.A.G. 70 (1991).

### § 143B-30.3: Repealed by Session Laws 1991, c. 418, s. 5.

**Cross References.** — As to an agency's exercise of its authority to adopt rules, see Article 2A of Chapter 150B, § 150B-18 et seq.

### § 143B-30.4. Evidence.

Evidence of the Commission's failure to object to and delay the filing of a rule or its part shall be inadmissible in all civil or criminal trials or other proceedings before courts, administrative agencies, or other tribunals. (1985 (Reg. Sess., 1986), c. 1028, s. 32.)

### §§ 143B-31 through 143B-48: Reserved for future codification.

## ARTICLE 2.

*Department of Cultural Resources.*

## Part 1. General Provisions.

**§ 143B-49. Department of Cultural Resources — creation, powers and duties.**

There is hereby created a department to be known as the “Department of Cultural Resources,” with the organization, duties, functions, and powers defined in the Executive Organization Act of 1973. (1973, c. 476, s. 29.)

**Editor’s Note.** — Session Laws 2000-138, s. 17.1, effective July 1, 2000, provides: “(a) There is hereby established the 1898 Wilmington Race Riot Commission. The Commission shall be located within the Department of Cultural Resources.

“(b) The purpose of the Commission shall be to develop a historical record of the 1898 Wilmington Race Riot. In developing such a record, the Commission shall gather information, including oral testimony from descendants of those affected by the riot or others, examine documents and writings, and otherwise take such actions as may be necessary or proper inaccurately identifying information having historical significance to the 1898 Wilmington Race Riot, including the economic impact of the riot on African-Americans in this State.

“(c) The Commission shall consist of 13 members, each of whom shall serve a two-year term. Commission members shall be appointed on or before September 1, 2000, as follows:

“(1) The President Pro Tempore of the Senate shall appoint three members.

“(2) The Speaker of the House of Representatives shall appoint three members.

“(3) The Governor shall appoint three public members, one of whom shall be a historian.

“(4) The Mayor and City Council of the City of Wilmington shall appoint two members.

“(5) The New Hanover County Commissioners shall appoint two members.

“The Commission shall terminate on December 31, 2002.

“(d) A vacancy shall be filled in the same manner as the original appointment, except that all unexpired terms in seats appointed by the General Assembly shall be filled in accordance with G.S. 120-122. Appointees to fill vacancies shall serve the remainder of the unexpired term and until their successors have

been duly appointed and qualified.

“(e) The Commission may remove any of its members for neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings shall be disqualified from participating in the official business of the Commission until the charges have been resolved.

“(f) Members of the Commission shall not receive per diem or reimbursement for travel or subsistence.

“(g) The Commission’s officers shall consist of two cochairs, a vice-chair, and other officers deemed necessary by the Commission to carry out the purposes of this Article. The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall appoint the cochairs of the Commission. All other officers shall be elected by the Commission. All officers shall serve for two-year terms and shall serve until their successors are elected and qualified.

“(h) The Commission shall meet at least quarterly to conduct business as authorized in subsection (b) of this section. A majority of Commission members shall constitute a quorum.

“(i) The Department of Cultural Resources shall provide necessary clerical and administrative support services to the Commission.

“(j) The Commission may submit to the General Assembly an interim report of its findings and recommendations. The Commission shall submit to the General Assembly a final report of its findings and recommendations no later than December 31, 2002. The final report may include suggestions for a permanent marker or memorial of the riot and whether to designate the event as a historic site.”

Session Laws 2000-138, s. 17.2 directs the Department of Cultural Resources to support the activities of the 1898 Wilmington Race Riot Commission.

### § 143B-50. Duties of the Department.

It shall be the duty of the Department to provide the necessary management, development of policy and establishment and enforcement of standards for the furtherance of resources, services and programs involving the arts and the historical and cultural aspects of the lives of the citizens of North Carolina. (1973, c. 476, s. 30.)

### § 143B-51. Functions of the Department.

(a) The functions of the Department of Cultural Resources shall comprise, except as otherwise expressly provided by the Executive Organization Act of 1973 or by the Constitution of North Carolina, all executive functions of the State in relation to the development and preservation of libraries, historical records, sites and property, and of an appreciation of art and music and further including those prescribed powers, duties, and functions enumerated in Article 17 of Chapter 143A of the General Statutes of this State.

(b) All such functions, powers, duties, and obligations heretofore vested in any agency enumerated in Article 17 of Chapter 143A of the General Statutes are hereby transferred to and vested in the Department of Cultural Resources except as otherwise provided by the Executive Organization Act of 1973. They shall include, by way of extension and not of limitation, the functions of:

- (1) The Secretary and Department of Art, Culture and History;
- (2) The State Department of Archives and History;
- (3) The North Carolina Advisory Council on Historic Preservation;
- (4) The North Carolina State Library;
- (5) The Interstate Library Compact;
- (6) The North Carolina Museum of Art;
- (7) The North Carolina State Art Society, Inc.;
- (8) The North Carolina Symphony Society, Inc.;
- (9) The State Art Museum Building Commission;
- (10) The Library Certification Board;
- (11) The Tryon Palace Commission;
- (12) The North Carolina Arts Council;
- (13) The U.S.S. North Carolina Battleship Commission;
- (14) The Memorials Commission;
- (15) The Commission to Promote Plans for the Celebration of the Four Hundredth Anniversary of the Landing of Sir Walter Raleigh's Colony on Roanoke Island;
- (16) The Executive Mansion Fine Arts Commission;
- (17) The North Carolina American Revolution Bicentennial Commission;
- (18) The North Carolina Awards Commission;
- (19) The Tobacco Museum Board;
- (20) The Roanoke Island Historical Association, Inc.;
- (21) The Sir Walter Raleigh Memorial Commission;
- (22) The Governor Richard Caswell Memorial Commission;
- (23) The Historic Swansboro Commission;
- (24) The Edenton Historical Commission;
- (25) The Historic Bath Commission;
- (26) The Historic Hillsborough Commission;
- (27) The John Motley Morehead Memorial Commission;
- (28) The Historic Murfreesboro Commission;
- (29) The Charles B. Aycock Memorial Commission;
- (30) The Frying Pan Lightship Marine Museum Commission;
- (31) The Guilford County Bicentennial Commission;
- (32) The Daniel Boone Memorial Commission;

- (33) The Bennett Place Memorial Commission;
- (34) The Durham-Orange Historical Commission;
- (35) The Pitt County Historical Commission;
- (36) The Transylvania County Historical Commission;
- (37) The Lenoir County Historical and Patriotic Commission;
- (38) The Raleigh Historic Sites Commission; and
- (39) The Stonewall Jackson Memorial Fund. (1973, c. 476, s. 31.)

**Cross References.** — As to allotments from the Contingency and Emergency Fund of the State to outdoor historical dramas, see § 143-204.8.

**Editor's Note.** — Article 17 of Chapter 143A, referred to in this section, was repealed by Session Laws 1973, c. 476, which enacted this Chapter.

## § 143B-52. Head of the Department.

The Secretary of Cultural Resources shall be the head of the Department. (1973, c. 476, s. 32.)

## § 143B-53. Organization of the Department.

The Department of Cultural Resources shall be organized initially to include the Art Commission, the Art Museum Building Commission, the North Carolina Historical Commission, the Tryon Palace Commission, the U.S.S. North Carolina Battleship Commission, the Sir Walter Raleigh Commission, the Executive Mansion Fine Arts Committee, the American Revolution Bicentennial Committee, the North Carolina Awards Committee, the America's Four Hundredth Anniversary Committee, the North Carolina Arts Council, the Public Librarian Certification Commission, the State Library Commission, the North Carolina Symphony Society, Inc., the North Carolina Art Society, and the Division of the State Library, the Division of Archives and History, the Division of the Arts, and such other divisions as may be established under the provisions of the Executive Organization Act of 1973. (1973, c. 476, s. 33; 1981, c. 918, s. 1.)

### Part 2. Art Commission.

§§ 143B-54 through 143B-57: Repealed by Session Laws 1979, 2nd Session, c. 1306, s. 5.

**Cross References.** — For present provisions as to the administration of the North Carolina Museum of Art, see § 140-5.12 et seq.

### Part 3. Art Museum Building Commission.

§§ 143B-58 through 143B-61.1: Repealed by Session Laws 2000-140, s. 78, effective July 21, 2000.

### Part 4. North Carolina Historical Commission.

## § 143B-62. North Carolina Historical Commission — creation, powers and duties.

There is hereby created the North Carolina Historical Commission of the

Department of Cultural Resources to give advice and assistance to the Secretary of Cultural Resources and to promulgate rules and regulations to be followed in the acquisition, disposition, preservation, and use of records, artifacts, real and personal property, and other materials and properties of historical, archaeological, architectural, or other cultural value, and in the extension of State aid to other agencies, counties, municipalities, organizations, and individuals in the interest of historic preservation.

- (1) The Historical Commission shall have the following powers and duties:
  - a. To advise the Secretary of Cultural Resources on the scholarly editing, writing, and publication of historical materials to be issued under the name of the Department;
  - b. To evaluate and approve proposed nominations of historic, archaeological, architectural, or cultural properties for entry on the National Register of Historic Places;
  - c. To evaluate and approve the State plan for historic preservation as provided for in Chapter 121;
  - d. To evaluate and approve historic, archaeological, architectural, or cultural properties proposed to be acquired and administered by the State;
  - e. To evaluate and prepare a report on its findings and recommendations concerning any property not owned by the State for which State aid or appropriations are requested from the Department of Cultural Resources, and to submit its findings and recommendations in accordance with Chapter 121;
  - f. To serve as an advisory and coordinative mechanism in and by which State undertakings of every kind that are potentially harmful to the cause of historic preservation within the State may be discussed, and where possible, resolved, particularly by evaluating and making recommendations concerning any State undertaking which may affect a property that has been entered on the National Register of Historic Places as provided for in Chapter 121 of the General Statutes of North Carolina;
  - g. To exercise any other powers granted to the Commission by provisions of Chapter 121 of the General Statutes of North Carolina;
  - h. To give its professional advice and assistance to the Secretary of Cultural Resources on any matter which the Secretary may refer to it in the performance of the Department's duties and responsibilities provided for in Chapter 121 of the General Statutes of North Carolina;
  - i. To serve as a search committee to seek out, interview, and recommend to the Secretary of Cultural Resources one or more experienced and professionally trained historian(s) for either the position of Director of the Division of Archives and History or the position of the Director of the North Carolina Museum of History Division when a vacancy occurs, and to assist and cooperate with the Secretary in periodic reviews of the performance of the Directors and the Divisions; and
  - j. To assist and advise the Secretary of Cultural Resources and the Director of the Division of Archives and History, and the Director of the North Carolina Museum of History Division in the development and implementation of plans and priorities for the State's historical programs.
- (2) The Historical Commission shall have the power and duty to establish standards and provide rules and regulations as follows:

- a. For the acquisition and use of historical materials suitable for acceptance in the North Carolina Division of Archives and History or the North Carolina Museum of History Division;
  - b. For the disposition of public records under provisions of Chapter 121 of the General Statutes of North Carolina; and
  - c. For the certification of records in the North Carolina State Archives as provided in Chapter 121 of the General Statutes of North Carolina;
  - d. For the use by the public of historic, architectural, archaeological, or cultural properties as provided in Chapter 121 of the General Statutes of North Carolina;
  - e. For the acquisition of historic, archaeological, architectural, or cultural properties by the State;
  - f. For the extension of State aid or appropriations through the Department of Cultural Resources to counties, municipalities, organizations, or individuals for the purpose of historic preservation or restoration; and
  - fl. For the extension of State aid or appropriations through the Department of Cultural Resources to nonstate-owned nonprofit history museums;
  - g. For qualification for grants-in-aid or other assistance from the federal government for historic preservation or restoration as provided in Chapter 121 of the General Statutes of North Carolina. This section shall be construed liberally in order that the State and its citizens may benefit from such grants-in-aid.
- (3) The Commission shall adopt rules and regulations consistent with the provisions of this section. All current rules and regulations heretofore adopted by the Executive Board of the State Department of Archives and History, the Historic Sites Advisory Committee, the North Carolina Advisory Council on Historical Preservation, the Executive Mansion Fine Arts Commission, and the Memorials Commission shall remain in full force and effect unless and until repealed or superseded by action of the Historical Commission. All rules and regulations adopted by the Commission shall be enforced by the Department of Cultural Resources. (1973, c. 476, s. 44; 1977, c. 513, s. 2; 1979, c. 861, s. 6; 1985 (Reg. Sess., 1986), c. 1014, s. 171(f); 1997-411, ss. 1-3.)

### **§ 143B-63. Historical Commission — members; selection; quorum; compensation.**

The Historical Commission of the Department of Cultural Resources shall consist of 11 members appointed by the Governor.

The members of the North Carolina Historical Commission shall include the members of the existing North Carolina Historical Commission who shall serve for a period equal to the remainder of their current terms on the Commission, plus four additional appointees of the Governor, two of whose appointments shall expire March 31, 1979, and two of whose appointments shall expire March 31, 1981. At the end of the respective terms of office of the members, their successors shall be appointed for terms of six years and until their successors are appointed and qualify. Of the members, at least five shall have professional training or experience in the fields of archives, history, historic preservation, historic architecture, archaeology, or museum administration, including at least three currently involved in the teaching of history at the college or university level or in administering archives or historical collections or programs. Any appointment to fill a vacancy on the Commission created by resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Commission from office for misfeasance, malfeasance or nonfeasance according to the provisions of G.S. 143B-13 of the Executive Organization Act of 1973.

The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Commission shall constitute a quorum for the transaction of business.

All clerical and other services required by the Commission shall be supplied by the Secretary of Cultural Resources. (1973, c. 476, s. 45; 1977, c. 513, s. 1.)

### **§ 143B-64. Historical Commission — officers.**

The Historical Commission shall have a chairman and a vice-chairman. The chairman shall be designated by the Governor from among the members of the Commission to serve as chairman at the pleasure of the Governor. The vice-chairman shall be elected by and from the members of the Commission and shall serve for a term of two years or until the expiration of his regularly appointed term. (1973, c. 476, s. 46.)

### **§ 143B-65. Historical Commission — regular and special meetings.**

The Historical Commission shall meet at least twice per year and may hold special meetings at any time and place within the State at the call of the chairman or upon the written request of at least four members. (1973, c. 476, s. 42.)

## Part 5. Archaeological Advisory Committee.

**§ 143B-66:** Repealed by Session Laws 1985 (Regular Session, 1986), c. 1028, s. 10.

## Part 6. Public Librarian Certification Commission.

### **§ 143B-67. Public Librarian Certification Commission — creation, powers and duties.**

There is hereby created the Public Librarian Certification Commission of the Department of Cultural Resources with the power and duty to adopt rules and regulations to be followed in the certification of public librarians. The Commission is authorized to establish and require written examinations for certified public librarian applicants.

The Commission shall adopt such rules and regulations consistent with the provisions of this Chapter. All rules and regulations consistent with the provisions of this Chapter heretofore adopted by the Library Certification Board shall remain in full force and effect unless and until repealed or superseded by action of the Public Librarian Certification Commission. All rules and regulations adopted by the Commission shall be enforced by the Department of Cultural Resources. (1973, c. 476, s. 49; 1981 (Reg. Sess., 1982), c. 1359, s. 4.)

**§ 143B-68. Public Librarian Certification Commission — members; selection; quorum; compensation.**

The Public Librarian Certification Commission of the Department of Cultural Resources shall consist of five members as follows: (i) the chairman of the North Carolina Association of Library Trustees, (ii) the chairman of the public libraries section of the North Carolina Library Association, (iii) an individual named by the Governor upon the nomination of the North Carolina Library Association, (iv) the dean of a State or regionally accredited graduate school of librarianship in North Carolina appointed by the Governor and (v) one member at large appointed by the Governor.

The members shall serve four-year terms or while holding the appropriate chairmanships. Any appointment to fill a vacancy created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Commission from office for misfeasance, malfeasance, and nonfeasance according to the provisions of G.S. 143B-13 of the Executive Organization Act of 1973.

The members of the Commission shall receive per diem, and necessary travel expenses in accordance with the provisions of G.S. 138-5.

A majority of the Commission shall constitute a quorum for the transaction of business.

All clerical and other services required by the Commission shall be supplied by the Secretary of the Department through the regular staff of the Department. (1973, c. 476, s. 50.)

**§ 143B-69. Public Librarian Certification Commission — officers.**

The Public Librarian Certification Commission shall have a chairman and a vice-chairman. The chairman shall be designated by the Governor from among the members of the Commission to serve as chairman at his pleasure. The vice-chairman shall be elected by and from the members of the Commission and shall serve for a term of two years or until the expiration of his regularly appointed term. (1973, c. 476, s. 51.)

**§ 143B-70. Public Librarian Certification Commission — regular and special meetings.**

The Public Librarian Certification Commission shall meet at least once in each quarter and may hold special meetings at any time and place within the State at the call of the chairman or upon the written request of at least three members. (1973, c. 476, s. 52.)

Part 7. Tryon Palace Commission.

**§ 143B-71. Tryon Palace Commission — creation, powers and duties.**

There is hereby created the Tryon Palace Commission of the Department of Cultural Resources with the power and duty to adopt, amend and rescind rules and regulations concerning the restoration and maintenance of the Tryon Palace complex, and such other powers and duties as provided in Article 2 of Chapter 121 of the General Statutes of North Carolina. (1973, c. 476, s. 54.)

**§ 143B-72. Tryon Palace Commission — members; selection; quorum; compensation.**

The Tryon Palace Commission of the Department of Cultural Resources shall consist of the following members: 25 voting members appointed by the Governor, nonvoting members emeriti appointed by the Governor, and five voting ex officio members as provided in this section.

The Governor shall appoint 25 voting members. The terms of the initial members shall be staggered as follows: Nine of the members shall be appointed to serve four-year terms, eight of the members shall be appointed to serve three-year terms, and eight of the members shall be appointed to serve two-year terms. At the end of the respective terms of office of the initial appointed members of the Commission, the appointments of their successors, with the exception of ex officio members and members emeriti, shall be for terms of four years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Commission shall be for the balance of the unexpired term. The Governor shall designate the chair of the Tryon Palace Commission. The other officers of the Tryon Palace Commission shall be elected by the members of the Tryon Palace Commission.

The Governor may also appoint any person who has previously served on the Tryon Palace Commission with distinction to the Commission as a member emeritus. A person appointed as a member emeritus shall be deemed a lifetime member of the Commission and shall serve as a nonvoting member.

In addition to the members who are appointed by the Governor, the Attorney General, the Secretary of Cultural Resources or the Secretary's designee, the mayor of the City of New Bern, the Dean of the College of Arts and Sciences at East Carolina University, and the chairman of the Board of County Commissioners of Craven County shall serve as voting ex officio members of said Commission. The provisions of the Executive Organization Act of 1973 pertaining to the residence of members of commissions shall not apply to the Tryon Palace Commission.

A majority of the voting members of the Commission shall constitute a quorum for the transaction of business.

The members of the Commission shall serve without pay and without expense allowance. (1973, c. 476, s. 55; 1977, c. 771, s. 4; 1979, c. 151, s. 1; 1993, c. 109, s. 1.)

Part 8. U.S.S. North Carolina Battleship Commission.

**§ 143B-73. U.S.S. North Carolina Battleship Commission — creation, powers and duties.**

There is hereby created the U.S.S. North Carolina Battleship Commission of the Department of Cultural Resources with the power and duty to adopt, amend, and rescind rules and regulations under and not inconsistent with the laws of this State necessary in carrying out the provisions and purposes of this Part.

- (1) The U.S.S. North Carolina Battleship Commission is authorized and empowered to adopt such rules and regulations not inconsistent with the management responsibilities of the Secretary of the Department provided by Chapter 143A of the General Statutes and laws of this State and this Chapter that may be necessary and desirable for the operation and maintenance of the U.S.S. North Carolina as a permanent memorial and exhibit commemorating the heroic participation of the men and women of North Carolina in the prosecution and victory

of the Second World War and for the faithful performance and fulfillment of its duties and obligations.

- (2) The U.S.S. North Carolina Battleship Commission shall have the power and duty to establish standards and adopt rules and regulations: (i) establishing and providing for a proper charge for admission to the ship; and (ii) for the maintenance and operation of the ship as a permanent memorial and exhibit.
- (3) The Commission shall adopt rules and regulations consistent with the provisions of this Chapter. (1973, c. 476, s. 57; 1977, c. 741, s. 3.)

### **§ 143B-73.1. U.S.S. North Carolina Battleship Commission — duties.**

The Commission shall have the further duty and authority to select an appropriate site for the permanent berthing of the Battleship U.S.S. North Carolina, taking into consideration factors including, but not limited to, the accessibility, location in relation to roads and highways, scenic attraction, protection from hazards of weather, fire and sea, cost of site and berthing, cooperation of local governmental authorities in securing, equipping, and maintaining appropriate areas surrounding the site, and others which may affect the suitability of such site for establishment of the ship as a permanent memorial and exhibit; to accept gifts, grants, and donations for the purposes of this Article; to transport to, and berth the ship at the site; to ready the ship for visitation by the public; to establish and provide for a proper charge for admission to the ship, and for safekeeping of funds; to maintain and operate the ship as a permanent memorial and exhibit; to acquire property, both real and personal, with the approval of the Governor and the Council of State, and to accept donations of property, both real and personal, from any source; to establish, supervise, manage and maintain in New Hanover County with the approval and assistance of the Department of Cultural Resources exhibits, dramas, cultural activities, museums, and records pertaining to the marine and naval history of the State of North Carolina and the United States of America; to identify, preserve and protect properties having historical, marine and naval significance to New Hanover County, the State, its communities and counties and the nation; to establish and provide for a proper charge for admission to all properties maintained and operated by the Commission in New Hanover County; to otherwise provide in carrying out its duties for the establishment of appropriate activities to encourage interest in the marine and naval history of North Carolina; to perpetuate the memory of North Carolinians who gave their lives in the course of World War II and in the events in which the battleship was a participant, and to allocate funds for the fulfillment of the duties and authority herein provided as may be necessary and appropriate for the purpose of this Article. (1961, c. 158; 1977, c. 741, ss. 1, 8.)

**Editor's Note.** — This section was formerly § 143-366. It was amended and recodified as § 143B-73.1 by Session Laws 1977, c. 741.

### **§ 143B-74. U.S.S. North Carolina Battleship Commission — members; selection; quorum; compensation.**

The U.S.S. North Carolina Battleship Commission of the Department of Cultural Resources shall consist of 18 members including the Secretary of Cultural Resources and the Secretary of Commerce who shall serve as voting ex officio members. The members of the Commission appointed for terms to end in 1991 shall serve for an additional two-year period. At the end of the

respective terms of office of the members of the Commission serving in 1991, their successors shall be appointed for terms of four years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term. The provisions of the Executive Organization Act of 1973 pertaining to the residence of members of commissions shall not apply to the U.S.S. North Carolina Battleship Commission.

The Governor shall have the power to remove any member of the Commission from office for misfeasance, malfeasance, or nonfeasance in accordance with the provisions of G.S. 143B-13 of the Executive Organization Act of 1973.

The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Commission shall constitute a quorum for the transaction of business. The Governor shall designate from among the members of the Commission a chairman, vice-chairman and treasurer. The Secretary of Cultural Resources or his designee shall serve as Secretary of the Commission. The Commission shall meet at least twice annually upon the call of the chairman, the Secretary of Cultural Resources, or any seven members of the Commission. (1973, c. 476, s. 58; 1977, c. 741, s. 4; 1991, c. 73, s. 1; 1991 (Reg. Sess., 1992), c. 959, s. 39.)

### **§ 143B-74.1. U.S.S. North Carolina Battleship Commission — funds.**

The Commission shall establish and maintain a "Battleship Fund" composed of the moneys which may come into its hands from admission or inspection fees, gifts, donations, grants, or bequests, which funds will be used by the Commission to pay all costs of maintaining and operating the ship for the purposes herein set forth. The Commission shall maintain books of accounting records concerning revenue derived and all expenses incurred in maintaining and operating the ship as a public memorial. The operations of the Commission shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. The Commission shall establish a reserve fund in an amount to be determined by the Secretary of Cultural Resources to be maintained and used for contingencies and emergencies beyond those occurring in the course of routine maintenance and operation, and may authorize the deposit of this reserve fund in a depository to be selected by the Treasurer of North Carolina. (1961, c. 158; 1977, c. 741, ss. 2, 8; 1983, c. 913, s. 40.)

**Editor's Note.** — This section was formerly § 143-367. It was amended and recodified as § 143B-74.1 by Session Laws 1977, c. 741.

### **§ 143B-74.2. U.S.S. North Carolina Battleship Commission — employees.**

The Department of Cultural Resources is hereby authorized to hire laborers, artisans, caretakers, stenographic and administrative employees, and other personnel, in accordance with the provisions of the State Personnel Act, as may be necessary in carrying out the purposes and provisions of this Article, and to maintain the ship in a clean, neat, and attractive condition satisfactory for exhibition to the public. Employees shall be residents of the State of North Carolina except as may, in emergency conditions, be necessary for the procurement of specially trained or specially skilled employees. Any materials

used for any purpose in maintaining and operating the ship for the purposes of this Article shall be, insofar as practicable, North Carolina materials. (1961, c. 158; 1975, c. 879, s. 46; 1977, c. 741, ss. 6, 8.)

**Editor's Note.** — This section was formerly § 143-368. It was amended and recodified as § 143B-74.2 by Session Laws 1977, c. 741.

### **§ 143B-74.3. U.S.S. North Carolina Battleship Commission — employees not to have interest.**

It shall be unlawful for any member of the Commission to charge, receive, or obtain, directly or indirectly, any fee, commission, retainer or brokerage other than established salaries to be fixed by the Commission, and no member of the Commission shall have any interest in any land, materials, commissions or contracts sold to or made with the Commission, or with any member thereof. Violation of any provisions of this section shall be a Class 2 misdemeanor. (1961, c. 158; 1977, c. 741, ss. 7, 8; 1993, c. 539, s. 1037; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — This section was formerly § 143-369. It was amended and recodified as § 143B-74.3 by Session Laws 1977, c. 741.

## Part 9. Sir Walter Raleigh Commission.

**§§ 143B-75 through 143B-78:** Repealed by Session Laws 1979, c. 504, s. 1.

## Part 10. Executive Mansion Fine Arts Committee.

### **§ 143B-79. Executive Mansion Fine Arts Committee — creation, powers and duties.**

There is hereby created the Executive Mansion Fine Arts Committee. The Executive Mansion Fine Arts Committee shall have the following functions and duties:

- (1) To advise the Secretary of Cultural Resources on the preservation and maintenance of the Executive Mansion located at 200 North Blount Street, Raleigh, North Carolina;
- (2) To encourage gifts and objects of art, furniture and articles of historical value for furnishing the Executive Mansion, and advise the Secretary of Cultural Resources on major changes in the furnishings of the Mansion;
- (3) To make recommendations to the Secretary of Cultural Resources concerning major renovations necessary to preserve and maintain the structure;
- (4) To aid the Secretary of Cultural Resources in keeping a complete list of all gifts and articles received together with their history and value;
- (5) No gifts or articles shall be accepted for the Executive Mansion without the approval of the Committee; and
- (6) The Committee shall advise the Secretary of Cultural Resources upon any matter the Secretary may refer to it.
- (7) The Committee may dispose of property held in the Executive Mansion after consultation with a review committee comprised of one person

from the Executive Mansion Fine Arts Committee, appointed by its chairman; one person from the Department of Administration appointed by the Secretary of Administration; and two qualified professionals from the Department of Cultural Resources, Division of Archives and History, appointed by the Secretary of Cultural Resources. Upon request of the Executive Mansion Fine Arts Committee, the review committee will view proposed items for disposition and make a recommendation to the North Carolina Historical Commission who will make a final decision. The Historical Commission must consider whether the disposition is in the best interest of the State of North Carolina. If such property is sold, (i) if the records with regard to the property reflect that it was acquired by the State by gift or devise the net proceeds of each such sale shall be deposited in the State Treasury to the credit of the Executive Mansion, Special Fund, and shall be used only for the purchase, conservation, restoration or repair of other property for use in the Executive Mansion and; (ii) if the records with regard to the property reflect that the property was acquired by the State by purchase with appropriated funds or do not show the manner of acquisition, the net proceeds of such sale shall be deposited in the General Fund. (1973, c. 476, s. 65; 1983, c. 632, s. 1; 1987, c. 251.)

### **§ 143B-80. Executive Mansion Fine Arts Committee — members; selection; quorum; compensation.**

The Executive Mansion Fine Arts Committee shall consist of 16 members appointed by the Governor. The initial members of the Committee shall be the appointed members of the present Executive Mansion Fine Arts Commission who shall serve for a period equal to the remainder of their current terms on the Executive Mansion Fine Arts Commission, four of whose appointments expire June 30, 1973, four of whose appointments expire June 30, 1974, four of whose appointments expire June 30, 1975, and four of whose appointments expire June 30, 1976. At the end of the respective terms of office of the initial members, the appointments of their successors shall be for terms of four years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Committee created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Committee from office in accordance with the provisions of G.S. 143B-16 of the Executive Organization Act of 1973.

The Governor shall designate a member of the Committee to serve as chairman at his pleasure.

Members of the Committee shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Committee shall constitute a quorum for the transaction of business.

All clerical and other services required by the Committee shall be supplied by the Secretary of Cultural Resources. (1973, c. 476, s. 66.)

#### **§ 143B-80.1. Regular and special meetings.**

The Executive Mansion Fine Arts Committee shall meet at least twice per year and may hold special meetings at any time and place within the State at the call of the chairman or upon the written request of at least five members.

Whenever a member shall fail, except for ill health or other valid reason, to be present for two successive regular meetings of the Board, his place as a member shall be deemed vacant. (1983, c. 632, s. 2.)

§§ **143B-80.2 through 143B-80.4:** Reserved for future codification purposes.

Part 10A. State Capitol Preservation Act.

§§ **143B-80.5 through 143B-80.14:** Repealed by Session Laws 1995, c. 507, s. 12(a).

Part 11. American Revolution Bicentennial Committee.

§§ **143B-81, 143B-82:** Repealed by Session Laws 1979, c. 504, s. 2.

Part 12. North Carolina Awards Committee.

§ **143B-83. North Carolina Awards Committee — creation, powers and duties.**

There is hereby created the North Carolina Awards Committee with the duty to advise the Secretary of Cultural Resources on the formulation and administration of the program governing North Carolina awards and on the selection of a committee in each award area to choose the recipients.

The Committee shall advise the Secretary of the Department upon any matter the Secretary may refer to it. (1973, c. 476, s. 71; 1979, c. 504, s. 2; 1983 (Reg. Sess., 1984), c. 995, s. 22.)

§ **143B-84. North Carolina Awards Committee — members; selection; quorum; compensation.**

The North Carolina Awards Committee shall consist of five members appointed by the Governor to serve at the Governor's pleasure.

The Governor shall designate a member of the Committee as chairman to serve in such capacity at the pleasure of the Governor.

Members of the Committee shall serve without compensation or travel or per diem.

A majority of the Committee shall constitute a quorum for the transaction of business.

The Secretary of Cultural Resources is hereby authorized to request contingency and emergency funds for the administration of the North Carolina Awards Committee, for the period between July 1, 1973, and ratification of the next general appropriations bill for the Department.

All clerical and other services required by the Committee shall be supplied by the Secretary of Cultural Resources. (1973, c. 476, s. 72.)

Part 13. America's Four Hundredth Anniversary Committee.

§ **143B-85. America's Four Hundredth Anniversary Committee — creation, powers and duties.**

There is hereby created the America's Four Hundredth Anniversary Committee of the Department of Cultural Resources. The Committee shall have the following functions and duties:

- (1) To advise the Secretary of the Department on the planning, conducting, and directing appropriate observances of, and on providing necessary physical facilities and other requirements for, the commemoration of the landing of Sir Walter Raleigh's colony on Roanoke Island; and
- (2) To advise the Secretary of the Department upon any matter the Secretary might refer to it. (1973, c. 476, s. 74.)

**§ 143B-86. America's Four Hundredth Anniversary Committee — members; selection; quorum; compensation.**

The America's Four Hundredth Anniversary Committee shall consist of 14 members as follows: 10 members at large appointed by the Governor and four ex officio members as follows: the mayor of the Town of Manteo, the Secretary of Environment and Natural Resources, the chairman of the Roanoke Island Historical Association, and the chairman of the Dare County Board of Commissioners, or their designees. Of the initial members of the America's Four Hundredth Anniversary Committee appointed by the Governor five shall be appointed for terms expiring June 30, 1975, and five for terms expiring June 30, 1977. At the end of their respective terms of office, the appointments shall be for a term of four years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Committee created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Committee from office in accordance with the provisions of G.S. 143B-16 of the Executive Organization Act of 1973.

The Governor shall designate a member of the Committee to serve as chairman at his pleasure.

Members of the Committee shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Committee shall constitute a quorum for the transaction of business. (1973, c. 476, s. 75; 1977, c. 771, s. 4; 1989, c. 727, s. 218(123); 1997-443, s. 11A.119(a).)

**Part 14. North Carolina Arts Council.**

**§ 143B-87. North Carolina Arts Council — creation, powers and duties.**

There is hereby created the North Carolina Arts Council with the following duties and functions:

- (1) To advise the Secretary of Cultural Resources on the study, collection, maintenance and dissemination of factual data and pertinent information relative to the arts;
- (2) To advise the Secretary concerning assistance to local organizations and the community at large in the area of the arts;
- (3) To advise the Secretary on the exchange of information, promotion of programs and stimulation of joint endeavor between public and nonpublic organizations;
- (4) To identify research needs in the arts area and to encourage such research;
- (5) To advise the Secretary in regard to bringing the highest obtainable quality in the arts to the State and promoting the maximum opportunity for the people to experience and enjoy those arts;

- (6) To advise the Secretary of the Department upon any matter the Secretary may refer to it; and
- (7) To advise the Secretary concerning the promotion of theater arts in the State. (1973, c. 476, s. 77; 1985 (Reg. Sess., 1986), c. 1028, s. 14.)

**Editor's Note.** — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 13 provides: "The Theater Arts Advisory Board, created in 7 North

Carolina Administrative Code 3D .0008, is abolished. The North Carolina Arts Council is authorized to perform the functions of the Board."

### § 143B-88. North Carolina Arts Council — members; selection; quorum; compensation.

The North Carolina Arts Council shall consist of 24 members appointed by the Governor. The initial members of the Council shall be the appointed members of the present Arts Council who shall serve for a period equal to the remainder of their current terms on the Arts Council, eight of whose terms expire June 30, 1973, eight of whose terms expire June 30, 1974, and eight of whose terms expire June 30, 1975. At the end of the respective terms of office of the initial members, the appointments of their successors shall be for terms of three years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Council created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Council from office in accordance with the provisions of G.S. 143B-16 of the Executive Organization Act of 1973.

The Governor shall designate a member of the Council as chairman to serve at his pleasure.

Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Council shall constitute a quorum for the transaction of business.

All clerical and other services required by the Council shall be supplied by the Secretary of Cultural Resources. (1973, c. 476, s. 78.)

#### Part 15. North Carolina Art Society, Incorporated.

### § 143B-89. North Carolina Art Society, Incorporated.

The North Carolina Art Society, Incorporated, shall continue to be under the patronage of the State as provided in Article 3 of Chapter 140 of the General Statutes of North Carolina. The governing body of the North Carolina Art Society, Incorporated, shall be a board of directors consisting of a minimum of 22 members as follows: the Governor, the Superintendent of Public Instruction, the State Treasurer, Secretary of Cultural Resources, and the Director of the North Carolina Museum of Art, who shall be ex officio members; six members who shall be named by the Governor; and a minimum of 12 directors who shall be chosen by members of the North Carolina Art Society, Incorporated, in such manner and for such terms as that body shall determine. The six directors named by the Governor shall serve for terms of three years each. (1973, c. 476, s. 80; 1975, c. 386; 1977, c. 702, s. 3; 1985, c. 316.)

## Part 16. State Library Commission.

### § 143B-90. State Library Commission — creation, powers and duties.

There is hereby created the State Library Commission of the Department of Cultural Resources. The State Library Commission has the following functions and duties:

- (1) To advise the Secretary of Cultural Resources on matters relating to the operation and services of the State Library;
- (2) Repealed by Session Laws 1991, c. 757, s. 2.
- (2a) To work for the financial support of statewide and local public library services;
- (3) To advise the Secretary upon any matter the Secretary might refer to it;
- (4) Repealed by Session Laws 1991, c. 757, s. 2.
- (4a) To work for the financial support of statewide interlibrary services;
- (5) Repealed by Session Laws 1991, c. 757, s. 2.
- (5a) To aid and advise the Secretary of Cultural Resources in the development of information services for the promotion of cultural, educational, and economic well-being of the State.
- (6) through (8) Repealed by Session Laws 1991, c. 757, s. 2.
- (8a) To aid and advise the Secretary of Cultural Resources on the recruitment and appointment of the State Librarian. (1973, c. 476, s. 82; 1981, c. 918, s. 2; 1991, c. 757, s. 2.)

### § 143B-91. State Library Commission — members; selection; quorum; compensation.

(a) The State Library Commission shall consist of 15 members. All members shall have an interest in the development of library and information services in North Carolina. Eight members shall be appointed by the Governor. One member shall be appointed by the President Pro Tempore of the Senate. One member shall be appointed by the Speaker of the North Carolina House of Representatives. Three members shall be appointed by the North Carolina Public Library Directors Association. Two members shall be the President and the President-elect of the North Carolina Library Association or two appointees as determined by the North Carolina Library Association's Board of Directors. The State Librarian shall be an ex officio member and act as secretary to the Commission.

All appointments shall be for four-year terms with eight of the commissioners taking office on the first four-year cycle and seven commissioners taking office on the second four-year cycle. Any appointment to fill a vacancy in one of the positions appointed by the Governor, President Pro Tempore or Speaker of the House of Representatives shall be for the remainder of the unexpired term. Appointees shall not serve more than two successive four-year terms.

The Governor shall choose a chairperson from among the gubernatorial appointees. The chairperson shall serve not more than two successive two-year terms as chair.

Members of the Commission shall receive per diem and necessary travel and subsistence expenses as provided in G.S. 138-5.

A majority of the Commission shall constitute a quorum for the transaction of business.

All clerical and other services required by the Commission shall be supplied by the Secretary of Cultural Resources.

The Commission shall meet at least twice a year.

(b) There shall be standing committees established to advise the Secretary of Cultural Resources, the Commission, and the State Librarian. These committees shall be: Public Library Development; Interlibrary Cooperation; State Government Information Services; State Library Development; and any other committee deemed appropriate. Each committee shall be composed of a committee chairperson and at least six persons appointed annually by the Secretary of Cultural Resources with the approval of the Commission. At least one of the members of each committee shall be a member of the Commission. Each committee shall report to the Commission at least once a year. (1973, c. 476, s. 83; 1981, c. 918, s. 3; 1991, c. 757, s. 3; 1995, c. 490, s. 53.)

## Part 17. Roanoke Island Historical Association.

### § 143B-92. Roanoke Island Historical Association — creation, powers and duties.

There is hereby recreated the Roanoke Island Historical Association with the powers and duties delineated in Article 19 of Chapter 143 of the General Statutes of North Carolina. (1973, c. 476, s. 85.)

**Legal Periodicals.** — For article, “Preservation Law 1976-1980: Faction, Property Rights and Ideology,” see 11 N.C. Cent. L.J. 276 (1980).

### § 143B-93. Roanoke Island Historical Association — status.

The Roanoke Island Historical Association is hereby declared not to be a State agency within the meaning of the Executive Organization Act of 1973 and shall be exempt from all provisions of the Executive Organization Act of 1973 except G.S. 143B-92 and G.S. 143B-93. (1973, c. 476, s. 86.)

## Part 18. North Carolina Symphony Society.

### § 143B-94. North Carolina Symphony Society, Inc.

The North Carolina Symphony Society, Incorporated, shall continue to be under the patronage of the State as provided in Article 2 of Chapter 140 of the General Statutes of North Carolina. The governing body of the North Carolina Symphony Society, Incorporated, shall be a board of trustees consisting of not less than 16 members of which the Governor of the State and the Superintendent of Public Instruction shall be ex officio members and four other members shall be named by the Governor. The remaining trustees shall be chosen by members of the North Carolina Symphony Society, Incorporated, in such manner and for such terms as that body shall determine. The initial members named by the Governor shall be appointed from the members of the existing board of trustees of the North Carolina State Symphony Society, Incorporated, for the balance of their existing terms. Subsequent appointments shall be made for terms of four years each. (1973, c. 476, s. 88.)

## Part 19. Edenton Historical Commission.

### § 143B-95. Edenton Historical Commission — creation, purposes and powers.

There is hereby recreated the Edenton Historical Commission. The purposes of the Commission are to effect and encourage preservation, restoration, and appropriate presentation of the Town of Edenton and Chowan County, as a historic, educational, and aesthetic place, to the benefit of the citizens of the place and the State and of visitors. To accomplish its purposes, the Commission has the following powers and responsibilities:

- (1) To acquire, hold, and dispose of title to or interests in historic properties in the Town of Edenton and County of Chowan and to repair, restore, and otherwise improve the properties, and to maintain them;
- (2) To acquire, hold, and dispose of title to or interests in other land there, upon which historic structures have been or shall be relocated, and to improve the land and maintain it;
- (3) To acquire, hold, and dispose of suitable furnishings for the historic properties, and to provide and maintain suitable gardens for them;
- (4) To develop and maintain one or more collections of historic objects and things pertinent to the history of the town and county, to acquire, hold, and dispose of the items, and to preserve and display them;
- (5) To develop and conduct appropriate programs, under the name "Historic Edenton" or otherwise, for the convenient presentation and interpretation of the properties and collections to citizens and visitors, as places and things of historic, educational, and aesthetic value;
- (6) To conduct programs for the fostering of research, for the encouragement of preservation, and for the increase of knowledge available to the local citizens and the visitors in matters pertaining to the history of the town and county;
- (7) To cooperate with the Secretary and Department of Cultural Resources and with appropriate associations, governments, governmental agencies, persons, and other entities, and to assist and advise them, toward the furtherance of the Commission's purposes;
- (8) To solicit gifts and grants toward the furtherance of these purposes and the exercise of these powers;
- (9) To conduct other programs and do other things appropriate and reasonably necessary to the accomplishment of the purposes and the exercise of the powers; and
- (10) To adopt and enforce any bylaws and rules that the Commission deems beneficial and proper. (1973, c. 476, s. 90; 1979, c. 733, s. 1.)

### § 143B-96. Edenton Historical Commission — status.

The Edenton Historical Commission is hereby declared not to be a State agency within the meaning of the Executive Organization Act of 1973 and shall be exempt from all provisions of the Executive Organization Act of 1973 except G.S. 143B-95 through G.S. 143B-98. (1973, c. 476, s. 91.)

### § 143B-97. Edenton Historical Commission — reports.

The Edenton Historical Commission shall submit an annual report of its activities, holdings, and finances, including an audit of its accounts by a certified public accountant, to the Secretary of Cultural Resources. In the event such annual report is not received by the Secretary, or if such report does not

indicate the need for the continuation of the Commission, the Secretary of Cultural Resources is authorized to recommend to the next General Assembly the abolition of the Commission. (1973, c. 476, s. 92.)

**§ 143B-98. Edenton Historical Commission — members; selection; compensation; quorum.**

The Edenton Historical Commission shall consist of 33 members, 18 appointed by the Governor to serve at his pleasure, 12 elected by the Commission from time to time according to the procedure it adopts, and, ex officio, the Mayor of the Town of Edenton, the Chairman of the Board of Commissioners of Chowan County, and the Secretary of Cultural Resources or his designee.

All the present members of the Commission may continue to serve, at the pleasure of the Governor, until the end of his present term of office. The Commission shall elect its own officers, and the members of the Commission shall serve without pay and without expense allowance from State funds. The Commission shall determine its requirements for a quorum. (1973, c. 476, s. 93; 1979, c. 733, s. 2.)

Part 20. Historic Bath Commission.

**§ 143B-99. Historic Bath Commission — creation, powers and duties.**

There is hereby created the Historic Bath Commission. The Historic Bath Commission shall have the following powers:

- (1) To acquire and dispose of title to or interests in historic properties in and near the Town of Bath in Beaufort County, and to repair, restore, or otherwise improve such properties, and to maintain them;
- (2) To offer such historic properties to the State of North Carolina, subject to the acceptance of such properties by the State;
- (3) To cooperate with, assist, and advise the Secretary of Cultural Resources upon any matter pertaining to the administration of Bath State Historic Site, which the Secretary of the Department may refer to it; and
- (4) To carry out other programs reasonably related to these purposes. (1973, c. 476, s. 95.)

**§ 143B-100. Historic Bath Commission — status.**

The Historic Bath Commission is hereby declared not to be a State agency within the meaning of the Executive Organization Act of 1973 and shall be exempt from all provisions of the Executive Organization Act of 1973 except G.S. 143B-99 through G.S. 143B-102. (1973, c. 476, s. 96.)

**§ 143B-101. Historic Bath Commission — reports.**

The Historic Bath Commission shall submit an annual report of its activities, holdings, and finances, including an audit of its accounts by a certified public accountant, to the Secretary of Cultural Resources. In the event such annual report is not received by the Secretary, or if such report does not indicate the need for the continuation of the Commission, the Secretary of Cultural Resources is authorized to recommend the abolition of the Commission to the next General Assembly. (1973, c. 476, s. 97.)

**§ 143B-102. Historic Bath Commission — members; selection; quorum; compensation.**

The Historic Bath Commission shall consist of 25 members appointed by the Governor plus, ex officio, the mayor of the Town of Bath, the Chairman of the Board of Commissioners of Beaufort County, and the Secretary of Cultural Resources or designee. The initial members of the Commission shall be the members of the present Historic Bath Commission who shall serve for a period equal to the remainder of their current terms on the Historic Bath Commission. At the end of the respective terms of office of the initial members of the Commission, the appointments of their successors, with the exception of the ex officio members, shall be for terms of five years and until their successors are appointed and qualify. Any appointments to fill a vacancy on the Commission created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term. The Commission shall elect its own officers. Members of the Commission shall serve without pay and without expense allowance from State funds. The Commission shall determine its requirements for a quorum. (1973, c. 476, s. 98.)

Part 21. Historic Hillsborough Commission.

**§ 143B-103. Historic Hillsborough Commission — creation, powers and duties.**

There is hereby recreated the Historic Hillsborough Commission. The Historic Hillsborough Commission shall have the following powers:

- (1) In cooperation with the Hillsborough Historical Society, the elected officials of Hillsborough and Orange County, and appropriate public agencies, to use every legal aid and method to preserve and restore the Town of Hillsborough, and its immediately adjacent area, as a living, functioning, educational, and historical exhibit of North Carolina's early life and times;
- (2) To acquire and to dispose of property, real and personal; to repair, restore, or otherwise improve such properties; to have prepared a history of the town and area; and to write, compile, publish, or sponsor such historical works as may pertain to the town and area; and
- (3) To carry on other programs reasonably related to these purposes. (1973, c. 476, s. 100.)

**§ 143B-104. Historic Hillsborough Commission — status.**

The Historic Hillsborough Commission is hereby declared not to be a State agency within the meaning of the Executive Organization Act of 1973 and shall be exempt from all provisions of the Executive Organization Act of 1973 except G.S. 143B-103 through G.S. 143B-106. (1973, c. 476, s. 101.)

**§ 143B-105. Historic Hillsborough Commission — reports.**

The Historic Hillsborough Commission shall submit an annual report of its activities, holdings, and finances, including an audit of its accounts by a certified public accountant, to the Secretary of Cultural Resources. In the event such annual report is not received by the Secretary, or if such report does not indicate the need for the continuation of the Commission, the Secretary of Cultural Resources is authorized to recommend to the next General Assembly the abolition of the Commission. (1973, c. 476, s. 102.)

### **§ 143B-106. Historic Hillsborough Commission — members; selection; quorum; compensation.**

The Historic Hillsborough Commission shall consist of not fewer than 25 members appointed by the Governor plus, ex officio, the mayor of the Town of Hillsborough, the Chairman of the Board of Commissioners of Orange County, the Orange County Register of Deeds, the Orange County Clerk of Superior Court, and the Secretary of Cultural Resources or designee. The initial appointed members of the Commission shall be the members of the present Historic Hillsborough Commission who shall serve for a period equal to the remainder of their current terms on the Historic Hillsborough Commission. At the end of the respective terms of office of the present members, the appointments of members, excepting the ex officio members, shall be for terms of six years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term. The Commission shall elect its own officers. Members of the Commission shall serve without pay and without expense allowance from State funds. The Commission shall determine its requirements for a quorum. (1973, c. 476, s. 103.)

## **Part 22. Historic Murfreesboro Commission.**

### **§ 143B-107. Historic Murfreesboro Commission — creation, powers and duties.**

There is hereby recreated the Historic Murfreesboro Commission. The Historic Murfreesboro Commission shall have the following powers:

- (1) To acquire and dispose of title to or interests in historic properties in and near the Town of Murfreesboro, and to repair, restore, or otherwise improve and maintain such properties;
- (2) To conduct research and planning to carry out a program for the preservation of historic sites, buildings, or objects in and near the Town of Murfreesboro;
- (3) To carry out other programs reasonably related to these purposes. (1973, c. 476, s. 105.)

### **§ 143B-108. Historic Murfreesboro Commission — status.**

The Historic Murfreesboro Commission is hereby declared not to be a State agency within the meaning of the Executive Organization Act of 1973 and shall be exempt from all provisions of the Executive Organization Act of 1973 except G.S. 143B-107 through G.S. 143B-110. (1973, c. 476, s. 106.)

### **§ 143B-109. Historic Murfreesboro Commission — reports.**

The Historic Murfreesboro Commission shall submit an annual report of its activities, holdings, and finances, including an audit of its accounts by a certified public accountant, to the Secretary of Cultural Resources. In the event such annual report is not received by the Secretary, or if such report does not indicate the need for the continuation of the Commission, the Secretary of Cultural Resources is authorized to recommend to the next General Assembly the abolition of the Commission. (1973, c. 476, s. 107.)

**§ 143B-110. Historic Murfreesboro Commission — members; selection; quorum; compensation.**

The Historic Murfreesboro Commission shall consist of 30 members appointed by the Governor plus, ex officio, the mayor of the Town of Murfreesboro, the Chairman of the Board of Commissioners of the County of Hertford, the President of Chowan College, and the Secretary of Cultural Resources or designee. The initial appointed members of the Commission shall be the members of the present Historic Murfreesboro Commission who shall serve for a period equal to the remainder of their current terms on the Historic Murfreesboro Commission. At the end of the respective terms of office of the initial members of the Commission, the appointments of their successors, with the exception of ex officio members, shall be for terms of five years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term. The Commission shall elect its own officers. Members of the Commission shall serve without pay and without expense allowance from State funds. The Commission shall determine its requirements for a quorum. (1973, c. 476, s. 108.)

Part 23. John Motley Morehead Memorial Commission.

**§ 143B-111. John Motley Morehead Memorial Commission — creation, powers and duties.**

There is hereby recreated the John Motley Morehead Memorial Commission. The John Motley Morehead Memorial Commission shall have the following powers:

- (1) To acquire title to or interests in property, both real and personal, and to solicit, collect, and expend funds for the acquisition, restoration, maintenance, and operation of a memorial to John Motley Morehead in the City of Greensboro; and to carry on other activities, including research and publications, reasonably related to this purpose;
- (2) To convey, lease, mortgage, and otherwise dispose of real and personal property and interests therein, as well as to accept deeds, bills of sale, and other instruments conveying and investing title in it; and
- (3) To offer such memorial to the State of North Carolina, which memorial, if accepted by the Department of Cultural Resources and Council of State, may be administered as a State historic site subject to existing covenants and agreements. (1973, c. 476, s. 110.)

**§ 143B-112. John Motley Morehead Memorial Commission — status.**

The John Motley Morehead Memorial Commission is hereby declared not to be a State agency within the meaning of the Executive Organization Act of 1973 and shall be exempt from all provisions of the Executive Organization Act of 1973 except G.S. 143B-111 through G.S. 143B-115. (1973, c. 476, s. 111.)

**§ 143B-113. John Motley Morehead Memorial Commission — authorization for counties to assist.**

The special approval of the General Assembly is hereby given to all appropriations of surplus or non-ad valorem tax funds that should be made and paid over to said Commission by all counties and municipalities and the

same are declared to be for a public purpose and the special approval of the General Assembly is given for such appropriations. Upon the request of the Commission hereby created, the governing body of Guilford County or of the City of Greensboro may, in its discretion, make appropriations from non-ad valorem tax revenues to the Commission. (1973, c. 476, s. 112.)

**§ 143B-114. John Motley Morehead Memorial Commission  
— reports.**

The John Motley Morehead Commission shall submit to the Secretary of Cultural Resources an annual report of its activities, holdings, and finances, including an audit of its accounts by a certified public accountant. In the event such annual report is not received by the Secretary, or if the report indicates that there is no further need for the Commission, the Secretary of Cultural Resources is authorized to recommend to the next General Assembly the abolition of the Commission. (1973, c. 476, s. 113.)

**§ 143B-115. John Motley Morehead Memorial Commission  
— members; selection; quorum; compensation.**

The John Motley Morehead Memorial Commission shall consist of 19 members as follows: nine members appointed by the Governor; three members appointed by the Board of Commissioners of Guilford County; three members appointed by the City Council of Greensboro; and four ex officio members, as follows: the Secretary of Environment and Natural Resources or designee, the Superintendent of Public Instruction or designee, the State Treasurer or designee and the Secretary of Cultural Resources or designee. The initial members of the Commission shall be the members of the present John Motley Morehead Memorial Commission who shall serve for a period equal to the remainder of their current terms on the John Motley Morehead Memorial Commission. At the end of the respective terms of office of the initial members, the appointments of their successors, with the exception of the ex officio members, shall be for terms of six years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term. The Commission shall elect its own officers. Members of the Commission shall serve without pay and without expense allowance from State funds. The Commission shall determine its requirements for a quorum. (1973, c. 476, s. 114; 1977, c. 711, s. 4; 1989, c. 727, s. 218(124); 1997-443, s. 11A.119(a).)

**§§ 143B-116 through 143B-120:** Reserved for future codification purposes.

**Part 24. Grassroots Arts Program.**

**§ 143B-121. Program established.**

The Department of Cultural Resources shall establish a program to be known as the Grassroots Arts Program, by which funds shall be distributed among the counties of this State for the purpose of assisting the counties in the development of community arts programs. The Grassroots Arts Program shall be established within the "Community Art Development Section" (North Carolina Arts Council) of the Division of the Arts. (1977, c. 1008, s. 1.)

### § 143B-122. Distribution of funds.

Funds available under the Grassroots Arts Program shall be distributed among the counties on a per capita basis. (1977, c. 1008, s. 2.)

### § 143B-123. Rules and procedures; standards for qualification for funds.

The Department of Cultural Resources shall be authorized to adopt rules and procedures necessary to implement this program and shall adopt standards which must be met by organizations within the counties in order to qualify for funds under the Grassroots Arts Program. The standards adopted shall include, but not be limited to the following:

- (1) The organization must show that it exists primarily to aid the arts and that it aids the arts in all its forms including the performing, visual and literary.
- (2) The organization must show that its programs are open to the entire community.
- (3) The organization must show that it is a nonprofit, tax-exempt corporation, governed by a citizen board which is not self-perpetuating, and that it has been in existence and active for at least one full year.
- (4) The organization must show that it can match funds available under the Grassroots Arts Program with public or private funds from within the county in which it is located at a ratio of one-to-one. (1977, c. 1008, s. 3.)

### § 143B-124. Designation of organization as official distributing agent; duties.

Guided by the standards set out in G.S. 143B-123, the board of county commissioners of each county shall designate to the Department of Cultural Resources an organization to serve as its distributing agent for Grassroots Arts Program funds. Upon the approval of the Department of Cultural Resources, the designated organization shall become the official distributing agent for that county and shall remain so until such time as it no longer meets the necessary standards. To receive its per capita funds, the official distributing agent must annually submit to the Department of Cultural Resources for its approval a plan for the expenditure of the funds allotted to that county and must account for the funds after they have been expended. Funds may be used for programming, administrative and operating expenses, and should assist in the total development of the arts within that county. (1977, c. 1008, s. 4.)

### § 143B-125. Disposition of funds for counties without organizations meeting Department standards.

Funds for counties without organizations which meet the necessary standards set by the Department of Cultural Resources shall be retained by the department and used for arts programming within these counties. Where feasible, the department shall maintain the same per capita rate for the distribution of funds to these counties and shall require the same matching ratio. (1977, c. 1008, s. 5; 1993, c. 321, s. 33.)

**Editor's Note.** — Session Laws 2001-124, s. 1, provides: "The Department of Health and Human Services and the Department of Juvenile Justice and Delinquency Prevention shall

review the feasibility of establishing and maintaining a statewide database containing information on the prescription and administration of psychotropic medications to children who

receive State services while residing in State facilities administered by the Department of Health and Human Services or the Department of Juvenile Justice and Delinquency Prevention. In conducting the review the Departments shall consider that any database developed must, in accordance with State and federal law, fully protect the medical records and other privacy interests of the minors for whom the drugs are prescribed. Not later than January 1, 2002, the Department of Health and Human Services and the Department of Juvenile Justice and Delinquency Prevention shall report their findings and recommendations to the

Joint Legislative Health Care Oversight Committee and to the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services. The report shall include the cost of establishing and maintaining the database in a manner that provides data for the analysis of prescription medication usage by and effects on children. The report shall also provide detailed information on how the database will be maintained in a manner that protects medical records and other privacy interests in compliance with State and federal law.”

## Part 25. Historical Military Reenactment Groups.

### § 143B-126. Voluntary registration; designation of names; registration symbol.

The Department of Cultural Resources shall establish a program for the voluntary registration of historical military reenactment groups. The Department shall require, as part of the registration procedure, the filing of a copy of the various bylaws governing the groups. The Department shall designate the names to be used by the groups to ensure a lack of duplication or confusion between the groups and shall, in the case of duplicate name requests, decide the use of a particular name based on the longest period of existence as shown by the dates of the bylaws or other evidence of creation. The Department shall create a seal or other logo which shall indicate registration with the Department and shall be authorized for use only by groups properly registered pursuant to this part. (1981, c. 523, s. 1.)

### § 143B-127. Contracts with registered groups.

The Department of Cultural Resources, Division of Archives and History shall sign contracts for the performance of military historical dramas on State-owned property only with historical military reenactment groups properly registered pursuant to this Part. (1981, c. 523, s. 2.)

## Part 26. Advisory Committee on Abandoned Cemeteries.

### § 143B-128. Advisory Committee on Abandoned Cemeteries; members; selections; compensation; terms; vacancy; duties.

(a) There is created the Advisory Committee on Abandoned Cemeteries to be composed of 17 members appointed as follows:

- (1) Two by the Governor;
- (2) One by the President Pro Tempore of the Senate;
- (3) One by the Speaker of the House;
- (4) One by the Secretary of the Department of Cultural Resources;
- (5) One by the Executive Director of the North Carolina Commission of Indian Affairs, Department of Administration;
- (6) One each by the chief executive of the following organizations, from the membership of the organization:
  - a. North Carolina Archaeological Council;

- b. North Carolina Association of County Commissioners;
- c. North Carolina Chapter of the Daughters of the American Revolution;
- d. North Carolina Chapter of the Society of the Cincinnati;
- e. North Carolina Chapter of the Sons of the American Revolution;
- f. North Carolina Genealogical Society;
- g. North Carolina Historical Commission;
- h. North Carolina League of Municipalities;
- i. Society of the Colonial Dames of America in the State of North Carolina;
- j. Sons of Confederate Veterans;
- k. United Daughters of the Confederacy.

(b) Members shall be appointed for staggered four-year terms beginning July 1 of odd-numbered years and shall serve until their successors are appointed and qualified. To create and maintain staggered terms, one member appointed by the Governor and the members appointed by the Speaker of the House, North Carolina Archaeological Council, North Carolina Chapter of the Daughters of the American Revolution, North Carolina Chapter of the Sons of the American Revolution, North Carolina Genealogical Society, North Carolina League of Municipalities, and the Sons of Confederate Veterans shall be appointed for two-year terms to expire June 30, 1983, at which time their successor shall be appointed pursuant to this section for four-year terms. The remaining committee members shall be appointed for four-year terms.

(c) Members shall serve without salary or compensation for their actual expenses resulting from the performance of their official duties.

(d) An appointment to fill a vacancy on the committee shall be made according to the procedures for appointment for regular terms, pursuant to this section. Any appointment to fill a vacancy on the committee for any reason shall be for the balance of the unexpired term.

(e) Upon its appointment the committee shall organize by electing from its membership a chairman and a vice-chairman. It shall be the duty of the committee to review existing statutes relating to cemeteries, make recommendations to the General Assembly concerning new statutes, and to assist the department in its efforts to collect information on abandoned cemeteries. (1981, c. 1016, s. 1; 1995, c. 490, s. 1.)

## Part 27. Roanoke Voyages and Elizabeth II Commission.

**§§ 143B-129 through 143B-131:** Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 12.5(c).

**Cross References.** — As to the Roanoke Island Commission, see now § 143B-131.1 et seq.

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 12.5(d), provides that effective October 1, 1994, the statutory author-

ity, powers, duties, functions, records, personnel, property, and funds of the Roanoke Voyages and Elizabeth II Commission are transferred to the Roanoke Island Commission, and that all its prescribed powers are transferred as well.

## Part 27A. Roanoke Island Commission.

### § 143B-131.1. Commission established.

There is established the Roanoke Island Commission. The Commission shall be an independent commission, but shall be located within the Department of Cultural Resources for historic resource management, organizational, and

budgetary purposes. (1993 (Reg. Sess., 1994), c. 769, s. 12.5(a); 1995, c. 507, s. 12.6(a).)

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 12.5(d), provides that effective October 1, 1994, the statutory authority, powers, duties, functions, records, personnel, property, and funds of the Roanoke Voyages and Elizabeth II Commission are transferred to the Roanoke Island Commission, and that all its prescribed powers are transferred as well.

Session Laws 1995, c. 507, s. 12.6(d) provides: "The personnel, personal property, and unexpended balances of appropriations, allocations, or other funds for the Elizabeth II State Historic Site and Visitor Center, the Elizabeth II, and the Roanoke Island Commission are transferred from the Department of Cultural Resources to the Roanoke Island Commission."

### § 143B-131.2. Roanoke Island Commission — Purpose, powers, and duties.

(a) The Commission is created to combine various existing entities in the spirit of cooperation for a cohesive body to protect, preserve, develop, and interpret the historical and cultural assets of Roanoke Island. The Commission is further created to operate and administer the Elizabeth II State Historic Site and Visitor Center, the Elizabeth II, Ice Plant Island, and all other properties under the administration of the Department of Cultural Resources located on Roanoke Island having historical significance to the State of North Carolina, Dare County, or the Town of Manteo, except as otherwise determined by the Commission.

(b) The Commission shall have the following powers and duties:

- (1) To advise the Secretary of Transportation and adopt rules on matters pertaining to, affecting, and encouraging restoration, preservation, and enhancement of the appearance, maintenance, and aesthetic quality of U.S. Highway 64/264 and the U.S. 64/264 Bypass and N.C. 400 travel corridors on Roanoke Island and the grounds on Roanoke Island Festival Park.
- (2) To operate the Elizabeth II State Historic Site and Visitor Center and the Elizabeth II as permanent memorials commemorating the Roanoke Voyages, 1584-1587.
- (3) To supervise the development of Ice Plant Island and to manage future facilities.
- (4) To advise the Secretary of the Department of Cultural Resources on matters pertinent to historical and cultural events on Roanoke Island.
- (5) With the assistance of the Department of Cultural Resources, to identify, preserve, and protect properties located on Roanoke Island having historical significance to the State of North Carolina, Dare County, or the Town of Manteo consistent with applicable State laws and rules.
- (6) To establish and collect a charge for admission to any property or event operated by the Commission.
- (7) To solicit and accept gifts, grants, and donations.
- (8) To cooperate with the Secretary and Department of Cultural Resources, the Secretary and Department of Transportation, the Secretary and Department of Environment and Natural Resources, and other governmental agencies, officials, and entities, and provide them with assistance and advice.
- (9) To adopt and enforce such bylaws, rules, and guidelines that the Commission deems to be reasonably necessary in order to carry out its powers and duties. Chapter 150B of the General Statutes does not apply to the adoption of rules by the Commission.
- (10) To establish and maintain a separate fund composed of moneys which may come into its hands from gifts, donations, grants, or bequests,

which funds will be used by the Commission for purposes of carrying out its duties and purposes herein set forth. The Commission may also establish a reserve fund to be maintained and used for contingencies and emergencies. Funds appropriated to the Commission may be transferred to the Friends of Elizabeth II, Inc., a private, nonprofit corporation. The Friends of Elizabeth II, Inc., shall use the funds transferred to it to carry out the purposes of this Part.

- (11) By cooperative arrangement with other agencies, groups, individuals, and other entities, to coordinate and schedule historical and cultural events on Roanoke Island.
- (12) Make recommendations to the Secretary of Cultural Resources concerning personnel and budgetary matters.
- (13) To acquire real and personal property by purchase, gift, bequest, devise, and exchange.
- (14) To administer the Roanoke Island Commission Fund and the Roanoke Island Commission Endowment Fund as provided in G.S. 143B-131.8.
- (15) To procure supplies, services, and property as appropriate and to enter into contracts, leases, or other legal agreements to carry out the purposes of this Part and duties of the Commission. The provisions of G.S. 143-129 and Article 3 of Chapter 143 of the General Statutes do not apply to purchases by the Roanoke Island Commission of equipment, supplies, and services. (1993 (Reg. Sess., 1994), c. 769, s. 12.5(a); 1995, c. 507, s. 12.6(b); 1997-443, ss. 11A.119(a), 30.1; 1998-212, ss. 21.1(a), 21.1(b).)

### **§ 143B-131.3. Assignment of property; offices.**

Upon request of the Commission, the head of any State agency may assign property, equipment, and personnel of such agency to the Commission to assist the Commission in carrying out its duties under this Part. Assignments under this section shall be without reimbursement by the Commission to the agency from which the assignment was made. (1993 (Reg. Sess., 1994), c. 769, s. 12.5(a).)

### **§ 143B-131.4. Commission reports.**

Before July 1, 1995, the Commission shall submit to the General Assembly a comprehensive report incorporating specific recommendations of the Commission for development and promotion of the Elizabeth II State Historic Site and Visitor Center. After the initial report, the Commission shall submit a report to the General Assembly within 30 days of the convening of each Regular Session of the General Assembly. The report shall include:

- (1) A summary of actions taken by the Commission consistent with the powers and duties of the Commission set forth in G.S. 143B-131.2.
- (2) Recommendations for legislation and administrative action to promote and develop the Elizabeth II State Historic Site and Visitor Center.
- (3) An accounting of funds received and expended. (1993 (Reg. Sess., 1994), c. 769, s. 12.5(a).)

### **§ 143B-131.5. Roanoke Island Commission — Additional powers and duties; transfer of assets and liabilities.**

(a) The Commission shall also have the powers and duties established by Chapter 1194, Session Laws of 1981, as amended.

(b) Effective October 1, 1994, all lawful standards, rules, regulations, guidelines, contracts, agreements, permits, bylaws, and certificates of appropriateness of or issued by the Roanoke Voyages Corridor Commission or the Roanoke Voyages and Elizabeth II Commission shall remain in effect until modified, amended, revoked, repealed, or changed (as appropriate) by the Roanoke Island Commission in accordance with law.

(c) Effective October 1, 1994, all the assets and liabilities of the Roanoke Voyages and Elizabeth II Commission are vested in the Roanoke Island Commission. (1993 (Reg. Sess., 1994), c. 769, s. 12.5(a).)

**Editor's Note.** — Session Laws 1985, c. 730, ss. 1 to 3, provide:

"Sec. 1. Notwithstanding Article III of Chapter 111 of General Statutes, with the approval of the Department of Cultural Resources, the Friends of Elizabeth II, Incorporated may operate vending machines on the site grounds of the Elizabeth II.

"Sec. 2. Eighty percent (80%) of the profits

from activities authorized by Section 1 of this act shall be used to support the Elizabeth II, the ship's boat, and related activities. The remainder of the profits shall be used for the activities of the Roanoke Voyages and Elizabeth II Commission.

"Sec. 3. This act is effective upon ratification."

### § 143B-131.6. Roanoke Island Commission — Members; terms; vacancies; expenses; officers.

(a) The Commission shall consist of 24 voting members appointed as follows:

- (1) Six members appointed by the Governor;
- (2) Six members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, at least two of whom reside in Dare County;
- (3) Six members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, at least two of whom reside in Dare County; and
- (4) The following persons, or their designees, ex officio:
  - a. The Governor;
  - b. The Attorney General;
  - c. The Secretary of the Department of Cultural Resources;
  - d. The Secretary of the Department of Transportation;
  - e. The Chair of the Dare County Board of Commissioners; and
  - f. The Mayor of Manteo.

(b) Members shall serve for two-year terms, with no prohibition against being reappointed, except initial appointments shall be for terms as follows:

- (1) The Governor shall initially appoint three members for a term of two years and three members for a term of three years.
- (2) The General Assembly upon the recommendation of the President Pro Tempore of the Senate shall initially appoint three members for a term of two years and three members for a term of three years.
- (3) The General Assembly upon the recommendation of the Speaker of the House of Representatives shall initially appoint three members for a term of two years and three members for a term of three years.

Initial terms shall commence on October 1, 1994.

(c) The Governor shall appoint a chair biennially from among the membership of the Commission. The initial term of the chair shall commence on October 1, 1994. The Commission shall elect from its membership a vice-chair, a secretary, and treasurer to serve two-year terms. The Commission in its discretion may appoint a historian to serve at its pleasure. Initial terms shall commence on October 1, 1994.

(d) A vacancy in the Commission resulting from the resignation of a member or otherwise, shall be filled in the same manner in which the original

appointment was made, and the term shall be for the balance of the unexpired term. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122.

(e) The Commission members shall receive no salary as a result of serving on the Commission but shall receive per diem, subsistence, and travel expenses in accordance with the provisions of G.S. 138-5 and G.S. 138-6, as applicable. When approved by the Commission, members may be reimbursed for subsistence and travel expenses in excess of the statutory amount.

(f) Members may be removed in accordance with G.S. 143B-13 as if that section applied to this Part.

(g) The chair shall convene the Commission. Meetings shall be held as often as necessary, but not less than two times a year.

(h) A majority of the members of the Commission shall constitute a quorum for the transaction of business. The affirmative vote of a majority of the members present at meetings of the Commission shall be necessary for action to be taken by the Commission.

(i) The Commission shall make its recommendations by March 15 of each year that terms expire for appointments for terms commencing July 1 of that year; provided the initial appointments for terms commencing October 1, 1994, shall be made upon recommendation of the Roanoke Island Historical Association. (1993 (Reg. Sess., 1994), c. 769, s. 12.5(a); 2000-181, s. 2.4.)

**Effect of Amendments.** — Session Laws 2000-181, s. 2.4, effective August 2, 2000, in subsection (i), substituted “March 15” for “September 15” and substituted “July 1” for “November 1.”

### § 143B-131.7. Roanoke Island Commission — Counsel.

The Attorney General shall assign legal counsel to the Commission. (1993 (Reg. Sess., 1994), c. 769, s. 12.5(a).)

### § 143B-131.8. Roanoke Island Commission Fund; Roanoke Island Commission Endowment Fund.

(a) The Roanoke Island Commission Fund is established as a nonreverting Fund and shall be administered by the Roanoke Island Commission. Seventy-five percent (75%) of the revenues collected from any property operated by the Roanoke Island Commission shall be credited to the Fund. In addition, gifts, donations, grants, or bequests received by the Commission for the purpose of carrying out its duties and purposes may also be deposited in the Fund.

The funds in the Roanoke Island Commission Fund shall be used for the expenses of the Roanoke Island Commission and the operation and maintenance of properties operated by the Commission.

(b) The Roanoke Island Commission Endowment Fund is established as a nonreverting Fund and shall be administered by the Commission. Twenty-five percent (25%) of the revenue collected from any property operated by the Roanoke Island Commission shall be credited to the Fund. Until July 1, 2000, the revenues credited to the Roanoke Island Commission Endowment Fund and the interest earned on the revenue shall be held in reserve to create the principal for the Fund.

On and after July 1, 2000, eighty percent (80%) of the interest generated by the principal in the Roanoke Island Commission Endowment Fund shall be used by the Roanoke Island Commission to carry out its duties and purposes as set out by this Part. The Roanoke Island Commission may also use those interest funds for capital expenditures for the properties operated by the Commission. (1995, c. 507, s. 12.6(c).)

### § 143B-131.9. Roanoke Island Commission staff.

The Commission shall appoint and fix the salary of an Executive Director to serve at its pleasure and may hire other employees. Employees of the Commission who were transferred from the Department of Cultural Resources as of July 1, 1995, and who were subject to the State Personnel Act, Chapter 126 of the General Statutes, at the time of the transfer shall continue to be subject to that act. Employees of the Commission who were transferred but were not subject to the State Personnel Act at the time of transfer are not subject to the State Personnel Act. Employees of the Commission who were not transferred are not subject to the State Personnel Act unless the Commission designates the employee's position as subject to the State Personnel Act when the employee is hired. Once designated, a position remains subject to the State Personnel Act unless exempted in accordance with that act. (1995, c. 507, s. 12.6(c).)

### § 143B-131.10. Exceptions.

Notwithstanding G.S. 143-28, the following provisions do not apply to this Part: G.S. 143-16.3 and G.S. 143-23. (1995, c. 507, s. 12.6(c).)

Part 28. Andrew Jackson Historic Memorial Committee.

### § 143B-132. Andrew Jackson Historic Memorial Committee.

(a) The State of North Carolina and its citizens have long noted and recognized the origins and early life of Andrew Jackson, the nation's seventh president, in the Waxhaw region along the North Carolina-South Carolina border. It is important that this State recognize the origins and early life of this outstanding national leader in Western North Carolina. It is necessary to plan an appropriate memorial in Union County, North Carolina, to commemorate and display for all Americans the origins and early life of Andrew Jackson.

(b) There is created an Andrew Jackson Historic Memorial Committee to consist of 12 members, six appointed by the Speaker of the House of Representatives and six appointed by the President Pro Tempore of the Senate. Members shall serve four-year terms. Vacancies shall be filled by the appointing officer for the unexpired term.

(c) The primary duties and responsibilities of the Committee are:

- (1) To assist the Division of Archives and History, Department of Cultural Resources in determining the need for a permanent memorial to honor Andrew Jackson and to commemorate and display the origins and early life of Jackson in the Waxhaw region;
- (2) To assist the Division of Archives and History, Department of Cultural Resources in determining the location, design, content, and form of a memorial, if the Committee determines that one is needed, at one of the sites associated with the early life of Andrew Jackson;
- (3) To assist the Division of Archives and History, Department of Cultural Resources in determining the most appropriate methods for proceeding with the establishment and operation of the memorial, including methods for obtaining the necessary financial resources for property acquisition, capital expenditures, and operational expenses; and
- (4) To select appropriate qualified researchers and research institutions to assist the Committee in undertaking any required studies to complete the Committee's duties and responsibilities.

(d) Members of this Committee may not receive per diem, travel reimbursement, or subsistence allowances.

(e) Administrative and staff services for the Committee shall be provided by the Division of Archives and History, Department of Cultural Resources, which shall also provide the Committee with information in its possession relating to past research concerning the origins and early life of Andrew Jackson. In addition, the Division of Archives and History, Department of Cultural Resources shall assist the Committee in preparing a report for submission to the General Assembly.

(f) Funds for the operation of the Committee shall be provided by the Department of Cultural Resources. (1985, c. 757, s. 180; 1995, c. 490, s. 7.)

## Part 29. Veterans' Memorial Commission.

### § 143B-133. Commission established.

(a) There is created within the Department of Cultural Resources the Veterans' Memorial Commission.

(b) The Veterans' Memorial Commission shall consist of 15 members, none of whom shall be members of the North Carolina General Assembly. The appointments shall be made as follows:

- (1) Five persons shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121.
- (2) Five persons shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121.
- (3) Five persons shall be appointed by the Governor.

Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. Other vacancies in appointive terms shall be filled by appointment by the Governor.

(c) The members of the Commission shall serve for the life of the Commission.

(d) The members of the Commission shall receive necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

(e) The majority of the Commission shall constitute a quorum for the transaction of business.

(f) The members of the Commission shall select a chairman and vice-chairman.

(g) The Commission shall meet at least once during each calendar quarter upon the call of the chairman. The initial meeting shall be called by the Secretary of Cultural Resources to be held no later than August 31, 1987.

(h) The Department of Cultural Resources shall provide administrative and support staff to the Commission to assist it in performing its duties.

(i) The Commission shall terminate and this Part expire upon dedication of the monument. (1987, c. 779, s. 1; 1995, c. 490, s. 62.)

### § 143B-133.1. Powers of Commission.

(a) The Commission shall cause to be erected on the Capitol Grounds a monument to the veterans of World War I, World War II, and the Korean War.

(b) The Commission may, in its discretion, hire any person or persons to design, construct, and erect the monument, and shall choose its location on the Capitol Grounds, in accordance with the review procedures of the North Carolina Historical Commission as set forth in Chapter 100 of the General

Statutes, and without regard to Article 8 of Chapter 143 of the General Statutes, G.S. 143B-373, or G.S. 147-12(12).

(c) Further, when a designer is selected and awarded a contract by the Commission to construct and erect the memorial, the Commission shall so advise, in writing, the Office of State Budget and Management of the total amount of the contract, a schedule of payments to be executed, if required, including any particular conditions upon which final acceptance of the Memorial and payment to the designer shall be made. Upon receipt of this document, the Office of State Budget and Management shall cause disbursements to be made from the Reserve established by Section 3 of Chapter 971, Session Laws of 1983, in accordance with the Commission's contractual obligations. (1987, c. 779, s. 1; 2000-140, s. 93.1(a); 2001-424, s. 12.2(b).)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-140, s. 93.1, effective July 1, 2000, substi-

tuted "Office of State Budget, Planning, and Management" for "Office of State Budget and Management" twice in subsection (c).

Session Laws 2001-424, s. 12.2(b), effective July 1, 2001, substituted "Office of State Budget and Management" for "Office of State Budget, Planning, and Management" in two places in subsection (c).

§§ 143B-134, 143B-135: Reserved for future codification purposes.

### ARTICLE 3.

#### *Department of Health and Human Services.*

##### Part 1. General Provisions.

§ 143B-136: Repealed by Session Laws 1997-443, s. 11A.2.

#### § 143B-136.1. Department of Health and Human Services — creation.

There is created a department to be known as the "Department of Health and Human Services," with the organization, duties, functions, and powers defined in this Article and other applicable provisions of law. (1997-443, s. 11A.3.)

**Editor's Note.** — Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 1997-443, s. 11A.120, provides that references in the Session Laws to any department, division, or other agency that is transferred by that Part of the act shall be considered to refer to the successor department, division, or other agency. Every Session Law that refers to any department, division, or other agency to which that Part applies that

relates to any power, duty, function, or obligation of any department, division, or agency and that continues in effect after that Part shall be construed so as to be consistent with that Part.

Session Laws 1997-443, s. 11A.124 provides all statutory authority, powers, duties, functions, records, personnel, property, and unexpended balances of appropriations or other funds of any agency which are transferred pursuant to this Part shall be transferred in their entirety.

Session Laws 1997-443, s. 11A.125 provides unless specifically provided to the contrary or unless a contrary intent is clear from the context, any official designation of any agency transferred by this Part as the State agency for

any function, including specifically purposes of federal programs, shall be considered to be a designation of the successor agency.

Session Laws 1997-443, s. 11A.126 provides no later than 30 days after the effective date of this part, the Department of Health and Human Services and the Department of Environment and Natural Resources shall enter into a Memorandum of Agreement that provides for coordination between the departments as to any functions shared by the departments as a result of the passage of this Part. This Memorandum shall require that the Department of Environment and Natural Resources provide staff to the Commission for Health Services for the Commission's duties under Articles 8, 9, 10, and 12 of Chapter 130A of the General Statutes. Until a Memorandum of Agreement has been entered into by the departments, the Department of Health and Human Services shall provide all clerical and other services required by the Commission for Health Services.

Session Laws 1997-443, s. 11A.129, as amended by Session Laws 1998-76, s. 3, provides that the Secretary of Health and Human Services may reorganize the Department of Health and Human Services in accordance with this section and shall report as required, and that by February 1, 1999, the Department shall report to the Joint Legislative Commission on Governmental Operations or to the General Assembly on incorporating health functions and agencies into the Department, on additional changes, on proposed changes in boards and commissions, and on rule changes.

Session Laws 1997-443, s. 11A.130, provides that Part XIA of that act becomes effective when the act becomes law (August 28, 1997), but for purposes of budget and financial records, s. 11A.130 becomes effective July 1, 1997, and that the Department by agreement and at the direction of the Office of State Budget and Management shall undertake certification, revisions, and transfer of budget funds and financial records so that State fiscal year financial records, reports, and accounting are maintained as if Part had become effective July 1, 1997.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Acts of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Consolidation of Department Offices.** —

Session Laws 2001-424, ss. 21.1(a) to (c), provided: "(a) The Department of Health and Human Services shall consolidate its regional, district, field, and satellite offices located throughout the State. The Department shall implement these consolidations no later than June 30, 2002. The Department shall provide the following information:

"(1) An inventory of all its regional, district, field, and satellite offices located throughout the State before the consolidation required in this section [s. 21.1 of Session Laws 2001-424]. This inventory shall include the purpose of the office (direct services or central location for field staff), the number of staff assigned to the office, the cost of operating the office, and information on whether the office is co-located or located near another regional, district, field, or satellite office;

"(2) An inventory of all its regional, district, field, and satellite offices located throughout the State after the consolidation required in this section [s. 21.1 of Session Laws 2001-424] is completed. This inventory shall include the purpose of the office (direct services or central location for field staff), the number of staff assigned to the office, the cost of operating the office, and information on whether the office is co-located or located near another regional, district, field, or satellite office;

"(3) A report on the anticipated impact of the consolidation required by this section [s. 21.1 of Session Laws 2001-424] on the delivery of services;

"(4) A report on the use of technology to comply with the consolidation required under this section [s. 21.1 of Session Laws 2001-424] to increase the number of staff working from their homes or other locations; and

"(5) A report on the anticipated cost savings, efficiencies in the use of State staff and resources, and improved delivery of services resulting from the consolidation required under this section [s. 21.1 of Session Laws 2001-424].

"(b) The Department of Health and Human Services shall conduct an inventory of all offices located in Wake County. This inventory shall include the purpose of the office, the number of staff assigned to the office, the cost of operating the office, information on whether the office is co-located or located near another related office, and information on whether the office could be moved to another area of the State.

"(c) The Department of Health and Human Services shall provide an interim report on the activities required under this section [s. 21.1 of Session Laws 2001-424] by January 1, 2002, and a final report by July 1, 2002. The interim and final reports shall be provided 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.”

**Centralization of Department Activities.**

— Session Laws 2001-424, s. 21.2, provides: “The Department of Health and Human Services shall centralize all activities throughout the Department relating to the coordination and processing of criminal record checks required by law. The centralization shall include the transfer of positions, corresponding State appropriations, federal funds, and other funds. The Department shall report on the centralization of criminal record check activities 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 not later than January 1, 2002.”

**Department of Phone Lines.**

— Session Laws 2001-424, ss. 21.5(a) and (b), provide: “(a) The Department of Health and Human Services shall determine the feasibility of combining all Department-operated and contracted toll-free (1-8xx) phone lines to create efficiencies. An inventory of all resource telephone lines throughout Divisions of the Department shall be conducted and an evaluation completed of potential savings in combining these phone lines. In conducting the inventory, the Department shall identify the following:

- “(1) Title and purpose of the phone line.
- “(2) Type of information provided to callers.
- “(3) Budget of the operations.
- “(4) Number of staff (phone agents, other).
- “(5) Number of calls received annually to each phone line.

- “(6) Contracts.

“The Department shall project costs for the new combined phone line and prepare a comprehensive cost-benefit analysis on the new consolidated plan compared with current services.

“(b) The Department shall submit a progress report on the feasibility study to the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Information Technology, and the House of Representatives Appropriations Subcommittee on Information Technology no later than December 1, 2001, and a final report by April 1, 2002.”

**Prescription Drug System.**

— Session Laws 2001-424, ss. 21.6(a) to (d), as amended by Session Laws 2001-513, s. 20, provides: “(a) Of the funds appropriated in this act [Session Laws 2001-424] to the Department of Health and Human Services, the sum of two hundred thousand dollars (\$200,000) for the 2001-2002 fiscal year and the sum of two hundred thousand dollars (\$200,000) for the 2002-2003 fiscal year shall be used to initiate the development

of a system to assist eligible individuals in obtaining prescription drugs at no cost through pharmaceutical company programs. The system will be designed to minimize the efforts of patients and their health care providers in securing needed drugs. The required patient and health care provider data will be maintained and orders tracked in order to initiate timely reorders of needed drugs to assure continuity of medication intake. The Department may contract with a private nonprofit organization to assist in the development of the system as provided under this section.

“(b) The development of the system shall be jointly managed by the Office of Research, Demonstrations and Rural Health Development and the Office of Pharmacy Services, Division of Public Health.

“(c) The Department shall work with pharmaceutical companies in obtaining access to company applications for assistance and making those applications available to the general public. The Department shall ensure that pharmaceutical company programs are registered with the Department and shall obtain the application forms of each pharmaceutical program.

“(d) The Department shall report on the implementation of this section [s. 21.6 of Session Laws 2001-424] on January 1, 2002, April 1, 2002, and October 1, 2002, 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.”

**Information Technology Project.**

— Session Laws 2001-424, ss. 21.17(a) and (b), provide: “(a) Notwithstanding any other provision of law to the contrary, the Department of Health and Human Services may establish special time-limited positions in the Division of Information Research Management for an information technology project to maximize efficiencies in the preparation for and implementation of federal requirements of the medical records privacy standards under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Positions established are not permanent positions, not subject to the State Personnel Act under G.S. 126-1.1, and not subject to the State salary schedule.

“(b) Positions established pursuant to this section [s. 21.17 of Session Laws 2001-424] may commence no earlier than July 1, 2001, and shall expire June 30, 2003.”

**Centralized Contracts System.**

— Session Laws 2001-424, s. 21.18B, provides: “The Department of Health and Human Services shall implement a centralized contracts system. The Department shall develop and implement consistent policies and procedures for the development and execution of contracts. The system shall include, where feasible and appropriate,

the transfer of positions, corresponding State appropriations, federal funds, and other funds. The Department shall not enter into new contracts for database management until the centralized contracts system required under this section [s. 21.18B of Session Laws 2001-424] has been implemented and the Department has complied with the requirements of Section 21.93 of this act [s. 21.93 of Session Laws 2001-424, which provides for centralization of statistical management and analysis functions].”

**Family Support Coordination.** — Session Laws 2001-424, s. 21.18C, provides: “The Department of Health and Human Services shall coordinate all family support contracts and activities across divisions. This coordination shall address duplication, cost efficiency, and effectiveness and shall ensure compliance with federal requirements while maximizing State and federal resources.”

**HIV/AIDS Programs.** — Session Laws 2001-424, ss. 21.18D (a) to (d), provide: “(a) It is the intention of the General Assembly to focus current resources and activities to strengthen and enhance prevention and intervention programs directed at the reduction of HIV/AIDS. The Department shall coordinate efforts to enhance awareness, education, and outreach with the North Carolina AIDS Advisory Council, North Carolina Minority Health Advisory Council, representatives of faith communities, representatives of nonprofit agencies, and other State agencies.

“(b) The Department of Health and Human Services shall coordinate and ensure the implementation of developmentally appropriate education, awareness, and outreach campaigns to comply with subsection (a) [s. 21.18D(a) of Session Laws 2001-424] in the following programs and services:

“(1) Division of Social Services programs and services:

“a. Domestic Violence Prevention and Awareness.

“b. Domestic Violence Services for Work First Families.

“c. After School Services for At Risk Children.

“d. Work First Boys/Girls Clubs.

“(2) Division of Mental Health, Developmental Disabilities, and Substance Abuse Services programs and services:

“a. Substance Abuse Services for Juveniles.

“b. Residential Substance Abuse Services for Women and Children.

“(3) Division of Public Health programs and services:

“a. Teen Pregnancy Prevention Activities.

“b. Out-of-Wedlock Births.

“c. School Health Program.

“d. High-Risk Maternity Clinic Services.

“e. Perinatal Education and Training.

“f. Public Information and Education.

“g. Technical Assistance to Local Health Departments.

“(4) Other divisions, services, and programs:

“a. Family Support Services.

“b. Family Resource Centers.

“c. Independent Living Services.

“d. Residential schools and facilities.

“e. Other programs, services, or contracts that provide education and awareness services to children and families.

“(c) Other State agencies, including the Department of Public Instruction, the Department of Juvenile Justice and Delinquency Prevention, and the Department of Administration, shall ensure the incorporation of developmentally appropriate HIV/AIDS education, awareness, and outreach information into their programs.

“(d) The Department shall report on the implementation of this section [s. 21.18D of Session Laws 2001-424] on March 15, 2002, 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.”

**Acute Care and Long-Term Care Expenditures.** — Session Laws 2001-424, s. 21.19(q), provides: “The Department of Health and Human Services shall submit a quarterly status report on expenditures for acute care and long-term care services to the Fiscal Research Division and to the Office of State Budget and Management. This report shall include an analysis of budgeted versus actual expenditures for eligibles by category and for long-term care beds. In addition, the Department shall revise the program’s projected spending for the current fiscal year and the estimated spending for the subsequent fiscal year on a quarterly basis. The quarterly expenditure report and the revised forecast shall be forwarded to the Fiscal Research Division and to the Office of State Budget and Management no later than the third Thursday of the month following the end of each quarter.”

**Division of Early Intervention and Education.** — Session Laws 2001-424, ss. 21.80(b) to (f), provide: “(b) The Division of Early Intervention and Education is dissolved and an Office of Education Services is created within the Department of Health and Human Services. The purpose of this office is to manage the Schools for the Deaf, the Governor Morehead School for the Blind, and their preschool components. The Office shall have a Superintendent and appropriate staff to manage these schools. The purpose of the Office is to improve student academic and postsecondary outcomes and to strengthen collaborative relationships with local education agencies and with the State Board of Education.

“(c) The Early Intervention program, includ-

ing all positions and the corresponding State appropriations, federal funds, and other funds that were in the Early Intervention program as of January 1, 2001, are transferred from the Division of Early Intervention and Education to the Division of Public Health, Women's and Children's Health Section.

"(d) The Developmental Evaluation Centers, including all positions and the corresponding State appropriations, federal funds, and other funds, are transferred from the Division of Early Intervention and Education to the Division of Public Health, Women's and Children's Health Section.

"(e) The Governor Morehead School preschool program, including all positions and the corresponding State appropriations, federal funds, and other funds, is transferred from the Division of Early Intervention and Education to the Governor Morehead School."

"(f) The Department of Health and Human Services shall make the necessary organization changes effective immediately and the budget adjustments by October 1, 2001."

**Reorganization of Division of Mental Health, Developmental Disabilities, and Substance Abuse Services.** — Session Laws 2001-424, ss. 21.64(a) to (c) provide for the Reorganization of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services so as to reduce layers of management and duplication of services. The Department is to study the feasibility of consolidating its staff, responsibilities, and resources

around the functional areas of need of its clients regardless of disability. These functional areas shall include housing services and supports, supported employment, local crisis services, and capacity development. The Department is to report its progress in complying with s. 21.64 on or before November 1, 2001, and December 1, 2001, with a final report to be submitted on or before April 15, 2002.

**Streamling of Division of Child Development.** — Session Laws 2001-424, s. 21.74, provides: "The Department of Health and Human Services, Division of Child Development shall reduce layers of management and streamline operations in accordance with the following:

"(1) Eliminate the Workforce Support and Consumer Outreach Section, including positions and corresponding State appropriations, federal funds, and other funds. Except that the Workforce Support, Criminal Records Checks, and the Work Force Unit-Quality Improvement Units shall be transferred to the Administration Section, including positions and corresponding State appropriations, federal funds, and other funds.

"(2) Eliminate the Program Integrity and Quality Assurance Section including positions and corresponding State appropriations, federal funds, and other funds.

"(3) Eliminate the Research and Policy Unit including positions and corresponding State appropriations, federal funds, and other funds."

## § 143B-137: Repealed by Session Laws 1997-443, s. 11A.2.

**Editor's Note.** — Session Laws 2000-67, s. 11.23(b), as amended by Session Laws 2000-138, s. 15.1, provides: "The Department, in consultation with the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services, shall study whether a new division of developmental disabilities should be established in the Department. Not later than Jan-

uary 1, 2001, the Department shall report its findings and recommendations to the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Senate Appropriations Committee on Human Resources.

## § 143B-137.1. Department of Health and Human Services — duties.

It shall be the duty of the Department to provide the necessary management, development of policy, and establishment and enforcement of standards for the provisions of services in the fields of public and mental health and rehabilitation with the intent to assist all citizens — as individuals, families, and communities — to achieve and maintain an adequate level of health, social and economic well-being, and dignity. Whenever possible, the Department shall emphasize preventive measures to avoid or to reduce the need for costly emergency treatments that often result from lack of forethought. The Department shall establish priorities to eliminate those excessive expenses incurred

by the State for lack of adequate funding or careful planning of preventive measures. (1997-443, s. 11A.3.)

**Cross References.** — As to establishment of a Spay/Neuter Program in the Department of Health and Human Services, see § 19A-60 et seq. As to report by the Division of Social Services on the activities of the State Child Fatality Review Team, see § 143B-150.20(h).

**Editor's Note.** — Child Residential Treatment Services Program, Session Laws 2000-67, ss. 11.19(a)-(d), provide: "(a) The Department of Health and Human Services shall establish the Child Residential Treatment Services Program. The Program shall be implemented by the Department in consultation with the Office of Juvenile Justice (now the Department of Juvenile Justice and Delinquency Prevention) and other affected State agencies. The purpose of the Program is to provide appropriate and medically necessary residential treatment alternatives for children at risk of institutionalization or other out-of-home placement. Program funds shall be targeted for non-Medicaid eligible children and may also be used for Medicaid-eligible children. Program funds may also be used to expand the Child Mental Health Systems of Care Project. The Program shall include the following:

"(1) Behavioral health screenings for all children at risk of institutionalization or other out-of-home placement.

"(2) Appropriate and medically necessary residential treatment placements, including placements for youths needing substance abuse treatment services and for specialized populations such as deaf children, children with serious emotional disturbances, and sexually aggressive youth.

"(3) Multidisciplinary case management services, as needed.

"(4) A system of utilization review specific to the nature and design of the Program.

"(5) Mechanisms to ensure that children are not placed in department of social services custody for the purpose of obtaining mental health residential treatment services.

"(6) Mechanisms to maximize current State and local funds and to expand use of Medicaid funds to accomplish the intent of this Program.

"(7) Other appropriate components to accomplish the Program's purpose.

"(8) The Secretary of the Department of Health and Human Services may enter into contracts with residential service providers.

"(b) The Department shall not allocate funds appropriated for Program services until a Memorandum of Agreement has been executed between the Department and other affected State agencies. The Memorandum of Agreement shall address specifically the roles and responsibilities of the various departmental di-

visions and affected State agencies involved in the administration, financing, care, and placement of children at risk of institutionalization or other out-of-home placement. The Department shall not allocate funds appropriated in this act for the Program until Memoranda of Agreement between local departments of social services and area mental health programs, and the Administrative Office of the Courts, and the Office of Juvenile Justice (Department of Juvenile Justice and Delinquency Prevention), as appropriate, are executed to effectuate the purpose of the Program. The Memoranda of Agreement shall address issues pertinent to local implementation of the Program.

"(c) Notwithstanding any other provision of law to the contrary, services under the Child Residential Treatment Services Program are not an entitlement for non-Medicaid eligible children served by the Program.

"(d) The Department of Health and Human Services, in conjunction with the Office of Juvenile Justice (Department of Juvenile Justice and Delinquency Prevention) and other affected agencies, shall report on the following:

"(1) The number and other demographic information of children served.

"(2) The amount and source of funds expended to implement the Program.

"(3) Information regarding the number of children screened, specific placement of children, and treatment needs of children served.

"(4) The average length of stay in residential treatment, transition, and return to home.

"(5) The number of children diverted from institutions or other out-of-home placements such as training schools and State psychiatric hospitals.

"(6) Recommendations on other areas of the Program that need to be improved.

"(7) Other information relevant to successful implementation of the Program.

"The Department shall submit a progress report on implementation of the Program not later than February 1, 2001, and a final report not later than May 1, 2002, to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Human Resources, and the Fiscal Research Division."

Funds for Child and Adolescent Residential Unit at Murdoch Center, Session Laws 2000-67, ss. 11.20(a)-(c), provide: "(a) Of the funds appropriated in this act to the Department of Health and Human Services, Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, the sum of one million two hundred thousand dollars (\$1,200,000)

for the 2000-2001 fiscal year shall be used as follows:

“(1) To develop and operate a six-bed short-term residential unit to meet the needs of autistic children statewide whose behaviors place them at serious risk of institutionalization. The unit shall be developed within the Murdoch Mental Retardation Center and supported by specialized staff within the Murdoch Mental Retardation Center; and

“(2) To develop and operate a four-bed residential program for autistic children statewide whose behaviors place them at serious risk of institutionalization. The program may offer short-term diagnostic/prescriptive services or comprehensive interventions in order to transition children back to their homes and communities. The program shall be developed and supported by staff from the Murdoch Mental Retardation Center.

“(b) Of the funds appropriated in this act to the Department of Health and Human Services, Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, the sum of three hundred twenty-six thousand dollars (\$326,000) for the 2000-2001 fiscal year shall be used to provide residential services for children with autism.

“(c) The Department shall submit progress reports on December 1, 2000, and on April 1, 2001, on its compliance with this section. The Department shall submit a final report on January 1, 2002. The reports shall be submitted to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Human Resources, and the Fiscal Research Division.”

Services to Children at Risk for Institutionalization or Other Out-of-Home Placement.

Session Laws 2000-67, ss. 11.21(a), (b), provide:

“(a) In order to ensure that children at risk for institutionalization or other out-of-home placement are appropriately served by the mental health, developmental disabilities, and substance abuse services system, the Department of Health and Human Services, Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, shall do the following with respect to services provided to these children:

“(1) Provide only those treatment services that are medically necessary.

“(2) Implement utilization review of services provided.

“(3) Effective immediately:

“a. Eliminate formerly court-mandated Willie M. or Eligible Violent and Assaultive Children Program administration, infrastructure, categorical funding designation, and eligibility determination process at the State and local level;

“b. Identify savings realized from elimination of Program administration and infrastructure

at the State and local level;

“c. Adopt the following guiding principles for the provision of services:

“1. Service delivery system must be outcome-oriented and evaluation-based.

“2. Services should be delivered as close as possible to the consumer's home.

“3. Services selected should be those that are most efficient in terms of cost and effectiveness.

“4. Services should not be provided solely for the convenience of the provider or the client.

“5. Families and consumers should be involved in decision making throughout treatment planning and delivery.

“d. Implement all of the following cost reduction strategies:

“1. Preauthorization for all services except emergency services.

“2. Levels of care to assist in the development of treatment plans.

“3. Clinically appropriate services.

“4. State review of individualized service plans for all children served to ensure that service plans focus on delivery of appropriate services rather than optimal treatment and habilitation plans.

“(4) Collaborate with other affected State agencies such as the Office of Juvenile Justice (Department of Juvenile Justice and Delinquency Prevention) and the Administrative Office of the Courts, and with local departments of social services and area mental health programs to eliminate cost-shifting and facilitate cost-sharing among these governmental agencies with respect to the treatment and placement services.

“(b) The Department shall submit a progress report on implementation of this section not later than February 1, 2001, and a final report not later than May 1, 2002, to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Human Resources, and the Fiscal Research Division.”

Services to Multiply-Diagnosed Adults. Session Laws 2000-67, ss. 11.22(a)-(c), provide:

“(a) In order to ensure that multiply-diagnosed adults are appropriately served by the mental health, developmental disabilities, and substance abuse services system, the Department of Health and Human Services, Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, shall do the following with respect to services provided to these adults:

“(1) Provide only those treatment services that are medically necessary.

“(2) Implement utilization review of services provided.

“(3) Effective immediately:

“a. Eliminate formerly court-mandated Thomas S. Program administration, infrastructure, and categorical funding designation at the

local level, while continuing to provide services to former Thomas S. clients and other multiply-diagnosed adults;

"b. Identify savings realized from elimination of Program administration and infrastructure.

"c. Adopt the following guiding principles for the provision of services:

"1. Service delivery system must be outcome oriented and evaluation based.

"2. Services should be delivered as close as possible to the consumer's home.

"3. Services selected should be those that are most efficient in terms of cost and effectiveness.

"4. Services should not be provided solely for the convenience of the provider or the client.

"5. Families and consumers should be involved in decision-making throughout treatment planning and delivery; and

"d. Implement all of the following cost reduction strategies:

"1. Preauthorization for all services except emergency services.

"2. Criteria for determining medical necessity.

"3. Clinically appropriate services.

"4. State review of (i) individualized service plans for all adults served to ensure that service plans focus on delivery of appropriate ser-

vices rather than optimal treatment and habilitation plans, and (ii) staffing patterns of residential services.

"(b) No State funds shall be used for the purchase of single-family or other residential dwellings to house multiply-diagnosed adults.

"(c) The Department shall submit a progress report on implementation of this section not later than February 1, 2001, and a final report not later than May 1, 2002, to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Human Resources, and the Fiscal Research Division."

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

#### CASE NOTES

**Funding for Medically Necessary Abortions.** — Under prior section 143B-137 the action of the General Assembly in placing severe restrictions on the funding of medically necessary abortions for indigent women was

valid and did not violate Article I, Section 1; Article 1, Section 19; or Article XI, Section 4 of the Constitution of North Carolina. *Rosie J. v. North Carolina Dept of Human Resources*, 347 N.C. 247, 491 S.E.2d 535 (1997).

§ 143B-138: Repealed by Session Laws 1997-443, s. 11A.2.

### § 143B-138.1. Department of Health and Human Services — functions and organization.

(a) All functions, powers, duties, and obligations previously vested in the following commissions, boards, councils, committees, or subunits of the Department of Human Resources are transferred to and vested in the Department of Health and Human Services by a Type I transfer, as defined in G.S. 143A-6:

- (1) Division of Aging.
- (2) Division of Services for the Blind.
- (3) Division of Medical Assistance.
- (4) Division of Mental Health, Developmental Disabilities, and Substance Abuse Services.
- (5) Division of Social Services.
- (6) Division of Facility Services.
- (7) Division of Vocational Rehabilitation.
- (8) Repealed by Session Laws 1998-202, s. 4(v), effective January 1, 1999.
- (9) Division of Services for the Deaf and the Blind.
- (10) Office of Economic Opportunity.
- (11) Division of Child Development.

## (12) Office of Rural Health.

(b) All functions, powers, duties, and obligations previously vested in the following commissions, boards, councils, committees, or subunits of the Department of Human Resources are transferred to and vested in the Department of Health and Human Services by a Type II transfer, as defined in G.S. 143A-6:

- (1) Respite Care Program.
- (2) Governor's Advisory Council on Aging.
- (3) Commission for the Blind.
- (4) Professional Advisory Committee.
- (5) Consumer and Advocacy Advisory Committee for the Blind.
- (6) Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services.
- (7) Social Services Commission.
- (8) Child Day Care Commission.
- (9) Medical Care Commission.
- (10) Emergency Medical Services Advisory Council.
- (11) Board of Directors of the Governor Morehead School.
- (12) Board of Directors for the North Carolina Schools for the Deaf.
- (13) North Carolina Council for the Hearing Impaired.
- (14) North Carolina Council on the Holocaust.
- (15) Council on Developmental Disabilities.

(c) The functions, powers, duties, and obligations previously vested in the following commissions, boards, councils, committees, or subunits of the Department of Environment, Health, and Natural Resources are transferred to and vested in the Department of Health and Human Services by a Type I transfer, as defined in G.S. 143A-6:

- (1) Division of Dental Health.
- (2) State Center for Health Statistics.
- (3) Division of Epidemiology.
- (4) Division of Health Promotion.
- (5) Division of Maternal and Child Health.
- (6) Office of Minority Health.
- (7) Office of Public Health Nursing.
- (8) Division of Laboratory Services.
- (9) Office of Local Health Services.
- (10) Division of Postmortem Medicolegal Examinations.
- (11) Office of Women's Health.

(d) All functions, powers, duties, and obligations previously vested in the following commissions, boards, councils, committees, or subunits of the Department of Environment, Health, and Natural Resources are transferred to and vested in the Department of Health and Human Services by a Type II transfer, as defined in G.S. 143A-6:

- (1) Commission for Health Services.
- (2) Council on Sickle Cell Syndrome.
- (3) Governor's Council on Physical Fitness and Health.
- (4) Commission of Anatomy.
- (5) Minority Health Advisory Council.
- (6) Advisory Committee on Cancer Coordination and Control.

(e) The Department of Health and Human Services is vested with all other functions, powers, duties, and obligations as are conferred by the Constitution and laws of this State. (1997-443, s. 11A.3; 1998-202, s. 4(v).)

**Editor's Note.** — Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999.'"

Session Laws 1999-237, s. 11.18, provides that the Bingo Program in the Department of Health and Human Services, Division of Facility Services, and all functions, powers, duties,

and obligations vested in the Department of Health and Human Services for the Bingo Program, are transferred to and vested in the Department of Crime Control and Public Safety by a Type I transfer, as defined in G.S. 143A-6.

Session Laws 1999-237, s. 30.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 30.4, contains a severability clause.

Session Laws 2000-67, s. 14.18(a)-(e), renames the State Energy Conservation Plan as the State Energy Efficiency Program. Effective September 30, 2000, the statutory authority, powers, duties and functions, records, property, funds, etc., of the Residential Energy Conservation Assistance Program in the Energy Division of the Department of Commerce are transferred from the Department of Commerce to the Department of Health and Human Services. Similarly, effective September 30, 2000, the statutory authority, powers, duties and functions, records, property, funds, etc., of the Energy Policy Council and State Energy Efficiency Program in the Energy Division of the Department of Commerce are transferred from the Department of Commerce to the Department of Administration. Effective July 1, 2000, all vacant positions in the Energy Division of the Department of Commerce are abolished.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

**Office of Policy and Planning.** — Session Laws 2001-424, s. 21.14(a), provides: "(a) It is the intent of the General Assembly that the Department of Health and Human Services provide coordinated policy development and strategic planning for the State's health and human services systems. The Department is directed to establish an Office of Policy and Planning within the Office of the Secretary from existing resources across the Department. The Director of the Office of Policy and Planning shall report directly to the Secretary and shall have the following responsibilities:

"(1) Coordinate the development of departmental policies, plans, and rules, in consultation with the Divisions of the Department.

"(2) Development of a departmental process for the development and implementation of new policies, plans, and rules.

"(3) Development of a departmental process for the review of existing policies, plans, and rules to ensure that departmental policies, plans, and rules are relevant.

"(4) Coordination and review of all departmental policies before dissemination to ensure that all policies are well-coordinated within and across all programs.

"(5) Implementation of ongoing strategic planning that integrates budget, personnel, and resources with the mission and operational goals of the Department.

"(6) Review, disseminate, monitor, and evaluate best practice models."

Session Laws 2001-424, s. 21.14(b), as amended by Session Laws 2001-487, s. 110, provides: "(b) Under the direction of the Secretary of Health and Human Services, the Director of the Office of Policy and Planning shall have the authority to direct Divisions, offices, and programs within the Department to conduct periodic reviews of policies, plans, and rules and shall advise the Secretary when it is determined to be appropriate or necessary to modify, amend, and repeal departmental policies, plans, and rules. All professional and supervisory employees in policy and management positions within the Office of Policy and Planning are exempt from Chapter 126 of the General Statutes except for Articles 6, 7, and 14 of that Chapter. Exempt positions within the Office of Policy and Planning shall not count toward the exempt position totals authorized by G.S. 126-5(d)(1)."

Session Laws 2001-424, s. 21.14(c), provides: "(c) The Department shall report on the establishment of the Office of Policy and Planning to the members of 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, 2002."

**Intervention Services Unit.** — Session Laws 2001-424, s. 21.18A, provides: "There is created in the Department of Health and Human Services the Intervention Services Unit in the Office of the Secretary. The Unit shall be responsible for planning, research, monitoring, and data analysis for the purpose of enhancing coordination among programs and activities related to intervention services. Services to be coordinated include mental health, developmental disabilities, and substance abuse services, social services, public health, preschool education services, and Smart Start services. The Unit shall work closely and collaboratively with the divisions through which such programs and activities operate."

**Section of Financial Management and**

**Support.** — Session Laws 2001-424, ss. 21.91(a) to (c), provide: “(a) The Department of Health and Human Services shall reduce layers of management and streamline operations by creating a Section of Financial Management and Support. The Department shall consolidate all budgeting, purchasing, contract oversight, and computer networking personnel into this section. The Department shall transfer all positions, corresponding State appropriations, federal funds, and other related funds into this section. At no time shall the Department allow the Division of Public Health to maintain nonprogram positions within the other sections of the Division.

“(b) The Department shall establish a new permanent full-time position in the Division of Public Health for Local Health Services section chief. The Department shall not contract for this position.

“(c) Not later than December 1, 2001, the Department shall report to the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropria-

tions Subcommittee on Health and Human Services, and the Fiscal Research Division on the reorganization activities required under this section [s. 21.91 of Session Laws 2001-424].”

Session Laws 2001-424, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Acts of 2001’.”

Session Laws 2001-424, s. 36.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium.”

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — The 1998 amendment, effective January 1, 1999, and applicable to acts committed on or after that date, repealed subdivision (a)(8), which read “Division of Youth Services”.

#### CASE NOTES

**Funding for Medically Necessary Abortions.** — Under prior section 143B-137 the action of the General Assembly in placing severe restrictions on the funding of medically necessary abortions for indigent women was valid and did not violate Article I, Section 1; Article 1, Section 19; or Article XI, Section 4 of

the Constitution of North Carolina. *Rosie J. v. North Carolina Dep’t of Human Resources*, 347 N.C. 247, 491 S.E.2d 535 (1997).

**Cited** in *Dialysis Care of N.C., LLC v. Department of Health & Human Servs.*, 137 N.C. App. 638, 529 S.E.2d 257 (2000), *aff’d*, 353 N.C. 258, 538 S.E.2d 566 (2000).

### § 143B-139. Department of Health and Human Services — head.

The Secretary of Health and Human Services shall be the head of the Department. (1973, c. 476, s. 120; 1997-443, s. 11A.122.)

#### § 143B-139.1. Secretary of Health and Human Services to adopt rules applicable to local health and human services agencies.

The Secretary of the Department of Health and Human Services may adopt rules applicable to local health and human services agencies for the purpose of program evaluation, fiscal audits, and collection of third-party payments. (1975, c. 875, s. 45; 1997-443, s. 11A.101.)

#### § 143B-139.2. Secretary of Health and Human Services requests for grants-in-aid from non-State agencies.

It is the intent of this General Assembly that non-State health and human services agencies submit their appropriation requests for grants-in-aid through the Secretary of the Department of Health and Human Services for recommendations to the Governor and the Advisory Budget Commission and

the General Assembly, and that agencies receiving these grants, at the request of the Secretary of the Department of Health and Human Services, provide a postaudit of their operations that has been done by a certified public accountant. (1975, c. 875, s. 16; 1989, c. 727, s. 173; 1997-443, s. 11A.102.)

### § 143B-139.3. Department of Health and Human Services — authority to contract with other entities.

(a) The Department of Health and Human Services is authorized to contract with any governmental agency, person, association, or corporation for the accomplishment of its duties and responsibilities provided that the expenditure of funds pursuant to such contracts shall be for the purposes for which the funds were appropriated and is not otherwise prohibited by law.

(b) The Department is authorized to enter into contracts with and to act as intermediary between any federal government agency and any county of this State for the purpose of assisting the county to recover monies expended by a county-funded financial assistance program; and, as a condition of such assistance, the county shall agree to hold and save harmless the Department against any claims, loss, or expense which the Department might incur under the contracts by reason of any erroneous, unlawful, or tortious act or omission of the county or its officials, agents, or employees. (1979, 2nd Sess., c. 1094, s. 1; 1983, c. 13; 1997-443, s. 11A.118(a).)

**Editor's Note.** — Session Laws 1979, 2nd Sess., c. 1094, which enacted present subsection (a) of this section, provided in s. 6: "This act is effective upon ratification. All contracts which would be permissible under this act which were entered into on or after April 20, 1979, are hereby validated." The act was ratified June 17, 1980.

The preamble to Session Laws 1979, 2nd Sess., c. 1094, cited as the reason for the enactment the case of *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1979), requiring statutory authority for third party contracts.

Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1998-99 fiscal year."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Session Laws 1998-212, s. 12.51, provides: "(a) The Department of Health and Human Services, Division of Epidemiology, shall continue the practice of contracting with community-based organizations, local health departments, and other entities to provide services to high-risk individuals. Contracts shall require quarterly reports to the Department on the entity's use of funds, number of clients served under the contract, details on program expenditures, and any other information needed by

the Department to enable it to evaluate the efficiency and effectiveness of the entity's use of funds and provision of services. Effective January 1, 1999, entities under contract with the Department shall provide to the Department, at least annually, a copy of the entity's financial statement and most recent audit report.

"(a1) If the entity with which the Department of Health and Human Services contracts in accordance with subsection (a) of this section is a nonprofit organization, then the entity shall also provide the same quarterly report to the appropriate local health department.

"(b) The Department of Health and Human Services shall adopt standards for the annual evaluation and certification of entities with which the Department contracts under this section. The evaluation and certification standards shall provide sanctions, including discontinuing of funding, for an entity's failure to comply with DHHS standards and State law. The Department shall adopt the standards not later than April 1, 1999, and the standards shall apply to contracts entered into on and after January 1, 2000.

"(c) The Department of Health and Human Services shall report to the House Appropriations Subcommittee on Human Resources and the Senate Appropriations Committee on Human Resources no later than May 1, 1999, on the standards adopted, on entities currently under contract with DHHS, and on those entities' experience in providing effective and efficient services under contract with the Department.

"(d) Effective January 1, 2000, the Department of Health and Human Services shall not

allocate HIV Prevention Funds to any entity unless the entity has met the certification standards adopted by the Department.”

Session Laws 1998-212, s. 12.52, provides: “(a) The Department of Health and Human Services, Division of Women’s and Children’s Health, shall develop and implement strategies to improve accountability in the Immunization Program. The Division shall examine and report on the following options for improving Program accountability:

“(1) Enhancing the current doses administered reporting system;

“(2) Converting to a vaccine replacement system;

“(3) Collecting child-specific immunization and Program eligibility information;

“(4) Expediting implementation of the North Carolina Immunization Registry;

“(5) Conducting site visits to twenty percent (20%) of private providers annually;

“(6) Sanctioning providers who fail to comply with Program requirements;

“(7) Identifying means to verify and reduce wastage;

“(8) Other options that will improve Program accountability.

“The Department shall submit its report to the members of the House of Representatives Appropriations Subcommittee on Human Resources and the Senate Appropriations Committee on Human Resources not later than April 1, 1999. This report shall include the Division’s recommendations for improving Program accountability and shall identify the resources required to implement these recommendations and to meet State and federal program reporting requirements.

“(b) The Department of Health and Human Services shall study the feasibility of changing the vaccine distribution system such that private providers obtain vaccines from the local health department. The study shall include the method that would be used to enable local

health departments to obtain sufficient quantities of vaccine, and cost-savings that could be realized in changing from a centralized vaccine distributions system to a decentralized system. The Department shall report its findings and recommendations to the members of the House of Representatives Appropriations Subcommittee on Human Resources and the Senate Appropriations Committee on Human Resources not later than April 1, 1999.

“(c) So that greater compliance and accountability by immunization program providers may be achieved as quickly as possible, the Commission for Health Services may adopt temporary rules to impose upon immunization program providers reasonable reporting requirements with respect to immunization activities and appropriate sanctions for failure to comply. The Division of Women’s and Children’s Health shall include in its report required under subsection (a) of this section requirements imposed under the temporary rules and information on provider compliance.

“(d) Effective March 1, 1999, the Division shall require as part of agreements with immunization program providers that the provider pay the cost of vaccine provided to replace vaccine provided under the program that has been wasted by the provider due to the provider’s failure to properly store, handle, or rotate vaccine inventory. The Division shall develop and make available to program providers guidelines and technical assistance for the proper storage, handling, and rotation of vaccine inventory. Not later than January 1, 1999, the Division shall notify all immunization program providers that providers shall be required to pay the cost of vaccine provided to replace vaccine wasted due to provider negligence in the storage, handling, or rotation of inventory. Funds received from providers shall be retained by the Division and used to provide technical assistance to providers and to enhance overall program efficiency.”

#### **§ 143B-139.4. Department of Health and Human Services; authority to assist private nonprofit organizations.**

(a) The Secretary of the Department of Health and Human Services may allow employees of the Department or provide other appropriate services to assist any private nonprofit organization which works directly with services or programs of the Department and whose sole purpose is to support the services and programs of the Department. Except as provided in G.S. 143B-164.18, a Department employee shall be allowed to work with an organization no more than 20 hours in any one month. These services are not subject to the provisions of Chapter 150B of the General Statutes.

(b) The board of directors of each private, nonprofit organization shall secure and pay for the services of the State Auditor’s Office or employ a certified public accountant to conduct an annual audit of the financial accounts of the organization. The board of directors shall transmit to the Secretary of

the Department a copy of the annual financial audit report of the private nonprofit organization.

(c) Notwithstanding the limitations of subsection (a) of this section, the Secretary of the Department of Health and Human Services may assign employees of the Office of Rural Health and Resource Development to serve as in-kind match to nonprofit organizations working to establish health care programs that will improve health care access while controlling costs. (1987, c. 634, s. 1; 1997-443, s. 11A.118(a); 1999-237, s. 11.3; 2001-412, s. 3.)

**Editor's Note.** — Session Laws 1997-443, s. 11.13, provides: "Notwithstanding the limitations of G.S. 143B-139.4, the Secretary of the Department of Human Resources may assign employees of the Office of Rural Health and Resource Development to serve as in-kind match to nonprofit corporations working to establish health care programs that will improve health care access while controlling costs." For similar prior provisions, see Session Laws 1995, c. 324, s. 23.1.

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.4, contains a severability clause.

**Effect of Amendments.** — Session Laws 1999-237, s. 11.3, effective July 1, 1999, substituted "organizations" for "foundations" in the catchline; designated the former first paragraph as subsection (a) and therein substituted "organization" for "foundation" in the first sentence and substituted "an organization" for "a foundation" in the second sentence; designated the former second paragraph as subsection (b) and therein substituted "organization" for "foundation" in three places; and added subsection (c).

Session Laws 2001-412, s. 3, effective September 14, 2001, inserted "Except as provided in G.S. 143B-164.18" at the beginning of the second sentence of subsection (a), and substituted "twenty" for "20" in that sentence.

### § 143B-139.5. Department of Health and Human Services; adult care State/county share of costs.

State funds available to the Department of Health and Human Services shall pay fifty percent (50%), and the counties shall pay fifty percent (50%) of the authorized rates for care in adult care homes including area mental health agency-operated or contracted-group homes. (1991, c. 689, s. 128; 1995, c. 535, s. 31; 1997-443, s. 11A.118(a).)

### § 143B-139.5A. Collaboration between Division of Social Services and Commission of Indian Affairs on Indian Child Welfare Issues.

The Division of Social Services, Department of Health and Human Services, shall work in collaboration with the Commission of Indian Affairs, Department of Administration, and the North Carolina Directors of Social Services Association to develop, in a manner consistent with federal law, an effective process through which the following can be accomplished:

- (1) Establishment of a relationship between the Division of Social Services and the Indian tribes set forth in G.S. 143B-407(a), either separately or through a central entity, that will enable these tribes, in general, and tribal councils or other tribal organizations, in particular, to receive reasonable notice of identified Indian children who are being placed in foster care or adoption or who otherwise enter the child protective services system, and to be consulted on policies and

other matters pertinent to placement of Indian children in foster care or adoption.

- (2) Agreement on a process by which North Carolina Indians might be identified and recruited for purposes of becoming foster care and adoptive parents.
- (3) Agreement on a process by which the cultural, social, and historical perspective and significance associated with Indian life may be taught to appropriate child welfare workers and to foster and adoptive parents.
- (4) Identification or formation of Indian child welfare advocacy, placement and training entities with which the Department of Health and Human Services might contract or otherwise form partnerships for the purpose of implementing the provisions of this act.
- (5) Development of a valid and reliable process through which Indian children within the child welfare system can be identified.
- (6) Identify the appropriate roles of the State and of Indian tribes, organizations and agencies to ensure successful means for securing the best interests of Indian children. (2001-309, s. 1.)

**Editor's Note.** — Session Laws 2001-309, s. 2, made this section effective July 27, 2001. The section was codified as § 143B-139.5A at the direction of the Revisor of Statutes.

### **§ 143B-139.5B. Department of Health and Human Services — provision for joint training.**

The Department of Health and Human Services shall offer joint training of Division of Facility Services consultants, county DSS adult home specialists, and adult care home providers. The training shall be offered no fewer than two times per year, and subject matter of the training should be based on one or more of the 10 deficiencies cited most frequently in the State during the immediately preceding calendar year. The joint training shall be designed to reduce inconsistencies experienced by providers in the survey process, to increase objectivity by DFS consultants and DSS specialists in conducting surveys, and to promote a higher degree of understanding between facility staff and DFS consultants and DSS specialists in what is expected during the survey process. (2001-385, s. 1(c).)

**Editor's Note.** — This section was codified as § 143B-139.5B at the direction of the Revisor of Statutes.

### **§ 143B-139.6. Confidentiality of records.**

All privileged patient medical records in the possession of the Department of Health and Human Services shall be confidential and shall not be public records pursuant to G.S. 132-1. (1991 (Reg. Sess., 1992), c. 890, s. 20; 1997-443, s. 11A.118(a).)

### **§ 143B-139.6A. (Effective July 1, 2002) Secretary's responsibilities regarding availability of early intervention services.**

The Secretary of the Department of Health and Human Services shall ensure, in cooperation with other appropriate agencies, that all types of early intervention services specified in the "Individuals with Disabilities Education Act" (IDEA), P.L. 102-119, the federal early intervention legislation, are

available to all eligible infants and toddlers and their families to the extent funded by the General Assembly.

The Secretary shall coordinate and facilitate the development and administration of the early intervention system for eligible infants and toddlers and shall assign among the cooperating agencies the responsibility, including financial responsibility, for services. The Secretary shall be advised by the Interagency Coordinating Council for Children from Birth to Five with Disabilities and Their Families, established by G.S. 143B-179.5, and may enter into formal interagency agreements to establish the collaborative relationships with the Department of Public Instruction, other appropriate agencies, and other public and private service providers necessary to administer the system and deliver the services.

The Secretary shall adopt rules to implement the early intervention system, in consultation with all other appropriate agencies. (2001-437, s. 1.20(b).)

**Editor's Note.** — Session Laws 2001-437, s. 4, makes this section effective July 1, 2002.

## Part 1A. Consolidated County Human Services.

### § 143B-139.7. Consolidated county human services funding.

(a) The Secretary of the Department of Health and Human Services shall adopt rules and policies to provide that:

(1) Any dedicated funding streams for local public health services, for social services, and for mental health, developmental disabilities, and substance abuse services may flow to a consolidated county human services agency and the consolidated human services board in the same manner as that for funding nonconsolidated county human services, unless a different manner of allocation is otherwise required by law.

(2) The fiscal accountability and reporting requirements pertaining to local health boards, social services boards, and area mental health authority boards apply to a consolidated human services board.

(b) The Secretary of the Department of Health and Human Services may adopt any other rule or policy required to facilitate the provision of human services by a consolidated county human services agency or a consolidated human services board.

(c) For the purposes of this section, “consolidated county human services agency” means a county human services agency created pursuant to G.S. 153A-77(b). “Consolidated human services board” means a county human services board established pursuant to G.S. 153A-77(b). (1995 (Reg. Sess., 1996), c. 690, s. 1; 1997-443, s. 11A.118(a).)

§ 143B-140: Repealed by Session Laws 1989, c. 727, s. 174.

## Part 2. Board of Human Resources.

§ 143B-141: Repealed by Session Laws 1983, c. 494.

### Part 3. Commission for Health Services.

§§ 143B-142 through 143B-146: Recodified as §§ 130A-29 through 130A-33 by Session Laws 1989, c. 727, s. 175.

#### Part 3A. Education Programs in Residential Schools.

##### § 143B-146.1. Mission of schools; definitions.

(a) It is the intent of the General Assembly that the mission of the residential school community is to challenge with high expectations each child to learn, to achieve, and to fulfill his or her potential.

(b) The following definitions apply in this Part:

- (1) ABC's Program or Program. — The School-Based Management and Accountability Program developed by the State Board.
- (2) Department. — The Department of Health and Human Services.
- (3) Instructional personnel. — Principals, assistant principals, teachers, instructional personnel, instructional support personnel, and teacher assistants employed in a residential school.
- (4) Participating school. — A residential school that is required to participate in the ABC's Program.
- (5) Residential school personnel. — The individuals included in G.S. 143B-146.16(a)(2).
- (6) Schools. — The residential schools under the control of the Secretary.
- (7) Secretary. — The Secretary of Health and Human Services.
- (8) State Board. — The State Board of Education.
- (9) Superintendent. — The individual designated by the Secretary to administer a residential school. (1998-131, s. 5.)

**Editor's Note.** — Session Laws 1998-131, s. 1 provides in part that the Secretary of Health and Human Services shall make changes in the structure and functions of the State residential schools with a view to improving student performance, increasing flexibility and control, and promoting economy and efficiency. The Secretary shall begin with the Governor Morehead School and the three schools for the deaf and may also make changes in the structure and functions of the other residential schools. The Secretary shall consider ways to reorder priorities and place greater emphasis on the basics — reading, communication skills, and mathematics — in the areas of staff development, the State testing program, program accreditation, the use of instructional funds, the instructional program, and other components of the education program offered at the residential schools. The Secretary shall make a preliminary report by November 1, 1998, and a final report by November 1, 1999, on the results of these changes.

Session Laws 1998-131, s. 2, provides in part that effective March 1, 1998, the Secretary of Health and Human Services also shall make changes in the administrative organization of the Department of Health and Human Services and of the Governor Morehead School, the

three schools for the deaf and in his discretion, to additional residential programs. The Secretary shall develop a plan for reducing, eliminating, and/or reorganizing the Department of Health and Human Services and each residential school. A reorganization may include the assignment or reassignment of the Department's duties and functions among divisions and other units, division heads, officers, and employees. The Secretary shall report by December 15, 1998, on the reduction, elimination, and/or reorganization plan it develops.

Session Laws 1998-131, s. 19, made this Part effective July 1, 1998 only if funds are appropriated for the 1998-99 fiscal year to implement this act. The Revisor of Statutes has been informed that funds were appropriated.

Session Laws 1998-131, s. 19 provides that Part 3A of Article 3 of Chapter 143B of the General Statutes, as established in s. 5 of the act (which added § 143B-146.1), applies to kindergarten through eighth grade in the three schools for the deaf and in the Governor Morehead School beginning with the 1999-2000 school year. The Secretary of Health and Human Services, in consultation with the General Assembly and the State Board of Education, shall recommend beginning dates of applicability for the remaining grades in those four

schools and for the other residential schools, particularly those operated by the Division of Youth Services. School improvement plans re-

quired under s. 5 shall be developed during the 1998-99 school year and shall be implemented by the beginning of the 1999-2000 school year.

### § 143B-146.2. ABC's Program in residential schools.

(a) The Governor Morehead School and the schools for the deaf shall participate in the ABC's Program. The Secretary, in consultation with the General Assembly and the State Board, may designate other residential schools that must participate in the ABC's Program. The primary goal of the ABC's Program is to improve student performance. The Program is based upon an accountability, recognition, assistance, and intervention process in order to hold each participating school, its superintendent, and the instructional personnel accountable for improved student performance in that school.

(b) In order to support the participating schools in the implementation of this Program, the State Board, in consultation with the Secretary, shall adopt guidelines, including guidelines to:

- (1) Assist the Secretary and the participating schools in the development and implementation of the ABC's Program.
- (2) Recognize the participating schools that meet or exceed their goals.
- (3) Identify participating schools that are low-performing and assign assistance teams to those schools. The assistance teams should include individuals with expertise in residential schools, individuals with experience in the education of children with disabilities, and others the State Board, in consultation with the Secretary, considers appropriate.
- (4) Enable assistance teams to make appropriate recommendations.

(c) The ABC's Program shall provide increased decision making and parental involvement at the school level with the goal of improving student performance.

(d) Consistent with improving student performance, the Secretary shall provide maximum flexibility to participating schools in the use of funds to enable those schools to accomplish their goals. (1998-131, s. 5; 2001-424, s. 21.81(c).)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Acts of 2001.'"

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, s. 21.81(c), effective July 1, 2001, deleted "three" preceding "schools for the deaf" in the first sentence of subsection (a).

### § 143B-146.3. Annual performance goals.

The ABC's Program shall (i) focus on student performance in the basics of reading, mathematics, and communications skills in elementary and middle schools, (ii) focus on student performance in courses required for graduation and on other measures required by the State Board in the high schools, and (iii) hold participating schools accountable for the educational growth of their students. To those ends, the State Board shall design and implement an accountability system that sets annual performance standards for each participating school in order to measure the growth in performance of the students in each individual school. (1998-131, s. 5.)

### § 143B-146.4. Performance recognition.

(a) The superintendent and instructional personnel assigned to participating schools that achieve or exceed a level of expected growth to be determined

by the State Board are eligible for financial awards in amounts set by the State Board. Participating schools and personnel shall not be required to apply for these awards.

(b) The State Board shall establish a procedure to allocate the funds for these awards. Funds shall become available for expenditure July 1 of each fiscal year. Funds shall remain available until November 30 of the subsequent fiscal year for expenditure for:

(1) Awards to the personnel; or

(2) The purposes authorized in a plan that has been:

a. Developed and voted on by the superintendent and instructional personnel in the same manner that a school improvement plan is approved under G.S. 143B-146.12;

b. Approved by a majority of the personnel who vote on the plan; and

c. Submitted to and approved by the Secretary.

The Secretary shall approve this plan unless the plan involves expenditures of funds that are not for a public purpose or that are otherwise unlawful. (1998-131, s. 5.)

### § 143B-146.5. Identification of low-performing schools.

(a) The State Board shall design and implement a procedure to identify low-performing schools on an annual basis. Low-performing schools are those participating schools in which there is a failure to meet the minimum growth standards, as defined by the State Board, and a majority of students are performing below grade level.

(b) By July 10 of each year, the Secretary shall do a preliminary analysis of test results to determine which participating schools the State Board may identify as low-performing under this section. The Secretary then shall proceed under G.S. 143B-146.7. In addition, within 30 days of the initial identification of a school as low-performing by the Secretary or the State Board, whichever occurs first, the Secretary shall develop a preliminary plan for addressing the needs of that school. Before the Secretary adopts this plan, the Secretary shall make the plan available to the residential school personnel and the parents and guardians of the students of the school, and shall allow for written comments. Within five days of adopting the plan, the Secretary shall submit the plan to the State Board. The State Board shall review the plan expeditiously and, if appropriate, may offer recommendations to modify the plan. The Secretary shall consider any recommendations made by the State Board.

(c) Each identified low-performing school shall provide written notification to the parents of students attending that school. The written notification shall include a statement that the State Board of Education has found that the school has “failed to meet the minimum growth standards, as defined by the State Board, and a majority of students in the school are performing below grade level.” This notification also shall include a description of the steps the school is taking to improve student performance. (1998-131, s. 5.)

**Editor’s Note.** — Subsections (b) and (c) had been enacted as (a1) and (b), respectively, and were redesignated at the direction of the Revisor of Statutes.

### § 143B-146.6. Assistance teams; review by State Board.

(a) The State Board may assign an assistance team to any school identified as low-performing under this Part or to any other school that the State Board determines would benefit from an assistance team. The State Board shall give priority to low-performing schools in which the educational performance of the

students is declining. The Department shall, with the approval of the Secretary, provide staff as needed and requested by an assistance team.

(b) When assigned to an identified low-performing school, an assistance team shall:

- (1) Review and investigate all facets of school operations, including instructional and residential, and assist in developing recommendations for improving student performance at that school.
- (2) Evaluate at least semiannually the superintendent and instructional personnel assigned to the school and make findings and recommendations concerning their performance.
- (3) Collaborate with school staff, the Department, and the Secretary in the design, implementation, and monitoring of a plan that, if fully implemented, can reasonably be expected to alleviate problems and improve student performance at that school.
- (4) Make recommendations as the school develops and implements this plan.
- (5) Review the school's progress.
- (6) Report, as appropriate, to the Secretary, the State Board, and the parents on the school's progress. If an assistance team determines that an accepted school improvement plan developed under G.S. 143B-146.12 is impeding student performance at a school, the team may recommend to the Secretary that he vacate the relevant portions of that plan and direct the school to revise those portions.

(c) If a participating school fails to improve student performance after assistance is provided under this section, the assistance team may recommend that the assistance continue or that the Secretary take further action under G.S. 143B-146.7.

(d) The Secretary, in consultation with the State Board, shall annually review the progress made in identified low-performing schools. (1998-131, s. 5.)

### **§ 143B-146.7. Consequences for personnel at low-performing schools.**

(a) Within 30 days of the initial identification of a school as low-performing, whether by the Secretary under G.S. 143B-146.5(b) or by the State Board under G.S. 143B-146.5(a), the Secretary shall take one of the following actions concerning the school's superintendent: (i) decide whether the superintendent should be retained in the same position, (ii) decide whether the superintendent should be retained in the same position and a plan of remediation should be developed, (iii) decide whether the superintendent should be transferred, or (iv) proceed under the State Personnel Act to dismiss or demote the superintendent. The superintendent may be retained in the same position without a plan for remediation only if the superintendent was in that position for no more than two years before the school is identified as low-performing. The superintendent shall not be transferred to another position unless (i) it is in a superintendent position in which the superintendent previously demonstrated at least two years of success, (ii) there is a plan to evaluate and provide remediation to the superintendent for at least one year following the transfer to assure the superintendent does not impede student performance at the school to which the superintendent is being transferred; and (iii) the parents of the students at the school to which the superintendent is being transferred are notified. The superintendent shall not be transferred to another low-performing school. The Secretary may, at any time, proceed under the State Personnel Act for the dismissal of any superintendent who is assigned to a low-performing school to which an assistance team has been assigned. The Secretary shall proceed under the State Personnel Act for the dismissal of any

superintendent when the Secretary receives from the assistance team assigned to that school two consecutive evaluations that include written findings and recommendations regarding the superintendent's inadequate performance. The Secretary shall order the dismissal of the superintendent if the Secretary determines from available information, including the findings of the assistance team, that the low performance of the school is due to the superintendent's inadequate performance. The Secretary may order the dismissal of the superintendent if (i) the Secretary determines that the school has not made satisfactory improvement after the State Board assigned an assistance team to that school; and (ii) the assistance team makes the recommendation to dismiss the superintendent. The Secretary may order the dismissal of a superintendent before the assistance team assigned to the superintendent's school has evaluated that superintendent if the Secretary determines from other available information that the low performance of the school is due to the superintendent's inadequate performance. The burden of proof is on the superintendent to establish that the factors leading to the school's low performance were not due to the superintendent's inadequate performance. The burden of proof is on the Secretary to establish that the school failed to make satisfactory improvement after an assistance team was assigned to the school. Two consecutive evaluations that include written findings and recommendations regarding that person's inadequate performance from the assistance team are substantial evidence of the inadequate performance of the superintendent. Within 15 days of the Secretary's decision concerning the superintendent, but no later than September 30, the Secretary shall submit to the State Board a written notice of the action taken and the basis for that action.

(b) At any time after the State Board identifies a school as low-performing under this Part, the Secretary shall proceed under G.S. 115C-325(p1) for the dismissal of certificated instructional personnel assigned to that school.

(c) At any time after the State Board identifies a school as low-performing under this Part, the Secretary shall proceed under the State Personnel Act for the dismissal of instructional personnel who are not certificated when the Secretary receives two consecutive evaluations that include written findings and recommendations regarding that person's inadequate performance from the assistance team. These findings and recommendations shall be substantial evidence of the inadequate performance of the instructional personnel. The Secretary may proceed under the State Personnel Act for the dismissal of instructional personnel who are not certificated when: (i) the Secretary determines that the school has failed to make satisfactory improvement after the State Board assigned an assistance team to that school; and (ii) that the assistance team makes the recommendation to dismiss that person for a reason that constitutes just cause for dismissal under the State Personnel Act.

(d) The certificated instructional personnel working in a participating school at the time the school is identified by the State Board as low-performing are subject to G.S. 115C-105.38A.

(e) The Secretary may terminate the contract of a school administrator dismissed under this section. Nothing in this section shall prevent the Secretary from refusing to renew the contract of any person employed in a school identified as low-performing under this Part. (1998-131, s. 5.)

**Editor's Note.** — In subsection (a), the reference to "G.S. 143B-146.5(b)" was substituted for "G.S. 143B-146.5(a1)" at the direction of the Revisor of Statutes.

### § 143B-146.8. Evaluation of certificated personnel and superintendents; action plans; State Board notification.

(a) Annual Evaluations; Low-Performing Schools. — The superintendent shall evaluate at least once each year all certificated personnel assigned to a participating school that has been identified as low-performing but has not received an assistance team. The evaluation shall occur early enough during the school year to provide adequate time for the development and implementation of an action plan if one is recommended under subsection (b) of this section. If the employee is a teacher as defined under G.S. 115C-325(a)(6), either the principal or an assessment team assigned under G.S. 143B-146.9 shall conduct the evaluation. If the employee is a school administrator as defined under G.S. 115C-287.1(a)(3), the superintendent shall conduct the evaluation.

Notwithstanding this subsection or any other law, the principal shall observe at least three times annually, a teacher shall observe at least once annually, and the principal shall evaluate at least once annually, all teachers who have not attained career status. All other employees defined as teachers under G.S. 115C-325(a)(6) who are assigned to participating schools that are not designated as low-performing shall be evaluated annually unless the Secretary adopts rules that allow specified categories of teachers with career status to be evaluated more or less frequently. The Secretary also may adopt rules requiring the annual evaluation of noncertificated personnel. This section shall not be construed to limit the duties and authority of an assistance team assigned to a low-performing school.

The Secretary shall use the State Board's performance standards and criteria unless the Secretary develops an alternative evaluation that is properly validated and that includes standards and criteria similar to those adopted by the State Board. All other provisions of this section shall apply if an evaluation is used other than one adopted by the State Board.

(b) Action Plans. — If a certificated employee receives an unsatisfactory or below standard rating on any function of the evaluation that is related to the employee's instructional duties, the individual or team that conducted the evaluation shall recommend to the superintendent that: (i) the employee receive an action plan designed to improve the employee's performance; or (ii) the superintendent recommend to the Secretary that the employee be dismissed or demoted. The superintendent shall determine whether to develop an action plan or to recommend a dismissal proceeding. The person who evaluated the employee or the employee's supervisor shall develop the action plan unless an assistance team or assessment team conducted the evaluation. If an assistance team or assessment team conducted the evaluation, that team shall develop the action plan in collaboration with the employee's supervisor. Action plans shall be designed to be completed within 90 instructional days or before the beginning of the next school year. The State Board, in consultation with the Secretary, shall develop guidelines that include strategies to assist in evaluating certificated personnel and developing effective action plans within the time allotted under this section. The Secretary may adopt policies for the development and implementation of action plans or professional development plans for personnel who do not require action plans under this section.

(c) Reevaluation. — Upon completion of an action plan under subsection (b) of this section, the superintendent or the assessment team shall evaluate the employee a second time. If on the second evaluation the employee receives one unsatisfactory or more than one below standard rating on any function that is related to the employee's instructional duties, the superintendent shall recommend that the employee be dismissed or demoted under G.S. 115C-325. The

results of the second evaluation shall constitute substantial evidence of the employee's inadequate performance.

(d) State Board Notification. — If the Secretary dismisses an employee for any reason except a reduction in force under G.S. 115C-325(e)(1)l., the Secretary shall notify the State Board of the action, and the State Board annually shall provide to all local boards of education the names of those individuals. If a local board hires one of these individuals, that local board shall proceed under G.S. 115C-333(d).

(e) Civil Immunity. — There shall be no liability for negligence on the part of the Secretary or the State Board, or their employees, arising from any action taken or omission by any of them in carrying out this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection is waived to the extent of indemnification by insurance, indemnification under Articles 31A and 31B of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Article 31 of Chapter 143 of the General Statutes.

(f) Evaluation of Superintendents. — Each year the Secretary or the Secretary's designee shall evaluate the superintendents. (1998-131, s. 5.)

### **§ 143B-146.9. Assessment teams.**

The State Board shall develop guidelines for the Secretary to use to create assessment teams. The Secretary shall assign an assessment team to every low-performing school that has not received an assistance team. The Secretary shall ensure that assessment team members are trained in the proper administration of the employee evaluation used in the participating schools. If service on an assessment team is an additional duty for an employee of a local school administrative unit or an employee of a residential school, the Secretary may pay the employee for that additional work.

Assessment teams shall:

- (1) Conduct evaluations of certificated personnel in low-performing schools;
- (2) Provide technical assistance and training to principals and superintendents who conduct evaluations of certificated personnel;
- (3) Develop action plans for certificated personnel; and
- (4) Assist principals and superintendents in the development and implementation of action plans. (1998-131, s. 5.)

### **§ 143B-146.10. Development of performance standards and criteria for certificated personnel.**

The State Board, in consultation with the Secretary, shall revise and develop uniform performance standards and criteria to be used in evaluating certificated personnel, including school administrators. These standards and criteria shall include improving student achievement, employee skills, and employee knowledge. The standards and criteria for school administrators also shall include building-level gains in student learning and effectiveness in providing for school safety and enforcing student discipline. The Secretary shall develop guidelines for evaluating superintendents. The guidelines shall include criteria for evaluating a superintendent's effectiveness in providing safe schools and enforcing student discipline. (1998-131, s. 5.)

### **§ 143B-146.11. School calendar.**

Each school shall adopt a school calendar that includes a minimum of 180 days and 1,000 hours of instruction covering at least nine calendar months. In

the development of its school calendar, each school shall consult with parents, the residential school personnel, and the local school administrative unit in which that school is located. (1998-131, s. 5.)

### **§ 143B-146.12. Development and approval of school improvement plans.**

(a) In order to improve student performance, each participating school shall develop a school improvement plan that takes into consideration the annual performance goal for that school that is set by the State Board under G.S. 143B-146.3. The superintendent, instructional personnel, and residential life personnel assigned to that school, and a minimum of five parents of children enrolled in the school shall constitute a school improvement team to develop a school improvement plan to improve student performance.

(b) Parents shall be elected by parents of children enrolled in the school in an election conducted by the parent and teacher organization of the school or, if none exists, by the largest organization of parents formed for this purpose. To the extent possible, parents serving on school improvement teams shall reflect the composition of the students enrolled in that school. No more than two parents may be employees of the school. Parental involvement is a critical component of school success and positive student achievement; therefore, it is the intent of the General Assembly that parents, along with teachers, have a substantial role in developing school improvement plans. To this end, school improvement team meetings shall be held at a convenient time to assure substantial parent participation. Parents who are elected to serve on school improvement teams and who are not employees of the school shall receive travel and subsistence expenses in accordance with G.S. 138-5 and, if appropriate, may receive a stipend.

(c) The strategies for improving student performance shall include the following:

- (1) A plan for the use of funds that may be made available to the school by the Secretary to meet the goals for that school under the ABC's Program and to implement the school improvement plan.
- (2) A comprehensive plan to encourage parent involvement.
- (3) A safe school plan designed to provide that the school is safe, secure, and orderly, that there is a climate of respect in the school, and that appropriate personal conduct is a priority for all students and all residential school personnel. This plan shall include components similar to those listed in G.S. 115C-105.47(b).

(d) Support among affected staff members is essential to successful implementation of a school improvement plan to address improved student performance at that school. The superintendent of the school shall present the proposed school improvement plan to all of the instructional personnel assigned to the school for their review and vote. The vote shall be by secret ballot. The superintendent shall submit the school improvement plan to the Secretary only if the proposed school improvement plan has the approval of a majority of the instructional personnel who voted on the plan.

(e) The Secretary shall accept or reject the school improvement plan. The Secretary shall not make any substantive changes in any school improvement plan that the Secretary accepts. If the Secretary rejects a school improvement plan, the Secretary shall state with specificity the reasons for rejecting the plan; the school improvement team may then prepare another plan, present it to the instructional personnel assigned to the school for a vote, and submit it to the Secretary to accept or reject. Within 60 days after the initial submission of the school improvement plan to the Secretary, the Secretary shall accept the plan or shall designate a person to work with the school improvement team to

resolve the disagreements. If there is no resolution within 30 days, then the Secretary may develop a school improvement plan for the school; however, the General Assembly urges the Secretary to utilize the school's proposed school improvement plan to the maximum extent possible when developing this plan.

(f) A school improvement plan shall remain in effect for no more than three years; however, the school improvement team may amend the plan as often as is necessary or appropriate. If, at any time, any part of a school improvement plan becomes unlawful or the Secretary finds that a school improvement plan is impeding student performance at a school, the Secretary may vacate the relevant portion of the plan and may direct the school to revise that portion. The procedures set out in this section shall apply to amendments and revisions to school improvement plans.

(g) Any funds the Secretary makes available to a school to meet the goals for that school under the ABC's Program and to implement the school improvement plan at that school shall be used in accordance with those goals and the school improvement plan.

(h) The Secretary, in consultation with the State Board, shall develop a list of recommended strategies that it determines to be effective which building-level committees may use to establish parent involvement programs designed to meet the specific needs of their schools.

(i) Once developed, the Secretary shall ensure the plan is available and accessible to parents and the school community. (1998-131, s. 5.)

### **§ 143B-146.13. School technology plan.**

(a) No later than December 15, 1998, the Secretary shall develop a school technology plan for the residential schools that meets the requirements of the State school technology plan. In developing a school technology plan, the Secretary is encouraged to coordinate its planning with other agencies of State and local government, including local school administrative units.

The Information Resources Management Commission shall assist the Secretary in developing the parts of the plan related to its technological aspects, to the extent that resources are available to do so. The Department of Public Instruction shall assist the Secretary in developing the instructional and technological aspects of the plan.

The Secretary shall submit the plan that is developed to the Information Resources Management Commission for its evaluation of the parts of the plan related to its technological aspects and to the Department of Public Instruction for its evaluation of the instructional aspects of the plan. The State Board of Education, after consideration of the evaluations of the Information Resources Management Commission and the Department of Public Instruction, shall approve all plans that comply with the requirements of the State school technology plan.

(b) After a plan is approved by the State Board of Education, all funds spent for technology in the residential schools shall be used to implement the school technology plan. (1998-131, s. 5.)

### **§ 143B-146.14. Dispute resolution; appeals to Secretary.**

The Secretary shall establish a procedure for the resolution of disputes between the residential schools and the parents or guardians of students who attend the schools.

An appeal shall lie from the decision of all residential school personnel to the Secretary or the Secretary's designee. In all of these appeals it is the duty of the Secretary to see that a proper notice is given to all parties concerned and that a record of the hearing is properly entered in the records. (1998-131, s. 5.)

### § 143B-146.15. Duty to report certain acts to law enforcement.

When the superintendent has personal knowledge or actual notice from residential school personnel or other reliable source that an act has occurred on school property involving assault resulting in serious personal injury, sexual assault, sexual offense, rape, kidnapping, indecent liberties with a minor, assault involving the use of a weapon, possession of a firearm in violation of the law, possession of a weapon in violation of the law, or possession of a controlled substance in violation of the law, the superintendent shall immediately report the act to the appropriate local law enforcement agency. Failure to report under this section is a Class 3 misdemeanor. For purposes of this section, "school property" shall include any building, bus, campus, grounds, recreational area, or athletic field, in the charge of the superintendent or while the student is under the supervision of school personnel. It is the intent of the General Assembly that the superintendent notify the Secretary or the Secretary's designee of any report made to law enforcement under this section. (1998-131, s. 5.)

### § 143B-146.16. Residential school personnel criminal history checks.

(a) As used in this section:

- (1) "Criminal history" means a county, state, or federal criminal history of conviction of a crime, whether a misdemeanor or a felony, that indicates the employee (i) poses a threat to the physical safety of students or personnel, or (ii) has demonstrated that he or she does not have the integrity or honesty to fulfill his or her duties as school personnel. Such crimes include the following North Carolina crimes contained in any of the following Articles of Chapter 14 of the General Statutes: Article 5A, Endangering Executive and Legislative Officers; Article 6, Homicide; Article 7A, Rape and Kindred Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretense and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots and Civil Disorders; Article 39, Protection of Minors; and Article 60, Computer-Related Crime. Such crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to underage persons in violation of G.S. 18B-302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5. In addition to the North Carolina crimes listed in this subdivision, such crimes also include similar crimes under federal law or under the laws of other states.
- (2) "Residential school personnel" means any:
  - a. Employee of a residential school whether full time or part time, or
  - b. Independent contractor or employee of an independent contractor of a residential school, if the independent contractor carries out duties customarily performed by residential school personnel,

whether paid with federal, State, local, or other funds, who has significant access to students in a residential school. Residential school personnel includes substitute teachers, driver training teachers, bus drivers, clerical staff, houseparents, and custodians.

(b) The Secretary shall require an applicant for a residential school personnel position to be checked for a criminal history before the applicant is offered an unconditional job. A residential school may employ an applicant conditionally while the Secretary is checking the person's criminal history and making a decision based on the results of the check.

The Secretary shall not require an applicant to pay for the criminal history check authorized under this subsection.

(c) The Department of Justice shall provide to the Secretary the criminal history from the State and National Repositories of Criminal Histories of any applicant for a residential school personnel position in a residential school. The Secretary shall require the person to be checked by the Department of Justice to (i) be fingerprinted and to provide any additional information required by the Department of Justice to a person designated by the Secretary, or to the local sheriff or the municipal police, whichever is more convenient for the person, and (ii) sign a form consenting to the check of the criminal record and to the use of fingerprints and other identifying information required by the repositories. The Secretary shall consider refusal to consent when making employment decisions and decisions with regard to independent contractors.

The Secretary shall not require an applicant to pay for being fingerprinted.

(d) The Secretary shall review the criminal history it receives on a person. The Secretary shall determine whether the results of the review indicate that the employee (i) poses a threat to the physical safety of students or personnel, or (ii) has demonstrated that he or she does not have the integrity or honesty to fulfill his or her duties as residential school personnel and shall use the information when making employment decisions and decisions with regard to independent contractors. The Secretary shall make written findings with regard to how it used the information when making employment decisions and decisions with regard to independent contractors.

(e) The Secretary shall provide to the State Board of Education the criminal history received on a person who is certificated, certified, or licensed by the State Board. The State Board shall review the criminal history and determine whether the person's certificate or license should be revoked in accordance with State laws and rules regarding revocation.

(f) All the information received by the Secretary through the checking of the criminal history or by the State Board in accordance with subsection (d) of this section is privileged information and is not a public record but is for the exclusive use of the Secretary or the State Board of Education. The Secretary or the State Board of Education may destroy the information after it is used for the purposes authorized by this section after one calendar year.

(g) There shall be no liability for negligence on the part of the Secretary, the Department of Health and Human Services or its employees, a residential school or its employees, or the State Board of Education or its employees, arising from any act taken or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification by insurance, indemnification under Articles 31A and 31B of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Article 31 of Chapter 143 of the General Statutes. (1998-131, s. 5.)

§§ 143B-146.17 through 143B-146.20: Reserved for future codification purposes.

**§ 143B-146.21. Policies, reports, and other miscellaneous provisions.**

(a) The Secretary of Health and Human Services shall consult with the State Board of Education in its implementation of this act as it pertains to improving the educational programs at the residential schools. The Secretary also shall fully inform and consult with the chairs of the Appropriations Subcommittees on Education and Health and Human Services of the Senate and the House of Representatives on a regular basis as the Secretary carries out his duties under this act.

(b) The Secretary of Health and Human Services shall adopt policies and offer training opportunities to ensure that personnel who provide direct services to children in the State schools for the deaf become proficient in sign language within two years of their initial date of employment or within two years of the effective date of this act, whichever occurs later. This subsection shall not apply to preschool personnel in any oral, auditory, or cued speech preschool.

(c) The Department of Public Instruction, the Board of Governors of The University of North Carolina, and the State Board of Community Colleges shall offer and communicate the availability of professional development opportunities, including those to improve sign language skills, to the personnel assigned to the State's residential schools, particularly the Governor Morehead School and the schools for the deaf.

(d) The Secretary of Health and Human Services shall adopt policies to ensure that students of the residential schools are given priority to residing in the independent living facilities on each school's campus. (1998-131, ss. 3, 10, 17; 2001-424, s. 21.81(a).)

**Editor's Note.** — Session Laws 1998-131, ss. 3, 10, 17 were codified as this section at the direction of the Revisor of Statutes.

Session Laws 1998-131, s. 19, made this section effective July 1, 1998 only if funds are appropriated for the 1998-99 fiscal year to implement this act. The Revisor of Statutes has been informed that funds were appropriated.

Session Laws 2001-124, s. 1, provides: "The Department of Health and Human Services and the Department of Juvenile Justice and Delinquency Prevention shall review the feasibility of establishing and maintaining a statewide database containing information on the prescription and administration of psychotropic medications to children who receive State services while residing in State facilities administered by the Department of Health and Human Services or the Department of Juvenile Justice and Delinquency Prevention. In conducting the review the Departments shall consider that any database developed must, in accordance with State and federal law, fully protect the medical records and other privacy interests of the minors for whom the drugs are prescribed. Not later than January 1, 2002, the Department of Health and Human Services and the Depart-

ment of Juvenile Justice and Delinquency Prevention shall report their findings and recommendations to the Joint Legislative Health Care Oversight Committee and to the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services. The report shall include the cost of establishing and maintaining the database in a manner that provides data for the analysis of prescription medication usage by and effects on children. The report shall also provide detailed information on how the database will be maintained in a manner that protects medical records and other privacy interests in compliance with State and federal law."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Acts of 2001.'"

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, s. 21.81(a), effective July 1, 2001, deleted "three" preceding "schools for the deaf" at the end of subsection (b) and preceding "State schools for the deaf" in the first sentence of subsection (c).

§ **143B-146.22:** Repealed by Session Laws 2001-424, s. 21.80(a), effective July 1, 2001.

§§ **143B-146.23 through 143B-146.27:** Reserved for future codification purposes.

Part 4. Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services.

§ **143B-147. (Effective until July 1, 2002) Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services — creation, powers and duties.**

(a) There is hereby created the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services of the Department of Health and Human Services with the power and duty to adopt, amend and repeal rules to be followed in the conduct of State and local mental health, developmental disabilities, alcohol and drug abuse programs including education, prevention, intervention, treatment, rehabilitation and other related services. Such rules shall be designed to promote the amelioration or elimination of the mental health, developmental disabilities, or alcohol and drug abuse problems of the citizens of this State. The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall have the authority:

- (1) To adopt rules regarding the
  - a. Admission, including the designation of regions, treatment, and professional care of individuals admitted to a facility operated under the authority of G.S. 122C-181(a), that is now or may be established;
  - b. Operation of education, prevention, intervention, treatment, rehabilitation and other related services as provided by area mental health, developmental disabilities, and substance abuse authorities under Part 4 of Article 4 of Chapter 122C of the General Statutes;
  - c. Hearings and appeals of area mental health, developmental disabilities, and substance abuse authorities as provided for in Part 4 of Article 4 of Chapter 122C of the General Statutes;
  - d. Requirements of the federal government for grants-in-aid for mental health, developmental disabilities, alcohol or drug abuse programs which may be made available to local programs or the State. This section is to be liberally construed in order that the State and its citizens may benefit from such grants-in-aid; and
  - e. Implementation of single portal of entry and exit policies established pursuant to Chapter 122C of the General Statutes.
- (2) To adopt rules for the licensing of facilities for the mentally ill, developmentally disabled, and substance abusers, under Article 2 of Chapter 122C of the General Statutes.
- (3) To advise the Secretary of the Department of Health and Human Services regarding the need for, provision and coordination of education, prevention, intervention, treatment, rehabilitation and other related services in the areas of:
  - a. Mental illness and mental health,
  - b. Developmental disabilities,

**§ 143B-147 is set out twice. See notes.**

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- c. Alcohol abuse, and
  - d. Drug abuse;
  - (4) To review and advise the Secretary of the Department of Health and Human Services regarding all State plans required by federal or State law and to recommend to the Secretary any changes it thinks necessary in those plans; provided, however, for the purposes of meeting State plan requirements under federal or State law, the Department of Health and Human Services is designated as the single State agency responsible for administration of plans involving mental health, developmental disabilities, alcohol abuse, and drug abuse services;
  - (5) To adopt rules relating to the registration and control of the manufacture, distribution, security, and dispensing of controlled substances as provided by G.S. 90-100;
  - (6) To adopt rules to establish the professional requirements for staff of licensed facilities for the mentally ill, developmentally disabled, and substance abusers. Such rules may require that one or more, but not all staff of a facility be either licensed or certified. If a facility has only one professional staff, such rules may require that that individual be licensed or certified. Such rules may include the recognition of professional certification boards for those professions not licensed or certified under other provisions of the General Statutes provided that the professional certification board evaluates applicants on a basis which protects the public health, safety or welfare;
  - (7) Except where rule making authority is assigned under that Article to the Secretary of the Department of Health and Human Services, to adopt rules to implement Article 3 of Chapter 122C of the General Statutes;
  - (8) To adopt rules specifying procedures for waiver of rules adopted by the Commission.

(b) All rules hereby adopted shall be consistent with the laws of this State and not inconsistent with the management responsibilities of the Secretary of the Department of Health and Human Services provided by this Chapter and the Executive Organization Act of 1973.

(c) All rules and regulations pertaining to the delivery of services and licensing of facilities heretofore adopted by the Commission for Mental Health and Mental Retardation Services, controlled substances rules and regulations adopted by the North Carolina Drug Commission, and all rules and regulations adopted by the Commission for Mental Health, Mental Retardation and Substance Abuse Services shall remain in full force and effect unless and until repealed or superseded by action of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services.

(d) All rules adopted by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall be enforced by the Department of Health and Human Services. (1973, ch. 476, s. 129; 1977, c. 568, ss. 2, 3; c. 679, s. 1; 1981, c. 51, s. 1; 1983, c. 718, s. 5; 1983 (Reg. Sess., 1984), c. 1110, s. 6; 1985, c. 589, ss. 47-54; 1985 (Reg. Sess., 1986), c. 863, s. 33; 1989, c. 625, s. 23; 1991, c. 309, s. 1; 1993, c. 396, s. 6; 1997-443, s. 11A.118(a).)

**Section Set Out Twice.** — The section above is effective until July 1, 2002. For the section as amended July 1, 2002, see the following section, also numbered § 143B-147.

**Legal Periodicals.** — For survey of 1977 law on health care regulation, see 56 N.C.L. Rev. 857 (1978).

**§ 143B-147. (Effective July 1, 2002) Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services — creation, powers and duties.**

(a) There is hereby created the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services of the Department of Health and Human Services with the power and duty to adopt, amend and repeal rules to be followed in the conduct of State and local mental health, developmental disabilities, substance abuse programs including education, prevention, intervention, screening, assessment, referral, detoxification, treatment, rehabilitation, continuing care, emergency services, case management, and other related services. Such rules shall be designed to promote the amelioration or elimination of the mental illness, developmental disabilities, or substance abuse problems of the citizens of this State. The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall have the authority:

- (1) To adopt rules regarding the
  - a. Admission, including the designation of regions, treatment, and professional care of individuals admitted to a facility operated under the authority of G.S. 122C-181(a), that is now or may be established;
  - b. Operation of education, prevention, intervention, treatment, rehabilitation and other related services as provided by area mental health, developmental disabilities, and substance abuse authorities, county programs, and all providers of public services under Part 4 of Article 4 of Chapter 122C of the General Statutes;
  - c. Hearings and appeals of area mental health, developmental disabilities, and substance abuse authorities as provided for in Part 4 of Article 4 of Chapter 122C of the General Statutes; and
  - d and e. Repealed by Session Laws 2001-437, s. 1.21(a), effective July 1, 2002.
  - f. Standards of public services for mental health, developmental disabilities, and substance abuse services.
- (2) To adopt rules for the licensing of facilities for the mentally ill, developmentally disabled, and substance abusers, under Article 2 of Chapter 122C of the General Statutes.
- (3) To advise the Secretary of the Department of Health and Human Services regarding the need for, provision and coordination of education, prevention, intervention, treatment, rehabilitation and other related services in the areas of:
  - a. Mental illness and mental health,
  - b. Developmental disabilities,
  - c. Substance abuse.
  - d. Repealed by Session Laws 2001-437, s. 1.21(a), effective July 1, 2002.
- (4) To review and advise the Secretary of the Department of Health and Human Services regarding all State plans required by federal or State law and to recommend to the Secretary any changes it thinks necessary in those plans; provided, however, for the purposes of meeting State plan requirements under federal or State law, the Department of Health and Human Services is designated as the single State agency responsible for administration of plans involving mental health, developmental disabilities, and substance abuse services.
- (5) To adopt rules relating to the registration and control of the manufac-

**§ 143B-147 is set out twice. See notes.**

ture, distribution, security, and dispensing of controlled substances as provided by G.S. 90-100.

- (6) To adopt rules to establish the professional requirements for staff of licensed facilities for the mentally ill, developmentally disabled, and substance abusers. Such rules may require that one or more, but not all staff of a facility be either licensed or certified. If a facility has only one professional staff, such rules may require that that individual be licensed or certified. Such rules may include the recognition of professional certification boards for those professions not licensed or certified under other provisions of the General Statutes provided that the professional certification board evaluates applicants on a basis which protects the public health, safety or welfare.
- (7) Except where rule making authority is assigned under that Article to the Secretary of the Department of Health and Human Services, to adopt rules to implement Article 3 of Chapter 122C of the General Statutes.
- (8) To adopt rules specifying procedures for waiver of rules adopted by the Commission.

(b) All rules hereby adopted shall be consistent with the laws of this State and not inconsistent with the management responsibilities of the Secretary of the Department of Health and Human Services provided by this Chapter and the Executive Organization Act of 1973.

(c) All rules and regulations pertaining to the delivery of services and licensing of facilities heretofore adopted by the Commission for Mental Health and Mental Retardation Services, controlled substances rules and regulations adopted by the North Carolina Drug Commission, and all rules and regulations adopted by the Commission for Mental Health, Mental Retardation and Substance Abuse Services shall remain in full force and effect unless and until repealed or superseded by action of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services.

(d) All rules adopted by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall be enforced by the Department of Health and Human Services. (1973, ch. 476, s. 129; 1977, c. 568, ss. 2, 3; c. 679, s. 1; 1981, c. 51, s. 1; 1983, c. 718, s. 5; 1983 (Reg. Sess., 1984), c. 1110, s. 6; 1985, c. 589, ss. 47-54; 1985 (Reg. Sess., 1986), c. 863, s. 33; 1989, c. 625, s. 23; 1991, c. 309, s. 1; 1993, c. 396, s. 6; 1997-443, s. 11A.118(a); 2001-437, s. 1.21(a).)

**Section Set Out Twice.** — The section above is effective July 1, 2002. For the section as in effect until July 1, 2002, see the preceding section, also numbered § 143B-147.

**Effect of Amendments.** — Session Laws 2001-437, s. 1.21 (a), effective July 1, 2002, in the first sentence of subsection (a), substituted “substance abuse” for “alcohol and drug abuse” in two places, substituted “screening, assessment, referral, . . . case management” for “treatment, rehabilitation,” and substituted “illness” for “health”; in subdivision (a)(1)b, inserted

“county programs, and all providers of public services”; added “and” at the end of subdivision (a)(1)c; deleted subdivisions (a)(1)d and (a)(1)e, relating to requirements of the federal government and to implementation of single uniform portal process and policies; added subdivision (a)(1)f; substituted “Substance abuse” for “Alcohol abuse, and” in subdivision (a)(3)c; deleted subdivision (a)(3)d, which read “Drug abuse”; and substituted “and substance abuse services” for “alcohol abuse, and drug abuse services” at the end of subdivision (a)(4).

**§ 143B-148. (Effective until July 1, 2002) Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services — members; selection; quorum; compensation.**

(a) The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services of the Department of Health and Human Services shall consist of 26 members:

- (1) Four of whom shall be appointed by the General Assembly, two upon the recommendation of the Speaker of the House of Representatives, and two upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121. These members shall have concern for the problems of mental illness, developmental disabilities, alcohol and drug abuse. Members shall serve for two-year terms beginning July 1 of odd-numbered years. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122;
- (2) Twenty-two of whom shall be appointed by the Governor, one from each congressional district in the State in accordance with G.S. 147-12(3)b, and 10 at-large members.
  - a. Of these 22 members, three shall have a special interest in mental health, three shall have a special interest in mental retardation, three shall have a special interest in developmental disabilities other than mental retardation, three shall have a special interest in alcohol abuse and alcoholism and three shall have a special interest in drug abuse. Each group of three shall be made up of one member who is a consumer representative; one other who is a representative of a local or State citizen organization or association; and one other who is a professional in the field.
  - b. The remaining seven members shall be appointed from the general public, other citizen groups, area mental health, developmental disabilities, and substance abuse authorities, or from other related agencies.
  - c. Of these 22 appointments, at least one shall be a licensed physician and at least one other shall be a licensed attorney.
  - d. The Governor shall appoint members to the Commission in accordance with the foregoing provisions. The terms of all Commission members appointed by the Governor shall be four years. The initial term of the person representing the 12th Congressional District shall begin January 3, 1993, and expire June 30, 1996. All Commission members shall serve their designated terms and until their successors are duly appointed and qualified. All Commission members may succeed themselves.
- (3) All appointments shall be made pursuant to current federal rules and regulations, when not inconsistent with State law, which prescribe the selection process and demographic characteristics as a necessary condition to the receipt of federal aid.
  - (b) Except as otherwise provided in this section, the provisions of G.S. 143B-13 through 143B-20 relating to appointment, qualifications, terms and removal of members shall apply to all members of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services.
  - (c) Commission members shall receive per diem, travel and subsistence allowances in accordance with G.S. 138-5 and G.S. 138-6, as appropriate.
  - (d) A majority of the Commission shall constitute a quorum for the transaction of business.

**§ 143B-148 is set out twice. See notes.**

(e) All clerical and other services required by the Commission shall be supplied by the Secretary of the Department of Health and Human Services. (1973, c. 476, s. 130; 1977, c. 679, s. 2; 1981, c. 51, s. 1; 1981 (Reg. Sess., 1982), c. 1191, ss. 55.1 through 57; 1989, c. 625, s. 23; 1991 (Reg. Sess., 1992), c. 1038, s. 17; 1995, c. 490, s. 34; 1997-443, s. 11A.118(a).)

**Section Set Out Twice.** — The section above is effective until July 1, 2002. For the section as amended July 1, 2002, see the following section, also numbered § 143B-148.

**Editor's Note.** — Section 143B-20, referred to in this section, was repealed by Session Laws 1991, c. 418, s. 10. As to rule making, see now § 150B-18 et seq.

**§ 143B-148. (Effective July 1, 2002) Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services — members; selection; quorum; compensation.**

(a) The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services of the Department of Health and Human Services shall consist of 29 members:

- (1) Six of whom shall be appointed by the General Assembly, three upon the recommendation of the Speaker of the House of Representatives, and three upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121. These members shall be individuals who are concerned about the needs of individuals for mental health, developmental disabilities, and substance abuse services. Members shall serve for two-year terms beginning July 1 of odd-numbered years. A member shall serve not more than three consecutive two-year terms. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122;
- (2) Twenty-three of whom shall be appointed by the Governor, one from each congressional district in the State in accordance with G.S. 147-12(3)b, and the remainder at-large members.
  - a. Of these 23 members, three shall have a special interest in mental health, three shall have a special interest in mental retardation, three shall have a special interest in developmental disabilities other than mental retardation, three shall have a special interest in alcohol abuse and alcoholism and three shall have a special interest in drug abuse. Each group of three shall be made up of one member who is a consumer representative; one other who is a representative of a local or State citizen organization or association; and one other who is a professional in the field.
  - b. The remaining eight members shall be appointed from the general public, other citizen groups, area mental health, developmental disabilities, and substance abuse authorities, or from other related agencies.
  - c. Of these 23 appointments, at least one shall be a licensed physician and at least one other shall be a licensed attorney.
  - d. The terms of all Commission members appointed or reappointed by the Governor on or after July 1, 2002, shall be two years. All Commission members shall serve their designated terms and until their successors are duly appointed and qualified. All Commission members may succeed themselves. A member shall serve not more than three consecutive terms.
- (3) All appointments shall be made pursuant to current federal rules and regulations, when not inconsistent with State law, which prescribe the

## § 143B-148 is set out twice. See notes.

selection process and demographic characteristics as a necessary condition to the receipt of federal aid.

(b) Except as otherwise provided in this section, the provisions of G.S. 143B-13 through 143B-20 relating to appointment, qualifications, terms and removal of members shall apply to all members of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services.

(c) Commission members shall receive per diem, travel and subsistence allowances in accordance with G.S. 138-5 and G.S. 138-6, as appropriate.

(d) A majority of the Commission shall constitute a quorum for the transaction of business.

(e) All clerical and other services required by the Commission shall be supplied by the Secretary of the Department of Health and Human Services. (1973, c. 476, s. 130; 1977, c. 679, s. 2; 1981, c. 51, s. 1; 1981 (Reg. Sess., 1982), c. 1191, ss. 55.1 through 57; 1989, c. 625, s. 23; 1991 (Reg. Sess., 1992), c. 1038, s. 17; 1995, c. 490, s. 34; 1997-443, s. 11A.118(a); 2001-437, s. 1.21(b); 2001-486, s. 2.13; 2001-487, s. 90.5.)

**Section Set Out Twice.** — The section above is effective July 1, 2002. For the section as in effect until July 1, 2002, see the preceding section, also numbered § 143B-148.

**Effect of Amendments.** — Session Laws 2001-437, s. 1.21(b), effective July 1, 2002, in subdivision (a)(1), substituted “be individuals who are concerned about the needs of individuals for mental health, developmental disabilities, substance abuse services” for “have concern for the problems of mental illness, developmental disabilities, alcohol and drug abuse” at the end of the second sentence, and added the fourth sentence.

Session Laws 2001-486, s. 2.13, amended this section as amended by 2001-437, s. 1.21(b), effective July 1, 2002, by substituting “29” for “26” in the introductory language of subsection (a); in the first sentence in subdivision (a)(1), substituting “Six” for “Four,” and twice substituting “three” for “two”; in the introductory language of subdivision (a)(2), substituting “Twenty-three” for “Twenty-two,” and substitut-

ing “the remainder” for “10”; substituting “23” for “22” near the beginning of subdivision (a)(2)a.; substituting “eight” for “seven” in subdivision (a)(2)b.; substituting “23” for “22” in subdivision (a)(2)c.; and rewriting subdivision (a)(2)d. Session Laws 2001-487, s. 90.5, made identical changes.

Session Laws 2001-487, s. 90.5, amended this section as amended by Session Laws 2001-437, s. 1.21(b), effective July 1, 2002, by substituting “29” for “26” in the introductory language of subsection (a); in the first sentence in subdivision (a)(1), substituting “Six” for “Four” and twice substituting “three” for “two”; in the introductory language of subdivision (a)(2), substituting “Twenty-three” for “Twenty-two,” and substituting “the remainder” for “10”; substituting “23” for “22” near the beginning of subdivision (a)(2)a.; substituting “eight” for “seven” in subdivision (a)(2)b.; substituting “23” for “22” in subdivision (a)(2)c.; and rewriting subdivision (a)(2)d. Session Laws 2001-486, s. 2.13, made identical changes.

## § 143B-149. Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services — officers.

The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall have a chairman and a vice-chairman. The chairman shall be designated by the Governor from among the members and shall serve as chairman at his pleasure. The vice-chairman shall be elected by and from the members of the Commission and shall serve for a term of two years or until the expiration of his regularly appointed term. (1973, c. 476, s. 131; 1977, c. 679, s. 3; 1981, c. 51, s. 1; 1989, c. 625, s. 23.)

**§ 143B-150. Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services — regular and special meetings.**

The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall meet at least once in each quarter and may hold special meetings at any time and place within the State at the call of the chairman or upon the written request of at least eight members. (1973, c. 476, s. 132; 1977, c. 679, s. 4; 1981, c. 51, s. 1; 1989, c. 625, s. 23.)

**§§ 143B-150.1 through 143B-150.4:** Reserved for future codification purposes.

**Part 4A. Family Preservation Act.**

**§ 143B-150.5. Family Preservation Services Program established; purpose.**

(a) There is established the Family Preservation Services Program of the Department of Health and Human Services. To the extent that funds are made available, locally-based family preservation services shall be available to all 100 counties. The Secretary of the Department of Health and Human Services shall be responsible for the development and implementation of the Family Preservation Services Program as established in this Part.

(b) The purpose of the Family Preservation Services Program is, where feasible and in the best interests of the child and the family, to keep the family unit intact by providing intensive family-centered services that help create, within the family, positive, long-term changes in the home environment.

(c) Family preservation services shall be financed in part through grants to local agencies for the development and implementation of locally-based family preservation services. Grants to local agencies shall be made in accordance with the provisions of G.S. 143B-150.6.

(d) The Secretary of the Department of Health and Human Services shall ensure the cooperation of the Division of Social Services, the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, and the Division of Medical Assistance, in carrying out the provisions of this Part. (1991, c. 743, s. 1; 1997-443, s. 11A.118(a); 2000-137, s. 4(z); 2001-424, s. 21.50(f).)

**Editor's Note.** — Session Laws 1991, c. 743, which enacted this Part, in s. 2 provides: "Section 1 of this act becomes effective October 1, 1991, if and only if specific funds are appropriated for the implementation of the Committee established in Section 1 of this act. Funds appropriated for the 1991-92 fiscal year or for any fiscal year in the future do not constitute an entitlement to services beyond those provided for that fiscal year. Nothing in this act creates any right except to the extent funds are appropriated by the State to implement its provisions from year to year and nothing in this act obligates the General Assembly or any County Government to appropriate funds to implement its provisions." The necessary funds were appropriated in 1991.

Session Laws 2001-424, s. 1.2, provides:

"This act shall be known as the 'Current Operations and Capital Improvements Appropriations Acts of 2001.'"

Session Laws 2001-424, ss. 21.50 (a) to (e), provide: "The Department of Health and Human Services shall review the Intensive Family Preservation Services Program (IFPS) to enhance and implement initiatives which focus on increasing the sustainability and effectiveness of the Program.

"(b) Notwithstanding the provisions of G.S. 143B-150.6, the Program shall provide intensive services to children and families in cases of abuse, neglect, and dependency where a child is at imminent risk of removal from the home and to children and families in cases of abuse where a child is not at imminent risk of removal. The Program shall be developed and implemented

Statewide on a regional basis. The revised IFPS shall ensure the application of standardized assessment criteria for determining imminent risk and clear criteria for determining out-of-home placement.

“(c) The Department of Health and Human Services shall require that any program or entity that receives State, federal, or other funding for the purpose of Intensive Family Preservation Services shall provide information and data that allows for:

“(1) An established follow-up system with a minimum of six months of follow-up services.

“(2) Detailed information on the specific interventions applied including utilization indicators and performance measurement.

“(3) Cost-benefit data.

“(4) Data on long-term benefits associated with Intensive Family Preservation Services. This data shall be obtained by tracking families through the intervention process.

“(5) The number of families remaining intact and the associated interventions while in IFPS and 12 months thereafter.

“(6) The number and percentage by race of children who received Intensive Family Preservation Services compared to the ratio of their distribution in the general population involved with Child Protective Services.

“(d) The Department shall establish performance-based funding protocol and shall only provide funding to those programs and entities providing the required information specified in subsection (c) of this section [s. 21.50(c) of Session Laws 2001-424]. The amount of funding shall be based on the individual performance of each program.

“(e) The Department of Health and Human Services shall prepare an interim report to the Senate Appropriations Committee on Health and Human Services, the House of Representa-

tives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division on the implementation of these changes by April 1, 2002, and an annual report on the Program not later than December 1 of each year of the biennium. The Department shall include the following in the annual reports due on December 1:

“(1) The number of children who remain unified with their families for one, two, and three years after receiving services under the Program.

“(2) A description of the Program, including the progress of the local programs during the preceding year, along with recommendations for improvement.”

Session Laws 2001-424, s. 36.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium.”

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-137, s. 4(z), effective July 20, 2000, deleted “the Division of Youth Services” following “Division of Social Services” in subsection (d).

Session Laws 2001-424, s. 21.50(f), effective July 1, 2001, in subsection (a), deleted the former second sentence, which read: “The Program shall be phased in over a four-year period, commencing with fiscal year 1991-92,” deleted “By the end of the four-year phase-in period, and” at the beginning of the present second sentence, and deleted the former last sentence, which read: “In developing the Program the Secretary shall consider the advice and recommendations of the Advisory Committee on Family-Centered Services.”

## § 143B-150.6. Program services; eligibility; grants for local projects; fund transfers.

(a) **Services:** Services to be provided under the Family Preservation Services Program shall include but are not limited to: family assessment, intensive family and individual counseling, client advocacy, case management, development and enhancement of parenting skills, and referral for other services as appropriate.

(b) **Eligibility:** Families eligible for services under the Family Preservation Services Program are those with children ages 0-17 years who are at risk of imminent separation through placement in public welfare, mental health, or juvenile justice systems.

(c) **Service Delivery:** Services delivered to eligible families under the Family Preservation Services Program shall be provided in accordance with the following requirements:

(1) Each eligible family shall receive intensive family preservation services, beginning with identification of an imminent risk of out-of-home placement for an average of four weeks but not more than six weeks;

- (2) At least one-half of a caseworker's time spent providing family preservation services to each eligible family shall be provided in the family's home and community;
- (3) Family preservation caseworkers shall be available to each eligible family by telephone and on call for visits 24 hours a day, seven days a week.
- (4) Each family preservation caseworker shall provide services to a maximum of four families at any given time.

(d) Grants for local projects: The Secretary of the Department of Health and Human Services shall award grants to local agencies for the development and implementation of locally-based family preservation services projects. The number of grants awarded and the level of funding of each grant for each fiscal year shall be contingent upon and determined by funds appropriated for that purpose by the General Assembly.

(e) Inter-agency fund transfers: The Department may allow the Division of Social Services and the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, to use funds available to each Division to support family preservation services provided by the Division under the Program; provided that such use does not violate federal regulations pertaining to, or otherwise jeopardize the availability of federal funds. (1991, c. 743, s. 1; 1997-443, s. 11A.118(a); 1999-423, s. 9; 2001-424, s. 21.50(g).)

**Editor's Note.** — Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvement Appropriations Act of 1999'."

Session Laws 1999-237, s. 5(n), directs that \$2,000,000 appropriated to the TANF Block Grant to the Department of Health and Human Services, Division of Social Services, for the 1999-2000 fiscal year for the Intensive Family Preservation Services (IFPS) Program is to be used by the division, in consultation with local departments of social services and other human services agencies, to plan and implement a revised IFPS Program. The subsection further provides that, notwithstanding the provisions of G.S. 143B-150.6, the program is to provide intensive services to children and families in cases of neglect and dependency where a child is at imminent risk of removal from the home and to children and families in cases of abuse where a child is not at imminent risk of removal. The Department may use funds appropriated under this subsection to establish up to three additional staff positions in the Division of Social Services for the IFPS Program. The Department is to issue a report on the use of the funds appropriated under this subsection, including the revised evaluation model and IFPS Program, to specified committees no later than May 1, 2000.

Session Laws 1999-237, s. 30.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 30.4, contains a severability clause.

Session Laws 2000-67, s. 5(l), effective July 1, 2000, appropriates \$2,000,000 in the TANF Block Grant to the Department of Health and Human Services, Division of Social Services, for the 2000-2001 fiscal year, for the Intensive Family Preservation Services (IFPS) Program, to plan and implement a revised IFPS Program. Notwithstanding G.S. 143B-150.6, the Program is to provide intensive services to children and families in cases of abuse, neglect, and dependency where a child is at imminent risk of removal from the home and to children and families in cases of abuse where a child is not at imminent risk of removal. The Department is to reexamine the existing IFPS Program design to ensure the application of a standardized assessment and clear criteria for the determination of imminent risk of removal and to assess the education and skill levels required of staff. The Department is to issue a report to Senate and House appropriations committees and the Fiscal Research Division no later than April 1, 2001.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Oper-

ations and Capital Improvements Appropriations Acts of 2001.’”

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, s. 21.50(g), effective July 1, 2001, in subsection (d), deleted the former second sentence, which read: “In awarding the grants, the Secretary shall consider the recommendations of the Advisory Committee on Family-Centered Services,” deleted “and shall be in accordance

with the phase-in period of the Family Preservation Services Program” at the end of the present final sentence, and deleted the former last sentence, which read: “During the phase-in period, and to the extent funds are appropriated, grants shall be awarded by the Secretary on a competitive basis to local agencies who submit proposals for such funding, which proposals meet grant award criteria established by the Advisory Committee on Family-Centered Services.”

**§§ 143B-150.7 through 143B-150.9:** Repealed by Session Laws 2001-424, ss. 21.50(h) to (j), effective July 1, 2001.

**Editor’s Note.** — Session Laws 2001-424, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improve-

ments Appropriations Acts of 2001.’”  
Session Laws 2001-424, s. 36.5 is a severability clause.

**§§ 143B-150.10 through 143B-150.19:** Reserved for future codification purposes.

Part 4B. State Child Fatality Review Team.

**§ 143B-150.20. State Child Fatality Review Team; establishment; purpose; powers; duties; report by Division of Social Services.**

(a) There is established in the Department of Health and Human Services, Division of Social Services, a State Child Fatality Review Team to conduct in-depth reviews of any child fatalities which have occurred involving children and families involved with local departments of social services child protective services in the 12 months preceding the fatality. Steps in this in-depth review shall include interviews with any individuals determined to have pertinent information as well as examination of any written materials containing pertinent information.

(b) The purpose of these reviews shall be to implement a team approach to identifying factors which may have contributed to conditions leading to the fatality and to develop recommendations for improving coordination between local and State entities which might have avoided the threat of injury or fatality and to identify appropriate remedies. The Division of Social Services shall make public the findings and recommendations developed for each fatality reviewed relating to improving coordination between local and State entities. These findings shall not be admissible as evidence in any civil or administrative proceedings against individuals or entities that participate in child fatality reviews conducted pursuant to this section. The State Child Fatality Review Team shall consult with the appropriate district attorney in accordance with G.S. 7B-2902(d) prior to the public release of the findings and recommendations.

(c) The State Child Fatality Review Team shall include representatives of the local departments of social services and the Division of Social Services, a member of the local Community Child Protection Team, a member of the local child fatality prevention team, a representative from local law enforcement, a prevention specialist, and a medical professional.

(d) The State Child Fatality Review Team shall have access to all medical records, hospital records, and records maintained by this State, any county, or

any local agency as necessary to carry out the purposes of this subsection, including police investigative data, medical examiner investigative data, health records, mental health records, and social services records. The State Child Fatality Review Team may receive a copy of any reviewed materials necessary to the conduct of the fatality review. Any member of the State Child Fatality Review Team may share, only in an official meeting of the State Child Fatality Review Team, any information available to that member that the State Child Fatality Review Team needs to carry out its duties.

(e) Meetings of the State Child Fatality Review Team are not subject to the provisions of Article 33C of Chapter 143 of the General Statutes. However, the State Child Fatality Review Team may hold periodic public meetings to discuss, in a general manner not revealing confidential information about children and families, the findings of their reviews and their recommendations for preventive actions. Minutes of all public meetings, excluding those of closed sessions, shall be kept in compliance with Article 33C of Chapter 143 of the General Statutes. Any minutes or any other information generated during any executive session shall be sealed from public inspection.

(f) All otherwise confidential information and records acquired by the State Child Fatality Review Team, in the exercise of its duties are confidential; are not subject to discovery or introduction into evidence in any proceedings except pursuant to an order of the court; and may only be disclosed as necessary to carry out the purposes of the State Child Fatality Review Team. In addition, all otherwise confidential information and records created by the State Child Fatality Review Team in the exercise of its duties are confidential; are not subject to discovery or introduction into evidence in any proceedings; and may only be disclosed as necessary to carry out the purposes of the State Child Fatality Review Team. No member of the State Child Fatality Review Team, nor any person who attends a meeting of the State Child Fatality Review Team, may testify in any proceeding about what transpired at the meeting, about information presented at the meeting, or about opinions formed by the person as a result of the meetings. This subsection shall not, however, prohibit a person from testifying in a civil or criminal action about matters within that person's independent knowledge.

(g) Each member of the State Child Fatality Review Team and invited participant shall sign a statement indicating an understanding of and adherence to confidentiality requirements, including the possible civil or criminal consequences of any breach of confidentiality.

(h) The Division of Social Services, Department of Health and Human Services, shall report to the members of the Senate Appropriations Committee on Human Resources, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the Fiscal Research Division on the activities of the State Child Fatality Review Team including recommendations for changes in the statewide child protection system no later than October 1 of each year. (1998-202, s. 13(oo); 1998-212, s. 12.22(e); 1999-190, s. 4; 2000-67, s. 11.14(a).)

**Editor's Note.** — The subsection designations were added at the direction of the Revisor of Statutes. In addition, the Revisor directed the codification of Session Laws 2000-67, s. 11.14(a) as subsection (h).

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions

that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

**Effect of Amendments.** — Session Laws 2000-67, s. 11.14(a), effective July 1, 2000, added subsection (h).

## Part 5. Eugenics Commission.

§§ 143B-151, 143B-152: Repealed by Session Laws 1977, c. 497.

**Cross References.** — As to sterilization of mentally ill and mentally retarded persons, see §§ 35-36 through 35-50.

### Part 5A. S.O.S. Program.

#### § 143B-152.1. Establishment of program; purpose; goals.

(a) There is created in the Department of Health and Human Services the Support Our Students (S.O.S.) Program. The purpose of the program is to award grants to neighborhood- and community-based organizations to establish local S.O.S. programs that provide high quality after-school activities for school-aged children and provide for comprehensive, collaborative delivery of services by public and nonpublic agencies to these children. These services shall be designed to enrich and make a positive impact on the lives of school-aged children. These after-school activities may include activities after the regular school day and activities on days that students are not required to attend school.

(b) The goals of the program are to:

- (1) Reduce juvenile crime in local communities served by the program;
- (2) Recruit community volunteers to provide positive adult role models for school-aged children and to help supervise after-school activities;
- (3) Reduce the number of students who are unsupervised after school, otherwise known as “latchkey” children;
- (4) Improve the academic performance of students participating in the program;
- (5) Meet the physical, intellectual, emotional, and social needs of students participating in the program and improve their attitudes and behavior; and
- (6) Improve coordination of existing resources and enhance collaboration so as to provide services to school-aged children effectively and efficiently. (1994, Ex. Sess., c. 24, s. 30(a); 1997-443, s. 11A.118(a).)

#### § 143B-152.2. Definitions.

As used in this Part, “school-aged children” means children enrolled in kindergarten through the ninth grade. (1994, Ex. Sess., c. 24, s. 30(a).)

#### § 143B-152.3. Administration of the program.

The Department shall develop and implement the Support Our Students (S.O.S.) Program. The Department shall:

- (1) Repealed by Session Laws 2001-424, s. 24.1(b), effective July 1, 2001.
- (2) Disseminate information regarding the program to interested neighborhood and community groups;
- (3) Develop and disseminate a request for applications to establish local S.O.S. programs;
- (4) Provide initial technical assistance to grant applicants and ongoing technical assistance as grants are implemented;
- (5) Administer funds appropriated by the General Assembly;
- (6) Monitor the grants funded;

- (7) Revoke a grant if necessary or appropriate;
- (8) Develop and implement a performance-based evaluation system to evaluate the program, in accordance with G.S. 143B-152.7(a);
- (9) Report on the program implementation to the General Assembly, the Joint Legislative Committee on Governmental Operations, and the Office of the Governor, in accordance with G.S. 143B-152.7(b); and
- (10) Adopt any rules necessary to implement this Part. (1994, Ex. Sess., c. 24, s. 30(a); 2001-424, s. 24.1(b).)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws

2001-424, s. 24.1(b), effective July 1, 2001, repealed subdivision (1), which read: "Sponsor a statewide conference each year for teams of interested representatives to provide background information and assistance regarding all aspects of the program."

### § 143B-152.4. Eligible applicants; application for grants.

(a) A community- or neighborhood-based 501(c)(3) entity or a consortium consisting of one or more local 501(c)(3) entities and one or more local school administrative units may apply for a grant.

(b) Applicants for grants shall submit to the Department an application that includes the following information:

- (1) Identification of one or more neighborhoods to be served by the local S.O.S. program, based on a needs assessment of existing conditions for school-aged children to be served. Data used in the needs assessment may include for each neighborhood to be served by a local program (i) dropout statistics, (ii) the number and percentage of school-aged children who participate in the federal subsidized lunch program, (iii) the number of suspensions and expulsions involving school-aged children, (iv) the number of children to be served, (v) the number and percentage of students with two working parents or one single parent to be served at a site, (vi) the incidence of juvenile crime in the neighborhood, and (vii) any other relevant or unique local demographic data.

Local authorities shall provide this or related information on a timely basis to local 501(c)(3) entities submitting applications to establish local S.O.S. programs;

- (2) A three-year plan that addresses data used in the needs assessment and that includes proposed goals and anticipated outcomes of the local S.O.S. program. The plan shall be prepared after consultation with local after-school programs, schools, community organizations or groups which have as their purpose assisting or helping school-aged children who are at risk of failing in school or entering the juvenile justice system, or other appropriate groups. In addition, the three-year plan shall provide for regular collaborative efforts to seek input and advice from parents of the students being served and from other citizens who reflect the demographic conditions of the students being served;
- (3) A statement of how grant funds would be used to address local problems and what other resources would be used to address the problems. This statement should include a list of services to be offered that are related to the goals and outcomes and should include plans for recruiting volunteers to assist in the program's activities; and
- (4) A process for assessing on an annual basis the success of the local plan for addressing the goals of the local S.O.S. program. (1994, Ex. Sess., c. 24, s. 30(a).)

### § 143B-152.5. Grants review and selection.

(a) The Department shall develop and disseminate a request for applications and establish procedures to be followed in developing and submitting applications to establish local S.O.S. programs and administering grants to establish local S.O.S. programs. This information shall include examples of the design and types of S.O.S. programs that evaluations have shown are likely to be successful in improving the academic performance of the participants or in reducing disruptive or illegal behavior.

(b) The Secretary of Health and Human Services shall appoint a State task force to assist the Secretary in reviewing grant applications. The State task force shall include representatives of the Department of Health and Human Services, the Department of Public Instruction, local school administrative units, educators, parents, the juvenile justice system, social services, and governmental agencies providing services to children, and other members the Secretary considers appropriate. In appointing the State task force, the Secretary shall consult with the Superintendent of Public Instruction in an effort to coordinate the membership of this State task force, the State task force appointed by the Secretary pursuant to G.S. 143B-152.14, and the State task force appointed by the Superintendent pursuant to G.S. 115C-238.42.

In reviewing grant applications, the Secretary and the State task force may consider (i) the severity of the local problems as determined by the needs assessment data, (ii) the likelihood that the locally designed plan will result in high quality after-school services for school-aged children, (iii) evidence of local collaboration and coordination of services, (iv) any innovative or experimental aspects of the plan that will make it a useful model for replication in other neighborhoods and communities, (v) evidence that similarly designed programs have been efficient and effective in improving the academic performance of the participants or in reducing disruptive or illegal behavior, and (vi) any other factors which affect the well-being of school-aged children.

(c) In determining the amount of funds an applicant receives, the Secretary and the State task force may consider (i) the number of children to be served, (ii) the number and percentage of children to be served who participate in the subsidized lunch program, (iii) the number and percentage of school-aged children with two working parents or one single parent to be served, (iv) the availability of other resources or funds, and (v) the amount needed to implement the proposal.

(d) The Secretary shall award the grants. (1994, Ex. Sess., c. 24, s. 30(a); 1997-443, ss. 8.29(m), 11A.118(a).)

### § 143B-152.6. Cooperation of State and local agencies.

All agencies of the State and local government, including the Department of Juvenile Justice and Delinquency Prevention, departments of social services, health departments, local mental health, mental retardation, and substance abuse authorities, court personnel, law enforcement agencies, The University of North Carolina, the community college system, and cities and counties, shall cooperate with the Department of Health and Human Services, and local nonprofit corporations that receive grants in coordinating the program at the State level and in implementing the program at the local level. The Secretary of Health and Human Services, after consultation with the Superintendent of Public Instruction, shall develop a plan for ensuring the cooperation of State agencies and local agencies, and encouraging the cooperation of private entities, especially those receiving State funds, in the coordination and implementation of the program. (1994, Ex. Sess., c. 24, s. 30(a); 1997-443, s. 11A.118(a); 1998-202, s. 4(x); 2000-137, s. 4(bb).)

**Effect of Amendments.** — Session Laws 2000-137, s. 4.(bb), effective July 20, 2000, substituted “Department of Juvenile Justice and Delinquency Prevention” for “Office of Juvenile Justice.”

### **§ 143B-152.7. Program evaluation; reporting requirements.**

(a) The Department of Health and Human Services shall develop and implement an evaluation system that will assess the efficiency and effectiveness of the S.O.S. Program. The Department shall design this system to:

- (1) Provide information to the Department and to the General Assembly on how to improve and refine the programs;
- (1a) Develop information for dissemination to potential grant applicants on the design of programs that experience has shown are likely to be successful;
- (2) Enable the Department and the General Assembly to assess the overall quality, efficiency, and impact of the existing programs;
- (3) Enable the Department and the General Assembly to determine whether to modify the S.O.S. Program; and
- (4) Provide a detailed fiscal analysis of how State funds for these programs were used.

(b) The Department shall report to the General Assembly and the Joint Legislative Commission on Governmental Operations by May 15, 1994, on its progress in developing the evaluation system and in developing and implementing the program. It shall report prior to February 1, 1995, on the evaluation system developed by the Department and on program implementation. The Department shall present an annual report on October 1, 1995, and annually thereafter to the General Assembly and to the Joint Legislative Commission on Governmental Operations on the implementation of the program and the results of the program evaluation.

The Department shall also report annually to the Joint Legislative Commission on Governmental Operations and to the Governor on the implementation of the S.O.S. Program.

(c) A local 501(c)(3) entity or consortium that receives a grant under this Part shall report by August 1 of each year to the Department on the implementation of the program. This report shall demonstrate the extent to which the local S.O.S. Program has met the local needs, goals, and anticipated outcomes as set forth in the grant applications. (1994, Ex. Sess., c. 24, s. 30(a); 1997-443, ss. 8.29(n), 11A.118(a).)

**§§ 143B-152.8, 143B-152.9:** Reserved for future codification purposes.

### Part 5B. Family Resource Center Grant Program.

### **§ 143B-152.10. Family Resource Center Grant Program; creation; purpose; intent.**

(a) There is created in the Department of Health and Human Services the Family Resource Center Grant Program. The purpose of the program is to provide grants to establish family resource centers that provide services to children from birth through elementary school age and to their families that:

- (1) Enhance the children’s development and ability to attain academic and social success;
- (2) Ensure a successful transition from early childhood education programs and child care to the public schools;

- (3) Assist families in achieving economic independence and self-sufficiency; and
- (4) Mobilize public and private community resources to help children and families in need.

(b) It is the intent of the General Assembly to encourage and support broad-based collaboration among public and private agencies and among people who reflect the racial and socioeconomic diversity in communities to develop initiatives that (i) prepare children to learn effectively and to have a successful school experience, (ii) enhance the ability of families to become advocates for and supporters of education for the children in their families, and (iii) enhance the ability of families to function as nurturing and effective family units.

(c) It is further the intent of the General Assembly that this program shall be targeted to those neighborhoods that have disproportionately high levels of (i) children who would be less likely to attain educational or social success, (ii) families with low incomes, and (iii) crime and juvenile delinquency. (1994, Ex. Sess., c. 24, s. 31(a); 1997-443, s. 11A.118(a).)

### **§ 143B-152.11. Administration of program.**

The Department of Health and Human Services shall develop and implement the Family Resource Center Grant Program. The Department shall:

- (1) Sponsor a statewide conference for teams of interested representatives to provide background information and assistance regarding all aspects of the program;
- (2) Disseminate information regarding the program to interested local community groups;
- (3) Provide initial technical assistance and ongoing technical assistance to grant recipients;
- (4) Administer funds appropriated by the General Assembly;
- (5) Monitor the grants funded and the ongoing operations of family resource centers;
- (6) Revoke a grant if necessary or appropriate;
- (7) Report to the General Assembly and the Joint Legislative Commission on Governmental Operations, in accordance with G.S. 143B-152.15; and
- (8) Adopt rules to implement this Part. (1994, Ex. Sess., c. 24, s. 31(a); 1997-443, s. 11A.118(a).)

### **§ 143B-152.12. Eligible applicants: applications for grants.**

(a) A community- or neighborhood-based 501(c)(3) entity or a consortium consisting of one or more local 501(c)(3) entities and one or more local school administrative units may apply for a grant.

(b) Applicants for grants shall identify the neighborhood or neighborhoods whose children and families will be served by a family resource center. The decision-making process for identifying and establishing family resource centers shall reflect the racial and socioeconomic diversity of the neighborhood or neighborhoods to be served.

(c) A grant application shall include a process for assessing on an annual basis the success of the local plan in addressing problems. (1994, Ex. Sess., c. 24, s. 31(a).)

### **§ 143B-152.13. Grants review and selection.**

(a) The Department shall develop and disseminate a request for applications and establish procedures to be followed in developing and submitting

applications to establish local family resource centers and administering grants to establish local family resource centers.

(b) The Secretary of Health and Human Services shall appoint a State task force to assist the Secretary in reviewing grant applications. The State task force shall include representatives of the Department of Health and Human Services, the Department of Public Instruction, local school administrative units, educators, parents, the juvenile justice system, social services, and governmental agencies providing services to children, and other members the Secretary considers appropriate. In appointing the State task force, the Secretary shall consult with the Superintendent of Public Instruction in an effort to coordinate the membership of this State task force, the State task force appointed by the Secretary pursuant to G.S. 143B-152.5, and the State task force appointed by the Superintendent pursuant to G.S. 115C-238.42.

In reviewing grant applications, the Secretary and the State task force may consider (i) the severity of the local problems as determined by the needs assessment data, (ii) the likelihood that the locally designed plan will result in high quality services for children and their families, (iii) evidence of local collaboration and coordination of services, (iv) any innovative or experimental aspects of the plan that will make it a useful model for replication in other counties, (v) the availability of other resources or funds, (vi) the incidence of crime and juvenile delinquency, (vii) the amount needed to implement the proposal, and (viii) any other factors consistent with the intent of this Part.

(c) In determining the amount of funds an applicant receives, the Secretary and the State task force may consider (i) the number of children to be served, (ii) the number and percentage of children to be served who participate in the subsidized lunch program, (iii) the number and percentage of school-aged children to be served with two working parents or one single parent, (iv) the availability of other resources or funds, and (v) the amount needed to implement the proposal.

(d) The Secretary shall award the grants. (1994, Ex. Sess., c. 24, s. 31(a); 1997-443, s. 11A.118(a).)

### § 143B-152.14. Cooperation of State and local agencies.

All agencies of the State and local government, including the Department of Juvenile Justice and Delinquency Prevention, departments of social services, health departments, local mental health, mental retardation, and substance abuse authorities, court personnel, law enforcement agencies, The University of North Carolina, the community college system, and cities and counties, shall cooperate with the Department of Health and Human Services, and local nonprofit corporations that receive grants in coordinating the program at the State level and in implementing the program at the local level. The Secretary of Health and Human Services, after consultation with the Superintendent of Public Instruction, shall develop a plan for ensuring the cooperation of State agencies and local agencies and encouraging the cooperation of private entities, especially those receiving State funds, in the coordination and implementation of the program. (1994, Ex. Sess., c. 24, s. 31(a); 1997-443, s. 11A.118(a); 1998-202, s. 4(y); 2000-137, s. 4(cc).)

**Effect of Amendments.** — Session Laws 2000-137, s. 4(cc), effective July 20, 2000, substituted “Department of Juvenile Justice and

Delinquency Prevention” for “Office of Juvenile Justice.”

### § 143B-152.15. Program evaluation; reporting requirements.

(a) The Department of Health and Human Services shall develop and implement an evaluation system that will assess the efficiency and effectiveness of the Family Resource Center Grant Program. The department shall design this system to:

- (1) Provide information to the Department and to the General Assembly on how to improve and refine the programs;
- (2) Enable the Department and the General Assembly to assess the overall quality, efficiency, and impact of the existing programs;
- (3) Enable the Department and the General Assembly to determine whether to modify the Family Resource Center Grant Program; and
- (4) Provide a detailed fiscal analysis of how State funds for these programs were used.

(b) The Department shall report no later than December 1 of each year 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 on the program and the results of the program evaluation.

(c) A local 501(c)(3) entity or consortium that receives a grant under this Part shall report by August 1 of each year to the Department on the implementation of the program. This report shall demonstrate the extent to which the local family resource center has met the local needs, goals, and anticipated outcomes as set forth in the grant application. (1994, Ex. Sess., c. 24, s. 31(a); 1997-443, s. 11A.118(a); 2001-424, s. 21.48(f).)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Acts of 2001.'"

Session Laws 2001-424, ss. 21.48(a) to (e), provide: "(a) The Department of Health and Human Services shall evaluate the use of all State and federal funds allocated to Family Resource Centers that primarily serve families with minor children. The evaluation shall incorporate data collected from these Centers and shall assess the effectiveness of each program in achieving established program goals including the following:

"(1) Enhancing children's development and ability to attain academic and social success.

"(2) Promoting successful transition from early childhood education programs and child care to public schools.

"(3) Assisting families in achieving economic independence and self-sufficiency.

"(4) Mobilizing public and private community resources to help children and families in need.

"(5) Ensuring that plans are designed and implemented to provide families with services in a holistic family centered manner.

"(b) The Department shall establish performance measurement protocol, based on national standards or best practice models, to determine the effectiveness of services provided by all family resource centers specified in subsection (a) of this section [s. 21.48(a) of Session Laws 2001-424].

"(c) Unless inconsistent with federal law, the Department shall ensure that all programs have similar core services and the same goals while eliminating duplication of effort at the local level. The Department shall redirect the funds for Family Resource Centers to focus on those core services that have a direct impact on strengthening family support.

"(d) In determining the allocation of funding, the Department shall ensure that Family Resource Centers have demonstrated that they have collaborative arrangements with other public and private agencies that have similar purposes that delineate specific roles and responsibilities to ensure effectiveness and efficiency in the operation of Family Resource Centers.

"(e) The Department shall report on activities under this section [s. 21.48 of Session Laws 2001-424]. This report is due 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 on May 1, 2002."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause. 2001-424, s. 21.48(f), effective July 1, 2001, rewrote subsection (b).

**Effect of Amendments.** — Session Laws

## Part 6. Social Services Commission.

### § 143B-153. Social Services Commission — creation, powers and duties.

There is hereby created the Social Services Commission of the Department of Health and Human Services with the power and duty to adopt rules and regulations to be followed in the conduct of the State's social service programs with the power and duty to adopt, amend, and rescind rules and regulations under and not inconsistent with the laws of the State necessary to carry out the provisions and purposes of this Article. Provided, however, the Department of Health and Human Services shall have the power and duty to adopt rules and regulations to be followed in the conduct of the State's medical assistance program.

- (1) The Social Services Commission is authorized and empowered to adopt such rules and regulations that may be necessary and desirable for the programs administered by the Department of Health and Human Services as provided in Chapter 108A of the General Statutes of the State of North Carolina.
- (2) The Social Services Commission shall have the power and duty to establish standards and adopt rules and regulations:
  - a. For the programs of public assistance established by federal legislation and by Article 2 of Chapter 108A of the General Statutes of the State of North Carolina with the exception of the program of medical assistance established by G.S. 108A-25(b);
  - b. To achieve maximum cooperation with other agencies of the State and with agencies of other states and of the federal government in rendering services to strengthen and maintain family life and to help recipients of public assistance obtain self-support and self-care;
  - c. For the placement and supervision of dependent juveniles and of delinquent juveniles who are placed in the custody of the Department of Juvenile Justice and Delinquency Prevention, and payment of necessary costs of foster home care for needy and homeless children as provided by G.S. 108A-48;
  - d. For the payment of State funds to private child-placing agencies as defined in G.S. 131D-10.2(4) and residential child care facilities as defined in G.S. 131D-10.2(13) for care and services provided to children who are in the custody or placement responsibility of a county department of social services; and
  - e. For client assessment and independent case management pertaining to the functions of county departments of social services for public assistance programs authorized under paragraph a. of this subdivision.
- (2a) The Social Services Commission shall have the power and duty to establish standards and adopt rules and regulations:
  - a. For social services programs established by federal legislation and by Article 3 of G.S. Chapter 108A;
  - b. For implementation of Title XX of the Social Security Act, except for Title XX services provided solely through the Division of Mental Health, Developmental Disabilities, and Substance Abuse

Services, by promulgating rules and regulations in the following areas:

1. Eligibility for all services established under a Comprehensive Annual Services Plan, as required by federal law;
2. Standards to implement all services established under the Comprehensive Annual Services Plan;
3. Maximum rates of payment for provision of social services;
4. Fees for services to be paid by recipients of social services;
5. Designation of certain mandated services, from among the services established by the Secretary below, which shall be provided in each county of the State; and
6. Title XX services for the blind, after consultation with the Commission for the Blind.

Provided, that the Secretary is authorized to promulgate all other rules in at least the following areas:

1. Establishment, identification, and definition of all services offered under the Comprehensive Annual Services Plan;
  2. Policies governing the allocation, budgeting, and expenditures of funds administered by the Department;
  3. Contracting for and purchasing services; and
  4. Monitoring for effectiveness and compliance with State and federal law and regulations.
- (3) The Social Services Commission shall have the power and duty to establish and adopt standards:
- a. For the inspection and licensing of maternity homes as provided by G.S. 131D-1;
  - b. Repealed by Session Laws 1999-334, s. 3.5, effective October 1, 1999.
  - c. For the inspection and licensing of child-care institutions as provided by G.S. 131D-10.5;
  - d. For the inspection and operation of jails or local confinement facilities as provided by G.S. 153A-220 and Article 2 of Chapter 131D of the General Statutes of the State of North Carolina;
  - e. Repealed by Session Laws 1981, c. 562, s. 7.
  - f. For the regulation and licensing of charitable organizations, professional fund-raising counsel and professional solicitors as provided by Chapter 131D of the General Statutes of the State of North Carolina.
- (4) The Social Services Commission shall have the power and duty to authorize investigations of social problems, with authority to subpoena witnesses, administer oaths, and compel the production of necessary documents.
- (5) The Social Services Commission shall have the power and duty to ratify reciprocal agreements with agencies in other states that are responsible for the administration of public assistance and child welfare programs to provide assistance and service to the residents and nonresidents of the State.
- (6) The Commission is authorized and empowered to adopt such rules and regulations, not inconsistent with the laws of this State, as may be required by the federal government of grants-in-aid for social services purposes which may be made available for the State by the federal government. This section is to be liberally construed in order that the State and its citizens may benefit from such grants-in-aid.
- (7) The Commission shall adopt rules and regulations consistent with the provisions of this Chapter. All rules and regulations not inconsistent with the provisions of this Chapter heretofore adopted by the Board of

Social Services shall remain in full force and effect unless and until repealed or superseded by action of the Social Services Commission. All rules and regulations adopted by the Commission shall be enforced by the Department of Health and Human Services.

- (8) The Commission may establish by regulation, except for Title XX services provided solely through the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, rates or fees for:
- a. A fee schedule for the payment of the costs of necessary child care in licensed facilities and registered plans for minor children of needy families.
  - b. A fee schedule for the payment by recipients for services which are established in accordance with Title XX of the Social Security Act and implementing regulations; and
  - c. The payment of an administrative fee not to exceed two hundred dollars (\$200.00) to be paid by public or nonprofit agencies which employ students under the Plan Assuring College Education (PACE) program.
  - d. Child support enforcement services as defined by G.S. 110-130.1. (1973, c. 476, s. 134; 1975, c. 747, s. 2; 1977, c. 674, s. 7; 1977, 2nd Sess., c. 1219, ss. 26, 27; 1981, c. 275, s. 5; c. 562, s. 7; c. 961, ss. 1-3; 1983, c. 278, ss. 1, 2; c. 527, s. 2; 1985, c. 206; c. 479, s. 96; c. 689, s. 29f; 1991, c. 462, s. 1; c. 636, s. 19(d); c. 689, s. 105; c. 761, s. 28; 1993, c. 553, s. 46; 1995, c. 449, s. 4; c. 535, s. 32; 1997-443, s. 11A.118(a); 1997-456, s. 22; 1997-506, s. 55; 1998-202, s. 4(z); 1999-334, s. 3.5; 2000-111, s. 4; 2000-137, s. 4(dd); 2000-140, s. 99(a).)

**Cross References.** — As to standards for Alzheimer's special care units, see § 143B-181.50 et seq.

**Editor's Note.** — Subdivision (3)b. of this section was amended by Session Laws 1995, c. 535, s. 32 in the coded bill drafting format provided by § 120-20.1. The act failed to incorporate the changes in subdivision (3)b. made by Session Laws 1995, c. 449, s. 4. Subdivision (3)b. is set out in the form above at the direction of the Revisor of Statutes.

**Effect of Amendments.** — The 1998 amendment, effective January 1, 1999, and applicable to acts committed on or after that date, substituted "dependent juveniles and of delinquent juveniles who are placed in the

custody of the Office of Juvenile Justice" for "dependent and delinquent children" in subdivision (2)c.

Session Laws 2000-111, s. 4, effective July 14, 2000, added subdivision (2)e, and made minor stylistic changes.

Session Laws 2000-137, s. 4(dd), July 20, 2000, made the same changes as Session Laws 2000-111, s. 4 as noted above.

Session Laws 2000-140, s. 99(a), effective July 21, 2000, substituted "Department of Juvenile Justice and Delinquency Prevention" for "Office of Juvenile Justice" in subdivision (2)c.

**Legal Periodicals.** — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

#### CASE NOTES

**Grant of Rule Making Authority to Social Services Commission.** — The Social Services Commission has and continues to have general rule making authority under its grant in this section and by the provision of § 108A-71 which authorizes the Department of Human Resources to accept all "State appropriations" for programs of social services. That grant became limited, however, by Chapter 150B upon its enactment, thereby requiring the Commission to comply with certain procedural requirements in adopting rules if specifically

authorized by legislative enactment to adopt rules. *Whittington v. North Carolina Dept of Human Resources*, 100 N.C. App. 603, 398 S.E.2d 40 (1990).

**Social Services Commission's Regulation of State Abortion Fund.** — Since the State Abortion Fund prior to the enactment of Session Laws 1985, c. 479, s. 93 was merely a "state appropriation", the Department of Human Resources, through its Social Services Commission, could and did enact rules and regulations pertaining to the program. How-

ever, by the passage of s. 93, which specifically limits, by legislative enactment, how the Fund is to be administered, the Department of Human Resources and the Commission's rule making authority must comply with the requirements of Chapter 150B. *Whittington v. North Carolina Dep't of Human Resources*, 100 N.C. App. 603, 398 S.E.2d 40 (1990).

**Liability of State for Negligence of County Social Services Director.** — In an action alleging that a foster child was negligently placed in a home by county department

of social services, the Department of Human Resources would be liable for the negligent acts of its agents, the county director of social services and his subordinates, since the Department, through the Social Services Commission, has the right to control the manner in which the county director is to execute his obligation to place children in foster homes. *Vaughn v. North Carolina Dep't of Human Resources*, 296 N.C. 683, 252 S.E.2d 792 (1979).

**Applied** in *Tripp v. Flaherty*, 27 N.C. App. 180, 218 S.E.2d 709 (1975).

§ **143B-153.1:** Repealed by Session Laws 1983, c. 883, s. 2.

### § 143B-154. Social Services Commission — members; selection; quorum; compensation.

The Social Services Commission of the Department of Health and Human Services shall consist of one member from each congressional district in the State, all of whom shall be appointed by the Governor for four-year terms.

The initial members of the Commission shall be the appointed members of the current Social Services Commission who shall serve for the remainder of their current terms and four additional members appointed by the Governor for terms expiring April 1, 1981. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death, removal or disability of a member shall be for the balance of the unexpired term.

In the event that more than 11 congressional districts are established in the State, the Governor shall on July 1 following the establishment of such additional congressional districts appoint a member of the Commission from that congressional district.

The Governor shall have the power to remove any member of the Commission from office for misfeasance, malfeasance, or nonfeasance in accordance with the provisions of G.S. 143B-13 of the Executive Organization Act of 1973.

The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Commission shall constitute a quorum for the transaction of business.

All clerical and other services required by the Commission shall be supplied by the Secretary of Health and Human Services. (1973, c. 476, s. 135; 1977, c. 516; 1981 (Reg. Sess., 1982), c. 1191, s. 77; 1997-443, s. 11A.118(a).)

### § 143B-155. Social Services Commission — regular and special meetings.

The Social Services Commission shall meet at least once in each quarter and may hold special meetings at any time and place within the State at the call of the chairman or upon the written request of at least four members. (1973, c. 476, s. 136.)

#### CASE NOTES

**Applied** in *Forsyth County Bd. of Social Servs. v. Division of Social Servs.*, 72 N.C. App. 645, 325 S.E.2d 47 (1985).

### § 143B-156. Social Services Commission — officers.

The Commission for Social Services shall have a chairman and a vice-chairman. The chairman shall be designated by the Governor from among the members of the Commission to serve as chairman at his pleasure. The vice-chairman shall be elected by and from the members of the Commission and shall serve for a term of two years or until the expiration of his regularly appointed term. (1973, c. 476, s. 137.)

#### Part 7. Commission for the Blind.

### § 143B-157. Commission for the Blind — creation, powers and duties.

There is recreated the Commission for the Blind of the Department of Health and Human Services with the power and duty to adopt rules governing the conduct of the State's rehabilitative programs for the blind that are necessary to carry out the provisions and purposes of this Article.

- (1) The Commission shall adopt rules that are necessary and desirable for the programs administered by the Department of Health and Human Services as provided in Chapter 111 of the General Statutes of North Carolina.
- (2) Repealed by Session Laws 1993, c. 561, s. 89(a).
- (3) The Commission shall adopt rules, not inconsistent with the laws of this State, that are required by the federal government for grants-in-aid for rehabilitative purposes for the blind that may be made available to the State from the federal government. This section is to be liberally construed in order that the State and its citizens may benefit from such grants-in-aid.
- (3a) The Commission shall review, analyze, and advise the Department regarding the performance of its responsibilities under the federal rehabilitation program in which the State participates, as it relates to the provision of services to the blind, particularly its responsibilities relating to the following:
  - a. Eligibility for the program;
  - b. The extent, scope, and effectiveness of the services provided; and
  - c. The functions performed by the Department that affect, or that have the potential to affect, the ability of individuals who are blind or visually impaired to achieve rehabilitative goals and objectives under the federal rehabilitation program;
- (3b) The Commission shall advise the Department regarding preparation of applications, the State Plan, amendments to this plan, the State needs assessments, and the evaluations required by the federal rehabilitation program; and in partnership with the Department develop, agree to, and review State goals and priorities;
- (3c) The Commission shall, to the extent feasible, conduct a review and analysis (i) of the effectiveness of, and consumer satisfaction with, the functions performed by the Department and other public and private entities responsible for performing functions for individuals who are blind or visually impaired, and (ii) of vocational rehabilitation services provided or paid for from funds made available through other public or private sources and provided by State agencies and other public and private entities responsible for providing vocational rehabilitation services to individuals who are blind or visually impaired;
- (3d) The Commission shall prepare and submit an annual report to the Governor, the Secretary, and the federal rehabilitation program, and make the report available to the public;

- (3e) The Commission shall coordinate with other councils within the State, including the statewide Independent Living Council established under section 705 of the federal Rehabilitation Act, 29 U.S.C. § 720, et seq., the advisory panel established under section 612(a)(21) of the Individuals with Disabilities Education Act, 20 U.S.C. § 1413(A)(12), the Council on Developmental Disabilities described in section 124 of the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6024, the State Mental Health Planning Council established pursuant to section 1916(e) of the Public Health Service Act, 42 U.S.C. § 300x-4(e), and the Commission on Workforce Development;
- (3f) The Commission shall advise the Department and provide for coordination with, and establishment of working relationships between, the Department and the Independent Living Council;
- (3g) The Commission shall prepare, in conjunction with the Department, a plan for the provision of those resources, including staff and other personnel, that are necessary to carry out the Commission's function under this Part. The resource plan shall, to the maximum extent possible, rely on the use of resources in existence during the period of implementation of the plan. The agreed-upon resources shall be provided pursuant to G.S. 143B-14. To the extent that there is a disagreement between the Commission and the Department with regard to the resources necessary to carry out the functions of the Commission required by this Part, the Governor shall resolve the disagreement. The Department or other State agency shall not assign any other duties to the staff and other personnel who are assisting the Commission in carrying out its duties that would create a conflict of interest;
- (4) The Commission shall adopt rules consistent with the provisions of this Chapter. All rules not inconsistent with the provisions of this Chapter heretofore adopted by the North Carolina State Commission for the Blind shall remain in full force and effect unless and until repealed or superseded by action of the recreated Commission for the Blind. All rules adopted by the Commission shall be enforced by the Department of Health and Human Services. (1973, c. 476, s. 139; 1993, c. 561, s. 89(a); 1997-443, s. 11A.118(a); 2000-121, ss. 29, 30.)

**Effect of Amendments.** — Session Laws 2000-121, ss. 29 and 30, effective July 14, 2000, in subdivision (3b), substituted “amendments to this plan” for “the strategic plan, amendments to these plans” and inserted “and in partnership with the Department develop, agree to, and review State goals and priorities”; and in

subdivision (3e), substituted “29 U.S.C. § 720” for “294 U.S.C. § 720,” substituted “612(a)(21)” for “613(a)(12),” substituted “Council on Developmental Disabilities” for “State Planning Council,” inserted “and the Commission on Workforce Development” and made a minor wording change.

## § 143B-158. Commission for the Blind.

(a) The Commission for the Blind of the Department of Health and Human Services shall consist of 13 members as follows:

- (1) One representative of the Statewide Independent Living Council.
- (2) One representative of a parent training and information center established pursuant to section 631(c) of the Individuals with Disabilities Education Act, 20 U.S.C. § 1431(c).
- (3) One representative of the State's Client Assistance Program.
- (4) One vocational rehabilitation counselor who has knowledge of and experience in vocational rehabilitation services for the blind. A vocational rehabilitation counselor appointed pursuant to this subdi-

vision shall serve as a nonvoting member of the Commission if the counselor is an employee of the Department of Health and Human Services.

- (5) One representative of community rehabilitation program services providers.
- (6) One current or former applicant for, or recipient of, vocational rehabilitation services.
- (7) One representative of a disability advocacy group representing individuals who are blind.
- (8) One parent, family member, guardian, advocate, or authorized representative of an individual who is blind, has multiple disabilities, and either has difficulty representing himself or herself or who is unable, due to disabilities, to represent himself or herself.
- (9) One representative of business, industry, and labor.
- (10) One representative of the directors of projects carried out under section 121 of the Rehabilitation Act of 1973, 29 U.S.C. § 741, as amended, if there are any of these projects in the State.
- (11) One representative of the Department of Public Instruction.
- (12) One representative of the Commission on Workforce Development.
- (13) The Director of the Division of Services for the Blind shall serve as an ex officio, nonvoting member.

(b) The members of the Commission for the Blind shall be appointed by the Governor. The Governor shall appoint members after soliciting recommendations from representatives of organizations representing a broad range of individuals who have disabilities and organizations interested in those individuals. In making appointments to the Commission, the Governor shall consider, to the greatest extent practicable, the extent to which minority populations are represented on the Commission.

(c) A majority of Commission members shall be persons who are blind, as defined in G.S. 111-11. A majority of Commission members shall be persons who are not employed by the Division of Services for the Blind.

(d) The Commission for the Blind shall select a Chairperson from among its members.

(e) The term of office of members of the Commission is three years. The term of members appointed under subdivisions (1), (2), (3), and (4) of subsection (a) of this section shall expire on June 30 of years evenly divisible by three. The term of members appointed under subdivisions (5), (6), (7), and (8) of subsection (a) of this section shall expire on June 30 of years that follow by one year those years that are evenly divisible by three. The term of members appointed under subdivisions (9), (10), (11), and (12) of subsection (a) of this section shall expire on June 30 of years that precede by one year those years that are evenly divisible by three.

(f) No individual may be appointed to more than two consecutive three-year terms. Upon the expiration of a term, a member shall continue to serve until a successor is appointed, as provided by G.S. 128-7. An appointment to fill a vacancy shall be for the unexpired balance of the term.

(g) A member of the Commission shall not vote on any issue before the Commission that would have a significant and predictable effect on the member's financial interest. The Governor shall have the power to remove any member of the Commission from office for misfeasance, malfeasance, or nonfeasance in accordance with the provisions of G.S. 143B-13 of the Executive Organization Act of 1973.

(h) The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

(i) A majority of the Commission shall constitute a quorum for the transaction of business.

(j) All clerical and other services required by the Commission shall be supplied by the Secretary of Health and Human Services. (1973, c. 476, s. 140; 1977, c. 581; 1993, c. 561, s. 89(b); 1997-443, s. 11A.118(a); 2000-121, s. 31.)

**Editor's Note.** — Session Laws 2000-121, s. 36, makes appointment to the Commission for the Blind and provides for staggered terms of three years.

**Effect of Amendments.** — Session Laws 2000-121, s. 31, effective July 14, 2000, rewrote the section and its catchline.

### **§ 143B-159. Commission for the Blind — regular and special meetings.**

The Commission for the Blind shall meet at least once in each quarter and may hold special meetings at any time and place within the State at the call of the chairman or upon the written request of at least five members. (1973, c. 476, s. 141.)

### **§ 143B-160. Commission for the Blind — officers.**

The Commission for the Blind shall have a chairman and a vice-chairman. The chairman shall be designated by the Governor from among the members of the Commission to serve as chairman at his pleasure. The vice-chairman shall be elected by and from the members of the Commission and shall serve for a term of two years or until the expiration of his regularly appointed term. (1973, c. 476, s. 142.)

## **Part 8. Professional Advisory Committee.**

### **§ 143B-161. Professional Advisory Committee — creation, powers and duties.**

There is hereby created the Professional Advisory Committee of the Department of Health and Human Services. The Professional Advisory Committee shall advise the Commission for the Blind on matters concerning or pertaining to the procurement, utilization, and rendering of professional services to the beneficiaries of the Commission's aid and services. (1973, c. 476, s. 144; 1997-443, s. 11A.118(a).)

### **§ 143B-162. Professional Advisory Committee — members; selection; quorum; compensation.**

The Professional Advisory Committee of the Department of Health and Human Services shall consist of nine members appointed by the Governor, three of whom shall be licensed physicians nominated by the North Carolina Medical Society whose practice is limited to ophthalmology, three optometrists nominated by the North Carolina State Optometric Society, and three opticians nominated by the North Carolina Opticians Association.

Those nine members shall serve three-year terms staggered such that the terms of three members shall expire each year. A member of the Committee shall continue to serve until his successor is appointed and qualifies. Any appointment to fill a vacancy on the Committee created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Committee from office in accordance with the provisions of G.S. 143B-16 of the Executive Organization Act of 1973.

The Governor shall designate a member of the Committee to serve as chairman at his pleasure.

Members of the Committee shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Committee shall constitute a quorum for the transaction of business.

All clerical and other services required by the Committee shall be supplied by the Secretary of Health and Human Services.

The schedule for appointments to the Committee described in Section 1 of this act is as follows: The ophthalmologists and optometrists serving on the Committee on the date this act is ratified shall continue to serve until their respective terms expire. Initial appointments of the three opticians shall be made no later than July 2, 1979, shall become effective on that date, and shall be for one, two, and three-year terms, respectively. At the end of the respective terms of office of those nine members, the appointment of their successors shall be for terms of three years. (1973, c. 476, s. 145; 1979, c. 977, ss. 1, 2; 1997-443, s. 11A.118(a).)

## Part 9. Consumer and Advocacy Advisory Committee for the Blind.

### § 143B-163. Consumer and Advocacy Advisory Committee for the Blind — creation, powers and duties.

(a) There is hereby created the Consumer and Advocacy Advisory Committee for the Blind of the Department of Health and Human Services. This Committee shall make a continuing study of the entire range of problems and needs of the blind and visually impaired population of this State and make specific recommendations to the Secretary of Health and Human Services as to how these may be solved or alleviated through legislative action. The Committee shall examine national trends and programs of other states, as well as programs and priorities in North Carolina. Because of the cost of treating persons who lose their vision, the Committee's role shall also include studying and making recommendations to the Secretary of Health and Human Services concerning methods of preventing blindness and restoring vision.

(b) The Consumer and Advocacy Advisory Committee for the Blind shall advise all State boards, commissions, agencies, divisions, departments, schools, corporations, or other State-administered associations or entities, including the secretary, director and members of said boards, commissions, agencies, divisions, departments, schools, et cetera, on the needs of the citizens of the State of North Carolina who are now or will become visually impaired.

(c) The Consumer and Advocacy Advisory Committee for the Blind shall also advise every State board, commission, agency, division, department, school, corporation, or other State-administered associations or entity concerning sight conservation programs that it supervises, administers or controls.

(d) All State boards, commissions, agencies, divisions, departments, schools, corporations, or other State-administered associations or entities including the secretary, director and members of said State boards, agencies, departments, et cetera, which supervise, administer or control any program for or affecting the citizens of the State of North Carolina who are now or will become visually impaired shall inform the Consumer and Advocacy Advisory Committee for the Blind of any proposed change in policy, program, budget, rule, or regulation which will affect the citizens of North Carolina who are now or will become visually impaired. Said board, commission, et cetera, shall allow the Consumer and Advocacy Advisory Committee for the Blind, prior to passage, unless such

change is made pursuant to G.S. 150B-21.1, an opportunity to object to the change and present information and proposals on behalf of the citizens of North Carolina who are now or will become visually impaired. This subsection shall also apply to all sight conservation programs of the State of North Carolina.

(e) Nothing in this statute shall prohibit a board, commission, agency, division, department, et cetera, from implementing any change after allowing the Consumer and Advocacy Advisory Committee for the Blind an opportunity to object and propose alternatives. Shifts in budget items within a program or administrative changes in a program required in the day-to-day operation of an agency, department, or school, et cetera, shall be allowed without prior consultation with said Committee. (1977, c. 842, s. 1; c. 1050; 1979, c. 973, s. 1; 1987, c. 827, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 44; 1997-443, s. 11A.118(a); 2000-121, s. 32.)

**Effect of Amendments.** — Session Laws “handicapped or” preceding “impaired” in sub-2000-121, s. 32, effective July 14, 2000, deleted section (b) and three times in subsection (d).

### **§ 143B-164. Consumer and Advocacy Advisory Committee for the Blind — members; selection; quorum; compensation.**

(a) The Consumer and Advocacy Advisory Committee for the Blind of the Department of Health and Human Services shall consist of the following members:

- (1) One member of the North Carolina Senate to be appointed by the President Pro Tempore of the Senate;
- (2) One member of the North Carolina House of Representatives to be appointed by the Speaker of the House of Representatives;
- (3) President and Vice-President of the National Federation of the Blind of North Carolina;
- (4) President and Vice-President of the North Carolina Council of the Blind;
- (5) President and Vice-President of the North Carolina Association of Workers for the Blind;
- (6) President and Vice-President of the North Carolina Chapter of the American Association of Workers for the Blind;
- (7) Chairman of the State Council of the North Carolina Lions and Executive Director of the North Carolina Lions Association for the Blind, Inc.;
- (8) Chairman of the Concession Stand Committee of the Division of Services for the Blind of the Department of Health and Human Services; and
- (9) Executive Director of the North Carolina Society for the Prevention of Blindness, Inc.

With respect to members appointed from the General Assembly, these appointments shall be made in the odd-numbered years, and the appointments shall be made for two-year terms beginning on the first day of July and continuing through the 30th day of June two years thereafter; provided, such appointments shall be made within two weeks after ratification of this act, and the first members which may be so appointed prior to July 1 of the year of ratification shall serve through the 30th day of June of the second year thereafter. If any Committee member appointed from the General Assembly ceases to be a member of the General Assembly, for whatever reason, his position on the Committee shall be deemed vacant. In the event that either Committee position which is designated herein to be filled by a member of the

General Assembly becomes vacant during a term, for whatever reason, a successor to fill that position shall be appointed for the remainder of the unexpired term by the person who made the original appointment or his successor. Provided members appointed by the President Pro Tempore of the Senate and the Speaker of the House shall not serve more than two complete consecutive terms.

With respect to the remaining Committee members, each officeholder shall serve on the Committee only so long as he holds the named position in the specified organization. Upon completion of his term, failure to secure reelection or appointment, or resignation, the individual shall be deemed to have resigned from the Committee and his successor in office shall immediately become a member of the Committee. Further, if any of the above-named organizations dissolve or if any of the above-stated positions no longer exist, then the successor organization or position shall be deemed to be substituted in the place of the former one and the officeholder in the new organization or of the new position shall become a member of the Committee.

(b) A chairman shall be elected by a majority vote of the Committee members for a one-year term to coincide with the fiscal year of the State. Provided, the first chairman shall be elected for a term to end June 30, 1978.

Provided, further, if any chairman does not desire or is unable to continue to perform as chairman for any reason, including his becoming ineligible to be a member of the Committee as specified in subsection (a), the remaining members shall elect a chairman to fulfill the remainder of his term.

(c) A majority of the members shall constitute a quorum for the transaction of business.

(d) The Committee shall meet once a quarter to act upon any information provided them by any board, commission, agency, division, department, school, et cetera. Special meetings may be held at any time and place within the State at the call of the chairman or upon written request of at least a majority of the members. Provided, a majority of the members shall be allowed to waive any meeting.

(e) All clerical and other services required by the Committee shall be supplied by the Secretary of Health and Human Services.

(f) Members of the Committee shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5. (1977, c. 842, s. 1; c. 1050; 1979, c. 973, s. 2; 1991, c. 739, s. 27; 1997-443, s. 11A.118(a).)

**§§ 143B-164.1 through 143B-164.9:** Reserved for future codification purposes.

### Part 9A. State School for Sight-Impaired Children.

#### § 143B-164.10. Incorporation, name and management.

The institution for the education of the blind, located in the City of Raleigh, shall be a corporation under the name and style of the Governor Morehead School, and shall be under the management of the Department of Health and Human Services and the director of the school. (1881, c. 211, s. 1; Code, s. 2227; Rev., s. 4187; 1917, c. 35, s. 1; C.S., s. 5872; 1957, c. 1434; 1963, c. 448, s. 28; 1969, c. 749, s. 2; 1973, c. 476, s. 164; 1975, c. 19, s. 39; 1981, c. 423, s. 1; 1997-18, s. 13(a); 1997-443, s. 11A.118(a).)

**Editor's Note.** — This Part is former Part 8 of Article 9 of Chapter 115C, as rewritten and recodified by Session Laws 1997-18, s. 13, effective April 11, 1997. Where appropriate, the

historical citations to the sections in the former Part have been added to corresponding sections in the Chapter as rewritten and recodified.

**§ 143B-164.11. Board of Directors of the Governor Morehead School — creation, powers and duties.**

(a) There is hereby created the Board of Directors of the Governor Morehead School of the Department of Health and Human Services with the power and duty to adopt rules and establish standards to be followed in the conduct of the Governor Morehead School including rules for the professional care of children admitted to the Governor Morehead School and rules to make the Governor Morehead School as nearly self-supporting as consistent with the purposes of its creation.

(b) The Board of Directors of the Governor Morehead School may adopt rules not inconsistent with the laws of this State, as may be required by the federal government for grants-in-aid that may be available to the State by the federal government. This subsection is to be liberally construed in order that the State and its citizens may benefit from such grants-in-aid.

(c) The Board of Directors of the Governor Morehead School may encourage the establishment of private, nonprofit corporations to support the institution. If the sole purpose of a corporation is to support the Governor Morehead School, the Department of Health and Human Services may, with the approval of the Board of Directors, assign employees to assist with the establishment and operation of the corporation and may make available to the corporation office space, equipment, supplies, and other related resources. The limitation on hours of service by an employee provided in G.S. 143B-139.4 does not apply to employees assisting a nonprofit corporation pursuant to this subsection. The board of directors of each private, nonprofit corporation that obtains assistance under this subsection shall secure and pay for the services of the State Auditor or employ a certified public accountant to conduct an annual audit of the financial accounts of the corporation. The board of directors of the corporation shall transmit to the Department of Health and Human Services a copy of the annual financial audit report of the corporation. (1989, c. 533, s. 3; 1997-18, s. 13(b); 1997-443, s. 11A.118(a); 2001-412, s. 2.)

**Effect of Amendments.** — Session Laws 2001-412, s. 2, effective September 14, 2001, added subsection (c).

**§ 143B-164.12. Board of Directors of the Governor Morehead School — members; selection; quorum; compensation.**

(a) The Board of Directors of the Governor Morehead School of the Department of Health and Human Services shall consist of 11 members appointed by the Governor for terms of six years. Any appointment to fill a vacancy created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term. The Governor shall have the power to remove any member of the Board from office for misfeasance, malfeasance or nonfeasance according to the provisions of G.S. 143B-13.

(b) The chairman of the Board shall be designated by the Governor from the Board members to serve as chairman at his pleasure. The vice-chairman shall be elected by and from the members of the Board and shall serve for a term of two years or until the expiration of his regularly appointed term.

(c) The Board shall meet at least once in each quarter and may hold special meetings at any time and place at the call of the chairman or upon the written request of at least a majority of its members. A majority of the Board shall constitute a quorum.

(d) Board members shall receive per diem and necessary travel and subsistence expenses in accordance with G.S. 138-5.

(e) The Secretary of the Department of Health and Human Services shall provide clerical and other assistance as needed. (1989, c. 533, s. 3; 1997-18, s. 13(c); 1997-443, s. 11A.118(a).)

### **§ 143B-164.13. Admission of pupils; how admission obtained.**

The Department of Health and Human Services shall, on application, receive in the institution for the purpose of education all blind children who are residents of this State and who are from age five through age 20 years: Provided, that pupils who are not within the age limits above set forth may be admitted to said institution in cases in which the Department of Health and Human Services finds that the admission of such pupils will be beneficial to them and in cases in which there is sufficient space available for their admission in said institution: Provided, further, that the Department of Health and Human Services is authorized to make expenditures, out of any scholarship funds or other funds already available or appropriated, of sums of money for the use of out-of-state facilities for any student who, because of peculiar conditions or disability, cannot be properly educated at the school in Raleigh. (1881, c. 211, s. 5; Code, s. 2231; Rev., s. 4191; 1917, c. 35, s. 1; C.S., s. 5876; 1947, c. 375; 1949, c. 507; 1953, c. 675, s. 14; 1963, c. 448, s. 28; 1969, c. 749, s. 2; c. 1279; 1973, c. 476, s. 164; 1981, c. 423, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 23; 1985, c. 780, s. 3; 1997-18, s. 13(a); 1997-443, s. 11A.118(a).)

### **§ 143B-164.14. Admission of pupils from other states.**

The Department of Health and Human Services may, on such terms as it deems proper and upon the receipt of tuition and necessary expenses as prescribed by the Department of Health and Human Services, admit as pupils persons of like infirmity from any other state but such power shall not be exercised to the exclusion of any child of this State, and the person so admitted shall not acquire the condition of a resident of the State by virtue of such pupilage. (1881, c. 211, s. 6; Code, s. 2232; Rev., s. 4193; C.S., s. 5878; 1963, c. 448, s. 28; 1969, c. 749, s. 2; 1973, c. 476, s. 164; 1981, c. 423, s. 1; 1997-18, s. 13(a); 1997-443, s. 11A.118(a).)

### **§ 143B-164.15. Department of Health and Human Services may confer diplomas.**

The Department of Health and Human Services may, upon the recommendation of the superintendent and faculty, confer such diplomas or marks of achievement upon its graduates as it may deem appropriate to encourage merit. (1881, c. 211, s. 7; Code, s. 2233; Rev., s. 4194; 1917, c. 35, s. 1; C.S., s. 5879; 1963, c. 448, s. 28; 1969, c. 749, s. 2; 1973, c. 476, s. 164; 1981, c. 423, s. 1; 1997-18, s. 13(a); 1997-443, s. 11A.122.)

### **§ 143B-164.16. State Treasurer is ex officio treasurer of institution.**

The State Treasurer shall be ex officio treasurer of the institution. He shall report to the Department of Health and Human Services at such times as they

may call on him, showing the amount received on account of the institution, amount paid out, and amount on hand. (1881, c. 211, s. 9; Code, s. 2235; Rev., s. 4196; C.S., s. 5881; 1963, c. 448, s. 28; 1969, c. 749, s. 2; 1973, c. 476, s. 164; 1981, c. 423, s. 1; 1997-18, s. 13(a); 1997-443, s. 11A.118(a).)

### **§ 143B-164.17. When clothing, etc., for pupils paid for by county.**

Where it shall appear to the satisfaction of the director of social services and the chairman of the board of county commissioners of any county in this State that the parents of any blind child residing in such county are then unable to provide such child with clothing or traveling expenses or both to and from the Governor Morehead School, or where such child has no living parent, or any estate of his own, or any person, or persons, upon which he is legally dependent who are able to provide expenses for such transportation and clothing, then upon the demand of the institution which such child attends or has been accepted for attendance, the board of county commissioners of the county in which such child resides shall pay to the proper institution an amount sufficient to clothe and pay traveling expenses of said child. (1879, c. 332, s. 1; Code, s. 2238; Rev., s. 4199; Ex. Sess. 1908, c. 69; 1917, c. 35, s. 3; 1919, c. 183; C.S., s. 5885; 1927, c. 86; 1929, c. 181; 1961, c. 186; 1963, c. 448, s. 28; 1969, c. 749, s. 2; c. 982; 1981, c. 423, s. 1; 1993, c. 257, s. 11; 1997-18, s. 13(a).)

### **§ 143B-164.18. Establishment of private, nonprofit corporations.**

The Department of Health and Human Services may encourage the establishment of private, nonprofit corporations to support the Governor Morehead School. If the sole purpose of a corporation is to support the Governor Morehead School, the Department may, with the approval of the Board of Directors of the Governor Morehead School, assign employees to assist with the establishment and operation of the nonprofit corporation and may make available to the corporation office space, equipment, supplies, and other related resources. The limitation on hours of service by an employee provided in G.S. 143B-139.4 does not apply to employees assisting a nonprofit corporation established pursuant to this section.

The board of directors of each private, nonprofit corporation that obtains assistance under this section shall secure and pay for the services of the State Auditor or employ a certified public accountant to conduct an annual audit of the financial accounts of the corporation. The board of directors of the corporation shall transmit to the Department of Health and Human Services a copy of the annual financial audit report of the corporation. (2001-412, s. 1.)

**Editor's Note.** — Session Laws 2001-412, s. 4, makes this section effective September 14, 2001.

## Part 10. North Carolina Medical Care Commission.

### **§ 143B-165. North Carolina Medical Care Commission — creation, powers and duties.**

There is hereby created the North Carolina Medical Care Commission of the Department of Health and Human Services with the power and duty to promulgate rules and regulations to be followed in the construction and maintenance of public and private hospitals, medical centers, and related

facilities with the power and duty to adopt, amend and rescind rules and regulations under and not inconsistent with the laws of the State necessary to carry out the provisions and purposes of this Article.

- (1) The North Carolina Medical Care Commission has the duty to adopt statewide plans for the construction and maintenance of hospitals, medical centers, and related facilities, or such other as may be found desirable and necessary in order to meet the requirements and receive the benefits of any federal legislation with regard thereto.
- (2) The Commission is authorized to adopt such rules and regulations as may be necessary to carry out the intent and purposes of Article 13 of Chapter 131 of the General Statutes of North Carolina.
- (3) The Commission may adopt such reasonable and necessary standards with reference thereto as may be proper to cooperate fully with the Surgeon General or other agencies or departments of the United States and the use of funds provided by the federal government as contained and referenced in Article 13 of Chapter 131 of the General Statutes of North Carolina.
- (4) The Commission shall have the power and duty to approve projects in the amounts of grants-in-aid from funds supplied by the federal and State governments for the planning and construction of hospitals and other related medical facilities according to the provisions of Article 13 of Chapter 131 of the General Statutes of North Carolina.
- (5) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1388, s. 3.
- (6) The Commission has the duty to adopt rules and regulations and standards with respect to the different types of hospitals to be licensed under the provisions of Article 13A of Chapter 131 of the General Statutes of North Carolina.
- (7) The Commission is authorized and empowered to adopt such rules and regulations, not inconsistent with the laws of this State, as may be required by the federal government for grants-in-aid for medical facility services and licensure which may be made available to the State by the federal government. This section is to be liberally construed in order that the State and its citizens may benefit from such grants-in-aid.
- (8) The Commission shall adopt such rules and regulations, consistent with the provisions of this Chapter. All rules and regulations not inconsistent with the provisions of this Chapter heretofore adopted by the North Carolina Medical Care Commission shall remain in full force and effect unless and until repealed or superseded by action of the North Carolina Medical Care Commission. All rules and regulations adopted by the Commission shall be enforced by the Department of Health and Human Services.
- (9) The Commission shall have the power and duty to adopt rules and regulations with regard to emergency medical services in accordance with the provisions of Article 26 of Chapter 130 and Article 56 of Chapter 143 of the General Statutes of North Carolina.
- (10) The Commission shall have the power and duty to adopt rules for the operation of nursing homes, as defined by Article 6 of Chapter 131E of the General Statutes.
- (11) The Commission is authorized to adopt such rules as may be necessary to carry out the provisions of Part C of Article 6, and Article 10, of Chapter 131E of the General Statutes of North Carolina.
- (12) The Commission shall adopt rules, including temporary rules pursuant to G.S. 150B-13, providing for the accreditation of facilities that perform mammography procedures and for laboratories evaluating screening pap smears. Mammography accreditation standards shall

address, but are not limited to, the quality of mammography equipment used and the skill levels and other qualifications of personnel who administer mammographies and personnel who interpret mammogram results. The Commission's standards shall be no less stringent than those established by the United States Department of Health and Human Services for Medicare/Medicaid coverage of screening mammography. These rules shall also specify procedures for waiver of these accreditation standards on an individual basis for any facility providing screening mammography to a significant number of patients, but only if there is no accredited facility located nearby. The Commission may grant a waiver subject to any conditions it deems necessary to protect the health and safety of patients, including requiring the facility to submit a plan to meet accreditation standards.

- (13) The Commission shall have the power and duty to adopt rules for the inspection and licensure of adult care homes and operation of adult care homes, as defined by Article 1 of Chapter 131D of the General Statutes, and for personnel requirements of staff employed in adult care homes, except where rule-making authority is assigned to the Secretary. (1973, c. 476, s. 148; c. 1090, s. 2; c. 1224, s. 3; 1981, c. 614, s. 10; 1981 (Reg. Sess., 1982), c. 1388, s. 3; 1983 (Reg. Sess., 1984), c. 1022, s. 6; 1987, c. 34; 1991, c. 490, s. 4; 1997-443, s. 11A.118(a); 1999-334, ss. 3.6, 3.7.)

**Cross References.** — As to standards for Alzheimer's special care units, see § 143B-181.50 et seq.

**Editor's Note.** — As to nursing home licensure, see now § 131E-100 et seq. Article 26 of Chapter 130, referred to in this section, was repealed by Session Laws 1983, c. 891, s. 1. As to regulation of ambulance services, see now § 131E-155 et seq. Articles 13 and 13A of Chapter 131, referred to in this section, were repealed by Session Laws 1983, c. 775, s. 1. As to health care facilities and services, see now § 131E-1 et seq. Section 150B-13, referred to in this section, was repealed by Session Laws 1991, c. 418, s. 5. As to rule making, see now § 150B-18 et seq.

Session Laws 1991, c. 490, which added subdivision (12), in s. 7, provides "Nothing in this act shall apply to specified accident, specified disease, hospital indemnity, or long-term care health insurance policies."

Session Laws 1999-386, s. 4, effective August 4, 1999, provides that, notwithstanding the requirements of G.S. 131E-8, G.S. 131E-13, G.S. 131E-14, G.S. 153A-176, and Article 12 of Chapter 160A of the General Statutes, and any past compliance or failure to comply with those requirements, the prior conveyance by a municipality as defined in G.S. 131E-6(5), or by a hospital authority as defined in G.S. 131E-16(14), of a hospital facility that currently

serves as collateral in a transaction involving North Carolina Medical Care Commission bonds issued under Part 10 of Article 3 of Chapter 143B of the General Statutes is hereby validated. Section 5 of the act provides that Section 4 shall not apply to litigation pending on or before the effective date.

Session Laws 2000-50, s. 2, effective June 30, 2000, provides: "Notwithstanding G.S. 150B-21.1(a), the Medical Care Commission shall adopt temporary rules for the purpose of defining the circumstances under which adult care homes may admit residents on a short-term basis for the purpose of caregiver respite and the rules that shall apply during the course of their stay. The Commission's authority to adopt temporary rules under this section expires on the date that permanent rules pertaining to the same subject matter adopted by the Commission as authorized under G.S. 143B-165(10) become effective."

**Effect of Amendments.** — Session Laws 1999-334, s. 3.6, effective July 22, 1999, in subdivision (10), substituted "adopt" for "promulgate," deleted "and regulations" following "rules" and substituted "Article 6 of Chapter 131E of the General Statutes" for "G.S. 130-9(e)."

Session Laws 1999-334, s. 3.7, effective October 1, 1999, added subdivision (13).

## CASE NOTES

**The Medical Care Commission is a creature of the State** of North Carolina. *Hawkins v. North Carolina Dental Soc'y*, 355 F.2d 718 (4th Cir. 1966).

**And the functions it serves are concededly public functions** of the State. *Hawkins v. North Carolina Dental Soc'y*, 355 F.2d 718 (4th Cir. 1966).

**§ 143B-166. North Carolina Medical Care Commission — members; selection; quorum; compensation.**

The North Carolina Medical Care Commission of the Department of Health and Human Services shall consist of 17 members appointed by the Governor. Three of the members appointed by the Governor shall be nominated by the North Carolina Medical Society, one member shall be nominated by the North Carolina Nurses Association, one member shall be nominated by the North Carolina Pharmaceutical Association, one member nominated by the Duke Foundation and one member nominated by the North Carolina Hospital Association. The remaining 10 members of the North Carolina Medical Care Commission shall be appointed by the Governor and selected so as to fairly represent agriculture, industry, labor, and other interest groups in North Carolina. One such member appointed by the Governor shall be a dentist licensed to practice in North Carolina. The initial members of the Commission shall be 18 members of the North Carolina Medical Care Commission who shall serve for a period equal to the remainder of their current terms on the North Carolina Medical Care Commission, six of whose appointments expire June 30, 1973, four of whose appointments expire June 30, 1974, four of whose appointments expire June 30, 1975, and four of whose appointments expire June 30, 1976. To achieve the required 17 members the Governor shall appoint three members to the Commission upon the expiration of four members' initial terms on June 30, 1973. At the end of the respective terms of office of the initial members of the Commission, their successors shall be appointed for terms of four years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Commission from office for misfeasance, malfeasance or nonfeasance in accordance with the provisions of G.S. 143B-13 of the Executive Organization Act of 1973.

Vacancies on said Commission among the membership nominated by a society, association, or foundation as hereinabove provided shall be filled by the Executive Committee or other authorized agent of said society, association or foundation until the next meeting of the society, association or foundation at which time the society, association or foundation shall nominate a member to fill the vacancy for the unexpired term.

The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Commission shall constitute a quorum for the transaction of business.

All clerical and other services required by the Commission shall be supplied by the Secretary of Health and Human Services. (1973, c. 476, s. 149; c. 1090, s. 2; 1997-443, s. 11A.118(a).)

**§ 143B-167. North Carolina Medical Care Commission — regular and special meetings.**

The North Carolina Medical Care Commission shall meet at least once in each quarter and may hold special meetings at any time and place within the

State at the call of the chairman or upon the written request of at least nine members. (1973, c. 476, s. 150; c. 1090, s. 2.)

### § 143B-168. North Carolina Medical Care Commission — officers.

The North Carolina Medical Care Commission shall have a chairman and vice-chairman. The chairman shall be designated by the Governor from among the members of the Commission to serve as chairman at his pleasure. The vice-chairman shall be elected by and from the members of the Commission and shall serve for a term of two years or until the expiration of his regularly appointed term. (1973, c. 476, s. 151; c. 1090, s. 2.)

## Part 10A. Child Day-Care Commission.

### [Child Care Commission.]

§ 143B-168.1: Repealed by Session Laws 1987, c. 788, s. 23.

**Cross References.** — As to child care, see § 110-85 et seq. As to the Child Care Commission, see § 143B-168.3.

§ 143B-168.2: Repealed by Session Laws 1987, c. 788, s. 24.

**Cross References.** — As to child care, see § 110-85 et seq. As to the Child Care Commission, see § 143B-168.3.

### § 143B-168.3. Child Care Commission — powers and duties.

(a) The Child Day-Care Licensing Commission of the Department of Administration is transferred, recodified, and renamed the Child Care Commission of the Department of Health and Human Services with the power and duty to adopt rules to be followed in the licensing and operation of child care facilities as provided by Article 7 of Chapter 110 of the General Statutes.

(a1) The Child Care Commission shall adopt rules:

- (1) For the issuance of licenses to any child care facility; and
- (2) To adopt rules as provided by Article 7 of Chapter 110 of the General Statutes of the State of North Carolina, and to establish standards for enhanced program licenses, as authorized by G.S. 110-88(7).

(b) The Commission shall adopt rules consistent with the provisions of this Chapter. All rules not inconsistent with the provisions of this Chapter heretofore adopted by the Child Day-Care Licensing Commission shall remain in full force and effect unless and until repealed or superseded by action of the Child Care Commission. All rules and regulations adopted by the Commission shall be enforced by the Department of Health and Human Services. (1985, c. 757, s. 155(a); 1987, c. 788, ss. 25, 26; 1997-443, s. 11A.118(a); 1997-456, s. 27; 1997-506, s. 56.)

**Editor's Note.** — Session Laws 1985, c. 757, s. 155(q) provides: "The statutory authority, powers, duties, and functions, records, person-

nel, property, unexpended balances of appropriations, allocations or other funds, including the functions of budgeting and purchasing, of the

North Carolina Day Care Licensing Commission of the Department of Administration is transferred to the Department of Human Resources. The statutory authority, powers, duties, and functions, records, personnel, property, unexpended balances of appropriations, allocations, or other funds, including the functions of budgeting and purchasing, of the Office of Day Care Licensing of the Department of Administration and of the Office of Day Care Services of the Department of Human Resources, are transferred to the Division of Facility Services of the Department of Human

Resources. Any disputes arising out of this transfer shall be resolved by the Governor pursuant to G.S. 143B-4.”

The first, undesignated, paragraph of this section was renumbered as subsection (a), and subsection (a) was renumbered as subsection (a1) pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly’s computer database.

### § 143B-168.4. Child Care Commission — members; selection; quorum.

(a) The Child Care Commission of the Department of Health and Human Services shall consist of 15 members. Seven of the members shall be appointed by the Governor and eight by the General Assembly, four upon the recommendation of the President Pro Tempore of the Senate, and four upon the recommendation of the Speaker of the House of Representatives. Four of the members appointed by the Governor, two by the General Assembly on the recommendation of the President Pro Tempore of the Senate, and two by the General Assembly on the recommendation of the Speaker of the House of Representatives, shall be members of the public who are not employed in, or providing, child care and who have no financial interest in a child care facility. Two of the foregoing public members appointed by the Governor, one of the foregoing public members recommended by the President Pro Tempore of the Senate, and one of the foregoing public members recommended by the Speaker of the House of Representatives shall be parents of children receiving child care services. Of the remaining two public members appointed by the Governor, one shall be a pediatrician currently licensed to practice in North Carolina. Three of the members appointed by the Governor shall be child care providers, one of whom shall be affiliated with a for profit child care center, one of whom shall be affiliated with a for profit family child care home, and one of whom shall be affiliated with a nonprofit facility. Two of the members appointed by the General Assembly on the recommendation of the President Pro Tempore of the Senate, and two by the General Assembly on recommendation of the Speaker of the House of Representatives, shall be child care providers, one affiliated with a for profit child care facility, and one affiliated with a nonprofit child care facility. None may be employees of the State.

(b) Members shall be appointed as follows:

- (1) Of the Governor’s initial appointees, four shall be appointed for terms expiring June 30, 1986, and three shall be appointed for terms expiring June 30, 1987;
- (2) Of the General Assembly’s initial appointees appointed upon recommendation of the President of the Senate, two shall be appointed for terms expiring June 30, 1986, and two shall be appointed for terms expiring June 30, 1987;
- (3) Of the General Assembly’s initial appointees appointed upon recommendation of the Speaker of the House of Representatives, two shall be appointed for terms expiring June 30, 1986, and two shall be appointed for terms expiring June 30, 1987.

Appointments by the General Assembly shall be made in accordance with G.S. 120-121. After the initial appointees’ terms have expired, all members shall be appointed to serve two-year terms. Any appointment to fill a vacancy on the

Commission created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

(c) A vacancy occurring during a term of office is filled:

- (1) By the Governor, if the Governor made the initial appointment;
- (2) By the General Assembly, if the General Assembly made the initial appointment in accordance with G.S. 120-122.

At its first meeting the Commission members shall elect a chairman to serve a two-year term. Chairmen shall be elected for two-year terms thereafter. The same member may serve as chairman for two consecutive terms.

Commission members may be reappointed and may succeed themselves for a maximum of four consecutive terms.

The Commission shall meet quarterly, and at other times at the call of the chairman or upon written request of at least six members.

The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5. A majority of the Commission shall constitute a quorum for the transaction of business.

All clerical and other services required by the Commission shall be supplied by the Secretary of Health and Human Services. (1985, c. 757, s. 155(a); 1987 (Reg. Sess., 1988), c. 896; 1989, c. 342; 1995, c. 490, s. 10; 1997-443, s. 11A.118(a); 1997-506, s. 57.)

### § 143B-168.5. Child Care — special unit.

There is established within the Department of Health and Human Services a special unit to deal primarily with violations involving child abuse and neglect in child care arrangements. The Child Care Commission shall make rules for the investigation of reports of child abuse or neglect and for administrative action when child abuse or neglect is substantiated, pursuant to G.S. 110-88(6a), 110-105, and 110-105.2. (1985, c. 757, s. 156(r); 1991, c. 273, s. 12; 1997-443, s. 11A.118(a); 1997-506, s. 58.)

§§ 143B-168.6 through 143B-168.9: Reserved for future codification purposes.

## Part 10B. Early Childhood Initiatives.

### § 143B-168.10. Early childhood initiatives; findings.

The General Assembly finds, upon consultation with the Governor, that every child can benefit from, and should have access to, high-quality early childhood education and development services. The economic future and well-being of the State depend upon it. To ensure that all children have access to high-quality early childhood education and development services, the General Assembly further finds that:

- (1) Parents have the primary duty to raise, educate, and transmit values to young preschool children;
- (2) The State can assist parents in their role as the primary caregivers and educators of young preschool children; and
- (3) There is a need to explore innovative approaches and strategies for aiding parents and families in the education and development of young preschool children. (1993, c. 321, s. 254(a); 1998-212, s. 12.37B(a).)

**Smart Start Performance Audit.** — Session Laws 1997-443, s. 11.55(b), provides: “Notwithstanding any provision of Part 10B of Article 3 of Chapter 143B of the General Statutes or any other provision of law or policy, the Department of Human Resources and the North Carolina Partnership for Children, Inc., jointly shall continue to implement the recommendations contained in the Smart Start Performance Audit prepared pursuant to Section 27A(1)b. of Chapter 324 of the 1995 Session Laws, as modified by Section 24.29 of Chapter 18 of the Session Laws, Second Extra Session 1996. The North Carolina Partnership for Children, Inc., shall continue to report quarterly to the Joint Legislative Commission on Governmental Operations on its progress toward full implementation of the modified audit recommendations.”

Session Laws 1997-443, s. 1.1, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 1997.’”

Session Laws 1997-443, s. 35.2, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium.”

Session Laws 2000-67, s. 11.28(e), repealed Session Laws 1999-237, s. 11.48(c), which had provided that notwithstanding any provision of this Part or any other provision of law or policy, the Department of Health and Human Services and the North Carolina Partnership for Children, Inc., was to jointly continue to implement the recommendations contained in the Smart Start Performance Audit prepared pursuant to Section 27A(1)b. of Chapter 324 of the 1995 Session Laws, as modified by Section 24.29 of Chapter 18 of the Session Laws, Second Extra Session 1996.

Session Laws 2000-67, s. 1.1, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2000.’”

Session Laws 2000-67, s. 28.2, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year.”

Session Laws 2000-67, s. 28.4, contains a severability clause.

**Early Childhood Education and Development Initiatives.** — Session Laws 2001-424, ss. 21.72(a) to (e), provide: “(a) Administrative costs shall be equivalent to, on an average statewide basis for all local partnerships, not more than eight percent (8%) of the total statewide allocation to all local partnerships. What

counts as administrative costs shall be as defined in the Smart Start Performance Audit.

“(b) The North Carolina Partnership for Children, Inc., and all local partnerships shall use competitive bidding practices in contracting for goods and services on contract amounts as follows:

“(1) For amounts of five thousand dollars (\$5,000) or less, the procedures specified by a written policy to be developed by the Board of Directors of the North Carolina Partnership for Children, Inc.;

“(2) For amounts greater than five thousand dollars (\$5,000) but less than fifteen thousand dollars (\$15,000), three written quotes;

“(3) For amounts of fifteen thousand dollars (\$15,000) or more but less than forty thousand dollars (\$40,000), a request for proposal process; and

“(4) For amounts of forty thousand dollars (\$40,000) or more, request for proposal process and advertising in a major newspaper.

“(c) The North Carolina Partnership for Children, Inc., and all local partnerships shall, in the aggregate, be required to match no less than fifty percent (50%) of the total amount budgeted for the Program in each fiscal year of the biennium as follows: contributions of cash equal to at least fifteen percent (15%) and in-kind donated resources equal to no more than five percent (5%) for a total match requirement of twenty percent (20%) for each fiscal year. The North Carolina Partnership for Children, Inc., may carryforward any amount in excess of the required match for a fiscal year in order to meet the match requirement of the succeeding fiscal year. Only in-kind contributions that are quantifiable shall be applied to the in-kind match requirement. Volunteer services may be treated as an in-kind contribution for the purpose of the match requirement of this subsection. Volunteer services that qualify as professional services shall be valued at the fair market value of those services. All other volunteer service hours shall be valued at the statewide average wage rate as calculated from data compiled by the Employment Security Commission in the Employment and Wages in North Carolina Annual Report for the most recent period for which data are available. Expenses, including both those paid by cash and in-kind contributions, incurred by other participating non-State entities contracting with the North Carolina Partnership for Children, Inc., or the local partnerships, also may be considered resources available to meet the required private match. In order to qualify to meet the required private match, the expenses shall:

“(1) Be verifiable from the contractor’s records;

“(2) If in-kind, other than volunteer services, be quantifiable in accordance with generally

accepted accounting principles for nonprofit organizations;

“(3) Not include expenses funded by State funds;

“(4) Be supplemental to and not supplant preexisting resources for related program activities;

“(5) Be incurred as a direct result of the Early Childhood Initiatives Program and be necessary and reasonable for the proper and efficient accomplishment of the Program’s objectives;

“(6) Be otherwise allowable under federal or State law;

“(7) Be required and described in the contractual agreements approved by the North Carolina Partnership for Children, Inc., or the local partnership; and

“(8) Be reported to the North Carolina Partnership for Children, Inc., or the local partnership by the contractor in the same manner as reimbursable expenses.

“The North Carolina Partnership for Children, Inc., shall establish uniform guidelines and reporting format for local partnerships to document the qualifying expenses occurring at the contractor level. Local partnerships shall monitor qualifying expenses to ensure they have occurred and meet the requirements prescribed in this subsection [s. 21.72(c) of Session Laws 2001-424].

“Failure to obtain a twenty percent (20%) match by June 30 of each fiscal year shall result in a dollar-for-dollar reduction in the appropriation for the Program for a subsequent fiscal year. The North Carolina Partnership for Children, Inc., shall be responsible for compiling information on the private cash and in-kind contributions into a report that is submitted to the Joint Legislative Commission on Governmental Operations in a format that allows verification by the Department of Revenue. The same match requirements shall apply to any expansion funds appropriated by the General Assembly.

“(d) Counties participating in the Program may use the county’s allocation of State and federal child care funds to subsidize child care according to the county’s Early Childhood Education and Development Initiatives Plan as approved by the North Carolina Partnership for Children, Inc. The use of federal funds shall be consistent with the appropriate federal regulations. Child care providers shall, at a minimum, comply with the applicable requirements for State licensure pursuant to Article 7 of Chapter 110 of the General Statutes, with other applicable requirements of State law or rule, including rules adopted for nonlicensed child care by the Social Services Commission, and with applicable federal regulations.

“(e) The Department of Health and Human Services shall continue to implement the performance-based evaluation system.”

**Same Enhancements.** — Session Laws 2001-424, ss. 21.75 (a) to (f), provide: “(a) The North Carolina Partnership for Children, Inc., and the Department of Health and Human Services shall immediately develop and implement the following:

“(1) Policies to ensure Early Childhood Education and Development Initiatives funds are allocated to child care programs, providers, and services that serve low-income children.

“(2) Policies to ensure the allocation of all State funds and federal funds where appropriate to the neediest child care providers with priority given from the lowest licensure rating to the highest. The North Carolina Partnership for Children, Inc., and the Department of Health and Human Services shall develop the definition of ‘neediest’ as used in this subdivision.

“(3) Policies to ensure the allocation of State funds and federal funds where appropriate to child care programs and providers that serve an adequate number of children and families eligible to participate in the State child care subsidy voucher program. The North Carolina Partnership for Children, Inc., and the Department of Health and Human Services shall develop policies and a definition of ‘adequate’ as used in this subdivision that takes into consideration the following:

“a. County economic conditions.

“b. Numbers of eligible families in a county.

“c. The diversity of child care needs in a county.

“d. Other factors that may impact on the number of child care facilities and the availability of child care in a county.

“(4) Policies to ensure the elimination of local duplication and increased efficiency in the administration of child care subsidy voucher funds, unless local partnerships in collaboration with county departments of social services can demonstrate to the Department a more efficient and effective plan for administration of child care subsidy voucher funds. These policies shall be developed and implemented no later than January 1, 2002.

“(5) Policies and procedures to ensure the unduplicated compilation of children served through State and federal child care subsidy voucher funds.

“(6) Policies and procedures to ensure the timely, accurate, and consistent reporting of information on local child care subsidy waiting lists statewide.

“(b) In consultation with the Department of Public Instruction and the North Carolina Partnership for Children, Inc., the Department of Health and Human Services shall develop and implement policies and procedures to ensure that local partnerships that allocate funds to child care providers receiving State and federal child care funds plan and coordinate

with their local education agencies the following:

“(1) Selection of preschool curriculum with measurable outcomes.

“(2) Kindergarten transition activities.

“(3) Other activities needed to ensure that children transitioning from child care settings to kindergarten enter school ready to succeed.

“(c) The Department of Health and Human Services, in consultation with the North Carolina Partnership for Children, Inc., and the Office of State Budget and Management, shall develop a separate NCPC, Early Childhood Education and Development Initiative Program budget, within the Division of Child Development fund code for the purpose of segregating all expenditures related to the administration and operation of the statewide Smart Start program.

“(d) The Department of Health and Human Services and the North Carolina Partnership for Children, Inc., shall ensure that the allocation of funds for Early Childhood Education and Development Initiatives for State fiscal year 2001-2002 shall be administered and distributed in the following manner:

“(1) The North Carolina Partnership for Children, Inc., shall develop a policy to allocate the reduction of funds for Early Childhood Education and Development Initiatives for the 2001-2002 fiscal year.

“(2) The North Carolina Partnership for Children, Inc., administration shall be reduced by ten percent (10%) from the 2000-2001 fiscal year level.

“(3) The Department of Health and Human Services Smart Start administration shall be reduced by ten percent (10%) from the 2000-2001 fiscal year level.

“(4) Capital expenditures and playground equipment expenditures are prohibited for fiscal year 2001-2002. For the purposes of this section, ‘capital expenditures’ means expenditures for capital improvements as defined in G.S. 143-34.40.

“(e) The allocation of fiscal year 2000-2001 State carryforward funds is prohibited, and all fiscal year 2000-2001 unspent funds shall revert to the General Fund.

“(f) For the 2001-2002 fiscal year, the North Carolina Partnership for Children, Inc., shall not approve local partnership plans that allocate State funds to child care providers for one-time quality improvement initiatives in the following circumstances:

“(1) Child care facilities with licensure of four or five stars, unless the expenditure of funds is to expand capacity for low-income children.

“(2) Child care facilities that do not accept child care subsidy funds.

“(3) Child care facilities that previously received quality improvement grants whose quality initiatives failed to increase licensure.”

**Editor’s Note.** — Session Laws 2001-424, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Acts of 2001.’”

Session Laws 2001-424, s. 36.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium.”

Session Laws 2001-424, s. 36.5 is a severability clause.

### § 143B-168.11. Early childhood initiatives; purpose; definitions.

(a) The purpose of this Part is to establish a framework whereby the General Assembly, upon consultation with the Governor, may support through financial and other means, the North Carolina Partnership for Children, Inc. and comparable local partnerships, which have as their missions the development of a comprehensive, long-range strategic plan for early childhood development and the provision, through public and private means, of high-quality early childhood education and development services for children and families. It is the intent of the General Assembly that communities be given the maximum flexibility and discretion practicable in developing their plans while remaining subject to the approval of the North Carolina Partnership and accountable to the North Carolina Partnership and to the General Assembly for their plans and for the programmatic and fiscal integrity of the programs and services provided to implement them.

(b) The following definitions apply in this Part:

- (1) Board of Directors. — The Board of Directors of the North Carolina Partnership for Children, Inc.
- (2) Department. — The Department of Health and Human Services.

- (2a) Early Childhood. — Birth through five years of age.
- (3) Local Partnership. — A county or regional private, nonprofit 501(c)(3) organization established to coordinate a local demonstration project, to provide ongoing analyses of their local needs that must be met to ensure that the developmental needs of children are met in order to prepare them to begin school healthy and ready to succeed, and, in consultation with the North Carolina Partnership and subject to the approval of the North Carolina Partnership, to provide programs and services to meet these needs under this Part, while remaining accountable for the programmatic and fiscal integrity of their programs and services to the North Carolina Partnership.
- (4) North Carolina Partnership. — The North Carolina Partnership for Children, Inc.
- (5) Secretary. — The Secretary of Health and Human Services. (1993, c. 321, s. 254(a); 1993 (Reg. Sess., 1994), c. 766, s. 1; 1997-443, s. 11A.118(a); 1998-212, s. 12.37B(a).)

**Editor's Note.** — Subdivision (b)(2a) had been enacted as (b)(2.1) by Session Laws 1998-212, s. 12.37B(a), and was redesignated as (b)(2a) at the direction of the Revisor of Statutes.

### § 143B-168.12. North Carolina Partnership for Children, Inc.; conditions.

- (a) In order to receive State funds, the following conditions shall be met:
  - (1) The North Carolina Partnership shall have a Board of Directors consisting of the following 25 members:
    - a. The Secretary of Health and Human Services, ex officio, or the Secretary's designee;
    - b. Repealed by Session Laws 1997, c. 443, s. 11A.105.
    - c. The Superintendent of Public Instruction, ex officio, or the Superintendent's designee;
    - d. The President of the Community Colleges System, ex officio, or the President's designee;
    - e. Three members of the public, including one child care provider, one other who is a parent, and one other who is a board chair of a local partnership serving on the North Carolina Partnership local partnership advisory committee, appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate;
    - f. Three members of the public, including one who is a parent, one other who is a representative of the faith community, and one other who is a board chair of a local partnership serving on the North Carolina Partnership local partnership advisory committee, appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives;
    - g. Twelve members, appointed by the Governor. Three of these 12 members shall be members of the party other than the Governor's party, appointed by the Governor. Seven of these 12 members shall be appointed as follows: one who is a child care provider, one other who is a pediatrician, one other who is a health care provider, one other who is a parent, one other who is a member of the business community, one other who is a member representing a philanthropic agency, and one other who is an early childhood educator;
    - h. Repealed by Session Laws 1998-212, s. 12.37B(a), effective October 30, 1998.

- h1. The Chair of the North Carolina Partnership Board shall be appointed by the Governor;
- i. Repealed by Session Laws 1998-212, s. 12.37B(a), effective October 30, 1998.
- j. One member of the public appointed by the General Assembly upon recommendation of the Majority Leader of the Senate;
- k. One member of the public appointed by the General Assembly upon recommendation of the Majority Leader of the House of Representatives;
- l. One member of the public appointed by the General Assembly upon recommendation of the Minority Leader of the Senate; and
- m. One member of the public appointed by the General Assembly upon recommendation of the Minority Leader of the House of Representatives.

All members appointed to succeed the initial members and members appointed thereafter shall be appointed for three-year terms. Members may succeed themselves.

All appointed board members shall avoid conflicts of interests and the appearance of impropriety. Should instances arise when a conflict may be perceived, any individual who may benefit directly or indirectly from the North Carolina Partnership's disbursement of funds shall abstain from participating in any decision or deliberations by the North Carolina Partnership regarding the disbursement of funds.

All ex officio members are voting members. Each ex officio member may be represented by a designee. These designees shall be voting members. No members of the General Assembly shall serve as members.

The North Carolina Partnership may establish a nominating committee and, in making their recommendations of members to be appointed by the General Assembly or by the Governor, the President Pro Tempore of the Senate, the Speaker of the House of Representatives, the Majority Leader of the Senate, the Majority Leader of the House of Representatives, the Minority Leader of the Senate, the Minority Leader of the House of Representatives, and the Governor shall consult with and consider the recommendations of this nominating committee.

The North Carolina Partnership may establish a policy on members' attendance, which policy shall include provisions for reporting absences of at least three meetings immediately to the appropriate appointing authority.

Members who miss more than three consecutive meetings without excuse or members who vacate their membership shall be replaced by the appropriate appointing authority, and the replacing member shall serve either until the General Assembly and the Governor can appoint a successor or until the replaced member's term expires, whichever is earlier.

The North Carolina Partnership shall establish a policy on membership of the local board, which policy shall include the requirement that all local board members, other than any member appointed because of a position held by that individual, be residents of the county or the partnership region they are representing. No member of the General Assembly shall serve as a member of a local board. Within these requirements for local board membership, the North Carolina Partnership shall allow local partnerships that are regional to have flexibility in the composition of their boards so that all counties in the region have adequate representation.

All appointed local board members shall avoid conflicts of interests and the appearance of impropriety. Should instances arise when a conflict may be perceived, any individual who may benefit directly or indirectly from the partnership's disbursement of funds shall abstain from participating in any decision or deliberations by the partnership regarding the disbursement of funds.

- (2) The North Carolina Partnership and the local partnerships shall agree to adopt procedures for its operations that are comparable to those of Article 33C of Chapter 143 of the General Statutes, the Open Meetings Law, and Chapter 132 of the General Statutes, the Public Records Law, and provide for enforcement by the Department.
- (3) The North Carolina Partnership shall oversee the development and implementation of the local demonstration projects as they are selected and shall approve the ongoing plans, programs, and services developed and implemented by the local partnerships and hold the local partnerships accountable for the financial and programmatic integrity of the programs and services. The North Carolina Partnership may contract at the State level to obtain services or resources when the North Carolina Partnership determines it would be more efficient to do so.

In the event that the North Carolina Partnership determines that a local partnership is not fulfilling its mandate to provide programs and services designed to meet the developmental needs of children in order to prepare them to begin school healthy and ready to succeed and is not being accountable for the programmatic and fiscal integrity of its programs and services, the North Carolina Partnership may suspend all funds to the partnership until the partnership demonstrates that these defects are corrected. Further, at its discretion, the North Carolina Partnership may assume the managerial responsibilities for the partnership's programs and services until the North Carolina Partnership determines that it is appropriate to return the programs and services to the local partnership.

- (4) The North Carolina Partnership shall develop and implement a comprehensive standard fiscal accountability plan to ensure the fiscal integrity and accountability of State funds appropriated to it and to the local partnerships. The standard fiscal accountability plan shall, at a minimum, include a uniform, standardized system of accounting, internal controls, payroll, fidelity bonding, chart of accounts, and contract management and monitoring. The North Carolina Partnership may contract with outside firms to develop and implement the standard fiscal accountability plan. All local partnerships shall be required to participate in the standard fiscal accountability plan developed and adopted by the North Carolina Partnership pursuant to this subdivision.
- (5) The North Carolina Partnership shall develop a regional accounting and contract management system which incorporates features of the required standard fiscal accountability plan described in subdivision (4) of subsection (a) of this section. All local partnerships shall participate in the regional accounting and contract management system.
- (6) The North Carolina Partnership shall develop a formula for allocating direct services funds appropriated for this purpose to local partnerships.
- (7) The North Carolina Partnership may adjust its allocations by up to ten percent (10%) on the basis of local partnerships' performance assessments. In determining whether to adjust its allocations to local

partnerships, the North Carolina Partnership shall consider whether the local partnerships are meeting the outcome goals and objectives of the North Carolina Partnership and the goals and objectives set forth by the local partnerships in their approved annual program plans.

The North Carolina Partnership may use additional factors to determine whether to adjust the local partnerships' allocations. These additional factors shall be developed with input from the local partnerships and shall be communicated to the local partnerships when the additional factors are selected. These additional factors may include board involvement, family and community outreach, collaboration among public and private service agencies, and family involvement.

On the basis of performance assessments, local partnerships annually shall be rated "superior", "satisfactory", or "needs improvement".

The North Carolina Partnership may contract with outside firms to conduct the performance assessments of local partnerships.

- (8) The North Carolina Partnership shall establish a local partnership advisory committee comprised of 15 members. Eight of the members shall be chairs of local partnerships' board of directors, and seven shall be staff of local partnerships. Members shall be chosen by the Chair of the North Carolina Partnership from a pool of candidates nominated by their respective boards of directors. The local partnership advisory committee shall serve in an advisory capacity to the North Carolina Partnership and shall establish a schedule of regular meetings. Members shall be chosen from local partnerships on a rotating basis. The advisory committee shall annually elect a chair from among its members.

(9) Repealed by Session Laws 2001-424, s. 21.75(h), effective July 1, 2001.

(b) The North Carolina Partnership shall be subject to audit and review by the State Auditor under Article 5A of Chapter 147 of the General Statutes. The State Auditor shall conduct annual financial and compliance audits of the North Carolina Partnership.

(c) The North Carolina Partnership shall require each local partnership to place in each of its contracts a statement that the contract is subject to monitoring by the local partnership and North Carolina Partnership, that contractors and subcontractors shall be fidelity bonded, unless the contractors or subcontractors receive less than one hundred thousand dollars (\$100,000) or unless the contract is for child care subsidy services, that contractors and subcontractors are subject to audit oversight by the State Auditor, and that contractors and subcontractors shall be audited as required by G.S. 143-6.1. Organizations subject to G.S. 159-34 shall be exempt from this requirement.

(d) The North Carolina Partnership for Children, Inc., shall make a report no later than December 1 of each year to the General Assembly that shall include the following:

- (1) A description of the program and significant services and initiatives.
- (2) A history of Smart Start funding and the previous fiscal year's expenditures.
- (3) The number of children served by type of service.
- (4) The type and quantity of services provided.
- (5) The results of the previous year's evaluations of the Initiatives or related programs and services.
- (6) A description of significant policy and program changes.
- (7) Any recommendations for legislative action. (1993, c. 321, s. 254(a); 1993 (Reg. Sess., 1994), c. 766, s. 1; 1995, c. 324, s. 27A.1; 1996, 2nd Ex. Sess., c. 18, s. 24.29(b); 1997-443, ss. 11.55(l), 11A.105; 1998-212, s. 12.37B(a), (b); 1999-84, s. 24; 1999-237, s. 11.48(a); 2000-67, s. 11.28(a); 2001-424, ss. 21.75(h), 21.75(i).)

**Editor's Note.** — Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvement Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.4, contains a severability clause.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Acts of 2001.'"

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Early Childhood Education and Development Initiatives.** — Session Laws 2001-424, ss. 21.75 (a) to (f), provide: "(a) The North Carolina Partnership for Children, Inc., and the Department of Health and Human Services shall immediately develop and implement the following:

"(1) Policies to ensure Early Childhood Education and Development Initiatives funds are allocated to child care programs, providers, and services that serve low-income children.

"(2) Policies to ensure the allocation of all State funds and federal funds where appropriate to the neediest child care providers with priority given from the lowest licensure rating to the highest. The North Carolina Partnership for Children, Inc., and the Department of Health and Human Services shall develop the definition of 'neediest' as used in this subdivision.

"(3) Policies to ensure the allocation of State funds and federal funds where appropriate to child care programs and providers that serve an adequate number of children and families eligible to participate in the State child care subsidy voucher program. The North Carolina Partnership for Children, Inc., and the Department of Health and Human Services shall develop policies and a definition of 'adequate' as used in this subdivision that takes into consideration the following:

"a. County economic conditions.

"b. Numbers of eligible families in a county.

"c. The diversity of child care needs in a county.

"d. Other factors that may impact on the number of child care facilities and the availability of child care in a county.

"(4) Policies to ensure the elimination of local duplication and increased efficiency in the administration of child care subsidy voucher funds, unless local partnerships in collaboration with county departments of social services can demonstrate to the Department a more efficient and effective plan for administration of child care subsidy voucher funds. These policies shall be developed and implemented no later than January 1, 2002.

"(5) Policies and procedures to ensure the unduplicated compilation of children served through State and federal child care subsidy voucher funds.

"(6) Policies and procedures to ensure the timely, accurate, and consistent reporting of information on local child care subsidy waiting lists statewide.

"(b) In consultation with the Department of Public Instruction and the North Carolina Partnership for Children, Inc., the Department of Health and Human Services shall develop and implement policies and procedures to ensure that local partnerships that allocate funds to child care providers receiving State and federal child care funds plan and coordinate with their local education agencies the following:

"(1) Selection of preschool curriculum with measurable outcomes.

"(2) Kindergarten transition activities.

"(3) Other activities needed to ensure that children transitioning from child care settings to kindergarten enter school ready to succeed.

"(c) The Department of Health and Human Services, in consultation with the North Carolina Partnership for Children, Inc., and the Office of State Budget and Management, shall develop a separate NCPC, Early Childhood Education and Development Initiative Program budget, within the Division of Child Development fund code for the purpose of segregating all expenditures related to the administration and operation of the statewide Smart Start program.

"(d) The Department of Health and Human Services and the North Carolina Partnership for Children, Inc., shall ensure that the allocation of funds for Early Childhood Education and Development Initiatives for State fiscal year 2001-2002 shall be administered and distributed in the following manner:

"(1) The North Carolina Partnership for Children, Inc., shall develop a policy to allocate the reduction of funds for Early Childhood Education and Development Initiatives for the 2001-2002 fiscal year.

"(2) The North Carolina Partnership for Children, Inc., administration shall be reduced by ten percent (10%) from the 2000-2001 fiscal year level.

"(3) The Department of Health and Human Services Smart Start administration shall be

reduced by ten percent (10%) from the 2000-2001 fiscal year level.

“(4) Capital expenditures and playground equipment expenditures are prohibited for fiscal year 2001-2002. For the purposes of this section, ‘capital expenditures’ means expenditures for capital improvements as defined in G.S. 143-34.40.

“(e) The allocation of fiscal year 2000-2001 State carryforward funds is prohibited, and all fiscal year 2000-2001 unspent funds shall revert to the General Fund.

“(f) For the 2001-2002 fiscal year, the North Carolina Partnership for Children, Inc., shall not approve local partnership plans that allocate State funds to child care providers for one-time quality improvement initiatives in the following circumstances:

“(1) Child care facilities with licensure of four or five stars, unless the expenditure of funds is to expand capacity for low-income children.

“(2) Child care facilities that do not accept child care subsidy funds.

“(3) Child care facilities that previously received quality improvement grants whose quality initiatives failed to increase licensure.”

**Same — Repeat.** — Session Laws 2001-424, s. 21.75 (k), provides: “(k) Effective January 1, 2002, the North Carolina Partnership for Children, Inc., in consultation with Department of Health and Human Services, shall report the following information 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 on a quarterly basis:

“(1) Total Smart Start budget and expenditures by month for the current fiscal year.

“(2) The number of children served by type of service.

“(3) A description of and expenditures for statewide initiatives.

“(4) A description of and quantity of non-child care services provided.

“(5) An accounting of expenditures for the child care voucher subsidy programs.

“(6) The progress of the North Carolina Partnership for Children, Inc., in complying with the provisions of this section.

“(7) Any other related information.”

**Effect of Amendments.** — Session Laws 2000-67, s. 11.28(a), effective July 1, 2000, inserted the second sentence in the seventh paragraph following subdivision (a)(1)m; added the last sentence in the first paragraph in subdivision (a)(3); rewrote subdivision (a)(5); and in subdivision (a)(7), inserted “by up to ten percent (10%)” at the beginning of the first paragraph and deleted the former second, third and fourth sentences regarding the amount of funding to be increased for each rating of local partnerships.

Session Laws 2001-424, ss. 21.75(h) and (i), effective July 1, 2001, repealed subdivision (a)(9), relating to reports required to be provided by the North Carolina Partnership for Children, Inc., on the ongoing progress of all the local partnerships’ work, and added subsection (d).

## OPINIONS OF ATTORNEY GENERAL

**Legislators Precluded from Serving on the Board of North Carolina Partnership for Children, Inc.** — The separation of powers provision of the N.C. Constitution precludes legislators from serving as members of a private, non-profit corporation where the corpora-

tion is “a special instrumentality of government” created to implement specific legislation. See opinion of Attorney General to The Honorable John R. Gamble, Jr., N.C. House of Representatives, 1998 N.C.A.G. 34 (7/30/98).

## § 143B-168.13. Implementation of program; duties of Department and Secretary.

(a) The Department shall:

(1) Repealed by Session Laws 1998-212, s. 12.37B(a), effective October 30, 1998.

(1a) Develop and conduct a statewide needs and resource assessment every third year, beginning in the 1997-98 fiscal year. This needs assessment shall be conducted in cooperation with the North Carolina Partnership and with the local partnerships. The data and findings of this needs assessment shall form the basis for annual program plans developed by local partnerships and approved by the North Carolina Partnership.

(2) Recodified as (a)(1a) by Session Laws 1998-212, s. 12.37B(a).

- (2a) Repealed by Session Laws 1998-212, s. 12.37B(1), effective October 30, 1998.
- (3) Provide technical and administrative assistance to local partnerships, particularly during the first year after they are selected under this Part to receive State funds. The Department, at any time, may authorize the North Carolina Partnership or a governmental or public entity to do the contracting for one or more local partnerships. After a local partnership's first year, the Department may allow the partnership to contract for itself.
- (4) Adopt, in cooperation with the North Carolina Partnership, any rules necessary to implement this Part, including rules to ensure that State leave policy is not applied to the North Carolina Partnership and the local partnerships. In order to allow local partnerships to focus on the development of long-range plans in their initial year of funding, the Department may adopt rules that limit the categories of direct services for young children and their families for which funds are made available during the initial year.
- (5) Repealed by Session Laws 1996, Second Extra Session, c. 18, s. 24.29(c).
- (6) Annually update its funding formula, in collaboration with the North Carolina Partnership for Children, Inc., using the most recent data available. These amounts shall serve as the basis for determining "full funding" amounts for each local partnership.
- (b) Repealed by Session Laws 1998-212, s. 12.37B(a), effective October 30, 1998. (1993 (Reg. Sess., 1994), c. 766, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 24.29(c); 1997-443, s. 11.55(m); 1998-212, s. 12.37B(a), (b); 2000-67, s. 11.28(b).)

**Editor's Note.** — Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Acts of 2001.'"

Session Laws 2001-424, s. 21.75(j), provides: "(j) Notwithstanding the funding formula in G.S. 143B-168.13(a)(6), the State, in consultation with the North Carolina Partnership for Children, Inc., shall evaluate the feasibility of developing a revised funding formula which takes into consideration all relevant funding used by the State, local human services agencies and programs, and local partnerships to provide services and assistance to children under age five and their families. These funds

shall include the Early Intervention Preschool Program, Health Choice, and Family Resource Centers, as well as other State and local services and programs funded with State funds, federal funds, local funds, and other resources."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-67, s. 11.28(b), effective July 1, 2000, inserted "in collaboration with the North Carolina Partnership for Children, Inc.," in subdivision (a)(6).

**Legal Periodicals.** — See Legislative Survey, 21 Campbell L. Rev. 323 (1999).

## § 143B-168.14. Local partnerships; conditions.

- (a) In order to receive State funds, the following conditions shall be met:
- (1) Each local partnership shall develop a comprehensive, collaborative, long-range plan of services to children and families in the service-delivery area. No existing local, private, nonprofit 501(c)(3) organization, other than one established on or after July 1, 1993, and that meets the guidelines for local partnerships as established under this Part, shall be eligible to apply to serve as the local partnership for the

purpose of this Part. The Board of the North Carolina Partnership may authorize exceptions to this eligibility requirement.

- (2) Each local partnership shall agree to adopt procedures for its operations that are comparable to those of Article 33C of Chapter 143 of the General Statutes, the Open Meetings Law, and Chapter 132 of the General Statutes, the Public Records Law, and provide for enforcement by the Department.
- (3) Each local partnership shall adopt procedures to ensure that all personnel who provide services to young children and their families under this Part know and understand their responsibility to report suspected child abuse, neglect, or dependency, as defined in G.S. 7B-101.
- (4) Each local partnership shall participate in the uniform, standard fiscal accountability plan developed and adopted by the North Carolina Partnership.

(b) Each local partnership shall be subject to audit and review by the State Auditor under Article 5A of Chapter 147 of the General Statutes. The State Auditor shall conduct annual financial and compliance audits of the local partnerships. (1993 (Reg. Sess., 1994), c. 766, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 24.29(d)(1); 1997-506, s. 59; 1998-202, s. 13(l); 1998-212, s. 12.37B(a).)

**Editor's Note.** — Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 24.29(d)(2) provides: "Local partnerships shall be in compliance with this subsection [Session Laws 1996, Second Extra Session, c. 18, s. 24.29(d)] effective July 1, 1997."

Session Laws 1996, Second Extra Session, c. 18, s. 29.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1996-97 fiscal year, the textual provisions of

this act apply only to funds appropriated for, and activities occurring during, the 1996-97 fiscal year."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

**Effect of Amendments.** — Session Laws 1998-202, s. 13(l), effective July 1, 1999, and applicable to acts committed on or after that date, substituted "G.S. 7B-101" for "G.S. 7A-517" in subdivision (a)(3).

Session Laws 1998-212, s. 12.37B(a), effective October 30, 1998, rewrote subdivision (a)(1).

## § 143B-168.15. Use of State funds.

(a) State funds allocated to local projects for services to children and families shall be used to meet assessed needs, expand coverage, and improve the quality of these services. The local plan shall address the assessed needs of all children to the extent feasible. It is the intent of the General Assembly that the needs of both young children below poverty who remain in the home, as well as the needs of young children below poverty who require services beyond those offered in child care settings, be addressed. Therefore, as local partnerships address the assessed needs of all children, they should devote an appropriate amount of their State allocations, considering these needs and other available resources, to meet the needs of children below poverty and their families.

(b) Depending on local, regional, or statewide needs, funds may be used to support activities and services that shall be made available and accessible to providers, children, and families on a voluntary basis. Of the funds allocated to local partnerships for direct services, seventy percent (70%) of the funds spent in each year shall be used in child care related activities and early childhood education programs that improve access to child care and early childhood education services, develop new child care and early childhood education services, and improve the quality of child care and early childhood education services in all settings.

(c) Long-term plans for local projects that do not receive their full allocation in the first year, other than those selected in 1993, should consider how to meet the assessed needs of low-income children and families within their neighborhoods or communities. These plans also should reflect a process to meet these needs as additional allocations and other resources are received.

(d) State funds designated for start-up and related activities may be used for capital expenses or to support activities and services for children, families, and providers. State funds designated to support direct services for children, families, and providers shall not be used for major capital expenses unless the North Carolina Partnership approves this use of State funds based upon a finding that a local partnership has demonstrated that (i) this use is a clear priority need for the local plan, (ii) it is necessary to enable the local partnership to provide services and activities to underserved children and families, and (iii) the local partnership will not otherwise be able to meet this priority need by using State or federal funds available to that local partnership. The funds approved for capital projects in any two consecutive fiscal years may not exceed ten percent (10%) of the total funds for direct services allocated to a local partnership in those two consecutive fiscal years.

(e) State funds allocated to local partnerships shall not supplant current expenditures by counties on behalf of young children and their families, and maintenance of current efforts on behalf of these children and families shall be sustained. State funds shall not be applied without the Secretary's approval where State or federal funding sources, such as Head Start, are available or could be made available to that county.

(f) Repealed by Session Laws 2001-424, s. 21.75(g), effective July 1, 2001.

(g) Not less than thirty percent (30%) of the funds spent in each year of each local partnership's direct services allocation shall be used to expand child care subsidies. To the extent practicable, these funds shall be used to enhance the affordability, availability, and quality of child care services as described in this section. The North Carolina Partnership may increase this percentage requirement up to a maximum of fifty percent (50%) when, based upon a significant local waiting list for subsidized child care, the North Carolina Partnership determines a higher percentage is justified. (1993 (Reg. Sess., 1994), c. 766, s. 1; 1995, c. 509, s. 97; 1996, 2nd Ex. Sess., c. 18, s. 24.29(e); 1997-443, s. 11.55(n); 1997-506, s. 60; 1998-212, s. 12.37B(a), (b); 1999-237, s. 11.48(o); 2000-67, ss. 11.28(c), 11.28(d); 2001-424, s. 21.75(g).)

**Required Match.** — Session Laws 1999-237, s. 11.48(i), as amended by Session Laws 2000-67, s. 11.28(g) provides: "The North Carolina Partnership for Children, Inc., and all local partnerships shall, in the aggregate, be required to match no less than fifty percent (50%) of the total amount budgeted for the Program in each fiscal year of the biennium as follows: contributions of cash equal to at least fifteen percent (15%) and in-kind donated resources equal to no more than five percent (5%) for a total match requirement of twenty percent (20%) for each fiscal year. The North Carolina Partnership for Children, Inc., may carry forward any amount in excess of the required match for a fiscal year in order to meet the match requirement of the succeeding fiscal year. Only in-kind contributions that are quantifiable shall be applied to the in-kind match requirement. Volunteer services may be treated as an in-kind contribution for the purpose of the

match requirement of this subsection. Volunteer services that qualify as professional services shall be valued at the fair market value of those services. All other volunteer service hours shall be valued at the statewide average wage rate as calculated from data compiled by the Employment Security Commission in the Employment and Wages in North Carolina Annual Report for the most recent period for which data are available. Expenses, including both those paid by cash and in-kind contributions, incurred by other participating non-State entities contracting with the North Carolina Partnership for Children, Inc., or the local partnerships, also may be considered resources available to meet the required private match. In order to qualify to meet the required private match, the expenses shall:

"(1) Be verifiable from the contractor's records;

"(2) If in-kind, other than volunteer services,

be quantifiable in accordance with generally accepted accounting principles for nonprofit organizations;

“(3) Not include expenses funded by State funds;

“(4) Be supplemental to and not supplant preexisting resources for related program activities;

“(5) Be incurred as a direct result of the Early Childhood Initiatives Program and be necessary and reasonable for the proper and efficient accomplishment of the Program’s objectives;

“(6) Be otherwise allowable under federal or State law;

“(7) Be required and described in the contractual agreements approved by the North Carolina Partnership for Children, Inc., or the local partnership; and

“(8) Be reported to the North Carolina Partnership for Children, Inc., or the local partnership by the contractor in the same manner as reimbursable expenses.

“The North Carolina Partnership for Children, Inc., shall establish uniform guidelines and reporting format for local partnerships to document the qualifying expenses occurring at the contractor level. Local partnerships shall monitor qualifying expenses to ensure they have occurred and meet the requirements prescribed in this subsection.

“Failure to obtain a twenty percent (20%) match by June 30 of each fiscal year shall result in a dollar-for-dollar reduction in the appropriation for the Program for a subsequent fiscal year. The North Carolina Partnership for Children, Inc., shall be responsible for compiling information on the private cash and in-kind contributions into a report that is submitted to the Joint Legislative Commission on Governmental Operations in a format that allows verification by the Department of Revenue. The same match requirements shall apply to any expansion funds appropriated by the General Assembly.”

Session Laws 2000-67, s. 1.1, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2000’.”

Session Laws 2000-67, s. 28.4, contains a severability clause.

**Child Care Allocation Formula.** — Session Laws 2001-424, ss. 21.69 (a) to (d), provide: “(a) The Department of Health and Human Services shall allocate child care subsidy voucher funds to pay the costs of necessary child care for minor children of needy families. The mandatory thirty percent (30%) Smart Start subsidy allocation under G.S. 143B-168.15(g) shall constitute the base amount for each county’s child care subsidy allocation. The

Department of Health and Human Services shall apply the following formula to all noncategorical federal and State child care funds, not including the aggregate mandatory thirty percent (30%) Smart Start subsidy allocation:

“(1) One-third of budgeted funds shall be distributed according to the county’s population in relation to the total population of the State.

“(2) One-third of budgeted funds shall be distributed according to the number of children under six years of age in a county who are living in families whose income is below the State poverty level in relation to the total number of children under six years of age in the State in families whose income is below the poverty level.

“(3) One-third of budgeted funds shall be distributed according to the number of working mothers with children under six years of age in a county in relation to the total number of working mothers with children under six years of age in the State.

“(b) A county’s initial allocation shall not be less than that county’s total expenditures for both FSA and non-FSA child care in fiscal year 1995-96.

“(c) The Department of Health and Human Services may reallocate unused child care subsidy voucher funds in order to meet the child care needs of low-income families. Any reallocation of funds shall be based upon the expenditures of all child care subsidy voucher funding, including Smart Start funds, within a county.

“(d) The Department of Health and Human Services, in consultation with the North Carolina Partnership for Children, Inc., the North Carolina Association of County Commissioners, directors of county departments of social services, and representatives of private for-profit and private not-for-profit child care providers, shall study the current methodology and process used to allocate all child care subsidy voucher funds to assess the effectiveness of the methodology and process in meeting the needs of North Carolina’s low-income working families. The Department shall report its findings and recommendations 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 no later than April 1, 2002.”

Session Laws 2001-424, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Acts of 2001’.”

Session Laws 2001-424, s. 36.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to

have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium.”

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-67, s. 11.28(c), effective July 1, 2000, re-wrote subsection (b).

Session Laws 2000-67, s. 11.28(d), effective

September 1, 2000, in subsection (g), inserted “of the funds spent in each year” in the first sentence, deleted the former third sentence, regarding priority for the use of the funds to augment the State’s payment rate, and added the present third sentence.

Session Laws 2001-424, s. 21.75(g), effective July 1, 2001, repealed subsection (f), relating to conditions under which local partnerships may carry over funds from one fiscal year to the next.

## § 143B-168.16. Home-centered services; consent.

No home-centered services including home visits or in-home parenting training shall be allowed under this Part unless the written, informed consent of the participating parents authorizing the home-centered services is first obtained by the local partnership, educational institution, local school administrative unit, private school, not-for-profit organization, governmental agency, or other entity that is conducting the parenting program. The participating parents may revoke at any time their consent for the home-centered services.

The consent form shall contain a clear description of the program including (i) the activities and information to be provided by the program during the home visits, (ii) the number of expected home visits, (iii) any responsibilities of the parents, (iv) the fact, if applicable, that a record will be made and maintained on the home visits, (v) the fact that the parents may revoke at any time the consent, and (vi) any other information as may be necessary to convey to the parents a clear understanding of the program.

Parents at all times shall have access to any record maintained on home-centered services provided to their family and may place in that record a written response to any information with which they disagree that is in the record. (1993 (Reg. Sess., 1994), c. 766, s. 1.)

### Part 11. Council for Institutional Boards.

§§ 143B-169 through 143B-172: Repealed by Session Laws 1979, c. 504, s. 9.

### Part 12. Boards of Directors of Institutions.

§§ 143B-173 through 143B-176: Repealed by Session Laws 1989, c. 533, s. 3.

**Cross References.** — As to the Board of Directors of the Governor Morehead School, see §§ 143B-164.11, 143B-164.12.

### Part 12A. Board of Directors of the Governor Morehead School.

§§ 143B-176.1, 143B-176.2: Recodified as §§ 143B-164.11 and 143B-164.12 by Session Laws 1997-18, s. 13(b) and (c).

### Part 13. Council on Developmental Disabilities.

#### § 143B-177. Council on Developmental Disabilities — creation, powers and duties.

There is hereby created the Council on Developmental Disabilities of the Department of Health and Human Services. The Council on Developmental Disabilities shall have the following functions and duties:

- (1) To advise the Secretary of Health and Human Services regarding the development and implementation of the State plan as required by Public Law 98-527, the Developmental Disabilities Act of 1984, by:
  - a. Identifying ways and means of promoting public understanding of developmental disabilities;
  - b. Examining the federally assisted State programs of all State agencies which provide services for persons with developmental disabilities;
  - c. Describing the quality, extent and scope of services being provided, or to be provided, to persons with developmental disabilities in North Carolina;
  - d. Recommending ways and means for coordination of programs to prevent duplication and overlapping of such services;
  - e. Considering the need for new State programs and laws in the field of developmental disabilities; and
  - f. Conducting activities which will increase and support the independence, productivity, and integration into the community of persons with developmental disabilities.
- (2) To advise the Secretary of Health and Human Services regarding the coordination of planning and service delivery of all State-funded programs which provide service to persons with developmental disabilities by:
  - a. Gathering, analyzing and interpreting individual and aggregate needs assessment data from all State agencies that provide services to developmentally disabled;
  - b. Conducting special needs assessment studies as may be necessary;
  - c. Specifying and supporting activities that will enhance the services delivered by individual agencies by reducing barriers between agencies;
  - d. Identifying service development priorities that require cooperative interagency planning and development;
  - e. Providing coordinative and technical assistance in interagency planning and development efforts; and
  - f. Coordinating interagency training efforts that will promote more effective service delivery to persons with developmental disabilities.
- (3) To advise the Secretary of Health and Human Services regarding other matters relating to developmental disabilities and upon any matter the Secretary may refer to it. (1973, c. 476, s. 167; 1987, c. 780; 1997-443, s. 11A.118(a).)

#### § 143B-178. Council on Developmental Disabilities — definitions.

The following definitions apply to this Chapter:

- (1) The term "developmental disability" means a severe, chronic disability of a person which:

- a. Is attributable to a mental or physical impairment or combination of mental and physical impairments;
  - b. Is manifested before the person attains age 22, unless the disability is caused by a traumatic head injury and is manifested after age 22;
  - c. Is likely to continue indefinitely;
  - d. Results in substantial functional limitations in three or more of the following areas of major life activity: (i) self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self-direction, (vi) capacity for independent living, and (vii) economic self-sufficiency; and
  - e. Reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.
- (2) The term "services for persons with developmental disabilities," as it is used in this Article, means:
- a. Alternative community living arrangement services, employment related activities, child development services, and case management services; and
  - b. Any other specialized services or special adaptations of generic services including diagnosis, evaluation, treatment, personal care, child care, adult care, special living arrangements, training, education, sheltered employment, recreation and socialization, counseling of the individual with such a disability and of his family, protective and other social and sociolegal services, information and referral services, follow-along services, nonvocational social-developmental services, and transportation services necessary to assure delivery of services to persons with developmental disabilities, and services to promote and coordinate activities to prevent developmental disabilities. (1973, c. 476, s. 168; 1977, c. 881, ss. 1, 2; 1979, c. 752, s. 1 1987, c. 780; 1995, c. 535, s. 33; 1997-506, s. 61.)

### **§ 143B-179. Council on Developmental Disabilities — members; selection; quorum; compensation.**

(a) The Council on Developmental Disabilities of the Department of Health and Human Services shall consist of 32 members appointed by the Governor. The composition of the Council shall be as follows:

- (1) Eleven members from the General Assembly and State government agencies as follows: One person who is a member of the Senate, one person who is a member of the House of Representatives, one representative of the Department of Public Instruction, one representative of the Department of Correction, and seven representatives of the Department of Health and Human Services to include the Secretary or his designee.
- (2) Sixteen members designated as consumers of service for the developmentally disabled. A consumer of services for the developmentally disabled is a person who (i) has a developmental disability or is the parent or guardian of such a person, or (ii) is an immediate relative or guardian of a person with mentally impairing developmental disability, and (iii) is not an employee of a State agency that receives funds or provides services under the provisions of Part B, Title 1, P.L. 98-527, as amended, the Developmental Disabilities Act of 1984, is not a managing employee (as defined in Section 1126(b) of the Social

Security Act) of any other entity that receives funds or provides services under such Part, and is not a person with an ownership or control interest (within the meaning of Section 1124(a)(3) of the Social Security Act) with respect to such an entity. Of these 16 members, at least one third shall be persons with developmental disabilities and at least another one third shall be the immediate relatives or guardians of persons with mentally impairing developmental disabilities, of whom at least one shall be an immediate relative or guardian of an institutionalized developmentally disabled person.

- (3) Five members at large as follows: One representative of the university affiliated facility, one representative of the State protection and advocacy system, one representative of a local agency, one representative of a nongovernmental agency or nonprofit group concerned with services to persons with developmental disabilities, and one representative from the public at large.

The appointments of all members, with the exception of those from the General Assembly and State agencies shall be for terms of four years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Council created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

The Governor shall make appropriate provisions for the rotation of membership on the Council.

(b) The Governor shall have the power to remove any member of the Council from office in accordance with the provisions of G.S. 143B-16.

The Governor shall designate one member of the Council to serve as chairman at his pleasure.

Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Council shall constitute a quorum for the transaction of business.

All clerical and other services required by the council shall be supplied by the Secretary of Health and Human Services. (1973, c. 476, s. 169; c. 1117; 1977, c. 881, s. 3; 1979, c. 752, s. 2; 1987, c. 780; 1997-443, s. 11A.118(a); 1997-456, s. 27.)

**Editor's Note.** — Subdivisions (a)(2)(1) through (a)(2)(3) were renumbered as subdivisions (a)(2)(i) through (a)(2)(iii) pursuant to S.L. 1997-456, s. 27 which authorized the Re-

visor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

**§§ 143B-179.1 through 143B-179.4:** Reserved for future codification purposes.

**Part 13A. Interagency Coordinating Council for Handicapped Children from Birth to Five Years of Age.**

**§ 143B-179.5. Interagency Coordinating Council for Children from Birth to Five with Disabilities and Their Families; establishment, composition, organization; duties, compensation, reporting.**

(a) There is established an Interagency Coordinating Council for Children from Birth to Five with Disabilities and Their Families in the Department of Health and Human Services.

(b) The Interagency Coordinating Council shall have 26 members, appointed by the Governor. Effective July 1, 1994, the Governor shall designate 13 appointees to serve for two years and 13 appointees to serve for one year. Thereafter, the terms of all Council members shall be two years. The Governor shall have the power to remove any member of the Council from office in accordance with the provisions of G.S. 143B-16. Any appointment to fill a vacancy on the Council created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term. Members may be appointed to succeed themselves for one term and may be appointed again, after being off the Council for one term.

The composition of the Council and the designation of the Council's chair shall be as specified in the "Individuals with Disabilities Education Act" (IDEA), P.L. 102-119, the federal early intervention legislation, except that two members shall be members of the Senate, appointed from recommendations of the President Pro Tempore of the Senate and two members shall be members of the House of Representatives, appointed from recommendations of the Speaker of the House of Representatives.

(c) The chair may establish those standing and ad hoc committees and task forces as may be necessary to carry out the functions of the Council and appoint Council members or other individuals to serve on these committees and task forces. The Council shall meet at least quarterly. A majority of the Council shall constitute a quorum for the transaction of business.

(d) The Council shall advise the Department of Health and Human Services and other appropriate agencies in carrying out their early intervention services, and the Department of Public Instruction, and other appropriate agencies, in their activities related to the provision of special education services for preschoolers. The Council shall specifically address in its studies and evaluations that it considers necessary to its advising:

- (1) The identification of sources of fiscal and other support for the early intervention system;
- (2) The development of policies related to the early intervention services;
- (3) The preparation of applications for available federal funds;
- (4) The resolution of interagency disputes; and
- (5) The promotion of interagency agreements.

(e) Members of the Council and parents on ad hoc committees and task forces of the Council shall receive travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

(f) The Council shall prepare and submit an annual report to the Governor and to the General Assembly on the status of the early intervention system for eligible infants and toddlers and on the status of special education services for preschoolers.

All clerical and other services required by the Council shall be supplied by the Secretary of Health and Human Services and the Superintendent of Public Instruction, as specified by the interagency agreement authorized by G.S. 122C-112(a)(13). (1989 (Reg. Sess., 1990), c. 1003, s. 1; 1993, c. 487, s. 1; 1997-443, s. 11A.106.)

**Editor's Note.** — Session Laws 1989 (Reg. Sess. 1990), c. 1003, s. 6 provides: "Funds appropriated for the 1990-91 fiscal year or for any fiscal year in the future do not constitute any entitlement to services beyond those provided for that fiscal year. Nothing in this act creates any rights except to the extent that

funds are appropriated by the State to implement its provisions from year to year and nothing in this act obligates the General Assembly to appropriate any funds to implement its provisions." Funds to implement the provisions of c. 1003 were appropriated in the 1989 (Reg. Sess., 1990) Session.

**§ 143B-179.6. Interagency Coordinating Council for Handicapped Children from Birth to Five Years of Age; agency cooperation.**

All appropriate agencies, including the Department of Health and Human Services and the Department of Public Instruction, and other public and private service providers shall cooperate with the Council in carrying out its mandate. (1989 (Reg. Sess., 1990), c. 1003, s. 1; 1997-443, s. 11A.107.)

Part 14. Governor's Advisory Council on Aging; Division of Aging.

**§ 143B-180. Governor's Advisory Council on Aging — creation, powers and duties.**

There is hereby created the Governor's Advisory Council on Aging of the Department of Health and Human Services. The Advisory Council on Aging shall have the following functions and duties:

- (1) To make recommendations to the Governor and the Secretary of Health and Human Services aimed at improving human services to the elderly;
- (2) To study ways and means of promoting public understanding of the problems of the aging, to consider the need for new State programs in the field of aging, and to make recommendations to and advise the Governor and the Secretary on these matters;
- (3) To advise the Department of Health and Human Services in the preparation of a plan describing the quality, extent and scope of services being provided, or to be provided, to elderly persons in North Carolina;
- (4) To study the programs of all State agencies which provide services for elderly persons and to advise the Governor and the Secretary of Health and Human Services on the coordination of programs to prevent duplication and overlapping of such services;
- (5) To advise the Governor and the Secretary of Health and Human Services upon any matter which the Governor and the Secretary may refer to it. (1973, c. 476, s. 171; 1977, c. 242, s. 1; 1983, c. 40, s. 1; 1997-443, s. 11A.118(a).)

**§ 143B-181. Governor's Advisory Council on Aging — members; selection; quorum; compensation.**

The Governor's Advisory Council on Aging of the Department of Health and Human Services shall consist of 33 members, 29 members to be appointed by the Governor, two members to be appointed by the President Pro Tempore of the Senate, and two members to be appointed by the Speaker of the House of Representatives. The composition of the Council shall be as follows: one representative of the Department of Administration; one representative of the Department of Cultural Resources; one representative of the Employment Security Commission; one representative of the Teachers' and State Employees' Retirement System; one representative of the Commissioner of Labor; one representative of the Department of Public Instruction; one representative of the Department of Environment and Natural Resources; one representative of the Department of Insurance; one representative of the Department of Crime Control and Public Safety; one representative of the Department of Community Colleges; one representative of the School of Public Health of The

University of North Carolina; one representative of the School of Social Work of The University of North Carolina; one representative of the Agricultural Extension Service of North Carolina State University; one representative of the collective body of the Medical Society of North Carolina; and 19 members at large. The at large members shall be citizens who are knowledgeable about services supported through the Older Americans Act of 1965, as amended, and shall include persons with greatest economic or social need, minority older persons, and participants in programs under the Older Americans Act of 1965, as amended. The Governor shall appoint 15 members at large who meet these qualifications and are 60 years of age or older. The four remaining members at large, two of whom shall be appointed by the President Pro Tempore of the Senate and two of whom shall be appointed by the Speaker of the House of Representatives, shall be broadly representative of the major private agencies and organizations in the State who are experienced in or have demonstrated particular interest in the special concerns of older persons. At least one of each of the at-large appointments of the President Pro Tempore of the Senate and the Speaker of the House of Representatives shall be persons 60 years of age or older. The Council shall meet at least quarterly.

Members at large shall be appointed for four-year terms and until their successors are appointed and qualify. Ad interim appointments shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Council from office in accordance with the provisions of G.S. 143B-16 of the Executive Organization Act of 1973.

The Governor shall designate one member of the Council as chair to serve in such capacity at his pleasure.

Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Council shall constitute a quorum for the transaction of business.

All clerical and other services required by the Council shall be supplied by the Secretary of Health and Human Services. (1973, c. 476, s. 172; 1975, c. 128, ss. 1, 2; 1977, c. 242, s. 2; c. 771, s. 4; 1983, c. 40, s. 2; 1989, c. 727, s. 218(127); 1993, c. 522, s. 16; 1995, c. 490, s. 3; 1997-443, s. 11A.108.)

### **§ 143B-181.1. Division of Aging — creation, powers and duties.**

(a) There is hereby created within the office of the Secretary of the Department of Health and Human Services a Division of Aging, which shall have the following functions and duties:

- (1) To maintain a continuing review of existing programs for the aging in the State of North Carolina, and periodically make recommendations to the Secretary of Health and Human Services for transmittal to the Governor and the General Assembly as appropriate for improvements in and additions to such programs;
- (2) To study, collect, maintain, publish and disseminate factual data and pertinent information relative to all aspects of aging. These include the societal, economic, educational, recreational and health needs and opportunities of the aging;
- (3) To stimulate, inform, educate and assist local organizations, the community at large, and older people themselves about aging, including needs, resources and opportunities for the aging, and about the role they can play in improving conditions for the aging;
- (4) To serve as the agency through which various public and nonpublic organizations concerned with the aged can exchange information, coordinate programs, and be helped to engage in joint endeavors;

- (5) To provide advice, information and technical assistance to North Carolina State government departments and agencies and to nongovernmental organizations which may be considering the inauguration of services, programs, or facilities for the aging, or which can be stimulated to take such action;
- (6) To coordinate governmental programs with private agency programs for aging in order that such efforts be effective and that duplication and wasted effort be prevented or eliminated;
- (7) To promote employment opportunities as well as proper and adequate recreational use of leisure for older people, including opportunities for uncompensated but satisfying volunteer work;
- (8) To identify research needs, encourage research, and assist in obtaining funds for research and demonstration projects;
- (9) To establish or help to establish demonstration programs of services to the aging;
- (10) To establish a fee schedule to cover the cost of providing in-home and community-based services funded by the Division. The fees may vary on the basis of the type of service provided and the ability of the recipient to pay for the service. The fees may be imposed on the recipient of a service unless prohibited by federal law. The local agency shall retain the fee and use it to extend the availability of in-home and community-based services provided by the Division in support of functionally impaired older adults and family caregivers of functionally impaired older adults;
- (11) To administer a Home and Community Care Block Grant for older adults, effective July 1, 1992. The Home and Community Care Block Grant shall be comprised of applicable Older Americans Act funds, Social Services Block Grant funding in support of the Respite Care Program (G.S. 143B-181.10), State funds for home and community care services administered by the Division of Aging, portions of the State In-Home and Adult Day Care funds (Chapter 1048, 1981 Session Laws) administered by the Division of Social Services which support services to older adults, and other funds appropriated by the General Assembly as part of the Home and Community Care Block Grant. Funding currently administered by the Division of Social Services to be included in the block grant will be based on the expenditures for older adults at a point in time to be mutually determined by the Divisions of Social Services and Aging. The total amount of Older Americans Act funds to be included in the Home and Community Care Block Grant and the matching rates for the block grant shall be established by the Department of Health and Human Services, Division of Aging. Allocations made to counties in support of older adults shall not be less than resources made available for the period July 1, 1990, through June 30, 1991, contingent upon availability of current State and federal funding; and
- (12) To organize, coordinate, and provide staff support to the North Carolina Senior Tar Heel Legislature.

(b) The Division shall function under the authority of the Department of Health and Human Services and the Secretary of Health and Human Services as provided in the Executive Organization Act of 1973 and shall perform such other duties as are assigned by the Secretary.

(c) The Secretary of Health and Human Services shall adopt rules to implement this Part and Title 42, Chapter 35, of the United States Code, entitled Programs for Older Americans. (1977, c. 242, s. 4; 1981, c. 614, s. 19; 1987, c. 827, s. 244; 1991, c. 52, s. 1; c. 241, s. 1; 1993, c. 503, s. 2; 1997-443, s. 11A.118(a).)

**Editor's Note.** — Session Laws 2001-424, s. 21.47, provides: “(a) The Department of Health and Human Services, Division of Aging, shall implement changes in its methodology currently used for allocating slots. The new allocation shall be implemented January 1, 2002, and shall ensure the Fund will serve new clients. Not later than January 1, 2002, the Department of Health and Human Services, Division of Aging, shall report 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 the new allocation methodology. The report shall include all of the changes made in the new allocation and an estimate of the number of new clients served. The allocation of all slots

paid for with State Adult Day Care Funds shall be distributed equitably among service providers and shall eliminate the funding of unused slots.”

Session Laws 2001-424, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2001.’”

Session Laws 2001-424, s. 36.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium.”

Session Laws 2001-424, s. 36.5 is a severability clause.

### **§ 143B-181.1A. Plan for serving older adults; inventory of existing data; cooperation by State agencies.**

(a) The Division of Aging, Department of Health and Human Services shall submit a regularly updated plan to the General Assembly by March 1 of every other odd-numbered year, beginning March 1, 1995. This plan shall include:

- (1) A detailed analysis of the needs of older adults in North Carolina, based on existing available data, including demographic, geographic, health, social, economical, and other pertinent indicators;
- (2) A clear statement of the goals of the State’s long-term public policy on aging;
- (3) An analysis of services currently provided and an analysis of additional services needed; and
- (4) Specific implementation recommendations on expansion and funding of current and additional services and services levels.

(b) The Division of Aging, Department of Health and Human Services, shall maintain an inventory of existing data sets regarding the elderly in North Carolina, in order to ensure that adequate demographic, geographic, health, social, economic, and other pertinent indicators are available to generate its regularly updated Plan for Serving Older Adults.

Upon request, the Division shall make information on these data sets available within a reasonable time.

All State agencies and entities that possess data relating to the elderly, including the Department of Health and Human Services’ Division of Health Services, the Division of Facility Services, and the Division of Social Services, and the Department of Administration, shall cooperate, upon request, with the Division of Aging in implementing this subsection. (1989, c. 52, s. 1; c. 695, s. 1; 1995, c. 253, s. 1; 1997-443, s. 11A.118(a).)

### **§ 143B-181.1B. Division as clearinghouse for information; agencies to provide information.**

(a) The Division of Aging, Department of Health and Human Services, shall be the central clearinghouse for information regarding all State education and training programs available and being provided about and for the elderly in North Carolina.

(b) The Division of Aging, Department of Health and Human Services, shall produce and distribute annually an updated calendar of conferences, training events, and educational programs about and for the elderly in North Carolina.

(c) All State agencies and entities administering State or federal funding for education and training programs about and for the elderly shall provide to the Division of Aging by September 1 of each year all information required by the Division regarding conferences, training events, and educational programs provided about and for the elderly. (1989, c. 696, ss. 1-3; 1997-443, s. 11A.118(a).)

### **§ 143B-181.2. Assistant Secretary for Aging — appointment and duties.**

(a) The Secretary of Health and Human Services shall appoint an assistant secretary in the Department of Health and Human Services, whose title shall be the Assistant Secretary for Aging. The Assistant Secretary for Aging shall monitor all aging programs in the Department of Health and Human Services and shall have such powers and duties as are conferred on him by this Part and delegated to him by the Secretary of Health and Human Services.

(b) The Assistant Secretary for Aging, through the appropriate subunits of the Department of Health and Human Services, shall, at the request of the Secretary, identify program needs for the aging, recommend program changes, coordinate intra-departmental program efforts, represent the Secretary in aging matters before boards and commissions, the General Assembly and the public, coordinate program contacts between the Department of Health and Human Services and private, State and federal agencies, initiate special studies on aging matters, and have the responsibility of assuring that services are delivered to the elderly of the State. (1977, c. 242, s. 4; 1997-443, s. 11A.118(a).)

## **Part 14A. Policy Act for the Aging.**

### **§ 143B-181.3. Statement of principles.**

To utilize effectively the resources of our State, to provide a better quality of life for our senior citizens, and to assure older adults the right of choosing where and how they want to live, the following principles are hereby endorsed:

- (1) Older people should be able to live as normal a life as possible.
- (2) Older adults should have a choice of life styles which will allow them to remain contributing members of society for as long as possible.
- (3) Preventive and primary health care are necessary to keep older adults active and contributing members of society.
- (4) Appropriate training in gerontology and geriatrics should be developed for individuals serving older adults.
- (5) Transportation to meet daily needs and to make accessible a broad range of services should be provided so that older persons may realize their full potential.
- (6) Services for older adults should be coordinated so that all their needs can be served efficiently and effectively.
- (7) Information on all services for older citizens and advocacy for these services should be available in each county.
- (8) Increased employment opportunities for older adults should be made available.
- (9) Options in housing should be made available.
- (10) Planning for programs for older citizens should always be done in consultation with them.
- (11) The State should aid older people to help themselves and should encourage families in caring for their older members. (1979, c. 983, s. 1.)

### § 143B-181.4. Responsibility for policy.

Responsibility for developing policy to carry out the purpose of this Part is vested in the Secretary of the Department of Health and Human Services as provided in G.S. 143B-181.1 who may assign responsibility to the Assistant Secretary for Aging. The Assistant Secretary for Aging shall, at the request of the Secretary, be the bridge between the federal and local level and shall review policies that affect the well being of older people with the goal of providing a balance in State programs to meet the social welfare and health needs of the total population. Responsibilities may include:

- (1) Serving as chief advocate for older adults;
- (2) Developing the State plan which will aid in the coordination of all programs for older people;
- (3) Providing information and research to identify gaps in existing services;
- (4) Promoting the development and expansion of services;
- (5) Evaluation of programs;
- (6) Bringing together the public and private sectors to provide services for older people. (1979, c. 983, s. 1; 1997-443, s. 11A.118(a).)

## Part 14B. Long-Term Care.

### § 143B-181.5. Long-term care policy.

The North Carolina General Assembly finds that the aging of the population and advanced medical technology have resulted in a growing number of persons who require assistance. The primary resource for long-term care provision continues to be the family and friends. However, these traditional caregivers are increasingly employed outside the home. There is growing demand for improvement and expansion of home and community-based long-term care services to support and complement the services provided by these informal caregivers.

The North Carolina General Assembly further finds that the public interest would best be served by a broad array of long-term care services that support persons who need such services in the home or in the community whenever practicable and that promote individual autonomy, dignity, and choice.

The North Carolina General Assembly finds that as other long-term care options become more available, the relative need for institutional care will stabilize or decline relative to the growing aging population. The General Assembly recognizes, however, that institutional care will continue to be a critical part of the State's long-term care options and that such services should promote individual dignity, autonomy, and a home-like environment. (1981, c. 675, s. 1; 1995 (Reg. Sess., 1996), c. 583, s. 2.)

**Editor's Note.** — Session Laws 2001-424, ss. 21.9 (a) to (c), provide: “(a) The Department of Health and Human Services shall, in cooperation with other appropriate State and local agencies and representatives of consumer and provider organizations, develop a system that provides a continuum of long-term care for elderly and disabled individuals and their families. The Department shall define the system of long-term care services to include:

“(1) A structure and means for screening, assessment, and care management across settings of care;

“(2) A process to determine outcome measures for care;

“(3) An integrated data system to track expenditures, consumer characteristics, and consumer outcomes;

“(4) Relationships between the Department and the State's universities to provide policy analysis and program evaluation support for the development of long-term care system reforms;

“(5) An implementation plan that addresses testing of models, reviewing existing models, evaluation of components, and steps needed to

achieve development of a coordinated system; and

“(6) Provision for consumer, provider, and agency input into the system design and implementation development.

“(b) Notwithstanding Section 11.7A(a) of S.L. 1999-237, as amended by Section 11.4(b) of S.L. 2000-67, relating to a system for providing long-term continuum of care for elderly and disabled individuals and their families, if non-State funds from within the Department can be identified, the Department may, with the approval of the Office of State Budget and Management, proceed to:

“(1) Implement the initial phase of a comprehensive data system that tracks long-term care expenditures, services, consumer profiles, and consumer preferences; and

“(2) Develop a system of statewide long-term care services coordination and case management to minimize administrative costs, im-

prove access to services, and minimize obstacles to the delivery of long-term care services to people in need.

“(c) Not later than April 15, 2002, the Department shall submit a progress report to the Senate Appropriations Committee on Health and Human Services, the House of Representatives Appropriations Subcommittee on Health and Human Services, and the North Carolina Study Commission on Aging, on the development of the system required under this section [s. 21.9 of Session Laws 2001-424].”

Session Laws 2001-424, s. 36.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium.”

Session Laws 2001-424, s. 36.5 is a severability clause.

### § 143B-181.6. Purpose and intent.

It is the North Carolina General Assembly’s intent in the State’s development and implementation of long-term care policies that:

- (1) Long-term care services administered by the Department of Health and Human Services and other State and local agencies shall include a balanced array of health, social, and supportive services that promote individual choice, dignity, and the highest practicable level of independence;
- (2) Home and community-based services shall be developed, expanded, or maintained in order to meet the needs of consumers in the least confusing manner and based on the desires of the elderly and their families;
- (3) All services shall be responsive and appropriate to individual need and shall be delivered through a seamless system that is flexible and responsive regardless of funding source;
- (4) Services shall be available to all elderly who need them but targeted primarily to the most frail, needy elderly;
- (5) State and local agencies shall maximize the use of limited resources by establishing a fee system for persons who have the ability to pay;
- (6) Institutional care shall be provided in such a manner and in such an environment as to promote maintenance or enhancement of the quality of life of each resident and timely discharge to a less restrictive care setting when appropriate; and
- (7) State health planning for institutional bed supply shall take into account increased availability of other home and community-based services options. (1981, c. 675, ss. 1, 2; 1995 (Reg. Sess., 1996), c. 583, s. 2; 1997-443, s. 11A.118(a).)

§§ 143B-181.7 through 143B-181.9: Repealed by Session Laws 1995 (Regular Session, 1996), c. 583, s. 2.

§ 143B-181.9A: Repealed by Session Laws 1995, c. 179, s. 1.

## Part 14C. Respite Care Program.

**§ 143B-181.10. Respite care program established; eligibility; services; administration; payment rates.**

(a) A respite care program is established to provide needed relief to caregivers of impaired adults who cannot be left alone because of mental or physical problems.

(b) Those eligible for respite care under the program established by this section are limited to those unpaid primary caregivers who are caring for people 60 years of age or older and their spouses, or those unpaid primary caregivers 60 years of age or older who are caring for persons 18 years of age or older, who require constant supervision and who cannot be left alone either because of memory impairment, physical immobility, or other problems that renders them unsafe alone.

(c) Respite care services provided by the programs established by this section may include:

- (1) Counseling and training in the caregiving role, including coping mechanisms and behavior modification techniques;
- (2) Counseling and accessing available local, regional, and State services;
- (3) Support group development and facilitation;
- (4) Assessment and care planning for the patient of the caregiver;
- (5) Attendance and companion services for the patient in order to provide release time to the caregiver;
- (6) Personal care services, including meal preparation, for the patient of the caregiver;
- (7) Temporarily placing the person out of his home to provide the caregiver total respite when the mental or physical stress on the caregiver necessitates this type of respite.

An out of home placement is defined as placement in a hospital, skilled or intermediate nursing facility, adult care home, adult day health center, or adult day care center. Duration of the service period may extend beyond a year.

(d) The respite care program established by this section shall be administered by the Division of Aging consistent with the policies and procedures of the Older Americans Act. The programs shall be coordinated with other appropriate Divisions in the Department of Health and Human Services, and with agencies and organizations concerned with the delivery of services to frail older adults and their unpaid caregivers. The Division shall choose respite care provider agencies in accordance with procedures outlined under the Older Americans Act and shall include the following criteria: documented capacity to provide care, adequacy of quality assurance, training, supervision, abuse prevention, complaint mechanisms, and cost. All funds allocated by the Division pursuant to this section shall be allocated on the same basis as funding under the Older Americans Act.

(e) Funding for the Division of Aging to administer this program shall not exceed the percentage allowed for administration as provided in the Older Americans Act but shall not be less than that budgeted for administration in fiscal year 1988-89.

(f) Unless prohibited by federal law, caregivers receiving respite care services through the program established by this section shall pay for some of the services on a sliding scale depending on their ability to pay. The Division of Aging, in consultation with the Councils of Governments in each region, shall specify rates of payment for the services. (1985 (Reg. Sess., 1986), c. 1014, s. 7.1; 1989, c. 500, s. 96(a); c. 770, s. 63; 1991, c. 332, s. 1; 1995, c. 535, s. 34; 1997-443, s. 11A.118(a); 1998-97, s. 1; 2000-50, s. 1.)

**Effect of Amendments.** — Session Laws 1998-97, s.1, effective August 14, 1998, in the last paragraph in subsection (c), deleted “reimbursement rate for out of home placement”

from the end of the first sentence. This provision had been due to expire on July 1, 2000. However, Session Laws 2000-50, s. 1, deleted the July 1, 2000 expiration date.

**§§ 143B-181.11 through 143B-181.14:** Reserved for future codification purposes.

#### Part 14D. Long-Term Care Ombudsman Program.

### § 143B-181.15. Long-Term Care Ombudsman Program/Office; policy.

The General Assembly finds that a significant number of older citizens of this State reside in long-term care facilities and are dependent on others to provide their care. It is the intent of the General Assembly to protect and improve the quality of care and life for residents through the establishment of a program to assist residents and providers in the resolution of complaints or common concerns, to promote community involvement and volunteerism in long-term care facilities, and to educate the public about the long-term care system. It is the further intent of the General Assembly that the Department of Health and Human Services, within available resources and pursuant to its duties under the Older Americans Act of 1965, as amended, 42 U.S.C. § 3001 et seq., ensure that the quality of care and life for these residents is maintained, that necessary reports are made, and that, when necessary, corrective action is taken at the Department level. (1989, c. 403, s. 1; 1995, c. 254, s. 1; 1997-443, s. 11A.118(a).)

### § 143B-181.16. Long-Term Care Ombudsman Program/Office; definition.

Unless the content clearly requires otherwise, as used in this Article:

- (1) “Long-term care facility” means any skilled nursing facility and intermediate care facility as defined in G.S. 131A-3(4) or any adult care home as defined in G.S. 131D-20(2).
- (2) “Resident” means any person who is receiving treatment or care in any long-term care facility.
- (3) “State Ombudsman” means the State Ombudsman as defined by the Older Americans Act of 1965, as amended, 42 U.S.C. § 3001 et seq., who carries out the duties and functions established by this Article.
- (4) “Regional Ombudsman” means a person employed by an Area Agency on Aging to carry out the functions of the Regional Ombudsman Office established by this Article. (1989, c. 403, s. 1; 1995, c. 254, s. 2; c. 535, s. 35.)

**Editor’s Note.** — Section 131D-20(2), referred to in this section, was repealed by Session Laws 1995, c. 535, s. 13.

### § 143B-181.17. Office of State Long-Term Care Ombudsman Program/Office; establishment.

The Secretary of Department of Health and Human Services shall establish and maintain the Office of State Long-Term Ombudsman in the Division of Aging. The Office shall carry out the functions and duties required by the Older

Americans Act of 1965, as amended. This Office shall be headed by a State Ombudsman who is a person qualified by training and with experience in geriatrics and long-term care. The Attorney General shall provide legal staff and advice to this Office. (1989, c. 403, s. 1; 1997-443, s. 11A.118(a).)

**§ 143B-181.18. Office of State Long-Term Care Ombudsman Program/State Ombudsman duties.**

The State Ombudsman shall:

- (1) Promote community involvement with long-term care providers and residents of long-term care facilities and serve as liaison between residents, residents' families, facility personnel, and facility administration;
- (2) Supervise the Long-Term Care Program pursuant to rules adopted by the Secretary of the Department of Health and Human Services pursuant to G.S. 143B-10;
- (3) Certify regional ombudsmen. Certification requirements shall include an internship, training in the aging process, complaint resolution, long-term care issues, mediation techniques, recruitment and training of volunteers, and relevant federal, State, and local laws, policies, and standards;
- (4) Attempt to resolve complaints made by or on behalf of individuals who are residents of long-term care facilities, which complaints relate to administrative action that may adversely affect the health, safety, or welfare of residents;
- (5) Provide training and technical assistance to regional ombudsmen;
- (6) Establish procedures for appropriate access by regional ombudsmen to long-term care facilities and residents' records including procedures to protect the confidentiality of these records and to ensure that the identity of any complainant or resident will not be disclosed except as permitted under the Older Americans Act of 1965, as amended, 42 U.S.C. § 3001 et seq.;
- (7) Analyze data relating to complaints and conditions in long-term care facilities to identify significant problems and recommend solutions;
- (8) Prepare an annual report containing data and findings regarding the types of problems experienced and complaints reported by residents as well as recommendations for resolutions of identified long-term care issues;
- (9) Prepare findings regarding public education and community involvement efforts and innovative programs being provided in long-term care facilities; and
- (10) Provide information to public agencies, and through the State Ombudsman, to legislators, and others regarding problems encountered by residents or providers as well as recommendations for resolution. (1989, c. 403, s. 1; 1995, c. 254, s. 3; 1997-443, s. 11A.118(a).)

**§ 143B-181.19. Office of Regional Long-Term Care Ombudsman; Regional Ombudsman; duties.**

(a) An Office of Regional Ombudsman Program shall be established in each of the Area Agencies on Aging, and shall be headed by a Regional Ombudsman who shall carry out the functions and duties of the Office. The Area Agency on Aging administration shall provide administrative supervision to each Regional Ombudsman.

(b) Pursuant to policies and procedures established by the State Office of Long-Term Care Ombudsman, the Regional Ombudsman shall:

- (1) Promote community involvement with long-term care facilities and residents of long-term care facilities and serve as a liaison between residents, residents' families, facility personnel, and facility administration;
- (2) Receive and attempt to resolve complaints made by or on behalf of residents in long-term care facilities;
- (3) Collect data about the number and types of complaints handled;
- (4) Work with long-term care providers to resolve issues of common concern;
- (5) Work with long-term care providers to promote increased community involvement;
- (6) Offer assistance to long-term care providers in staff training regarding residents' rights;
- (7) Report regularly to the office of State Ombudsman about the data collected and about the activities of the Regional Ombudsman;
- (8) Provide training and technical assistance to the community advisory committees; and
- (9) Provide information to the general public on long-term care issues.  
(1989, c. 403, s. 1.)

**§ 143B-181.20. State/Regional Long-Term Care Ombudsman; authority to enter; cooperation of government agencies; communication with residents.**

(a) The State and Regional Ombudsman may enter any long-term care facility and may have reasonable access to any resident in the reasonable pursuit of his function. The Ombudsman may communicate privately and confidentially with residents of the facility individually or in groups. The Ombudsman shall have access to the patient records as permitted under the Older Americans Act of 1965, as amended, 42 U.S.C. § 3001 et seq., and under procedures established by the State Ombudsman pursuant to G.S. 143B-181.18(6). Entry shall be conducted in a manner that will not significantly disrupt the provision of nursing or other care to residents and if the long-term care facility requires registration of all visitors entering the facility, then the State or Regional Ombudsman must also register. Any State or Regional Ombudsman who discloses any information obtained from the patient's records except as permitted under the Older Americans Act of 1965, as amended, 42 U.S.C. § 3001 et seq., is guilty of a Class 1 misdemeanor.

(b) The State or Regional Ombudsman shall identify himself as such to the resident, and the resident has the right to refuse to communicate with the Ombudsman.

(c) The resident has the right to participate in planning any course of action to be taken on his behalf by the State or Regional Ombudsman, and the resident has the right to approve or disapprove any proposed action to be taken on his behalf by the Ombudsman.

(d) The State or Regional Ombudsman shall meet with the facility administrator or person in charge before any action is taken to allow the facility the opportunity to respond, provide additional information, or take appropriate action to resolve the concern.

(e) The State and Regional Ombudsman may obtain from any government agency, and this agency shall provide, that cooperation, assistance, services, data, and access to files and records that will enable the Ombudsman to properly perform his duties and exercise his powers, provided this information is not privileged by law.

(f) If the subject of the complaint involves suspected abuse, neglect, or exploitation, the State or Regional Ombudsman shall notify the county department of social services' Adult Protection Services section of the county department of social services, pursuant to Article 6 of Chapter 108A of the General Statutes. (1989, c. 403, s. 1; 1993, c. 539, s. 1038; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 254, s. 4.)

### **§ 143B-181.21. State/Regional Long-Term Care Ombudsman; resolution of complaints.**

(a) Following receipt of a complaint, the State or Regional Ombudsman shall attempt to resolve the complaint using, whenever possible, informal technique of mediation, conciliation, and persuasion.

(b) Complaints or conditions adversely affecting residents of long-term care facilities that cannot be resolved in the manner described in subsection (a) of this section shall be referred by the State or Regional Ombudsman to the appropriate licensure agency pursuant to G.S. 131E-100 through 131E-110 and G.S. 131D-2. (1989, c. 403, s. 1.)

### **§ 143B-181.22. State/Regional Long-Term Care Ombudsman; confidentiality.**

The identity of any complainant, resident on whose behalf a complaint is made, or any individual providing information on behalf of the resident or complainant relevant to the attempted resolution of the complaint along with the information produced by the process of complaint resolution is confidential and shall be disclosed only as permitted under the Older Americans Act of 1965, as amended, 42 U.S.C. § 3001 et seq. (1989, c. 403, s. 1; 1995, c. 254, s. 5.)

### **§ 143B-181.23. State/Regional Long-Term Care Ombudsman; prohibition of retaliation.**

No person shall discriminate or retaliate in any manner against any resident or relative or guardian of a resident, any employee of a long-term care facility, or any other person because of the making of a complaint or providing of information in good faith to the State Ombudsman or Regional Ombudsman. (1989, c. 403, s. 1.)

### **§ 143B-181.24. Office of State/Regional Long-Term Care Ombudsman; immunity from liability.**

No representative of the Office shall be liable for good faith performance of official duties. (1989, c. 403, s. 1.)

### **§ 143B-181.25. Office of State/Regional Long-Term Care Ombudsman; penalty for willful interference.**

Willful or unnecessary obstruction with the State or Regional Long-Term Care Ombudsman in the performance of his official duties is a Class 1 misdemeanor. (1989, c. 403, s. 1; 1993, c. 539, s. 1039; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ **143B-181.26 through 143B-181.49:** Reserved for future codification purposes.

#### Part 14E. Standards for Alzheimer's Special Care Units.

§§ **143B-181.50 through 143B-181.54:** Repealed by Session Laws 1999-334, s. 3.11, effective July 22, 1999.

**Editor's Note.** — Former §§ 143B-181.53 and 143B-181.54 had been reserved for future codification purposes.

#### Part 14F. Senior Tar Heel Legislature.

### § **143B-181.55. Creation, membership, meetings, organization, and adoption of measures.**

(a) There is created the North Carolina Senior Tar Heel Legislature. It shall:

- (1) Provide information and education to senior citizens on the legislative process and matters being considered by the General Assembly;
- (2) Promote citizen involvement and advocacy concerning aging issues before the General Assembly; and
- (3) Assess the legislative needs of older citizens by convening a forum modeled after the General Assembly.

(b) The delegates to the Senior Tar Heel Legislature shall be age 60 or over and shall be duly selected pursuant to procedures developed by the Department of Health and Human Services, Division of Aging, and approved by the Secretary of the Department in consultation with senior citizens advocacy groups who have given written notice to the Division of Aging that they desire to be consulted. The Senior Tar Heel Legislative Session shall be organized and coordinated by the Division with Area Agencies on Aging organizing the local election procedures and other related matters. At the conclusion of each session, the Senior Tar Heel Legislature shall make a report of that session's proceedings and recommendations to the General Assembly. Delegates to the Senior Tar Heel Legislature shall be from each county.

(c) The Senior Tar Heel Legislature is authorized to meet one day in March of every year beginning in 1994 but shall hold its first session no later than August 1993. The sessions shall be held in the State Capitol or in a building to be selected by the Governor or the Governor's designee. The Senior Tar Heel Legislature is authorized to adopt bylaws to govern its internal procedures and is authorized to adopt such recommendations as it deems appropriate to present to the General Assembly for consideration.

(d) A report of the proceedings of each session of the Senior Tar Heel Legislature shall be presented to the next Regular Session of the North Carolina General Assembly. (1993, c. 503, s. 1; 1997-443, s. 11A.118(a).)

#### Part 15. Mental Health Advisory Council.

§§ **143B-182, 143B-183:** Repealed by Session Laws 1981, c. 51, s. 13.

## Part 16. Governor's Council on Employment of the Handicapped.

[Transferred.]

**Editor's Note.** — Part 16 of this Article was transferred to Article 9, Part 16, and subsequently repealed.

### Part 16A. North Carolina Arthritis Program Committee.

§§ **143B-184, 143B-185:** Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 28.

### Part 17. Governor's Advocacy Council on Children and Youth.

§§ **143B-186, 143B-187:** Transferred to §§ 143B-414, 143B-415 by Session Laws 1977, c. 872, s. 6.

### Part 18. Council on Sickle Cell Syndrome.

§§ **143B-188 through 143B-190:** Recodified as §§ 130A-131 through 130A-131.2 by Session Laws 1989, c. 727, s. 179.

§§ **143B-191 through 143B-196:** Repealed by Session Laws 1987, c. 822, s. 1.

**Cross References.** — As to the Sickle Cell Council on Sickle Cell Syndrome, see § 130A-131 et seq. Program, see §§ 130A-129, 130A-130. As to the

### Part 19. Commission for Human Skills and Resource Development.

§§ **143B-197 through 143B-201:** Repealed by Session Laws 1979, c. 504, s. 10.

§§ **143B-202, 143B-203:** Repealed by Session Laws 1989, c. 727, s. 181.

### Part 20. Commission of Anatomy.

§§ **143B-204 through 143B-206:** Recodified as §§ 130A-33.30 through 130A-33.32 by Session Laws 1989, c. 727, s. 182(a).

### Part 21. Youth Services Advisory Committee.

§§ **143B-207, 143B-208:** Repealed by Session Laws 1981, c. 50, s. 7.

## Part 22. Human Tissue Advisory Council.

§ **143B-209**: Repealed by Session Laws 1983, c. 891, s. 10.

## Part 23. North Carolina Drug Commission.

§§ **143B-210 through 143B-212**: Repealed by Session Laws 1981, c. 51, s. 7.

## Part 24. North Carolina Council for the Hearing Impaired.

§§ **143B-213 through 143B-216.5B**: Repealed by Session Laws 1989, c. 533, s. 1.

**Cross References.** — As to the Council for Services for the Deaf and the Hard of Hearing, the Deaf and Hard of Hearing and Division of see § 143B-216.30 et seq.

## Part 25. Nutrition Advisory Committee.

§§ **143B-216.6, 143B-216.7**: Repealed by Session Laws 1979, c. 504, s. 13.

## Part 26. Governor's Council on Physical Fitness and Health.

§§ **143B-216.8, 143B-216.9**: Recodified as §§ 130A-33.40, 130A-33.41 by Session Laws 1989, c. 727, s. 186.

## Part 27. Governor's Waste Management Board.

§§ **143B-216.10 through 143B-216.15**: Recodified as §§ 143B-285.10 through 143B-285.15 by Session Laws 1989, c. 727, s. 189.

§§ **143B-216.16 through 143B-216.19**: Reserved for future codification purposes.

## Part 28. North Carolina Council on the Holocaust.

§ **143B-216.20. North Carolina Council on the Holocaust; creation; purpose.**

There is hereby created the North Carolina Council on the Holocaust. The purpose of the Council is to prevent future atrocities similar to the systematic program of genocide of six million Jews and others by the Nazis. This purpose shall be accomplished by developing a program of education and observance of the Holocaust. (1985, c. 757, s. 81(a).)

### § 143B-216.21. Membership; selection; quorum.

The Council shall consist of 24 members, six appointed by the Governor, six appointed by the President Pro Tempore of the Senate, six appointed by the Speaker of the House of Representatives, and six appointed by the other 18 members. Members shall be appointed in 1985 for two-year terms to begin July 1, 1985. In 1987 and biennially thereafter, successors shall be appointed for two-year terms. The six at-large appointments shall be made by the Council at its first meeting after July 1 of each odd-numbered year. To be eligible for appointment as an at-large member, a person must either be a survivor of the Holocaust or a first-generation lineal descendant of such person. A majority of the members shall constitute a quorum for the transaction of business. (1985, c. 757, s. 81(a); 1989, c. 47; 1995, c. 490, s. 23.)

### § 143B-216.22. Expenses.

The members of the Council shall be compensated and reimbursed for their expenses in accordance with G.S. 138-5. (1985, c. 757, s. 81(a).)

### § 143B-216.23. Assistance.

The Secretary may arrange for clerical or other assistance required by the Council. (1985, c. 757, s. 81(a).)

§§ 143B-216.24 through 143B-216.29: Reserved for future codification purposes.

## Part 29. Council for the Deaf and the Hard of Hearing; Division of Services for the Deaf and the Hard of Hearing.

### § 143B-216.30. Definitions.

The following definitions shall apply throughout this Part unless otherwise specified:

- (1) "Council" means the Council for the Deaf and the Hard of Hearing of the Department of Health and Human Services.
- (2) "Deaf" means the inability to hear and/or understand oral communication, with or without assistance of amplification devices.
- (3) "Division" means the Division of Services for the Deaf and the Hard of Hearing of the Department of Health and Human Services.
- (4) "Hard of hearing" means permanent hearing loss which is severe enough to necessitate the use of amplification devices to hear oral communication.
- (5) "Ring signaling device" means a mechanism such as a flashing light which visually indicates that a communication is being received through a telephone line. This phrase also means mechanisms such as adjustable volume ringers and buzzers which audibly and loudly indicate an incoming telephone communication.
- (6) "Speech impaired" means permanent loss of oral communication ability.
- (7) "Telecommunications device" or "TDD" means a keyboard mechanism attached to or in place of a standard telephone by some coupling device, used to transmit or receive signals through telephone lines.
- (8) "Volume control handset" means a telephone handset or other telephone listening device which has an adjustable control for increasing

the volume of the sound being produced by the telephone receiving unit. (1989, c. 533, s. 2; 1997-443, s. 11A.118(a).)

**§ 143B-216.31. Council for the Deaf and the Hard of Hearing — creation and duties.**

There is hereby created the Council for the Deaf and the Hard of Hearing of the Department of Health and Human Services. The Council shall have duties including the following:

- (1) To make recommendations to the Secretary of the Department of Health and Human Services regarding improvement of human services to the deaf and the hard of hearing;
- (2) To study ways to promote public understanding of the problems of the deaf and the hard of hearing and to consider the need for new State programs concerning deafness;
- (3) To advise the Secretary of the Department of Health and Human Services in the preparation of a plan describing the quality, extent and scope of services provided or to be provided, to deaf and hard of hearing persons in this State;
- (4) To study any State programs that provide educational services for deaf and hard of hearing persons and to advise the Secretary of the Department of Health and Human Services and the Superintendent of Public Instruction concerning coordination of these programs to prevent duplication of services; and
- (5) To advise and make recommendations to the Secretary of the Department of Health and Human Services upon any matter as requested by the Secretary. (1989, c. 533, s. 2; 1997-443, s. 11A.118(a).)

**§ 143B-216.32. Council for the Deaf and the Hard of Hearing — membership; quorum; compensation.**

(a) The Council for the Deaf and the Hard of Hearing shall consist of 25 members. Fifteen members shall be members appointed by the Governor. Three members appointed by the Governor shall be persons who are deaf and three members shall be persons who are hard of hearing. One appointment shall be an educator who trains deaf education teachers and one appointment shall be an audiologist licensed under Article 22 of Chapter 90 of the General Statutes. Three appointments shall be parents of deaf or hard of hearing children including one parent of a student in a residential school; one parent of a student in a preschool program; and one parent of a student in a mainstream education program, with at least one parent coming from each region of the North Carolina schools for the deaf regions. One member appointed by the Governor shall be recommended by the President of the North Carolina Association of the Deaf; one member shall be recommended by the President of the North Carolina Pediatric Society; one member shall be recommended by the President of the North Carolina Registry of Interpreters for the Deaf; and one member shall be nominated by the Superintendent of Public Instruction. Two members shall be appointed from the House of Representatives by the Speaker of the House of Representatives and two members shall be appointed from the Senate by the President Pro Tempore of the Senate. The Secretary of Health and Human Services shall appoint six members as follows: one from the Division of Vocational Rehabilitation, one from the Division of Aging, one from the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, one from the Division of Social Services, one from a North Carolina Chapter of SHHH (Self Help for the

Hard of Hearing), and one from SPEAK (Statewide Parents' Education and Advocacy for Kids).

(b) The terms of the initial members of the Council shall commence July 1, 1989. In his initial appointments, the Governor shall designate four members who shall serve terms of five years, four who shall serve terms of four years, four who shall serve terms of three years, and three who shall serve terms of two years. After the initial appointees' terms have expired, all members shall be appointed for a term of four years. No member appointed by the Governor shall serve more than two successive terms.

Any appointment to fill a vacancy on the Council created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

(c) The chairman of the Council shall be designated by the Secretary of the Department of Health and Human Services from the Council members. The chairman shall hold this office for not more than four years.

(d) The Council shall meet quarterly and at other times at the call of the chairman. A majority of the Council shall constitute a quorum.

(e) Council members shall be reimbursed for expenses incurred in the performance of their duties in accordance with G.S. 138-5.

(f) The Secretary of the Department of Health and Human Services shall provide clerical and other assistance as needed. (1989, c. 533, s. 2; 1993, c. 551, s. 1; 1997-443, s. 11A.118(a); 2001-424, s. 21.81(d); 2001-486, s. 2.14.)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Acts of 2001.'"

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, s. 21.81(d), effective July 1, 2001, in the fifth sentence of subsection (a), substituted

"at least one parent" for "each parent" and substituted "each region of the North Carolina" for "a different region of the three North Carolina."

Session Laws 2001-486, s. 2.14, effective December 16, 2001, in subsection (a), substituted "25" for "23" in the first sentence, and twice substituted "two members" for "one member" in the seventh sentence.

### § 143B-216.33. Division of Services for the Deaf and the Hard of Hearing — creation, powers and duties.

(a) There is hereby created within the Department of Health and Human Services, the Division of Services for the Deaf and the Hard of Hearing. The Division shall have the powers and duties including the following:

- (1) To review existing programs for persons who are deaf or hard of hearing in the State, and make recommendations to the Secretary of the Department of Health and Human Services and to the Superintendent of the Department of Public Instruction for improvements to such programs;
- (2) Repealed by Session Laws 1999-237, s. 11.4(b), effective July 1, 1999.
- (3) To provide a network of resource centers for local access to services such as interpreters, information and referral, telephone relay, and advocacy for persons who are deaf or hard of hearing;
- (4) To collect, study, maintain, publish and disseminate information relative to all aspects of deafness;
- (5) To promote public awareness of the needs of, resources and opportunities available to persons who are deaf or hard of hearing;
- (6) To provide technical assistance to agencies and organizations in the development of services to persons who are deaf or hard of hearing;
- (7) To administer the Telecommunications Program for the Deaf pursuant to G.S. 143B-216.34; and

(8) To establish training and evaluation standards for determination of competency of individuals serving as interpreters for persons who are deaf or hard of hearing.

(b) The Division shall function under the authority of the Department of Health and Human Services and the Secretary of the Department of Health and Human Services as provided in the Executive Organization Act of 1973 and shall perform such other duties as are assigned by the Secretary.

(c) The Department of Health and Human Services may receive moneys from any source, including federal funds, gifts, grants and bequests which shall be expended for the purposes designated in this Part. Gifts and bequests received shall be deposited in a trust fund with the State Treasurer who shall hold them in trust in a separate account in the name of the Division. The cash balance of this account may be pooled for investment purposes, but investment earnings shall be credited pro rata to this participating account. Moneys deposited with the State Treasurer in the trust fund account pursuant to this subsection, and investment earnings thereon, are available for expenditure without further authorization from the General Assembly. Such funds shall be administered by the Division under the direction of the director and fiscal officer of the Division and will be subject to audits normally conducted with the agency.

(d) The Secretary of the Department of Health and Human Services shall adopt rules to implement this Part. (1989, c. 533, s. 2; 1997-443, s. 11A.118(a); 1999-237, s. 11.4(b).)

**Editor's Note.** — The Telecommunications Program for the Deaf, referred to in subdivision (a)(7), is apparently the same as the communication services program established in § 143B-216.34.

**Effect of Amendments.** — Session Laws

1999-237, s. 11.4(b), effective July 1, 1999, repealed subdivision (a)(2), pertaining to providing comprehensive residential and nonresidential educational program services for persons who are deaf or hard of hearing, aged birth to 21 years of age.

**§ 143B-216.34. Division of Services for the Deaf and the Hard of Hearing — communication services program established.**

(a) There is established a communications services program for the deaf, hard of hearing, and speech impaired to be developed, administered, and implemented by the Division of Services for the Deaf and the Hard of Hearing.

(b) The Division shall develop rules to implement a schedule for the purchase and distribution of the telecommunications devices and equipment necessary to implement the communications services program. The Division shall establish by rule performance standards for TDDs, ring signaling devices, and volume control handsets. The Division shall select equipment to be purchased for distribution to qualifying recipients. The equipment discussed in this section shall be subleased at no cost to qualifying recipients for a period of time not exceeding five years. Nothing herein shall be construed to prevent the renewal of any lease previously executed with a qualified recipient.

(c) The central communications office of each county sheriff's department shall purchase and continually operate at least one TDD. The central communications office of each police department and firefighting agency in municipalities with a population of 25,000 to 250,000 shall purchase and continually operate at least one TDD. The central communications office of each police department and firefighting agency in municipalities with a population exceeding 250,000 persons shall purchase and continually operate at least two TDDs.

At least one hospital in each county shall purchase and continually operate at least one TDD.

Each 911 emergency number system and each agency receiving automatically routed calls through a 911 emergency system shall purchase and continually operate at least one TDD.

(d) Each public safety office, health care provider, and 911 emergency number system required to obtain a TDD pursuant to this section shall continually operate and staff such equipment on a 24-hour basis as follows:

- (1) Offices and organizations required to purchase TDDs pursuant to this section may buy such equipment from the Division, or from private vendors who can supply devices identical to or compatible with those selected by the Division at a lower price than the Division offers.
- (2) The purchase price imposed on such offices and organizations by the Division shall not exceed the actual per unit cost including shipping and storage charges. (1989, c. 533, s. 2.)

§§ 143B-216.35 through 143B-216.39: Reserved for future codification purposes.

### Part 30. State Schools for Hearing-impaired Children.

#### § 143B-216.40. Establishment; operations.

There are established, and there shall be maintained, the following schools for the deaf: the Eastern North Carolina School for the Deaf at Wilson (K-12) and the North Carolina School for the Deaf at Morganton (K-12). The Department of Health and Human Services shall be responsible for the operation and maintenance of the schools.

The Board of Directors of the North Carolina Schools for the Deaf shall advise the Department and shall adopt rules and regulations concerning the schools as provided in G.S. 115C-124 and 143B-173. (1891, c. 399, s. 1; Rev., s. 4202; 1915, c. 14; C. S., s. 5888; 1957, c. 1433; 1963, c. 448, s. 28; 1969, c. 1279; 1971, c. 1000; 1973, c. 476, s. 165; 1981, c. 423, s. 1; c. 635, s. 2; 1997-18, s. 12; 1997-443, s. 11A.118(a); 2001-424, s. 21.81(b).)

**Editor's Note.** — Section 115C-124 referred to above has been recodified as 143B-216.41.

Section 143B-173, referred to in this section, was repealed by Session Laws 1989, c. 533, s. 3.

This Part is former Part 7 of Article 9 of Chapter 115C, as rewritten and recodified by Session Laws 1997-18, s. 12, effective April 11, 1997. Where appropriate, the historical citations to the sections in the former Part have been added to corresponding sections in the Chapter as rewritten and recodified.

Session Laws 2001-424, s. 1.2, provides:

“This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Acts of 2001.’”

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, s. 21.81(b), effective July 1, 2001, deleted “the Central North Carolina School for the Deaf at Greensboro (K-8)” following “Wilson (K-12)” in the first sentence of the first paragraph.

#### § 143B-216.41. Pupils admitted; education.

The Department of Health and Human Services shall according to such reasonable regulations as the Board of Directors may prescribe, on application, receive into the schools for the purposes of education all deaf children resident of the State who are from age five through age 20 years: Provided, that the Department of Health and Human Services may admit students who are not within the age limits set forth above when in its judgment, such admission will be in the best interests of the applicant and the facilities of the school permit such admission. Only those who are bona fide citizens or residents of North

Carolina shall be eligible to and entitled to receive free tuition and maintenance. The Department may fix charges and the Board of Directors may prescribe rules whereby nonresident deaf children may be admitted, but in no event shall the admission of nonresidents in any way prevent the attendance of any eligible deaf child, resident of North Carolina. The Department shall provide for the instruction of all pupils in the branches of study now prescribed by law for the public schools of the State and in such other branches as may be of special benefit to the deaf.

The Department shall encourage the State to provide the classrooms with modern auditory training equipment, audiovisual media equipment, and any other special equipment to provide the best educational conditions for the deaf. The Department shall provide a teacher training program in the State. The Department shall provide for a comprehensive vocational and technical training program for boys and girls as may be useful to them in making themselves self-supporting. (1961, c. 968; 1963, c. 448, s. 28; 1969, c. 1279; 1971, c. 1000; 1973, c. 476, s. 165; 1981, c. 423, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 23; 1985, c. 780, s. 3; 1997-18, s. 12; 1997-443, s. 11A.118(a).)

### § 143B-216.42. Free textbooks and State purchase and rental system.

The Schools for the Deaf shall have the right and privilege of participating in the distribution of free textbooks and in the purchase and rental system operated by the State of North Carolina in the same manner as any other public school in the State. (1943, c. 205; 1963, c. 448, s. 28; 1971, c. 1000; 1981, c. 423, s. 1; 1997-18, s. 12.)

### § 143B-216.43. Agreements with local governing authorities.

The Department is authorized to make such agreements with the governing authority of any municipality, or of any county, as may be mutually agreed upon, to promote convenience and economy for joint water supply, lighted areas, use of sewage facilities, or any other utilities or facilities that may be necessary and as may be agreed upon. (1891, c. 399, ss. 8-10; Rev., s. 4205; C.S., s. 5893; 1963, c. 448, s. 28; 1971, c. 1000; 1973, c. 476, s. 165; 1981, c. 423, s. 1; 1997-18, s. 12.)

### § 143B-216.44. Fees for athletic programs; appeal.

The Secretary of Health and Human Services may establish by regulation fees not to exceed one hundred dollars (\$100.00) per year to support the athletic program and after school student activities and an appeal process under Chapter 150B by which a student unable to pay may prove that he is unable to pay and be relieved of the fee. (1981, c. 562, s. 3; c. 912, s. 2; 1987, c. 827, s. 1; 1997-443, s. 11A.118(a).)

**Editor's Note.** — This section was enacted 1981, c. 912, s. 2, and recodified as § 143B- as § 115-343 by Session Laws 1981, c. 562, s. 3; 216.44 by 1997-18, s. 12; recodified as § 115C-126.1 by Session Laws

## OPINIONS OF ATTORNEY GENERAL

**Student activity fees**, which are assessed from students of the Schools for the Deaf pursuant to this section, are "State funds" and are subject to the fiscal control of the Executive

Budget Act. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 56 N.C.A.G. 10 (1986).

§§ 143B-216.45 through 143B-216.49: Reserved for future codification purposes.

### Part 31. Office of the Internal Auditor.

#### § 143B-216.50. Department of Health and Human Services; office of the Internal Auditor.

(a) The office of Internal Auditor is established in the Department of Health and Human Services. The office of the Internal Auditor shall provide independent reviews and analyses of various functions and programs within the Department that will provide management information to promote accountability, integrity, and efficiency within the Department.

(b) It shall be the duty and responsibility of the Internal Auditor to:

- (1) Advise in the development of performance measures, standards, and procedures for the evaluation of the Department;
- (2) Assess the reliability and validity of performance measures and the information provided by the Department on performance measures and standards and make recommendations for improvement, if necessary;
- (3) Review the actions taken by the Department of Health and Human Services to improve program performance and meet program standards and make recommendations for improvement, if necessary;
- (4) Provide direction for, supervise, and coordinate audits, investigations, and management reviews relating to programs and operations of the Department;
- (5) Conduct independent analysis of programs carried out or financed by the Department of Health and Human Services for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting waste, management, misconduct, fraud and abuse in its programs and operations;
- (6) Keep the Secretary of the Department of Health and Human Services informed concerning fraud, abuses, and deficiencies relating to programs and operations administered or financed by the Department of Health and Human Services, recommend corrective action concerning fraud, abuses, and deficiencies, and report on the progress made in implementing corrective action;
- (7) Ensure effective coordination and cooperation between the State Auditor, federal auditors, and other governmental bodies with a view toward avoiding duplication; and
- (8) Ensure that an appropriate balance is maintained between audit, investigative, and other accountability activities.

(c) The Internal Auditor shall be appointed by the Secretary. The Internal Auditor shall be appointed without regard to political affiliation.

(d) The Internal Auditor shall report to an official designated by the Secretary.

(e) The Internal Auditor shall have access to any records, data, or other information of the Department the Internal Auditor believes necessary to carry out the Internal Auditor's duties. (1997-443, s. 12.21(c).)

**Editor's Note.** — Session Laws 1997-443, s. 12.35, made this Part effective August 28, 1997.

Session Laws 1997-443, s. 12.21(d), provides: "The Department of Justice and the Department of Health and Human Services shall immediately proceed with the implementation of this section, including proceeding with all actions necessary to establish a State Law Enforcement Bureau (SLEB) program for food stamps in the State."

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

### § 143B-216.51. Department of Health and Human Services office of the Internal Auditor; Department audits.

(a) To ensure that Department audits are performed in accordance with applicable auditing standards, the Internal Auditor shall possess the following qualifications:

- (1) A bachelors degree from an accredited college or university with a major in accounting, or with a major in business which includes five courses in accounting, and five years' experience as an internal auditor or independent postauditor, electronic data processing auditor, accountant, or any combination thereof. The experience shall, at a minimum, consist of audits of units of government or private business enterprises operating for profit or not for profit;
- (2) A masters degree in accounting, business administration, or public administration from an accredited college or university and four years of experience as required in subdivision (1) of this subsection; or
- (3) A certified public accountant license issued pursuant to law or a certified internal audit certificate issued by the Institute of Internal Auditors or earned by examination, and four years' experience as required in subdivision (1) of this subsection.

The Internal Auditor shall, to the extent both necessary and practicable, include on the Internal Auditor's staff individuals with electronic data processing auditing experience.

(b) In carrying out the auditing duties and responsibilities of this Part, the Internal Auditor shall review and evaluate internal controls necessary to ensure the fiscal accountability of the Department. The Internal Auditor shall conduct financial, compliance, electronic data processing, and performance audits of the Department and prepare audit reports of findings. The scope and assignment of the audits shall be determined by the Internal Auditor; however, the Secretary may at any time direct the Internal Auditor to perform an audit of a special program, function, or organizational unit. The performance of the audit shall be under the direction of the Internal Auditor.

(c) Audits undertaken pursuant to this Part shall be conducted in accordance with auditing standards prescribed by the State Auditor. All audit reports issued by internal audit staff shall include a statement that the audit was conducted pursuant to these standards.

(d) The Internal Auditor shall maintain, for 10 years, a complete file of all audit reports and reports of other examinations, investigations, surveys, and reviews issued under the Internal Auditor's authority. Audit work papers and other evidence and related supportive material directly pertaining to the work of his office shall be retained according to an agreement between the Internal Auditor and State Archives. To promote cooperation and avoid unnecessary duplication of audit effort, audit work papers related to issued audit reports shall be, unless otherwise prohibited by law, made available for inspection by duly authorized representatives of the State and federal governments in connection with some matter officially before them. Except as otherwise provided in this subsection, or upon subpoena issued by a duly authorized

court or court official, audit work papers shall be kept confidential. Audit reports shall be public records to the extent that they do not include information which, under State laws, is confidential and exempt from Chapter 132 of the General Statutes or would compromise the security systems of the Department.

(e) The Internal Auditor shall submit the final report to the Secretary.

(f) The State Auditor shall review a sample of the Department's internal audit reports and related work papers when determined by the State Auditor that, when conducting audits, it would be efficient to consider the work of the Internal Auditor. If the State Auditor finds deficiencies in the work of the Internal Auditor, the State Auditor shall include a statement of these findings in the audit report of the Department. The office of the Internal Auditor will cause to be made an external quality control review at least once every three years by a qualified organization not affiliated with the office of the Internal Auditor. The external quality review should determine whether the Department's internal quality control system is in place and operating effectively to provide reasonable assurance that established policies and procedures and applicable audit standards are being followed.

(g) The Internal Auditor shall monitor the implementation of the Department's response to any audit of the Department conducted by the State Auditor pursuant to law. No later than six months after the State Auditor publishes a report of the audit of the Department, the Internal Auditor shall report to the Secretary on the status of corrective actions taken. A copy of the report shall be filed with the Joint Legislative Commission on Governmental Operations.

(h) The Internal Auditor shall develop long-term and annual audit plans based on the findings of periodic risk assessments. The plan, where appropriate, should include postaudit samplings of payments and accounts. The plan shall show the individual audits to be conducted during each year and related resources to be devoted to the respective audits. The State Controller may utilize audits performed by the Internal Auditor. The plan shall be submitted to the Secretary for approval. A copy of the approved plan shall be submitted to the State Auditor. (1997-443, s. 12.21(c).)

## ARTICLE 4.

### *Department of Revenue.*

#### Part 1. General Provisions.

#### **§ 143B-217. Department of Revenue — creation.**

There is hereby recreated and reestablished a department to be known as the "Department of Revenue" with the organization, duties, functions, and powers defined in the Executive Organization Act of 1973. (1973, c. 476, s. 184.)

#### **§ 143B-218. Department of Revenue — duties.**

It shall be the duty of the Department to collect and account for the State's tax funds, to insure uniformity of administration of the tax laws and regulations, to conduct research on revenue matters, and to exercise general and specific supervision over the valuation and taxation of property throughout the State. (1973, c. 476, s. 185; 1981, c. 859, s. 81; c. 1127, s. 53.)

§ **143B-218.1**: Recodified as § 105-256(a)(6) by Session Laws 2001-414, s. 25, effective September 14, 2001.

### § **143B-219. Department of Revenue — functions.**

(a) The functions of the Department of Revenue shall comprise, except as otherwise expressly provided by the Executive Organization Act of 1973 or by the Constitution of North Carolina, all executive functions of the State in relation to revenue collection, tax research, tax settlement, and property tax supervision including those prescribed powers, duties and functions enumerated in Article 16 of Chapter 143A of the General Statutes of this State.

(b) All functions, powers, duties, and obligations heretofore vested in any agency enumerated in Article 16 of Chapter 143A of the General Statutes are hereby transferred to and vested in the Department of Revenue, except as otherwise provided by the Executive Organization Act of 1973. They shall include, by way of extension and not of limitation, the functions of:

- (1) The Commissioner and Department of Revenue,
- (2) The Department of Tax Research, and
- (3) The State Board of Assessment. (1973, c. 476, s. 186; 1981, c. 859, s. 82; c. 1127, s. 53.)

**Editor's Note.** — Article 16 of Chapter 143A, referred to in this section, has been repealed. For present provisions as to the Department of Revenue, see § 143B-217 et seq.

#### CASE NOTES

**Among the duties and obligations of the Secretary of Revenue** is responsibility for all executive functions relative to revenue collection. *Bailey v. State*, 330 N.C. 227, 412 S.E.2d 295 (1991), cert. denied, 504 U.S. 911, 112 S. Ct. 1942, 118 L. Ed. 2d 547 (1992), overruled on other grounds, 348 N.C. 130, 500 S.E.2d 54 (1998).

### § **143B-220. Department of Revenue — head.**

The Secretary of Revenue shall be the head of the Department. (1973, c. 476, s. 187.)

§ **143B-221**: Repealed by Session Laws 2001-414, s. 47, effective September 14, 2001.

**Editor's Note.** — Session Laws 2001-414, s. 49, provides: "Section 47 of this act [which repealed this section] does not derogate any existing powers." Section 48 of the act (which amended G.S. 159-81) may have been intended rather than section 47.

## Part 2. Property Tax Commission.

§§ **143B-222 through 143B-225**: Repealed by Session Laws 1991, c. 110, s. 3.

**Cross References.** — As to the Property Tax Commission, see now § 105-288.

§§ **143B-226 through 143B-245**: Reserved for future codification purposes.

## ARTICLE 5.

*Department of Military and Veterans Affairs.*

## Part 1. General Provisions.

§§ **143B-246 through 143B-251:** Repealed by Session Laws 1977, c. 70, s. 33.

**Cross References.** — As to transfer of the Division of Veterans Affairs of the Department of Military and Veterans Affairs to the Department of Administration, see § 143A-96.1.

## Part 2. Veterans Affairs Commission.

§§ **143B-252, 143B-253:** Transferred to §§ 143B-399, 143B-400 by Session Laws 1977, c. 70, ss. 24, 25.

## Part 3. Energy Division.

§§ **143B-254, 143B-255:** Repealed by Session Laws 1977, c. 23, s. 3.

**Cross References.** — As to reporting and data collection regarding stocks of coal and petroleum fuels, see § 143-345.13 et seq.

§§ **143B-256 through 143B-259:** Reserved for future codification purposes.

## ARTICLE 6.

*Department of Correction.*

## Part 1. General Provisions.

§ **143B-260. Department of Correction — creation.**

There is hereby created and established a department to be known as the Department of Correction with the organization, powers, and duties hereafter defined in the Executive Organization Act of 1973. (1973, c. 1262, s. 2.)

**Editor's Note.** — Session Laws 1996, Second Extra Session, c. 18, s. 20.1, provides: "In conjunction with the closing of small expensive prison units recommended for consolidation by the Government Performance Audit Committee, the Department of Correction shall consult with the county or municipality in which the unit is located or any private for-profit or non-

profit firm about the possibility of converting that unit to other use. Consistent with existing law, the Department may provide for the lease of any of these units to counties, municipalities, or private firms wishing to convert them to other use. The Department of Correction may also consider converting some of the units recommended for closing from medium security to

minimum security, where that conversion would be cost-effective.

“The Department of Correction shall report

quarterly to the Joint Legislative Corrections Oversight Committee on the conversion of these units to other use.”

#### CASE NOTES

**Suits Against Department.** — The State Prison Department (now Department of Correction) was created as the State’s agency for the performance of an essentially governmental function, and a suit against the Department *eo nomine* is essentially a suit against the State.

Hence, absent constitutional or legislative authority therefor, one cannot maintain such a suit. *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E.2d 18 (1960), decided under former § 148-1.

### § 143B-261. Department of Correction — duties.

It shall be the duty of the Department to provide the necessary custody, supervision, and treatment to control and rehabilitate criminal offenders and thereby to reduce the rate and cost of crime and delinquency. (1973, c. 1262, s. 3; 1999-423, s. 7.)

**Editor’s Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 20.10 provides the Departments of Transportation and Correction shall report, quarterly beginning October 1, 1994, to the Joint Legislative Transportation Oversight Committee on the implementation of

the recommendations of the Inmate Labor Subcommittee.

**Effect of Amendments.** — Session Laws 1999-423, s. 7, effective July 1, 1999, deleted “and juvenile delinquents” following “criminal offenders.”

#### CASE NOTES

**Secretary Immune from Suit.** — The Secretary of the Department of Correction is a public official, and is immune from suit for allegedly negligent acts committed within the scope of his or her authority. *Harwood v.*

*Johnson*, 92 N.C. App. 306, 374 S.E.2d 401 (1988), *aff’d* in part and *rev’d* in part, 326 N.C. 231, 388 S.E.2d 439 (1990).

**Cited** in *Harwood v. Johnson*, 326 N.C. 231, 388 S.E.2d 439 (1990).

### § 143B-261.1. Department of Correction — rules and regulations.

The Department of Correction shall adopt rules and regulations related to the conduct, supervision, rights and privileges of persons in its custody or under its supervision. Such rules and regulations shall be filed with and published by the office of the Attorney General and shall be made available by the Department for public inspection. The rules and regulations shall include a description of the organization of the Department. A description or copy of all forms and instructions used by the Department, except those relating solely to matters of internal management, shall also be filed with the office of the Attorney General. (1975, c. 721, s. 2.)

#### CASE NOTES

**Rights and privileges of mental health patients who are in the custody of the Department of Correction** are determined by the rules and regulations adopted by the Department of Correction pursuant to this section. *Baugh v. Woodard*, 56 N.C. App. 180, 287 S.E.2d 412 (1982).

With respect to the rights of prisoners receiv-

ing care in facilities operated by the Department of Human Resources, this section and the regulations adopted pursuant thereto would apply, rather than former §§ 122-36 and 122-55.2(d), as they do to those prisoners who remain in prison for their mental health care. *Baugh v. Woodard*, 56 N.C. App. 180, 287 S.E.2d 412 (1982).

### § 143B-261.2. Repair or replacement of personal property.

(a) The Secretary of Correction may adopt rules governing repair or replacement of personal property items excluding private passenger vehicles that belong to employees of State facilities within the Department of Correction and that are damaged or stolen by inmates of the State facilities provided that the item is determined by the Secretary to be damaged or stolen on or off facility grounds during the performance of employment and necessary for the employee to have in his possession to perform his assigned duty.

(b) Reimbursement for items damaged or stolen shall not be granted in instances in which the employee is determined to be negligent or otherwise at fault for the damage or loss of the property. Negligence shall be determined by the superintendent of the facility.

(c) The superintendent of the facility shall determine if the person seeking reimbursement has made a good faith effort to recover the loss from all other non-State sources and has failed before reimbursement is granted.

(d) Reimbursement shall be limited to the amount specified in the rules and shall not exceed a maximum of two hundred dollars (\$200.00) per incident. No employee shall receive more than five hundred dollars (\$500.00) per year in reimbursement. Reimbursement is subject to the availability of funds.

(e) The Secretary of Correction shall establish by rule an appeals process consistent with Chapter 150B of the General Statutes. (1987, c. 639, s. 1; 1989, c. 189, s. 2.)

### § 143B-262. Department of Correction — functions.

(a) The functions of the Department of Correction shall comprise except as otherwise expressly provided by the Executive Organization Act of 1973 or by the Constitution of North Carolina all functions of the executive branch of the State in relation to corrections and the rehabilitation of adult offenders, including detention, parole, and aftercare supervision, and further including those prescribed powers, duties, and functions enumerated in Article 14 of Chapter 143A of the General Statutes and other laws of this State.

(b) All such functions, powers, duties, and obligations heretofore vested in the Department of Social Rehabilitation and Control and any agency enumerated in Article 14 of Chapter 143A of the General Statutes and laws of this State are hereby transferred to and vested in the Department of Correction except as otherwise provided by the Executive Organization Act of 1973. They shall include, by way of extension and not of limitation, the functions of:

- (1) The State Department of Correction and Commission of Correction,
- (2) Repealed by Session Laws 1999-423, s. 8, effective July 1, 1999.
- (3) The State Probation Commission,
- (4) The State Board of Paroles,
- (5) The Interstate Agreement on Detainers, and
- (6) The Uniform Act for Out-of-State Parolee Supervision.

(c) The Department shall establish within the Division of Community Corrections a program of Intensive Supervision. This program shall provide intensive supervision for probationers, post-release supervisees, and parolees who require close supervision in order to remain in the community pursuant to a community penalties plan, community work plan, community restitution plan, or other plan of rehabilitation. The intensive supervision program shall be available to both felons and misdemeanants. Each offender shall be required to comply with the rules adopted for the Program as well as the requirements specified in G.S. 15A-1340.11(5).

(d) The Department shall establish a Substance Abuse Program. This Program shall include an intensive term of inpatient treatment, normally four

to six weeks, for alcohol or drug addiction in independent, residential facilities for approximately 100 offenders per facility. (1973, c. 1262, s. 4; 1983, c. 682, s. 1; 1987, c. 479; c. 738, s. 111(a); 1989 (Reg. Sess., 1990), c. 994; 1997-57, s. 1; 1999-423, s. 8; 2001-487, s. 47(f).)

**Editor's Note.** — Session Laws 1987, c. 738, s. 111(c) provided: "The Substance Abuse Program established by subsection (a) of this section shall be offered in a medium custody facility, or a portion of a medium custody facility that is self-contained, so that the residential and program space is separate from any other programs or inmate housing, and shall be operational by January 1, 1988, at such unit as the Secretary may designate."

Section 111(c) of Session Laws 1987, c. 738, also provided, *inter alia*:

"Admission priorities shall be established as follows:

- "(1) Court recommendation.
- "(2) Evaluation and referral from reception and diagnostic centers.

"(3) General staff referral.

"(4) Self-referral.

"The Program shall include extensive follow-up after the period of intensive treatment. There will be specific plans for each departing inmate for follow-up, including active involvement with Alcoholics Anonymous, community resources, and personal sponsorship."

Article 14 of Chapter 143A, referred to in this section, was repealed by Session Laws 1973, c. 1262, s. 10. The same 1973 act enacted this Article.

**Effect of Amendments.** — Session Laws 2001-487, s. 47(f), effective December 16, 2001, substituted "Community Corrections" for "Adult Probation and Parole" in the first sentence in subsection (c).

## § 143B-262.1. Department of Correction — Substance Abuse Program.

(a) The Substance Abuse Program established by subsection (d) of § 143B-262 shall be offered in a medium custody facility, or a portion of a medium custody facility that is self-contained, so that the residential and program space is separate from any other programs or inmate housing, and shall be operational by January 1, 1988, at such unit as the Secretary may designate.

(b) An Assistant Secretary for Substance Abuse shall be employed and shall report directly to the Office of the Secretary of Correction. A Correctional Administrator I shall be employed to manage programs for offenders with substance abuse problems in the Department of Correction and its divisions. The Correctional Administrator I shall report to the Assistant Secretary for Substance Abuse. A Secretary IV shall be employed to assist the correctional Administrator I. An Administrative Officer II and a Secretary IV shall be employed to assist the Assistant Secretary and work under his direction and management. The duties of the Assistant Secretary shall include the following:

- (1) Administer and coordinate all substance abuse programs, grants, contracts, and related functions in the Department of Correction;
- (2) Develop and maintain working relationships and agreements with agencies and organizations that will assist in developing and operating a Substance Abuse Program in the Department of Correction;
- (3) Develop and coordinate the use of volunteers in the Substance Abuse Program;
- (4) Develop and present training programs related to substance abuse for employees and others at all levels in the agency;
- (5) Develop programs that provide effective treatment for inmates, probationers, and parolees with substance abuse problems;
- (6) Maintain contact with key leaders in the substance abuse field and active supporters of the Correction Program;
- (7) Supervise directly the directors of treatment units, specialized personnel, and programs that exist or may be developed in the Department of Correction; and
- (8) Develop employee assistance programs for employees with substance abuse problems.

(c) Ten additional program staff shall be employed. There shall be a Correctional Program Director II who is responsible to the Assistant Secretary for Substance Abuse. This employee shall be responsible for managing and implementing the inpatient treatment program. Also employed will be a Correctional Program Director I, two Correctional Program Supervisors, four Correctional Program Assistant II's, one Correctional Program Assistant I, and one Clerk-Stenographer IV.

(d) The duties of the Program Director shall include the following:

- (1) Implement and manage the inpatient treatment program for inmates with substance abuse problems;
- (2) Supervise personnel assigned to the inpatient treatment program;
- (3) Assist in developing the treatment program for inmates with substance abuse problems;
- (4) Recruit and develop staff for the inpatient program and other staff as required;
- (5) Assist in developing linkage and follow-up of inmates between the inpatient program, related agencies, organizations, and other facilities of the Department of Correction;
- (6) Be responsible for treatment plans and daily activities and schedules for all assigned inmates;
- (7) Develop methods for involving families of inmates in the program to the extent deemed appropriate and useful; and
- (8) Other duties as required.

Preference shall be accorded to qualified recovering alcoholics and substance abusers in the employment of treatment counselors.

(e) In the unit there shall be a unit superintendent under the Division of Prisons and other custodial, administrative, and support staff as required for a medium custody facility for approximately one hundred inmates. The unit superintendent shall be responsible for all matters pertaining to custody and administration of the unit. The Correctional Program Director II will administer the inpatient treatment program under the direction of the Assistant Secretary for Substance Abuse.

(f) Extensive use may be made of inmates working in the role of ancillary staff, peer counselors, role models, or group leaders as the program manager determines. Additional resource people who may be required for specialized treatment activities, presentations, or group work may be employed on a fee or contractual basis.

(g) The Program in each unit shall be structured such that approximately 25 offenders will enter the Program on a weekly basis.

(h) Admission priorities shall be established as follows:

- (1) Court recommendation.
- (2) Evaluation and referral from reception and diagnostic centers.
- (3) General staff referral.
- (4) Self-referral.

The Program shall include extensive follow-up after the period of intensive treatment. There will be specific plans for each departing inmate for follow-up, including active involvement with Alcoholics Anonymous, community resources, and personal sponsorship. (1987, c. 738, s. 111(c); 1987 (Reg. Sess., 1988), c. 1086, s. 126.1(a).)

### **§ 143B-262.2. Pilot program on sexual assault.**

(a) The Department of Correction shall establish pilot programs on sexual assault for inmates at three units of the State prison system. The Department shall select units with greater than average levels of inmate violence for participation in these pilot programs.

(b) Each pilot program shall operate as follows:

- (1) The Department shall provide, as part of every inmate's orientation, a program on sexual assault, with a goal to complete that program within seven days of commitment to the Department of Correction. The program shall provide inmates with at least the following information:
  - a. An accurate presentation pertaining to sexual assault violence;
  - b. Information on preventing and reducing the risk of sexual assault;
  - c. Information on available counseling for victims of sexual assault; and
  - d. The procedure for victims of sexual assault to request counseling.
- (2) The department shall provide sexual assault counseling on-site at the prison unit to any prisoner requesting it. Counselors shall be granted reasonable access to Department of Correction institutions and prisoners for the purpose of providing confidential sexual assault counseling.
- (3) Unless the Director of the Division of Prisons finds a particular item to be unsuitable, the Department shall allow the distribution of materials on sexual assault and rape trauma syndrome developed or sponsored by community rape crisis centers or nonprofit organizations with expertise in sexual assault. Any such material provided to a correctional institution shall be made available to inmates in places where they may make use of them privately and without attracting undue attention, such as in the library, law library, medical clinic, recreation hall, mental health offices, and educational lobby areas.
- (4) The Department shall post notices of the availability of any community-based rape crisis counselors who are willing to provide confidential counseling. Communications between prisoners and rape crisis counselors are confidential. The Department shall cooperate with community rape crisis centers seeking to identify and provide counseling to former inmates who were the victims of sexual assault.
- (5) The Department shall collect statistical data of all known, reported, or suspected incidents of sexual aggression or sexually motivated violence occurring at units participating in the pilot programs. The Department shall compile this data on a quarterly and annual basis.
- (6) The Department shall develop and implement employee training on the identification and prevention of sexual assault among inmates, in coordination with the Department's employee basic training program. The training shall be provided to new employees at orientation and shall also be part of annual employee training.
- (7) The Department shall evaluate and classify each prisoner with respect to the probable risk of sexual assault. When feasible, incoming inmates shall be handled separately until this classification is made. The classification shall be prominently displayed in the inmate's confidential file, and the Department shall consider the prisoner's classification when making housing assignments.
- (8) The Department shall also rate prisoners as potential sexual assault offenders based upon (i) criminal history; (ii) incidents occurring during confinement; and (iii) reports of incidents that the Department determines to be credible. The Department shall take the prisoners' potential for sexual assault into consideration when making housing assignments.
- (9) The Department shall ensure that prisoners rated vulnerable or highly vulnerable to sexual assault and prisoners rated as potential assaulters are not housed in the same cell or room holding four or fewer inmates or placed in the showers at the same time to the extent

that it is practicable. Any exceptions to this policy shall be reported to the Secretary within three days. (1997-288, ss. 1, 2.)

**Editor's Note.** — Session Laws 1997-288, ss. 1 and 2 were codified as this section at the direction of the Revisor of Statutes.

Session Laws 1997-288, s. 3 provides that the Department may use funds available to the Department for the 1997-98 fiscal year to implement the pilot programs established in this act.

Session Laws 1997-288, s. 4 provides that the Department of Correction shall report by May 1, 1998, to the Joint Legislative Corrections Oversight Committee, the Chairs of the Senate and House Appropriations Committees and the Senate and House Appropriations Sub-

committees on Justice and Public Safety on the effectiveness of the pilot programs established in this act and on the advisability of establishing additional programs at other prison units. The report shall include information one: (1) The percentage of inmate orientation programs on sexual assault completed within seven days of commitment; and (2) The Department's success in segregating prisoners rated vulnerable to sexual assault from prisoners rated as potential assaulters.

Session Laws 1997-288, s. 5 made this section effective August 1, 1997.

### § 143B-262.3. Report to the General Assembly.

The Department of Correction shall report by March 1 of each year to the Chairs of the Senate and House Appropriations Committees and the Chairs of the Senate and House Appropriations Subcommittees in Justice and Public Safety on their efforts to provide effective treatment to offenders with substance abuse problems. The report shall include:

- (1) Details of any new initiatives and expansions or reduction of programs;
- (2) Details on any treatment efforts conducted in conjunction with other departments;
- (3) Utilization of the DART/DWI program, including its aftercare program;
- (4) Progress in the development on an offender and inmate tracking and program evaluation system; and
- (5) A report on the number of current inmates with substance abuse problems, the numbers currently receiving treatment, and the numbers who have completed treatment. As an offender and inmate tracking system becomes operational, this report shall also include information on the recidivism of inmates who have previously completed substance abuse treatment and been released from prison. (1998-212, s. 17.12(d).)

**Cross References.** — As to reports on vacant positions in the Judicial Department and three other departments, see § 120-12.1.

**Editor's Note.** — Session Laws 1998-212, s. 17.12(d) was codified as this section at the direction of the Revisor of Statutes.

Session Laws 1998-212, s. 17.25, as amended by Session Laws 1999-237, s. 18.17, provides: "(a) The Department of Correction shall establish a pilot program for determining the benefits of work-release prison units by placing all eligible inmates in the Alamance Correctional Center on work release to the extent possible. The Department shall provide a progress report on this pilot program to the Chairs of the Senate and House Appropriations Committees and the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public

Safety by June 30, 2000. The Department shall provide a final report to the Chairs of the House and Senate Appropriations Committees and the Chairs of the House and Senate Appropriations Subcommittees on Justice and Public Safety by March 1, 2001, on the cost-effectiveness of the program.

"(b) The Department of Correction shall establish a pilot program for determining the benefits of work-release prison units by placing all eligible inmates in the Union Correctional Center, except those needed for Department of Transportation road squads, on work release to the extent possible. The Department shall provide a progress report on this pilot program to the Chairs of the Senate and House Appropriations Committees and the Chairs of the Senate and House Appropriations Subcommittees

on Justice and Public Safety by June 30, 2000. The Department shall provide a final report to the Chairs of the House and Senate Appropriations Committees and the Chairs of the House and Senate Appropriations Subcommittees on Justice and Public Safety by March 1, 2001, on the cost-effectiveness of the program.”

Session Laws 1998-212, s. 1.1 provides: “This act shall be known as the ‘Current Operations Appropriations and Capital Improvement Appropriations Act of 1998’.”

Session Laws 1998-212, s. 30.2 provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1998-99 fiscal year.”

Session Laws 1998-212, s. 30.5 contains a severability clause.

Session Laws 1999-237, s. 1.1 provides: “This act shall be known as the ‘Current Operations and Capital Improvement Appropriations Act of 1999’.”

Session Laws 1999-237, s. 30.2 provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium.”

Session Laws 1999-237, s. 30.4 contains a severability clause.

### **§ 143B-262.4. Deferred prosecution, community service restitution, and volunteer program.**

(a) The Department of Correction may conduct a deferred prosecution, community service restitution, and volunteer program for youthful and adult offenders. The Secretary of Correction may assign one or more coordinators to each district court district as defined in G.S. 7A-133 to assure and report to the Court the offender’s compliance with the requirements of the program. The appointment of each coordinator shall be made in consultation with the chief district court judge in the district to which the coordinator is assigned. Each county shall provide office space in the courthouse or other convenient place, for the use of each coordinator assigned to that county.

(b) Unless a fee is assessed pursuant to G.S. 20-179.4 or G.S. 15A-1371(i), a fee of one hundred dollars (\$100.00) shall be paid by all persons who participate in the program or receive services from the program staff. If the person is convicted in a court in this State, the fee shall be paid to the clerk of court in the county in which he is convicted. If the person is participating in the program as a result of a deferred prosecution or similar program, the fee shall be paid to the clerk of court in the county in which the agreement is filed. Persons participating in the program for any other reason shall pay the fee to the clerk of court in the county in which the services are provided by the program staff. The fee shall be paid in full within two weeks from the date the person is ordered to perform the community service, and before he begins his community service, except that:

- (1) A person convicted in a court in this State may be given an extension of time or allowed to begin the community service before he pays the fee by the court in which he is convicted; or
- (2) A person performing community service pursuant to a deferred prosecution or similar agreement may be given an extension of time or allowed to begin his community service before the fee is paid by the official or agency representing the State in the agreement.

Fees collected pursuant to this subsection shall be deposited in the General Fund.

(c) The Secretary may designate the same person to serve as a coordinator under this section and under G.S. 20-179.4.

(d) A person is not liable for damages for any injury or loss sustained by an individual performing community or reparation service under this section unless the injury is caused by the person’s gross negligence or intentional wrongdoing. As used in this subsection, “person” includes any governmental

unit or agency, nonprofit corporation, or other nonprofit agency that is supervising the individual, or for whom the individual is performing community service work, as well as any person employed by the agency or corporation while acting in the scope and course of the person's employment. This subsection does not affect the immunity from civil liability in tort available to local governmental units or agencies. Notice of the provisions of this subsection shall be furnished to the individual at the time of assignment of community service work by the community service coordinator.

(e) In order to maximize the efficiency and effectiveness of the community service program, (i) beginning September 1, 1995, community service program districts shall have the same boundaries as the district court districts established in G.S. 7A-133 and (ii) beginning with persons hired on or after September 1, 1995, all community service program district supervisors employed by the Department of Correction to supervise each of the community service program districts shall reside in the district in which the supervisor works.

(f) The community service staff shall report to the court in which the community service was ordered, a significant violation of the terms of the probation, or deferred prosecution, related to community service. The community service staff shall give notice of the hearing to determine if there is a willful failure to comply to the person who was ordered to perform the community service. This notice shall be given by either personal delivery to the person to be notified or by depositing the notice in the United States mail in an envelope with postage prepaid, addressed to the person at the address shown on the records of the community service staff. The notice shall be mailed at least 10 days prior to any hearing and shall state the basis of the alleged willful failure to comply. The court shall then conduct a hearing, even if the person ordered to perform the community service fails to appear, to determine if there is a willful failure to complete the work as ordered by the community service staff within the applicable time limits. If the court determines there is a willful failure to comply, it shall revoke any drivers [driver's] license issued to the person and notify the Division of Motor Vehicles to revoke any drivers [driver's] license issued to the person until the community service requirement has been met. In addition, if the person is present, the court may take any further action authorized by Article 82 of Chapter 15A of the General Statutes for violation of a condition of probation. (1983 (Reg. Sess., 1984), c. 1034, s. 102; 1985, c. 451; 1985 (Reg. Sess., 1986), c. 1012, s. 4; 1987 (Reg. Sess., 1988), c. 1037, s. 118; 1989, c. 752, s. 109; 1995, c. 330, s. 2; c. 507, s. 20(a); 1997-234, s. 2; 1998-217, s. 34; 2001-487, ss. 91(a), (b).)

**Editor's Note.** — This section was formerly § 143B-475.1. It was recodified by Session Laws 2001-487, s. 91(a), effective December 16, 2001.

**Effect of Amendments.** — Session Laws 2001-487, s. 91(b), effective December 16, 2001,

amended this section as recodified by Session Laws 2001-487, s. 91(a), by substituting "Correction" for "Crime Control and Public Safety" in subsections (a) and (e).

**Legal Periodicals.** — For 1997 legislative survey, see 20 Campbell L. Rev. 417.

## § 143B-263. Department of Correction — head.

The Secretary of Correction shall be the head of the Department. (1973, c. 1262, s. 5.)

### CASE NOTES

**Immunity from Suit.** — The Secretary of the Department of Correction is a public official, and is immune from suit for allegedly

negligent acts committed within the scope of his or her authority. *Harwood v. Johnson*, 92 N.C. App. 306, 374 S.E.2d 401 (1988), *aff'd in*

part and rev'd in part, 326 N.C. 231, 388 S.E.2d 439 (1990).

## § 143B-264. Department of Correction — organization.

The Department of Correction shall be organized initially to include the Post-Release Supervision and Parole Commission, the Board of Correction, the Division of Prisons, the Division of Adult Probation and Parole, and such other divisions as may be established under the provisions of the Executive Organization Act of 1973.

The Department shall establish a Substance Abuse Program. All substance abuse programs established or in existence shall be administered by the Department of Correction under the Substance Abuse Program. (1973, c. 1262, s. 6; 1987, c. 738, s. 111(b); 1993, c. 538, s. 41; 1994, Ex. Sess., c. 24, s. 14(b); 2001-95, s. 7.)

**Editor's Note.** — Session Laws 424, s. 26.11, provides: "Effective January 1, 2002, the Community Service Work Program of the Division of Victims and Justice Services of the Department of Crime Control and Public Safety shall be merged with the Division of Community Corrections of the Department of Correction. The merger shall have all the elements of a Type I transfer, as defined in G.S. 143A-6. All (i) statutory authority, powers, duties, and functions, including rule making, budgeting, and purchasing, (ii) records, (iii) personnel, personnel positions, and salaries, (iv) property, and (v) unexpended balances of appropriations, allocations, reserves, support costs, and other funds of the Community Service Work Program of the Division of Victims and Justice Services of the Department of Crime Control and Public Safety shall be transferred to and vested in the Department of Correction.

"The following positions shall be terminated no later than January 1, 2002:

- "(1) The four regional managers;
- "(2) The 21 district managers in the area of community service work;
- "(3) The Director of the Division of Victim and Justice Services;

"(4) The administrative assistant of the Division of Victim and Justice Services.

"The Department of Correction and the Department of Crime Control and Public Safety shall make every effort to place the employees whose positions have been terminated in existing vacancies with those departments."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-95, s. 7, effective May 18, 2001, deleted "the Division of Youth Development," preceding "the Division of Adult Probation and Parole."

### CASE NOTES

#### **Suit Against Officials and Employees of Parole Commission as Suit Against State.**

— A suit against the secretary of the North Carolina Department of Correction, the chairman and the members of the Parole Commission, and a parole case analyst, in their official capacities, as public officials and a public em-

ployee of the Parole Commission acting pursuant to its direction, is a suit against the State. Since the State has not consented to being sued for violations by the Parole Commission, such a suit cannot be maintained. *Harwood v. Johnson*, 326 N.C. 231, 388 S.E.2d 439 (1990).

### OPINIONS OF ATTORNEY GENERAL

#### **Agency Cannot Disregard Statute Setting Preferences for Hiring Treatment Counselors.** — Commission for Mental

Health, Mental Retardation and Substance Abuse Services cannot in adopting standards disregard provision of N.C. Sess. Laws 1987, c.

758 that says "Preferences shall be accorded to qualified recovering alcoholics and substance abusers in the employment of treatment coun-

selors." See opinion of Attorney General to Substance Abuse Council, 60 N.C.A.G. 27 (May 11, 1990).

## Part 2. Board of Correction.

### § 143B-265. Board of Correction — duties and responsibilities; members; selection; compensation; meetings; quorum; services.

(a) The Board of Correction shall consider and advise the Secretary of Correction upon any matter that the Secretary may refer to it. The Board shall assist the Secretary of Correction in the development of major programs and recommend priorities for the programs within the Department.

The Board of Correction shall have such other responsibilities and shall perform such other duties as may be specifically given to it by the Secretary of Correction.

(b) The Board of Correction shall consist of one voting member from each of the 13 congressional districts, appointed by the Governor to serve at his pleasure. One member shall be a psychiatrist or a psychologist, one an attorney with experience in the criminal courts, one a judge in the General Court of Justice and nine members appointed at large. The Secretary of Correction shall be an additional nonvoting member and chairman ex officio. The terms of office of the nine members presently serving on the Board shall continue, but any vacancy occurring on or after July 1, 1983, shall be filled by the Governor in compliance with the requirement of membership from the various congressional districts.

(c) Members of the Board shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

The Board of Correction shall meet at least quarterly and may hold special meetings at any time and place within the State at the call of its chairman.

A majority of the Board shall constitute a quorum for the transaction of business.

(d) All clerical and other services required by the Board shall be supplied by the Secretary of Correction. (1973, c. 1262, s. 7; 1983, c. 709, s. 2; 1991 (Reg. Sess., 1992), c. 1038, s. 18; 2001-486, s. 2.15.)

**Effect of Amendments.** — Session Laws substituted "13" for "12" in the first sentence of 2001-486, s. 2.15, effective December 16, 2001, subsection (b).

## Part 3. Parole Commission.

### § 143B-266. Post-Release Supervision and Parole Commission — creation, powers and duties.

(a) There is hereby created a Post-Release Supervision and Parole Commission of the Department of Correction with the authority to grant paroles, including both regular and temporary paroles, to persons held by virtue of any final order or judgment of any court of this State as provided in Chapter 148 of the General Statutes and laws of the State of North Carolina, except that persons sentenced under Article 81B of Chapter 15A of the General Statutes are not eligible for parole. The Commission shall also have authority to revoke, terminate, and suspend paroles of such persons (including persons placed on parole on or before the effective date of the Executive Organization Act of 1973) and to assist the Governor in exercising his authority in granting reprieves,

commutations, and pardons, and shall perform such other services as may be required by the Governor in exercising his powers of executive clemency. The Commission shall also have authority to revoke and terminate persons on post-release supervision, as provided in Article 84A of Chapter 15A of the General Statutes.

(b) All releasing authority previously resting in the Commissioner and Commission of Correction with the exception of authority for extension of the limits of the place of confinement of a prisoner contained in G.S. 148-4 is hereby transferred to the Post-Release Supervision and Parole Commission. Specifically, such releasing authority includes work release (G.S. 148-33.1), indeterminate-sentence release (G.S. 148-42), and release of youthful offenders (G.S. 148-49.8), provided the individual considered for work release or indeterminate-sentence release shall have been recommended for release by the Secretary of Correction or his designee.

(c) The Commission is authorized and empowered to adopt such rules and regulations, not inconsistent with the laws of this State, in accordance with which prisoners eligible for parole consideration may have their cases reviewed and investigated and by which such proceedings may be initiated and considered. All rules and regulations heretofore adopted by the Board of Pardons shall remain in full force and effect unless and until repealed or superseded by action of the Post-Release Supervision and Parole Commission. All rules and regulations adopted by the Commission shall be enforced by the Department of Correction.

(d) The Commission is authorized and empowered to impose as a condition of parole or post-release supervision that restitution or reparation be made by the prisoner in accordance with the provisions of G.S. 148-57.1. The Commission is further authorized and empowered to make restitution or reparation a condition of work release in accordance with the provisions of G.S. 148-33.2. (1973, c. 1262, s. 8; 1975, c. 220; 1977, c. 614, s. 5; c. 732, s. 5; 1993, c. 538, s. 42; 1994, Ex. Sess., c. 21, s. 6; c. 24, s. 14(b).)

**Editor's Note.** — Section 148-42, referred to in subsection (b) of this section, was repealed by Session Laws 1977, c. 711, s. 33.

Section 148-49.8, referred to in subsection (b) of this section, was repealed by Session Laws 1977, c. 732, s. 1. For present provisions covering the subject matter of the repealed section, see § 148-49.15.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 25.21, provides: "The Post-Release Supervision and Parole Commission shall provide quarterly reports to the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety and the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee on inmates eligible for parole. These reports shall include at least the following:

"(1) The total number of Fair Sentencing and Pre-Fair Sentencing inmates that were parole-eligible during the previous quarter and the

total number of those inmates that were paroled. The report should group these inmates by offense type and custody classification;

"(2) A list of all those inmates paroled or released by category of parole or release, including each inmate's offense and custody classification at the time of the parole or release;

"(3) The average time served, by offense class, of Fair Sentencing and Pre-Fair Sentencing inmates compared to inmates sentenced under Structured Sentencing;

"(4) The projected number of parole-eligible inmates to be paroled or released by the end of the 2001-2002 fiscal year and by the end of the 2002-2003 fiscal year."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

## CASE NOTES

**Immunity from Suit.** — The members and chairman of the Parole Commission are public officials, and are immune from suit for allegedly negligent acts committed within the scope of their authority. *Harwood v. Johnson*, 92 N.C. App. 306, 374 S.E.2d 401 (1988), *aff'd in part and rev'd in part*, 326 N.C. 488, 388 S.E.2d 439 (1990).

**Releasing Authority for Work-Release**

**Privileges.** — Under former § 148-33.1(b), read in conjunction with subsection (b) of this section, all releasing authority for work-release privileges for any inmate serving a term greater than five years rests ultimately in the Parole Commission. *State v. Walker*, 31 N.C. App. 199, 228 S.E.2d 772 (1976).

**Cited in** *Harwood v. Johnson*, 326 N.C. 231, 388 S.E.2d 439 (1990).

### § 143B-267. Post-Release Supervision and Parole Commission — members; selection; removal; chairman; compensation; quorum; services.

The Post-Release Supervision and Parole Commission shall consist of three full-time members. The three full-time members shall be appointed by the Governor from persons whose recognized ability, training, experience, and character qualify them for service on the Commission. The terms of office of the five members presently serving on the Commission shall expire on July 31, 1999. The term of one of the members appointed effective August 1, 1999, shall be for one year. The term of one of the members appointed effective August 1, 1999, shall be for two years. The term of one of the members appointed effective August 1, 1999, shall be for three years. Thereafter, the terms of office of persons appointed by the Governor as members of the Commission shall be for four years or until their successors are appointed and qualify. Any appointment to fill a vacancy on the Commission created by the resignation, removal, death or disability of a full-time member shall be for the balance of the unexpired term only.

The Governor shall have the authority to remove any member of the Commission from office for misfeasance, malfeasance or nonfeasance, pursuant to the provisions of G.S. 143B-13. The Governor shall designate a full-time member of the Commission to serve as chairman of the Commission at the pleasure of the Governor.

The granting, denying, revoking, or rescinding of parole, the authorization of work-release privileges to a prisoner, or any other matters of business coming before the Commission for consideration and action shall be decided by majority vote of the full Commission.

The full-time members of the Commission shall receive the salary fixed by the General Assembly in the Current Operations Appropriations Act and shall receive necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-6.

All clerical and other services required by the Commission shall be supplied by the Secretary of Correction. (1973, c. 1262, s. 9; 1977, c. 704, s. 1; 1979, c. 2; 1983, c. 709, s. 3; c. 717, s. 80; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1993, c. 337, s. 1; c. 538, s. 43; 1994, Ex. Sess., c. 14, s. 63; c. 24, s. 14(b); 1999-237, s. 18.2.)

**Legal Periodicals.** — For survey of 1977 administrative law affecting state government, see 56 N.C.L. Rev. 867 (1978).

## CASE NOTES

**Immunity from Suit.** — The members and chairman of the Parole Commission are public officials, and are immune from suit for allegedly negligent acts committed within the scope of

their authority. *Harwood v. Johnson*, 92 N.C. App. 306, 374 S.E.2d 401 (1988), aff'd in part and rev'd in part, 326 N.C. 488, 388 S.E.2d 439 (1990).

§ **143B-268**: Reserved for future codification purposes.

#### Part 4. Black Mountain Advancement Center for Women.

### § **143B-269. Black Mountain Advancement Center for Women — established; inmates; medical and food services; training; work release.**

(a) The Black Mountain Advancement Center for Women to be located at Black Mountain is established. This unit of the North Carolina Department of Correction shall be a satellite of the Correctional Center for Women at Raleigh and shall be governed by such rules and regulations as shall be imposed by the North Carolina Department of Correction.

(b) Notwithstanding G.S. 143-341(4)(g), the grounds now occupied by the Black Mountain Regional Mental Retardation Center as described below and Building 3 are transferred from the Department of Health and Human Services to the Department of Correction. The legal description of those grounds is:

In Buncombe County, Black Mountain Township:

Beginning on an iron pin in Craigmont Road North 23° 35' East 104.0 from an iron pin, the corner of the Bussman Corp. Property; runs thence, leaving said road, the following courses and distances: North 32° 35' 30" East 100 ft. to an iron pin; North 41° 35' 36" East 50 ft. to an iron pin; North 50° 03' 30" East 100 ft. to an iron pin; North 53° 35' 30" East 200 ft. to a pin; South 87° 24' 30" East to a concrete monument, a corner of Bussman Corp. Property; North 33° 45' East 474 ft.; North 13° 30' East to a point in the junction of roads; thence following the road an average course of South 76° 10' West 865 ft. to an iron pin in Craigmont Road; thence South 06° 30' West 235 ft. to a pin in Craigmont Road; thence continuing with the center of said road South 25° 35' West 570 ft. to the beginning; containing 7.54 acres, more or less.

The transfer of these grounds and Building 3 shall occur on or before July 1, 1986.

(c) The women to be housed in the Black Mountain Advancement Center for Women shall be minimum custody inmates. The Secretary of Correction shall, when appropriate, transfer minimum custody inmates to this unit who have relatives in Western North Carolina. However, the population at this facility shall not exceed 50 inmates.

(d) When the population exceeds 40 square feet of living space per inmate in any women's correctional facility, the Secretary may transfer inmates to another facility or implement emergency release options within his authority within 30 days.

(e) The Department of Correction may contract with the Department of Health and Human Services to provide medical services and food services at cost to the Black Mountain Advancement Center for Women.

(f) The State Board of Community Colleges shall provide appropriate educational and vocational training to the inmates of the Black Mountain Advancement Center for Women. The staff of the Alcoholic Rehabilitation Center may assist in providing high school equivalency programs for the inmates.

(g) The Director of the Black Mountain Mental Retardation Center may allow inmates from the Black Mountain Advancement Center for Women who are qualified for positions in the Center to work in the Center on work release. The Director of the Black Mountain Mental Retardation Center may also allow inmates from the Black Mountain Advancement Center for Women to enroll in the health care programs offered at the Center and may grant certificates of completion to those inmates who satisfactorily finish the program.

(h) Nothing in this act shall obligate the General Assembly to appropriate funds to carry out its provisions. (1985, c. 593, ss. 1-8; 1997-443, s. 11A.118(a).)

## Part 5. Substance Abuse Advisory Council.

### § 143B-270. Substance Abuse Advisory Council.

(a) There is created a Substance Abuse Advisory Council to consult with the Secretary of the Department of Correction in the administration of the Substance Abuse Program.

(b) The Council shall be composed of nine members. Three members shall be appointed by the Speaker of the House of Representatives, three members by the President Pro Tempore of the Senate, and three members by the Governor. Of each set of three members, the appointing authority shall appoint one person who is a member of the recovering community, one person who is a professional in the field of substance abuse services, and one other person who is a member of the public at large. Vacancies shall be filled by the office making the initial appointment and for the remainder of the unexpired term only. The Council shall elect its chairman annually.

(c) Members appointed shall hold office for a term of four years beginning on October 1, 1987, except that three of the initial appointees and these three appointees' immediate successors shall serve a term of two years, with the immediate successors' terms expiring on September 30, 1991.

(d) The Council shall meet at least once each quarter and at the call of the Secretary.

(e) Council members who are members of the General Assembly shall receive travel and subsistence allowances as provided in G.S. 120-3.1. Council members who are not members of the General Assembly shall receive travel and subsistence as provided in G.S. 138-5. (1987, c. 738, s. 111(d); 1991, c. 405, s. 2; 1995, c. 490, s. 55; 2000-140, s. 33.)

**Effect of Amendments.** — Session Laws 2000-140, s. 33, effective July 21, 2000, deleted the last sentence in subsection (c), which read

“The Speaker, Lieutenant Governor, and Governor shall each select one of their initial appointees to serve a two-year term.”

### OPINIONS OF ATTORNEY GENERAL

**Legislative Intent.** — Although Substance Abuse Advisory Council was not given any rule making authority of its own, the clear intent of General Assembly was to give Council active role in formulation of policy governing substance abuse program. Thus, Council was directed to give advice to Secretary of Correction as to any rules and regulations and on any other matters pertaining to program; however, 1987 legislation did not impose duty upon Commission for Mental Health, Mental Retardation and Substance Abuse Services to consult di-

rectly with Council; Commission's responsibility as set out in § 148-19(d) was left untouched and is fulfilled by giving Secretary of Correction opportunity to review and comment on proposed standards for delivery of substance abuse services to inmates. Secretary of Correction should then consult with the Council under this section and § 143B-271 in order to effectuate legislatively intended role of Council. See opinion of Attorney General to Substance Abuse Council, 60 N.C.A.G. 27 (May 11, 1990).

**§ 143B-271. Powers and duties of the Council.**

The Substance Abuse Advisory Council shall advise the Secretary of the Department of Correction on the administration of the Substance Abuse Program. The Council shall also give advice as to any rules and regulations to be adopted and on any other matters pertaining to the Substance Abuse Program. (1987, c. 738, s. 111(d).)

**OPINIONS OF ATTORNEY GENERAL**

**Legislative Intent.** — Although Substance Abuse Advisory Council was not given any rule making authority of its own, the clear intent of General Assembly was to give Council active role in formulation of policy governing substance abuse program. Thus, Council was directed to give advice to Secretary of Correction as to any rules and regulations and on any other matters pertaining to program; however, 1987 legislation did not impose duty upon Commission for Mental Health, Mental Retardation and Substance Abuse Services to consult di-

rectly with Council; Commission's responsibility as set out in § 148-19(d) was left untouched and is fulfilled by giving Secretary of Correction opportunity to review and comment on proposed standards for delivery of substance abuse services to inmates. Secretary of Correction should then consult with Council under § 143B-270 and this section in order to effectuate legislatively intended role of Council. See opinion of Attorney General to Substance Abuse Council, — N.C.A.G. — (May 11, 1990).

**§ 143B-272:** Reserved for future codification purposes.

**ARTICLE 6A.**

*North Carolina State-County Criminal Justice Partnership Act.*

**§ 143B-273. Short title.**

This Article is the "North Carolina State-County Criminal Justice Partnership Act of 1993" and may be cited by that name. (1993, c. 534, s. 1.)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.

**§ 143B-273.1. Legislative policy.**

The policy of the General Assembly with respect to the State-county criminal justice partnership is:

- (1) To support the implementation of the recommendations of the North Carolina Sentencing and Policy Advisory Commission by providing supplemental community-based corrections programs which appropriately punish criminal behavior and which provide effective rehabilitative services;
- (2) To expand sentencing options by adding community-based corrections programs for offenders receiving a nonincarcerative sentence;
- (3) To promote coordination between State and county community-based corrections programs; and
- (4) To improve public confidence in the criminal justice system by educating the public on the role of community-based corrections programs. (1993, c. 534, s. 1.)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.1.

## § 143B-273.2. Definitions.

The following definitions apply in this Article:

- (1) Account. — The State-County Criminal Justice Partnership Account.
- (2) County Board. — A County Criminal Justice Partnership Advisory Board.
- (3) Department. — The Department of Correction.
- (4) Multi-County Board. — A Multi-County Criminal Justice Partnership Advisory Board.
- (5) Plan. — A Community-Based Corrections Plan.
- (6) Program. — A Community-Based Corrections Program.
- (7) Secretary. — The Secretary of the Department of Correction.
- (8) State Board. — The State Criminal Justice Partnership Advisory Board. (1993, c. 534, s. 1.)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.2.

## § 143B-273.3. Goals of community-based corrections programs funded under this Article.

The goals of community-based programs funded under this Article include:

- (1) To reduce recidivism;
- (2) To reduce the number of probation revocations;
- (3) To reduce alcoholism and other drug dependencies among offenders; and
- (4) To reduce the cost to the State and the counties of incarceration. (1993, c. 534, s. 1.)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.3.

## § 143B-273.4. Eligible population.

(a) An eligible offender is an adult offender who either is in confinement awaiting trial, or was convicted of a misdemeanor or a felony offense and received a nonincarcerative sentence of an intermediate punishment or is serving a term of parole or post-release supervision after serving an active sentence of imprisonment.

(b) The priority populations for programs funded under this Article shall be:

- (1) Offenders sentenced to intermediate punishments; and
- (2) Offenders who are appropriate for release from jail prior to trial under the supervision of a pretrial monitoring program. (1993, c. 534, s. 1; 1997-443, s. 19.8(b).)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.4.

## § 143B-273.5. State-County Criminal Justice Partnership Account established.

The State-County Criminal Justice Partnership Account is created within the Department of Correction. Revenue in the Account may be used only to make grants to counties for supplementary community-based correctional programs for eligible offenders in accordance with this Article. Revenue appropriated to the Account does not revert at the end of the fiscal year; it

remains in the Account for expenditures in the following fiscal year. (1993, c. 534, s. 1.)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.5.

### § 143B-273.6. State Criminal Justice Partnership Advisory Board; members; terms; chairperson.

(a) There is created the State Criminal Justice Partnership Advisory Board. The State Board shall act as an advisory body to the Secretary with regards to this Article. The State Board shall consist of 22 members as follows:

- (1) A member of the Senate.
- (2) A member of the House of Representatives.
- (3) A judge of the Superior Court.
- (4) A judge of the district court.
- (5) A district attorney.
- (6) A criminal defense attorney.
- (7) A county sheriff.
- (8) A chief of a city police department.
- (9) Two county commissioners, one from a predominantly urban county and one from a predominantly rural county.
- (10) A representative of an existing community-based corrections program.
- (11) A member of the public who has been the victim of a crime.
- (12) A rehabilitated ex-offender.
- (13) A member of the business community.
- (14) Three members of the general public, one of whom is a person recovering from chemical dependency or who is a previous consumer of substance abuse treatment services.
- (15) A victim service provider.
- (16) A member selected from each of the following service areas: mental health, substance abuse, and employment and training.
- (17) A clerk of superior court.

(b) The membership of the State Board shall be selected as follows:

- (1) The Governor shall appoint the following members: the county sheriff, the chief of a city police department, the member of the public who has been the victim of a crime, a rehabilitated ex-offender, the members selected from each of the service areas.
- (2) The Lieutenant Governor shall appoint the following members: the member of the business community, one member of the general public who is a person recovering from chemical dependency or who is a previous consumer of substance abuse treatment services, the victim service provider.
- (3) The Chief Justice of the North Carolina Supreme Court shall appoint the following members: the superior court judge, the district court judge, the district attorney, the clerk of superior court, the criminal defense attorney, the representative of an existing community-based corrections program.
- (4) The President Pro Tempore of the Senate shall appoint the following members: the member of the Senate, the county commissioner from a predominantly urban county, one member of the general public.
- (5) The Speaker of the House shall appoint the following members: the member of the House of Representatives, the county commissioner from a predominantly rural county, one member of the general public.

In appointing the members of the State Board, the appointing authorities shall make every effort to ensure fair geographic representation of the State

Board membership and that minority persons and women are fairly represented.

(c) The initial members shall serve staggered terms, one-third shall be appointed for a term of one year, one-third shall be appointed for a term of two years, and one-third shall be appointed for a term of three years. The members identified in subdivisions (1) through (7) of subsection (a) of this section shall be appointed initially for a term of one year. The members identified in subdivisions (8) through (13) in subsection (a) of this section shall be appointed initially for a term of two years. The members identified in subdivisions (14) through (16) of subsection (a) of this section shall each be appointed for a term of three years. The additional member identified in subdivision (17) in subsection (a) of this section shall be appointed initially for a term of three years.

At the end of their respective terms of office their successors shall be appointed for terms of three years. A vacancy occurring before the expiration of the term of office shall be filled in the same manner as original appointments for the remainder of the term. Members may be reappointed without limitation.

(d) Each appointing authority shall have the power to remove a member it appointed from the State Board for misfeasance, malfeasance, or nonfeasance.

(e) The members of the State Board shall, within 30 days after the last initial appointment is made, meet and elect one member as chairman and one member as vice-chairman.

(f) The State Board shall meet at least quarterly and may also hold special meetings at the call of the chairman. For purposes of transacting business, a majority of the membership shall constitute a quorum.

(g) Any member who has an interest in a governmental agency or unit or private nonprofit agency which is applying for a State-County Criminal Justice Partnership grant or which has received a grant and which is the subject of an inquiry or vote by a grant oversight committee, shall publicly disclose that interest on the record and shall take no part in discussion or have any vote in regard to any matter directly affecting that particular grant applicant or grantee. "Interest" in a grant applicant or grantee shall mean a formal and direct connection to the entity, including, but not limited to, employment, partnership, serving as an elected official, board member, director, officer, or trustee, or being an immediate family member of someone who has such a connection to the grant applicant or grantee.

(h) The members of the State Board shall serve without compensation but shall be reimbursed for necessary travel and subsistence expenses. (1993, c. 534, s. 1; 1998-170, s. 2.)

**Editor's Note.** — The number of this section number in Session Laws 1993, c. 534, s. 1, was assigned by the Revisor of Statutes, the having been § 143B-272.6.

### § 143B-273.7. Duties of State Criminal Justice Partnership Advisory Board.

The State Criminal Justice Partnership Advisory Board has the following duties:

- (1) To recommend community-based corrections program priorities;
- (2) To review the application process and procedures for funding community-based corrections programs, including the format for comprehensive community-based corrections plans;
- (3) To review the criteria for monitoring and evaluating community-based corrections programs;

- (4) To distribute an annual plan which describes the community-based corrections program priorities, and the application process and procedures for funding community-based corrections programs, including the format for comprehensive community-based corrections plans. The annual plan must also announce the amount of funds appropriated to the State-County Criminal Justice Partnership Account;
- (5) To coordinate community-based corrections programs administered by the state agencies and programs funded under this Article;
- (6) To review plans of participating counties and, based on the State Board's annual plan, to make recommendations to the Secretary to provide grant funding to counties for implementing and operating community-based corrections programs; and
- (7) To review the minimum program standards, policies, and rules for community-based corrections programs.
- (8) To evaluate the effects of categories of programs funded by this Article and prepare a written report. (1993, c. 534, s. 1.)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.7.

### § 143B-273.8. Duties of Department of Correction.

(a) In addition to those otherwise provided by law, the Department of Correction shall have the following duties:

- (1) To provide technical assistance to applicants in developing, implementing, monitoring, evaluating, and operating community-based corrections programs.
- (2) To enter into contractual agreements with county boards for the operation of community-based corrections programs and monitor compliance with those agreements.
- (3) To act as an information clearinghouse regarding community-based corrections programs.
- (4) To review plans of participating counties and to approve grants based on applications to assist them in the implementation and operation of community-based corrections programs.
- (5) To develop policies and procedures for the disbursement of grant funds to participating counties on a reimbursement basis.
- (6) To develop the minimum program standards, policies, and rules for community-based corrections programs.
- (7) In instances of substantial noncompliance, the Secretary shall notify the board or boards of county commissioners, the county community corrections advisory board, and the chief administrator of the program in writing of the allegations and allow 60 days for a response. If an agreement is reached concerning a remedy, then the Secretary shall allow 30 days following that agreement for the remedy to be implemented. If the deficiencies are not corrected within this period, then the Secretary may, upon written notice, suspend any or all of the grant funds until compliance is achieved.

(b) The Department of Correction shall report by February 1 of each year to the Chairs of the Senate and House Appropriations Committees, the Senate and House Appropriations Subcommittees on Justice and Public Safety, and the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee on the status of the Criminal Justice Partnership Program. The report shall include the following information:

- (1) The amount of funds carried over from the prior fiscal year;
- (2) The dollar amount and purpose of grants awarded to counties as discretionary grants for the current fiscal year;

- (3) Any counties the Department anticipates will submit requests for new implementation grants;
- (4) The number of counties submitting offender participation data via the electronic reporting system;
- (5) An analysis of offender participation data received; and
- (6) An update on efforts to ensure that all counties make use of the electronic reporting system. (1993, c. 534, s. 1; 1999-237, s. 18(d); 2000-67, s. 16; 2001-138, s. 2.)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.8.

Session Laws 1999-237, s. 18(d), as amended by Session Laws 2000-67, s. 16, was codified as subsection (b) of this section and the existing provisions designated as subsection (a) at the direction of the Revisor of Statutes.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 424, s. 25.16 (d), provides: "The Department of Correction shall report by February 1 of each year to the Chairs of the Senate and House of Representatives Appropriations Committees, the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety, and the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee on the status of the Criminal Justice Partnership Program. The report shall include the following information:

"(1) The amount of funds carried over from the prior fiscal year;

"(2) The dollar amount and purpose of grants awarded to counties as discretionary grants for current fiscal year;

"(3) Any counties the Department anticipates will submit requests for new implementation grants;

"(4) An update on efforts to ensure that all counties make use of the electronic reporting system, including the number of counties submitting offender participation data via the system;

"(5) An analysis of offender participation data received, including data on each program's utilization and capacity; and

"(6) An analysis of comparable programs, prepared by the Research and Planning Division of the Department of Correction, and a summary of the reports prepared by county Criminal Justice Partnerships Advisory Boards."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-138, s. 2, effective July 1, 2001, substituted "Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee" for "Joint Legislative Corrections and Crime Control Oversight Committee" in the introductory paragraph of subsection (b).

## § 143B-273.9. Election to apply for funding.

A county may elect to apply for funding under this Article by a vote of the board of county commissioners approving the decision to apply, and by appointing a county criminal justice partnership advisory board. Two or more counties, by vote of the board of county commissioners of each county, may agree to create a multicounty board instead of a county board. A multicounty board shall perform the same functions as a county board for each county that participates in establishing the multicounty board. The board or boards of county commissioners shall notify the Secretary of the intent to apply for funds within 60 days of receiving notification of the availability of funds and may

request technical assistance to develop the community-based corrections plan. (1993, c. 534, s. 1.)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.9.

### § 143B-273.10. County Criminal Justice Partnership Advisory Boards; members; terms; chairperson.

(a) A county board or a multicounty board shall consist of not less than 10 members and shall, to the greatest extent possible, include the following:

- (1) A county commissioner. In the case of a multicounty community corrections advisory board, one county commissioner from each participating county shall serve as a member.
- (2) A county manager, or the county manager's designee.
- (3) A judge of the superior court.
- (4) A judge of the district court.
- (5) A district attorney, or the district attorney's designee.
- (6) A criminal defense attorney.
- (7) A public defender.
- (8) A county sheriff, or the sheriff's designee.
- (9) A chief of a city police department, or the police chief's designee.
- (10) A probation officer.
- (11) A community service coordinator.
- (12) One member selected from each of the following service areas which are available in the county or counties: mental health, public health, substance abuse, employment and training, community-based corrections programs, victim services programs.
- (13) A member of the business community.
- (14) A member of the community who has been a victim of a crime.
- (15) Members at large, including persons who are recovering from chemical dependency or are previous consumers of substance abuse treatment services.

(b) In the case of a single county board, the board of county commissioners shall appoint the members. In the case of a multicounty board, the board of county commissioners from the participating counties shall each appoint one commissioner as a member. These members shall appoint the other members. The board of county commissioners may designate an existing board which meets the requirements of this section to serve as the County Criminal Justice Partnership Advisory Board. A member may be removed, with cause, by the group authorized to make the initial appointment.

(c) Before an appointment is made under this section, the appointing authority shall publish advance notice of the appointments and shall request that the names of persons interested in being considered for appointment be submitted to the appointing authority. In appointing the members of a county board, the county shall make every effort to ensure that minority persons and women are fairly represented.

(d) The initial members of the county board appointed by the board or boards of county commissioners shall serve staggered terms, one-third shall be appointed for a term of one year, one-third shall be appointed for a term of two years, and one-third shall be appointed for a term of three years. Members appointed by virtue of their office serve only while holding the office or position held at the time of appointment. A vacancy occurring before the expiration of the term of office shall be filled in the same manner as original appointments for the remainder of the term. Members may be reappointed without limitation.

(e) The members of the county board shall, within 30 days after the last initial appointment is made, meet and elect one member as chairman and one member as vice-chairman and appoint a secretary-treasurer who need not be a member. For purposes of transacting business, a majority of the membership constitutes a quorum.

(f) The county board shall meet at least quarterly and may also hold special meetings at the call of the Chairman.

(g) Any member who has an interest in a governmental agency or unit or private nonprofit agency which is applying for a State-County Criminal Justice Partnership Act grant or which has received a grant and which is the subject of an inquiry or vote by a grant oversight committee shall publicly disclose that interest on the record and shall take no part in discussion or have any vote in regard to any matter directly affecting that particular grant applicant or grantee. "Interest" in a grant applicant or grantee shall mean a formal and direct connection to the entity, including, but not limited to, employment, partnership, serving as an elected official, board member, director, officer or trustee, or being an immediate family member of someone who has such a connection to the grant applicant or grantee.

(h) The board or boards of county commissioners shall provide necessary assistance and appropriations to the county board established for that county or counties. (1993, c. 534, s. 1.)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.10.

### § 143B-273.11. County Criminal Justice Partnership Advisory Boards; powers and duties.

The County Criminal Justice Partnership Advisory Board shall have the following powers and duties:

- (1) To participate in a planning process to develop a Community-Based Corrections Plan. The purpose of this planning process is to:
  - a. Examine the local criminal justice system;
  - b. Identify problem areas;
  - c. Identify offender groups for programs;
  - d. Propose strategies for improving the local criminal justice system;
  - e. Identify a specific community-based program that is needed;
  - f. Plan a method for integrating the needed community-based program into the existing local criminal justice system;
  - g. Develop criteria for evaluating the impact of the community-based program; and
  - h. Improve coordination at the local level between State and county community-based corrections programs.
- (2) To submit the plan to the boards of county commissioners for approval within one year of the last appointment to the county board. This plan shall include all of the elements required by this section.
- (3) To review and revise the plan and make a formal recommendation to the board or boards of county commissioners at least annually concerning the plan and its implementation and operation during the ensuing year.
- (4) To monitor and evaluate the impact of the community-based corrections program and prepare a written report. (1993, c. 534, s. 1.)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.11.

### § 143B-273.12. Community-Based Corrections Plan.

- (a) The Community-Based Corrections Plan shall include the following:
- (1) A flowchart of the criminal justice system which describes processing steps from the point of arrest through conviction, to post-release supervision after completing an active sentence of imprisonment. The flowchart shall identify all decision points, decision makers and options;
  - (2) Number and rate of arrest, convictions, admissions to probation, jail, prison, and post-release supervision;
  - (3) Arrest practices and data, including the use of citations;
  - (4) Pretrial release practices and data on type of release and bond amounts;
  - (5) Procedures for assignment of indigent counsel;
  - (6) Court procedures for reducing bond amounts;
  - (7) Jail capacity and population data by type of offender;
  - (8) The jail population by type of offender, type of offenses, and average length of stay;
  - (9) Existing State and county community-based corrections programs (pretrial, sentenced, and post-release) including target population, program activities, profile of offenders entering and released from the programs, length of stay, and completion rates;
  - (10) Education, vocation/employment, health, mental health, housing, and other social services which are available to offenders; and
  - (11) Number of offenders who received an active sentence in the past two years, including type of offense, length of sentence, and actual time served.

(b) Based on the information collected in subsection (a) of this section, the plan shall include a detailed description of the need for the proposed community-based corrections program, the offender population the proposed program will target, the changes that are planned in local policies and procedures to accommodate the proposed program, and how the proposed program will be integrated into the criminal justice system.

(c) The proposed program shall target eligible offenders as defined in G.S. 143B-273.4.

(d) Technical assistance to complete the plan shall be provided either by the Department, or the Department shall grant funds to the county for technical assistance. If a county receives technical assistance funds, the county must provide twenty-five percent (25%) of the grant amount. (1993, c. 534, s. 1; 1997-443, s. 19.8(c).)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.12.

### § 143B-273.13. Application for implementation funding.

(a) Upon approving the Community-Based Corrections Plan, the board or boards of county commissioners shall submit the plan and an application for implementation funding. The application shall contain the following:

- (1) A description of the problem, including specific data and information concerning the population the proposed community-based corrections program is to serve.
- (2) A description of the program's goal, objective, activities and how it relates to the annual plan distributed by the State Board.
- (3) A description of the operation of the program, including an outline of the approach, implementation steps and phases of the program, its

administrative structure, staffing pattern, staff training, financing, degree of community involvement, and offender participation.

- (4) A description of the program’s monitoring criteria, outlining the documentation and records to be maintained.
- (5) A description of the method for evaluating the impact of the program.
- (6) The identity of any designated contractor.
- (7) In the case of a multicounty community-based corrections plan, provisions for the appointment of a fiscal agent to coordinate the financial activities pertaining to the grant award.
- (8) A detailed budget for the program.

(b) The Secretary shall complete the review of the plan within 90 days of submission. Failure to disapprove or recommend amendment to the plan within 90 days shall constitute approval. (1993, c. 534, s. 1.)

**Editor’s Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.13.

**§ 143B-273.14. Fundable programs; community-based corrections programs.**

(a) Fundable programs under this Article shall include community-based corrections programs which are operated under a county community-based corrections plan and funded by the State subsidy provided in this Article. Based on the prioritized populations in G.S. 143B-273.4, the programs may include, but are not limited to, the following:

- (1) For offenders who receive intermediate punishments:
  - a. Residential facilities;
  - b. Day reporting centers;
  - c. Restitution centers;
  - d. Substance abuse services;
  - e. Employment services;
- (2) For offenders who are appropriate for release from jail prior to trial:
  - a. Pretrial monitoring services;
  - b. Pretrial electronic surveillance;
- (3) For offenders who are serving a term of post-release supervision after completing active sentences of imprisonment:
  - a. Aftercare support services.

(b) Community-based corrections funds may be used to operate programs and may also be used to construct, acquire, or renovate community facilities established to provide the programs and services set forth in subsection (a) of this section. Construction and renovation funds may not be used for jails. Construction and renovation funds may not be used to reimburse expenses for any facilities renovated before the effective date of this Article.

(c) When a county receives more than fifty thousand dollars (\$50,000) in community-based corrections funds, then that county shall use at least fifty percent (50%) of those funds to develop programs for offenders who receive intermediate punishments. (1993, c. 534, s. 1.)

**Editor’s Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.14.

As originally enacted, subsection (c) was set out preceding subsection (b). These subsections were reordered at the direction of the Revisor of Statutes.

### § 143B-273.15. Funding formula.

To determine the grant amount for which a county or counties may apply, the granting authority shall apply the following formula:

- (1) Twenty percent (20%) based on a fixed equal dollar amount for each county;
- (2) Sixty percent (60%) based on the county share of the State population; and
- (3) Twenty percent (20%) based on the supervised probation admissions rate for the county.

The sum of the amounts in subdivisions (1), (2), and (3) is the total amount of the funding that a county may apply for under this subsection.

Grants to participating counties are for a period of one fiscal year with unobligated funds being returned to the Account at the end of the grant period. Funds are provided to participating counties on a reimbursement basis unless a county documents a need for an advance of grant funds. (1993, c. 534, s. 1; 1995, c. 324, s. 19; 2001-424, s. 25.16(a).)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.15.

Session Laws 1999-237, ss. 18(a)-(c), as amended by Session Laws 2000-67, s. 16, provide that notwithstanding the funding formula set forth in G.S. 143B-273.15, appropriations made to the Department of Correction through the North Carolina State-County Criminal Justice Partnership Act for the 1999-2000 and 2000-2001 fiscal years shall be distributed to the counties as specified in G.S. 143B-273.15(2) only, and not as discretionary funds. The Department may also use funds from the State-County Criminal Justice Partnership Account in order to maintain the counties' allocations of nine million six hundred thousand dollars (\$9,600,000) as provided in previous fiscal years. Appropriations not claimed or expended by the counties during the 1999-2000 and 2000-2001 fiscal years are to be distributed as specified in G.S. 143B-273.15(1). A single county may apply for discretionary funds under G.S. 143B-273.15(1) for a residential program that serves offenders from other counties; in order for those other counties to assign offenders to such a program, those counties shall include a residential component in an approved partnership plan. The Department of Correction may not deny funds to a county to support both a residential program and a day reporting center if the Department of Correction determines that the county has a demonstrated need and a fully-developed plan for each type of sanction. For prior similar provisions, see Session Laws 1996, Second Extra Session, c. 18, c. 20.4, Session Laws 1997-443, s. 19(a) and Session Laws 1998-212, s. 17.5.

Session Laws 1999-237, s. 30.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium,

the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvement Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.4, contains a severability clause.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2001-424, s. 25.16(b), as amended by Session Laws 2001-513, s. 11, provides: "Notwithstanding the provisions of G.S. 143B-273.15 specifying that grants to participating counties are for the full fiscal year and that unobligated funds are returned to the State-County Criminal Justice Partnership Account at the end of the grant period, the Department of Correction may reallocate unspent or unclaimed funds distributed to counties participating in the State-County Criminal Justice Partnership Program in an effort to maintain the level of services realized in previous fiscal years."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have

effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium.”

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, s. 25.16(a), effective July 1, 2001, deleted former subdivisions (1) and (2), relating

to distribution of 20% of the fiscal year appropriation plus unspent funds for certain purposes and distribution of the remaining 80% according to the variables now found in present subdivisions (1), (2) and (3); redesignated subdivisions a. through c. as subdivisions (1) through (3); and substituted “subdivisions (1), (2), and (3)” for “sub-subdivisions a., b., and c.” in the second paragraph.

**§ 143B-273.16. Continued eligibility.**

(a) To continue to receive funding under this Article, a county shall submit an updated application for implementation funding to the Secretary at the beginning of each fiscal year.

(b) To remain eligible for funding, a county shall:

- (1) Comply with its community-based corrections plan;
- (2) Submit monitoring reports as required by the Department; and
- (3) Comply with the minimum standards adopted.

(c) If the Secretary suspends any or all of the grant funds, the county may request a hearing in accordance with Chapter 150B of the General Statutes. (1993, c. 534, s. 1.)

**Editor’s Note.** — The number of this section was assigned by the Revisor of Statutes, the

number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.16.

**§ 143B-273.17. Termination of participation in program.**

A county receiving financial aid under this Article may terminate its participation by delivering a resolution of the board or boards of county commissioners to the Secretary at the beginning of any calendar quarter. Upon withdrawal from the program, the board or boards of county commissioners may adopt a resolution stating that it is in the best interests of the county that the county community corrections advisory board be dissolved, whereupon the county commissioners shall pay and discharge any debts or liabilities of the advisory board, collect and distribute assets of the advisory board under the laws of North Carolina, and pay over any remaining proceeds or property to the proper fund. (1993, c. 534, s. 1.)

**Editor’s Note.** — The number of this section was assigned by the Revisor of Statutes, the

number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.17.

**§ 143B-273.18. Private nonprofit agencies participating in program.**

After the county criminal justice partnership advisory board has developed a plan and the board or boards of county commissioners has reviewed it, if the county decides that it does not intend to operate the proposed program, the county criminal justice partnership advisory board shall recommend the appropriate deliverer of services and the county may contract for services. (1993, c. 534, s. 1.)

**Editor’s Note.** — The number of this section was assigned by the Revisor of Statutes, the

number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.18.

**§ 143B-273.19. Prohibited uses of funds.**

(a) Counties may not use funds received under this Article to supplant or replace existing funds or other resources from the federal, State, or county government for existing community-based corrections programs.

(b) Counties may not use funds received under this Article for indirect costs associated with a program. (1993, c. 534, s. 1.)

**Editor’s Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 534, s. 1, having been § 143B-272.19.

**§ 143B-274:** Reserved for future codification purposes.

ARTICLE 7.

*Department of Environment and Natural Resources.*

Part 1. General Provisions.

**§§ 143B-275 through 143B-279:** Repealed by Session Laws 1989, c. 727, s. 2.

**Cross References.** — For present provisions relating to the Department of Environment and Natural Resources, see § 143B-279.1 et seq.

**Editor’s Note.** — Session Laws 1997-443, s. 11A.4, rewrote the name of Article 7 of Chapter 143B of the General Statutes to read: “Department of Environment and Natural Resources.”

**§ 143B-279.1. Department of Environment and Natural Resources — creation.**

(a) There is hereby created and constituted a department to be known as the Department of Environment and Natural Resources, with the organization, powers, and duties defined in this Article and other applicable provisions of law.

(b) The provisions of Article 1 of this Chapter not inconsistent with this Article shall apply to the Department of Environment and Natural Resources. (1989, c. 727, s. 3; 1997-443, s. 11A.119(a).)

**Cross References.** — As to the Minority Health Advisory Council, see § 130A-33.43.

**Editor’s Note.** — As to abolition of the Department of Natural Resources and Community Development and the transfer of its divisions, agencies, functions, etc. to the Department of Environment Health, and Natural Resources [now Department of Environment and Natural Resources], see Session Laws 1989, c. 727.

Session Laws 1989, c. 727, s. 225 provided: “(a) The Environmental Review Commission may continue the study of environmental agency consolidation and reorganization. The study of environmental agency consolidation shall include, but is not limited to:

“(1) Monitoring the implementation of this act;

“(2) Evaluation of the organization, programs, and operation of the Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources];

“(3) Evaluation of the organization, functions, powers, and duties of the components of the Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources], including boards, commissions, councils, and regional offices; and

“(4) Recodification of the General Statutes relating to the environment and environmental agencies.

“(b) Notwithstanding any rule or resolution

to the contrary, proposed legislation to implement any recommendation made by the Environmental Review Commission may be introduced and considered during any session of the General Assembly.”

Session Laws 1997-443, s. 11A.120, provides that references in the Session Laws to any department, division, or other agency that is transferred by that Part of the act shall be considered to refer to the successor department, division, or other agency. Every Session Law that refers to any department, division, or other agency to which that Part applies that relates to any power, duty, function, or obligation of any department, division, or agency and that continues in effect after that Part shall be construed so as to be consistent with that Part.

Session Laws 1997-443, s. 11A.124 provides that all statutory authority, powers, duties, functions, records, personnel, property, and unexpended balances of appropriations or other funds of any agency which are transferred pursuant to this Part shall be transferred in their entirety.

Session Laws 1997-443, s. 11A.125 provides that unless specifically provided to the contrary or unless a contrary intent is clear from the context, any official designation of any agency transferred by this Part as the State agency for any function, including specifically purposes of federal programs, shall be considered to be a designation of the successor agency.

Session Laws 1997-443, s. 11A.126 provides that no later than 30 days after the effective date of this Part, the Department of Health and Human Services and the Department of Environment and Natural Resources shall enter into a Memorandum of Agreement that provides for coordination between the departments as to any functions shared by the departments as a result of the passage of this Part. This Memorandum shall require that the Department of Environment and Natural Resources provide staff to the Commission for Health Services for the Commission’s duties under Articles 8, 9, 10, 11, and 12 of Chapter 130A of the General Statutes. Until a Memorandum of Agreement has been entered into by the departments, the Department of Health and Human Services shall provide all clerical and other services required by the Commission for Health Services. All statutory authority, powers, duties, functions, records, personnel, property, and unexpended balances of appropriations or other funds of any agency which are transferred pursuant to this Part shall be transferred in their entirety.

Session Laws 1997-443, s. 11A.127, as amended by S.L. 1998-76, s. 1, provides that pending action by the General Assembly on the recommendation of the Environmental Review Commission resulting from the study to be undertaken by the Environmental Review

Commission as provided in this Part, on-site wastewater functions, public drinking water programs, and environmental health programs shall remain in the Department of Environment and Natural Resources, the Division of Environmental Health, shall remain intact in the Department of Environment and Natural Resources, and the Department of Environment and Natural Resources shall not consolidate on-site wastewater functions or drinking water programs in the Division of Water Quality.

Session Laws 1997-443, s. 11A.130, effective July 1, 1997, provides that the Departments by agreement and at the direction of the Office of State Budget and Management (now the Office of State Budget, Planning, and Management) shall undertake certification, revisions, and transfer of budget funds and financial records so that State fiscal year financial records, reports, and accounting are maintained as if this Part had become effective July 1, 1997.

Session Laws 1997-443, s. 35.2, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium.”

Session Laws 1997-443, s. 1.1, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 1997.’”

Session Laws 1997-443, s. 35.4, is a severability clause.

Session Laws 1998-225, s. 5.3, provides: “Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules.”

**One-Stop Environmental Permit Application Assistance and Tracking System Pilot Program.** — Session Laws 2000-67, s. 13.7 (a)-(f), directs the Department of Environment and Natural Resources to establish a one-stop environmental permit application assistance and tracking system pilot project for one year in at least two regional offices, and to expand this program, to more than two offices during the 2000-2001 fiscal year if resources are available, and to a statewide program as soon as possible after the 2000-2001 fiscal year. As part of the

project, the Department is to provide each person who submits an application for an environmental permit to one of the regional offices participating in the pilot project a time frame within which that applicant may expect a final decision regarding issuance or denial of a permit. The Department is to track the time required to process each complete environmental permit application received on or after July 1, 2000, as part of the pilot project and is to identify each permit that was issued or denied more than 90 days after receipt of a complete application and document reasons for delayed action. The Department is to issue a report, with recommendations, regarding permit time frames for all major permits issued by the Department to the Senate and House Appropriations Subcommittees on Natural and Economic Resources, the Fiscal Research Division, and the Environmental Review Commission by April 1, 2001. The Department may adopt temporary rules to implement s. 13.7.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

**Same — Continuation.** — Session Laws 2001-424, ss. 19.6 (a) to (c), provide: "(a) The Department of Environment and Natural Resources shall continue the one-stop environmental permit application assistance and tracking system pilot project established under Section 13.7 of S.L. 2000-67 during the 2001-2003 fiscal biennium. It is the intent of the General Assembly that the Department of Environment and Natural Resources expand this pilot program to a statewide program effective in all of the Department's regional offices if the resources are available to do so during the 2001-2003 fiscal biennium. The provisions of Section 13.7(a) through (d) of S.L. 2000-67 apply to the pilot program under this section [s. 19.6 of Session Laws 2001-424].

"(b) The Department of Environment and Natural Resources shall report to the Appropriations Subcommittees on Natural and Economic Resources in both the Senate and the House of Representatives, the Fiscal Research Division, and the Environmental Review Commission no later than April 1, 2002, and again no later than April 1, 2003, regarding the results of the pilot project continued under this section [s. 19.6 of Session Laws 2001-424]. This report shall include the number of environmen-

tal permits in the pilot project that took more than 90 days to issue or deny; the types of permits those were; the reasons for the extended processing time of those permits; how the time within which the permit was actually issued or denied compared with the projected time frame provided to the applicant by the Department; based on the data gathered in the pilot project, any recommendations regarding what the permit time frames should be for all major permits issued by the Department; and to what extent, if any, the program has been expanded to a statewide program under this section [s. 19.6 of Session Laws 2001-424].

"(c) The Department of Environment and Natural Resources may adopt temporary rules to implement this section [s. 19.6 of Session Laws 2001-424]."

Session Laws 2001-424, s. 19.9, provides: "The Secretary of Environment and Natural Resources shall designate from existing staff within the Department of Environment and Natural Resources a staff position to be responsible for managing the Submerged Lands Program. By November 1, 2001, the Secretary shall report to both the Senate and House of Representatives Cochairs of the Appropriations Subcommittees on Natural and Economic Resources what position will manage the Program."

**Study.** — Session Laws 2001-424, ss. 19.11 (a) to (c), provide: "(a) The Department of Environment and Natural Resources shall study the permitting process in the Division of Water Quality, the Division of Coastal Management as it relates to CAMA permits, and the Division of Land Resources as it relates to the sedimentation and erosion control plans. The study shall at a minimum include the following:

"(1) A description of how the permitting process currently works.

"(2) The number and types of permits issued by each of these Divisions.

"(3) The time frame within which each of the types of permits is issued.

"(4) The adequacy of existing staff levels to complete the issuance of permits in a timely manner.

"(5) Whether duplication in the permitting process exists between the regional office and the central office staff.

"(6) Efficiencies to be gained from delegation of authority to regional offices.

"(7) Efficiencies to be gained from issuing more general permits.

"(8) The amount of revenue generated by the permits and retained as departmental receipts.

"(9) Any other information or issue deemed relevant by the Fiscal Research Division to provide an accurate analysis of the issues.

"(b) In conducting this study, the Department shall record its tracking of the permits and the statistical data regarding those permits in a

format that is easily accessible and usable for fiscal analysis by the Fiscal Research Division.

“(c) The Department shall make a report with its findings and recommendations to the Senate and House of Representatives Cochairs of the full Appropriations Committee and to the Senate and House of Representatives Cochairs of the Natural and Economic Resources Appropriations Subcommittees, on ways to improve, expedite, or simplify the permitting process no later than March 10, 2002.”

Session Laws 2001-424, s. 1.2, provides:

“This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2001.’”

Session Laws 2001-424, s. 36.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium.”

Session Laws 2001-424, s. 36.5 is a severability clause.

#### CASE NOTES

**Cited** in *Crowell Constructors, Inc. v. State*, 342 N.C. 838, 467 S.E.2d 675 (1996).

### § 143B-279.2. Department of Environment and Natural Resources — duties.

It shall be the duty of the Department:

- (1) To provide for the protection of the environment;
- (1a) To administer the State Outer Continental Shelf (OCS) Task Force and coordinate State participation activities in the federal outer continental shelf resource recovery programs as provided under the OCS Lands Act Amendments of 1978 (43 USC §§ 1801 et seq.) and the OCS Lands Act Amendments of 1986 (43 USC §§ 1331 et seq.).
- (1b) To provide for the protection of the environment and public health through the regulation of solid waste and hazardous waste management and the administration of environmental health programs.
- (2) Repealed by Session Laws 1997-443, s. 11A.5, effective August 28, 1997.
- (2a) To provide and keep a museum or collection of the natural history of the State and to maintain the North Carolina Biological Survey; and
- (3) To provide for the management of the State’s natural resources. (1989, c. 727, s. 3; 1993, c. 321, s. 28(c); c. 561, s. 116(e); 1997-443, s. 11A.5.)

### § 143B-279.3. Department of Environment and Natural Resources — structure.

(a) All functions, powers, duties, and obligations previously vested in the following subunits of the following departments are transferred to and vested in the Department of Environment and Natural Resources by a Type I transfer, as defined in G.S. 143A-6:

- (1) Radiation Protection Section, Division of Facility Services, Department of Health and Human Services.
- (2), (3) Repealed by Session Laws 1997-443, s. 11A.6.
- (4) Coastal Management Division, Department of Natural Resources and Community Development.
- (5) Environmental Management Division, Department of Natural Resources and Community Development.
- (6) Forest Resources Division, Department of Natural Resources and Community Development.
- (7) Land Resources Division, Department of Natural Resources and Community Development.
- (8) Marine Fisheries Division, Department of Natural Resources and Community Development.

- (9) Parks and Recreation Division, Department of Natural Resources and Community Development.
- (10) Soil and Water Conservation Division, Department of Natural Resources and Community Development.
- (11) Water Resources Division, Department of Natural Resources and Community Development.
- (12) North Carolina Zoological Park, Department of Natural Resources and Community Development.
- (13) Albemarle-Pamlico Study.
- (14) Office of Marine Affairs, Department of Administration.
- (15) Environmental Health Section, Division of Health Services, Department of Health and Human Services.

(b) All functions, powers, duties, and obligations previously vested in the following commissions, boards, councils, and committees of the following departments are transferred to and vested in the Department of Environment and Natural Resources by a Type II transfer, as defined in G.S. 143A-6:

- (1) Repealed by Session Laws 1993, c. 501, s. 27.
  - (2) Radiation Protection Commission, Department of Health and Human Services.
  - (3) Repealed by Session Laws 1997-443, s. 11A.6.
  - (4) Water Treatment Facility Operators Board of Certification, Department of Health and Human Services.
  - (5) to (8) Repealed by Session Laws 1997-443, s. 11A.6.
  - (9) Coastal Resources Commission, Department of Natural Resources and Community Development.
  - (10) Environmental Management Commission, Department of Natural Resources and Community Development.
  - (11) Air Quality Council, Department of Natural Resources and Community Development.
  - (12) Wastewater Treatment Plant Operators Certification Commission, Department of Natural Resources and Community Development.
  - (13) Forestry Council, Department of Natural Resources and Community Development.
  - (14) North Carolina Mining Commission, Department of Natural Resources and Community Development.
  - (15) Advisory Committee on Land Records, Department of Natural Resources and Community Development.
  - (16) Marine Fisheries Commission, Department of Natural Resources and Community Development.
  - (17) Parks and Recreation Council, Department of Natural Resources and Community Development.
  - (18) Board of Trustees of the Recreation and Natural Heritage Trust Fund, Department of Natural Resources and Community Development.
  - (19) North Carolina Trails Committee, Department of Natural Resources and Community Development.
  - (20) Sedimentation Control Commission, Department of Natural Resources and Community Development.
  - (21) State Soil and Water Conservation Commission, Department of Natural Resources and Community Development.
  - (22) North Carolina Zoological Park Council, Department of Natural Resources and Community Development.
  - (23) Repealed by Session Laws 1997-286, s. 6.
- (c)(1) There is created a division within the environmental area of the Department of Environment and Natural Resources to be named the Division of Radiation Protection. All functions, powers, duties, and

obligations of the Radiation Protection Section of the Division of Facility Services of the Department of Health and Human Services are transferred in their entirety to the Radiation Protection Division of the Department of Environment and Natural Resources.

- (2) There is created a division within the environmental area of the Department of Environment and Natural Resources to be named the Division of Waste Management. All functions, powers, duties, and obligations of the Solid Waste Management Section of the Division of Health Services of the Department of Health and Human Services are transferred in their entirety to the Division of Waste Management of the Department of Environment and Natural Resources.
- (3) There is created a division within the environmental areas of the Department of Environment and Natural Resources to be named the Division of Environmental Health. All functions, powers, duties and obligations of the Division of Environmental Health of the Department of Environment and Natural Resources are transferred in their entirety to the Division of Environmental Health, Department of Environment and Natural Resources.

(d) The Department of Environment and Natural Resources is vested with all other functions, powers, duties, and obligations as are conferred by the Constitution and laws of this State. (1989, c. 727, s. 3; 1989 (Reg. Sess., 1990), c. 1004, s. 31; 1991, c. 342, ss. 16(a), (b); 1993, c. 321, ss. 28(a), (b); c. 501, s. 27; 1995 (Reg. Sess., 1996), c. 743, s. 20; 1997-286, s. 6; 1997-443, ss. 11A.6, 11A.123.)

**Editor's Note.** — Session Laws 2000-67, s. 23, effective July 1, 2000, consolidates the Office of State Budget and Management and the Office of State Planning into the Office of State Budget, Planning, and Management under the Office of the Governor. The Department of Environment and Natural Resources is to transfer the responsibility for development of topographic mapping through a cooperative agreement with the U.S. Geological Survey and funds to match federal funding under the agreement from the Division of Land Resources to the Office of State Budget, Planning, and Management.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 12.3(a), provides: "The Center for Geographic Information Analysis/Geodetic Survey is transferred from the Office of State Budget and Management to the Department of Environment and Natural Resources, Division of Land Resources. This transfer has all of the elements of a Type I transfer as defined in G.S. 143A-6."

Session Laws 2001-424, s. 19.7, provides: "The Department of Environment and Natural Resources shall develop a plan to make the Division of Radiation Protection of the Department of Environment and Natural Resources self-supporting within two years. The Department of Environment and Natural Resources shall report the details of this plan to the Appropriations Subcommittees on Natural and Economic Resources in both the Senate and the House of Representatives no later than January 15, 2002."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

**§ 143B-279.4. The Department of Environment and Natural Resources — Secretary; Deputy Secretaries.**

(a) The Secretary of Environment and Natural Resources shall be the head of the Department.

(b) The Secretary may appoint two Deputy Secretaries. (1989, c. 727, s. 3; 1989 (Reg. Sess., 1990), c. 1004, s. 19(a); 1997-443, s. 11A.119(a).)

**§ 143B-279.5. Biennial State of the Environment Report.**

(a) The Secretary of Environment and Natural Resources shall report on the state of the environment to the General Assembly and the Environmental Review Commission no later than 15 February of each odd-numbered year. The report shall include:

- (1) An identification and analysis of current environmental protection issues and problems within or affecting the State and its people;
- (2) Trends in the quality and use of North Carolina's air and water resources;
- (3) An inventory of areas of the State where air or water pollution is in evidence or may occur during the upcoming biennium;
- (4) Current efforts and resources allocated by the Department to correct identified pollution problems and an estimate, if necessary, of additional resources needed to study, identify, and implement solutions to solve potential problems;
- (5) Departmental goals and strategies to protect the natural resources of the State;
- (6) Any information requested by the General Assembly or the Environmental Review Commission;
- (7) Suggested legislation, if necessary; and
- (8) Any other information on the state of the environment the Secretary considers appropriate.

(b) Other State agencies involved in protecting the State's natural resources and environment shall cooperate with the Department of Environment and Natural Resources in preparing this report. (1989, c. 727, s. 3; 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1991 (Reg. Sess., 1992), c. 990, s. 5; 1997-443, s. 11A.123.)

**CASE NOTES**

**Cited** in *Crowell Constructors, Inc. v. State*, 342 N.C. 838, 467 S.E.2d 675 (1996).

**§ 143B-279.6:** Repealed by Session Laws 1997-443, s. 11A.2.

**§ 143B-279.7. Fish kill response protocols; report.**

(a) The Department of Environment and Natural Resources shall coordinate an intradepartmental effort to develop scientific protocols to respond to significant fish kill events utilizing staff from the Division of Water Quality, Division of Marine Fisheries, Department of Health and Human Services, Wildlife Resources Commission, the scientific community, and other agencies, as necessary. In developing these protocols, the Department of Environment and Natural Resources shall address the unpredictable nature of fish kills caused by both natural and man-made factors. The protocols shall contain written procedures to respond to significant fish kill events including:

- (1) Developing a plan of action to evaluate the impact of fish kills on public health and the environment.
- (2) Responding to fish kills within 24 hours.
- (3) Investigating and collecting data relating to fish kill events.
- (4) Summarizing and distributing fish kill information to participating agencies, scientists and other interested parties.

(b) The Secretary of Environment and Natural Resources shall take all necessary and appropriate steps to effectively carry out the purposes of this Part including:

- (1) Providing adequate training for fish kill investigators.
- (2) Taking immediate action to protect public health and the environment.
- (3) Cooperating with agencies, scientists, and other interested parties, to help determine the cause of the fish kill.

(c) The Department of Environment and Natural Resources shall report annually to the Environmental Review Commission no later than December 1 of each year. This report shall include a summary of all fish kill activity within the last year, an overview of any trend analyses, a discussion of any new or modified methodologies or reporting protocols, and any other relevant information. (1995 (Reg. Sess., 1996), c. 633, s. 4; 1997-443, s. 11A.108A; 2001-452, s. 2.8; 2001-474, ss. 30, 31.)

**Editor's Note.** — Session Laws 1995 (Reg. Sess., 1996), c. 633, s. 4, was codified as this section at the direction of the Revisor of Statutes.

**Effect of Amendments.** — Session Laws 2001-452, s. 2.8, effective October 28, 2001, deleted “and the Senate Agriculture and Environment Committee” following “Commission”

in the first sentence of subsection (c).

Session Laws 2001-474, ss. 30 and 31, effective November 29, 2001, substituted “Division of Water Quality” for “Division of Environmental Management” in the first sentence of subsection (a); and deleted “the Department of” preceding “Environment” in subsection (b).

## § 143B-279.8. Coastal Habitat Protection Plans.

(a) The Department shall coordinate the preparation of draft Coastal Habitat Protection Plans for critical fisheries habitats. The goal of the Plans shall be the long-term enhancement of coastal fisheries associated with each coastal habitat identified in subdivision (1) of this subsection. The Department shall use the staff of those divisions within the Department that have jurisdiction over marine fisheries, water quality, and coastal area management in the preparation of the Coastal Habitat Protection Plans and shall request assistance from other federal and State agencies as necessary. The plans shall:

- (1) Describe and classify biological systems in the habitats, including wetlands, fish spawning grounds, estuarine or aquatic endangered or threatened species, primary or secondary nursery areas, shellfish beds, submerged aquatic vegetation (SAV) beds, and habitats in outstanding resource waters.
- (2) Evaluate the function, value to coastal fisheries, status, and trends of the habitats.
- (3) Identify existing and potential threats to the habitats and the impact on coastal fishing.
- (4) Recommend actions to protect and restore the habitats.

(b) Once a draft Coastal Habitat Protection Plan has been prepared, the chairs of the Coastal Resources Commission, the Environmental Management Commission, and the Marine Fisheries Commission shall each appoint two members of the commission he or she chairs to a six-member review committee. The six-member review committee, in consultation with the Department, shall review the draft Plan and may revise the draft Plan on a consensus basis.

The draft Plan, as revised by the six-member review committee, shall then be submitted to the Coastal Resources Commission, the Environmental Management Commission, and the Marine Fisheries Commission, each of which shall independently consider the Plan for adoption. If any of the three commissions is unable to agree to any aspect of a Plan, the chair of each commission shall refer that aspect of the Plan to a six-member conference committee to facilitate the resolution of any differences. The six-member conference committee shall be appointed in the same manner as a six-member review committee and may include members of the six-member review committee that reviewed the Plan. Each final Coastal Habitat Protection Plan shall consist of those provisions adopted by all three commissions. The three commissions shall review and revise each Coastal Habitat Protection Plan at least once every five years.

(c) In carrying out their powers and duties, the Coastal Resources Commission, the Environmental Management Commission, and the Marine Fisheries Commission shall ensure, to the maximum extent practicable, that their actions are consistent with the Coastal Habitat Protection Plans as adopted by the three commissions. The obligation to act in a manner consistent with a Coastal Habitat Protection Plan is prospective only and does not oblige any commission to modify any rule adopted, permit decision made, or other action taken prior to the adoption or revision of the Coastal Habitat Protection Plan by the three commissions. The Coastal Resources Commission, the Environmental Management Commission, and the Marine Fisheries Commission shall adopt rules to implement Coastal Habitat Protection Plans in accordance with Chapter 150B of the General Statutes.

(d) If any of the three commissions concludes that another commission has taken an action that is inconsistent with a Coastal Habitat Protection Plan, that commission may request a written explanation of the action from the other commission. A commission shall provide a written explanation: (i) upon the written request of one of the other two commissions, or (ii) upon its own motion if the commission determines that it must take an action that is inconsistent with a Coastal Habitat Protection Plan.

(e) The Coastal Resources Commission, the Environmental Management Commission, and the Marine Fisheries Commission shall report to the Joint Legislative Commission on Seafood and Aquaculture and the Environmental Review Commission on progress in developing and implementing the Coastal Habitat Protection Plans, including the extent to which the actions of the three commissions are consistent with the Plans, on or before 1 September of each year.

(f) The Secretary of Environment and Natural Resources shall report to the Environmental Review Commission and the Joint Legislative Commission on Seafood and Aquaculture within 30 days of the completion or substantial revision of each draft Coastal Habitat Protection Plan. The Environmental Review Commission and the Joint Legislative Commission on Seafood and Aquaculture shall concurrently review each draft Coastal Habitat Protection Plan within 30 days of the date the draft Plan is submitted by the Secretary. The Environmental Review Commission and the Joint Legislative Commission on Seafood and Aquaculture may submit comments and recommendations on the draft Plan to the Secretary within 30 days of the date the draft Plan is submitted by the Secretary. (1997-400, s. 3.1; 1997-443, s. 11A.119(b).)

**Editor's Note.** — Session Laws 1997-400, s. 6.9, effective July 1, 1998, provides that all of the Coastal Habitat Protection Plans required by G.S. 143B-279.8 shall be adopted no later than July 1, 2003; that the Coastal Resources Commission, the Environmental Management

Commission shall make the first report on progress on or before September 1, 1999; and that the Secretary of Environment, Health, and Natural Resources [Secretary of Environment and Natural Resources] shall make the first report on Fishery Management Plans on or before September 1, 1999.

Session Laws 1997-400, s. 6.10, provides that, unless otherwise expressly provided, every agency to which the act applies shall adopt rules to implement the provisions of that act only in accordance with the provisions of Chapter 150B of the General Statutes, that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, that every agency to which the act applies that is

authorized to adopt rules to implement the provisions of the act may adopt temporary rules to implement the provisions of the act, and that s. 6.10 of that act shall continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

**Legal Periodicals.** — For 1997 legislative survey, see 20 Campbell L. Rev. 443.

### **§ 143B-279.9. Land-use restrictions may be imposed to reduce danger to public health at contaminated sites.**

(a) In order to reduce or eliminate the danger to public health or the environment posed by the presence of contamination at a site, an owner, operator, or other responsible party may impose restrictions on the current or future use of the real property comprising any part of the site where the contamination is located if the restrictions meet the requirements of this section. The restrictions must be agreed to by the owner of the real property, included in a remedial action plan for the site that has been approved by the Secretary, and implemented as a part of the remedial action program for the site. The Secretary may approve restrictions included in a remedial action plan in accordance with standards that the Secretary determines to be applicable to the site. Except as provided in subsection (b) of this section, if the remedial action is risk-based or will not require that the site meet unrestricted use standards, the remedial action plan must include an agreement by the owner, operator, or other responsible party to record approved land-use restrictions that meet the requirements of this section as provided in G.S. 143B-279.10 or G.S. 143B-279.11, whichever applies. Restrictions may apply to activities on, over, or under the land, including, but not limited to, use of groundwater, building, filling, grading, excavating, and mining. Any approved restriction shall be enforced by any owner of the land, operator of the facility, or other party responsible for the contaminated site. Any land-use restriction may also be enforced by the Department through the remedies provided by any provision of law that is implemented or enforced by the Department or by means of a civil action. The Department may enforce any land-use restriction without first having exhausted any available administrative remedies. A land-use restriction may also be enforced by any unit of local government having jurisdiction over any part of the site. A land-use restriction shall not be declared unenforceable due to lack of privity of estate or contract, due to lack of benefit to particular land, or due to lack of any property interest in particular land. Any person who owns or leases a property subject to a land-use restriction under this Part shall abide by the land-use restriction.

(b) The definitions set out in G.S. 143-215.94A apply to this subsection. A risk-based remedial action plan for the cleanup of environmental damage resulting from a discharge or release of petroleum from an underground storage tank pursuant to Part 2A of Article 21A of Chapter 143 of the General Statutes that will not require that the site meet unrestricted use standards must include an agreement by the owner, operator, or other party responsible for the discharge or release of petroleum to record approved land-use restrictions that meet the requirements of this section as provided in G.S. 143B-279.11. All of the provisions of this section shall apply except as specifically modified by this subsection. Any restriction on the current or future use of real property shall be enforceable only with respect to: (i) real property on which the source of contamination is located and (ii) any real property on which contamination is located at the time the remedial action plan is approved and

that was owned or controlled by any owner or operator of the underground storage tank or other responsible party at the time the discharge or release of petroleum is discovered or reported or at any time thereafter. No restriction on the current or future use of real property shall apply to any portion of any parcel or tract of land on which contamination is not located. This subsection shall not be construed to require any person to record any restriction on the current or future use of real property other than the real property described in this subsection. For purposes of this subsection and G.S. 143B-279.11, the current or future use of real property may be restricted only as set out in any one or more of the following subdivisions:

- (1) Where soil contamination will remain in excess of unrestricted use standards, the property may be used for a primary or secondary residence, school, daycare center, nursing home, playground, park, recreation area, or other similar use only with the approval of the Department.
  - (2) Where soil contamination will remain in excess of unrestricted use standards and the property is used for a primary or secondary residence that was constructed before the release of petroleum that resulted in the contamination is discovered or reported, the Secretary may approve alternative restrictions that are sufficient to reduce the risk of exposure to contaminated soils to an acceptable level while allowing the real property to continue to be used for a residence.
  - (3) Where groundwater contamination will remain in excess of unrestricted use standards, installation or operation of any well usable as a source of water shall be prohibited.
  - (4) Any restriction on the current or future use of the real property that is agreed upon by both the owner of the real property and the Department.
- (c) This section does not alter any right, duty, obligation, or liability of any owner, operator, or other responsible party under any other provision of law.
- (d) As used in this section:
- (1) "Unrestricted use standards" means generally applicable standards, guidance, or established methods governing contaminants that are established by statute or adopted, published, or implemented by the Environmental Management Commission, the Commission for Health Services, or the Department. Cleanup or remediation of real property to unrestricted use standards means that the property is restored to a condition such that the property and any use that is made of the property does not pose a danger or risk to public health, the environment, or users of the property that is significantly greater than that posed by use of the property prior to its having been contaminated.
  - (2) "Risk-based", when used in connection with cleanup, remediation, or similar terms, means cleanup or remediation of contamination of real property to a level that, although not in compliance with unrestricted use standards, does not pose a significant danger or risk to public health, the environment, or users of the real property so long as the property remains in the condition and is used in a manner that is consistent with the assumptions as to the condition and use of the property on which the determination that the level of risk is acceptable is based. (1999-198, s. 1; 2000-51, s. 1; 2001-384, ss. 1, 12.)

**Editor's Note.** — Session Laws 1999-198, s. 2, made this section effective October 1, 1999. Session Laws 2000-51, s. 3, directs the Environmental Review Commission to continue to study the application of land-use restrictions to the cleanup of environmental damage resulting

from discharges and releases of petroleum from underground storage tanks through a stakeholder negotiation process, considering issues related to notice to current and future users of real property of any restrictions on the current and future use of the property, mechanisms to

ensure compliance with those restrictions, notice to current and future users of real property of the existence of contamination in excess of current standards, and issues related to recordation in the register of deeds office of this information. The Commission is to report its findings and recommendations, including any legislative proposals, to the 2001 General Assembly.

Session Laws 2001-348, s. 12, effective September 1, 2001, deleted the provision of Session Laws 2000-51, s. 4, that had provided a September 1, 2001, sunset for the 2000 amendment to the section.

Session Laws 2001-384, s. 13, provides; "This act becomes effective 1 September 2001. This act applies to any cleanup of a discharge or release of petroleum from an underground storage tank pursuant to Part 2A of Article 21A of Chapter 143 of the General Statutes except that land-use restrictions and recordation of residual contamination are not required with respect to a discharge or release of petroleum

for which the Department of Environment and Natural Resources issued a determination that no further action is required prior to 1 September 2001."

**Effect of Amendments.** — Session Laws 2000-51, s. 1, effective retroactively to October 1, 1999, and expiring September 1, 2001, designated the existing paragraph as subsection (a) and added "Except as provided in subsection (b) of this section" to the beginning of the fourth sentence; and added subsection (b).

Session Laws 2001-384, s. 1, effective September 1, 2001, in subsection (a), substituted "unrestricted use standards" for "current standards, as defined in G.S. 130A-310.31" in the fourth sentence, and inserted "or G.S. 143B-279.11, whichever applies" at the end of that sentence, and substituted "owner of the land, operator of the facility" for "owner, operator" in the sixth sentence; rewrote subsection (b); and added subsections (c) and (d). See editor's note for applicability.

### § 143B-279.10. Recordation of contaminated sites.

(a) The owner of the real property on which a site is located that is subject to current or future use restrictions approved as provided in G.S. 143B-279.9(a) shall submit to the Department a survey plat as required by this section within 180 days after the owner is notified to do so. The survey plat shall identify areas designated by the Department, shall be prepared and certified by a professional land surveyor, and shall be entitled "NOTICE OF CONTAMINATED SITE". Where a contaminated site is located on more than one parcel or tract of land, a composite map or plat showing all parcels or tracts may be recorded. The Notice shall include a legal description of the site that would be sufficient as a description in an instrument of conveyance, shall meet the requirements of G.S. 47-30 for maps and plats, and shall identify:

- (1) The location and dimensions of any disposal areas and areas of potential environmental concern with respect to permanently surveyed benchmarks.
- (2) The type, location, and quantity of contamination known to the owner of the site to exist on the site.
- (3) Any restriction approved by the Department on the current or future use of the site.

(b) The Department shall review the proposed Notice to determine whether the Notice meets the requirements of this section and rules adopted to implement this section, and shall provide the owner of the site with a notarized copy of the approved Notice. After the Department approves the Notice, the owner of the site shall file a notarized copy of the approved Notice in the register of deeds office in the county or counties in which the land is located within 15 days of the date on which the owner receives approval of the Notice from the Department.

(c) The register of deeds shall record the notarized copy of the approved Notice and index it in the grantor index under the names of the owners of the land.

(d) In the event that the owner of the site fails to submit and file the Notice required by this section within the time specified, the Secretary may prepare and file the Notice. The costs thereof may be recovered by the Secretary from any responsible party. In the event that an owner of a site who is not a

responsible party submits and files the Notice required by this section, the owner may recover the reasonable costs thereof from any responsible party.

(e) When a contaminated site that is subject to current or future land-use restrictions is sold, leased, conveyed, or transferred, the deed or other instrument of transfer shall contain in the description section, in no smaller type than that used in the body of the deed or instrument, a statement that the property is a contaminated site and a reference by book and page to the recordation of the Notice.

(f) A Notice of Contaminated Site filed pursuant to this section shall, at the request of the owner of the land, be cancelled by the Secretary after the contamination has been eliminated or remediated to unrestricted use standards. If requested in writing by the owner of the land and if the Secretary concurs with the request, the Secretary shall send to the register of deeds of each county where the Notice is recorded a statement that the contamination has been eliminated, or that the contamination has been remediated to unrestricted use standards, and request that the Notice be cancelled of record. The Secretary's statement shall contain the names of the owners of the land as shown in the Notice and reference the plat book and page where the Notice is recorded. The register of deeds shall record the Secretary's statement in the deed books and index it on the grantor index in the names of the owners of the land as shown in the Notice and on the grantee index in the name "Secretary of Environment and Natural Resources". The register of deeds shall make a marginal entry on the Notice showing the date of cancellation and the book and page where the Secretary's statement is recorded, and the register of deeds shall sign the entry. If a marginal entry is impracticable because of the method used to record maps and plats, the register of deeds shall not be required to make a marginal entry.

(g) This section does not apply to the cleanup pursuant to a risk-based remedial action plan that addresses environmental damage resulting from a discharge or release of petroleum from an underground storage tank pursuant to Part 2A of Article 21A of Chapter 143 of the General Statutes.

(h) The definitions set out in G.S. 143B-279.9 apply to this section. (1999-198, s. 1; 2000-51, s. 2; 2001-384, s. 2.)

**Editor's Note.** — Session Laws 2000-51, s. 3, directs the Environmental Review Commission to continue to study the application of land-use restrictions to the cleanup of environmental damage resulting from discharges and releases of petroleum from underground storage tanks through a stakeholder negotiation process, considering issues related to notice to current and future users of real property of any restrictions on the current and future use of the property, mechanisms to ensure compliance with those restrictions, notice to current and future users of real property of the existence of contamination in excess of current standards, and issues related to recordation in the register of deeds office of this information. The Commission is to report its findings and recommendations, including any legislative proposals, to the 2001 General Assembly.

Session Laws 2001-384, s. 13, provides; "This act becomes effective 1 September 2001. This act applies to any cleanup of a discharge or release of petroleum from an underground storage tank pursuant to Part 2A of Article 21A of Chapter 143 of the General Statutes except

that land-use restrictions and recordation of residual contamination are not required with respect to a discharge or release of petroleum for which the Department of Environment and Natural Resources issued a determination that no further action is required prior to 1 September 2001."

**Effect of Amendments.** — Session Laws 2000-51, s. 2, effective retroactively to October 1, 1999, in subsection (f), in the first sentence, substituted "section shall" for "section may" and added "or remediated to current standards, as defined in G.S. 130A-310.31," and inserted "or that the contamination has been remediated to current standards" in the second sentence.

Session Laws 2001-384, s. 2, effective September 1, 2001, inserted the first sentence of subsection (b), and in the second sentence of that subsection deleted "and certifies" following "approves" and substituted "a notarized copy of the approved Notice" for "the certified copy of the Notice"; in subsection (c), substituted "notarized" for "certified"; in subsection (f), substituted "unrestricted use standards" for "current standards, as defined in G.S. 130A-310.31" at

the end of the first sentence and substituted “unrestricted use” for “current” preceding “standards” in the second sentence; and added subsections (g) and (h). See editor’s note for applicability.

### **§ 143B-279.11. Recordation of residual petroleum from an underground storage tank.**

(a) The definitions set out in G.S. 143-215.94A and G.S. 143B-279.9 apply to this section. This section applies only to a cleanup pursuant to a risk-based remedial action plan that addresses environmental damage resulting from a discharge or release of petroleum from an underground storage tank pursuant to Part 2A of Article 21A of Chapter 143 of the General Statutes.

(b) The owner, operator, or other person responsible for a discharge or release of petroleum from an underground storage tank shall prepare and submit to the Department a proposed Notice that meets the requirements of this section. The proposed Notice shall be submitted to the Department (i) before the property is conveyed, or (ii) when the owner, operator, or other person responsible for the discharge or release requests that the Department issue a determination that no further action is required under the remedial action plan, whichever first occurs. The Notice shall be entitled “NOTICE OF RESIDUAL PETROLEUM”. The Notice shall include a description that would be sufficient as a description in an instrument of conveyance of the (i) real property on which the source of contamination is located and (ii) any real property on which contamination is located at the time the remedial action plan is approved and that was owned or controlled by any owner or operator of the underground storage tank or other responsible party at the time the discharge or release of petroleum is discovered or reported or at any time thereafter. The Notice shall identify the location of any residual petroleum known to exist on the real property at the time the Notice is prepared. The Notice shall also identify the location of any residual petroleum known, at the time the Notice is prepared, to exist on other real property that is a result of the discharge or release. The Notice shall set out any restrictions on the current or future use of the real property that are imposed by the Secretary to protect public health, the environment, or users of the property.

(c) If the contamination is located on more than one parcel or tract of land, the Department may require that the owner, operator, or other person responsible for the discharge or release prepare a composite map or plat that shows all parcels or tracts. If the contamination is located on one parcel or tract of land, the owner, operator, or other person responsible for the discharge or release may prepare a map or plat that shows the parcel but is not required to do so. A map or plat shall be prepared and certified by a professional land surveyor, shall meet the requirements of G.S. 47-30, and shall be submitted to the Department for approval. When the Department has approved a map or plat, it shall be recorded in the office of the register of deeds and shall be incorporated into the Notice by reference.

(d) The Department shall review the proposed Notice to determine whether the Notice meets the requirements of this section and rules adopted to implement this section and shall provide the owner, operator, or other person responsible for the discharge or release of petroleum from an underground storage tank with a notarized copy of the approved Notice. After the Department approves the Notice, the owner, operator, or other person responsible for the discharge or release of petroleum from an underground storage tank shall file a notarized copy of the approved Notice in the register of deeds office in the county or counties in which the real property is located (i) before the property is conveyed or (ii) within 30 days after the owner, operator, or other person responsible for the discharge or release receives notice from the Department that no further action is required under the remedial action plan, whichever

first occurs. If the owner, operator, or other person responsible for the discharge or release fails to file the Notice as required by this section, any determination by the Department that no further action is required is void. The owner, operator, or other person responsible for the discharge or release shall submit a certified copy of the Notice as filed in the register of deeds office to the Department.

(e) The register of deeds shall record the notarized copy of the approved Notice and index it in the grantor index under the names of the owners of the real property.

(f) In the event that the owner, operator, or other person responsible for the discharge or release fails to submit and file the Notice required by this section within the time specified, the Secretary may prepare and file the Notice. The costs thereof may be recovered by the Secretary from any responsible party. In the event that an owner of the real property who is not a responsible party submits and files the Notice required by this section, the owner may recover the reasonable costs thereof from any responsible party.

(g) A Notice filed pursuant to this section shall, at the request of the owner of the real property, be cancelled by the Secretary after the residual petroleum has been eliminated or remediated to unrestricted use standards. If requested in writing by the owner of the land, the Secretary shall send to the register of deeds of each county where the Notice is recorded a statement that the residual petroleum has been eliminated, or that the residual petroleum has been remediated to unrestricted use standards, and request that the Notice be cancelled of record. The Secretary's statement shall contain the names of the owners of the land as shown in the Notice and reference the plat book and page where the Notice is recorded. The register of deeds shall record the Secretary's statement in the deed books and index it on the grantor index in the names of the owners of the real property as shown in the Notice and on the grantee index in the name "Secretary of Environment and Natural Resources". The register of deeds shall make a marginal entry on the Notice showing the date of cancellation and the book and page where the Secretary's statement is recorded, and the register of deeds shall sign the entry. If a marginal entry is impracticable because of the method used to record, the register of deeds shall not be required to make a marginal entry. (2001-384, s. 3.)

**Editor's Note.** — Session Laws 2001-384, s. 13, provides; "This act becomes effective 1 September 2001. This act applies to any cleanup of a discharge or release of petroleum from an underground storage tank pursuant to Part 2A of Article 21A of Chapter 143 of the General Statutes except that land-use restrictions and

recordation of residual contamination are not required with respect to a discharge or release of petroleum for which the Department of Environment and Natural Resources issued a determination that no further action is required prior to 1 September 2001."

§§ 143B-279.12 through 143B-279.15: Reserved for future codification purposes.

## Part 2. Board of Natural Resources and Community Development.

§ 143B-280: Repealed by Session Laws 1989, c. 727, s. 2.

## Part 3. Wildlife Resources Commission.

§ 143B-281: Repealed by Session Laws 1989, c. 727, s. 2.

**§ 143B-281.1. Wildlife Resources Commission — transfer; independence preserved; appointment of Executive Director and employees.**

The Wildlife Resources Commission, as established by Chapters 75A, 113, and 143 of the General Statutes and other applicable laws of this State, is hereby transferred to the Department of Environment and Natural Resources by a Type II transfer as defined in G.S. 143A-6. The Wildlife Resources Commission shall exercise all its prescribed statutory powers independently of the Secretary of Environment and Natural Resources and, other provisions of this Chapter notwithstanding, shall be subject to the direction and supervision of the Secretary only with respect to the management functions of coordinating and reporting. Any other provisions of this Chapter to the contrary notwithstanding, the Executive Director of the Wildlife Resources Commission shall be appointed by the Commission and the employees of the Commission shall be employed as now provided in G.S. 143-246. (1989, c. 727, s. 4; 1997-443, s. 11A.119(a).)

**Editor's Note.** — Session Laws 1989, c. 727, s. 4 originally enacted this section as § 143B-279.6; it was recodified as § 143B-281.1 at the direction of the Revisor of Statutes.

Part 4. Environmental Management Commission.

**§ 143B-282. Environmental Management Commission — creation; powers and duties.**

(a) There is hereby created the Environmental Management Commission of the Department of Environment and Natural Resources with the power and duty to promulgate rules to be followed in the protection, preservation, and enhancement of the water and air resources of the State.

- (1) Within the limitations of G.S. 143-215.9 concerning industrial health and safety, the Environmental Management Commission shall have all of the following powers and duties:
  - a. To grant a permit or temporary permit, to modify or revoke a permit, and to refuse to grant permits pursuant to G.S. 143-215.1 and G.S. 143-215.108 with regard to controlling sources of air and water pollution.
  - b. To issue a special order pursuant to G.S. 143-215.2(b) and G.S. 143-215.110 to any person whom the Commission finds responsible for causing or contributing to any pollution of water within such watershed or pollution of the air within the area for which standards have been established.
  - c. To conduct and direct that investigations be conducted pursuant to G.S. 143-215.3 and G.S. 143-215.108(b)(5).
  - d. To conduct public hearings, institute actions in superior court, and agree upon or enter into settlements, all pursuant to G.S. 143-215.3.
  - e. To direct the investigation of any killing of fish and wildlife pursuant to G.S. 143-215.3.
  - f. To consult with any person proposing to construct, install, or acquire an air or water pollution source pursuant to G.S. 143-215.3 and G.S. 143-215.111.
  - g. To encourage local government units to handle air pollution problems and to provide technical and consultative assistance pursuant to G.S. 143-215.3 and G.S. 143-215.112.

- h. To review and have general oversight and supervision over local air pollution control programs pursuant to G.S. 143-215.3 and G.S. 143-215.112.
  - i. To declare an emergency when it finds a generalized dangerous condition of water or air pollution pursuant to G.S. 143-215.3.
  - j. To render advice and assistance to local government regarding floodways pursuant to G.S. 143-215.56.
  - k. To declare and delineate and modify capacity use areas pursuant to G.S. 143-215.13.
  - l. To grant permits for water use within capacity use areas pursuant to G.S. 143-215.15.
  - m. To direct that investigations be conducted when necessary to carry out duties regarding capacity use areas pursuant to G.S. 143-215.19.
  - n. To approve, disapprove and approve subject to conditions all applications for dam construction pursuant to G.S. 143-215.28; to require construction progress reports pursuant to G.S. 143-215.29.
  - o. To halt dam construction pursuant to G.S. 143-215.29.
  - p. To grant final approval of dam construction work pursuant to G.S. 143-215.30.
  - q. To have jurisdiction and supervision over the maintenance and operation of dams pursuant to G.S. 143-215.31.
  - r. To direct the inspection of dams pursuant to G.S. 143-215.32.
  - s. To modify or revoke any final action previously taken by the Commission pursuant to G.S. 143-214.1 and G.S. 143-215.107.
  - t. To have jurisdiction and supervision over oil pollution and dry-cleaning solvent use, contamination, and remediation pursuant to Article 21A of Chapter 143 of the General Statutes.
  - u. To administer the State's authority under 33 U.S.C. § 1341 of the federal Clean Water Act.
  - v. To approve Coastal Habitat Protection Plans as provided in G.S. 143B-279.8.
- (2) The Environmental Management Commission shall adopt rules:
- a. For air quality standards, emission control standards and classifications for air contaminant sources pursuant to G.S. 143-215.107;
  - b. For water quality standards and classifications pursuant to G.S. 143-214.1 and G.S. 143-215;
  - c. To implement water and air quality reporting pursuant to G.S. 143-215.68;
  - d. To be applied in capacity use areas pursuant to G.S. 143-215.14;
  - e. To implement the issuance of permits for water use within capacity use areas pursuant to G.S. 143-215.20;
  - f. Repealed by Session Laws 1983, c. 222, s. 3.
  - g. For the protection of the land and the waters over which this State has jurisdiction from pollution by oil, oil products and oil by-products pursuant to Article 21A of Chapter 143.
  - h. Governing underground tanks used for the storage of oil or hazardous substances pursuant to Articles 21, 21A, or 21B of Chapter 143 of the General Statutes, including inspection and testing of these tanks and certification of persons who inspect and test tanks.
  - i. To implement the provisions of Part 2A of Article 21 of Chapter 143 of the General Statutes.
  - j. To implement the provisions of Part 6 of Article 21A of Chapter 143 of the General Statutes.

- k. To implement basinwide water quality management plans developed pursuant to G.S. 143-215.8B.
- (3) The Commission is authorized to make such rules, not inconsistent with the laws of this State, as may be required by the federal government for grants-in-aid for water and air resources purposes which may be made available to the State by the federal government. This section is to be liberally construed in order that the State and its citizens may benefit from such grants-in-aid.
- (4) The Commission shall make rules consistent with the provisions of this Chapter. All rules adopted by the Commission shall be enforced by the Department of Environment and Natural Resources.
- (5) The Environmental Management Commission shall have the power to adopt rules with respect to any State laws administered under its jurisdiction so as to accept evidence of compliance with corresponding federal law or regulation in lieu of a State permit, or otherwise modify a requirement for a State permit, upon findings by the Commission, and after public hearings, that there are:
- a. Similar and corresponding or more restrictive federal laws or regulations which also require an applicant to obtain a federal permit based upon the same general standards or more restrictive standards as the State laws and rules require; and
  - b. That the enforcement of the State laws and rules would require the applicant to also obtain a State permit in addition to the required federal permit; and
  - c. That the enforcement of the State laws and rules would be a duplication of effort on the part of the applicant; and
  - d. Such duplication of State and federal permit requirements would result in an unreasonable burden not only on the applicant, but also on the citizens and resources of the State.

(b) The Environmental Management Commission shall submit quarterly written reports as to its operation, activities, programs, and progress to the Environmental Review Commission. The Environmental Management Commission shall supplement the written reports required by this subsection with additional written and oral reports as may be requested by the Environmental Review Commission. The Environmental Management Commission shall submit the written reports required by this subsection whether or not the General Assembly is in session at the time the report is due.

(c) The Environmental Management Commission shall implement the provisions of subsections (d) and (e) of 33 U.S.C. § 1313 by identifying and prioritizing impaired waters and by developing appropriate total maximum daily loads of pollutants for those impaired waters. The Commission shall incorporate those total maximum daily loads approved by the United States Environmental Protection Agency into its continuing basinwide water quality planning process.

(d) The Environmental Management Commission may adopt rules setting out strategies necessary for assuring that water quality standards are met by any point or nonpoint source or by any category of point or nonpoint sources that is determined by the Commission to be contributing to the water quality impairment. These strategies may include, but are not limited to, additional monitoring, effluent limitations, supplemental standards or classifications, best management practices, protective buffers, schedules of compliance, and the establishment of and delegations to intergovernmental basinwide groups.

(e) In appointing the members of the Commission, the appointing authorities shall make every effort to ensure fair geographic representation of the Commission. (1973, c. 1262, s. 19; 1975, c. 512; 1977, c. 771, s. 4; 1983, c. 222, s. 3; 1985, c. 551, s. 1; 1989, c. 652, s. 2; c. 727, s. 218(128); 1989 (Reg. Sess.,

1990), c. 1036, s. 1; 1991 (Reg. Sess., 1992), c. 990, s. 1; 1993, c. 348, s. 3; 1996, 2nd Ex. Sess., c. 18, s. 27.4(b); 1997-392, s. 2(a), (b); 1997-400, s. 3.2; 1997-443, s. 11A.119(a); 1997-458, ss. 8.4, 8.5; 1997-496, s. 16; 1998-212, s. 14.9H(f); 1999-328, s. 4.13; 2001-424, s. 19.13(a).)

**Editor's Note.** — Section 143-215.20, referred to in this section, was repealed by Session Laws 1987, c. 827, s. 173. Section 143-215.68, referred to in this section, was repealed by Session Laws 1987, c. 827, s. 188.

Subdivision (b)(5) of § 143-215.108, referred to in subdivision (1)(c) of this section, is now codified as § 143-215.108(c)(5).

Session Laws 1997-392, s. 5, as amended by Session Laws 2000-19, s. 17, provides: "This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. The Environmental Management Commission may adopt temporary rules to implement this act until 30 June 2001."

Session Laws 1997-400, s. 6.10, provides that, unless otherwise expressly provided, every agency to which the act applies shall adopt rules to implement the provisions of that act only in accordance with the provisions of Chapter 150B of the General Statutes, that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, that every agency to which the act applies that is authorized to adopt rules to implement the provisions of the act may adopt temporary rules to implement the provisions of the act, and that s. 6.10 of that act shall continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

Session Laws 1997-458, s. 8.6, effective August 27, 1997, provides: "The Environmental Management Commission may adopt rules to implement this Part as provided in Article 2A of Chapter 150B of the General Statutes. The Environmental Management Commission shall not adopt a temporary rule to implement this Part. The Environmental Management Commission shall report on its progress in implementing this Part as a part of each quarterly report the Environmental Management Commission makes to the Environmental Review Commission pursuant to G.S. 143B-282(b)."

**Neuse River Nutrient Sensitive Waters Management Strategy.** — Session Laws 1998-221, s. 1.9 provides: "**Commission to review the implementation of the Neuse River Nutrient Sensitive Waters (NSW) Management Strategy.** — The Commission shall review the implementation of the Neuse River Basin Nutrient Sensitive Waters (NSW) Management Strategy. As a part of this review, the Commission shall assess progress toward implementation of the Management Strategy, achievement of the nitrogen reduction goal established by Chapter 572 of the 1995 Session

Laws (1996 Regular Session) and any other milestones related to the effort to improve water quality in the Neuse River and Neuse estuary established by the Commission, and the impact of the implementation of the Neuse River Nutrient Sensitive Waters (NSW) Management Strategy on the regulated community. The Commission shall report the results of this review, including any recommendations relative to water quality in the Neuse River and Neuse estuary, to the Environmental Review Commission no later than 1 December 2000. The Commission shall conduct a second review and report the results, including any recommendations, to the Environmental Review Commission no later than 1 December 2001."

Session Laws 1998-221, ss. 1.1, 1.2, 1.3, 1.4, 1.6, 1.7, 1.8, and 1.14, effective November 5, 1998, provide:

Section 1.1. **Definitions.** — Unless otherwise required by the context, the following definitions apply throughout this Part:

- (1) "Commission" means the Environmental Management Commission.
- (2) "Department" means the Department of Environment and Natural Resources.
- (3) "Secretary" means the Secretary of Environment and Natural Resources.

- (4) "Temporary rule 15A NCAC 2B.0233" means 15A NCAC 2B.0233 (Neuse River Basin: Nutrient Sensitive Waters Management Strategy: Protection and Maintenance of Riparian Areas with Existing Forest Vegetation), adopted as a temporary rule by the Commission effective 22 July 1997, amended by the Commission effective 22 April 1998, and continued in effect by Section 1.2 of this act.

Section 1.2. **Permanent rule disapproved; temporary rule continued in effect.** — Pursuant to G.S. 150B-21.3(b), 15A NCAC 2B.0233 (Neuse River Basin: Nutrient Sensitive Waters Management Strategy: Protection and Maintenance of Riparian Areas with Existing Forest Vegetation), as amended by the Commission and approved by the Rules Review Commission on 19 February 1998, is disapproved as a permanent rule. Notwithstanding G.S. 150B-21.1(d), 15A NCAC 2B.0233 (Neuse River Basin: Nutrient Sensitive Waters Management Strategy: Protection and Maintenance of Riparian Areas with Existing Forest Vegetation), as amended by the Commission effective 22 April 1998, shall remain in effect as a temporary rule until the revised temporary rule required by Section 1.8 of this act becomes effective. The Commission and the Department shall imple-

ment temporary rule 15A NCAC 2B.0233 as provided in Section 1.3 of this act.

**Section 1.3. Implementation of the temporary rule: determination of surface waters; forest vegetation defined.** — (a) Until the effective date of the revised temporary rule that the Commission is required to adopt by Section 1.8 of this act, the Commission and the Department shall implement temporary rule 15A NCAC 2B.0233 as provided in this section.

(b) For purposes of implementing temporary rule 15A NCAC 2B.0233, the presence of surface waters in the Neuse River Basin, including intermittent streams, perennial streams, lakes, ponds, and estuaries shall be determined solely as provided in this subsection and subsection (c) of this section. Surface water is presumed to be present on a particular parcel or tract of land if surface water appears on either the most recent versions of the soil survey maps prepared by the Natural Resources Conservation Service of the United States Department of Agriculture or the most recent versions of the 1:24,000 scale (7.5 minute quadrangle) topographic maps prepared by the United States Geological Survey (USGS).

(c) The General Assembly recognizes that the soil survey maps and the USGS topographic maps may be in error in that these maps may indicate the presence of surface water where no surface water is actually present and may fail to indicate the presence of surface water where surface water is actually present. Any question as to the accuracy or application of the maps to a particular parcel or tract of land shall be referred to the Director of the Division of Water Quality of the Department. A determination of the Director as to the accuracy or application of the maps is subject to review as provided in Articles 3 and 4 of Chapter 150B of the General Statutes. The Commission shall make the final agency decision in a contested case involving a determination under this section. A determination of the presence of surface waters pursuant to this section applies only to the implementation of temporary rule 15A NCAC 2B.0233.

(d) As used in temporary rule 15A NCAC 2B.0233, "forest vegetation" is not defined by 15A NCAC 2B.0202 but instead means vegetation consisting of trees and woody perennial plants with associated herbaceous vegetation in conjunction with a defined surface layer consisting of leaves, branches, and other plant material. "Forest vegetation" includes mature and successional forest areas and cutover areas.

**Section 1.4. Alternatives to maintaining riparian buffers; compensatory mitigation fees.** — (a) The Commission shall establish a program to provide alternatives for persons who would otherwise be required to maintain existing riparian buffers and who can demonstrate that they have attempted to avoid and

minimize the loss of the riparian buffer and that there is no practical alternative to the loss of the buffer. This program is intended to allow these persons to perform compensatory mitigation in lieu of complying with the requirements of the revised temporary rule and permanent rule required by Section 1.8 of this act. Alternatives shall include, but are not limited to:

(1) Payment of a compensatory mitigation fee into the Riparian Buffer Restoration Fund.

(2) Donation of real property or of an interest in real property to the Department, another State agency, a unit of local government, or a private nonprofit conservation organization if both the donee organization and the donated real property or interest in real property are approved by the Department. The Department may approve a donee organization only if the donee agrees to maintain the real property or interest in real property as a riparian buffer. The Department may approve a donation of real property or an interest in real property only if the real property or interest in real property is either:

a. A riparian buffer that will provide protection of water quality that is equivalent to or greater than that provided by the riparian buffer that is lost; or

b. Will be used to restore, create, enhance, or maintain a riparian buffer that will provide protection of water quality that is equivalent to or greater than that provided by the riparian buffer that is lost.

(3) Establishment, restoration, or enhancement of a riparian buffer that is not otherwise required to be protected.

(b) Compensatory mitigation is only available for loss of a riparian buffer along an intermittent stream. Compensatory mitigation shall be conducted within the Neuse River Basin.

(c) The Commission shall establish a standard schedule of compensatory mitigation fees. The compensatory mitigation fee schedule shall be based on the area of the riparian buffer that is permitted to be lost and the cost to provide equivalent or greater protection of water quality by:

(1) Restoring existing riparian buffers.

(2) Acquiring land for and creation of new riparian buffers.

(3) Monitoring and maintaining the restored or created riparian buffers over time.

(d) The Commission may adopt rules to implement this section and may recommend any legislation it determines to be necessary or desirable to achieve the purposes of this section. Rules to implement this section shall not be codified as a part of 15A NCAC 2B.0233 but shall be set out as a separately numbered rule.

**Section 1.6. Delegation of riparian buffer**

**protection requirements to local governments.** — (a) The Commission may delegate responsibility for the implementation and enforcement of the State's riparian buffer protection requirements in the Neuse River Basin to units of local government that have the power to regulate land use. A delegation under this section shall not affect the jurisdiction of the Commission over State agencies and units of local government. Any unit of local government in the Neuse River Basin that has the power to regulate land use may request that responsibility for the implementation and enforcement of the State's riparian buffer protection requirements be delegated to the unit of local government. To this end, units of local government may adopt ordinances and regulations necessary to establish and enforce the State's riparian buffer protection requirements.

(b) Within 90 days after the Commission receives a complete application requesting delegation of responsibility for the implementation and enforcement of the State's riparian buffer protection requirement, the Commission shall review the application and notify the unit of local government that submitted the application whether the application has been approved, approved with modifications, or disapproved. The Commission shall not approve a delegation unless the Commission finds that local implementation and enforcement of the State's riparian buffer protection requirements will equal implementation and enforcement by the State.

(c) If the Commission determines that any unit of local government is failing to implement or enforce the State's riparian buffer protection requirements, the Commission shall notify the unit of local government in writing and shall specify the deficiencies in implementation and enforcement. If the local government has not corrected the deficiencies within 90 days after the unit of local government receives the notification, the Commission shall rescind delegation and shall implement and enforce the State's riparian buffer protection program. If the unit of local government indicates that it is willing and able to resume implementation and enforcement of the State's riparian buffer protection requirements, the unit of local government may reapply for delegation under this section.

(d) The Division of Water Quality in the Department shall provide technical assistance to units of local government in the development, implementation, and enforcement of the State's riparian buffer protection requirements.

(e) The Commission may adopt rules to implement this section and may recommend any legislation it determines to be necessary or desirable to achieve the purposes of this section. Rules to implement this section shall not be codified as a part of 15A NCAC 2B.0233 but

shall be set out as a separately numbered rule.

**Section 1.7. Recognition of vested development rights.** — (a) Vested rights recognized or established under the common law or by G.S. 153A-344(b), 153A-344.1, 160A-385(b), or 160A-385.1 shall include the right as provided in this section, to undertake and complete development in the Neuse River Basin without application of temporary rule 15A NCAC 2B.0233 and the revised temporary rule required by Section 1.8 of this act. The Commission and the Department shall not apply temporary rule 15A NCAC 2B.0233 and the revised temporary rule required by Section 1.8 of this act to development with vested rights recognized or established under G.S. 153A-344(b), 153A-344.1, 160A-385(b), or 160A-385.1 prior to 22 July 1997. The Commission and the Department shall not apply temporary rule 15A NCAC 2B.0233 and the revised temporary rule required by Section 1.8 of this act to development with vested rights recognized or established under the common law prior to the date this Part becomes effective if the Commission has issued a certification pursuant to G.S. 143B-282(a)(1)u. prior to 22 July 1997.

(b) The Commission shall not adopt rules that confer or restrict a vested right to undertake or complete development.

(c) It is the intent of the General Assembly that this section apply only to the particular circumstances that are the subject of this Part. This section does not establish a precedent as to the application of vesting under a zoning or land-use planning program administered by a local government to any other environmental program.

**Section 1.8. Revision of temporary rule 15A NCAC 2B.0233; adoption of a permanent rule to replace the temporary rule.** — (a) The Commission shall revise temporary rule 15A NCAC 2B.0233 in accordance with this section. The Commission shall:

(1) Establish a method for determining the presence of surface waters on a particular parcel or tract of land in the Neuse River Basin. The Commission shall establish a method that is scientifically valid, easily understandable, efficient, consistent, reliable, and cost-effective, including a method for resolving disputes regarding the presence of surface waters on any particular parcel or tract of land.

(2) Establish methods to determine the point from which to measure the landward extent of zones within a protected riparian buffer appropriate to the different regions of the Neuse River Basin.

(3) Determine, based on drainage area, those segments of intermittent streams to which the riparian buffer protection requirements do not apply. The Commission may establish different drainage areas for seg-

ments of intermittent streams located in different parts of the Neuse River Basin on the basis of topography and other relevant factors.

(4) Define forest vegetation.

(5) Establish a clearly defined set of exemptions and uses that will be allowed within a riparian area.

(6) Establish criteria to determine whether there exists a practical alternative to the loss of the riparian buffer.

(b) All provisions that the Commission finds to be necessary to revise temporary rule 15A NCAC 2B.0233 and to implement the revised temporary rule shall be set out in the revised temporary rule. The Commission and the Department may develop and use guidance documents and other statements that concern only the internal management of the Commission and the Department. Neither the Commission nor the Department may develop or use any guidance document or other statement that directly or substantially affects the procedural or substantive rights or duties of any person not employed by the Commission or the Department unless those documents are set out in rules adopted in accordance with the provisions of Article 2A of Chapter 150B of the General Statutes.

(c) The Commission shall develop revisions to temporary rule 15A NCAC 2B.0233 with the assistance and advice of the Stakeholder Advisory Committee appointed for that purpose as provided in Section 1.10 of this act. Notwithstanding G.S. 150B-21.1(d), the revised temporary rule shall not expire until the permanent rule required by subsection (d) of this section becomes effective.

(d) Once temporary rule 15A NCAC 2B.0233 has been revised as required by this section, the Commission shall proceed, in accordance with Article 2A of Chapter 150B of the General Statutes, with the adoption of a permanent rule to replace the revised temporary rule.

**Section 1.14. Commission to establish riparian buffer maintenance and restoration goal.** — The Commission shall establish a goal for the maintenance and restoration of riparian buffers that is consistent with the thirty percent (30%) nitrogen reduction goal for the Neuse River estuary established by Chapter 572 of the 1995 Session Laws (1996 Regular Session).

**Emission of Nitrogen Oxides.** — Session Laws 1999-328, s. 4.9, provides that the Environmental Management Commission shall initiate rule making to regulate the emissions of nitrogen oxides (NO<sub>x</sub>) from complex sources pursuant to G.S. 143-215.109 no later than 1 October 1999. The Environmental Management Commission shall report on the progress of this rule making as a part of each quarterly report the Commission makes to the Environ-

mental Review Commission pursuant to G.S. 143B-282(b).

Session Laws 1999-328, s. 5.1, provides that this act shall not be construed to obligate the General Assembly to appropriate any funds to implement the provisions of this act. Every State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency.

Session Laws 1999-328, s. 5.3 contains a severability clause.

**Water Quality for the Cape Fear, Catawba and Tar-Pamlico River Basins.** — Session Laws 1999-329, s. 7.1, provides that, notwithstanding G.S. 150B-21.1(a)(2) and Section 8.6 of S.L. 1997-458, the Environmental Management Commission may adopt temporary rules to protect water quality standards and uses as required to implement basinwide water quality management plans for the Cape Fear, Catawba, and Tar-Pamlico River Basins pursuant to G.S. 143-214.1, 143-214.7, 143-215.3, and 143B-282. The Commission is to provide notice and the opportunity for a hearing prior to the adoption of a temporary rule under this subsection. Section 7.2 provides that Section 7.1 is to continue in effect until July 1, 2001. Section 7.3 provides that this Part is not to be construed to invalidate any development and implementation of basinwide water quality management plans by the Environmental Management Commission and the Department of Environment and Natural Resources occurring prior to the effective date of the Part (July 21, 1999).

**Municipal and Domestic Wastewater Collection.** — Session Laws 1999-329, s. 11.1, directs the Environmental Management Commission to develop engineering standards governing municipal and domestic wastewater collection systems that will allow interconnection of these systems on a regional basis and, further, to report on its progress in developing the engineering standards required by this section as a part of each quarterly report the Commission makes to the Environmental Review Commission pursuant to G.S. 143B-282(b).

Session Laws 2001-452, s. 1.1, effective October 28, 2001, repealed Session Laws 1999-329, s. 11.2, which had directed the Environmental Management Commission to develop and implement a permit program for municipal and domestic wastewater collection systems on a systemwide basis over a five-year period beginning 1 July 2000, and had required the Commission to make a quarterly report on its progress.

**Lagoon Conversion Plan.** — Session Laws 1999-329, s. 13.4, directs the Environmental Management Commission to report on its progress in implementing the Lagoon Conversion Plan pursuant to the letter from Governor

James B. Hunt, Jr. to Dr. David Moreau, Chairman, Environmental Management Commission, dated 13 May 1999, as a part of each quarterly report it makes to the Environmental Review Commission pursuant to G.S. 143B-282(b).

Session Laws 1999-329, s. 13.8, contains a severability clause.

**Dry-Cleaning.** — Session Laws 2000-19, s. 21, authorizes the Secretary of Environment and Natural Resources to study alternative dry-cleaning processes and equipment, evaluating the benefits and costs as well as the feasibility of installing and implementing these, and to make a final report to the Environmental Review Commission no later than September 1, 2001, with findings, recommendations, and any legislative proposals.

Session Laws 2000-19, s. 22, as amended by Session Laws 2001-265, s. 4, provides: "This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. The Environmental Management Commission and the Commission on Health Services may adopt temporary rules to implement the provisions of this act until 1 July 2002."

Session Laws 2000-19, s. 20, contains a severability clause.

**Tar-Pamlico River Basin-Nutrient Sensitive Waters Management Strategy.** — Session Laws 2001-355, ss. 1 to 6 provide for the implementation of the Tar-Pamlico River Basin-Nutrient Sensitive Waters Management Strategy: Agricultural Nutrient Control Strategy, as adopted by the Environmental Management Commission on October 12, 2000 and approved by the Rules Review Commission on November 20, 2000, to become effective on September 1, 2001. A Local Advisory Committee is to be appointed in each county or watershed, as specified in the Basin Oversight Committee, within the Tar-Pamlico River Basin; these committees terminate upon a finding by the Environmental Management Commission that the long-term maintenance of nutrient loads is assured. Under the act, the Soil and Water Commission is to approve best management practices for pasture-based production or management of livestock, including a point system applicable thereto. Harvesting of trees is also addressed. Furthermore, the Basin Oversight Committee is to develop a nutrient loading accounting methodology, to be approved by the Environmental Management Commission no later than 1 March 2003. The Environmental Management Commission may adopt and revise a temporary rule incorporating the provisions of the act until a permanent rule can be adopted. Session Laws 2001-355, s. 7, provides that ss. 2 and 3 of the act expire when the temporary rule becomes effective, and s. 4 expires upon a finding that the long-term main-

tenance of nutrient loads in the Tar-Pamlico River Basin is assured.

**Catawba River Basin.** — Session Laws 2001-418, s. 4(a) provides: "Notwithstanding G.S. 150B-21.1(d), temporary rules 15A NCAC 2B.0243 and 15A NCAC 2B.0244, which were adopted pursuant to Section 7.1 of S.L. 1999-329 and which became effective on or before 1 July 2001, shall continue in effect until 1 September 2003 in order to provide sufficient time for the Environmental Management Commission to further consult with businesses and industries, local governments, landowners, and other interested or potentially affected persons in the upper and lower Catawba River Basin as to the appropriate scope of permanent rules to protect water quality and riparian buffers in that river basin. In developing permanent rules, the Commission shall consider whether riparian buffers on the mainstem of the Catawba River and on lake shorelines are adequate to protect water quality in the river and whether riparian buffer protection requirements should or should not be extended to some or all of the tributary streams in the river basin, taking into account the sources of water quality degradation in the river, the topography of the land in the river basin, and other relevant factors."

Session Laws 2001-418, s. 4(b), provides: "Vested rights recognized or established under the common law or by G.S. 153A-344(b), 153A-344.1, 160A-385(b), or 160A-385.1 shall include the right, as provided in this subsection, to undertake and complete development in the Catawba River Basin without application of temporary rule 15A NCAC 2B.0243. The Commission and the Department shall not apply temporary rule 15A NCAC 2B.0243 to development with vested rights recognized or established under G.S. 153A-344(b), 153A-344.1, 160A-385(b), or 160A-385.1 prior to 1 July 2001. The Commission and the Department shall not apply temporary rule 15A NCAC 2B.0243 to development with vested rights recognized or established under the common law prior to the date this section [s. 4 of Session Laws 2001-418] becomes effective if the Commission has issued a certification pursuant to G.S. 143B-282(a)(1)u. prior to 1 July 2001. The Commission shall not adopt or enforce rules that confer or restrict a vested right to undertake or complete development. It is the intent of the General Assembly that this subsection [s. 4(b)] apply only to the particular circumstances that are the subject of this section [s. 4 of Session Laws 2001-418]. This subsection [s. 4(b)] does not establish a precedent as to the application of vesting under a zoning or land-use planning program administered by a local government or to any other environmental program."

Session Laws 2001-416, s. 4(c), provides:

“Notwithstanding G.S. 150B-21.3(a), this section [s.4 of Session Laws 2001-416] shall not be construed to authorize the adoption of additional temporary rules related to protection of water quality and riparian buffers.”

Session Laws 2001-424, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2001.’”

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, s. 19.13(a), effective September 26, 2001, and applicable to appointments made on or after that date, added subsection (e).

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For comment, “Legal Analysis of the Constitutionality of the Water Supply Watershed Protection Act of 1989 and the Hyde Bill,” see 29 Wake Forest L. Rev. 1279 (1994).

#### CASE NOTES

**The duties of the Environmental Management Commission are administrative or executive** in character and have no relation to the function of the legislative branch of government, which is to make laws. State ex

rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982).

**Cited in** In re Environmental Mgt. Comm’n, 80 N.C. App. 1, 341 S.E.2d 588 (1986).

### § 143B-282.1. Environmental Management Commission — quasi-judicial powers; procedures.

(a) With respect to those matters within its jurisdiction, the Environmental Management Commission shall exercise quasi-judicial powers in accordance with the provisions of Chapter 150B of the General Statutes. This section and any rules adopted by the Environmental Management Commission shall govern such proceedings:

- (1) Exceptions to recommended decisions in contested cases shall be filed with the Secretary within 30 days of the receipt by the Secretary of the official record from the Office of Administrative Hearings, unless additional time is allowed by the chairman of the Commission.
- (2) Oral arguments by the parties may be allowed by the chairman of the Commission upon request of the parties.
- (3) Deliberations of the Commission shall be conducted in its public meeting unless the Commission determines that consultation with its counsel should be held in a closed session pursuant to G.S. 143-318.11.

(b) The final agency decision in contested cases that arise from civil penalty assessments shall be made by the Commission. In the evaluation of each violation, the Commission shall recognize that harm to the natural resources of the State arising from the violation of standards or limitations established to protect those resources may be immediately observed through damaged resources or may be incremental or cumulative with no damage that can be immediately observed or documented. Penalties up to the maximum authorized may be based on any one or combination of the following factors:

- (1) The degree and extent of harm to the natural resources of the State, to the public health, or to private property resulting from the violation;
- (2) The duration and gravity of the violation;
- (3) The effect on ground or surface water quantity or quality or on air quality;
- (4) The cost of rectifying the damage;
- (5) The amount of money saved by noncompliance;
- (6) Whether the violation was committed willfully or intentionally;
- (7) The prior record of the violator in complying or failing to comply with programs over which the Environmental Management Commission has regulatory authority; and
- (8) The cost to the State of the enforcement procedures.

(c) The chairman shall appoint a Committee on Civil Penalty Remissions from the members of the Commission. No member of the Committee on Civil Penalty Remissions may hear or vote on any matter in which he has an economic interest. The Committee on Civil Penalty Remissions shall make the final agency decision on remission requests. In determining whether a remission request will be approved, the Committee shall consider the recommendation of the Secretary and the following factors:

- (1) Whether one or more of the civil penalty assessment factors in subsection (b) of this section were wrongly applied to the detriment of the petitioner;
- (2) Whether the violator promptly abated continuing environmental damage resulting from the violation;
- (3) Whether the violation was inadvertent or a result of an accident;
- (4) Whether the violator had been assessed civil penalties for any previous violations;
- (5) Whether payment of the civil penalty will prevent payment for the remaining necessary remedial actions.

(d) The Committee on Civil Penalty Remissions may remit the entire amount of the penalty only when the violator has not been assessed civil penalties for previous violations, and when payment of the civil penalty will prevent payment for the remaining necessary remedial actions.

(e) If any civil penalty has not been paid within 30 days after the final agency decision or court order has been served on the violator, the Secretary of Environment and Natural Resources shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment.

(f) As used in this section, "Secretary" means the Secretary of Environment and Natural Resources. (1989 (Reg. Sess., 1990), c. 1036, s. 2; 1993 (Reg. Sess., 1994), c. 570, s. 5; 1995 (Reg. Sess., 1996), c. 743, s. 21; 1997-443, s. 11A.119(a).)

### **§ 143B-283. Environmental Management Commission — members; selection; removal; compensation; quorum; services.**

(a) The Environmental Management Commission shall consist of 13 members appointed by the Governor. The Governor shall select the members so that the membership of the Commission shall consist of:

- (1) One who shall be a licensed physician with specialized training and experience in the health effects of environmental pollution;
- (2) One who shall, at the time of appointment, be actively connected with the Commission for Health Services or local board of health or have experience in health sciences;
- (3) One who shall, at the time of appointment, be actively connected with or have had experience in agriculture;
- (4) One who shall, at the time of appointment, be a registered engineer with specialized training and experience in water supply or water or air pollution control;
- (5) One who shall, at the time of appointment, be actively connected with or have had experience in the fish and wildlife conservation activities of the State;
- (6) One who shall, at the time of appointment, have special training and scientific expertise in hydrogeology or groundwater hydrology;
- (7) Three members interested in water and air pollution control, appointed from the public at large;

- (8) One who shall, at the time of appointment, be actively employed by, or recently retired from, an industrial manufacturing facility and knowledgeable in the field of industrial air and water pollution control;
- (9) One who shall, at the time of appointment, be actively connected with or have had experience in pollution control problems of municipal or county government;
- (10) One who shall, at the time of appointment, have special training and scientific expertise in air pollution control and the effects of air pollution; and
- (11) One who shall, at the time of appointment, have special training and scientific expertise in freshwater, estuarine, marine biological, or ecological sciences.

(b) Members appointed by the Governor shall serve terms of office of six years. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term. The Governor may reappoint a member of the Commission to an additional term if, at the time of the reappointment, the member qualifies for membership on the Commission under subsection (a) of this section.

(b1) The Governor shall have the power to remove any member of the Commission from office for misfeasance, malfeasance, or nonfeasance in accordance with the provisions of G.S. 143B-13 of the Executive Organization Act of 1973.

(b2) The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

(b3) A majority of the Commission shall constitute a quorum for the transaction of business.

(b4) All clerical and other services required by the Commission shall be supplied by the Secretary of Environment and Natural Resources.

(c) Nine of the members appointed by the Governor under this section shall be persons who do not derive any significant portion of their income from persons subject to permits or enforcement orders under this Chapter. The Governor shall require adequate disclosure of potential conflicts of interest by members. The Governor, by executive order, shall promulgate criteria regarding conflicts of interest and disclosure thereof for determining the eligibility of persons under this section, giving due regard to the requirements of federal legislation, and for this purpose may promulgate rules, regulations or guidelines in conformance with those established by any federal agency interpreting and applying provisions of federal law.

(d) In addition to the members designated by subsection (a) of this section, the General Assembly shall appoint six members, three upon the recommendation of the Speaker of the House of Representatives, and three upon the recommendation of the President Pro Tempore of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. Members appointed by the General Assembly shall serve terms of two years. (1973, c. 1262, s. 20; 1977, c. 771, s. 4; 1979, 2nd Sess., c. 1158, ss. 5, 6; 1981 (Reg. Sess., 1982), c. 1191, s. 19; 1989, c. 315; c. 727, s. 218(129); 1995, c. 490, s. 18; 1997-381, s. 1; 1997-443, s. 11A.119(a); 1998-217, s. 17; 2000-172, ss. 4.1, 4.2; 2001-486, s. 2.16.)

**Editor's Note.** — Session Laws 2000-172, s. 8.3 provides: "Section 4.1 of this act is effective upon ratification and applicable retroactively to all appointments by the Governor to the Environmental Management Commission." The act

was ratified July 10, 2000.

Session Laws 2000-172, s. 8.2, contains a severability clause.

**Effect of Amendments.** — Session Laws 2000-172, s. 4.1 rewrote subsection (b); and

designated the former second through fifth paragraphs in subsection (b) as present subsections (b1) through (b4), respectively. For effective date and applicability of this amendment, see the editor's note.

Session Laws 2000-172, s. 4.2, effective August 2, 2000, in subsection (d), inserted "of this section" in the first sentence, and rewrote the former last two sentences as the present last sentence.

Session Laws 2001-486, s. 2.16, effective December 16, 2001, in the first sentence of subsection (d), substituted "six" for "four," and twice substituted "three" for "two."

**Legal Periodicals.** — For survey of 1981 constitutional law, see 60 N.C.L. Rev. 1272 (1982).

For 1997 legislative survey, see 20 Campbell L. Rev. 443.

#### CASE NOTES

**Constitutionality of Former Version of Subsection (d).** — Subsection (d) of this section, prior to its amendment by the 1981 (Reg. Sess., 1982) act, providing for the appointment of two representatives and two senators to membership on the Environmental Management Commission, violated N.C. Const., Art. I, § 6, the separation of powers provision. State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982).

The legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality. State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982).

**Cited** in North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983).

### § 143B-284. Environmental Management Commission — officers.

The Environmental Management Commission shall have a chairman and a vice-chairman. The chairman shall be designated by the Governor from among the members of the Commission to serve as chairman at the pleasure of the Governor. The vice-chairman shall be elected by and from the members of the Commission and shall serve for a term of two years or until the expiration of his regularly appointed term whichever comes first. (1973, c. 1262, s. 21.)

### § 143B-285. Environmental Management Commission — meetings.

The Environmental Management Commission shall meet at least once in each quarter and may hold special meetings at any time and place within the State at the call of the chairman or upon the written request of at least five members. (1973, c. 1262, s. 22.)

§§ 143B-285.1 through 143B-285.9: Reserved for future codification purposes.

#### Part 4A. Governor's Waste Management Board.

§§ 143B-285.10 through 143B-285.15: Repealed by Session Laws 1993, c. 501, s. 1.

**Cross References.** — As to creation of a Pollution Prevention Advisory Council, see Editor's Note under § 143B-285.23.

§§ 143B-285.16 through 143B-285.19: Reserved for future codification.

#### Part 4B. Office of Environmental Education.

##### § 143B-285.20. Short title.

This Part shall be known and cited as the Environmental Education Act of 1993. (1993, c. 501, s. 28.)

##### § 143B-285.21. Declaration of purpose.

The purpose of this Part shall be to encourage, promote, and support the development of programs, facilities, and materials for the purpose of environmental education in North Carolina. (1993, c. 501, s. 28.)

##### § 143B-285.22. Creation.

There is hereby created a North Carolina Office of Environmental Education (hereinafter referred to as "Office") within the Department of Environment and Natural Resources. (1993, c. 501, s. 28; 1997-443, s. 11A.119(a).)

##### § 143B-285.23. Powers and duties of the Secretary of Environment and Natural Resources.

The Secretary of Environment and Natural Resources shall:

- (1) Establish an Office of Environmental Education to:
  - a. Serve as a clearinghouse of environmental information for the State.
  - b. Plan for the Department's future needs for environmental education materials and programs.
  - c. Maintain a computerized database of existing education materials and programs within the Department.
  - d. Maintain a speaker's bureau of environmental specialists to address environmental concerns and issues in communities across the State.
  - e. Evaluate opportunities for establishing regional environmental education centers.
  - f. Administer the Project Tomorrow Award Program to encourage school children to discover and explore ways to protect the environment.
  - g. Assist the Department of Public Instruction in integrating environmental education into course curricula.
  - h. Develop and implement a grants and award program for environmental education projects in schools and communities.
- (2) Coordinate, through technical assistance and staff support and with participation of the Department of Public Instruction and other relevant agencies, institutions, and citizens, the planning and implementation of a statewide program of environmental education.
- (3) Be responsible for such matters as the purchase of educational equipment, materials, and supplies; the construction or modification of facilities; and the employment of consultants and other personnel necessary to carry out the provisions of this Part.
- (4) Encourage coordination between the various State and federal agencies, citizens groups, and the business and industrial community, in the dissemination of environmental information and education.

- (5) Utilize existing programs, educational materials, or facilities, both public and private, wherever feasible. (1993, c. 501, s. 28; 1997-443, s. 11A.119(a).)

### § 143B-285.24. Grants and awards.

The objective of grants and awards made under the provisions of this Part shall be to promote the further development of local and regional environmental education and information dissemination to aid especially, but not be limited to, school-age children. The Office shall recommend each year to the Governor recipients for the Project Tomorrow Award, which the Governor shall award for outstanding environmental projects by elementary schools in North Carolina. (1993, c. 501, s. 28.)

### § 143B-285.25. Liaison between the Office of Environmental Education and the Department of Public Instruction.

The Superintendent of the Department of Public Instruction shall identify an environmental education liaison within the Office of Instructional Services of the Department of Public Instruction to:

- (1) Coordinate environmental education within the State curriculum and among the Department and other State agencies.
- (2) Conduct teacher training in environmental education topics in conjunction with Department and other State agencies.
- (3) Coordinate and integrate topics within the various curriculum areas of the standard course of study.
- (4) Promote awareness of environmental issues to the public and to the school communities, including students, teachers, and administrators.
- (5) Establish a repository of environmental education instructional materials and disseminate information on the availability of these materials to schools.
- (6) Promote and facilitate the sharing of information through electronic networks to all schools. (1993, c. 501, s. 28.)

### Part 5. Marine Fisheries Commission.

§§ 143B-286 through 143B-289: Repealed by Session Laws 1987, c. 641, s. 1.

### Part 5A. Marine Fisheries Commission.

§§ 143B-289.1 through 143B-289.12: Repealed by Session Laws 1997-400, s. 6.3.

**Editor's Note.** — Session Laws 1997-400, s. 6.3, effective September 1, 1997, provided: "Part 5A of Article 7 of Chapter 143B of the General Statutes is repealed, except that G.S. 143B-289.19, as amended by Section 2 of S.L. 1997-286, is not repealed but is recodified as G.S. 143B-289.40 within Part 5C of Article 7 of Chapter 143B of the General Statutes."

Part 5B. Office of Marine Affairs.

§§ **143B-289.19 through 143B-289.23**: Recodified as §§ 143B-289.40 through 143B-289.44 by Session Laws 1997-400, ss. 6, 6.3(b).

Part 5C. Division of North Carolina Aquariums.

§ **143B-289.40. Division of North Carolina Aquariums — creation.**

The Division of North Carolina Aquariums is created in the Department of Environment and Natural Resources. (1985, c. 202, s. 3; 1995, c. 509, s. 98; 1997-286, s. 2; 1997-400, s. 6.3(a), (b); 1997-443, s. 11A.119(b).)

**Editor's Note.** — This section is former G.S. 143B-390.1, as recodified by Session Laws 1995, c. 509, s. 98 as 143B-289.19. The historical citation to the former section has been

added to this section as recodified. This section was subsequently recodified as 143B-289.40 by Session Laws 1997-400, s. 6.3.

§ **143B-289.41. Division of North Carolina Aquariums — organization; powers and duties.**

(a) The Division of North Carolina Aquariums shall be organized as prescribed by the Secretary of Environment and Natural Resources and shall exercise the following powers and duties:

(1) Repealed by Session Laws 1991, c. 320, s. 3.

(1a) Establish and maintain the North Carolina Aquariums.

(1b) Administer the operations of the North Carolina Aquariums, such administrative duties to include, but not be limited to the following:

- a. Adopt goals and objectives for the Aquariums and review and revise these goals and objectives periodically.
- b. Review and approve requests for use of the Aquarium facilities and advise the Secretary of Environment and Natural Resources on the most appropriate use consistent with the goals and objectives of the Aquariums.
- c. Continually review and evaluate the types of projects and programs being carried out in the Aquarium facilities and determine if the operation of the facilities is in compliance with the established goals and objectives.
- d. Recommend to the Secretary of Environment and Natural Resources any policies and procedures needed to assure effective staff performance and proper liaison among Aquarium facilities in carrying out the overall purposes of the Aquarium programs.
- e. Review Aquarium budget submissions to the Secretary of Environment and Natural Resources.
- f. Recruit and recommend to the Secretary of Environment and Natural Resources candidates for the positions of directors of the Aquariums.
- g. Create local advisory committees in accordance with the provisions of G.S. 143B-289.43.

(1c) Notwithstanding Article 3A of Chapter 143 of the General Statutes, and G.S. 143-49(4), dispose of any exhibit, exhibit component, or object from the collections of the North Carolina Aquariums by sale,

lease, or trade. A sale, lease, or trade under this subdivision shall be conducted in accordance with generally accepted practices for zoos and aquariums that are accredited by the American Association of Zoos and Aquariums. After deducting the expenses attributable to the sale or lease, the net proceeds of any sale or lease shall be credited to the North Carolina Aquariums Fund.

(2), (3) Repealed by Session Laws 1993, c. 321, s. 28(e).

(4) to (6) Repealed by Session Laws 1991, c. 320, s. 3.

(7) Assume any other powers and duties assigned to it by the Secretary.

(b) The Secretary may adopt any rules and procedures necessary to implement this section. (1985, c. 202, s. 3; 1991, c. 320, s. 3; 1993, c. 321, ss. 28(d), 28(e); 1997-286, s. 3; 1997-400, s. 6.3(b), (c); 1997-443, ss. 11A.119(a), 11A.123; 1999-49, s. 1.)

**Editor's Note.** — This section was formerly G.S. 143B-390.2. It was recodified as 143B-289.20 by Session Laws 1993, c. 321, s. 28(d), effective July 1, 1993. This section was subsequently recodified as 143B-289.41 by Session Laws 1997-400, s. 6.3(b).

### § 143B-289.42. North Carolina Aquariums; purpose.

The purpose of establishing and maintaining the North Carolina Aquariums is to promote an awareness, understanding, and appreciation of the diverse natural and cultural resources associated with North Carolina's oceans, estuaries, rivers, streams, and other aquatic environments. (1991, c. 320, s. 4; 1993, c. 321, s. 28(d); 1997-400, s. 6.3(b).)

**Editor's Note.** — This section was formerly G.S. 143B-390.3. It was recodified as 143B-289.21 by Session Laws 1993, c. 321, s. 28(d), effective July 1, 1993. This section was subsequently recodified as 143B-289.42 by Session Laws 1997-400, s. 6.3(b).

### § 143B-289.43. Local advisory committees; duties; membership.

Local advisory committees created pursuant to G.S. 143B-289.41(a)(1b) shall assist each North Carolina Aquarium in its efforts to establish projects and programs and to assure adequate citizen-consumer input into those efforts. Members of these committees shall be appointed by the Secretary of Environment and Natural Resources for three-year terms from nominations made by the Director of the Office of Marine Affairs. Each committee shall select one of its members to serve as chairperson. Members of the committees shall serve without compensation for services or expenses. (1991, c. 320, s. 4; 1993, c. 321, ss. 28(d), 28(f); 1997-286, s. 4; 1997-400, s. 6.3(b), (d); 1997-443, ss. 11A.119(a), 11A.123.)

**Editor's Note.** — This section was formerly G.S. 143B-390.4. It was recodified as 143B-289.22 by Session Laws 1993, c. 321, s. 28, effective July 1, 1993. This section was subsequently recodified as 143B-289.43 by Session Laws 1997-400, s. 6.3(b).

### § 143B-289.44. North Carolina Aquariums; fees; fund.

(a) Fees. — The Secretary of Environment and Natural Resources may adopt a schedule of uniform entrance fees for the North Carolina Aquariums.

(b) Fund. — The North Carolina Aquariums Fund is hereby created as a special and nonreverting fund. The North Carolina Aquariums Fund shall be used for repair, maintenance, educational exhibit construction, and opera-

tional expenses at existing aquariums and to match private funds that are raised for these purposes.

(c) Disposition of Fees. — All entrance fee receipts shall be credited to the North Carolina Aquariums Fund. The Secretary of Environment and Natural Resources may expend monies from the North Carolina Aquariums Fund only upon the authorization of the General Assembly.

(d) The Division of North Carolina Aquariums shall submit to the Joint Legislative Commission on Governmental Operations, the House and Senate Appropriations Subcommittees on Natural and Economic Resources, and the Fiscal Research Division by September 30 of each year a report on the North Carolina Aquariums Fund that shall include the source and amounts of all funds credited to the Fund and the purpose and amount of all expenditures from the Fund during the prior fiscal year. (1997-286, s. 5; 1997-400, s. 6.3(b); 1997-443, s. 11A.119(b); 1999-49, s. 2.)

**Editor's Note.** — This section was formerly numbered 143B-289.23. It was recodified as 143B-289.44 by Session Laws 1997-400, s. 6.3(b).

Session Laws 1999-49, s. 3, provides that the first report required by G.S. 143B-289.44(d), as enacted by 1999-49, s. 2, shall be due on September 30, 2000.

**§§ 143B-289.45 through 143B-289.49:** Reserved for future codification purposes.

### Part 5D. Marine Fisheries Commission.

#### § 143B-289.50. Definitions.

(a) As used in this part:

- (1) "Commission" means the Marine Fisheries Commission.
- (2) "Department" means the Department of Environment and Natural Resources.
- (3) "Fisheries Director" means the Director of the Division of Marine Fisheries of the Department of Environment and Natural Resources.
- (4) "Secretary" means the Secretary of Environment and Natural Resources.

(b) The definitions set out in G.S. 113-129 and G.S. 113-130 shall apply throughout this Part. (1997-400, s. 2.1; 1997-443, s. 11A.123.)

**Editor's Note.** — Sections 143B-289.20 through 143B-289.31, as enacted by Session Laws 1997-400, s. 2.1, as Part 5B of Article 7,

have been recodified as sections 143B-289.50 through 143B-289.61, Part 5D of Article 7, at the direction of the Revisor of Statutes.

#### § 143B-289.51. Marine Fisheries Commission — creation; purposes.

(a) There is hereby created the Marine Fisheries Commission in the Department of Environment and Natural Resources.

(b) The functions, purposes, and duties of the Marine Fisheries Commission are to:

- (1) Manage, restore, develop, cultivate, conserve, protect, and regulate the marine and estuarine resources within its jurisdiction, as described in G.S. 113-132.
- (2) Implement the laws relating to coastal fisheries, coastal fishing, shellfish, crustaceans, and other marine and estuarine resources enacted by the General Assembly by the adoption of rules and policies,

- to provide a sound, constructive, comprehensive, continuing, and economical coastal fisheries program directed by citizens who are knowledgeable in the protection, restoration, proper use, and management of marine and estuarine resources.
- (3) Implement management measures regarding ocean and marine fisheries in the Atlantic Ocean consistent with the authority conferred on the State by the United States.
  - (4) Advise the State regarding ocean and marine fisheries within the jurisdiction of the Atlantic States Marine Fisheries Compact, the South Atlantic Fishery Management Council, the Mid-Atlantic Fishery Management Council, and other similar organizations established to manage or regulate fishing in the Atlantic Ocean. (1997-400, s. 2.1; 1997-443, s. 11A.119(b).)

**Editor's Note.** — Session Laws 1997-400, s. 6.4, provides: "The records, personnel, property, unexpended balances of appropriations, allocations, and other funds, including the functions of budgeting and purchasing, heretofore vested in the Marine Fisheries Commission created under Part 5A of Article 7 of Chapter 143B of the General Statutes, repealed by Section 6.3 of this act, are transferred to the Marine Fisheries Commission created under Part 5B of Article 7 of Chapter 143B of the General Statutes, as enacted by Section 2.1 of this act. All rules, decisions, and actions heretofore adopted, made or taken by the Marine Fisheries Commissions created under Part 5 of Article 7 of Chapter 143B of the General Statutes, repealed by Section 1 of Chapter 641 of the 1987 Session Laws, and all rules, decisions, and actions, heretofore adopted, made, or taken by the Marine Fisheries Commission created under Part 5A of Article 7 of Chapter 143B of the General Statutes, repealed by Section 6.3 of this act, that have not been heretofore repealed or rescinded shall continue in effect until repealed

or rescinded by the Marine Fisheries Commission created under Part 5B of Article 7 of Chapter 143B of the General Statutes, as enacted by Section 2.1 of this act."

Session Laws 1997-400, s. 6.8 directed the Revisor of Statutes to set out s. 6.4 of that act as a note under this section. Section 6.4 is noted above.

Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

**OPINIONS OF ATTORNEY GENERAL**

**The Marine Fisheries Commission has the power to regulate North Carolina vessels in the Exclusive Economic Zone (EEZ), and the Marine Patrol has the power to cite those vessels in the EEZ; the Marine Patrol has both subject matter jurisdiction and terri-**

torial jurisdiction over State registered vessels in the EEZ, subject to certain restrictions. See opinion of Attorney General to Colonel B. M. Rivenbark, N.C. Marine Patrol Division of Marine Fisheries, 1998 N.C.A.G. 16 (3/9/98).

**§ 143B-289.52. Marine Fisheries Commission — powers and duties.**

(a) The Marine Fisheries Commission shall adopt rules to be followed in the management, protection, preservation, and enhancement of the marine and estuarine resources within its jurisdiction, as described in G.S. 113-132, including commercial and sports fisheries resources. The Marine Fisheries Commission shall have the power and duty:

- (1) To authorize, license, regulate, prohibit, prescribe, or restrict all forms of marine and estuarine resources in coastal fishing waters with respect to:

- a. Time, place, character, or dimensions of any methods or equipment that may be employed in taking fish.
  - b. Seasons for taking fish.
  - c. Size limits on and maximum quantities of fish that may be taken, possessed, bailed to another, transported, bought, sold, or given away.
- (2) To provide fair regulation of commercial and recreational fishing groups in the interest of the public.
  - (3) To adopt rules and take all steps necessary to develop and improve mariculture, including the cultivation, harvesting, and marketing of shellfish and other marine resources in the State, involving the use of public grounds and private beds as provided in G.S. 113-201.
  - (4) To close areas of public bottoms under coastal fishing waters for such time as may be necessary in any program of propagation of shellfish as provided in G.S. 113-204.
  - (5) In the interest of conservation of the marine and estuarine resources of the State, to institute an action in the superior court to contest the claim of title or claimed right of fishery in any navigable waters of the State registered with the Department as provided in G.S. 113-206(d).
  - (6) To make reciprocal agreements with other jurisdictions respecting any of the matters governed in this Subchapter as provided by G.S. 113-223.
  - (7) To adopt relevant provisions of federal laws and regulations as State rules pursuant to G.S. 113-228.
  - (8) To delegate to the Fisheries Director the authority by proclamation to suspend or implement, in whole or in part, a particular rule of the Commission that may be affected by variable conditions as provided in G.S. 113-221(e).
  - (9) To comment on and otherwise participate in the determination of permit applications received by State agencies that may have an effect on the marine and estuarine resources of the State.
  - (10) To adopt Fishery Management Plans as provided in G.S. 113-182.1, to establish a Priority List to determine the order in which Fishery Management Plans are developed, to establish a Schedule for the development and adoption of each Fishery Management Plan, and to establish guidance criteria as to the contents of Fishery Management Plans.
  - (11) To approve Coastal Habitat Protection Plans as provided in G.S. 143B-279.8.
  - (12) Except as may otherwise be provided, to make the final agency decision in all contested cases involving matters within the jurisdiction of the Commission.
- (b) The Marine Fisheries Commission shall have the power and duty to establish standards and adopt rules:
- (1) To implement the provisions of Subchapter IV of Chapter 113 as provided in G.S. 113-134.
  - (2) To manage the disposition of confiscated property as set forth in G.S. 113-137.
  - (3) To govern all license requirements prescribed in Article 14A of Chapter 113 of the General Statutes.
  - (4) To regulate the importation and exportation of fish, and equipment that may be used in taking or processing fish, as necessary to enhance the conservation of marine and estuarine resources of the State as provided in G.S. 113-170.
  - (5) To regulate the possession, transportation, and disposition of seafood, as provided in G.S. 113-170.4.

- (6) To regulate the disposition of the young of edible fish, as provided by G.S. 113-185.
- (7) To manage the leasing of public grounds for mariculture, including oysters and clam production, as provided in G.S. 113-202.
- (8) To govern the utilization of private fisheries, as provided in G.S. 113-205.
- (9) To impose further restrictions upon the throwing of fish offal in any coastal fishing waters, as provided in G.S. 113-265.
- (10) To regulate the location and utilization of artificial reefs in coastal waters.
- (11) To regulate the placement of nets and other sports or commercial fishing apparatus in coastal fishing waters with regard to navigational or recreational safety as well as from a conservation standpoint.

(c) The Commission is authorized to authorize, license, prohibit, prescribe, or restrict:

- (1) The opening and closing of coastal fishing waters, except as to inland game fish, whether entirely or only as to the taking of particular classes of fish, use of particular equipment, or as to other activities.
- (2) The possession, cultivation, transportation, importation, exportation, sale, purchase, acquisition, and disposition of all marine and estuarine resources and all related equipment, implements, vessels, and conveyances as necessary to carry out its duties.

(d) The Commission may adopt rules required by the federal government for grants-in-aid for coastal resource purposes that may be made available to the State by the federal government. This section is to be liberally construed in order that the State and its citizens may benefit from federal grants-in-aid.

(d1) The Commission may regulate participation in a fishery that is subject to a federal fishery management plan if that plan imposes a quota on the State for the harvest or landing of fish in the fishery. If the Commission regulates participation in a fishery under this subsection, the Division may issue a license to participate in the fishery to a person who:

- (1) Held a valid license issued by the Division to harvest, land, or sell fish during at least two of the three license years immediately preceding the date adopted by the Commission to determine participation in the fishery; and
- (2) Participated in the fishery during at least two of those license years by landing in the State at least the minimum number of pounds of fish adopted by the Commission to determine participation in the fishery.

(e) The Commission may adopt rules to implement or comply with a fishery management plan adopted by the Atlantic States Marine Fisheries Commission or adopted by the United States Secretary of Commerce pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801, et seq. Notwithstanding G.S. 150B-21.1(a), the Commission may adopt temporary rules under this subsection at any time within six months of the adoption or amendment of a fishery management plan or the notification of a change in management measures needed to remain in compliance with a fishery management plan.

(f) The Commission shall adopt rules as provided in this Chapter. All rules adopted by the Commission shall be enforced by the Department of Environment and Natural Resources.

(g) As a quasi-judicial agency, the Commission, in accordance with Article IV, Section 3 of the Constitution of North Carolina, has those judicial powers reasonably necessary to accomplish the purposes for which it was created. (1997-400, ss. 2.1, 2.2; 1997-443, s. 11A.123; 1998-217, s. 18(a); 1998-225, ss. 1.3, 1.4, 1.5; 2001-474, s. 32.)

**Editor's Note.** — Session Laws 1997-400, s. 5.5 provides that the Marine Fisheries Commission shall adopt a Fishery Management Plan for the blue crab fishery in accordance with this section, as enacted by s. 2.1 of the act, and § 113-182.1, as enacted by s. 3.4 of the act, no later than January 1, 1999.

Session Laws 1997-400, s. 6.10, provides that, unless otherwise expressly provided, every agency to which the act applies shall adopt rules to implement the provisions of that act only in accordance with the provisions of Chapter 150B of the General Statutes, that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, that every agency to which the act applies that is authorized to adopt rules to implement the provisions of the act may adopt temporary rules to implement the provisions of the act, and that s. 6.10 of that act shall continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

Session Laws 1998-225, s. 1.4, which added subsection (d1), became effective July 1, 1999.

Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency

to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-217, s. 18(b), provided that if House Bill 1448, 1997 Regular Session, became law after the effective date of that act (Session Laws 1998-217), and amended subsection (e) of this section, the amendment by this act would be repealed. House Bill 1448 (Session Laws 1998-225) became law after the date this act (Session Laws 1998-217) became law, thus, the amendment to subsection (e) was repealed.

**Effect of Amendments.** — Session Laws 2001-474, s. 32, effective November 29, 2001, deleted "Health" following "Environment" in subsection (f).

## § 143B-289.53. Marine Fisheries Commission — quasi-judicial powers; procedures.

(a) With respect to those matters within its jurisdiction, the Marine Fisheries Commission shall exercise quasi-judicial powers in accordance with the provisions of Chapter 150B of the General Statutes. This section and any rules adopted by the Marine Fisheries Commission shall govern the following proceedings:

- (1) Exceptions to recommended decisions in contested cases shall be filed with the Secretary within 30 days of the receipt by the Secretary of the official record from the Office of Administrative Hearings, unless additional time is allowed by the Chair of the Commission.
- (2) Oral arguments by the parties may be allowed by the Chair of the Commission upon request of the parties.
- (3) Deliberations of the Commission shall be conducted in its public meeting unless the Commission determines that consultation with its counsel should be held in a closed session pursuant to G.S. 143-318.11.

(b) The final agency decision in contested cases that arise from civil penalty assessments shall be made by the Commission. In the evaluation of each violation, the Commission shall recognize that harm to the marine and estuarine resources within its jurisdiction, as described in G.S. 113-132, arising from the violation of a statute or rule enacted or adopted to protect those resources may be immediately observed through damaged resources or may be incremental or cumulative with no damage that can be immediately observed or documented. Penalties up to the maximum authorized may be based on any one or combination of the following factors:

- (1) The degree and extent of harm to the marine and estuarine resources within the jurisdiction of the Commission, as described in G.S. 113-132; to the public health; or to private property resulting from the violation.
- (2) The frequency and gravity of the violation.

- (3) The cost of rectifying the damage.
- (4) Whether the violation was committed willfully or intentionally.
- (5) The prior record of the violator in complying or failing to comply with programs over which the Marine Fisheries Commission has regulatory authority.
- (6) The cost to the State of the enforcement procedures.

(c) The Chair shall appoint a Committee on Civil Penalty Remissions from the members of the Commission. No member of the Committee on Civil Penalty Remissions may hear or vote on any matter in which the member has an economic interest. The Committee on Civil Penalty Remissions shall make the final agency decision on remission requests. In determining whether a remission request will be approved, the Committee shall consider the recommendation of the Secretary and the following factors:

- (1) Whether one or more of the civil penalty assessment factors in subsection (b) of this section were wrongly applied to the detriment of the petitioner.
- (2) Whether the violator promptly abated continuing environmental damage resulting from the violation.
- (3) Whether the violation was inadvertent.
- (4) Whether the violator had been assessed civil penalties for any previous violations.
- (5) Whether payment of the civil penalty will prevent payment for the remaining necessary remedial actions.

(d) The Committee on Civil Penalty Remissions may remit the entire amount of the penalty only when the violator has not been assessed civil penalties for previous violations and when payment of the civil penalty will prevent payment for the remaining necessary remedial actions.

(e) If any civil penalty has not been paid within 30 days after the final agency decision or court order has been served on the violator, the Secretary of Environment and Natural Resources shall request the Attorney General to institute a civil action in the superior court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment.

(f) The Secretary may delegate his powers and duties under this section to the Fisheries Director. (1997-400, s. 2.1; 1997-443, s. 11A.119(a).)

**§ 143B-289.54. Marine Fisheries Commission — members; appointment; term; oath; ethical standards; removal; compensation; staff.**

(a) Members, Selection. — The Marine Fisheries Commission shall consist of nine members appointed by the Governor as follows:

- (1) One person actively engaged in, or recently retired from, commercial fishing as demonstrated by currently or recently deriving at least fifty percent (50%) of annual earned income from taking and selling fishery resources in coastal fishing waters of the State. The spouse of a commercial fisherman who meets the criteria of this subdivision may be appointed under this subdivision.
- (2) One person actively engaged in, or recently retired from, commercial fishing as demonstrated by currently or recently deriving at least fifty percent (50%) of annual earned income from taking and selling fishery resources in coastal fishing waters of the State. The spouse of a commercial fisherman who meets the criteria of this subdivision may be appointed under this subdivision.
- (3) One person actively connected with, and experienced as, a licensed fish dealer or in seafood processing or distribution as demonstrated by

deriving at least fifty percent (50%) of annual earned income from activities involving the buying, selling, processing, or distribution of seafood landed in this State. The spouse of a person qualified under this subdivision may be appointed provided that the spouse is actively involved in the qualifying business.

- (4) One person actively engaged in recreational sports fishing in coastal waters in this State. An appointee under this subdivision may not derive more than ten percent (10%) of annual earned income from sports fishing activities.
- (5) One person actively engaged in recreational sports fishing in coastal waters in this State. An appointee under this subdivision may not derive more than ten percent (10%) of annual earned income from sports fishing activities.
- (6) One person actively engaged in the sports fishing industry as demonstrated by deriving at least fifty percent (50%) of annual earned income from selling goods or services in this State. The spouse of a person qualified under this subdivision may be appointed provided that the spouse is actively involved in the qualifying business.
- (7) One person having general knowledge of and experience related to subjects and persons regulated by the Commission.
- (8) One person having general knowledge of and experience related to subjects and persons regulated by the Commission.
- (9) One person who is a fisheries scientist having special training and expertise in marine and estuarine fisheries biology, ecology, population dynamics, water quality, habitat protection, or similar knowledge. A person appointed under this subdivision may not receive more than ten percent (10%) of annual earned income from either the commercial or sports fishing industries, including the processing and distribution of seafood.

(b) Residential Qualifications. — For purposes of providing regional representation on the Commission, the following three coastal regions of the State are designated: (i) Northeast Coastal Region comprised of Bertie, Camden, Chowan, Currituck, Dare, Gates, Halifax, Hertford, Martin, Northampton, Pasquotank, Perquimans, Tyrrell, and Washington Counties, (ii) Central Coastal Region comprised of Beaufort, Carteret, Craven, Hyde, Jones, and Pamlico Counties; and (iii) Southeast Coastal Region comprised of Bladen, Brunswick, Columbus, New Hanover, Onslow, and Pender Counties. Persons appointed under subdivisions (1), (2), (3), (4), and (8) of subsection (a) of this section shall be residents of one of the coastal regions of the State. The membership of the Commission shall include at least one person who is a resident of each of the three coastal regions of the State.

(c) Additional Considerations. — In making appointments to the Commission, the Governor shall provide for appropriate representation of women and minorities on the Commission. The Governor shall make appointments to the Commission consistent with the restrictions of G.S. 113-200(g).

(d) Terms. — The term of office of members of the Commission is three years. A member may be reappointed to any number of successive three-year terms. Upon the expiration of a three-year term, a member shall continue to serve until a successor is appointed and duly qualified as provided by G.S. 128-7. The term of members appointed under subdivisions (1), (4), and (7) of subsection (a) of this section shall expire on 30 June of years evenly divisible by three. The term of members appointed under subdivisions (2), (5), and (8) of subsection (a) of this section shall expire on 30 June of years that precede by one year those years that are evenly divisible by three. The term of members appointed under subdivisions (3), (6), and (9) of subsection (a) of this section shall expire on 30 June of years that follow by one year those years that are evenly divisible by three.

(e) Vacancies. — An appointment to fill a vacancy shall be for the unexpired balance of the term.

(f) Oath of Office. — Each member of the Commission, before assuming the duties of office, shall take an oath of office as provided in Chapter 11 of the General Statutes.

(g) Ethical Standards. —

(1) Disclosure statements. — Any person under consideration for appointment to the Commission shall provide both a financial disclosure statement and a potential bias disclosure statement to the Governor. A financial disclosure statement shall include statements of the nominee's financial interests in and related to State fishery resources use, licenses issued by the Division of Marine Fisheries held by the nominee or any business in which the nominee has a financial interest, and uses made by the nominee or by any business in which the nominee has a financial interest of the regulated resources. A potential bias disclosure statement shall include a statement of the nominee's membership or other affiliation with, including offices held, in societies, organizations, or advocacy groups pertaining to the management and use of the State's coastal fishery resources. Disclosure statements shall be treated as public records under Chapter 132 of the General Statutes and shall be updated on an annual basis.

(2) Voting/conflict of interest. — A member of the Commission shall not vote on any issue before the Commission that would have a "significant and predictable effect" on the member's financial interest. For purposes of this subdivision, "significant and predictable effect" means there is or may be a close causal link between the decision of the Commission and an expected disproportionate financial benefit to the member that is shared only by a minority of persons within the same industry sector or gear group. A member of the Commission shall also abstain from voting on any petition submitted by an advocacy group of which the member is an officer or sits as a member of the advocacy group's board of directors. A member of the Commission shall not use the member's official position as a member of the Commission to secure any special privilege or exemption of substantial value for any person. No member of the Commission shall, by the member's conduct, create an appearance that any person could improperly influence the member in the performance of the member's official duties.

(3) Regular attendance. — It shall be the duty of each member of the Commission to regularly attend meetings of the Commission.

(h) Removal. — The Governor may remove, as provided in G.S. 143B-13, any member of the Commission for misfeasance, malfeasance, or nonfeasance.

(i) Office May Be Held Concurrently With Others. — The office of member of the Marine Fisheries Commission may be held concurrently with any other elected or appointed office, as authorized by Article VI, Section 9, of the Constitution of North Carolina.

(j) Compensation. — Members of the Commission who are State officers or employees shall receive no per diem compensation for serving on the Commission, but shall be reimbursed for their expenses in accordance with G.S. 138-6. Members of the Commission who are full-time salaried public officers or employees other than State officers or employees shall receive no per diem compensation for serving on the Commission, but shall be reimbursed for their expenses in accordance with G.S. 138-6 in the same manner as State officers or employees. All other Commission members shall receive per diem compensation and reimbursement in accordance with the compensation rate established in G.S. 93B-5.

(k) Staff. — All clerical and other services required by the Commission shall be supplied by the Fisheries Director and the Department.

(l) Legal Services. — The Attorney General shall: (i) act as attorney for the Commission; (ii) at the request of the Commission, initiate actions in the name of the Commission; and (iii) represent the Commission in any appeal or other review of any order of the Commission. (1997-400, s. 2.1; 1998-225, ss. 1.6, 1.7; 2001-213, s. 5.)

**Editor's Note.** — Session Laws 1997-400, s. 6.5, provides that, in order to establish a schedule of staggered terms of three years for the Marine Fisheries Commission, the terms of members of the Commission initially filling positions established by subdivisions (a)(1), (a)(2), and (a)(3) of this section shall begin on the date the member is appointed and duly qualified and expire on June 30, 2001; the terms of members initially filling positions established by subdivisions (a)(4), (a)(5), and (a)(6) shall begin on the date the member is appointed and duly qualified and expire on June 30, 2000; and the terms of members filling positions initially established by subdivisions (a)(7), (a)(8), and (a)(9) shall begin on the date the member is appointed and duly qualified and expire on June 30, 1999.

Session Laws 1998-225, ss. 1.6, 1.7, which added the second sentence in subsection (c);

and in subsection (h), substituted "G.S. 143B-13" for "G.S. 143-13," was effective retroactively to September 1, 1997.

Session Laws 2001-213, s. 6, effective June 30, 2001, makes appointments for the Marine Fisheries Commission and specifies the termination date for the appointments made for each named individual, altering the schedule of staggered terms of three years for the Commission to provide for an orderly transition in membership of the Commission as specified in G.S. 143B-289.54, as amended by Session Laws 2001-213, s. 1, notwithstanding G.S. 143B-289.54(d).

**Effect of Amendments.** — Session Laws 2001-213, s. 5, effective June 30, 2001, substituted "(4), and (7)" for "(2), and (3)" in the fourth sentence, "(2), (5), and (8)" for "(4), (5), and (6)" in the fifth sentence, and "(3), (6)" for "(7), (8)" in the sixth sentence.

### § 143B-289.55. Marine Fisheries Commission — officers; organization; seal.

(a) The Governor shall appoint a member of the Commission to serve as Chair. The Chair shall serve at the pleasure of the Governor. The Commission shall elect one of its members to serve as Vice-Chair. The Vice-Chair shall serve a one-year term beginning 1 July and ending 30 June of the following year. The Vice-Chair may serve any number of consecutive terms.

(b) The Chair shall guide and coordinate the activities of the Commission in fulfilling its duties as set out in this Article. The Chair shall report to and advise the Governor and the Secretary on the activities of the Commission, on marine and estuarine conservation matters, and on all marine fisheries matters.

(c) The Commission shall determine its organization and procedure in accordance with the provisions of this Article. The provisions of the most recent edition of Robert's Rules of Order shall govern any procedural matter for which no other provision has been made.

(d) The Commission may adopt a common seal and may alter it as necessary. (1997-400, s. 2.1.)

### § 143B-289.56. Marine Fisheries Commission — meetings; quorum.

(a) The Commission shall meet at least once each calendar quarter and may hold additional meetings at any time and place within the State at the call of the Chair or upon the written request of at least four members. At least three of the four quarterly meetings of the Commission shall be held in one of the coastal regions designated in G.S. 143B-289.54.

(b)(1) Six members of the Commission shall constitute a quorum for the transaction of business.

- (2) A quorum of the Commission may transact business only if one member, other than the Chair, appointed pursuant to subdivision (1), (2), or (3) of G.S. 143B-289.54(a) and one member, other than the Chair, appointed pursuant to subdivision (4), (5), or (6) of G.S. 143B-289.54(a) are present.

(c) If the Commission is unable to transact business because the requirements of subdivision (2) of subsection (b) of this section are not met, the Chair shall call another meeting of the Commission within 30 days and shall place on the agenda for that meeting every matter with respect to which the Commission was unable to transact business. Five members of the Commission shall constitute a quorum for the transaction of business at a meeting called under this subsection. The requirements of subdivision (2) of subsection (b) of this section shall not apply to a meeting called under this subsection. (1997-400, s. 2.1; 1998-225, s. 1.8.)

**Editor's Note.** — Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-

21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

**§ 143B-289.57. Marine Fisheries Commission Advisory Committees established; members; selection; duties.**

(a) The Commission shall be assisted in the performance of its duties by four standing advisory committees and four regional advisory committees. Each standing and regional advisory committee shall consist of no more than 11 members. The Chair of the Commission shall designate one member of each advisory committee to serve as Chair of the committee. Members shall serve staggered three-year terms as determined by the Commission. The Commission shall establish other policies and procedures for standing and regional advisory committees that are consistent with those governing the Commission as set out in this Part.

(b) The Chair of the Commission shall appoint the following standing advisory committees:

- (1) The Finfish Committee, which shall consider matters concerning finfish.
- (2) The Crustacean Committee, which shall consider matters concerning shrimp and crabs.
- (3) The Shellfish Committee, which shall consider matters concerning oysters, clams, scallops, and other molluscan shellfish.
- (4) The Habitat and Water Quality Committee, which shall consider matters concerning habitat and water quality that may affect coastal fisheries resources.

(c) Each standing advisory committee shall be composed of commercial and recreational fishermen, scientists, and other persons who have expertise in the matters to be considered by the advisory committee to which they are appointed. In making appointments to advisory committees, the Chair of the Commission shall ensure that both commercial and recreational fishing interests are fairly represented and shall consider for appointment persons who are recommended by groups representing commercial fishing interests, recreational fishing interests, environmental protection and conservation interests, and other groups interested in coastal fisheries management.

(d) Each standing advisory committee shall review all matters referred to the committee by the Commission and shall make findings and recommendations on these matters. A standing advisory committee may, on its own motion, make findings and recommendations as to any matter related to its subject area. The Commission, in the performance of its duties, shall consider all findings and recommendations submitted by standing advisory committees.

(e) The Chair of the Commission shall appoint a regional advisory committee for each of the three coastal regions designated in G.S. 143B-289.54(b) and shall appoint a regional advisory committee for that part of the State that is not included in the three coastal regions. In making appointments to regional advisory committees, the Chair of the Commission shall ensure that both commercial and recreational fishing interests are fairly represented. (1997-400, s. 2.1.)

### § 143B-289.58. Marine Fisheries Endowment Fund.

(a) Recognizing the inestimable importance to the State and its people of conserving the marine and estuarine resources of the State, and for the purpose of providing the opportunity for citizens and residents of the State to invest in the future of its marine and estuarine resources, there is created the North Carolina Marine Fisheries Endowment Fund, the income and principal of which shall be used only for the purpose of supporting marine and estuarine resource conservation programs of the State in accordance with this section.

(b) There is created the Board of Trustees of the Marine Fisheries Endowment Fund of the Marine Fisheries Commission, with full authority over the administration of the Marine Fisheries Endowment Fund, whose ex officio Chair, Vice-Chair, and members shall be the Chair, Vice-Chair, and members of the Marine Fisheries Commission. The State Treasurer shall be the custodian of the Marine Fisheries Endowment Fund and shall invest its assets in accordance with the provisions of G.S. 147-69.2 and G.S. 147-69.3.

(c) The assets of the Marine Fisheries Endowment Fund shall be derived from the following:

- (1) The proceeds of any gifts, grants, and contributions to the State that are specifically designated for inclusion in the Fund.
- (2) Any other sources specified by law.

(d) The Marine Fisheries Endowment Fund is declared to constitute a special trust derived from a contractual relationship between the State and the members of the public whose investments contribute to the Fund. In recognition of this special trust, the following limitations and restrictions are placed on expenditures from the Fund:

- (1) Any limitations or restrictions specified by the donors on the uses of the income derived from the gifts, grants, and voluntary contributions shall be respected but shall not be binding.
- (2) No expenditure or disbursement shall be made from the principal of the Marine Fisheries Endowment Fund except as otherwise provided by law.
- (3) The income received and accruing from the investments of the Marine Fisheries Endowment Fund must be spent only to further the conservation of marine and estuarine resources.

(e) The Board of Trustees of the Marine Fisheries Endowment Fund may accumulate the investment income of the Fund until the income, in the sole judgment of the trustees, can provide a significant supplement to the budget for the conservation and management of marine and estuarine resources. After that time the trustees, in their sole discretion and authority, may direct expenditures from the income of the Fund for the purposes set out in subdivision (3) of subsection (d) above.

(f) Expenditure of the income derived from the Marine Fisheries Endowment Fund shall be made through the State budget accounts of the Marine Fisheries Commission in accordance with the provisions of the Executive Budget Act. The Marine Fisheries Endowment Fund is subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes.

(g) The Marine Fisheries Endowment Fund and the income therefrom shall not take the place of State appropriations, but any portion of the income of the Marine Fisheries Endowment Fund available for the purpose set out in subdivision (3) of subsection (d) above shall be used to supplement other income of and appropriations for the conservation and management of marine and estuarine resources to the end that the Commission may improve and increase its services and become more useful to a greater number of people. (1997-400, s. 2.1.)

### **§ 143B-289.59. Conservation Fund; Commission may accept gifts.**

(a) The Marine Fisheries Commission may accept gifts, donations, or contributions from any sources. These funds shall be held in a separate account and used solely for the purposes of marine and estuarine conservation and management. These funds shall be administered by the Marine Fisheries Commission and shall be used for marine and estuarine resources management, including education about the importance of conservation, in a manner consistent with marine and estuarine conservation management principles.

(b) The Marine Fisheries Commission is hereby authorized to issue and sell appropriate emblems by which to identify recipients thereof as contributors to a special marine and estuarine resources Conservation Fund that shall be made available to the Marine Fisheries Commission for conservation, protection, enhancement, preservation, and perpetuation of marine and estuarine species that may be endangered or threatened with extinction and for education about these issues. The special Conservation Fund is subject to oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. Emblems of different sizes, shapes, types, or designs may be used to recognize contributions in different amounts, but no emblem shall be issued for a contribution amounting in value to less than five dollars (\$5.00). (1997-400, s. 2.1.)

### **§ 143B-289.60. Article subject to Chapter 113.**

Nothing in this Article shall be construed to affect the jurisdictional division between the Marine Fisheries Commission and the Wildlife Resources Commission contained in Subchapter IV of Chapter 113 of the General Statutes or in any way to alter or abridge the powers and duties of the two agencies conferred in that Subchapter. (1997-400, s. 2.1.)

### **§ 143B-289.61. Jurisdictional questions.**

In the event of any question arising between the Wildlife Resources Commission and the Marine Fisheries Commission or between the Department of Environment and Natural Resources and the Marine Fisheries Commission as to any duty, responsibility, or authority imposed upon any of these bodies by law or with respect to conflict involving rules or administrative practices, the question or conflict shall be resolved by the Governor, whose

decision shall be binding. (1997-400, s. 2.1; 1997-443, s. 11A.123; 1997-443, s. 11A.123.)

**Editor's Note.** — Pursuant to Session Laws 1997-443, s. 11A.123, references to the Department or Secretary of Environment and Natural

Resources were substituted for references to the Department or Secretary of Environment, Health and Natural Resources.

**§§ 143B-289.62 through 143B-289.65:** Reserved for future codification purposes.

## Part 6. North Carolina Mining Commission.

### § 143B-290. North Carolina Mining Commission — creation; powers and duties.

There is hereby created the North Carolina Mining Commission of the Department of Environment and Natural Resources with the power and duty to promulgate rules for the enhancement of the mining resources of the State.

- (1) The North Carolina Mining Commission shall have the following powers and duties:
  - a. To act as the advisory body to the Interstate Mining Compact pursuant to G.S. 74-38(a);
  - b. To adopt and modify rules to implement Chapter 74, Article 6, pursuant to G.S. 74-44(b);
  - c. To hear permit appeals, conduct a full and complete hearing on such controversies and affirm, modify, or overrule permit decisions made by the Department pursuant to G.S. 74-61; and
  - d. To promulgate rules necessary to administer the Mining Act of 1971, pursuant to G.S. 74-63;
  - e. To promulgate rules necessary to administer the Control of Exploration for Uranium in North Carolina Act of 1983, pursuant to G.S. 74-86.
- (2) The Commission is authorized to make such rules, not inconsistent with the laws of this State, as may be required by the federal government for grants-in-aid for mining resource purposes which may be made available to the State by the federal government. This section is to be liberally construed in order that the State and its citizens may benefit from such grants-in-aid.
- (3) The Commission shall make such rules consistent with the provisions of this Chapter. All rules adopted by the Commission shall be enforced by the Department of Environment and Natural Resources.
- (4) Recodified as § 74-54.1 by c. 1039, s. 16, effective July 24, 1992. (1973, c. 1262, s. 29; 1977, c. 771, s. 4; 1983, c. 279, s. 2; 1989, c. 727, s. 193; 1989 (Reg. Sess., 1990), c. 944, s. 1; 1991 (Reg. Sess., 1992), c. 1039, s. 16; 1997-443-11A.119(a).)

**Editor's Note.** — Subsection (a) of § 74-38, referred to in subdivision (1)a of this section, was repealed by Session Laws 1973, c. 1262, s. 33.

Article 6 of Chapter 74, referred to in subdivision (1)b of this section, was repealed by

Session Laws 1977, c. 712, s. 2 effective July 1, 1979.

Section 74-44, referred to in subdivision (1)b of this section, was repealed by Session Laws 1977, c. 712, s. 2, effective July 1, 1979.

**§ 143B-291. North Carolina Mining Commission — members; selection; removal; compensation; quorum; services.**

(a) **Members, Selection.** — The North Carolina Mining Commission shall consist of nine members appointed by the Governor under a specified subdivision of this subsection as follows:

- (1) One member who is the chairman of the North Carolina State University Minerals Research Laboratory Advisory Committee, ex officio.
- (2) One member who is a representative of the mining industry.
- (3) One member who is a representative of the mining industry.
- (4) One member who is a representative of the mining industry.
- (5) One member who is a representative of nongovernmental conservation interests.
- (6) One member who is a representative of nongovernmental conservation interests.
- (7) One member who is a representative of nongovernmental conservation interests.
- (8) One who, at the time of the appointment to the Mining Commission, is a member of the Environmental Management Commission and knowledgeable in the principles of water and air resources management.
- (9) One who, at the time of the appointment to the Mining Commission, is a member of the Environmental Management Commission and knowledgeable in the principles of water and air resources management.

(b) **Terms.** — The term of office of a member of the Commission is six years. At the expiration of each member's term, the Governor shall replace the member with a new member of like qualifications for a term of six years. The term of members appointed under subdivisions (2), (5), and (8) of subsection (a) of this section shall expire on 30 June of years that precede by one year those years that are evenly divisible by six. The term of members appointed under subdivisions (3) and (6) of subsection (a) of this section shall expire on 30 June of years that follow by one year those years that are evenly divisible by six. The term of members appointed under subdivisions (4), (7), and (9) of subsection (a) of this section shall expire on 30 June of years that follow by three years those years that are evenly divisible by six. Upon the expiration of a six-year term, a member may continue to serve until a successor is appointed and duly qualified as provided by G.S. 128-7.

(c) **Vacancies.** — An appointment to fill a vacancy shall be for the unexpired balance of the term.

(d) **Removal.** — The Governor may remove any member of the Commission from office for misfeasance, malfeasance, or nonfeasance in accordance with the provisions of G.S. 143B-13.

(e) **Compensation.** — The members of the Commission shall receive per diem and necessary traveling and subsistence expenses in accordance with the provisions of G.S. 138-5.

(f) **Quorum.** — A majority of the Commission shall constitute a quorum for the transaction of business.

(g) **Staff.** — All clerical and other services required by the Commission shall be supplied by the Secretary of the Department. (1973, c. 1262, s. 30; 1997-496, s. 8.)

**Editor's Note.** — Session Laws 1997-496, s. 9, effective September 11, 1997, provides: "In order to reestablish a schedule of six-year staggered terms for the Mining Commission as

required by G.S. 143B-291, as amended by Section 8 of this act, the Governor, in making appointments to replace the two members of the Mining Commission who represent the mining industry and whose terms both expire on 30 June 1997, shall appoint one member

under G.S. 143B-291(a)(2) to a full six-year term expiring on 30 June 2003 and shall appoint one member under G.S. 143B-291(a)(4), to a four-year term expiring 30 June 2001."

**Legal Periodicals.** — For 1997 legislative survey, see 20 Campbell L. Rev. 450.

### § 143B-292. North Carolina Mining Commission — officers.

The North Carolina Mining Commission shall have a chairman and a vice-chairman. The chairman shall be designated by the Governor from among the members of the Commission to serve as chairman at his pleasure. The vice-chairman shall be elected by and from the members of the Commission and shall serve for a term of two years or until the expiration of his regularly appointed term. (1973, c. 1262, s. 31.)

### § 143B-293. North Carolina Mining Commission — meetings.

The North Carolina Mining Commission shall meet at least semiannually and may hold special meetings at any time and place within the State at the call of the chairman or upon the written request of at least five members. (1973, c. 1262, s. 32.)

## Part 7. Soil and Water Conservation Commission.

### § 143B-294. Soil and Water Conservation Commission — creation; powers and duties; compliance inspections.

(a) There is hereby created the Soil and Water Conservation Commission of the Department of Environment and Natural Resources with the power and duty to adopt rules to be followed in the development and implementation of a soil and water conservation program.

(1) The Soil and Water Conservation Commission has all of the following powers and duties:

a. To approve petitions for soil conservation districts.

b. To approve application for watershed plans.

c. Such other duties as specified in Chapter 139.

d. To conduct any inspections in accordance with subsection (b) of this section.

(2) The Commission shall adopt rules consistent with the provisions of this Chapter. All rules not inconsistent with the provisions of this Chapter heretofore adopted by the Soil and Water Conservation Committee shall remain in full force and effect unless and until repealed or superseded by action of the Soil and Water Conservation Commission. All rules adopted by the Commission shall be enforced by the Department of Environment and Natural Resources.

(b) An employee or agent of the Soil and Water Conservation Commission or the Department of Environment and Natural Resources may enter property, with the consent of the owner or person having control over property, at reasonable times for the purposes of investigating compliance with Commission or Department programs when the investigation is reasonably necessary to carry out the duties of the Commission. If the Commission or Department is

unable to obtain the consent of the owner of the property, the Commission or Department may obtain an administrative search warrant pursuant to G.S. 15-27.2.

(c) Any person who refuses entry or access to property by an employee or agent of the Commission or the Department or who willfully resists, delays, or obstructs an employee or agent of the Commission or the Department while the employee or agent is in the process of carrying out official duties after the employee or agent has obtained the consent of the owner or person having control of the property or, if consent is not obtained, after the employee or agent has obtained an administrative search warrant, shall be guilty of a Class 1 misdemeanor. (1973, c. 1262, s. 34; 1977, c. 771, s. 4; 1989, c. 727, s. 194; 1997-173, s. 1; 1997-443, s. 11A.119(a).)

**Cross References.** — For notes regarding implementation of the Tar-Pamlico River Basin-Nutrient Sensitive Waters Management Strategy, see § 143B-282.

**Editor's Note.** — Session Laws 1998-165, s. 2, provides: "The Soil and Water Conservation

Commission may adopt temporary rules to implement the conservation Reserve Enhancement Program. This section shall constitute a recent act of the General Assembly for purposes of G.S. 150B-21(a)(2)."

### **§ 143B-295. Soil and Water Conservation Commission — members; selection; removal; compensation; quorum; services.**

The Soil and Water Conservation Commission of the Department of Environment and Natural Resources shall be composed of seven members appointed by the Governor. The Commission shall be composed of the following members:

- (1) The president, first vice-president, and immediate past president of the North Carolina Association of Soil and Water Conservation Districts. Vacancies arising in any of these positions shall be filled through appointment by the Governor upon the nomination by the executive committee of the North Carolina Association of Soil and Water Conservation Districts;
- (2) Three supervisor members nominated by the North Carolina Association of Soil and Water Conservation Districts from its own membership representing the three major geographical regions of the State and appointed by the Governor;
- (3) One member appointed at large by the Governor.

The initial members of the Commission shall be the members of the Soil Conservation Committee who shall serve for a period equal to the remainder of their current terms on the Soil Conservation Committee. At the end of the respective terms of office of the initial members of the Commission, their successors, except those members serving in an ex officio capacity, shall be appointed for terms of three years and until their successors are appointed and qualified. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Commission from office for misfeasance, malfeasance, and nonfeasance according to the provisions of G.S. 143B-13 of the Executive Organization Act of 1973.

The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Commission shall constitute a quorum for the transaction of business.

All clerical and other services required by the Commission shall be supplied by the Secretary of Environment and Natural Resources. (1973, c. 1262, s. 35; 1977, c. 771, s. 4; 1989, c. 727, s. 218(136); 1997-443, s. 11A.119(a).)

**§ 143B-296. Soil and Water Conservation Commission — officers.**

The Soil and Water Conservation Commission shall have a chairman and a vice-chairman. The chairman shall be designated by the Governor from among the members of the Commission to serve as chairman at the pleasure of the Governor. The vice-chairman shall be elected by and from the members of the Commission and shall serve for a term of two years or until the expiration of his regularly appointed term. (1973, c. 1262, s. 36.)

**§ 143B-297. Soil and Water Conservation Commission — meetings.**

The Soil and Water Conservation Commission shall meet at least quarterly and may hold special meetings at any time and place within the State at the call of the chairman or upon the written request of at least four members. (1973, c. 1262, s. 37.)

**§ 143B-297.1. Soil and Water Conservation Account.**

The Soil and Water Conservation Account is established as a nonreverting account within the Department of Environment and Natural Resources. The Account consists of revenue credited to the Account from the sale of soil and water conservation special license plates. The Commission shall use the revenue from the account to fund environmental education and water quality education in North Carolina. (1997-477, s. 5; 1997-443, s. 11A.123.)

**Part 8. Sedimentation Control Commission.**

**§ 143B-298. Sedimentation Control Commission — creation; powers and duties.**

There is hereby created the Sedimentation Control Commission of the Department of Environment and Natural Resources with the power and duty to develop and administer a sedimentation control program as herein provided.

The Sedimentation Control Commission has the following powers and duties:

- (1) In cooperation with the Secretary of the Department of Transportation and Highway Safety and other appropriate State and federal agencies, develop, promulgate, publicize, and administer a comprehensive State erosion and sedimentation control program.
- (2) Develop and adopt on or before July 1, 1974, rules and regulations for the control of erosion and sedimentation pursuant to G.S. 113A-54.
- (3) Conduct public hearings pursuant to G.S. 113A-54.
- (4) Assist local governments in developing erosion and sedimentation control programs pursuant to G.S. 113A-60.
- (5) Assist and encourage other State agencies in developing erosion and sedimentation control programs pursuant to G.S. 113A-56.
- (6) Develop recommended methods of control of sedimentation and prepare and make available for distribution publications and other materials dealing with sedimentation control techniques pursuant to

G.S. 113A-54. (1973, c. 1262, s. 39; 1977, c. 771, s. 4; 1989, c. 727, s. 218(137); 1997-443, s. 11A.119(a).)

### **§ 143B-299. Sedimentation Control Commission — members; selection; compensation; meetings.**

(a) Creation; Membership. — There is hereby created in the Department of Environment and Natural Resources the North Carolina Sedimentation Control Commission, which is charged with the duty of developing and administering the sedimentation control program provided for in this Article. The Commission shall consist of the following members:

- (1) A person to be nominated jointly by the boards of the North Carolina League of Municipalities and the North Carolina Association of County Commissioners;
- (2) A person to be nominated by the Board of the North Carolina Home Builders Association;
- (3) A person to be nominated by the Carolinas Branch, Associated General Contractors of America;
- (4) The president, vice-president, or general counsel of a North Carolina public utility company;
- (5) The Director of the North Carolina Water Resources Research Institute;
- (6) A member of the State Mining Commission who shall be a representative of nongovernmental conservation interests, as required by G.S. 74-38(b);
- (7) A member of the State Soil and Water Conservation Commission;
- (8) A member of the Environmental Management Commission;
- (9) A soil scientist from the faculty of North Carolina State University;
- (10) Two persons who shall be representatives of nongovernmental conservation interests; and
- (11) A professional engineer registered under the provisions of Chapter 89C of the General Statutes nominated by the Professional Engineers of North Carolina, Inc.

(b) Appointment. — The Commission members shall be appointed by the Governor. All Commission members, except the person filling position number five, as specified above, shall serve staggered terms of office of three years and until their successors are appointed and duly qualified. The person filling position number five shall serve as a member of the Commission, subject to removal by the Governor as hereinafter specified in this section, so long as he continues as Director of the Water Resources Research Institute. The terms of office of members filling positions two, four, seven, and eight shall expire on 30 June of years evenly divisible by three. The terms of office of members filling positions one, three, and ten shall expire on 30 June of years that follow by one year those years that are evenly divisible by three. The terms of office of members filling positions six, nine, and eleven, shall expire on 30 June of years that precede by one year those years that are evenly divisible by three. Except for the person filling position number five, no member of the Commission shall serve more than two complete consecutive three-year terms. Any member appointed by the Governor to fill a vacancy occurring in any of the appointments shall be appointed for the remainder of the term of the member causing the vacancy. The Governor may at any time remove any member of the Commission for inefficiency, neglect of duty, malfeasance, misfeasance, non-feasance or, in the case of members filling positions five, six, seven, eight, nine, and eleven as specified above, because they no longer possess the required qualifications for membership. In each instance appointments to fill vacancies in the membership of the Commission shall be a person or persons with similar

experience and qualifications in the same field required of the member being replaced. The office of the North Carolina Sedimentation Control Commission is declared to be an office that may be held concurrently with any other elective or appointive office, under the authority of Article VI, Sec. 9, of the North Carolina Constitution.

(b1) Chairman. — The Governor shall designate a member of the Commission to serve as chairman.

(c) Compensation. — The members of the Commission shall receive the usual and customary per diem allowed for the other members of boards and commissions of the State and as fixed in the Biennial Appropriation Act, and, in addition, the members of the Commission shall receive subsistence and travel expenses according to the prevailing State practice and as allowed and fixed by statute for such purposes, which said travel expenses shall also be allowed while going to or from any place of meeting or when on official business for the Commission. The per diem payments made to each member of the Commission shall include necessary time spent in traveling to and from their places of residence within the State to any place of meeting or while traveling on official business for the Commission.

(d) Meetings of Commission. — The Commission shall meet at the call of the chairman and shall hold special meetings at the call of a majority of the members. (1973, c. 1262, s. 40; 1977, c. 771, s. 4; 1981, c. 248, ss. 1, 2; 1989, c. 727, s. 218(138); 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1991, c. 551, s. 1; 1997-443, s. 11A.119(a).)

**Editor's Note.** — Former § 113A-53 was repealed by Session Laws 1973, c. 1262, s. 41, ratified April 11, 1974, and effective July 1, 1974, and its provisions were incorporated in Session Laws 1973, c. 1262, s. 40, codified as this section. Session Laws 1973, c. 1417, ratified April 13, 1974, and effective on ratification, amended subdivision (a)(1) and subsection (b) of repealed § 113A-53. In an opinion of the Attorney General to Mr. James E. Harrington, Secretary of Natural and Economic Resources, July 10, 1974, it was concluded that Session Laws 1973, c. 1417, s. 2, had the effect of amending Session Laws 1973, c. 1262, s. 40, so as to permanently remove the Secretary of Natural and Economic Resources from his po-

sition as chairman of the Sedimentation Control Commission.

Subsection (b) of § 74-38, referred to in subdivision (6) of subsection (a), was repealed by Session Laws 1973, c. 1262, s. 33.

Session Laws 1991, c. 551, s. 3, provides: "This act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act. The Sedimentation Control Commission and the Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] shall implement the provisions of this act from funds otherwise appropriated or available to the Commission or to the Department."

## Part 9. Water Pollution Control System Operators Certification Commission.

### § 143B-300. Water Pollution Control System Operators Certification Commission — creation; powers and duties.

(a) There is hereby created the Water Pollution Control System Operators Certification Commission to be located in the Department of Environment and Natural Resources. The Commission shall adopt rules with respect to the certification of water pollution control system operators as provided by Article 3 of Chapter 90A of the General Statutes.

(b) The Commission shall adopt such rules, not inconsistent with the laws of this State, as may be required by the federal government for grants-in-aid for programs concerned with the certification of water pollution control system operators which may be made available to the State by the federal government.

This section is to be liberally construed in order that the State and its citizens may benefit from such grants-in-aid.

(c) The Commission may by rule delegate any of its powers, other than the power to adopt rules, to the Secretary of Environment and Natural Resources or his designee. (1973, c. 1262, s. 42; 1977, c. 771, s. 4; 1989, c. 727, s. 195; 1991, c. 623, s. 15; 1997-443, s. 11A.119(a).)

### **§ 143B-301. Water Pollution Control System Operators Certification Commission — members; selection; removal; compensation; quorum; services.**

(a) The Water Pollution Control System Operators Certification Commission shall consist of 11 members. Two members shall be from the animal agriculture industry and shall be appointed by the Commissioner of Agriculture. Nine members shall be appointed by the Secretary of Environment and Natural Resources with the approval of the Environmental Management Commission with the following qualifications:

- (1) Two members shall be currently employed as water pollution control facility operators, water pollution control system superintendents or directors, water and sewer superintendents or directors, or equivalent positions with a North Carolina municipality;
- (2) One member shall be manager of a North Carolina municipality having a population of more than 10,000 as of the most recent federal census;
- (3) One member shall be manager of a North Carolina municipality having a population of less than 10,000 as of the most recent federal census;
- (4) One member shall be employed by a private industry and shall be responsible for supervising the treatment or pretreatment of industrial wastewater;
- (5) One member who is a faculty member of a four-year college or university and whose major field is related to wastewater treatment;
- (6) One member who is employed by the Department of Environment and Natural Resources and works in the field of water pollution control, who shall serve as Chairman of the Commission;
- (7) One member who is employed by a commercial water pollution control system operating firm; and
- (8) One member shall be currently employed as a water pollution control system collection operator, superintendent, director, or equivalent position with a North Carolina municipality.

(b) Appointments to the Commission shall be for a term of three years. Terms shall be staggered so that three terms shall expire on 30 June of each year, except that members of the Commission shall serve until their successors are appointed and duly qualified as provided by G.S. 128-7.

(c) The Commission shall elect a Vice-Chairman from among its members. The Vice-Chairman shall serve from the time of his election until 30 June of the following year, or until his successor is elected.

(d) Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term.

(e) The Governor shall have the power to remove any member of the Commission from office for misfeasance, malfeasance, and nonfeasance according to the provisions of G.S. 143B-13.

(f) The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5 and G.S. 143B-15.

(g) A majority of the Commission shall constitute a quorum for the transaction of business.

(h) All clerical and other services required by the Commission shall be supplied by the Secretary of Environment and Natural Resources. (1973, c. 1262, s. 43; 1977, c. 771, s. 4; 1989, c. 372, s. 10; c. 727, s. 196, 197; 1989 (Reg. Sess., 1990), c. 850, s. 1; c. 1004, s. 19(b); 1991, c. 623, ss. 1, 16; 1995 (Reg. Sess., 1996), c. 626, s. 5; 1997-443, s. 11A.119(a).)

### § 143B-301.1. Definitions.

The definitions set out in G.S. 90A-46 shall apply throughout this Part. (1991, c. 623, s. 17; 1991 (Reg. Sess., 1992), c. 890, s. 21.)

§§ 143B-301.2 through 143B-301.9: Reserved for future codification purposes.

## Part 9A. Well Contractors Certification Commission.

### § 143B-301.10. Definitions.

The definitions in G.S. 87-85 and G.S. 87-98.2 apply in this Part. (1997-358, s. 1.)

### § 143B-301.11. Creation, powers, and duties of the Commission.

(a) Creation and Duties. — The Well Contractors Certification Commission is created within the Department. The Commission shall:

- (1) Adopt rules with respect to the certification of well contractors as provided by Article 7A of Chapter 87 of the General Statutes.
- (2) Exercise quasi-judicial powers in accordance with the provisions of Chapter 150B of the General Statutes. The Commission shall make the final agency decision on any matter involving the certification of well contractors pursuant to Article 7A of Chapter 87 of the General Statutes and on civil penalties assessed for violations of that Article or rules adopted pursuant to that Article.
- (3) Adopt rules as may be required to secure a federal grant-in-aid for a program concerned with the certification of well contractors. This subdivision is to be liberally construed in order that the State and its citizens may benefit from federal grants-in-aid.

(b) Delegation. — The Commission may, by rule, delegate to the Secretary any of its powers, other than the power to adopt rules. (1997-358, s. 1.)

### § 143B-301.12. Membership of Commission.

(a) Appointments. — The Commission shall consist of seven members appointed as follows:

- (1) One member appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives who, at the time of appointment, is (i) engaged in well contractor activities, (ii) certified as a well contractor under Article 7A of Chapter 87 of the General Statutes, (iii) engaged primarily in the construction, installation, repair, alteration, or abandonment of domestic water supply wells, and (iv) a resident of a county that is located east of or is traversed by Interstate 95.

- (2) One member appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives who, at the time of appointment, is (i) engaged in well contractor activities, (ii) certified as a well contractor under Article 7A of Chapter 87 of the General Statutes, (iii) engaged primarily in the construction, installation, repair, alteration, or abandonment of domestic water supply wells, and (iv) a resident of a county that is located wholly west of Interstate 95.
- (3) One member appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate who, at the time of appointment, is (i) engaged in well contractor activities, (ii) certified as a well contractor under Article 7A of Chapter 87 of the General Statutes, and (iii) engaged primarily in the construction, installation, repair, alteration, or abandonment of industrial, municipal, or other large capacity water supply wells.
- (4) One member appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate who, at the time of appointment, is (i) engaged in well contractor activities, (ii) certified as a well contractor under Article 7A of Chapter 87 of the General Statutes, and (iii) engaged primarily in the construction, installation, repair, alteration, or abandonment of nonwater supply wells, such as monitoring or recovery wells.
- (5) One member appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives who, at the time of appointment, is (i) employed by a local county health department and (ii) actively engaged in well inspection and permitting.
- (6) One member appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate who, at the time of appointment, is (i) employed by a local county health department and (ii) actively engaged in well inspection and permitting.
- (7) One member appointed by the Governor who is (i) appointed from the public at large, (ii) not engaged in well contractor activities, and (iii) not an employee of a firm or corporation engaged in well contractor activities or a State or county governmental agency.

(b) Additional Qualifications. — Appointment of members to fill positions (1), (2), (3), and (4) shall be made from among all those persons who are recommended for appointment to the Commission by any person who is engaged in well contractor activities and who is certified as a well contractor under Article 7A of Chapter 87 of the General Statutes. No person shall be appointed to the Commission who is a resident of, or has a principal place of business in, the same county as another member of the Commission.

(c) Terms. — Appointments to the Commission shall be for terms of three years. The terms of members appointed to fill positions (1), (2), and (7) shall expire on 30 June of years evenly divisible by three. The terms of members appointed to fill positions (3) and (4) shall expire on 30 June of years that follow by one year those years that are evenly divisible by three. The terms of members appointed to fill positions (5) and (6) shall expire on 30 June of years that precede by one year those years that are evenly divisible by three. Members shall serve until their successors are appointed and qualified. No member shall serve more than two consecutive terms.

(d) Officers. — The Commission shall elect a Chair and a Vice-Chair from among its members. These officers shall serve from the time of their election until 30 June of the following year, or until a successor is elected.

(e) Vacancies. — An appointment to fill a vacancy on the Commission created by the resignation, dismissal, disability, or death of a member shall be for the balance of the unexpired term. Vacancies in appointments made by the General Assembly shall be filled as provided in G.S. 120-122.

(f) Removal. — The Governor may remove any member of the Commission from office for misfeasance, malfeasance, or nonfeasance, as provided in G.S. 143-13.

(g) Compensation. — The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

(h) Quorum. — A majority of the membership of the Commission constitutes a quorum for the transaction of business.

(i) Services. — All clerical and other services required by the Commission shall be supplied by the Secretary. (1997-358, s. 1.)

**Editor's Note.** — Session Laws 1997-358, s. 8 provides: "(a) To provide for staggered terms, initial appointments to the Well Contractors Certification Commission created in Section 1 of this act shall be as follows:

"(1) Initial appointments to positions (1), (2), and (7) shall expire on 30 June 2001.

"(2) Initial appointments to positions (3) and (4) shall expire on 30 June 1999.

"(3) Initial appointments to positions (5) and

(6) shall expire on 30 June 2000.

"(b) In the event that the General Assembly fails to appoint one or more initial members to the Well Contractors Certification Commission while the General Assembly is in session during 1997, the failure to make an initial appointment shall be treated as though a vacancy had occurred, and the vacancy may be filled by appointment as provided in G.S. 120-122."

## Part 10. Earth Resources Council.

§§ 143B-302 through 143B-304: Repealed by Session Laws 1983, c. 667, s. 1.

## Part 11. Community Development Council.

§§ 143B-305 through 143B-307: Recodified as §§ 143B-437.1 through 143B-437.3 by Session Laws 1989, c. 727, s. 199.

## Part 12. Forestry Council.

### § 143B-308. Forestry Council — creation; powers and duties.

There is hereby created the Forestry Council of the Department of Environment and Natural Resources. The Forestry Council shall have the following functions and duties:

- (1) To advise the Secretary of Environment and Natural Resources with respect to all matters concerning the protection, management, and preservation of State-owned, privately owned, and municipally owned forests in the State, including but not limited to:
  - a. Profitable use of the State's forests consistent with the principles of sustained productivity.
  - b. Best management practices, including those for protection of soil, water, wildlife, and wildlife habitat, to be used in managing the State's forests and their resources.
  - c. Restoration of forest ecosystems and protection of rare and endangered species occurring in the State's private forests consistent with principles of private ownership of land.
- (2) To maintain oversight of a continuous monitoring and planning process, to provide a long-range, comprehensive plan for the use,

management, and sustainability of North Carolina's forest resources, and to report regularly on progress made toward meeting the objectives of the plan.

- (3) To provide a forum for the identification, discussion, and development of recommendations for the resolution of conflicts in the management of North Carolina's forests.
- (4) To undertake any other studies, make any reports, and advise the Secretary of Environment and Natural Resources on any matter as the Secretary may direct. (1973, c. 1262, s. 52; 1977, c. 771, s. 4; 1989, c. 727, s. 218(139); 1995 (Reg. Sess., 1996), c. 653, s. 1; 1997-443, s. 11A.119(a).)

**Editor's Note.** — The subdivision (2) designation in this section was added at the direction of the Revisor of Statutes.

### § 143B-309. Forestry Council — members; chairperson; selection; removal; compensation; quorum.

(a) The Forestry Advisory Council of the Department of Environment and Natural Resources shall consist of 18 members appointed as follows:

- (1) Three persons who are registered foresters and who represent the primary forest products industry, one each from the Mountains, Piedmont and Coastal Plain.
- (2) One person who represents the secondary wood-using industry.
- (3) One person who represents the logging industry.
- (4) Four persons who are nonindustrial woodland owners actively involved in forest management, one of whom has agricultural interests, and at least one each from the Mountains, Piedmont, and Coastal Plain.
- (5) Three persons who are members of statewide environmental or wildlife conservation organizations.
- (6) One consulting forester.
- (7) Two persons who are forest scientists with knowledge of the functioning and management of forest ecosystems.
- (8) One person who represents a banking institution that manages forestland.
- (9) One person with expertise in urban forestry.
- (10) One person with active experience in city and regional planning.

(b) The Governor shall appoint one person from categories (1) and (5), two persons from category (4), and the persons from categories (6), (7), (8), (9), and (10). The President Pro Tempore of the Senate shall appoint the person from category (2) and one person each from categories (1), (4), and (5). The Speaker of the House of Representatives shall appoint the person from category (3) and one person each from categories (1), (4), and (5). The Governor, the President Pro Tempore of the Senate, and the Speaker of the House of Representatives shall consult with one another to insure that each of the three geographic regions of the State are represented in appointments made to fill categories (1) and (4).

(c) The Governor shall designate one member of the Council to serve as chairperson at the pleasure of the Governor.

(d) Members shall serve staggered terms of office of four years. The terms of office of members filling categories (1), (4), and (5) shall expire on 30 June of years that follow by one year those years that are evenly divisible by four. The terms of office of members filling categories (2), (3), (6), (7), (8), (9), and (10) shall expire on 30 June of years that follow by three years those years that are

evenly divisible by four. Terms shall expire as provided by this subsection except that members of the Council shall serve until their successors are appointed and duly qualified as provided by G.S. 128-7. Any appointment to fill a vacancy on the Council created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term and shall be made by the appointing authority responsible for that category. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122.

(e) The Governor shall have the power to remove, in accordance with G.S. 143B-13, any member appointed by the Governor. The General Assembly shall have the power to remove, in accordance with G.S. 143B-13, any member appointed by the General Assembly.

(f) Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

(g) A majority of the Council shall constitute a quorum for the transaction of business.

(h) All clerical and other services required by the Council, including the support required to carry out studies it is requested to make, shall be supplied by the Secretary of Environment and Natural Resources. (1973, c. 1262, s. 53; 1977, c. 771, s. 4; 1989, c. 727, s. 218(140); 1995 (Reg. Sess., 1996), c. 653, s. 2; 1997-443, s. 11A.119(a).)

### **§ 143B-310. Forestry Council — meetings.**

The Forestry Council shall meet annually in October and at least three other times a year and may hold special meetings at any time and place within the State at the call of the chairperson or upon the written request of at least a majority of the members. At least one meeting during each two-year period shall be held in the Mountains, Piedmont, and the Coastal Plain. (1973, c. 1262, s. 54; 1995 (Reg. Sess., 1996), c. 653, s. 3.)

## **Part 13. Parks and Recreation Council.**

**§§ 143B-311 through 143B-313:** Repealed by Session Laws 1995, c. 456, s. 4.

### **Part 13A. North Carolina Parks and Recreation Authority.**

#### **§ 143B-313.1. North Carolina Parks and Recreation Authority; creation; powers and duties.**

The North Carolina Parks and Recreation Authority is created, to be administered by the Department of Environment and Natural Resources. The North Carolina Parks and Recreation Authority shall have at least the following powers and duties:

- (1) To receive public and private donations, appropriations, grants, and revenues for deposit into the Parks and Recreation Trust Fund.
- (2) To allocate funds for land acquisition from the Parks and Recreation Trust Fund.
- (3) To allocate funds for repairs, renovations, improvements, construction, and other capital projects from the Parks and Recreation Trust Fund.
- (4) To solicit financial and material support from public and private sources.
- (5) To develop effective public and private support for the programs and operations of the parks and recreation areas.

- (6) To consider and to advise the Secretary of Environment and Natural Resources on any matter the Secretary may refer to the North Carolina Parks and Recreation Authority. (1995, c. 456, s. 1; 1997-443, s. 11A.119(a).)

**Editor's Note.** — Session Laws 1995, c. 456, s. 6, made this Part effective July 1, 1996.

**§ 143B-313.2. North Carolina Parks and Recreation Authority; members; selection; compensation; meetings.**

(a) Membership. — The North Carolina Parks and Recreation Authority shall consist of 11 members. The members shall include persons who are knowledgeable about park and recreation issues in North Carolina or with expertise in finance. In making appointments, each appointing authority shall specify under which subdivision of this subsection the person is appointed. Members shall be appointed as follows:

- (1) One member appointed by the Governor.
- (2) One member appointed by the Governor.
- (3) One member appointed by the Governor.
- (4) One member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, as provided in G.S. 120-121.
- (5) One member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, as provided in G.S. 120-121.
- (6) One member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, as provided in G.S. 120-121.
- (7) One member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, as provided in G.S. 120-121.
- (8) One member appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, as provided in G.S. 120-121.
- (9) One member appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, as provided in G.S. 120-121.
- (10) One member appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, as provided in G.S. 120-121.
- (11) One member appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, as provided in G.S. 120-121.

(b) Terms. — Members shall serve staggered terms of office of three years. Members shall serve no more than two consecutive three-year terms. After serving two consecutive three-year terms, a member is not eligible for appointment to the Authority for at least one year after the expiration date of that member's most recent term. Upon the expiration of a three-year term, a member may continue to serve until a successor is appointed and duly qualified as provided by G.S. 128-7. The terms of members appointed under subdivision (1), (5), (7), or (9) of subsection (a) of this section shall expire on July 1 of years that are evenly divisible by three. The terms of members appointed under subdivision (2), (4), (8), or (11) of subsection (a) of this section shall expire on July 1 of years that follow by one year those years that are

evenly divisible by three. The terms of members appointed under subdivision (3), (6), or (10) of subsection (a) of this section shall expire on July 1 of years that precede by one year those years that are evenly divisible by three.

(c) Chair. — The Governor shall appoint one member of the North Carolina Parks and Recreation Authority to serve as Chair.

(d) Vacancies. — A vacancy on the North Carolina Parks and Recreation Authority shall be filled by the appointing authority responsible for making the appointment to that position as provided in subsection (a) of this section. An appointment to fill a vacancy shall be for the unexpired balance of the term.

(e) Removal. — The Governor may remove, as provided in G.S. 143-13, any member of the North Carolina Parks and Recreation Authority appointed by the Governor for misfeasance, malfeasance, or nonfeasance. The General Assembly may remove any member of the North Carolina Parks and Recreation Authority appointed by the General Assembly for misfeasance, malfeasance, or nonfeasance.

(f) Compensation. — The members of the North Carolina Parks and Recreation Authority shall receive per diem and necessary travel and subsistence expenses according to the provisions of G.S. 138-5.

(g) Meetings. — The North Carolina Parks and Recreation Authority shall meet at least quarterly at a time and place designated by the Chair.

(h) Quorum. — A majority of the North Carolina Parks and Recreation Authority shall constitute a quorum for the transaction of business.

(i) Staff. — All clerical and other services required by the North Carolina Parks and Recreation Authority shall be provided by the Secretary of Environment and Natural Resources. (1995, c. 456, s. 1; 1996, 2nd Ex. Sess., c. 15, s. 16.1; 1997-443, s. 11A.119(a); 1997-496, s. 10; 2001-424, s. 19.3(a).)

**Editor's Note.** — Session Laws 1995, c. 456, s. 5, effective July 1, 1996, provides for the appointment and terms of the initial appointees of the North Carolina Parks and Recreation Authority, notwithstanding the provisions of subsection (b) of this section.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 19.3(b), makes various appointments in order to alter the length of the staggered terms from two years to three years for the North Carolina Parks and Recreation Authority and to provide for an orderly transition in membership of the Authority as specified in this section, as amended by Session Laws 2001-424, s. 19.3(a), notwithstanding subsection (b) of this section, as amended.

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to

funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, s. 19.3(a), effective July 1, 2001, in subsection (b), substituted "staggered terms of office of three years" for "two-year terms" in the first sentence, substituted "consecutive three-year terms" for "full two-year terms" in the second sentence, added the present third sentence, substituted "three-year" for "two-year" in the fourth sentence, deleted the former fourth and fifth sentences, which read: "The term of members appointed under odd-numbered subdivisions of subsection (a) of this section shall expire on 30 June of odd-numbered years. The term of members appointed under even-numbered subdivisions of subsection (a) of this section shall expire on 30 June of even-numbered years"; and added the last three sentences.

**Legal Periodicals.** — For 1997 legislative survey, see 20 Campbell L. Rev. 450.

## Part 14. North Carolina Water Safety Council.

§§ 143B-314 through 143B-316: Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 12.

## Part 15. Air Quality Council.

### § 143B-317. Air Quality Compliance Advisory Panel — creation; powers and duties.

There is hereby created the Air Quality Compliance Advisory Panel of the Department of Environment and Natural Resources. The Air Quality Compliance Advisory Panel shall have the following functions and duties:

- (1) To render advisory opinions concerning the effectiveness of the small business stationary source technical and environmental compliance assistance program, difficulties encountered, and degree and severity of enforcement.
- (2) To make periodic reports to the Administrator of the United States Environmental Protection Agency concerning the compliance of the State Small Business Stationary Source Technical and Environmental Compliance Assistance Program with the requirements of the Paperwork Reduction Act, 44 U.S.C. §§ 3501 et. seq.; the Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.; and the Equal Access to Justice Act, 5 U.S.C. §§ 504 et seq.
- (3) To review information for small business stationary sources to assure such information is understandable by the layperson. (1973, c. 1262, s. 61; 1977, c. 771, s. 4; 1989, c. 727, s. 218(143); 1991, c. 552, s. 6; 1997-443, s. 11A.119(a).)

**Legal Periodicals.** — For note regarding North Carolina air toxics regulations, see 69 N.C.L. Rev. 1579 (1991).

### § 143B-318. Air Quality Compliance Advisory Panel — members; chairman; selection; removal; compensation; quorum; services.

(a) The Air Quality Compliance Advisory Panel of the Department of Environment and Natural Resources shall consist of two members who are not owners or representatives of owners of small business stationary sources, appointed by the Governor to represent the general public; two members appointed one each by the Speaker and the minority leader of the House of Representatives, and who are owners, or who represent owners, of small business stationary sources; two members appointed one each by the President Pro Tempore and the minority leader of the Senate, who are owners, or who represent owners, of small business stationary sources; and one member appointed by the Secretary of Environment and Natural Resources.

(b) The Governor shall designate one member of the Panel to serve as chairman at his pleasure.

(c) Members shall serve staggered terms of four years. In order to achieve staggered terms, the Speaker and the minority leader of the House of Representatives shall initially appoint members for terms of two years, the President Pro Tempore and the minority leader of the Senate shall initially appoint members for terms of three years. At the end of the respective terms of office of the initial members, their successors shall be appointed for terms of four years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Panel created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term.

(d) The Governor shall have the power to remove any member of the Panel from office for misfeasance, malfeasance or nonfeasance in accordance with the provisions of G.S. 143B-16.

(e) The members of the Panel shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

(f) A majority of the Panel shall constitute a quorum for the transaction of their business.

(g) The Secretary of Environment and Natural Resources shall designate an office within the Department of Environment and Natural Resources to serve as ombudsman for the Small Business Stationary Source Technical and Environmental Compliance Assistance Program established by the Department pursuant to section 507 of Title V of the 1990 amendments to the federal Clean Air Act (Pub. L. 101-549, 104 Stat. 2645, 42 U.S.C. § 7661f(a)(3)). The Small Business Stationary Source Technical and Environmental Compliance Assistance Program shall serve as the secretariat for the development and dissemination of reports and advisory opinions issued by the Panel. The Panel and the ombudsman shall exercise their powers consistent with G.S. 143B-14(b).

(h) All clerical and other services required by the Panel shall be supplied by the Secretary of Environment and Natural Resources. (1973, c. 1262, s. 62; 1977, c. 771, s. 4; 1989, c. 727, s. 218(144); 1991, c. 552, s. 7; 1993, c. 400, s. 1(d); 1997-443, s. 11A.119(a); 2001-474, s. 33.)

**Effect of Amendments.** — Session Laws 2001-474, s. 33, effective November 29, 2001, deleted “the Department of” preceding “Environment and Natural Resources” in the final sentence of subsection (a).

### **§ 143B-319. Air Quality Compliance Advisory Panel — meetings.**

The Panel shall meet at least semiannually and may hold special meetings at any time and place at the call of the chairman or upon the written request of at least three members. (1973, c. 1262, s. 63; 1991, c. 552, s. 8.)

#### Part 16. Water Quality Council.

§§ **143B-320, 143B-321:** Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 14.

#### Part 17. North Carolina National Park, Parkway and Forests Development Council.

§§ **143B-322 through 143B-324:** Recodified as §§ 143B-446 through 143B-447.1 by Session Laws 1977, c. 198, s. 26.

#### Part 17A. North Carolina National Park, Parkway and Forests Development Council.

### **§ 143B-324.1. North Carolina National Park, Parkway and Forests Development Council; creation; powers; duties.**

The North Carolina National Park, Parkway and Forests Development Council is created within the Department of Environment and Natural

Resources. The North Carolina National Park, Parkway and Forests Development Council shall:

- (1) Endeavor to promote the development of that part of the Smoky Mountains National Park lying in North Carolina, the completion and development of the Blue Ridge Parkway in North Carolina, the development of the Nantahala and Pisgah national forests, and the development of other recreational areas in that part of North Carolina immediately affected by the Great Smoky Mountains National Park, the Blue Ridge Parkway or the Pisgah or Nantahala national forests.
- (2) Study the development of these areas and to recommend a policy that will promote the development of the entire area generally designated as the mountain section of North Carolina, with particular emphasis upon the development of the scenic and recreational resources of the region, and the encouragement of the location of tourist facilities along lines designed to develop to the fullest these resources in the mountain section.
- (3) Confer with the various departments, agencies, commissioners and officials of the federal government and governments of adjoining states in connection with the development of the federal areas and projects named in this section.
- (4) Advise and confer with the various officials, agencies or departments of the State of North Carolina that may be directly or indirectly concerned in the development of the resources of these areas.
- (5) Advise and confer with the various interested individuals, organizations or agencies that are interested in developing this area.
- (6) Use its facilities and efforts in formulating, developing and carrying out overall programs for the development of the area as a whole.
- (7) Study the need for additional entrances to the Great Smoky Mountains National Park, together with the need for additional highway approaches and connections.
- (8) File its findings in this connection as recommendations with the National Park Service of the federal government, and the North Carolina Department of Transportation.
- (9) Advise the Secretary of Environment and Natural Resources upon any matter the Secretary of Environment and Natural Resources may refer to it. (1973, c. 1262, s. 66; 1977, c. 198, ss. 5, 26; 1989, c. 751, s. 9(c); 1991 (Reg. Sess., 1992), c. 959, s. 85; 1997-443, ss. 11A.123, 15.36(b), (c).)

**Editor's Note.** — The above section was formerly § 143B-322. It was recodified in this Article by Session Laws 1977, c. 198, s. 26.

Session Laws 1997-443, s. 15.36(b), recodified Part 7 of Article 10 of this chapter as Part 17A of Article 7 of this chapter.

This section was formerly 143B-446. It was recodified as 143B-324.1 by Session Laws 1997-443, s. 15.36(b).

Session Laws 1997-443, s. 15.36(a), provides: "All functions, powers, duties, and obligations heretofore vested in the North Carolina National Park, Parkway and Forests Development Council of the Department of Commerce are hereby transferred to and vested in the Department of Environment, Health, and Natural

Resources [now the Department of Environment and Natural Resources] by a Type II transfer, as defined in G.S. 143A-6."

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997.'"

Session Laws 1997-443, s. 35.4, is a severability clause.

**§ 143B-324.2. North Carolina National Park, Parkway and Forests Development Council — members; selection; officers; removal; compensation; quorum; services.**

The North Carolina National Park, Parkway and Forests Development Council within the Department of Environment and Natural Resources shall consist of seven members appointed by the Governor. The composition of the Council shall be as follows: one member shall be a resident of Buncombe County, one member a resident of Haywood County, one member a resident of Jackson County, one member a resident of Swain County, three members residents of counties adjacent to the Blue Ridge Parkway, the Great Smoky Mountains National Park or the Pisgah or Nantahala national forests. The appointment of members shall be for terms of four years, or until their successors are appointed and qualify. Any appointment to fill a vacancy on the Council created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term.

The Council shall elect a chairman, a vice-chairman and a secretary. The chairman and the vice-chairman shall all be members of the Council, but the secretary need not be a member of the Council. These officers shall perform the duties usually pertaining to such offices and when elected shall serve for a period of one year, but may be reelected. In case of vacancies by resignation or death, the office shall be filled by the Council for the unexpired term of said officer.

The Governor shall have the power to remove any member of the Council from office in accordance with the provisions of G.S. 143B-16 of the Executive Organization Act of 1973.

Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5 and G.S. 143B-15 of the Executive Organization Act of 1973.

Five members of the Council shall constitute a quorum for the transaction of business. (1973, c. 1262, s. 67; 1977, c. 198, ss. 5, 26; 1997-443, ss. 11A.123, 15.36(b), (d).)

**Editor's Note.** — The above section was formerly § 143B-323. It was recodified in this Article by Session Laws 1977, c. 198, s. 26.

This section was formerly 143B-447. It was recodified as 143B-324.2 by Session Laws 1997-443, s. 15.36(b).

**§ 143B-324.3. North Carolina National Park, Parkway and Forests Development Council — meetings.**

The North Carolina National Park, Parkway and Forests Development Council shall meet monthly and may hold special meetings at any time and place within the State at the call of the chairman or upon written request of at least a majority of the members. (1973, c. 1262, s. 68; 1977, c. 198, s. 26; 1997-443, s. 15.36(b).)

**Editor's Note.** — The above section was formerly § 143B-324. It has been recodified in this Article pursuant to Session Laws 1977, c. 198, s. 26. The 1977 act expressly recodified §§ 143B-322 and 143B-323, but did not mention § 143B-324.

This section was formerly 143B-447.1. It was recodified as 143B-324.3 by Session Laws 1997-443, s. 15.36(b).

Part 18. Commercial and Sports Fisheries Advisory Committee.

§§ **143B-325 through 143B-327**: Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 11.

Part 19. John H. Kerr Reservoir Committee.

§§ **143B-328 through 143B-330**: Repealed by Session Laws 1985 (Regular Session 1986), c. 1028, s. 30.

**Editor's Note.** — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 30 abolished the John H. Kerr Reservoir Committee, but provided that the act does not prevent local officials in counties affected by the reservoir from establishing a local advisory group.

Part 20. Science and Technology Committee.

§§ **143B-331, 143B-332**: Recodified as §§ 143B-440, 143B-441 by Session Laws 1977, c. 198, s. 26.

Part 21. North Carolina Trails Committee.

§ **143B-333. North Carolina Trails Committee — creation; powers and duties.**

There is hereby created the North Carolina Trails Committee of the Department of Environment and Natural Resources. The Committee shall have the following functions and duties:

- (1) To meet not less than two times annually to advise the Department on all matters directly or indirectly pertaining to trails, their use, extent, location, and the other objectives and purposes of G.S. 113A-88.
- (2) To coordinate trail development among local governments, and to assist local governments in the formation of their trail plans and advise the Department of its findings.
- (3) To advise the Secretary of trail needs and potentials pursuant to G.S. 113A-88. (1973, c. 1262, s. 80; 1977, c. 771, s. 4; 1989, c. 727, s. 218(145); 1997-443, s. 11A.119(a).)

§ **143B-334. North Carolina Trails Committee — members; selection; removal; compensation.**

The North Carolina Trails Committee shall consist of seven members appointed by the Secretary of Environment and Natural Resources. Two members shall be from the mountain section, two from the Piedmont section, two from the coastal plain, and one at large. They shall as much as possible represent various trail users.

The initial members of the North Carolina Trails Committee shall be the members of the current North Carolina Trails Committee who shall serve for a period equal to the remainder of their current term on the North Carolina Trails Committee. At the end of the respective terms of office of the initial members of the Committee, the appointment of their successors shall be for staggered terms of four years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Committee created by the

resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Committee from office in accordance with the provisions of G.S. 143B-16 of the Executive Organization Act of 1973.

The Secretary of Environment and Natural Resources shall designate a member of the Committee to serve as chairman at the pleasure of the Governor.

Members of the Committee shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5 and G.S. 143B-15 of the Executive Organization Act of 1973. (1973, c. 1262, s. 81; 1977, c. 771, s. 4; 1989, c. 727, s. 218(146); 1997-443, s. 11A.119(a).)

## Part 22. North Carolina Zoological Park Council.

### § 143B-335. North Carolina Zoological Park Council — creation; powers and duties.

There is hereby created the North Carolina Zoological Park Council of the Department of Environment and Natural Resources. The North Carolina Zoological Park Council shall have the following functions and duties:

- (1) To advise the Secretary on the basic concepts of and for the Zoological Park, approve conceptual plans for the Zoological Park and its buildings;
- (2) To advise on the construction, furnishings, equipment and operations of the North Carolina Zoological Park;
- (2a) To establish and set admission fees with the approval of the Secretary of Environment and Natural Resources as provided in G.S. 143-177.3(b);
- (3) To recommend programs to promote public appreciation of the North Carolina Zoological Park;
- (4) To disseminate information on animals and the park as deemed necessary;
- (5) To develop effective public support of the North Carolina Zoological Park through whatever means are desirable and necessary;
- (6) To solicit financial and material support from various private sources within and without the State of North Carolina; and
- (7) To advise the Secretary of Environment and Natural Resources upon any matter the Secretary may refer to it. (1973, c. 1262, s. 83; 1977, c. 771, s. 4; 1981, c. 278, s. 2; 1989, c. 727, s. 218(147); 1997-443, s. 11A.119(a).)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 19.4, provides: "Subject to the approval of the Secretary of Environment and Natural Resources, up to four hundred thousand dollars (\$400,000) of the receipts from the increase in admission fees to the North Carolina Zoological Park for the 2001-2002 fiscal year and up to four hundred thousand dollars (\$400,000) of those receipts

for the 2002-2003 fiscal year may be used for marketing activities related to promoting the North Carolina Zoological Park."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

**§ 143B-336. North Carolina Zoological Park Council — members; selection; removal; chairman; compensation; quorum; services.**

The North Carolina Zoological Park Council of the Department of Environment and Natural Resources shall consist of 15 members appointed by the Governor, one of whom shall be the Chairman of the Board of Directors of the North Carolina Zoological Society.

The initial members of the Council shall be the members of the Board of Directors of the North Carolina Zoo Authority who shall serve for a period equal to the remainder of their current terms on the Board of Directors of the North Carolina Zoological Authority, all of whose terms expire July 15, 1975. At the end of the respective terms of office of the initial members of the Council, the Governor, to achieve staggered terms, shall appoint five members for terms of two years, five members for terms of four years and five members for terms of six years. Thereafter, the appointment of their successors shall be for terms of six years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Council created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Council from office in accordance with the provisions of G.S. 143B-16 of the Executive Organization Act of 1973.

The Governor shall designate a member of the Council to serve as chairman at his pleasure.

Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Council shall constitute a quorum for the transaction of business.

All clerical and other services required by the Council shall be supplied by the Secretary of Environment and Natural Resources. (1973, c. 1262, s. 84; 1977, c. 771, s. 4; 1979, c. 30, s. 1; 1989, c. 727, s. 218(148); 1997-443, s. 11A.119(a).)

**§ 143B-336.1. Special Zoo Fund.**

A special continuing and nonreverting fund, to be called the Special Zoo Fund, is created. The North Carolina Zoological Park shall retain unbudgeted receipts at the end of each fiscal year, beginning June 30, 1989, and deposit these receipts into this Fund. This Fund shall be used for maintenance, repairs, and renovations of exhibits in existing habitat clusters and visitor services facilities, construction of visitor services facilities and support facilities such as greenhouses and temporary animal holding areas, and for the replacement of tram equipment as required to maintain adequate service to the public. The Special Zoo Fund may also be used to match private funds which are raised for these purposes. Funds may be expended for these purposes by the Department of Environment and Natural Resources on the advice of the North Carolina Zoological Park Council and with the approval of the Office of State Budget and Management. The Department of Environment and Natural Resources shall provide an annual report to the Office of State Budget and Management and to the Fiscal Research Division of the Legislative Services Office on the use of fees collected pursuant to this section. (1989, c. 752, s. 154; 1995, c. 324, s. 26.11; 1997-443, s. 11A.119(a); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b).)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-140, s. 93.1(a), effective July 1, 2000,

substituted "Office of State Budget, Planning, and Management" for "Office of State Budget and Management" in two places.

Session Laws 2001-424, s. 12.2(b), effective July 1, 2001, substituted "Office of State Budget and Management" for "Office of State Budget, Planning, and Management."

## Part 23. Governor's Law and Order Commission.

§§ **143B-337 through 143B-339:** Recodified as §§ 143B-478 through 143B-480.

**Editor's Note.** — This Part was rewritten by Session Laws 1977, c. 11, and has been recodified as §§ 143B-478 through 143B-480.

## Part 24. North Carolina Employment and Training Council.

§§ **143B-340, 143B-341:** Repealed by Session Laws 1985, c. 543, s. 6.

**Cross References.** — For the Employment and Training Act of 1985, see § 143B-438.1 et seq.

## Part 25. Triad Park Commission.

§§ **143B-342 through 143B-344.2:** Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 13.

## Part 26. Economic Opportunity Agencies.

§§ **143B-344.3 through 143B-344.10:** Repealed by Session Laws 1981, c. 1127, s. 70.

**Editor's Note.** — The repealed Part was Article 6 of Chapter 108 as recodified by Session Laws 1981, c. 275, s. 3.

## Part 27. Employment and Training Act of 1985.

§§ **143B-344.11 through 143B-344.15:** Recodified as §§ 143B-438.1 through 143B-438.5 by Session Laws 1989, c. 727, s. 202.

## Part 28. North Carolina Aquariums Commission.

§§ **143B-344.16, 143B-344.17:** Repealed by Session Laws 1997, c. 286, s. 1.

Part 29. Advisory Commission for North Carolina State  
Museum of Natural Sciences.

**§ 143B-344.18. Commission created; membership.**

There is created an Advisory Commission for the North Carolina State Museum of Natural Sciences which shall determine its own organization. It shall consist of at least nine members, which shall include the Director of the North Carolina State Museum of Natural Sciences, the Commissioner of Agriculture, the State Geologist and Secretary of Environment and Natural Resources, the Director of the Institute of Fisheries Research of the University of North Carolina, the Director of the Wildlife Resources Commission, the Superintendent of Public Instruction, or qualified representative of any or all of the above-named members, and at least three persons representing the East, the Piedmont, and the Western areas of the State. Members appointed by the Governor shall serve for terms of two years with the first appointments to be made effective September 1, 1961. Any member may be removed by the Governor for cause. (1961, c. 1180, s. 1; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 218(119); 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1993, c. 561, ss. 116(b), (f); 1997-443, s. 11A.119(a).)

**Editor's Note.** — This Part is former Article 40 of Chapter 143, as rewritten and recodified by Session Laws 1993, c. 561, s. 116(b), effective August 1, 1993. Where appropriate, the historical citations to the sections in the former Article have been added to corresponding sections in the Part as rewritten and recodified.

Session Laws 1993, c. 561, s. 23.1, as added by Session Laws 1994, Extra Session, c. 24, s. 54, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

Session Laws 1993, c. 561, which recodified this section, in s. 116(a) provides: "The statutory authority, powers, duties, and functions, records, personnel, property, and unexpended

balances of appropriations, allocations, or other funds of (i) the North Carolina State Museum of Natural Sciences, and of (ii) the Advisory Commission established in Article 40 of Chapter 143 of the General Statutes for the North Carolina State Museum of Natural Sciences, are transferred from the Department of Agriculture to the Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources]. This transfer has all of the elements of a Type I transfer as defined by G.S. 143A-6."

**State Government Reorganization.** — The Museum of Natural History Advisory Commission was transferred to the Department of Agriculture by former § 143A-66, enacted by Session Laws 1971, c. 864. See now § 143B-344.18 et seq.

**§ 143B-344.19. Duties of Commission; meetings, formulation of policies and recommendations to Governor and General Assembly.**

It shall be the duty of the Advisory Commission for the North Carolina State Museum of Natural Sciences to meet at least twice each year, to formulate policies for the advancement of the Museum, to make recommendations to the Governor and to the General Assembly concerning the Museum, and to assist in promoting and developing wider and more effective use of the North Carolina State Museum of Natural Sciences as an educational, scientific and historical exhibit. (1961, c. 1180, s. 2; 1993, c. 561, ss. 116(b), (f).)

**Editor's Note.** — This section was formerly G.S. 143-371. It was recodified by Session Laws 1993, c. 516, s. 116(b).

### § 143B-344.20. No compensation of members; reimbursement for expenses.

Members of the Advisory Commission shall serve without compensation and shall be reimbursed for actual expenses incurred while in attendance at meetings of the Commission at the same rate as that established for reimbursement of State employees. Payment for such reimbursement for actual expense shall be made from the Contingency and Emergency Fund. (1961, c. 1180, s. 3; 1993, c. 561, s. 116(b).)

**Editor's Note.** — This section was formerly G.S. 143-372. It was recodified by Session Laws 1993, c. 561, s. 116(b).

### § 143B-344.21. Reports to General Assembly.

The Commission shall prepare and submit to the 1995 General Assembly, and to each succeeding General Assembly, a report outlining the needs of the North Carolina State Museum of Natural Sciences and their recommendation for improvement of the effectiveness of the North Carolina State Museum of Natural Sciences for the purpose hereinabove set forth. (1961, c. 1180, s. 4; 1993, c. 561, ss. 116(b), (f).)

**Editor's Note.** — This section was formerly G.S. 143-373. It was recodified by Session Laws 1993, c. 561, c. 116(b).

### § 143B-344.22. Museum of Natural Sciences; disposition of objects.

Notwithstanding Article 3A of Chapter 143 of the General Statutes, G.S. 143-49(4), or any other law pertaining to surplus State property, the Department of Environment and Natural Resources may sell or exchange any object from the collection of the Museum of Natural Sciences when it would be in the best interest of the Museum to do so. Sales or exchanges shall be conducted in accordance with generally accepted practices for accredited museums. If an object is sold, the net proceeds of the sale shall be deposited in the State treasury to the credit of a special fund to be used for the improvement of the Museum's collections or exhibits. (1991 (Reg. Sess., 1992), c. 900, s. 175; 1997-261, s. 24; 1998-212, s. 21(a).)

**Editor's Note.** — This section was formerly § 106-22.2. It was recodified pursuant to Session Laws 1998-212, s. 21.

Session Laws 1997-443, s. 14.2, effective July 1, 1997, provides for the transfer of the North

Carolina Maritime Museum and associated funds, resources, and personnel from the Department of Agriculture and Consumer Services to the Department of Cultural Resources.

### § 143B-344.23. North Carolina Museum of Forestry; satellite museum.

The Department of Environment and Natural Resources shall establish and administer the North Carolina Museum of Forestry in Columbus County as a satellite museum of the North Carolina State Museum of Natural Sciences. (1998-212, s. 14.1(a).)

**Editor's Note.** — Session Laws 1998-212, s. 14.1(a), originally enacted this section as § 143B-344.22; however, it has been redesignated as § 143B-344.23 at the direction of the Revisor of Statutes.

Session Laws 1998-212, s. 14(b), made this section effective December 1, 1998.

Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

§§ 143B-344.24 through 143B-344.29: Reserved for future codification purposes.

Part 30. State Infrastructure Council.

**§ 143B-344.30. Council established; purpose; members; terms of office; quorum; compensation; termination.**

(a) Establishment. — There is established the State Infrastructure Council. The Council shall be located within the Department of Environment and Natural Resources for organizational, budgetary, and administrative purposes.

(b) Purpose. — The purpose of the Council is to develop a State strategic plan that addresses North Carolina's water supply and distribution and wastewater treatment needs.

(c) Membership. — The Council shall consist of 19 members, five of whom are ex officio and 14 of whom are appointed as follows:

- (1) Four persons appointed by the Governor.
- (2) Five persons appointed by the President Pro Tempore of the Senate, at least one of whom must be a member of the Senate.
- (3) Five persons appointed by the Speaker of the House of Representatives, at least one of whom must be a member of the House of Representatives.
- (4) The following persons or their designees, ex officio:
  - a. The Secretary of Commerce.
  - b. The Secretary of Environment and Natural Resources.
  - c. The State Treasurer.
  - d. The Executive Director of the League of Municipalities.
  - e. The Executive Director of the North Carolina Association of County Commissioners.

The members appointed to the State Infrastructure Council shall be chosen from among individuals who have the ability and commitment to promote and fulfill the purposes of the Council, including individuals who have demonstrated expertise in the fields of environmental science, particularly the areas of wastewater treatment and water supply and distribution, public planning, public financing, public health, and economic development.

(d) Terms. — Members shall serve for two-year terms, with no prohibition against being reappointed, except initial appointments shall be for terms as follows:

- (1) The Governor shall initially appoint two members for terms of two years and two members for terms of three years.
- (2) The President Pro Tempore of the Senate shall initially appoint two members for terms of two years and three members for terms of three years.
- (3) The Speaker of the House of Representatives shall initially appoint two members for terms of two years and three members for terms of three years.

Initial terms shall begin on January 1, 1999.

(e) Chair. — The chair shall be appointed biennially by the Governor from among the membership of the Council. The initial term shall begin on January 1, 1999.

(f) Vacancies. — A vacancy in the Council or as chair of the Council resulting from the resignation of a member or otherwise shall be filled in the same manner in which the original appointment was made and the term shall be for the balance of the unexpired term.

(g) Compensation. — The Council members shall receive no salary as a result of serving on the Council but shall receive per diem, subsistence, and travel expenses in accordance with the provisions of G.S. 120-3.1, G.S. 138-5, and G.S. 138-6, as applicable.

(h) Removal. — Members may be removed in accordance with G.S. 143B-13 as if that section applied to this Part.

(i) Meetings. — The chair shall convene the Council. Meetings shall be held as often as necessary, but not fewer than four times a year.

(j) Quorum. — A majority of the members of the Council shall constitute a quorum for the transaction of business. The affirmative vote of a majority of the members present at meetings of the Council shall be necessary for action to be taken by the Council. (1998-132, s. 14.)

**Editor's Note.** — Session Laws 1998-132, s. 14 was codified as this Part of Article 7 rather than as an Article of Chapter 143 at the direction of the Revisor of Statutes.

Session Laws 1998-132, s. 14, provides that this Part becomes effective only if the voters approve the issuance of Clean Water Bonds in an election to be held on the first Tuesday after the first Monday of November 1998. The bonds were approved at that election, and the results of that election were certified on November 24, 1998.

Session Laws 1998-132, s. 1 provides that this act shall be known as the Clean Water and Natural Gas Critical Needs Bond Act of 1998.

Session Laws 2000-156, s. 2.1, effective August 1, 2000, directs the State Infrastructure Council, with the cooperation of the Department of Environment and Natural Resources and the Rural Economic Development Center, Inc., to study the geographic distribution of loans and grants from the proceeds of the Clean Water Bonds and determine the extent to which geographic disparities and inequities of distribution exist, as well as to develop a plan to redress the disparities or inequities identified. No later than December 1, 2000, the Council is to report the results of its evaluation, any administrative actions taken, and any legislative proposals to address disparities and inequities

to the President Pro Tempore of the Senate, the Speaker of the House of Representatives, and the Fiscal Research Division.

Session Laws 2001-416, s. 1(a), provides: "Notwithstanding any other provision of law, the State Treasurer shall defer the issuance of any of the following until after January 1, 2002:

"(1) State of North Carolina Clean Water Bonds authorized in S.L. 1998-132.

"(2) State of North Carolina Natural Gas Bonds authorized for the construction of natural gas facilities in S.L. 1998-132.

"(3) State of North Carolina Public School Building Bonds authorized for public school building capital improvements in S.L. 1995-631."

Session Laws 2001-416, ss. 1(b) to 7(b), provide for reallocation of Clean Water Bonds for unsewered community grants and for supplemental grants to eligible local government units to match funds to plan or improve needed water and sewer projects, and defer the issuance of Clean Water Bonds authorized in Session Laws 1998-132, Natural Gas Bonds authorized in Session Laws 1998-132, and Public School Building Bonds authorized in Session Laws 1995, c. 631, until after January 1, 2002. The Rural Economic Development Center is to report annually on the allocation and making of grants authorized by Session Laws 1998-132.

## § 143B-344.31. Duties of the Council.

Duties. — The Council shall have the following duties:

- (1) To plan and develop a State strategic plan that addresses North Carolina's water supply and distribution and wastewater treatment needs.

- (2) To evaluate the State’s natural resource base and existing water and sewer systems and to project statewide future needs for water and sewer systems.
- (3) To analyze current and proposed statutes, rules, and programs that address or affect State water and sewer needs.
- (4) To analyze the roles of State and local government and other parties in addressing water and sewer needs and to recommend the appropriate roles for each with regard to addressing future water and sewer needs.
- (5) To anticipate the impact of infrastructure development on natural resources and to make recommendations on how to minimize the impact. (1998-132, s. 14.)

**Editor’s Note.** — Session Laws 1998-132, s. 14, provides that this Part becomes effective only if the voters approve the issuance of Clean Water Bonds in an election to be held on the first Tuesday after the first Monday of November 1998. The bonds were approved at that

election, and the results of that election were certified on November 24, 1998.

Session Laws 1998-132, s. 1 provides that this act shall be known as the Clean Water and Natural Gas Critical Needs Bond Act of 1998.

**§ 143B-344.32. Staff and offices.**

The Department of Environment and Natural Resources shall provide office space and staff for the State Infrastructure Council as requested by the Council. Upon the request of a chair of the State Infrastructure Council, who is also a member of the General Assembly, the Legislative Services Office shall also provide professional staff services to the Council. (1998-132, s. 14; 2001-486, s. 2.24; 2001-487, s. 125.5.)

**Editor’s Note.** — Session Laws 1998-132, s. 14, provides that this Part becomes effective only if the voters approve the issuance of Clean Water Bonds in an election to be held on the first Tuesday after the first Monday of November 1998. The bonds were approved at that election, and the results of that election were certified on November 24, 1998.

Session Laws 1998-132, s. 1 provides that this act shall be known as the Clean Water and Natural Gas Critical Needs Bond Act of 1998.

**Effect of Amendments.** — Session Laws 2001-486, s. 2.24, as amended by Session Laws 2001-487, s. 125.5, effective December 16, 2001, added the second sentence.

**§ 143B-344.33. Council reports.**

The Council shall report to the Joint Legislative Commission on Governmental Operations, with a written report to the Fiscal Research Division, by October 1, 1999, and annually thereafter, regarding the implementation of this Part. In its report the Council shall include any recommendations regarding statewide water and sewer needs that require review or action by the General Assembly. (1998-132, s. 14.)

**Editor’s Note.** — Session Laws 1998-132, s. 14, provides that this Part becomes effective only if the voters approve the issuance of Clean Water Bonds in an election to be held on the first Tuesday after the first Monday of November 1998. The bonds were approved at that

election, and the results of that election were certified on November 24, 1998.

Session Laws 1998-132, s. 1 provides that this act shall be known as the Clean Water and Natural Gas Critical Needs Bond Act of 1998.

## ARTICLE 8.

*Department of Transportation.*

## Part 1. General Provisions.

**§ 143B-345. Department of Transportation — creation.**

There is hereby created and established a department to be known as the "Department of Transportation" with the organization, powers, and duties defined in Article 1 of Chapter 143B, except as modified in this Article. (1975, c. 716, s. 1.)

**§ 143B-346. Department of Transportation — purpose and functions.**

The general purpose of the Department of Transportation is to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and safe transportation of people and goods as provided for by law. The Department shall also provide and maintain an accurate register of transportation vehicles as provided by statutes, and the Department shall enforce the laws of this State relating to transportation safety assigned to the Department. The Department of Transportation shall be responsible for all of the transportation functions of the executive branch of the State as provided by law except those functions delegated to the Utilities Commission, the State Ports Authority, and the Commissioners of Navigation and Pilotage as provided for by Chapter 76. The major transportation functions include aeronautics, highways, mass transportation, motor vehicles, and transportation safety as provided for by State law. The Department of Transportation shall succeed to all functions vested in the Board of Transportation and the Department of Motor Vehicles on July 1, 1977. (1975, c. 716, s. 1; 1977, c. 464, s. 2.)

**Legal Periodicals.** — For survey of 1984 administrative law, "A Declining Role for the Attorney General," see 63 N.C.L. Rev. 1051 (1985).

## CASE NOTES

**The Board of Transportation and the Department of Transportation are in essence the sovereign** and have paramount authority over municipal corporations, which are subservient to the State in such matters. *Town of Morehead City v. North Carolina Dep't of Transp.*, 74 N.C. App. 66, 327 S.E.2d 602 (1985).

**Duty to Use Due Care.** — The law does not impose a duty on the individual employees of the Department of Transportation that extends to the general public, beyond the duty to use due care in the performance of the specific tasks they undertake. The duty owing to the public to maintain highways falls upon the Department of Transportation (DOT). *Reid v. Roberts*, 112 N.C. App. 222, 435 S.E.2d 116, cert. denied, 335 N.C. 559, 439 S.E.2d 151 (1993).

**Failure to Erect Guardrail.** — The De-

partment of Transportation's intentional, discretionary decision not to erect a guardrail at the site of fatal accident was not so clearly unreasonable as to amount to oppressive and manifest abuse so as to invoke the jurisdiction of the judiciary or the Industrial Commission to review the discretionary policy-making decisions of the Department, nor was it a breach of any duty imposed upon it. Thus, the Department was not negligent in any respect within the meaning of the Tort Claims Act, § 143-291, and no act or omission upon the part of defendant was the proximate cause of the accident and the deaths of plaintiff's decedents. *Hochheiser v. North Carolina Dep't of Transp.*, 82 N.C. App. 712, 348 S.E.2d 140 (1986), aff'd, 321 N.C. 117, 361 S.E.2d 562 (1987).

**Applied** in *Tice v. DOT*, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

**Quoted** in Guthrie v. North Carolina State Ports Auth., 56 N.C. App. 68, 286 S.E.2d 823 (1982); Davis v. J.M.X., Inc., 137 N.C. App. 267, 528 S.E.2d 56 (2000), aff'd, 352 N.C. 662, 535 S.E.2d 356 (2000).

§ **143B-347**: Repealed by Session Laws 1977, c. 464, s. 3.

**Cross References.** — For present provisions as to the functions of the Department of Transportation, see § 143B-346.

§ **143B-348. Department of Transportation — head; rules, regulations, etc., of Board of Transportation.**

The Secretary of Transportation shall be the head of the Department of Transportation. He shall carry out the day-to-day operations of the Department and shall be responsible for carrying out the policies, programs, priorities, and projects approved by the Board of Transportation. He shall be responsible for all other transportation matters assigned to the Department of Transportation, except those reserved to the Board of Transportation by statute. Except as otherwise provided for by statute, the Secretary shall have all the powers and duties as provided for in Article 1 of Chapter 143B including the responsibility for all management functions for the Department of Transportation. The Secretary shall be vested with authority to adopt design criteria, construction specifications, and standards as required for the Department of Transportation to construct and maintain highways, bridges, and ferries.

All rules, regulations, ordinances, specifications, standards, and criteria adopted by the Board of Transportation and in effect on July 1, 1977, shall continue in effect until changed by the Board of Transportation or the Secretary of Transportation. The Secretary shall have complete authority to modify any of these matters existing on July 1, 1977, except as specifically restricted by the Board. Whenever any such criteria, rule, regulation, ordinance, specification, or standards are continued in effect under this section and the words "Board of Transportation" are used, the words shall mean the "Department of Transportation" unless the context makes such meaning inapplicable. All actions pending in court by or against the Board of Transportation may continue to be prosecuted in that name without the necessity of formally amending the name to the Department of Transportation. (1975, c. 716, s. 1; 1977, c. 464, s. 4.)

§ **143B-349**: Repealed by Session Laws 1977, c. 464, s. 5.

Part 2. Board of Transportation.

§ **143B-350. Board of Transportation — organization; powers and duties, etc.**

(a) Board of Transportation. — There is hereby created a Board of Transportation. The Board shall carry out its duties consistent with the needs of the State as a whole. The diversity and size of the State require that regional differences be considered by Board members as they develop transportation policy and projects for the benefit of the citizens of the State.

(b) Membership of the Board. —

(1) Number, appointment. — The Board of Transportation shall have 19 voting members. Fourteen of the members shall be division members

appointed by the Governor. Five shall be at-large members appointed by the Governor. At least three members of the Board shall be registered voters of a political party other than the political party of the Governor. The Secretary of Transportation shall serve as an ex officio nonvoting member of the Board. No more than two members of the Board may reside in the same highway division.

- (2) Division members. — One member shall be appointed from and be a resident of each of the 14 highway divisions. The Governor, in selecting division members, shall consider for appointment persons suggested by the Transportation Advisory Committees located within each division. Division members shall direct their primary effort to developing transportation policy and addressing transportation problems in the region they represent. Division members shall regularly consult with and consider the views of local government units and Transportation Advisory Committees in the region they represent.
- (3) At-large members. — Five members shall be appointed by the Governor from the State at large. At-large members appointed pursuant to this subdivision shall develop transportation policy and address transportation problems with a statewide perspective. At-large members appointed under this subdivision shall possess the following qualifications:
  - a. One at-large member shall be a person with expertise in environmental issues affecting the State;
  - b. One at-large member shall be a person familiar with the State ports and aviation issues;
  - c. One at-large member shall be a person residing in a rural area of the State with broad knowledge of and experience in transportation issues affecting rural areas;
  - d. One at-large member shall be a person residing in an urban area with broad knowledge of and expertise in mass transit;
  - e. One at-large member shall be a person with broad knowledge of and expertise in government-related finance and accounting.

(c) Staggered Terms. — The terms of all Board members serving on the Board prior to January 15, 2001, shall expire on January 14, 2001. A new board of 19 members shall be appointed with terms beginning on January 15, 2001. The Board shall serve the following terms: division members representing divisions 1, 3, 5, 7, 9, 11, and 13 and the three at-large members filling the positions designated in sub-subdivisions (b)(3)a., b., and e. of this section shall serve four-year terms beginning on January 15, 2001, and four-year terms thereafter; and division members representing divisions 2, 4, 6, 8, 10, 12, and 14 and the two at-large members filling the positions designated in sub-subdivisions (b)(3)c. and d. of this section shall serve two-year terms beginning January 15, 2001, and four-year terms thereafter.

(d) Holdover Terms; Vacancies; Removal. — Members shall continue to serve until their successors are appointed. The Governor may appoint a member to serve out the unexpired term of any Board member. The Governor may remove any member of the Board for any cause the Governor finds sufficient. The Governor shall remove any member of the Board upon conviction of a felony, conviction of any offense involving a violation of the Board member's official duties, or for a violation of the provisions of subsections (i), (j), and (k) of this section or any other code of ethics applicable to members of the Board as determined by the Governor or the Governor's designee.

(e) Organization and Meetings of the Board. — Within 60 days after January 15, 2001, and thereafter within 60 days following the beginning of the regular term of the Governor, the Governor or his designee shall call the Board into session. The Board shall select a chair and vice-chair from among its

membership for two-year terms. The Board may select a chair or vice-chair for one additional two-year term. The Board of Transportation shall meet once in each 60 days at such regular meeting times as the Board may by rule provide and at any place in the State as the Board may provide. The Board may hold special meetings at any time at the call of the chairman or any three members. The Board shall have the power to adopt and enforce rules and regulations for the government of its business and proceedings. The Board shall keep minutes of its meetings, which shall at all times be open to public inspection. The majority of the Board shall constitute a quorum for the transaction of business. Board members shall receive per diem and necessary travel and subsistence expenses in accordance with G.S. 138-5 and G.S. 138-6, as appropriate.

(f) Duties of the Board. — The Board of Transportation shall have duties and powers:

- (1) To formulate policies and priorities for all modes of transportation under the Department of Transportation;
- (2) To advise the Secretary on matters to achieve the maximum public benefit in the performance of the functions assigned to the Department;
- (3) To ascertain the transportation needs and the alternative means to provide for these needs through an integrated system of transportation taking into consideration the social, economic and environmental impacts of the various alternatives;
- (4) To approve a schedule of all major transportation improvement projects and their anticipated cost for a period of seven years into the future. This schedule is designated the Transportation Improvement Program; it must be published and copies must be available for distribution. The document that contains the Transportation Improvement Program, or a separate document that is published at the same time as the Transportation Improvement Program, must include the anticipated funding sources for the improvement projects included in the Program, a list of any changes made from the previous year's Program, and the reasons for the changes;
- (5) To consider and advise the Secretary of Transportation upon any other transportation matter that the Secretary may refer to it;
- (6) To assist the Secretary of Transportation in the performance of his duties in the development of programs and approve priorities for programs within the Department;
- (7) To allocate all highway construction and maintenance funds appropriated by the General Assembly as well as federal-aid funds which may be available;
- (8) To approve all highway construction programs;
- (9) To approve all highway construction projects and construction plans for the construction of projects;
- (10) To review all statewide maintenance functions;
- (11) To award all highway construction contracts;
- (12) To authorize the acquisition of rights-of-way for highway improvement projects, including the authorization for acquisition of property by eminent domain;
- (13) To promulgate rules, regulations, and ordinances concerning all transportation functions assigned to the Department.

(f1) Municipal Participation. — The ability of a municipality to pay in part or whole for any transportation improvement project shall not be a factor considered by the Board of Transportation in its development and approval of a schedule of major State highway system improvement projects to be undertaken by the Department under G.S. 143B-350(f)(4).

(f2) Approval of aircraft and ferry purposes. — Before approving the purchase of an aircraft from the Equipment Fund or a ferry in a Transporta-

tion Improvement Program, the Board of Transportation shall prepare an estimate of the operational costs and capital costs associated with the addition of the aircraft or ferry and shall report those additional costs to the General Assembly pursuant to G.S. 136-12(b), and to the Joint Legislative Commission on Governmental Operations.

(g) Delegation of Board Duties. — The Board of Transportation may, in its discretion, delegate to the Secretary of Transportation the authority:

- (1) To approve all highway construction projects and construction plans for the construction of projects;
- (2) To award all highway construction contracts;
- (3) To promulgate rules, regulations, and ordinances concerning all transportation functions assigned to the Department.

The Secretary may, in turn, subdelegate these duties and powers.

(h) Consultation of Board Members. — Each member of the Board of Transportation who is appointed to represent a transportation engineering division or who resides in a division shall be consulted before the Board makes a decision affecting that division.

(i) Disclosure of Contributions. — Any person serving on the Board of Transportation or as Secretary of Transportation on December 1, 1998, shall disclose on that date any contributions the person or the person's immediate family made to the political campaign of the appointing Governor in the two years preceding December 1, 1998. A person appointed to the Board of Transportation and a person appointed as Secretary of Transportation after December 1, 1998, shall disclose at the time the appointment of the person is officially made public any contributions the person or the person's immediate family made to the political campaign of the appointing Governor in the two years preceding the date of appointment. The term "immediate family", as used in this subsection, means a person's spouse, children, parents, brothers, and sisters. Disclosure forms shall be filed with the Governor or the Governor's designee and in a manner as prescribed by the Governor. Disclosure forms shall not be a public record under the provisions of Chapter 132 of the General Statutes until such time as the appointment of the person filing the statement is officially made public.

(j) Disclosure of Campaign Fund-Raising. — A person appointed to the Board of Transportation on or after January 1, 2001, and a person appointed as Secretary of Transportation on or after January 1, 2001, shall disclose at the time the appointment of the person is officially made public any contributions the person personally acquired in the two years prior to appointment for: any political campaign for a statewide or legislative elected office in North Carolina; any political party executive committee or political committee acting on behalf of a candidate for statewide or legislative office. Disclosure forms shall be filed with the Governor or the Governor's designee and in a manner as prescribed by the Governor. Disclosure forms shall not be a public record under the provisions of Chapter 132 of the General Statutes until such time as the appointment of the person filing the statement is officially made public.

(k) Ethics Policy. — The Board shall adopt by December 1, 1998, a code of ethics applicable to members of the Board, including the Secretary. Any code of ethics adopted by the Board shall be supplemental to any other code of ethics that may be applicable to members of the Board or to the Secretary. A code of ethics adopted pursuant to this subsection shall:

- (1) Include a prohibition against a member taking action as a Board member when a conflict of interest, or the appearance of a conflict of interest, exists. The ethics policy adopted pursuant to this subsection shall specify that a conflict of interest exists when the use of the Board member's position, or any official action taken by the Board member, would result in financial benefit, direct or indirect, to the Board member, a member of the Board member's immediate family, or an

individual with whom, or business with which, the Board member is associated. The ethics policy adopted pursuant to this subsection shall specify that an appearance of a conflict of interest exists when a reasonable person would conclude from the circumstances that the Board member's ability to protect the public interest, or perform public duties, would be compromised by personal interest, even in the absence of an actual conflict of interest. The performance of usual and customary duties associated with the public position or the advancement of public policy goals or constituent services, without compensation, shall not constitute the use of the Board member's position for financial benefit. The conflict of interest provision of the ethics policy adopted pursuant to this subsection shall not apply to financial or other benefits derived by a Board member that the Board member would enjoy to an extent no greater than that which other citizens of the State would or could enjoy.

- (2) Require the filing of a statement of economic interest. The statement of economic interest shall include a listing of the appointee's legal, equitable, or beneficial interest in real estate holdings in the State, and a statement of the appointee's financial interest in any business related to the State's transportation system. The statement of economic interest shall be filed with the Governor, or the Governor's designee, and in a manner as prescribed by the Governor.
- (3) Require the filing of a statement of association. The statement of association shall include a statement of the appointee's membership or other affiliation with, including offices held, in societies, organizations, or advocacy groups pertaining to the State's transportation system. The statement of association shall be filed with the Governor, or the Governor's designee, and in a manner as prescribed by the Governor.

Board members and the Secretary serving on December 1, 1998, shall file the statement of economic interest and statement of association on that date. Board members and the Secretary appointed after December 1, 1998, shall file the statement of economic interest and statement of association at the time the appointment of the person is officially made public. The statement of economic interest and the statement of association shall not be a public record under the provisions of Chapter 132 of the General Statutes until the appointment of the person filing the statement is officially made public.

(l) Additional Requirements for Disclosure Statements. — All disclosure statements required under subsections (i), (j), and (k) of this section must be sworn written statements.

(m) Ethics and Board Duties Education. — The Board shall institute by January 1, 1999, and conduct annually an education program on ethics and on the duties and responsibilities of Board members. The training session shall be comprehensive in nature and shall include input from the Institute of Government, the North Carolina Board of Ethics, the Attorney General's Office, the University of North Carolina Highway Safety Research Center, and senior career employees of the various divisions of the Department. This program shall include an initial orientation for new members of the Board and continuing education programs for Board members at least once each year.

(n) Review of Appointments by the Joint Legislative Transportation Oversight Committee. — The Governor shall submit the names of all proposed Board of Transportation appointees, along with the disclosure statements required under subsections (i), (j), and (k) of this section, to the Joint Legislative Transportation Oversight Committee prior to Board members' taking office. The Committee shall have 30 days to review and submit comments to the Governor on the proposed appointees before they take office. The Governor shall consider the views expressed by the Committee concerning

the appointees to the Board. If the Committee does not review or submit comments to the Governor on the proposed Board appointees within the 30 days, the Governor may proceed to appoint the proposed members to the Board. (1975, c. 716, s. 1; 1977, c. 464, s. 6; 1981 (Reg. Sess., 1982), c. 1191, ss. 9, 10; 1985, c. 479, s. 185; 1987, c. 738, s. 170(b), (c); c. 747, s. 4.1; 1989, c. 500, s. 53; c. 692, s. 1.10; 1993, c. 483, s. 4; 1995, c. 490, s. 60; 1997-443, s. 32.1; 1997-495, s. 88(a); 1998-169, ss. 1, 2.)

**Editor's Note.** — The Part 2 heading was amended by Session Laws 1998-169, effective January 1, 2001, to read "Board of Transportation."

Subsection (f2) was designated as such at the direction of the Revisor of Statutes, the designation in Session Laws 1997-443, s. 32.1 having been subsection (i). This subsection was enacted by Session Laws 1997-443, s. 32.1, effective July 1, 1997.

Session Laws 1998-169, s. 9, provides: "Section 1 of this act becomes effective December 1, 1998. Section 2 of this act becomes effective January 1, 2001. Section 3 of this act becomes effective January 1, 1999, and applies to actions taken by the Board of Transportation on or after March 1, 1999. Section 4 of this act becomes effective December 1, 1998, and applies to offenses committed on or after that date. The remainder of this act becomes effective October 1, 1998. Members of the Board of Transportation serving on and before January 14, 2001, shall continue to serve until the date their successors are appointed in accordance with this act."

Session Laws 1998-169, s. 9, provides, in part: "Members of the Board of Transportation serving on and before January 14, 2001, shall continue to serve until the date their successors are appointed in accordance with this act."

Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999.'"

Session Laws 1999-237, s. 27.3, provides that notwithstanding any other provision of law, the Board of Transportation may award up to three contracts annually for construction of transportation projects on a design-build basis. These contracts may be awarded after a determination by the Department of Transportation that delivery of the projects must be expedited and that it is not in the public interest to comply with normal design and construction contracting procedures. Prior to the award of a design-build contract, the Secretary of Transportation shall report to the Joint Legislative Transportation Oversight Committee and to the Joint Legislative Commission on Governmental Operations on the nature and scope of the project and the reasons an award on a design-build basis will best serve the public interest.

Session Laws 1999-237, s. 30.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 30.4, contains a severability clause.

**Effect of Amendments.** — Session Laws 1998-169, s. 2, effective January 1, 2001, rewrote subsections (a) through (e); in subsection (f) added the catchline and made a stylistic change; in subsections (f1), (g), and (h) added the catchlines; and added subsection (n).

#### CASE NOTES

**The Board of Transportation and the Department of Transportation are in essence the sovereign** and have paramount authority over municipal corporations, which are subservient to the State in such matters. *Town of Morehead City v. North Carolina Dep't of Transp.*, 74 N.C. App. 66, 327 S.E.2d 602 (1985).

**Quoted** in *Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina DOT*, 46 N.C. App. 350, 265 S.E.2d 890 (1980); *Guthrie v. North Carolina State Ports Auth.*, 56 N.C. App. 68, 286 S.E.2d 823 (1982).

**Cited** in *Batch v. Town of Chapel Hill*, 92 N.C. App. 601, 376 S.E.2d 22 (1989).

§§ 143B-351, 143B-352: Repealed by Session Laws 1977, c. 464, s. 7.

### Part 3. North Carolina State Ports Authority Transfer.

§ 143B-353: Repealed by Session Laws 1977, c. 65, s. 3.

## Part 4. Navigation and Pilotage Commissions.

§ **143B-354:** Recodified as § 143B-451 by Session Laws 1977, c. 198, s. 26.

## Part 5. Division of Aeronautics — Aeronautics Council.

### § 143B-355. Division of Aeronautics.

There is hereby created the Division of Aeronautics of the Department of Transportation. The Division of Aeronautics shall carry out the duties assigned to the Department of Transportation by Article 1B of Chapter 113 of the General Statutes. (1975, c. 716, s. 1.)

**Editor's Note.** — Article 1B of Chapter 113, §§ 63-65 through 63-72 by Session Laws 1979, referred to in this section, was recodified as c. 148, s. 5.

### § 143B-356. Aeronautics Council — creation; powers and duties.

There is hereby created the Aeronautics Council of the Department of Transportation. The Aeronautics Council shall advise the Secretary of the Department in the issuance of loans and grants to the cities, counties, and public airport authorities of North Carolina for the purposes of planning, acquiring, constructing, or improving municipal, county, or public authority airport facilities and upon any matter relating to airports which the Secretary may refer to it. The Secretary shall report the activities of the Council to the Governor. (1975, c. 716, s. 1.)

### § 143B-357. Aeronautics Council — Members; selection; quorum; compensation.

(a) The Aeronautics Council of the Department of Transportation shall consist of 15 members appointed by the Governor, who, in making such appointments, shall designate one person from each of the congressional districts of the State and two members selected at large. At least four of the appointed members shall possess a broad knowledge of aviation and airport development.

Five of the initial members of the Council shall be the five members of the Governor's Aviation Committee whose terms expire on June 30, 1977, who shall serve on the Council until June 30, 1977. Thereafter, their successors shall be appointed for a term of office of four years. Six members of the Council shall be appointed for a term of four years beginning July 1, 1975. The initial term of the member representing the 12th Congressional District shall commence on January 3, 1993, and expire on June 30, 1996. Thereafter, after the expiration of their respective terms of office, the successors shall be appointed for terms of four years. Any appointment to fill a vacancy on the Council created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

(b) The Governor shall have the power to remove any member of the Council from office in accordance with the provisions of G.S. 143B-16.

The Governor shall designate a member of the Council to serve as chairman at his pleasure.

(c) Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Council shall constitute a quorum for the transaction of business.

(d) All clerical and other services required by the Council shall be supplied by the Secretary of Transportation. (1975, c. 716, s. 1; 1983, c. 325, s. 1; 1991 (Reg. Sess., 1992), c. 1038, s. 19; 2001-486, s. 2.17.)

**Effect of Amendments.** — Session Laws 2001-486, s. 2.17, effective December 16, 2001, substituted “15” for “14” in the first sentence of subsection (a).

## Part 6. North Carolina Railroad and Atlantic and North Carolina Railroad.

§ **143B-358:** Repealed by Session Laws 1991 (Regular Session, 1992), c. 1030, s. 45.

## Part 7. North Carolina Traffic Safety Authority.

§ **143B-359:** Repealed by Session Laws 1981, c. 90, s. 2.

## Part 8. Highway Safety Program.

### § **143B-360. Powers and duties of Department and Secretary.**

The Department of Transportation is hereby empowered to contract on behalf of the State with the government of the United States to the extent allowed by the laws of North Carolina for the purpose of securing the benefits available to this State under the Federal Highway Safety Act of 1966. To that end, the Secretary of Transportation shall coordinate, with the Governor’s approval, the activities of any and all departments and agencies of the State and its subdivisions relating thereto.

All of the duties and responsibilities of the Governor’s Highway Safety Program, established pursuant to this section, are transferred to the Office of the Secretary of Transportation. (1975, c. 716, s. 1; 2001-424, s. 27.11(a).)

**Editor’s Note.** — Session Laws 2001-424, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2001.’”

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, s. 27.11(a), effective July 1, 2001, substituted “on behalf” for “in behalf” in the first paragraph and added the second paragraph.

## Part 9. North Carolina Rail Council.

### § **143B-361. Findings.**

The General Assembly finds that:

- (1) The rail system in North Carolina is an irreplaceable transportation resource;
- (2) The promotion and preservation of railroads operating within North Carolina as transportation resources and economic development tools is vital to the State’s economy, and the continued economic viability of railroads is a necessary part of the free enterprise system;

- (3) A healthy rail system is vital to a competitive State economy, and railroads must be allowed, through effective public policy, to compete fairly in the transportation marketplace and to provide those transportation services for which rail is suitable;
- (4) The preservation of rail corridors, through branch line rehabilitation and State acquisition of strategic corridors, is in the public interest and is an integral and necessary part of a balanced transportation system; and
- (5) As the owner of the majority interest in the North Carolina Railroad Company, the State has a vested interest in the preservation, development, and well-being of the North Carolina Railroad. (1993, c. 483, s. 1.)

### § 143B-362. North Carolina Rail Council — creation; powers and duties.

There is created the North Carolina Rail Council of the Department of Transportation. The Rail Council shall:

- (1) Advise the Governor, Secretary of Transportation, Board of Transportation, and General Assembly on policy concerning the preservation and enhancement of the State's rail system, including the acquisition and management of existing rail corridors, revitalization and rehabilitation of active freight and passenger railways, improvements in rail safety, and promotion of competitive rail passenger services;
- (2) Designate a Strategic Rail System, with the North Carolina Railroad as its foundation, to be approved by the Board of Transportation;
- (3) Recommend to the Board of Transportation funding sources and levels to accomplish the purposes of this act;
- (4) Plan and recommend the distribution of financial assistance for the revitalization of railroads and conservation of rail corridors as authorized in G.S. 136-44.36;
- (5) Plan and recommend the acquisition of rail corridors for future use as authorized in G.S. 136-44.36A and oversee the protection and maintenance of preserved rail corridors;
- (6) Otherwise assist in the preservation of the rail system in North Carolina through branch line rehabilitation and revitalization and through corridor acquisition by the Department of Transportation, and encourage cooperation between the Department of Transportation and railroad companies in preserving the linear integrity of strategic corridors;
- (7) Advise the Department of Transportation on the reinvestment in the State's rail system of the annual dividends received by the State from its ownership of stock in the North Carolina Railroad and appropriated to the Department in G.S. 136-16.6;
- (8) Promote and assist in the preservation of rail access to the facilities operated by the State Ports Authority and to passenger and cargo airport facilities; and
- (9) Perform any other duties relating to the promotion and preservation of railroads which the Secretary may recommend.

The Council shall report its activities to the General Assembly by March 1 in odd-numbered years and to the Joint Legislative Commission on Governmental Operations by March 1 in even-numbered years. (1993, c. 483, s. 1.)

**Editor's Note.** — Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999'." Session Laws 1999-237, s. 27.25(a)-(l), established the Future of the North Carolina Rail-

road Study Commission, and Session Laws 2000-138, ss. 8.1-8.3 and Session Laws 2000-146, ss. 12, 13, amended portions of these provisions. Session Laws 2000-138, s. 8.3, amended Session Laws 1999-237, s. 27.25(k), to make the Commission permanent. Session Laws 1999-237, ss. 27.25(a)-(k), have been codified as Chapter 120, Article 28, §§ 120-245 to 120-255, at the direction of the Revisor of Statutes.

Session Laws 1999-237, s. 30.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 30.4, contains a severability clause.

### § 143B-363. North Carolina Rail Council — members; selection; compensation.

(a) The North Carolina Rail Council shall consist of 18 members, 14 of which shall be appointed by the Governor, who, in making the appointments, shall designate one person from each of the 14 transportation engineering divisions of the State. Of the members appointed by the Governor, at least two members shall possess broad knowledge of railroad operations, at least two members shall represent local government interests, and at least two members shall represent the interests of shippers or passengers using rail service. The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall each appoint two members, who may be members of the General Assembly. All members of the Council should have an interest in developing policy for the promotion and preservation of railroads as part of a balanced transportation system.

(b) Nine of the initial members appointed by the Governor shall serve on the Council for terms of three years beginning July 1, 1993. The remaining members shall be appointed for terms of two years beginning July 1, 1993. Upon the expiration of each member's term, a successor shall be appointed for a term of two years. Any appointment to fill a vacancy on the Council created by the resignation, dismissal, or death of a member shall be for the balance of the unexpired term.

(c) Each appointing officer may remove any member of the Council appointed by him for the reasons that members of boards, councils, or committees may be removed by the Governor pursuant to G.S. 143B-16.

(d) The Governor shall designate a member of the Council to serve as chairman at his pleasure.

(e) Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

(f) Members of the Council shall be subject to the provisions of G.S. 136-13, 136-13.1, and 136-14.

(g) All clerical and other services required by the Council shall be supplied by the Secretary of Transportation. (1993, c. 483, s. 1.)

§§ 143B-364, 143B-365: Reserved for future codification purposes.

## ARTICLE 9.

### *Department of Administration.*

#### Part 1. General Provisions.

### § 143B-366. Department of Administration — creation.

There is hereby recreated and reestablished a department to be known as the "Department of Administration," with the organization, powers, and duties defined in the Executive Organization Act of 1973. (1975, c. 879, s. 2.)

**Cross References.** — For other provisions as to the Department of Administration, see § 143-334 et seq.

**Editor's Note.** — Session Laws 2001-424, s. 7.9, provides: "The Secretary of the Department of Administration shall maintain the Office of Historically Underutilized Businesses (HUB) as established by Executive Order 150. The HUB shall have the same duties, responsibilities, and functions as under Executive Order 150 until further action is taken by the General Assembly concerning the HUB. Every governmental entity required by statute to use the services of the Department of Administration in the purchase of goods and services shall report its use of historically underutilized businesses to the HUB on a quarterly basis. The HUB

shall report annually to the Chairs of the Appropriation Subcommittee on General Government of the Senate and the House of Representatives by May 1 of each year."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

## § 143B-367. Duties of the Department.

It shall be the duty of the Department of Administration to serve as a staff agency to the Governor and to provide for such ancillary services as the other departments of State government might need to insure efficient and effective operations. (1975, c. 879, s. 3.)

**Cross References.** — As to powers and duties of the Department of Administration, see § 143-341. As to establishment of land records

management program in the Department of Administration, see § 147-54.3.

## § 143B-368. Functions of the Department.

(a) The functions of the Department of Administration shall comprise, except as otherwise expressly provided by the Executive Organization Act of 1973 or by the Constitution of North Carolina, all functions of the executive branch of the State in relation to interdepartmental administration previously delineated and further including those prescribed powers, duties, functions, and responsibilities enumerated in Article 10 of Chapter 143A of the General Statutes of North Carolina.

(b) Repealed by Session Laws 1991, c. 542, s. 11, effective July 4, 1991. (1975, c. 879, s. 4; 1991, c. 134, s. 2; c. 542, s. 11.)

**Cross References.** — As to the powers and duties of the Department of Administration, see also § 143-341.

## § 143B-369. Head of the Department.

The Secretary of Administration shall be the head of the Department. (1975, c. 879, s. 5.)

**Cross References.** — As to the powers and duties of the Secretary of Administration, see § 143-340.

**§ 143B-370:** Repealed by Session Laws 1991, c. 542, s. 12.

## Part 2. State Goals and Policy Board.

§§ 143B-371, 143B-372: Repealed by Session Laws 1995, c. 117, s. 2.

### Part 2A. North Carolina Progress Board.

#### § 143B-372.1. North Carolina Progress Board.

(a) The North Carolina Progress Board is established. The Board shall be located administratively in the Board of Governors of The University of North Carolina and may be located at any constituent institution within The University of North Carolina, or at any institution to which it is invited formally, but shall exercise all its prescribed statutory powers independently of the Board of Governors or the institution at which it resides.

(b) The North Carolina Progress Board shall consist of 24 members of statewide prominence as follows:

- (1) The Governor, *ex officio*;
- (2) Eight persons appointed by the Governor, none of whom shall be State employees or officers;
- (3) Five persons appointed by the Speaker of the House of Representatives, two of whom shall be members of the House of Representatives;
- (4) Five persons appointed by the President Pro Tempore of the Senate, two of whom shall be members of the Senate; and
- (5) Five persons appointed by the North Carolina Progress Board.

(c) The Governor or the Governor's designee shall be chair of the North Carolina Progress Board. The Governor shall appoint a vice-chair from among the membership of the North Carolina Progress Board to serve at the pleasure of the Governor. The North Carolina Progress Board may elect such other officers as it sees fit.

(d) The North Carolina Progress Board shall meet at least twice annually on the call of the chair or as additionally provided by the North Carolina Progress Board. A quorum is 12 members of the Board. Members may not send designees to board meetings, nor may they vote by proxy.

(e) Board appointments shall be for terms to begin July 1, 1999, with subsequent appointments to be made as terms expire or resignations occur. Of the Governor's appointments, two shall be for one-year terms, two shall be for two-year terms, two shall be for three-year terms, and two shall be for four-year terms. Of the appointments made by the Speaker of the House of Representatives, the President Pro Tempore of the Senate, and the North Carolina Progress Board, one member appointed by each shall be appointed for a one-year term, one member appointed by each shall be appointed for a two-year term, one member appointed by each shall be appointed for a three-year term, and two members appointed by each shall be appointed for a four-year term. As terms expire, successors shall be appointed for four-year terms.

(f) No member may be appointed to more than two consecutive terms. A member of the House of Representatives appointed by the Speaker of the House vacates membership on the North Carolina Progress Board when that person is no longer a member of the House of Representatives, except that if that person is in office at the expiration of the term of office in the House of Representatives but has not been elected to the next term, that person shall continue to serve until the convening of the regular session. A member of the Senate appointed by the President Pro Tempore of the Senate vacates membership on the North Carolina Progress Board when that person is no longer a member of the Senate, except that if that person is in office at the

expiration of the term of office in the Senate but has not been elected to the next term, that person shall continue to serve until the convening of the regular session. (1995, c. 117, s. 1; 1999-237, s. 10.12(a); 2001-424, s. 31.12(a); 2001-486, s. 2.18.)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, s. 31.12(a), effective July 1, 2001, in subsection (a), substituted "may be located at any constituent institution within The University of North Carolina, or at any institution to which it is invited formally," for "is located at North Carolina State University," and inserted "or the institution at which it resides"; in sub-

section (b), substituted "24 members" for "21 members" in the first paragraph, substituted "Five persons" for "Four persons" in subdivisions (3), (4), and (5), substituted "members" for "a member" and "two of whom" for "one of whom" in subdivisions (3) and (4); in subsection (d), substituted "12 members" for "11 members"; and in subsection (e), substituted "two members" for "one member" following "a three-year term."

Session Laws 2001-486, s. 2.18, effective December 16, 2001, inserted "or the Governor's designee" in the first sentence of subsection (c).

## § 143B-372.2. Responsibilities.

(a) The General Assembly notes that the Commission for a Competitive North Carolina developed goals in the following categories:

- (1) Healthy Children and Families;
- (2) Quality Education for All;
- (3) A High Performance Workforce;
- (4) A Prosperous Economy;
- (5) A Sustainable Environment;
- (6) Technology and Infrastructure Development;
- (7) Safe and Vibrant Communities; and
- (8) Active Citizenship/Accountable Government.

The Commission for a Competitive North Carolina adopted a report which established major goals and ways to measure progress toward these goals.

(a1) The General Assembly finds that the North Carolina Progress Board developed a report that focused on four of the Commission's recommended topics and issued 16 major targets for 2010. The objectives of the targets are to drive the State toward (i) a more expansive vision of education and environmental protection, (ii) strengthening families, and (iii) bringing more people into the economic mainstream.

(b) The General Assembly finds the following:

- (1) The North Carolina economy of the future can provide unparalleled opportunity while maintaining North Carolina's traditional values, if the State pursues the future with clarity of purpose and perseverance.
- (2) The North Carolina economy is in the midst of a massive transition created by technological changes, global competition, and new production practices.
- (3) In order to maintain employment opportunities, increase income levels, reduce poverty, and generate the public revenues necessary to provide public services, North Carolina must increasingly rely on an economy which adds value to its natural and human resources and provides a diverse mix of products.
- (4) Regional Progress Boards, modeled after the North Carolina Progress Board, should be encouraged, and to the extent practicable, funded from local sources, public and private, to ensure that the several regions of North Carolina describe a clear regional vision, with measures, targets, and methods for keeping track of progress toward

that regional vision, and each forming a strategic alliance with the North Carolina Progress Board.

(c) The North Carolina Progress Board shall:

- (1) Encourage a discussion toward understanding the critical global, national, statewide, regional, and local demographic, social, economic, and environmental trends and conditions that exist or are emerging in North Carolina today, and how those issues will impact living in North Carolina in 10 to 20 years.
- (2) Examine the report of the Commission for a Competitive North Carolina and the 1997 and February 2000 reports of the North Carolina Progress Board to the General Assembly.
- (3) Track the eight issue areas set out in subsection (a) of this section and the objectives set out in subsection (a1) of this section and other issues identified by the Progress Board. The Progress Board may, upon vote of the Board, add to those issues identified by its predecessor Commission and Board.
- (4) Hold public hearings and other methods of public participation, including educational and outreach programs, to secure the views of citizens on priority goals for North Carolina and to disseminate findings and recommendations to policymakers.
- (5) Formulate and submit to North Carolinians a report every five years, beginning 2001, that updates the 10- to 20-year vision for North Carolina and that describes and explains a vision for North Carolina's progress over the next 10 to 20 years.
- (6) Submit a report to the General Assembly prior to its convening the regular session every odd-numbered year, which reports on demographic, social, economic, or environmental trends and recommends specific targets and milestones to accomplish its mission.
- (7) Recommend, by reporting special legislative provisions, in draft form only, how targets and milestones can be applied to increase accountability of government to the people of this State.
- (8) Report periodically to the people of North Carolina on progress toward meeting goals, targets, and milestones, together with an assessment of the failure to meet the same and, where possible, an estimate of the potential costs associated with failure to act.
- (9) Undertake new and ongoing policy research and benchmarking studies.
- (10) Publish and distribute periodic reports on policies, performance improvement, and best practices for achieving the long-term, strategic goals for the State.
- (11) May apply for and accept gifts or grants or engage in consulting activities, or other contractual assignments, consistent with its mission, for which applicable staff or Board members may expect to receive reasonable fees and expenses in exchange for specific work products.

(d) Any Regular Session of the General Assembly shall further define the mission of the North Carolina Progress Board in continuing its work and may from time to time, and to the extent practicable, request staff assistance from the Board to standing, select, or independent legislative study committees or commissions.

(e) The General Assembly, after adopting the initial set of goals and measures as proposed or amended, may alter the goals and measures. (1995, c. 117, s. 1; 1999-237, s. 10.12(a); 2001-424, s. 31.12(b).)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, s. 31.12(b), effective July 1, 2001, in subsection (b), substituted “finds the following” for “finds that” at the end of the first paragraph, substituted “practices.” for “practices; and” at the end of subdivision (2), and added subdivision (4); in subsection (c), rewrote subdivision (1), substituted “the 1997 and February 2000 reports” for “the 1997 report” in subdivision (2), substituted “10- to 20-year” for “20 to 30 year” and “10 to 20” for “20 to 30” in subdivision (5), substituted “demographic, social, economic, or environmental trends and recommends” for “social and economic trends and issues” in subdivision (6), inserted “, by reporting special legis-

lative provisions, in draft form only,” and deleted “the” following “how” and following “increase” in subdivision (7), inserted “together with an assessment of the failure to meet the same and, where possible, an estimate of the potential costs associated with failure to act” in subdivision (8), substituted “achieving the long-term strategic goals for the State” for “meeting the long-term goals for the State; and” in subdivision (10), inserted the language following “accept gifts or grants” in subdivision (11), and made minor punctuation changes throughout the subsection; in subsection (d), substituted “Any Regular Session” for “The Regular Session” and inserted the language following “continuing its work.”

### § 143B-372.3. Staff.

(a) Upon the recommendation of the Board, the Governor shall appoint an Executive Director who shall serve at the pleasure of the Board and the Governor but, for administrative purposes, shall report to the Board of Governors of The University of North Carolina. The Executive Director shall report to the North Carolina Progress Board and the Governor. The Executive Director shall hire or contract with support staff, who shall work at the pleasure of the Executive Director.

(b) The Office of State Budget and Management shall also provide support, information, reports, and other assistance to the North Carolina Progress Board as requested.

(c) Repealed by Session Laws 1999-237, s. 10.12(a), effective June 30, 1999. (1995, c. 117, s. 1; 1999-237, s. 10.12(a); 2000-140, s. 93.1(g); 2001-424, ss. 12.2(b), 31.12(c).)

**Editor’s Note.** — Session Laws 2001-424, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2001.’”

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-140, s. 93.1(g), effective July 1, 2000, substituted “Office of State Budget, Planning, and Management” for “Office of State Budget and Management and the Office of State Planning” in subsection (b).

Session Laws 2001-424, ss. 12.2(b) and

31.12(c), effective July 1, 2001, in subsection (a), substituted “Upon the recommendation of the Board, the Governor” for “The Chancellor of North Carolina State University” and “Board and the Governor but, for administrative purposes, shall report to the Board of Governors of The University of North Carolina” for “Chancellor” in the first sentence and substituted “Governor” for “Chancellor” at the end of the second sentence; and in subsection (b), substituted “Office of State Budget and Management” for “Office of State Budget, Planning, and Management.”

## Part 3. North Carolina Capital Planning Commission.

### § 143B-373. North Carolina Capital Planning Commission — creation; powers and duties.

(a) There is hereby recreated the North Carolina Capital Planning Commission of the Department of Administration.

(1) The Commission shall have the following powers and duties:

a. To obtain and maintain up-to-date building requirements for State governmental agencies in Wake County;

- b. To formulate a long-range capital improvement program as required for State central governmental agencies in Wake County and maintain this program up-to-date;
  - c. To recommend the acquisition of land as required;
  - d. To recommend to the Governor the locations for State government buildings, monuments, memorials and improvements in Wake County, except for buildings occupied by the General Assembly; and
  - e. To recommend to the Governor the name for any new State government building or any building hereafter acquired by the State of North Carolina in Wake County, with the exception of buildings comprising a part of the North Carolina State University, the Dorothea Dix Hospital, the General Assembly or the Governor Morehead School;
- (2) The Commission is authorized and empowered to adopt such rules and regulations, not inconsistent with the laws of this State, as may be required by the federal government for grants-in-aid for capital improvement purposes which may be made available to the State by the federal government. This section is to be liberally construed in order that the State and its citizens may benefit from such grants-in-aid.
- (3) The Commission shall adopt rules and regulations consistent with the provisions of this Chapter. All rules and regulations not inconsistent with the provisions of this Chapter heretofore adopted by the existing North Carolina Capital Planning Commission shall remain in full force and effect unless and until repealed or superseded by action of the recreated Commission. All rules and regulations adopted by the Commission shall be enforced by the Department of Administration.
- (b) Any:
- (1) City exercising any jurisdiction in Wake County under Article 19 of Chapter 160A of the General Statutes (or under any local act of similar nature); and
  - (2) County exercising any jurisdiction in Wake County under Article 18 of Chapter 153A of the General Statutes (or under any local act of similar nature)
- shall provide to the North Carolina Capital Planning Commission no later than August 1, 1989, a copy of any ordinance adopted under that Article and in effect on July 1, 1989, and shall provide a copy of any additional ordinance adopted or amended under such Article or similar local act after July 1, 1989, within 30 days of adoption; provided that no ordinance adopted under G.S. 160A-441 shall be so provided unless it applies to a structure owned by the State.
- (c) Any:
- (1) City exercising any jurisdiction in Wake County under Article 19 of Chapter 160A of the General Statutes (or under any local act of similar nature); and
  - (2) County exercising any jurisdiction in Wake County under Article 18 of Chapter 153A of the General Statutes (or under any local act of similar nature)
- shall provide to the North Carolina Capital Planning Commission within seven days of first consideration by the governing body any proposal under either of those Articles or local acts which, if adopted would affect property within Wake County owned by the State.
- (d) The North Carolina Capital Planning Commission may, by resolution, further define what types of proposals are required to be submitted under subsection (c) of this section, and may define the meaning of "first consider-

ation” differently as to different types of actions, and may require similar notice of proposals before planning boards, boards of adjustment, and planning commissions. The North Carolina Capital Planning Commission may, in lieu of the specific requirements of subsection (c) and this subsection, adopt a different schedule for submission of proposals and ordinances, and the schedule may be different for different jurisdictions, so as to carry out the intent of this section. (1975, c. 879, s. 10; 1981 (Reg. Sess., 1982), c. 1191, s. 66; 1989, c. 32.)

### § 143B-374. North Carolina Capital Planning Commission — members; selection; quorum; compensation.

(a) The North Carolina Capital Planning Commission of the Department of Administration shall consist of the following ex officio members: the Governor of North Carolina who shall serve as chairman; all members of the Council of State including the Lieutenant Governor (or a person designated by the Lieutenant Governor), who shall serve as vice-chairman; the Speaker (or a person designated by the Speaker), and four members of the North Carolina House of Representatives, and four members of the North Carolina Senate; and a representative of the City of Raleigh to be designated by the City Council of Raleigh to serve a two-year term to expire at the same date city council members’ terms expire. The President Pro Tempore of the Senate shall appoint the four members of the Senate on or before July 1, 1975, for two-year terms to expire at the same date General Assembly members’ terms expire. The Speaker of the House of Representatives shall appoint the four members of the House on or before July 1, 1975, for two-year terms to expire at the same date General Assembly members’ terms expire.

Public officers who are made members of the Commission shall be deemed to serve ex officio.

(b) The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Commission shall constitute a quorum for the transaction of business.

All clerical and other services required by the Commission shall be supplied by the Secretary of Administration.

All minutes, records, plans, and all other documents of public record of the State Capital Planning Commission, the Heritage Square Commission, and the former North Carolina Capital Planning Commission shall be turned over to the Department of Administration.

The Commission shall meet quarterly, and at other times at the call of the chairman. (1975, c. 879, s. 11; 1981, c. 47, s. 3; 1991, c. 739, s. 28.)

**Editor’s Note.** — Session Laws 1981, c. 47, which amended this section, in s. 7, provided: “When the Speaker, President of the Senate, or Lieutenant Governor has designated a person to serve in his place as permitted by this act, that person shall be compensated in accordance with G.S. 120-3.1 if a member of the General

Assembly, in accordance with G.S. 138-6 if a State officer or employee, and in accordance with G.S. 138-5 in any other case, except that a member of the General Assembly so designated may not receive per diem if the Speaker, President of the Senate, or Lieutenant Governor may not receive per diem.”

## Part 4. Child Day-Care Licensing Commission.

§§ 143B-375, 143B-376: Recodified as §§ 143B-168.1, 143B-168.2 by Session Laws 1985, c. 757, s. 155(f).

### Part 5. North Carolina Drug Commission.

§§ **143B-377, 143B-378:** Repealed by Session Laws 1977, c. 667, s. 1.

### Part 6. North Carolina Council on Interstate Cooperation.

§§ **143B-379 through 143B-384:** Repealed by Session Laws 1991 (Regular Session, 1992), c. 912, s. 1.

### Part 7. Youth Councils.

#### § **143B-385. State Youth Advisory Council — creation; powers and duties.**

There is hereby created the State Youth Advisory Council of the Department of Administration. The State Youth Advisory Council shall have the following functions and duties:

- (1) To advise the youth councils of North Carolina;
- (2) To encourage State and local councils to take active part in governmental and civic affairs, promote and participate in leadership and citizenship programs, and cooperate with other youth-oriented groups;
- (3) To receive on behalf of the Department of Administration and to recommend expenditure of gifts and grants from public and private donors;
- (4) To establish procedures for the election of its youth representatives by the State Youth Council; and
- (5) To advise the Secretary of Administration upon any matter the Secretary may refer to it. (1975, c. 879, s. 26.)

#### § **143B-386. State Youth Advisory Council — members; selection; quorum; compensation.**

The State Youth Advisory Council of the Department of Administration shall consist of 20 members. The composition and appointment of the Council shall be as follows:

Ten youths to be elected by the procedure adopted by the Youth Advisory Council, which shall include a requirement that four of the members represent youth organizations; and 10 adults to be appointed by the Governor at least four of whom shall be individuals working on youth programs through youth organizations. Provided that no person shall serve on the Board for more than two complete consecutive terms.

The initial members of the Council shall be the appointed members of the Youth Advisory Board who shall serve for a period equal to the remainder of their current terms on the Youth Advisory Board. The current terms of the youth members expire July 1, 1976, the current terms of four of the adult members expire April 7, 1976, and the remaining four adult members' terms expire May 1, 1978. At the end of the respective terms of office of the initial members of the Council, the appointment of their successors shall be as follows:

- (1) Eight youth members to serve for terms beginning on July 1, 1976, and expiring on June 30, 1977, and two additional youth members to serve for terms beginning on July 1, 1977, and expiring on June 30, 1978. At

the end of the terms of office of these youth members of the Council, the appointment of their successors shall be for terms of two years and until their successors are appointed and qualify.

- (2) Four adult members to serve for terms beginning on April 8, 1976, and expiring on June 30, 1979; four adult members to serve for terms beginning on May 1, 1978, and expiring on June 30, 1980; one additional adult member to serve for a term beginning July 1, 1977, and expiring June 30, 1978; and one additional adult member to serve for a term beginning July 1, 1977, and expiring June 30, 1979. At the end of the respective terms of office of these adult members of the Council, the appointment of their successors shall be for terms of two years and until their successors are appointed and qualify. At least one adult member shall be an advisor of a local youth council at appointment and for the duration of the term. The total membership shall reasonably reflect the socioeconomic, ethnic, sexual and sectional composition of the State.

Any appointment to fill a vacancy on the Council created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Council from office in accordance with the provisions of G.S. 143B-16 of the Executive Organization Act of 1973.

The Governor shall designate an adult member of the Council to serve as chairman at the pleasure of the Governor. The Council shall elect a youth member to serve as vice-chairman for a one-year term.

A majority of the Council shall constitute a quorum for the transaction of business.

Members of the Council who are not officers or employees of the State shall receive per diem and necessary travel and subsistence expenses in accordance with provisions of G.S. 138-5.

All clerical and other services required by the Council shall be supplied by the Secretary of Administration. (1975, c. 879, s. 27; 1977, c. 510; 1979, c. 410; 1991, c. 128, s. 1.)

## § 143B-387. State Youth Council.

There shall be a State Youth Council. It shall be established within one year of July 1, 1975, in accordance with the methods and procedures established by the Youth Advisory Council. The State Youth Council is authorized and empowered to do the following:

- (1) To consider problems affecting youth and recommend solutions or approaches to these problems to State and local governments and their officials;
- (2) To promote statewide activities for the benefit of youth; and,
- (3) To elect the youth representatives to the Youth Advisory Council. (1975, c. 879, s. 28.)

## § 143B-387.1. North Carolina Youth Legislative Assembly Fund.

The North Carolina Youth Legislative Assembly Fund is created as a special and nonreverting fund. North Carolina Youth Legislative Assembly registration fees, gifts, donations, or contributions shall be credited to the North Carolina Youth Legislative Assembly Fund.

The fund shall be used solely to support planning and execution of the North Carolina Youth Legislative Assembly. (2000-67, s. 23.1.)

**Editor's Note.** — Session Laws 2000-67, s. 28.5, made this section effective July 1, 2000. Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'." Session Laws 2000-67, s. 28.4, contains a severability clause.

### § 143B-388. Local youth councils.

The primary purpose of local youth councils is to promote participation by youth in programs affecting civic and governmental affairs. (1975, c. 879, s. 29.)

#### Part 8. North Carolina Marine Science Council.

§§ 143B-389, 143B-390: Repealed by Session Laws 1991, c. 320, s. 1.

#### Part 8A. Office of Marine Affairs.

§ 143B-390.1: Recodified as § 143B-289.19 by Session Laws 1995, c. 509, s. 98.

§§ 143B-390.2 through 143B-390.4: Recodified as §§ 143B-289.20 through 143B-289.22 by Session Laws 1993, c. 321, s. 28.

§§ 143B-390.5 through 143B-390.9: Reserved for future codification purposes.

#### Part 8B. North Carolina Council on Ocean Affairs.

§§ 143B-390.10, 143B-390.11: Repealed by Session Laws 1993, c. 321, s. 28.

§§ 143B-390.12 through 143B-390.14: Reserved for future codification purposes.

#### Part 8C. North Carolina Aquariums Commission.

§§ 143B-390.15, 143B-390.16: Recodified as §§ 143B-344.16, 143B-344.17 by Session Laws 1993, c. 321, s. 28.

#### Part 9. North Carolina Human Relations Commission.

### § 143B-391. North Carolina Human Relations Commission — Creation; powers and duties.

There is hereby created the North Carolina Human Relations Commission of the Department of Administration. The North Carolina Human Relations Commission shall have the following functions and duties:

- (1) To study problems concerning human relations;
- (2) To promote equality of opportunity for all citizens;
- (3) To promote understanding, respect, and goodwill among all citizens;
- (4) To provide channels of communication among the races;
- (5) To encourage the employment of qualified people without regard to race;
- (6) To encourage youths to become better trained and qualified for employment;
- (7) To receive on behalf of the Department of Administration and to recommend expenditure of gifts and grants from public and private donors;
- (8) To enlist the cooperation and assistance of all State and local government officials in the attainment of the objectives of the Commission;
- (9) To assist local good neighborhood councils and biracial human relations committees in promoting activities related to the functions of the Commission enumerated above;
- (10) To advise the Secretary of Administration upon any matter the Secretary may refer to it;
- (11) To administer the provisions of the State Fair Housing Act as outlined in Chapter 41A of the General Statutes;
- (12) To administer the provisions of Chapter 99D of the General Statutes. (1975, c. 879, s. 34; 1983, c. 522, s. 2; 1989 (Reg. Sess., 1990), c. 979, s. 1(6); 1991, c. 433, s. 3.)

**Editor's Note.** — Session Laws 1989 (Reg. Sess., 1990), c. 979, effective July 19, 1990, in s. 1(4), amended "Part 9. North Carolina Human Relations Council" by substituting references to the North Carolina Human Relations Commission for references to the North Carolina Human Relations Council; however, the Chapter and Article were not specified by the act. Therefore, the title of Part 9 of Article 9 of this Chapter was changed pursuant to Session Laws 1989 (Reg. Sess., 1990), c. 979, s. 2, which

provided: "The Revisor of Statutes is authorized to delete any reference to the North Carolina Human Relations Council or derivative thereof in any portion of the General Statutes or in any Session Law of local applicability to which conforming amendments are not made by this act and replace them with the phrase North Carolina Human Relations Commission or the appropriate derivative, consistent with the provisions of this act."

#### CASE NOTES

**Federal Age Discrimination Plaintiff Need Not Seek Recourse from Human Relations Council as Jurisdictional Prerequisite.** — Recourse by a plaintiff to the North Carolina Human Relations Council is not a jurisdictional prerequisite to filing a suit in a federal court under the Age Discrimination in Employment Act, 29 U.S.C. §§ 201-219, since § 143-422.1 et seq. is not "a law prohibiting

discrimination in employment because of age" and the North Carolina Human Relations Council is not a "state authority established or authorized to grant or seek relief from such discriminatory practice" within the meaning of 29 U.S.C. § 633(b). *Spagnuolo v. Whirlpool Corp.*, 467 F. Supp. 364 (W.D.N.C. 1979), *aff'd* in part and *rev'd* in part, 641 F.2d 1109 (4th Cir. 1981).

### § 143B-392. North Carolina Human Relations Commission — Members; selection; quorum; compensation.

(a) The Human Relations Commission of the Department of Administration shall consist of 22 members. The Governor shall appoint one member from each of the 13 congressional districts, plus five members at large, including the chairperson. The Speaker of the North Carolina House of Representatives shall appoint two members to the Commission. The President Pro Tempore of the Senate shall appoint two members to the Commission. The terms of four of the members appointed by the Governor shall expire June 30, 1988. The terms

of four of the members appointed by the Governor shall expire June 30, 1987. The terms of four of the members appointed by the Governor shall expire June 30, 1986. The terms of four of the members appointed by the Governor shall expire June 30, 1985. The terms of the members appointed by the Speaker of the North Carolina House of Representatives shall expire June 30, 1986. The terms of the members appointed by the Lieutenant Governor shall expire June 30, 1986. The initial term of office of the person appointed to represent the 12th Congressional District shall commence on January 3, 1993, and expire on June 30, 1996. At the end of the respective terms of office of the initial members of the Commission, the appointment of their successors shall be for terms of four years. No member of the commission shall serve more than two consecutive terms. A member having served two consecutive terms shall be eligible for reappointment one year after the expiration of his second term. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death, or disability of a member shall be filled in the manner of the original appointment for the unexpired term.

(b) Members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

(c) A majority of the Commission shall constitute a quorum for the transaction of business.

(d) All clerical and support services required by the Commission shall be supplied by the Secretary of the Department of Administration. (1975, c. 879, s. 35; 1983, c. 461; 1989 (Reg. Sess., 1990), c. 979, s. 1(7); 1991 (Reg. Sess., 1992), c. 1038, s. 20; 1995, c. 490, s. 26; 2001-486, s. 2.19.)

**Effect of Amendments.** — Session Laws 2001-486, s. 2.19, effective December 16, 2001, in (a), substituted “22 members” for “21 mem-

bers” in the first sentence and substituted “13 congressional districts” for “12 congressional districts” in the second sentence.

## Part 10. North Carolina Council for Women.

### § 143B-393. North Carolina Council for Women — creation; powers and duties.

There is hereby created the North Carolina Council for Women of the Department of Administration. The North Carolina Council for Women shall have the following functions and duties:

- (1) To advise the Governor, the principal State departments, and the State legislature concerning the education and employment of women in the State of North Carolina; and
- (2) To advise the Secretary of Administration upon any matter the Secretary may refer to it; and
- (3) To establish programs for the assistance of displaced homemakers as set forth in Part 10B of this Article. (1975, c. 879, s. 37; 1979, c. 1016, s. 1; 1991, c. 134, s. 4.)

### § 143B-394. North Carolina Council for Women — members; selection; quorum; compensation.

The North Carolina Council for Women of the Department of Administration shall consist of 20 members appointed by the Governor. The initial members of the Council shall be the appointed members of the North Carolina Council for Women, three of whose appointments expire June 30, 1977, and four of whose appointments expire June 30, 1978. Thirteen additional members shall be appointed in 1977, six of whom shall serve terms expiring June 30, 1978, and

seven of whom shall serve terms expiring June 30, 1979. At the ends of the respective terms of office of the initial members of the Council and of the 13 members added in 1977, the appointment of their successors shall be for terms of two years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Council created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term. Members of the Council shall be representative of age, sex, ethnic and geographic backgrounds.

The Governor shall have the power to remove any member of the Council from office in accordance with the provisions of G.S. 143B-16 of the Executive Organization Act of 1973.

The Governor shall designate a member of the Council to serve as chairman at the pleasure of the Governor.

Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Council shall constitute a quorum for the transaction of business.

All clerical and other services required by the Council shall be supplied by the Secretary of Administration. (1975, c. 879, s. 38; 1977, c. 818; 1991, c. 134, s. 4.)

## Part 10A. Office of Coordinator of Services for Victims of Sexual Assault.

### § 143B-394.1. Office of Coordinator of Services for Victims of Sexual Assault — purpose.

The ultimate goal of this Article is to establish a network of coordinated public and private services for victims of sexual assault, incorporating existing programs as well as aiding in the development of new programs. (1977, c. 997, s. 1.)

### § 143B-394.2. Office of Coordinator of Services for Victims of Sexual Assault — office created.

(a) The office of Coordinator of Services for Victims of Sexual Assault is hereby created in the Department of Administration. The office shall be under the direction and supervision of a full-time salaried State employee who shall be designated as the State Coordinator. The State Coordinator shall be appointed by the Secretary of the Department of Administration and shall receive a salary commensurate with State government pay schedules for the duties of this office, or such salary to be set by the State Personnel Board pursuant to G.S. 126-4. Necessary travel allowance or reimbursement for expenses shall be authorized for the State Coordinator in accordance with G.S. 138-6. Sufficient clerical staff shall be provided under the direction of the Secretary of the Department of Administration.

(b) This State Coordinator shall have administrative experience and the recommendation of the North Carolina Rape Crisis Association and the North Carolina Council for Women. If possible, the State Coordinator shall have public speaking experience, training in rape crisis intervention and education in a related field. (1977, c. 997, s. 1; 1991, c. 134, s. 5.)

**Legal Periodicals.** — For survey of 1977 administrative law affecting state government, see 56 N.C.L. Rev. 867 (1978).

### § 143B-394.3. Office of Coordinator of Services for Victims of Sexual Assault — duties and responsibilities.

The duties of the State Coordinator shall include the following:

- (1) To establish an office to facilitate and coordinate all programs and services which deal with the victim of sexual assault;
- (2) To research the needs of the State and already existing programs for sexual assault services;
- (3) To create a liaison between public services and private services with which victims of sexual assault normally come in contact;
- (4) To be an information clearinghouse on all aspects of sexual assault services;
- (5) To develop model programs and training techniques to be used to train medical, legal, and psychological personnel (both in the public and private sectors) who deal with the victims of sexual assault, and to aid in implementing these programs to suit the needs of specific communities;
- (6) To be available to aid and advise sexual assault services on operational and functional problems; and
- (7) To develop and coordinate a public education program for the State of North Carolina on the phenomenon of sexual assault. (1977, c. 997, s. 1.)

## Part 10B. Displaced Homemakers.

### § 143B-394.4. Definitions.

As used in this Part, unless the context otherwise requires:

- (1) "Center" means any multi-purpose service facility for displaced homemakers established pursuant to this Part;
- (2) "Council" means the North Carolina Council for Women;
- (3) "Department" means the Department of Administration;
- (4) "Displaced homemaker" means an individual who:
  - a. Has worked in his or her own household for at least five years and during which period has provided unpaid household services; and
  - b. Is unable to secure gainful employment due to the lack of required training or experience; or is unemployed, or underemployed; and
  - c. Has been dependent on the income of another household member but is no longer adequately supported by that income, or is receiving support from a spouse but is within two years of losing such support, or has been supported by public assistance as the parent of minor children but is no longer eligible, or is within two years of losing such eligibility. (1979, c. 1016, s. 2; 1991, c. 134, s. 6.)

### § 143B-394.5. Establishment of center; location.

The Council shall establish or contract for the establishment of a pilot center for displaced homemakers. In determining where to locate the center, the Council shall consider, with respect to each proposed location, the probable number of displaced homemakers in the area and the availability of resources for training and education. (1979, c. 1016, s. 2.)

### § 143B-394.6. Staff for center.

To the maximum extent feasible, the staff of the center, including technical, administrative, and advisory positions, shall be filled by displaced homemak-

ers. Where necessary, potential staff members shall be provided with on-the-job training. (1979, c. 1016, s. 2.)

### **§ 143B-394.7. Funding.**

The Council shall explore all possible sources of funding and in-kind contributions from federal, local and private sources in establishing the center. The Council is authorized to accept any funding or other contributions such as building space, equipment, or services of training personnel. (1979, c. 1016, s. 2.)

### **§ 143B-394.8. Services to be provided.**

(a) The center shall be designed to provide displaced homemakers with such necessary counseling, training, services, skills, and education as would enable them to secure gainful employment, and as would be necessary for their health, safety, and well-being.

(b) The center shall provide:

- (1) Job counseling programs specifically designed for displaced homemakers entering the job market, taking into consideration their previous absence from the job market, and their lack of recent paid work experience, and taking into account and building upon the skills and experience possessed by the displaced homemaker;
- (2) Job training and job placement services to train and place displaced homemakers for and into available jobs in the public and private sectors;
- (3) Health education and counseling services with respect to general principles of preventive health care, including but not limited to family health care, nutrition education, and the selection of physicians and health care services;
- (4) Financial management services with information and assistance on all aspects of financial management including but not limited to insurance, taxes, estate and probate matters, mortgages, and loans; and
- (5) Educational services, including information services concerning available secondary and post-secondary education programs beneficial to displaced homemakers seeking employment; and information services with respect to all employment in the public or private sectors, education, health, public assistance, and unemployment assistance programs. (1979, c. 1016, s. 2.)

### **§ 143B-394.9. Rules and regulations; evaluation.**

(a) The Department shall, upon recommendations by the Council, promulgate rules and regulations concerning the eligibility of persons for the services of the center and governing the granting of any stipends to be provided.

(b) The Council shall require the director and staff of the center to evaluate the effectiveness of the job training, placement, and service components of the center. The evaluation shall include the number of persons trained, the number of persons placed in employment, follow-up data on such persons, the number of persons served by the various service programs, and the cost effectiveness of each component of the center. (1979, c. 1016, s. 2.)

### **§ 143B-394.10. North Carolina Fund for Displaced Homemakers.**

(a) There is established in the Department of Administration the North Carolina Fund for Displaced Homemakers. The Fund shall be administered by

the North Carolina Council for Women in accordance with Article 1 of Chapter 143 of the General Statutes and shall be used to make grants to programs for displaced homemakers. The Council shall make quarterly grants to each eligible program. Grants shall be awarded according to criteria established by the Council. No more than ten percent (10%) of these funds shall be used for administrative costs by the Council. In order to be eligible to receive grant funds under this section, a displaced homemaker program shall fulfill all of the criteria established by the Council. The Council shall report annually to the Joint Legislative Commission on Governmental Operations on the revenues credited to the Fund, the programs receiving grants from the Fund, the success of those programs, and the costs associated with administering the Fund.

(b) The Department, upon recommendations by the Council, shall adopt rules to implement the North Carolina Fund for Displaced Homemakers. (1998-219, s. 1.)

**Editor's Note.** — Session Laws 1998-219, s. 4, made this section effective December 1, 1998, and applicable to final actions for divorce filed on and after that date.

**§§ 143B-394.11 through 143B-394.14:** Reserved for future codification purposes.

### Part 10C. Domestic Violence Commission.

#### **§ 143B-394.15. Commission established; purpose; membership; transaction of business.**

(a) Establishment. — There is established the Domestic Violence Commission. The Commission shall be located within the Department of Administration for organizational, budgetary, and administrative purposes.

(b) Purpose. — The purpose of the Commission is to (i) assess statewide needs related to domestic violence, (ii) assure that necessary services, policies, and programs are provided to those in need, and (iii) coordinate and collaborate with the North Carolina Council For Women in strengthening the existing domestic violence programs which have been established pursuant to G.S. 50B-9 and are funded through the Domestic Violence Center Fund and in establishing new domestic violence programs.

(c) Membership. — The Commission shall consist of 39 members, who reflect the geographic and cultural regions of the State, as follows:

- (1) Nine persons appointed by the Governor, one of whom is a clerk of superior court; one of whom is an academician who is knowledgeable about domestic violence trends and treatment; one of whom is a member of the medical community; one of whom is a United States Attorney for the State of North Carolina or that person's designee; one of whom is a member of the North Carolina Bar Association who has studied domestic violence issues; one of whom is a representative of a victims' service program eligible for funding by the Governor's Crime Commission or the North Carolina Council for Women; one of whom is a member of the North Carolina Coalition Against Domestic Violence; one of whom is a former victim of domestic violence; and one of whom is a member of the public at large.
- (2) Nine persons appointed by the General Assembly, upon recommendation of the President Pro Tempore of the Senate, one of whom is a member of the Senate; one of whom is a district court judge; one of whom is a district attorney or assistant district attorney; one of whom is a representative of the law enforcement community with special-

ized knowledge of domestic violence issues; one of whom is a county manager; one of whom is a representative of a community legal services agency who works with domestic violence victims; one of whom is a representative of the linguistic and cultural minority communities; one of whom is a representative of a victims' service program eligible for funding by the Governor's Crime Commission or the North Carolina Council for Women; and one of whom is a member of the public at large.

- (3) Nine persons appointed by the General Assembly, upon recommendation of the Speaker of the House of Representatives, one of whom is a member of the House of Representatives; one of whom is a magistrate; one of whom is a member of the business community; one of whom is a district court judge; one of whom is a representative of a victims' service program eligible for funding by the Governor's Crime Commission or the North Carolina Council for Women; one of whom is a representative of the law enforcement community with specialized knowledge of domestic violence issues; one of whom provides offender treatment and is approved by the North Carolina Council for Women; one of whom is a representative of the linguistic and cultural minority communities; and one of whom is a public member.
- (4) The following persons or their designees, ex officio:
  - a. The Governor.
  - b. The Lieutenant Governor.
  - c. The Attorney General.
  - d. The Secretary of the Department of Administration.
  - e. The Secretary of the Department of Crime Control and Public Safety.
  - f. The Superintendent of Public Instruction.
  - g. The Secretary of the Department of Correction.
  - h. The Secretary of the Department of Health and Human Services.
  - i. The Director of the Office of State Personnel.
  - j. The Executive Director of the North Carolina Council for Women.
  - k. The Director of the Institute of Government.
  - l. The Chairman of the Governor's Crime Commission.

(d) Terms. — Members shall serve for two-year terms, with no prohibition against being reappointed, except initial appointments shall be for terms as follows:

- (1) The Governor shall initially appoint five members for terms of two years and four members for terms of three years.
- (2) The President Pro Tempore of the Senate shall initially appoint five members for terms of two years and four members for terms of three years.
- (3) The Speaker of the House of Representatives shall initially appoint five members for terms of two years and four members for terms of three years.

Initial terms shall commence on September 1, 1999.

(e) Chair. — The chair shall be appointed biennially by the Governor from among the membership of the Commission. The initial term shall commence on September 1, 1999.

(f) Vacancies. — A vacancy on the Commission or as chair of the Commission resulting from the resignation of a member or otherwise shall be filled in the same manner in which the original appointment was made, and the term shall be for the balance of the unexpired term.

(g) Compensation. — The Commission members shall receive no salary as a result of serving on the Commission but shall receive per diem, subsistence, and travel expenses in accordance with the provisions of G.S. 120-3.1, 138-5,

and 138-6, as applicable. When approved by the Commission, members may be reimbursed for subsistence and travel expenses in excess of the statutory amount.

(h) Removal. — Members may be removed in accordance with G.S. 143B-13 as if that section applied to this Article.

(i) Meetings. — The chair shall convene the Commission. Meetings shall be held as often as necessary, but not less than four times a year.

(j) Quorum. — A majority of the members of the Commission shall constitute a quorum for the transaction of business. The affirmative vote of a majority of the members present at meetings of the Commission shall be necessary for action to be taken by the Commission.

(k) Office Space. — The Department of Administration shall provide office space in Raleigh for use as offices by the Domestic Violence Commission, and the Department of Administration shall receive no reimbursement from the Commission for the use of the property during the life of the Commission.

(l) Staffing. — The Secretary of the Department of Administration shall be responsible for staffing the Commission. To that end, the Secretary shall, at a minimum, assign an employee to serve as a Deputy Director within the North Carolina Council for Women whose primary duties shall be to staff the Commission. The person assigned as Deputy Director shall have the education, experience, and any other qualifications necessary for the position. (1999-237, s. 24.2(b); 2001-424, s. 7.7.)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, s. 7.7, effective July 1, 2001, added subsection (l).

## § 143B-394.16. Powers and duties of the Commission; reports.

(a) Powers and Duties. — The Commission shall have the following powers and duties:

- (1) As recommended in the January 15, 1999, final report of the Governor's Task Force on Domestic Violence, to develop and recommend to the General Assembly the "Safe Families Act" and to promote adequate funding to promote victim safety and accountability of perpetrators.
- (2) To develop and recommend domestic violence training initiatives for law enforcement and judicial personnel and for all persons who provide treatment and services to domestic violence victims.
- (3) To develop training initiatives for and make recommendations and provide information and advice to State agencies in the areas of child protection, education, employer/employee relations, criminal justice, and subsidized housing.
- (4) To provide information and advice to any private entities that request assistance in providing services and support to domestic violence victims.
- (5) To design, coordinate, and oversee a statewide public awareness campaign.
- (6) To design and coordinate improved data collection efforts for domestic violence crimes and acts in the State.
- (7) To research, develop, and recommend proposals of how best to meet the needs of domestic violence victims and to prevent domestic violence in the State.

(b) Report. — The Commission shall report its findings and recommendations, including any legislative or administrative proposals, to the General Assembly no later than April 1 each year. (1999-237, s. 24.2(b).)

**Editor's Note.** — Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvement Appropriations Act of 1999'."

Session Laws 1999-237, s. 24.2(c), provides that if it recommends the adoption in North Carolina of a "Safe Families Act," the Domestic Violence Commission is to report a legislative proposal to the General Assembly on or before April 1, 2000.

Session Laws 1999-237, s. 30.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 30.4, contains a severability clause.

## Part 11. North Carolina Manpower Council.

§§ 143B-395, 143B-396: Repealed by Session Laws 1977, c. 771, s. 14.

**Cross References.** — As to the State Job Training Coordinating Council in the Depart-

ment of Natural Resources and Community Development, see § 143B-438.4.

## Part 12. Standardization Committee.

§§ 143B-397, 143B-398: Repealed by Session Laws 1983, c. 717, s. 81.

## Part 13. Veterans' Affairs Commission.

### § 143B-399. Veterans' Affairs Commission — creation, powers and duties.

There is hereby created the Veterans' Affairs Commission of the Department of Administration. The Veterans' Affairs Commission shall have the following functions and duties:

- (1) To advise the Governor on matters relating to the affairs of veterans in North Carolina;
- (2) To maintain a continuing review of the operation and budgeting of existing programs for veterans and their dependents in the State and to make any recommendations to the Governor for improvements and additions to such matters to which the Governor shall give due consideration;
- (3) To serve collectively as a liaison between the Division of Veterans Affairs and the veterans organizations represented on the Commission;
- (4) To promulgate rules and regulations concerning the awarding of scholarships for children of North Carolina veterans as provided by Article 4 of Chapter 165 of the General Statutes of North Carolina. The Commission shall make rules and regulations consistent with the provisions of this Chapter. All rules and regulations not inconsistent with the provisions of this Chapter heretofore adopted by the State Board of Veterans' Affairs shall remain in full force and effect unless and until repealed or superseded by action of the Veterans Affairs Commission. All rules and regulations adopted by the Commission shall be enforced by the Division of Veterans' Affairs;

- (4a) To promulgate rules concerning the awarding of the North Carolina Services Medal to all veterans who have served in any period of war as defined in 38 U.S.C. § 101. The award shall be self-financing; those who wish to be awarded the medal shall pay a fee to cover the expenses of producing the medal and awarding the medal. All rules adopted by the Commission with respect to the North Carolina Services Medal shall be implemented and enforced by the Division of Veterans' Affairs; and
- (5) To advise the Governor on any matter the Governor may refer to it. (1973, c. 620, s. 7; 1977, c. 70, ss. 24, 25, 27; c. 622; 1991 (Reg. Sess., 1992), c. 998, s. 1; 1993, c. 553, s. 47.)

**Editor's Note.** — This section was formerly § 143B-252. It was recodified as § 143B-399 by Session Laws 1977, c. 70.

### **§ 143B-400. Veterans' Affairs Commission — members; selection; quorum; compensation.**

The Veterans' Affairs Commission of the Department of Administration shall consist of one voting member from each congressional district, all of whom shall be veterans, appointed by the Governor for four-year terms. In making these appointments, the Governor shall insure that both major political parties will be continuously represented on the Veterans' Affairs Commission.

The initial members of the Commission shall be the appointed members of the current Veterans' Affairs Commission who shall serve for the remainder of their current terms and six additional members appointed by the Governor for terms expiring June 30, 1981. Thereafter, all members shall be appointed for terms of four years. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term. The Governor shall have the power to remove any member of the Commission in accordance with provisions of G.S. 143B-13.

In the event that more than 11 congressional districts are established in the State, the Governor shall on July 1 following the establishment of such additional congressional districts appoint a member of the Commission from that congressional district. If on July 1, 1977, or at any time thereafter due to congressional redistricting, two or more members of the Veterans' Affairs Commission shall reside in the same congressional district then such members shall continue to serve as members of the Commission for a period equal to the remainder of their current terms on the Commission provided that upon the expiration of said term or terms the Governor shall fill such vacancy or vacancies in such a manner as to insure that as expeditiously as possible there is one member of the Veterans' Affairs Commission who is a resident of each congressional district in the State.

The Governor shall designate from the membership of the Commission a chairman and vice-chairman of the Commission who shall serve at the pleasure of the Governor. The Secretary of the Department of Administration or his designee shall serve as secretary of the Commission.

Members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with provisions of G.S. 138-5.

A majority of the Commission shall constitute a quorum for the transaction of business.

The Veterans' Affairs Commission shall meet at least twice a year and may hold special meetings at any time or place within the State at the call of the chairman, at the call of the Secretary of the Department of Administration or upon the written request of at least six members.

All clerical and other services required by the Commission shall be provided by the Secretary of the Department of Administration. (1973, c. 620, s. 8; 1977, c. 70, ss. 24, 25, 27; c. 637, s. 1.)

**Editor's Note.** — This section was formerly § 143B-253. It was recodified as § 143B-400 by Session Laws 1977, c. 70.

### **§ 143B-401. Veterans' Affairs Commission Advisory Committee — members; compensation.**

The department commander or official head of each veterans' organization which has been chartered by an act of the United States Congress and which is legally constituted and operating in this State pursuant to said charter shall constitute an Advisory Committee to the Veterans' Affairs Commission. Members of the Veterans' Affairs Commission Advisory Committee shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5. (1977, c. 637, s. 3.)

#### Part 14. Advocacy Council for the Handicapped.

§§ 143B-402, 143B-403: Repealed by Session Laws 1979, c. 575, s. 1.

#### Part 14A. Governor's Advocacy Council for Persons with Disabilities.

### **§ 143B-403.1. Governor's Advocacy Council for Persons with Disabilities — creation; powers and duties.**

There is hereby created the Governor's Advocacy Council for Persons with Disabilities of the Department of Administration. The Council shall have the following functions and duties:

- (1) To provide for a statewide protection and advocacy program in accordance with the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000, et seq., and Public Law 99-319, as amended, the Protection and Advocacy for the Mentally Ill Act of 1988. In accordance with this Act, the Council shall, among other things, investigate complaints made by or on behalf of incompetent developmentally or mentally disabled persons who reside in facilities for the developmentally or mentally disabled who have no legal guardian or whose guardian is the State or a State designee. Where such a complaint is made to the Council, the Council shall have access to the individual who is the subject of the complaint, and to the records of such individual; provided that an allegedly incompetent client who has no guardian who, in the opinion of the facility director, is competent shall have the opportunity prior to disclosure to deny access to his individual records by making a specific objection to disclosure to the Council. The Council shall keep client information confidential in accordance with 42 U.S.C. § 6000 and implementing rules and regulations, including 45 C.F.R. Part 1386. The Council's authority under this subdivision shall override any contrary provisions of State law and shall apply as long as the Council is designated

by the Governor as the Protection and Advocacy Agency under 42 U.S.C. § 6000.

- (2) To pursue legal, administrative, or other appropriate remedies to insure the protection of the rights of all developmentally, mentally, physically, emotionally and otherwise disabled persons who are receiving treatment, services, or habilitation from any State, local, or area program;
- (3) To review and recommend changes in all laws, rules, regulations, programs and policies of this State or any agency or subdivision thereof to insure the rights of the developmentally, mentally, physically, emotionally and otherwise disabled persons are safeguarded;
- (4) To investigate complaints concerning the violation of the rights of the developmentally, mentally, physically, emotionally and otherwise disabled persons and to take appropriate action;
- (5) To contract with public agencies or private nonprofit corporations to fulfill any of the functions and duties provided for in subdivisions (2) and (6) and government funded programs;
- (6) To aid and assist local advocacy program and the advocacy programs in mental retardation centers, psychiatric hospitals, youth development centers, and alcoholic rehabilitation centers;
- (7) To perform such other functions as are necessary to protect the rights of the developmentally, mentally, physically, emotionally and otherwise disabled or as may be assigned by the Secretary of Administration;
- (8) To advise and assist the Department of Administration on the continuing program to promote the employment of the physically, mentally, emotionally, and otherwise handicapped citizens of North Carolina by creating statewide interest in the rehabilitation and employment of the handicapped, and by obtaining and maintaining cooperation with all public and private groups and individuals in this field;
- (9) To work in close cooperation with the President's Committee on the Employment of People with Disabilities to carry out more effectively the purpose of Article 29A of Chapter 143 of the General Statutes, and with State and federal agencies having responsibilities for employment and rehabilitation of the handicapped;
- (10) To promote and encourage the holding of appropriate ceremonies throughout the State during the "National Disability Employment Awareness Month," the purpose of which ceremony shall be to enlist public support for interest in the employment of the developmentally, mentally, physically, emotionally and otherwise disabled; and
- (10a) To initiate public awareness projects and to make recommendations to the Governor concerning broad policies pertaining to rehabilitation for disabled persons;
- (11) The Council shall advise the Secretary of Administration upon any matter the Secretary may refer to it. (1977, c. 822, s. 1; 1979, c. 575; 1983 (Reg. Sess., 1984), c. 995, s. 20; 1985, c. 307; 1989, c. 121, s. 1; 2001-95, s. 5.)

**Effect of Amendments.** — Session Laws 2001-95, s. 5, effective May 18, 2001, substi-

tuted "youth development center" for "training school" in subdivision (6).

#### OPINIONS OF ATTORNEY GENERAL

**Minor Free to Consult Advocate.** — For complaints about the conditions of treatment in a 24-hour facility, the General Assembly specif-

ically designated the Governor's Advocacy Council for Persons with Disabilities to perform such a function. There is no inclusion of the

legally responsible person in this statute as is found in the statute dealing with minor patients and attorney consultations; thus the minor is free to consult an advocate. See opinion of

Attorney General to C. Robin Britt, Sr., Secretary, Department of Human Resources, — N.C.A.G. — (December 20, 1995).

**§ 143B-403.2. Governor's Advocacy Council for Persons with Disabilities — members; selection; quorum; compensation.**

(a) The Governor's Advocacy Council for Persons with Disabilities of the Department of Administration shall consist of 21 members, appointed as follows:

- (1) Seven members appointed by the Governor;
- (2) Seven members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate;
- (3) Seven members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.

(b) Of the members appointed to the Council, at least 12 shall be disabled persons or family members of disabled persons, with representation as follows:

- (1) One representative of persons associated with substance abuse, one representative of persons with sensory impairment, one representative of persons with physical disabilities, one person who shall serve as Chair of the Protection and Advocacy for the Mentally Ill Advisory Committee of the Governor's Advocacy Council for Persons with Disabilities, to be appointed by the Governor;
- (2) One representative of persons with mental retardation, one representative of persons with developmental disabilities, one representative of persons with mental illness and one representative of persons with sensory impairment, to be appointed upon recommendation of the President of the Senate; and
- (3) One representative of persons with mental retardation, one representative of persons with developmental disabilities, one representative of persons with mental illness, and one representative of persons with physical disabilities, to be appointed upon recommendation of the Speaker of the House of Representatives.

Appointments to the Council under the provisions of this subsection shall be made after consultation with and consideration of recommendations from statewide advocacy and membership organizations associated with persons covered by the federal Developmental Disabilities Assistance and Bill of Rights and the Protection and Advocacy for Mentally Ill Individuals Act.

(c) Members appointed to fit the representative categories shall be initially appointed as terms expire and as vacancies occur, until all categories are filled. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. An administrator in any branch of State government that delivers services to persons with disabilities is not eligible for membership on the Council.

(d) The initial term for three of the members appointed by the Governor shall be two years. The initial term for the remaining members appointed by the Governor shall be four years. At the end of the respective terms of office of the initial members of the Council, the appointment of all members shall be for terms of four years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Council created by the resignation, dismissal, death, or disability of a member shall be filled within 60 days after the date on which the vacancy occurs and shall be for the balance of the unexpired term. The initial members appointed by the General Assembly shall serve for terms to expire June 30, 1993. Subsequently, members appointed by

the General Assembly shall serve two-year terms beginning July 1, 1993, and biennially thereafter.

The Governor may remove any member of the Council appointed by the Governor.

The Governor shall designate one member of the Council to serve as chair and one member to serve as vice-chair.

Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Council shall constitute a quorum for the transaction of business.

All clerical and other services required by the Council shall be supplied by the Secretary of Administration. (1977, c. 822, s. 1; 1979, c. 575; 1981 (Reg. Sess., 1982), c. 1191, ss. 23, 23.1; 1989, c. 121, s. 1; 1991, c. 608, s. 1; 1995, c. 490, s. 38.)

## Part 15. North Carolina State Commission of Indian Affairs.

### § 143B-404. North Carolina State Commission of Indian Affairs — creation; name.

There is hereby created and established the North Carolina State Commission of Indian Affairs. The Commission shall be administered under the direction and supervision of the Department of Administration pursuant to G.S. 143A-6(b) and (c). (1977, c. 849, s. 1; 1977, 2nd Sess., c. 1189.)

### § 143B-405. North Carolina State Commission of Indian Affairs — purposes for creation.

The purposes of the Commission shall be The purposes of the Commission shall be as follows:

- (1) To deal fairly and effectively with Indian affairs.
- (2) To bring local, State, and federal resources into focus for the implementation or continuation of meaningful programs for Indian citizens of the State of North Carolina.
- (3) To provide aid and protection for Indians as needs are demonstrated; to prevent undue hardships.
- (4) To hold land in trust for the benefit of State-recognized Indian tribes. This subdivision shall not apply to federally recognized Indian tribes.
- (5) To assist Indian communities in social and economic development.
- (6) To promote recognition of and the right of Indians to pursue cultural and religious traditions considered by them to be sacred and meaningful to Native Americans. (1977, c. 849, s. 1; 1977, 2nd Sess., c. 1189; 2001-344, s. 1.)

**Editor's Note.** — Session Laws 2001-344, s. 1 amended this section in the coded bill drafting format prescribed by § 120-20.1. In adding new introductory language, the amendment failed to delete preexisting introductory language. The introductory language has been set out in the form above as directed by the Revisor of Statutes.

**Effect of Amendments.** — Session Laws 2001-344, s. 1, effective August 3, 2001, added the introductory language; inserted the subdivision designations; inserted subdivision (4); and made related changes.

## § 143B-406. North Carolina State Commission of Indian Affairs — duties; use of funds.

(a) The Commission shall have the following duties:

- (1) To study, consider, accumulate, compile, assemble and disseminate information on any aspect of Indian affairs.
- (2) To investigate relief needs of Indians of North Carolina and to provide technical assistance in the preparation of plans for the alleviation of such needs.
- (3) To confer with appropriate officials of local, State and federal governments and agencies of these governments, and with such congressional committees that may be concerned with Indian affairs to encourage and implement coordination of applicable resources to meet the needs of Indians in North Carolina.
- (4) To cooperate with and secure the assistance of the local, State and federal governments or any agencies thereof in formulating any such programs, and to coordinate such programs with any programs regarding Indian affairs adopted or planned by the federal government to the end that the State Commission of Indian Affairs secure the full benefit of such programs.
- (5) To act as trustee for any interest in real property that may be transferred to the Commission for the benefit of State-recognized Indian tribes in accordance with a trust agreement approved by the Commission. The Commission shall not hold any interest in real property for the benefit of federally recognized Indian tribes.
- (6) To review all proposed or pending State legislation and amendments to existing State legislation affecting Indians in North Carolina.
- (7) To conduct public hearings on matters relating to Indian affairs and to subpoena any information or documents deemed necessary by the Commission.
- (8) To study the existing status of recognition of all Indian groups, tribes and communities presently existing in the State of North Carolina.
- (9) To establish appropriate procedures to provide for legal recognition by the State of presently unrecognized groups.
- (10) To provide for official State recognition by the Commission of such groups.
- (11) To initiate procedures for their recognition by the federal government.

(b) The Commission may adopt rules to implement the provisions of subdivision (a)(5) of this section. (1977, c. 849, s. 1; 1977, 2nd Sess., c. 1189; 2001-344, s. 2.)

**Effect of Amendments.** — Session Laws 2001-344, s. 2, effective August 3, 2001, inserted the subsection (a) designation, and at the beginning of subsection (a) substituted “The Commission shall have the following duties:” for “It shall be the duty of the Commission”;

inserted subdivision (a)(5); added subdivision (b); and made stylistic changes throughout.

**Legal Periodicals.** — For an article on criminal jurisdiction on the North Carolina Cherokee Indian reservation, see 24 Wake Forest L. Rev. 335 (1989).

### OPINIONS OF ATTORNEY GENERAL

**Actions by local units of government purporting to “recognize” Indian groups as Indian tribes have no binding impact on the Commission** with regard to its statutory duties or its process for official State recognition of Indian tribes; however, a county

may adopt such a resolution to urge the State to grant such recognition. See opinion of Attorney General to Mr. R. Glen Peterson General Counsel North Carolina Department of Administration, 1998 N.C.A.G. 42 (10/15/98).

**§ 143B-407. North Carolina State Commission of Indian Affairs — membership; term of office; chairman; compensation.**

(a) The State Commission of Indian Affairs shall consist of two persons appointed by the General Assembly, the Secretary of Health and Human Services, the Director of the State Employment Security Commission, the Secretary of Administration, the Secretary of Environment and Natural Resources, the Commissioner of Labor or their designees and 20 representatives of the Indian community. These Indian members shall be selected by tribal or community consent from the Indian groups that are recognized by the State of North Carolina and are principally geographically located as follows: the Coharie of Sampson and Harnett Counties; the Eastern Band of Cherokees; the Haliwa Saponi of Halifax, Warren, and adjoining counties; the Lumbees of Robeson, Hoke and Scotland Counties; the Meherrin of Hertford County; the Waccamaw-Siouan from Columbus and Bladen Counties; the Indians of Person County; and the Native Americans located in Cumberland, Guilford, Johnston, Mecklenburg, Orange, and Wake Counties. The Coharie shall have two members; the Eastern Band of Cherokees, two; the Haliwa Saponi, two; the Lumbees, three; the Meherrin, one; the Waccamaw-Siouan, two; the Indians of Person County, one; the Cumberland County Association for Indian People, two; the Guilford Native Americans, two; the Metrolina Native Americans, two; the Triangle Native American Society, one. Of the two appointments made by the General Assembly, one shall be made upon the recommendation of the Speaker, and one shall be made upon recommendation of the President Pro Tempore of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121 and vacancies shall be filled in accordance with G.S. 120-122.

(b) Members serving by virtue of their office within State government shall serve so long as they hold that office. Members representing Indian tribes and groups shall be elected by the tribe or group concerned and shall serve for three-year terms except that at the first election of Commission members by tribes and groups one member from each tribe or group shall be elected to a one-year term, one member from each tribe or group to a two-year term, and one member from the Lumbees to a three-year term. The initial appointment from the Indians of Person County shall expire on June 30, 1999. The initial appointment from the Triangle Native American Society shall expire June 30, 2003. Thereafter, all Commission members will be elected to three-year terms. All members shall hold their offices until their successors are appointed and qualified. Vacancies occurring on the Commission shall be filled by the tribal council or governing body concerned. Any member appointed to fill a vacancy shall be appointed for the remainder of the term of the member causing the vacancy. The Governor shall appoint a chairman of the Commission from among the Indian members of the Commission, subject to ratification by the full Commission. The initial appointments by the General Assembly shall expire on June 30, 1983. Thereafter, successors shall serve for terms of two years.

(c) Commission members who are seated by virtue of their office within the State government shall be compensated at the rate specified in G.S. 138-6. Commission members who are members of the General Assembly shall be compensated at the rate specified in G.S. 120-3.1. Indian members of the commission shall be compensated at the rate specified in G.S. 138-5. (1977, c. 771, s. 4; c. 849, s. 1; 1977, 2nd Sess., c. 1189; 1981, c. 47, s. 5; 1981 (Reg. Sess., 1982), c. 1191, ss. 74, 76; 1989, c. 727, s. 218(149); 1991, c. 467, s. 1; 1995, c. 490, s. 27; 1997-147, s. 2; 1997-293, s. 2; 1997-443, ss. 11A.118(a), 11A.119(a); 2001-318, s. 1.)

**Cross References.** — As to collaboration between Division of Social Services and Commission of Indian Affairs on Indian child welfare issues, see § 143B-139.5A.

**Editor's Note.** — Session Laws 1981, c. 47, which amended this section, in s. 7, provided: "When the Speaker, President of the Senate, or Lieutenant Governor has designated a person to serve in his place as permitted by this act, that person shall be compensated in accordance with G.S. 120-3.1 if a member of the General Assembly, in accordance with G.S. 138-6 if a State officer or employee, and in accordance with G.S. 138-5 in any other case, except that a

member of the General Assembly so designated may not receive per diem if the Speaker, President of the Senate or Lieutenant Governor may not receive per diem."

**Effect of Amendments.** — Session Laws 2001-318, s. 1, effective July 28, 2001, in subsection (a), substituted "20 representatives" for "19 representatives" in the first sentence, inserted references to Johnston, Orange, and Wake Counties at the end of the third sentence, and inserted "the Triangle Native American Society, one" at the end of the fourth sentence; and inserted the fourth sentence of subsection (b).

### § 143B-408. North Carolina State Commission of Indian Affairs — meetings; quorum; proxy vote.

(a) The Commission shall meet quarterly, and at any other such time that it shall deem necessary. Meetings may be called by the chairman or by a petition signed by a majority of the members of the Commission. Ten days' notice shall be given in writing prior to the meeting date.

(b) Simple majority of the Indian members of the Commission must be present to constitute a quorum.

(c) Proxy vote shall not be permitted. (1977, c. 849, s. 1; 1977, 2nd Sess., c. 1189.)

### § 143B-409. North Carolina State Commission of Indian Affairs — reports.

The Commission shall prepare a written annual report giving an account of its proceedings, transactions, findings, and recommendations. This report shall be submitted to the Governor and the legislature. The report will become a matter of public record and will be maintained in the State Historical Archives. It may also be furnished to such other persons or agencies as the Commission may deem proper. (1977, c. 849, s. 1; 1977, 2nd Sess., c. 1189.)

**Editor's Note.** — Session Laws 1977, c. 849, §§ 143B-400.6 and 143B-400.9, which have contained two identical sections, numbered 143B-400.6 and 143B-400.9, have been codified above as § 143B-409.

### § 143B-410. North Carolina State Commission of Indian Affairs — fiscal records; clerical staff.

Fiscal records shall be kept by the Secretary of Administration. The audit report will become a part of the annual report and will be submitted in accordance with the regulations governing preparation and submission of the annual report. (1977, c. 849, s. 1; 1977, 2nd Sess., c. 1189; 1983, c. 913, s. 41.)

### § 143B-411. North Carolina State Commission of Indian Affairs — executive director; employees.

The Commission may, subject to legislative or other funds that would accrue to the Commission, employ an executive director to carry out the day-to-day responsibilities and business of the Commission. The executive director shall serve at the pleasure of the Commission. The executive director, also subject to legislative or other funds that would accrue to the Commission, may hire additional staff and consultants to assist in the discharge of his responsibilities.

ties, as determined by the Commission. The executive director shall not be a member of the Commission, and shall be of Indian descent. (1977, c. 849, s. 1; 1977, 2nd Sess., c. 1189; 1991, c. 88, s. 1.)

Part 15A. North Carolina Advisory Council on the Eastern Band of the Cherokee.

**§ 143B-411.1. North Carolina Advisory Council on the Eastern Band of the Cherokee — creation; membership; terms of office.**

The North Carolina Advisory Council on the Eastern Band of the Cherokee is created in the Department of Administration. The Council shall consist of 16 members and shall include the following members: eight members shall be appointed by the Chief with the consent of the Tribal Council of the Eastern Band of the Cherokee; the Superintendent of Public Instruction or his designee; the Secretary of Administration or his designee; the Secretary of Health and Human Services or his designee; the Secretary of Environment and Natural Resources or his designee; the Attorney General or his designee; one member appointed by the Governor who shall be a representative of local government in Swain, Jackson, or Cherokee Counties; one legislator appointed by the Speaker of the House; and one legislator appointed by the President Pro Tempore of the Senate. Members serving by virtue of their office within State Government shall serve so long as they hold that office, except that the members appointed by the Speaker of the House and the President Pro Tempore of the Senate shall serve for two-year terms. Members appointed by the Chief shall serve at the pleasure of the Chief. Members appointed by the Governor shall serve a term of four years at the pleasure of the Governor. (1983 (Reg. Sess., 1984), c. 1085, s. 1; 1989, c. 727, s. 218(150); 1997-443, ss. 11A.118(a), 11A.119(a).)

**§ 143B-411.2. North Carolina Advisory Council on the Eastern Band of the Cherokee — purpose or creation; powers and duties.**

The purpose of the Council is to study on a continuing basis the relationship between the Eastern Band of the Cherokee and the State of North Carolina in order to resolve any matters of concern to the State or the Tribe. It shall be the duty of the Council:

- (1) Identify existing and potential conflicts between the State of North Carolina and the Eastern Band of Cherokee Indians;
- (2) Propose State and federal legislation and agreements between the State of North Carolina and the Cherokee Tribe to resolve existing and potential conflicts;
- (3) To study and make recommendations concerning any issue referred to the Council by any official of the Eastern Band of the Cherokee, the State of North Carolina, or the government of Haywood, Jackson, Swain, Graham, or Cherokee Counties.
- (4) Study other issues of mutual concern to the Eastern Band of the Cherokee;
- (5) Make a report with recommendations as needed, but not less often than biannually to the Governor, the Chief of the Eastern Band of the Cherokee, the General Assembly, and the Tribal Council of the Eastern Band of the Cherokee. (1983 (Reg. Sess., 1984), c. 1085, s. 1.)

**Legal Periodicals.** — For an article on Cherokee Indian reservation, see 24 Wake Forest L. Rev. 335 (1989).

**§ 143B-411.3. North Carolina Advisory Council of the Eastern Band of the Cherokee — meetings; quorum; compensation; chairman.**

The Council shall meet at least quarterly or at the call of the chairman or a majority of the Council. A quorum shall consist of a majority of the Council. Designees of Council members serving by virtue of office shall be entitled to vote. The Chairman of the Council shall be elected from the membership. The selection of a member as chairman shall have no effect on the member's voting privileges. Council members who are seated by virtue of their office within State government shall be compensated at the rate specified in G.S. 138-6. Council members who are members of the General Assembly shall be compensated at the rate specified in G.S. 120-31. Other Council members shall be compensated at the rate specified in G.S. 138-5. (1983 (Reg. Sess., 1984), c. 1085, s. 1.)

**§ 143B-411.4. North Carolina Advisory Council on the Eastern Band of the Cherokee — clerical and administrative support.**

All clerical and other services required by the Council shall be supplied by the Secretary of Administration. (1983 (Reg. Sess., 1984), c. 1085, s. 1.)

**Part 16. Governor's Council on Employment of the Handicapped.**

**§§ 143B-412, 143B-413:** Repealed by Session Laws 1979, c. 575, s. 1.

**Cross References.** — As to powers and duties of the Governor's Council on Employment of the Handicapped, see also § 143-283.1 et seq.

**Editor's Note.** — The above sections were formerly §§ 143B-184 and 143B-185. They were rewritten and recodified in this Article by Session Laws 1977, c. 872, s. 2.

**Part 17. Governor's Advocacy Council on Children and Youth.**

**§ 143B-414. Governor's Advocacy Council on Children and Youth — creation; powers and duties.**

There is hereby created the Governor's Advocacy Council on Children and Youth of the Department of Administration. The Council shall have the following functions and duties:

- (1) To act as an advocate for children and youth within State and local governments, and with private agencies serving children and youth;
- (2) To provide assistance in the development and coordination of child advocacy systems at the regional and local levels within the State;
- (3) To perform a continuing review of existing programs of State government for children and youth and their families;
- (4) To, in cooperation with State, local or private agencies, identify needs of children and youth and their families that are not currently being met and recommend new programs or improvement of existing programs;

- (5) To review any new programs affecting children and youth proposed by any State agency and recommend changes to avoid duplication of services, to promote better planning, or otherwise to make more effective use of available resources;
- (6) To meet at least annually with the Governor and present a written report concerning the health and well-being of North Carolina's children and the effectiveness of current programs and the need for new programs for children and youth;
- (7) To provide information to the general public and State, local and private agencies serving children and youth and their families concerning the activities and findings of the Council; and
- (8) To perform other advisory functions assigned by the Secretary of Administration or a legislative committee. (1973, c. 476, s. 180; 1977, c. 872, s. 6; 1981 (Reg. Sess., 1982), c. 1191, s. 13.)

**Editor's Note.** — This section was formerly § 143B-186. It was rewritten and recodified in this Article by Session Laws 1977, c. 872, s. 6.

### **§ 143B-415. Governor's Advocacy Council on Children and Youth — members; selection; quorum; compensation.**

(a) The Governor's Advocacy Council on Children and Youth shall consist of 19 members. The composition of the Council shall be as follows: two members appointed by the President Pro Tempore of the Senate from the membership of the Senate; two members selected by the Speaker of the House of Representatives from the membership of the House of Representatives; 15 members appointed by the Governor.

Of the members appointed by the Governor, at least one shall come from each congressional district in accordance with G.S. 147-12(3)b.

In selecting the 15 members of the Council, the Governor shall select 11 public-spirited adult citizens who have an interest in and knowledge of children and youth, persons who work with children or representatives of organizations concerned with problems of children and youth. The remaining four members to be appointed by the Governor shall consist of two youths of each sex who are 18 years of age or under at the time of their appointments.

(b) The initial members of the Council shall be the members of the former Governor's Advocacy Council on Children and Youth of the Department of Health and Human Services whose terms shall expire on the date they would have, had said Council of the Department of Health and Human Services not been transferred. At the end of the respective terms of office of the initial members of the Council, the appointment of all members shall be as provided in this section and for terms of four years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Council created by the resignation, death, dismissal, or disability of a member shall be for the balance of the unexpired term.

(c) The Governor may remove any member of the Council appointed by the Governor.

The Governor shall designate from the membership of the Council a chairman and a vice-chairman to serve at his pleasure.

The Council shall meet at least quarterly and upon the call of the chairman or upon written request of at least nine members.

The members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Council shall constitute a quorum for the transaction of business.

(d) All clerical and other services required by the Council shall be supplied by the Secretary of Administration. (1973, c. 476, s. 181; 1977, c. 872, s. 6; 1981 (Reg. Sess., 1982), c. 1191, s. 14; 1991, c. 739, s. 31; 1991 (Reg. Sess., 1992), c. 1038, s. 21; 1997-443, s. 11A.118(a); 2001-486, s. 2.20.)

**Effect of Amendments.** — Session Laws 2001-486, s. 2.20, effective December 16, 2001, in subsection (a), substituted “19 members” for “18 members” in the first paragraph, substi-

tuted “15” for “14” in the first and last paragraphs, and substituted “11” for “10” in the last paragraph.

### § 143B-416. Governor’s Advocacy Council on Children and Youth — access to information.

Unless otherwise prohibited by law, every State and local agency, department, board, commission, school, or corporation that supervises, administers, or otherwise directs programs or services for children and youth shall provide the Council with any requested information relating to such programs and services. (1977, c. 872, s. 6.)

## Part 18. North Carolina Internship Council.

### § 143B-417. North Carolina Internship Council — creation; powers and duties.

There is hereby created the North Carolina Internship Council of the Department of Administration. The North Carolina Internship Council shall have the following functions and duties:

- (1) To determine the number of student interns to be allocated to each of the following offices or departments:
  - a. Office of the Governor
  - b. Department of Administration
  - c. Department of Correction
  - d. Department of Cultural Resources
  - e. Department of Revenue
  - f. Department of Transportation
  - g. Department of Environment and Natural Resources
  - h. Department of Commerce
  - i. Department of Crime Control and Public Safety
  - j. Department of Health and Human Services
  - k. Office of the Lieutenant Governor
  - l. Office of the Secretary of State
  - m. Office of the State Auditor
  - n. Office of the State Treasurer
  - o. Department of Public Instruction
  - p. Repealed by Session Laws 1985, c. 757, s. 162.
  - q. Department of Agriculture and Consumer Services
  - r. Department of Labor
  - s. Department of Insurance
  - t. Office of the Speaker of the House of Representatives
  - u. Justices of the Supreme Court and Judges of the Court of Appeals
  - v. Community Colleges System Office
  - w. Office of State Personnel
  - x. Office of the Senate President Pro Tempore
  - y. Department of Juvenile Justice and Delinquency Prevention;

- (2) To screen applications for student internships and select from these applications the recipients of student internships; and
- (3) To determine the appropriateness of proposals for projects for student interns submitted by the offices and departments enumerated in subdivision (1) of this section. (1977, c. 771, s. 4; c. 967; 1979, c. 783; 1983, c. 710; 1985, c. 757, s. 162; 1989, c. 727, s. 218(151), c. 751, s. 7(21); 1989 (Reg. Sess., 1990), c. 900, s. 1; 1991 (Reg. Sess., 1992), c. 959, s. 42; 1993, c. 522, s. 17; 1997-261, s. 104; 1997-443, ss. 11A.118(a), 11A.119(a); 1999-84, s. 25; 2000-137, s. 4(oo).)

**Effect of Amendments.** — Session Laws 2000-137, s. 4(oo), effective July 20, 2000, added subdivision (1)y; in (3), substituted “sub-

division (1) of this section” for “(1)”; and made minor stylistic changes.

### **§ 143B-418. North Carolina Internship Council — members; selection; quorum; compensation; clerical, etc., services.**

The North Carolina Internship Council shall consist of 17 members, including the Secretary of Administration or his designee, one member to be designated by and to serve at the pleasure of the President Pro Tempore of the Senate, one member to be designated by and to serve at the pleasure of the Speaker of the House of Representatives and the following 14 members to be appointed by the Governor to a two-year term commencing on July 1 of odd-numbered years: two representatives of community colleges; four representatives of The University of North Carolina system; two representatives of private colleges or universities; three representatives of colleges or universities with an enrollment of less than 5,000 students; and three former interns.

At the end of the respective terms of office of the 14 members of the Council appointed by the Governor, the appointment of their successors shall be for terms of two years and until their successors are appointed and qualify. The Governor may remove any member appointed by the Governor.

Any appointment to fill a vacancy on the Council created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

The Council shall meet at the call of the chairman or upon written request of at least five members.

The Governor shall designate a member of the Council as chairman to serve at the pleasure of the Governor.

Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Council shall constitute a quorum for the transaction of business.

All clerical and other services required by the Council shall be supplied by the Secretary of Administration. (1977, c. 967; 1987, c. 564, s. 9; 1995, c. 490, s. 28.)

### **§ 143B-419. North Carolina Internship Council — committees for screening applications.**

The North Carolina Internship Council may designate one representative from each office or department enumerated in G.S. 143B-417 to serve on a committee to assist pursuant to guidelines adopted by the Council, in the screening and selection of applicants for student internships. (1977, c. 967.)

Part 19. Jobs for Veterans Committee.

**§ 143B-420. Governor's Jobs for Veterans Committee — creation; appointment, organization, etc.; duties.**

(a) There is hereby created and established in the North Carolina Department of Administration, Division of Veterans Affairs, a committee to be known as the Governor's Jobs for Veterans Committee, with one member from each Congressional district, appointed by the Governor. Members of the Committee shall serve at the pleasure of the Governor. The Secretary of Administration, with the concurrence of the Governor, shall appoint a chairman to administer this Committee who shall be subject to the direction and supervision of the Secretary. The chairman shall serve at the pleasure of the Secretary. The chairman shall devote full time to his duties of office.

(b) Subject to the general supervision of the Secretary, the duties of the chairman shall include but not be limited to the following:

- (1) Serving as a liaison between the Office of the Governor and all State agencies to insure that veterans receive the employment preference to which they are legally entitled and that such State agencies list available jobs with appropriate public employment services;
- (2) Evaluating existing programs designed to benefit veterans and submitting reports and recommendations to the Governor and Secretary;
- (3) Developing and furthering favorable employer attitudes toward the employment of veterans by appropriate promulgation of information concerning veterans and the functions of the Committee;
- (4) Serving as a liaison between the Committee and communities throughout the State to the end that civic committees and volunteer groups are formed and utilized to promote the objectives of the Committee;
- (5) Assisting employers in properly designing affirmative action plans as they relate to handicapped and Vietnam-era veterans;
- (6) Serving as a liaison between veterans and State agencies on questions regarding the employment practices of such State agencies. (1977, c. 1032; 1985, c. 479, s. 166.)

**Legal Periodicals.** — For survey of 1977 law on employment regulation, see 56 N.C.L. Rev. 854 (1978).

**§ 143B-421. Governor's Jobs for Veterans Committee — authority to receive grants-in-aid.**

The Committee is hereby authorized to receive grants-in-aid from the federal government and charitable organizations for carrying out its duties. (1977, c. 1032.)

Part 19A. Selective Service Registration.

**§ 143B-421.1. Selective Service registration.**

(a) A person who is required under 50 United States Code Appx. § 453 (Military Selective Service Act) to present himself for and submit to registration and fails to do so in accordance with any proclamation or any rule or regulation issued under this section, shall be ineligible for:

- (1) Employment by or service for the State, or a political subdivision of the State, including all boards and commissions, departments, agencies, institutions, and instrumentalities.
- (2) State-supported scholarships, programs for financial assistance for postsecondary education, or loans insured by any State agency, including educational assistance authorized under Article 23 of Chapter 116 of the General Statutes.

(b) It shall be the duty of all persons or officials having charge of and authority over either the hiring of employees or granting of educational assistance, as described in this section, to adopt rules and regulations which shall require applicants to indicate on a form whether they are in compliance with the registration requirements described in subsection (a). Rules and regulations issued under the authority of this section shall provide that an applicant be given not less than 30 days after notification of a proposed finding of ineligibility for employment or benefits to provide the issuing official with information that he is in compliance with the registration requirements described in subsection (a). The issuing official may afford such person an opportunity for a hearing to establish his compliance or for any other purpose.

(c) A person may not be denied a right, privilege, or benefit under State law by reason of failure to present himself for and submit to registration under 50 U.S.C.S. Appx. § 453 if:

- (1) The requirement for the person to so register has terminated or become inapplicable to the person; and
- (2) The person shows by a preponderance of the evidence that the failure of the person to register was not a knowing and willful failure to register. (1989, c. 618.)

## Part 20. Public Officers and Employees Liability Insurance Commission.

**§§ 143B-422 through 143B-426.1:** Recodified as §§ 58-27.20 through 58-27.26 (now 58-32-1 through 58-32-30) by Session Laws 1985, c. 666, s. 79.

## Part 21. Child and Family Services Interagency Committees.

**§§ 143B-426.2 through 143B-426.7A:** Repealed by Session Laws 1985 (Regular Session, 1986), c. 1028, s. 31.

## Part 22. North Carolina Agency for Public Telecommunications.

### § 143B-426.8. Definitions.

As used in this Part, except where the context clearly requires otherwise:

- (1) "Agency" means the North Carolina Agency for Public Telecommunications.
- (2) "Board" means the Board of Public Telecommunications Commissioners.
- (3) "Telecommunications" means any origination, creation, transmission, emission, storage-retrieval, or reception of signs, signals, writing, images and sounds, or intelligence of any nature, by wire, radio, television, optical or other electromagnetic systems. (1979, c. 900, s. 1.)

## CASE NOTES

**Cited** in *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989).

**§ 143B-426.9. North Carolina Agency for Public Telecommunications — Creation; membership; appointments, terms and vacancies; officers; meetings and quorum; compensation.**

The North Carolina Agency for Public Telecommunications is created. It is governed by the Board of Public Telecommunications Commissioners, composed of 27 members as follows:

- (1) A Chairman appointed by, and serving at the pleasure of, the Governor;
- (2) Ten at-large members, appointed by the Governor from the general public;
- (3) Two members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121;
- (4) Two members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121;
- (5) The Secretary of Administration, ex officio;
- (6) The Chairman of the Board of Trustees of The University of North Carolina Center for Public Television (if and when established), ex officio;
- (7) The Chairman of the State Board of Education, ex officio;
- (8) The Chairman of the OPEN/net Committee, ex officio, so long as such person is not a State employee;
- (9) The Chairman of the North Carolina Utilities Commission, ex officio;
- (10) The Director of the Public Staff of the North Carolina Utilities Commission, ex officio;
- (11) The Chairman of the Public Radio Advisory Committee of the North Carolina Agency for Public Telecommunications, ex officio;
- (12) The Superintendent of Public Instruction, ex officio;
- (13) The President of the University of North Carolina, ex officio;
- (14) The President of the Community Colleges System, ex officio; and
- (15) Two members ex officio who shall rotate from among the remaining heads of departments enumerated in G.S. 143A-11 or G.S. 143B-6, appointed by the Governor.

The 10 at-large members shall serve for terms staggered as follows: four terms shall expire on June 30, 1980; and three terms shall expire on June 30, 1982; and three terms shall expire on June 30, 1984. Thereafter, the members at large shall be appointed for full four-year terms and until their successors are appointed and qualified. In making appointments of members at large, the Governor shall seek to appoint persons from the various geographic areas of the State including both urban and rural areas; persons from various classifications as to sex, race, age, and handicapped persons; and persons who are representatives of the public broadcast, commercial broadcast, nonbroadcast distributive systems and private education communities of the State.

The terms of the ex officio members are coterminous with their respective terms of office. In the event that any of the offices represented on the Board ceases to exist, the successor officer to the designated member shall become an ex officio member of the Board; if there shall be no successor, then the position

on the Board shall be filled by a member to be appointed by the Governor from the general public. The ex officio members shall have the right to vote.

The initial members appointed to the Board by the General Assembly shall serve for terms expiring June 30, 1983. Thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years.

The terms of the rotating ex officio members shall be of one-year duration, and the schedule of rotation is determined by the Governor.

Each State official who serves on the Board may designate a representative of his department, agency or institution to sit in his place on the Board and to exercise fully the official's privileges of membership.

The Secretary of Administration or his designee serves as secretary of the Board.

Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. Other vacancies shall be filled in the same manner as the original appointment.

The Governor may remove any member of the Board from office in accordance with the provisions of G.S. 143B-16.

The Board meets quarterly and at other times at the call of the chairman or upon written request of at least six members.

A majority of the Board members shall constitute a quorum for the transaction of business. (1979, c. 900, s. 1; 1981 (Reg. Sess., 1982), c. 1191, ss. 6-8; 1983 (Reg. Sess., 1984), c. 1116, s. 92; 1995, c. 490, s. 42; 1999-84, s. 26.)

### § 143B-426.10. Purpose of Agency.

The North Carolina Agency for Public Telecommunications shall serve as an instrumentality of the State of North Carolina for the accomplishment of the following general purposes:

- (1) To advise the Governor, the Council of State, the principal State departments, the University of North Carolina, the General Assembly and all other State agencies and institutions on all matters of telecommunications policy as may affect the State of North Carolina and its citizens;
- (2) To foster and stimulate the use of telecommunications programming, services and systems for noncommercial educational and cultural purposes by public agencies for the improvement of the performance of governmental services and functions;
- (3) To serve State government, local governments and other public agencies and councils in the following ways:
  - a. To provide a clearinghouse of information about innovative projects, programs or demonstrations in telecommunications;
  - b. To provide advice on the acquisition, location and operation of telecommunications systems, equipment, and facilities and to provide particularly such advice as may foster compatibility of systems, equipment and facilities and as may reduce or eliminate duplication or mismatching of systems and facilities;
  - c. To provide advice on the disposition of excess or unused telecommunications equipment;
  - d. To provide information and advice on new telecommunications developments and emerging technologies;
  - e. To provide advice on procurement matters on all purchases and contracts for telecommunications systems, programming and services;
  - f. To provide information and advice on the most cost-effective means of using telecommunications for management, operations and service delivery;

- g. To provide advice and assistance in the evaluation of alternative media programming so that the most efficient and effective products may be developed and used;
  - h. To provide advice and assistance in the identification of various methods of distributing programs and materials;
- (4) To study the utilization of the frequency spectrum and to advise appropriate authorities as to effective frequency management;
  - (5) To assist in the development of a State plan or plans for the best development of telecommunications systems, both public and private, to insure that all citizens of North Carolina will enjoy the benefits which such systems may deliver;
  - (6) In addition to and not in place of the programs, projects, and services of The University of North Carolina Center for Public Television (or its functional predecessor), to develop and provide media programs and programming materials and services of a noncommercial educational, informational, cultural or scientific nature;
  - (7) To undertake innovative projects in interactive telecommunications and teleconferencing whenever such projects might serve to improve services, expand opportunities for citizen participation in government and reduce the costs of delivering a service;
  - (8) To serve as a means of acquiring governmental and private funds for use in the development of services through telecommunications;
  - (9) To serve as a means of distributing State funds and awarding grants for any purpose determined to be in furtherance of the purposes of this Part;
  - (10) To operate such telecommunications facilities or systems as may fall within the purview of this Part or as may be assigned to the Agency by the Governor, by the General Assembly, or by the Secretary of Administration consistent with the provisions of G.S. 143-340(14);
  - (11) To review, assess and report to the Governor on an annual basis on the telecommunications needs and services of State and local government and on the production capabilities and services, the nonproduction services, and the research and development services offered by the Agency and by all other agencies of State government;
  - (12) To review, assess and report to the Governor, after a period of not less than two years and not more than three years after the enactment of this Part, on the telecommunications statutes, plans and operations in State government, including those resulting from the enactment of this Part and from revision of statutes pertaining to telecommunications in the Department of Administration;
  - (13) To serve as liaison between State government and local governments, regional organizations, the federal government, foundations and other states and nations on common telecommunications concerns;
  - (14) To study and evaluate all existing or proposed statutes, rules or regulations at all levels of government touching upon or affecting telecommunications policy, services, systems, programming, rates or funds and to advise the appropriate officials, agencies and councils;
  - (15) To acquire, construct, equip, maintain, develop and improve such facilities as may be necessary to the fulfillment of the purpose of the Part;
  - (16) To provide information and advice on any related matter which may be referred to it by any agency or council of State or local government;
  - (17) And in general to do and perform any act or function which may tend to be useful toward the development and improvement of telecommunications services within State government and which may increase the delivery of services through telecommunications programs or systems.

The enumeration of the above purposes shall not limit or circumscribe the broad objective of developing to the utmost the possibilities of telecommunications programming, services and systems in the State of North Carolina. (1979, c. 900, s. 1.)

**Editor's Note.** — Subdivision (14) of § 143-340, referred to in subdivision (10) of this section, was repealed by Session Laws 1989, c. 239, s. 1.

#### CASE NOTES

**Quoted** in *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989).

### § 143B-426.11. Powers of Agency.

In order to enable it to carry out the purposes of this Part, the Agency:

- (1) Has the powers of a body corporate, including the power to sue and be sued, to make contracts, to hold and own copyrights and to adopt and use a common seal and to alter the same as may be deemed expedient;
- (2) May make all necessary contracts and arrangements with any parties which will serve the purposes and facilitate the business of the North Carolina Agency for Public Telecommunications; except that, the Agency may not contract or enter into any agreement for the production by the Agency of programs or programming materials with any person, group, or organization other than government agencies; principal State departments; public and noncommercial broadcast licensees;
- (3) May rent, lease, buy, own, acquire, mortgage, or otherwise encumber and dispose of such property, real or personal; and construct, maintain, equip and operate any facilities, buildings, studios, equipment, materials, supplies and systems as said Board may deem proper to carry out the purposes and provisions of this Part;
- (4) May establish an office for the transaction of its business at such place or places as the Board deems advisable or necessary in carrying out the purposes of this Part;
- (5) May apply for and accept loans and grants of money from any federal agency or the State of North Carolina or any political subdivision thereof or from any public or private sources for any and all of the purposes authorized in this Part; may extend or distribute the funds in accordance with directions and requirements attached thereto or imposed thereon by the federal agency, the State of North Carolina or any political subdivision thereof, or any public or private lender or donor; and may give such evidences of indebtedness as shall be required, but no indebtedness of any kind incurred or created by the Agency shall constitute an indebtedness of the State of North Carolina or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State of North Carolina or any political subdivision thereof. At no time may the total outstanding indebtedness of the Agency, excluding bond indebtedness, exceed five hundred thousand dollars (\$500,000) unless the Agency has consulted with the Director of the Budget;
- (6) May pay all necessary costs and expenses involved in and incident to the formation and organization of the Agency and incident to the administration and operation thereof, and may pay all other costs and expenses reasonably necessary or expedient in carrying out and accomplishing the purposes of this Part;

- (7) Under such conditions as the Board may deem appropriate to the accomplishment of the purposes of this Part, may distribute in the form of grants, gifts, or loans any of the revenues and earnings received by the Agency from its operations;
- (8) May adopt, alter or repeal its own bylaws, rules and regulations governing the manner in which its business may be transacted and in which the power granted to it may be exercised, and may provide for the creation of such divisions and for the appointment of such committees, and the functions thereof, as the Board deems necessary or expedient in facilitating the business and purposes of the Agency;
- (9) The Board shall be responsible for all management functions of the Agency. The chairman shall serve as the chief executive officer, and shall have the responsibility of executing the policies of the Board. The Executive Director shall be the chief operating and administrative officer and shall be responsible for carrying out the decisions made by the Board and its chairman. The Executive Director shall be appointed by the Governor upon the recommendation of the Board and shall serve at the pleasure of the Governor. The salary of the Executive Director shall be fixed by the General Assembly in the Current Operations Appropriations Act. Subject to the provisions of the State Personnel Act and with the approval of the Board, the Executive Director may appoint, employ, dismiss and fix the compensation of such professional, administrative, clerical and other employees as the Board deems necessary to carry out the purposes of this Part; but any employee who serves as the director of any division of the Agency which may be established by the Board shall be appointed with the additional approval of the Secretary of Administration. There shall be an executive committee consisting of three of the appointed members and three of the ex officio members elected by the Board and the chairman of the Board, who shall serve as chairman of the executive committee. The executive committee may do all acts which are authorized by the bylaws of the Agency. Members of the executive committee shall serve until their successors are elected;
- (10) May do any and all other acts and things in this Part authorized or required to be done, whether or not included in the general powers in this section; and
- (11) May do any and all things necessary to accomplish the purposes of this Part.

Nothing herein authorizes the Agency to exercise any control over any public noncommercial broadcast licensee, its staff or facilities or over any community antenna television system (Cable TV; CATV), its staff, employees or facilities operating in North Carolina, or the Police Information Network (PIN), its staff, employees or facilities or the Judicial Department.

The property of the Agency shall not be subject to any taxes or assessments.

Prior to taking any action under subdivisions (5) or (7) of this section, the Board may consult with the Advisory Budget Commission. (1979, c. 900, s. 1; 1983, c. 666; c. 717, s. 82; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1985, c. 122, ss. 3, 4; 1985 (Reg. Sess., 1986), c. 955, ss. 99-101.)

### **§ 143B-426.12. Public Radio Advisory Committee — policy; creation; duties; members.**

It is the policy of the State of North Carolina that at least one public radio signal shall be made available to every resident of North Carolina, that there be diversity in the kinds of public radio licensees, that there be a uniform policy for extending State financial aid to stations eligible to participate in federal

funds for public radio, that State financial support shall constitute less than one half of the operating budget of any station, that program content shall not be influenced by the State by virtue of State financial support to the stations, and that technical facilities be established and operated to achieve station interconnection.

The Public Radio Advisory Committee of the North Carolina Agency on Public Telecommunications is created. That Committee shall advise the Board on the distribution of State funds to public radio licensees in North Carolina and on any matter which the Board may refer to it. There shall be nine members of said Committee; three of whom shall be representatives selected by the public radio broadcast licensees in the State; six of whom shall be at-large members chosen by the Governor from the general public. The members shall choose one of the at-large members to serve as chairman of the Committee; and that chairman shall serve ex officio as a member of the Board. The terms of the members of the Committee shall be established by the Board. (1979, c. 900, s. 1.)

**Legal Periodicals.** — For note, “First Amendment Claims Against Public Broadcasters: Testing the Public’s Right to a Balanced Presentation,” see 5 Duke L.J. 1386 (1989).

#### CASE NOTES

**Quoted** in *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989).

### § 143B-426.13. Approval of acquisition and disposition of real property.

Any transaction relating to the acquisition or disposition of any estate or interest in real property by the North Carolina Agency for Public Telecommunications shall be subject to prior review by the Governor and Council of State, and shall become effective only after the transaction has been approved by the Governor and Council of State. Upon the acquisition of an estate in real property by the North Carolina Agency for Public Telecommunications, the fee title or other estate shall vest in and the instrument of conveyance shall name “North Carolina Agency for Public Telecommunications” as grantee, lessee, or transferee. Upon the disposition of an interest or estate in real property, the instrument of lease conveyance or transfer shall be executed by the North Carolina Agency for Public Telecommunications. The approval of any transaction by the Governor or Council of State shall be evidenced by a duly certified copy of excerpt of minutes of the meeting of the Governor and the Council of State, attested by the Governor or by the private secretary to the Governor, reciting the approval, affixed to the instrument of acquisition or transfer; the certificate may be recorded as a part of the instrument, and shall be conclusive evidence of review and approval of the subject transaction by the Governor and Council of State. The Governor, acting with the approval of the Council of State, may delegate the review and approval of such classes of lease, rental, easement or right-of-way transactions as he deems advisable, and he may likewise delegate the review and approval of the severance of buildings and timber from the land. (1979, c. 900, s. 1.)

### § 143B-426.14. Issuance of bonds.

As a means of raising the funds needed from time to time in the acquisition, construction, equipment, maintenance and operation of any facility, building,

structure, telecommunications equipment or systems or any other matter or thing which the Agency is herein authorized to acquire, construct, equip, maintain, or operate, the Agency may, with the approval of the Advisory Budget Commission, at one time or from time to time issue negotiable revenue bonds of the Agency. The principal and interest of the revenue bonds shall be payable solely from the revenues to be derived from the operation of all or any part of the Agency's properties and facilities. A pledge of the net revenues derived from the operation of specified properties and facilities of the Agency may be made to secure the payment of the bonds as they mature. Revenue bonds issued under the provisions of this Part shall not be deemed to constitute a debt of the State of North Carolina or a pledge of the faith and credit of the State. The issuance of revenue bonds shall not directly or indirectly or contingently obligate the State to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment. The bonds and the income therefrom shall be exempt from all taxation within the State. (1979, c. 900, s. 1.)

#### **§ 143B-426.15. Exchange of property; removal of building, etc.**

The Agency may exchange any property or properties acquired under the authority of this Chapter for other property or properties usable in carrying out the powers hereby conferred, and also may remove from lands needed for its purposes and reconstruct on other locations, buildings, facilities, equipment, telecommunications systems or other structures, upon the payment of just compensation. (1979, c. 900, s. 1.)

#### **§ 143B-426.16. Treasurer of the Agency.**

The Board shall select its own treasurer from among the at-large members. The Board shall require a corporate surety bond of the treasurer in an amount fixed by the Board, and the premium or premiums thereon shall be paid by the Board as a necessary expense of the Agency. (1979, c. 900, s. 1.)

#### **§ 143B-426.17. Deposit and disbursement of funds.**

All Agency funds shall be handled in accordance with the Executive Budget Act. (1979, c. 900, s. 1.)

#### **§ 143B-426.18. Audit.**

The operations of the North Carolina Agency for Public Telecommunications shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. (1979, c. 900, s. 1; 1983, c. 913, s. 42.)

#### **§ 143B-426.19. Purchase of supplies, material and equipment.**

All the provisions of Article 3 of Chapter 143 of the General Statutes relating to the purchase of supplies, material and equipment by the State government are applicable to the North Carolina Agency for Public Telecommunications. (1979, c. 900, s. 1.)

#### **§ 143B-426.20. Liberal construction of Part.**

It is intended that the provisions of this Part shall be liberally construed to accomplish the purposes provided for herein. (1979, c. 900, s. 1.)

## Part 23. Information Technology [Resource Management] Commission.

§ **143B-426.21:** Recodified as § 143B-472.41 by Session Laws 1997-148, s. 2.

**Editor's Note.** — Section 143B-472.41 was repealed by Session Laws 2000-174, s. 1, effective September 1, 2000. As to the Information Resource Management Commission, see now § 147-33.78.

## Part 24. Governor's Management Committee.

### § **143B-426.22. Governor's Management Council.**

(a) Creation; Membership. — The Governor's Management Council is created in the Department of Administration. The Council shall contain the following members: The Secretary of Administration, who shall serve as chairman, a senior staff officer responsible for productivity and management programs from the Departments of Commerce, Revenue, Environment and Natural Resources, Transportation, Crime Control and Public Safety, Cultural Resources, Correction, Health and Human Services, Juvenile Justice and Delinquency Prevention, and Administration; and an equivalent officer from the Offices of State Personnel, State Budget and Management, and the Governor's Program for Executive and Organizational Development. The following persons may also serve on the Council if the entity represented chooses to participate: a senior staff officer responsible for productivity and management programs from any State department not previously specified in this section, and a representative from The University of North Carolina.

(b) Powers. — The Council may:

- (1) Coordinate efforts to make State government more efficient and productive;
- (2) Review plans and policies submitted by participating agencies to improve agency management and productivity;
- (3) Recommend to the Governor the issuance of specific Management Directive and Executive Orders that will establish management policies and procedures to be implemented by the agencies to improve agency management and productivity;
- (4) Provide a clearinghouse for productivity initiatives and communicate these initiatives to all agencies;
- (5) Authorize special projects on specific management and productivity improvement issues;
- (6) Review plans and policies of statewide management programs such as the Incentive Pay Program, the North Carolina Employee Suggestion System, the Work Options Program, and similar productivity improvement programs; and
- (7) Develop criteria for annual recognition for outstanding Government Executives. (1983, c. 540, s. 1; c. 907, s. 3; 1989, c. 727, s. 218(152); c. 751, s. 9(c); 1991 (Reg. Sess., 1992), c. 959, s. 43; 1997-443, ss. 11A.109, 11A.119(a); 2000-137, s. 4(pp).)

**Effect of Amendments.** — Session Laws 2000-137, s. 4(pp), effective July 20, 2000, inserted "Juvenile Justice and Delinquency Prevention" in subsection (a).

### § 143B-426.23. Meetings; clerical services report.

The Council shall meet monthly or at the call of the chairman. The Department of Administration is responsible for providing clerical and other services required by the Council. The Council shall make an annual report of its work to the Governor and to the Joint Appropriations Committee of the General Assembly. (1983, c. 540, s. 1.)

## Part 25. Board of Trustees of the North Carolina Public Employee Deferred Compensation Plan.

### § 143B-426.24. Board of Trustees of the North Carolina Public Employee Deferred Compensation Plan.

(a) The Governor may, by Executive Order, establish a Board of Trustees of the North Carolina Public Employee Deferred Compensation Plan, which when established shall be constituted an agency of the State of North Carolina within the Department of Administration. The Board shall create, establish, implement, coordinate and administer a Deferred Compensation Plan for State employees. Until so established, the Board heretofore established pursuant to Executive Order XII dated November 12, 1974, shall continue in effect. Likewise, the Plan heretofore established shall continue until a new plan is established.

(b) The Board shall consist of seven voting members, as follows:

- (1) Three persons shall be appointed by the Governor who shall have experience with taxation, finance and investments, and one of whom shall be a State employee;
- (2) One member shall be appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives under G.S. 120-121;
- (3) One member shall be appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate under G.S. 120-121;
- (4) The State Treasurer, ex officio; and
- (5) The Secretary of Administration, ex officio, chairman.

(c) General Assembly appointments shall serve two year terms. A member shall continue to serve until his successor is duly appointed but a holdover under this provision does not affect the expiration date of the succeeding term. No member of the Board may serve more than three consecutive two year terms.

(d) In case of a vacancy on the Board before the expiration of a member's term, a successor shall be appointed within 30 days of the vacancy for the remainder of the unexpired term by the appropriate official pursuant to subsection (b). Vacancies in legislative appointments shall be filled under G.S. 120-122.

(e) Other than ex officio members, members appointed by the Governor shall serve at his pleasure.

(f) Any ex officio member may designate in writing, filed with the Board, any employee of his department to act at any meeting of the Board from which the member is absent, to the same extent that the member could act if present in person at such meeting.

(g) It shall be the duty of the Board when established to review all contracts,

agreements or arrangements then in force relating to G.S. 147-9.2 and Executive Order XII to include, but not be limited to, such contracts, agreements or arrangements pertaining to the administrative services and the investment of deferred funds under the Plan for the purpose of recommending continuation of or changes to such contracts, agreements or arrangements.

(h) It shall be the duty of the Board to devise a uniform Deferred Compensation Plan for teachers and State employees, which shall include a reasonable number of options to the teacher or employee, for the investment of deferred funds, among which may be life insurance, fixed or variable annuities and retirement income contracts, regulated investment trusts, pooled investment funds managed by the Board or its designee, or other forms of investment approved by the Board, always in such form as will assure the desired tax treatment of such funds. The Board may alter, revise and modify the Plan from time to time to improve the Plan or to conform to and comply with requirements of State and federal laws and regulations relating to the deferral of compensation of teachers and public employees generally.

(i) The Board is authorized to delegate the performance of such of its administrative duties as it deems appropriate including coordination, administration, and marketing of the Plan to teachers and employees. Prior to entering into any contract with respect to such administrative duties, it shall seek bids, hold public hearings and in general take such steps as are calculated by the Board to obtain competent, efficient and worthy services for the performance of such administrative duties.

(j) The Board may acquire investment vehicles from any company duly authorized to conduct such business in this State or may establish, alter, amend and modify, to the extent it deems necessary or desirable, a trust for the purpose of facilitating the administration, investment and maintenance of assets acquired by the investment of deferred funds. All assets of the Plan, including all deferred amounts, property and rights purchased with deferred amounts, and all income attributed thereto shall be held in trust for the exclusive benefit of the Plan participants and their beneficiaries.

(k) Members of the Board, who are not officers or employees of the State, shall receive per diem and necessary travel and subsistence in accordance with the provisions of G.S. 138-5, funded as provided in subsection (m) hereof.

(l) All clerical and other services and personnel required by the Board shall be supplied by the Secretary of Administration, funded as provided in subsection (m) hereof.

(m) Investment of deferred funds shall not be unreasonably delayed, and in no case shall the investment of deferred funds be delayed more than 30 days. The Board may accumulate such funds pending investment, and the interest earned on such funds pending investment shall be available to and may be spent in the discretion of the Board only for the reasonable and necessary expenses of the Board. The Secretary of Administration is authorized to prescribe guidelines for the expenditure of such funds by the Board. From time to time as the Board may direct, funds not required for such expenses may be used to defray administrative expenses and fees which would otherwise be required to be borne by teachers and employees who are then participating in the Plan.

(n) A majority of the Board shall constitute a quorum for the transaction of business.

(o) It is intended that the provisions of this Part shall be liberally construed to accomplish the purposes provided for herein. (1983, c. 559, s. 1; 1991, c. 389, s. 2; 1995, c. 490, s. 40; 1999-456, s. 42.)

Part 26. North Carolina Farmworker Council.

**§ 143B-426.25. North Carolina Farmworker Council — creation; membership; meetings.**

(a) There is established within the Department of Administration the North Carolina Farmworker Council.

(b) The North Carolina Farmworker Council shall consist of 13 members as follows:

- (1) Four shall be appointed by the Governor.
- (2) Two shall be appointed by the Speaker of the House of Representatives.
- (3) Two shall be appointed by the President Pro Tempore of the Senate.
- (4) The Secretary of the Department of Health and Human Services or the Deputy Secretary of the Department if designated by the Secretary shall serve ex officio.
- (5) The Commissioner of Labor or the Deputy Commissioner of the Department if designated by the Commissioner shall serve ex officio.
- (6) The Commissioner of Agriculture or the Deputy Commissioner of the Department if designated by the Commissioner shall serve ex officio.
- (7) The Chairman of the Employment Security Commission or his designee shall serve ex officio.
- (8) The Secretary of Environment and Natural Resources or his designee shall serve ex officio.

(c) Vacancies in membership of the Council shall be filled by the original appointing authority for the remainder of the unexpired term.

(d) The Governor shall appoint the chairman of the Council. At its first meeting the Council shall select a vice-chairman from its membership and a secretary. The chairman shall preside at all meetings and in his absence the vice-chairman shall act as chairman.

(e) A majority of the membership shall constitute a quorum.

(f) The initial meeting of the Council shall be called by the Governor. Subsequent meetings shall be held upon the call of the chairman or upon the written request of four members. The Council shall meet at least four times per year.

(g) Council members who are members of the General Assembly shall receive subsistence and travel allowances at the rate set forth in G.S. 120-3.1. Council members and ex officio members who are employees of the State of North Carolina shall receive travel allowances at the rate set forth in G.S. 138-6. All other Council members shall receive per diem, subsistence and travel expenses at the rate set forth in G.S. 138-5.

(h) The Department of Administration shall provide necessary clerical equipment and administrative services to the Council, provided the Council may hire and discharge its own staff if it so desires. (1983, c. 923, s. 205; 1987, c. 876, s. 29.1; 1991, c. 130, s. 1; 1995, c. 490, s. 19; 1997-443, ss. 11A.118(a), 11A.119(a).)

**§ 143B-426.26. North Carolina Farmworker Council — duties; annual report.**

(a) The Council shall have the following duties:

- (1) Study and evaluate the existing system of delivery of services to farmworkers.
- (2) Seek effective methods for the improvement of living, working, and related problems affecting farmworkers.

- (3) Recommend a mechanism for coordinating all farmworkers' activities in the State.
- (4) Identify and make recommendations to alleviate gaps and duplication of services or programs.
- (5) Propose and review legislation relating to farmworkers.

(b) By February 1 of each year, the Council shall make a report describing its activities for the preceding calendar year to the Governor and General Assembly. (1983, c. 923, s. 205.)

**§§ 143B-426.27 through 143B-426.29:** Reserved for future codification purposes.

Part 27. North Carolina Board of Science and Technology.

**§§ 143B-426.30, 143B-426.31:** Recodified as §§ 143B-472.80, 143B-472.81 by Session Laws 2001-424, s. 7.6, effective July 1, 2001.

**§§ 143B-426.32 through 143B-426.34:** Reserved for future codification purposes.

Part 27A. Martin Luther King, Jr. Commission.

**§ 143B-426.34A. Martin Luther King, Jr. Commission — creation; powers and duties.**

There is hereby created the Martin Luther King, Jr. Commission of the Department of Administration. The Martin Luther King, Jr. Commission shall have the following functions and duties:

- (1) To encourage appropriate ceremonies and activities throughout the State relating to the observance of the legal holiday honoring Martin Luther King, Jr.'s birthday;
- (2) To provide advice and assistance to local governments and private organizations across the State with respect to the observance of such holiday; and
- (3) To promote among the people of North Carolina an awareness and appreciation of the life and work of Martin Luther King, Jr. (1993, c. 502, s. 1.)

**§ 143B-426.34B. Martin Luther King, Jr. Commission — members; selection; quorum; compensation.**

(a) The Martin Luther King, Jr. Commission of the Department of Administration shall consist of 16 members. The Governor shall appoint 12 members, one of whom he shall designate as the chair of the Commission. The Governor shall make reasonable efforts to assure that his appointees are equally distributed geographically throughout the State. The President Pro Tempore of the Senate shall appoint two members and the Speaker of the House of Representatives shall appoint two members. The terms of four of the members appointed by the Governor shall expire June 30, 1997. The terms of four of the members appointed by the Governor shall expire June 30, 1996. The terms of four of the members appointed by the Governor shall expire June 30, 1994. The terms of the members appointed by the President Pro Tempore of the Senate and the Speaker of the House of Representatives shall expire June 30, 1995. At

the end of the respective terms of office of the initial members of the Commission, the appointment of their successors shall be for terms of four years. No member of the Commission shall serve more than two consecutive terms. A member having served two consecutive terms shall be eligible for reappointment one year after the expiration of the second term. A member who fails to attend any three meetings of the Commission shall be dismissed automatically from the Commission upon failure to attend the third such meeting. Provided, however, that the Commission may, by majority vote, reinstate any such dismissed member for the remainder of the unexpired term for good cause shown for failing to attend the meetings. Vacancies shall be filled by the appointing officer for the unexpired term.

(b) A majority of the Commission shall constitute a quorum for the transaction of business.

(c) Members of the Commission shall be compensated for their services as authorized by G.S. 138-5. Members of the Commission who are State officials or employees shall be reimbursed as authorized by G.S. 138-6.

(d) The Department of Administration shall provide necessary clerical and administrative support services to the Commission. (1993, c. 502, s. 1.)

## Part 28. Office of the State Controller.

### § 143B-426.35. Definitions.

As used in this Part, unless the context clearly indicates otherwise:

- (1) "Accounting system" means the total structure of records and procedures which discover, record, classify, and report information on the financial position and operating results of a governmental unit or any of its funds, balanced account groups, and organizational components.
- (2) "Office" means the Office of the State Controller.
- (3) "State agency" means any State agency as defined in G.S. 147-64.4(4).
- (4) "State funds" means any moneys appropriated by the General Assembly, or moneys collected by or for the State, or any agency of the State, pursuant to the authority granted in any State laws. (1985 (Reg. Sess., 1986), c. 1024, s. 1; 1991, c. 542, s. 13.)

### § 143B-426.36. Office of the State Controller; creation.

There is created the Office of the State Controller. This office shall be located administratively within the Department of Administration but shall exercise all of its prescribed statutory powers independently of the Secretary of Administration. (1985 (Reg. Sess., 1986), c. 1024, s. 1.)

### § 143B-426.37. State Controller.

(a) The Office of the State Controller shall be headed by the State Controller who shall maintain the State accounting system and shall administer the State disbursing system.

(b) The State Controller shall be a person qualified by education and experience for the office and shall be appointed by the Governor subject to confirmation by the General Assembly. The term of office of the State Controller shall be for seven years; the first full term shall begin July 1, 1987.

The Governor shall submit the name of the person to be appointed, for confirmation by the General Assembly, to the President of the Senate and the Speaker of the House of Representatives by May 1 of the year in which the State Controller is to be appointed. If the Governor does not submit the name by that date, the President of the Senate and the Speaker of the House of

Representatives shall submit a name to the General Assembly for confirmation.

In case of death; incapacity, resignation, removal by the Governor for cause, or vacancy for any other reason in the Office of State Controller prior to the expiration of the term of office while the General Assembly is in session, the Governor shall submit the name of a successor to the President of the Senate and the Speaker of the House of Representatives within four weeks after the vacancy occurs. If the Governor does not do so, the President of the Senate and the Speaker of the House of Representatives shall submit a name to the General Assembly for confirmation.

In case of death, incapacity, resignation, removal by the Governor for cause, or vacancy for any other reason in the Office of State Controller prior to the expiration of the term of office while the General Assembly is not in session, the Governor shall appoint a State Controller to serve on an interim basis pending confirmation by the General Assembly.

(c) The salary of the State Controller shall be set by the General Assembly in the Current Operations Appropriations Act. (1985 (Reg. Sess., 1986), c. 1024, s. 1; 1991 (Reg. Sess., 1992), c. 1039, s. 27.)

**Editor's Note.** — Session Laws 2001-42, s. 1, effective May 1, 2001 and expiring June 30, 2001, provided: "Notwithstanding G.S. 143B-426.37(b), the Governor shall have until June 15, 2001, to submit the name of the person to be

appointed as State Controller, for confirmation by the General Assembly, to the President of the Senate and the Speaker of the House of Representatives."

### § 143B-426.38. Organization and operation of office.

(a) The State Controller may appoint a Chief Deputy State Controller. The salary of the Chief Deputy State Controller shall be set by the State Controller.

(b) The State Controller may appoint all employees necessary to carry out his powers and duties. These employees shall be subject to the State Personnel Act.

(c) All employees of the office shall be under the supervision, direction, and control of the State Controller. Except as otherwise provided by this Part, the State Controller may assign any function vested in him or his office to any subordinate officer or employee of the office.

(d) The State Controller may, subject to the provisions of G.S. 147-64.7(b)(2), obtain the services of independent public accountants, qualified management consultants, and other professional persons or experts to carry out his powers and duties.

(e) The State Controller shall have legal custody of all books, papers, documents, and other records of the office.

(f) The State Controller shall be responsible for the preparation of and the presentation of the office budget request, including all funds requested and all receipts expected for all elements of the budget.

(g) The State Controller may adopt regulations for the administration of the office, the conduct of employees of the office, the distribution and performance of business, the performance of the functions assigned to the State Controller and the office of the State Controller, and the custody, use, and preservation of the records, documents, and property pertaining to the business of the office. (1985 (Reg. Sess., 1986), c. 1024, s. 1.)

### § 143B-426.39. Powers and duties of the State Controller.

The State Controller shall:

- (1) Prescribe, develop, operate, and maintain in accordance with generally accepted principles of governmental accounting, a uniform state

- accounting system for all state agencies. The system shall be designed to assure compliance with all legal and constitutional requirements including those associated with the receipt and expenditure of, and the accountability for public funds.
- (2) On the recommendation of the State Auditor, prescribe and supervise the installation of any changes in the accounting systems of an agency that, in the judgment of the State Controller, are necessary to secure and maintain internal control and facilitate the recording of accounting data for the purpose of preparing reliable and meaningful statements and reports. The State Controller shall be responsible for seeing that a new system is designed to accumulate information required for the preparation of budget reports and other financial reports.
  - (3) Maintain complete, accurate and current financial records that set out all revenues, charges against funds, fund and appropriation balances, interfund transfers, outstanding vouchers, and encumbrances for all State funds and other public funds including trust funds and institutional funds available to, encumbered, or expended by each State agency, in a manner consistent with the uniform State accounting system.
  - (4) Prescribe the uniform classifications of accounts to be used by all State agencies including receipts, expenditures, assets, liabilities, fund types, organization codes, and purposes. The State Controller shall also, after consultation with the Office of State Budget and Management, prescribe a form for the periodic reporting of financial accounts, transactions, and other matters that is compatible with systems and reports required by the State Controller under this section. Additional records, accounts, and accounting systems may be maintained by agencies when required for reporting to funding sources provided prior approval is obtained from the State Controller.
  - (4a) Prescribe that, unless exempted by the State Controller, newly created or acquired component units of the State are required to have the same fiscal year as the State.
  - (5) Prescribe the manner in which disbursements of the State agencies shall be made, in accordance with G.S. 143-3.
  - (6) Operate a central payroll system, in accordance with G.S. 143-3.2 and 143-34.1.
  - (7) Keep a record of the appropriations, allotments, expenditures, and revenues of each State agency, in accordance with G.S. 143-20.
  - (8) Make appropriate reconciliations with the balances and accounts kept by the State Treasurer.
  - (9) Develop, implement, and amend as necessary a uniform statewide cash management plan for all State agencies in accordance with G.S. 147-86.11.
  - (9a) Implement a statewide accounts receivable program in accordance with Article 6B of Chapter 147 of the General Statutes.
  - (10) Prepare and submit to the Governor, the State Auditor, the State Treasurer, and the Office of State Budget and Management each month, a report summarizing by State agency and appropriation or other fund source, the results of financial transactions. This report shall be in the form that will most clearly and accurately set out the current fiscal condition of the State. The State Controller shall also furnish each State agency a report of its transactions by appropriation or other fund source in a form that will clearly and accurately present the fiscal activities and condition of the appropriation or fund source.
  - (11) Prepare and submit to the Governor, the State Auditor, the State Treasurer, and the Office of State Budget and Management, at the end

of each quarter, a report on the financial condition and results of operations of the State entity for the period ended. This report shall clearly and accurately present the condition of all State funds and appropriation balances and shall include comments, recommendations, and concerns regarding the fiscal affairs and condition of the State.

- (12) Prepare on or before October 31 of each year, a Comprehensive Annual Financial Report in accordance with generally accepted accounting principles of the preceding fiscal year, in accordance with G.S. 143-20.1. The report shall include State agencies and component units of the State, as defined by generally accepted accounting principles.
- (13) Perform additional functions and duties assigned to the State Controller, within the scope and context of the Executive Budget Act, Chapter 143, Article 1 of the General Statutes.
- (14) through (16) Recodified as G.S. 143B-472.42 (1), (2), and (3) by Session Laws 1997-148, s. 3, effective June 4, 1997. (1985 (Reg. Sess., 1986), c. 1024, s. 1; 1987, c. 738, s. 59(a)(2); 1989, c. 239, s. 4; 1989 (Reg. Sess., 1990), c. 1024, s. 37; 1991, c. 542, s. 14; 1993, c. 512, s. 2; 1993 (Reg. Sess., 1994), c. 777, s. 1(a); 1997-148, s. 3; 2000-67, s. 7(b); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b).)

**Editor's Note.** — Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Section 143B-472.42, referred to in subdivision (14) of this section, was repealed by Session Laws 2000-174, s. 1, effective September 1, 2000.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-67, s. 7(b), effective July 1, 2000, added subdivision (4a); and in subdivision (12), inserted "in accordance with generally accepted accounting principles" in the first sentence and added the second sentence.

Session Laws 2000-140, s. 93.1(a), effective July 1, 2000, substituted "Office of State Budget, Planning, and Management" for "Office of State Budget and Management" in subdivisions (4), (10) and (11).

Session Laws 2001-424, s. 12.2(b), effective July 1, 2001, substituted "Office of State Budget and Management" for "Office of State Budget, Planning, and Management" in subdivisions (4), (10), and (11).

**§ 143B-426.39A:** Recodified as § 143B-472.43 by Session Laws 1997-148, s. 4.

**Editor's Note.** — Section 143B-472.43 was repealed by Session Laws 2000-174, s. 1, effective September 1, 2000.

## Part 28A. State Information Processing Services.

**§ 143B-426.40:** Recodified as § 143B-472.44 by Session Laws 1997-148, s. 5.

**Editor's Note.** — Section 143B-472.44 was repealed by Session Laws 2000-174, s. 1, effective September 1, 2000. As to the Office of

Information Technology Services, see now § 147-33.77.

## ARTICLE 10.

*Department of Commerce.*

## Part 1. General Provisions.

**§ 143B-427. Department of Commerce — creation.**

There is hereby recreated and reconstituted a Department to be known as the “Department of Commerce,” with the organization, powers, and duties defined in Article 1 of this Chapter, except as modified in this Article. (1977, c. 198, s. 1; 1989, c. 751, s. 7(23); 1991 (Reg. Sess., 1992), c. 959, ss. 44, 45.)

**Editor’s Note.** — Session Laws 2001-424, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2001.’”

Session Laws 2001-424, s. 20.5, provides: “The Department of Commerce (hereinafter Department) shall study the feasibility of consolidating each of the Business and Industry Division regional offices (hereinafter B&I) with a Regional Economic Development Commission (hereinafter Commission) office. In considering whether consolidation is feasible and would better advance the goals of both the B&I and the Commissions, the Department shall do at least the following:

“(1) Evaluate the degree to which existing shared offices in Asheville, Edenton, Greensboro, and Research Triangle Park differ in organization, budget, and performance from the B&I offices in Charlotte, Greenville, and Fayetteville that do not share office space with Commissions.

“(2) Evaluate the extent to which B&I staff responsibilities in each B&I office duplicate those performed by the Commission staff in their region regardless of whether the offices are shared or separate.

“(3) Evaluate the extent to which existing B&I offices in Lenoir and Bryson City add value cost-effectively to the service provided by the Asheville office. In particular, the Department shall consider how the same level of service might be provided if the Lenoir and Bryson City offices were eliminated or merged into the Asheville office.

“(4) Estimate any costs that would result from closing B&I offices in Charlotte,

Greenville, and Fayetteville and consolidating them with Commissions in Charlotte, Kinston, and Elizabethtown, respectively. The Department shall also estimate any costs that would result from closing B&I offices in Lenoir and Bryson City and consolidating them with the Asheville office.

“(5) Identify whether the actions described in subdivision (4) of this section [s. 20.5(4) of Session Laws 2001-424] would produce any net savings and, if affirmative, identify the sources of the savings. The Department shall document whether all current B&I regional staff would remain essential to program function if the closings and consolidations described in subdivision (4) of this section [s. 20.5(4) of Session Laws 2001-424] were carried out.

“The Department shall report its findings and recommendations, including any estimates of efficiencies and cost savings that may be produced by consolidating the Charlotte, Greenville, and Fayetteville B&I regional offices with Commissions and consolidating the Lenoir and Bryson City offices with the existing shared office in Asheville, to the House of Representatives and Senate Appropriations Subcommittees on Natural and Economic Resources by January 15, 2002.”

Session Laws 2001-424, s. 36.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium.”

Session Laws 2001-424, s. 36.5 is a severability clause.

**§ 143B-428. Department of Commerce — declaration of policy.**

It is hereby declared to be the policy of the State of North Carolina to actively encourage the expansion of existing environmentally sound North Carolina industry; to actively encourage the recruitment of environmentally sound national and international industry into North Carolina through industrial recruitment efforts and through effective advertising, with an emphasis on

high-wage-paying industry; to promote the development of North Carolina's labor force to meet the State's growing industrial needs; to promote the growth and development of our travel and tourist industries; to promote the development of our State ports; to promote the management of North Carolina's energy resources and the development of a State energy policy; and to assure throughout State government, the coordination of North Carolina's economic development efforts. (1977, c. 198, s. 1; 1989, c. 751, s. 7(24); 1991 (Reg. Sess., 1992), c. 959, s. 46.)

### § 143B-429. Department of Commerce — duties.

It shall be the duty of the Department of Commerce to provide for and promote the implementation of the declared policy of the State of North Carolina as provided in G.S. 143B-428, to promote and assist in the total economic development of North Carolina in accord with such declared policy and to perform such other duties and functions as are conferred by this Chapter, delegated or assigned by the Governor and conferred by the Constitution and laws of this State. (1977, c. 198, s. 1; 1989, c. 751, s. 7(25); 1991 (Reg. Sess., 1992), c. 959, s. 47.)

**Editor's Note.** — Session Laws 2001-424, ss. 20.3 (a) and (b), provide: "(a) Funds appropriated in this act [Session Laws 2001-424] to the Department of Commerce for the Industrial Recruitment Competitive Fund shall be used to continue the Fund. The purpose of the Fund is to provide financial assistance to those businesses or industries deemed by the Governor to be vital to a healthy and growing State economy and that are making significant efforts to establish or expand in North Carolina. Moneys allocated from the Fund shall be used for the following purposes:

"(1) Installation or purchase of equipment;

"(2) Structural repairs, improvements, or renovations of existing buildings to be used for expansion; and

"(3) Construction of or improvements to new or existing water, sewer, gas or electric utility distribution lines, or equipment for existing buildings.

"Moneys may also be used for construction of or improvements to new or existing water, sewer, gas or electric utility distribution lines, or equipment to serve new or proposed indus-

trial buildings used for manufacturing and industrial operations. The Governor shall adopt guidelines and procedures for the commitment of moneys from the Fund.

"(b) The Department of Commerce shall report on or before January 1, 2002, and quarterly thereafter to the Joint Legislative Commission on Governmental Operations and to the Fiscal Research Division on the commitment, allocation, and use of funds allocated from the Industrial Recruitment Competitive Fund."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

### § 143B-430. Secretary of Commerce — powers and duties.

(a) The head of the Department of Commerce is the Secretary of Commerce. The Secretary of Commerce shall have such powers and duties as are conferred on him by this Chapter, delegated to him by the Governor, and conferred on him by the Constitution and laws of this State. The Secretary of Commerce shall be responsible for effectively and efficiently organizing the Department of Commerce to promote the policy of the State of North Carolina as outlined in G.S. 143B-428 and to promote statewide economic development in accord with that policy. Except as otherwise specifically provided in this Article and in Article 1 of this Chapter, the functions, powers, duties and obligations of every agency or subunit in the Department of Commerce shall be prescribed by the Secretary of Commerce.

(b) The Secretary of Commerce shall have the power and duty to accept and administer federal funds provided to the State through the Job Training Partnership Act, Pub. L. No. 97-300, 96 Stat. 1322, 29 U.S.C. § 1501 et seq., as amended. (1977, c. 198, s. 1; 1989, c. 727, s. 6, c. 751, ss. 7(26), 8(18); 1991 (Reg. Sess., 1992), c. 959, s. 48.)

**Working Group.** — Session Laws 2001-13, ss. 1 to 5, effective April 4, 2001, and expiring June 30, 2005, provide: “Working Group. — The Secretary of Commerce shall convene a working group of interested parties knowledgeable in the different facets of doing business with the Department of Defense. The working group must include representatives from the following government agencies and nonprofit organizations: the Department of Commerce, the Community Colleges System, the Employment Security Commission, the Department of Administration, the Department of the Secretary of State, Concurrent Technologies Corporation, the Small Business Technology and Development Center, the Procurement Technical Assistance Center, the Governor’s Advisory Commission on Military Affairs, the DoD Business Committee of the Governor’s Advisory Commission on Military Affairs, and any other organization that the Department of Commerce or this working group may identify with an expertise in this area.

“Meetings. — The Secretary of Commerce must convene the working group created in Section 1 of this act at least once quarterly. The Secretary may chair the meetings or designate another member of the working group to chair the meetings.

“Goals and Objectives. — The working group created in Section 1 of this act [section 1 of Session Laws 2001-13] is charged with the goal of increasing the amount of dollars from federal contracts paid to businesses in North Carolina and of utilizing the skilled workforce represented by the more than 17,000 service members which transition from active duty each year in North Carolina. In fulfilling its goals, the working group should consider studies pre-

pared by agencies and organizations in this area, including the studies prepared by the DoD Business Committee of the Governor’s Advisory Commission on Military Affairs and by Concurrent Technologies Corporation. To accomplish these goals, the working group should strive to meet the following objectives:

“(1) Investigate requirements for and establish a Single Point Registration for North Carolina vendors with automatic linked registration to DLIS Central Contractor Registration, VendorLink, and other established programs.

“(2) Coordinate within the various agencies and organizations that help North Carolina businesses obtain federal contracts to develop a unified approach to delivering these services in an efficient and effective manner.

“(3) Determine the gaps between government needs and industry capability and needs and develop an approach to encourage industry to utilize its capabilities to meet those government needs.

“(4) Complete a skills assessment program for transitioning Department of Defense personnel and develop a job placement database that may be used to promote this skilled workforce with industries that need employees with those particular skills.

“(5) Any other issue the working group determines needs to be addressed to meet its goals.

“Consultants. — The Department of Commerce may contract for consultant services as determined necessary by the working group.

“The Department of Commerce shall report on the progress of the working group to the Natural and Economic Resources-Governmental Operations Subcommittee by April 2002 and by January 2003.”

## § 143B-431. Department of Commerce — functions.

(a) The functions of the Department of Commerce, except as otherwise expressly provided by Article 1 of this Chapter or by the Constitution of North Carolina, shall include:

- (1) All of the executive functions of the State in relation to economic development including by way of enumeration and not of limitation, the expansion and recruitment of environmentally sound industry, labor force development, the promotion of and assistance in the orderly development of North Carolina counties and communities, the promotion and growth of the travel and tourism industries, the development of our State’s ports, energy resource management and energy policy development;

- (2) All functions, powers, duties and obligations heretofore vested in an agency enumerated in Article 15 of Chapter 143A, to wit:
  - a. The State Board of Alcoholic Control,
  - b. The North Carolina Utilities Commission,
  - c. The Employment Security Commission,
  - d. The North Carolina Industrial Commission,
  - e. State Banking Commission and the Commissioner of Banks,
  - f. Savings Institutions Division,
  - g. Repealed by Session Laws 2001-193, s. 10, effective July 1, 2001.
  - h. Credit Union Commission,
  - i. The North Carolina Milk Commission,
  - j. The North Carolina Mutual Burial Association Commission,
  - k. The North Carolina Rural Electrification Authority,
  - l. The North Carolina State Ports Authority, all of which enumerated agencies are hereby expressly transferred by a Type II transfer, as defined by G.S. 143A-6, to this recreated and reconstituted Department of Commerce; and

- (3) All other functions, powers, duties and obligations as are conferred by this Chapter, delegated or assigned by the Governor and conferred by the Constitution and laws of this State. Any agency transferred to the Department of Commerce by a Type II transfer, as defined by G.S. 143A-6, shall have the authority to employ, direct and supervise professional and technical personnel, and such agencies shall not be accountable to the Secretary of Commerce in their exercise of quasi-judicial powers authorized by statute, notwithstanding any other provisions of this Chapter, provided that the authority of the North Carolina State Ports Authority to employ, direct and supervise personnel shall be as provided in Part 10 of this Article.

(b) The Department of Commerce is authorized to establish and provide for the operation of North Carolina nonprofit corporations to achieve the purpose of aiding the development of small businesses and to achieve the purposes of the United States Small Business Administration's 504 Certified Development Company Program.

(c) The Department of Commerce shall have the following powers and duties with respect to local planning assistance:

- (1) To provide planning assistance to municipalities and counties and joint and regional planning boards established by two or more governmental units in the solution of their local planning problems. Planning assistance as used in this section shall consist of making population, economic, land use, traffic, and parking studies and developing plans based thereon to guide public and private development and other planning work of a similar nature. Planning assistance shall also include the preparation of proposed subdivision regulations, zoning ordinances, capital budgets, and similar measures that may be recommended for the implementation of such plans. The term planning assistance shall not be construed to include the providing of plans for specific public works.
- (2) To receive and expend federal and other funds for planning assistance to municipalities and counties and to joint and regional planning boards, and to enter into contracts with the federal government, municipalities, counties, or joint and regional planning boards with reference thereto.
- (3) To perform planning assistance, either through the staff of the Department or through acceptable contractual arrangements with other qualified State agencies or institutions, local planning agencies, or with private professional organizations or individuals.

- (4) To assume full responsibility for the proper execution of a planning program for which a grant of State or federal funds has been made and for carrying out the terms of a federal grant contract.
- (5) To cooperate with municipal, county, joint and regional planning boards, and federal agencies for the purpose of aiding and encouraging an orderly, coordinated development of the State.
- (6) To establish and conduct, either with its own staff or through contractual arrangements with institutions of higher education, State agencies, or private agencies, training programs for those employed or to be employed in community development activities.

(d) The Department of Commerce, with the approval of the Governor, may apply for and accept grants from the federal government and its agencies and from any foundation, corporation, association, or individual and may comply with the terms, conditions, and limitations of such grants in order to accomplish the Department's purposes. Grant funds shall be expended pursuant to the Executive Budget Act. In addition, the Department shall have the following powers and duties with respect to its duties in administering federal programs:

- (1) To negotiate, collect, and pay reasonable fees and charges regarding the making or servicing of grants, loans, or other evidences of indebtedness.
- (2) To establish and revise by regulation, in accordance with Chapter 150B of the General Statutes, schedules of reasonable rates, fees, or charges for services rendered, including but not limited to, reasonable fees or charges for servicing applications. Schedules of rates, fees, or charges may vary according to classes of service, and different schedules may be adopted for public entities, nonprofit entities, private for-profit entities, and individuals.
- (3) To pledge current and future federal fund appropriations to the State from the Community Development Block Grant (CDBG) program for use as loan guarantees in accordance with the provisions of the Section 108 Loan Guarantee program, Subpart M, 24 CFR 570.700, et seq., authorized by the Housing and Community Development Act of 1974 and amendments thereto. The Department may enter into loan guarantee agreements in support of projects sponsored by individual local governments or in support of pools of two or more projects supported by local governments with authorized State and federal agencies and other necessary parties in order to carry out its duties under this subdivision. In making loan guarantees and grants under this subdivision the Department shall take into consideration project applications, geographic diversity and regional balance in the entire community development block grant program. In making loan guarantees authorized under this subdivision, the Department shall ensure that apportionment of the risks involved in pledging future federal funds in accordance with State policies and priorities for financial support of categories of assistance is made primarily against the category from which the loan guarantee originally derived. A pledge of future CDBG funds under this subdivision is not a debt or liability of the State or any political subdivision of the State or a pledge of the faith and credit of the State or any political subdivision of the State. The pledging of future CDBG funds under this subdivision does not directly, indirectly, or contingently obligate the State or any political subdivision of the State to levy or to pledge any taxes, nor any pledges exceed twice the amount of annual CDBG funds.

Prior to issuing a Section 108 Loan Guarantee agreement, the Department of Commerce must make the following findings:

- a. The minimum size of the Section 108 Loan Guarantee is (i) seven hundred fifty thousand dollars (\$750,000) for a project supported by an individual local government and (ii) two hundred fifty thousand dollars (\$250,000) for a project supported as part of a loan pool; and the maximum size is five million dollars (\$5,000,000) per project.
- b. The Section 108 Loan Guarantee cannot constitute more than fifty percent (50%) of total project costs.
- c. The project has ten percent (10%) equity from the corporation, partnership, or sponsoring party. "Equity" means cash, real estate, or other hard assets contributed to the project and loans that are subordinated in payment and collateral during the term of the Section 108 Loan Guarantee.
- d. The project has the personal guarantee of any person owning ten percent (10%) or more of the corporation, partnership, or sponsoring entity, except for projects involving Low-Income Housing Tax Credits under section 42 of the Internal Revenue Code or Historic Tax Credits under section 47 of the Internal Revenue Code. Collateral on the loan must be sufficient to cover outstanding debt obligations.
- e. The project has sufficient cash flow from operations for debt service to repay the Section 108 loan.
- f. The project meets all underwriting and eligibility requirements of the North Carolina Section 108 Guarantee Program Guidelines and of the Department of Housing and Urban Development regulations, except that projects involving hotels, motels, private recreational facilities, private entertainment facilities, and convention centers are ineligible for Section 108 loan guarantees.

The Department shall create a loan loss reserve fund as additional security for loans guaranteed under this section and may deposit federal program income or other funds governed by this section into the loan loss reserve fund. The Department shall maintain a balance in the reserve fund of no less than ten percent (10%) of the outstanding indebtedness secured by Section 108 loan guarantees. (1977, c. 198, s. 1; 1987, c. 214; 1989, c. 76, s. 25; c. 751, s. 2; 1991, c. 689, s. 153; 1991 (Reg. Sess., 1992), c. 959, s. 49; 1995, c. 310, s. 1; 1995 (Reg. Sess., 1996), c. 575, s. 1; 2001-193, s. 10.)

**Editor's Note.** — Sections 143A-171 through 143A-180 and 143A-182 through 143A-185.1, included in Article 15 of Chapter 143A, referred to in subdivision (a)(2) of this section, were repealed by Session Laws 1977, c. 198, s. 25. Sections 143A-180.1, 143A-180.2, and 143A-181, also included in Article 15 of Chapter 143A, were recodified as §§ 143B-448, 143B-449, and 143B-439, respectively, by Session Laws 1977, c. 198, s. 26. This same 1977 act enacted this Article.

Session Laws 1997-313, which, effective January 1, 1998, transferred the authority, powers, duties, and functions vested in the North Carolina Mutual Burial Association Commission and in the Burial Association Administrator to the North Carolina Board of Mortuary Science, and abolished the North Carolina Mutual Burial Association Commission, provides in s. 7:

"(a) Effective January 1, 1998, references in the Session Laws to the North Carolina Mutual

Burial Association Commission or the Burial Association Administrator shall be deemed to refer to the Board of Mortuary Science. Every Session Law that refers to the North Carolina Mutual Burial Association Commission or the Burial Association Administrator and that relates to any power, duty, function, or obligation of the Commission or the Administrator that continues in effect after the provisions of this act become effective shall be construed in a manner consistent with this act.

"(b) The Revisor of Statutes may on and after the effective date of this act, correct any reference or citation in the General Statutes that is amended by this act by deleting incorrect references and substituting correct references.

"(c) The Revisor of Statutes may, on and after the first day of January 1998, delete any reference to the North Carolina Mutual Burial Association Commission or to the Burial Association Administrator in any portion of the General Statutes to which conforming amend-

ments are not made by this act and substitute, as appropriate and consistent with this act, any of the following terms: North Carolina Board of Mortuary Science, Board of Mortuary Science, or Board.”

Subdivision (2)j of this section is set out above as directed by the Revisor of Statutes.

Session Laws 2000-67, s. 14.18(a)-(e), re-names the State Energy Conservation Plan as the State Energy Efficiency Program. Effective September 30, 2000, the statutory authority, powers, duties and functions, records, property, funds, etc., of the Residential Energy Conservation Assistance Program in the Energy Division of the Department of Commerce are transferred from the Department of Commerce to the Department of Health and Human Services. Similarly, effective September 30, 2000, the statutory authority, powers, duties and functions, records, property, funds, etc., of the Energy Policy Council and State Energy Efficiency Program in the Energy Division of the Department of Commerce are transferred from the Department of Commerce to the Department of

Administration. Effective July 1, 2000, all vacant positions in the Energy Division of the Department of Commerce are abolished.

Session Laws 2000-67, s. 1.1, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2000.’”

Session Laws 2000-67, s. 28.2, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year.”

Session Laws 2000-67, s. 28.4, contains a severability clause.

**Effect of Amendments.** — Session Laws 2001-193, s. 10, effective July 1, 2001, substituted “Savings Institutions Division” for “Savings and Loan Association Division” in subdivision (a)(2)f.; deleted subdivision (a)(2)g., which read “The State Savings Institutions Commission”; and deleted a comma at the end of subsection (a)(2) l.

#### CASE NOTES

**Cited** in *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 299 S.E.2d 618 (1983).

### § 143B-431.1. Toll-free number for information on housing assistance.

There shall be established in the Department of Commerce a toll-free telephone number to provide information on housing assistance to the citizens of the State. (1989, c. 751, s. 6; 1991 (Reg. Sess., 1992), c. 959, s. 50.)

### § 143B-431.2. Department of Commerce — limitation on grants and loans.

The Department of Commerce may not make a loan nor award a grant to any individual, organization, or governmental unit if that individual, organization, or governmental unit is currently in default on any loan made by the Department of Commerce. (2000-56, s. 4.)

**Editor’s Note.** — Session Laws 2000-56, s. 10(c), made the amendment effective July 1, 2000 and applicable to funds appropriated, grants awarded, or loans made on or after that date.

### § 143B-432. Transfers to Department of Commerce.

(a) The Division of Economic Development of the Department of Natural and Economic Resources, the Science and Technology Committee of the Department of Natural and Economic Resources, the Science and Technology Research Center of the Department of Natural and Economic Resources, and the North Carolina National Park, Parkway and Forests Development Council of the Department of Natural and Economic Resources are each hereby

transferred to the Department of Commerce by a Type I transfer, as defined in G.S. 143A-6.

(b) All functions, powers, duties, and obligations heretofore vested in the following subunits of the Department of Natural Resources and Community Development are hereby transferred to and vested in the Department of Commerce by a Type I transfer as defined in G.S. 143A-6:

- (1) Community Assistance Division.
- (2) Employment and Training Division.

(c) All functions, powers, duties, and obligations heretofore vested in the following councils of the Department of Natural Resources and Community Development are hereby transferred to and vested in the Department of Commerce by a Type II transfer as defined in G.S. 143A-6:

- (1) Community Development Council.
- (2) Job Training Coordinating Council. (1977, c. 198, s. 1; 1989, c. 727, s. 7; c. 751, s. 7(27); 1989 (Reg. Sess., 1990), c. 1004, s. 32; 1991 (Reg. Sess., 1992), c. 959, s. 51.)

### § 143B-433. Department of Commerce — organization.

The Department of Commerce shall be organized to include:

- (1) The following agencies:
  - a. The North Carolina Alcoholic Beverage Control Commission.
  - b. The North Carolina Utilities Commission.
  - c. The Employment Security Commission.
  - d. The North Carolina Industrial Commission.
  - e. State Banking Commission.
  - f. Savings Institutions Division.
  - g. Repealed by Session Laws 2001-193, s. 11, effective July 1, 2001.
  - h. Credit Union Commission.
  - i. The North Carolina Milk Commission.
  - j. The North Carolina Mutual Burial Association Commission.
  - k. North Carolina Cemetery Commission.
  - l. The North Carolina Rural Electrification Authority.
  - m. Repealed by Session Laws 1985, c. 757, s. 179(d).
  - n. North Carolina Science and Technology Research Center.
  - o. The North Carolina State Ports Authority.
  - p. North Carolina National Park, Parkway and Forests Development Council.
  - q. Economic Development Board.
  - r. Labor Force Development Council.
  - s., t. Repealed by Session Laws 2000, c. 140, s. 76.(j), effective September 30, 2000.
  - u. Navigation and Pilotage Commissions established by Chapter 76 of the General Statutes.
  - v. Repealed by Session Laws 1993, c. 321, s. 313b.
- (2) Those agencies which are transferred to the Department of Commerce including the:
  - a. Community Assistance Division.
  - b. Community Development Council.
  - c. Employment and Training Division.
  - d. Job Training Coordinating Council.
- (3) Such divisions as may be established pursuant to Article 1 of this Chapter. (1977, c. 198, s. 1; 1979, c. 668, s. 2; 1981, c. 412, ss. 4, 5; 1983, c. 899, s. 1; 1985, c. 757, s. 179(d); 1989, c. 76, s. 26; c. 727, s. 8; c. 751, s. 7(28); 1991 (Reg. Sess., 1992), c. 959, s. 52; 1993, c. 321, s. 313(b); 1998-217, s. 19; 2000-140, s. 76(j); 2001-193, s. 11.)

**Editor's Note.** — Session Laws 1997-313, which, effective January 1, 1998, transferred the authority, powers, duties, and functions vested in the North Carolina Mutual Burial Association Commission and in the Burial Association Administrator to the North Carolina Board of Mortuary Science, and abolished the North Carolina Mutual Burial Association Commission, provides in s. 7:

“(a) Effective January 1, 1998, references in the Session Laws to the North Carolina Mutual Burial Association Commission or the Burial Association Administrator shall be deemed to refer to the Board of Mortuary Science. Every Session Law that refers to the North Carolina Mutual Burial Association Commission or the Burial Association Administrator and that relates to any power, duty, function, or obligation of the Commission or the Administrator that continues in effect after the provisions of this act become effective shall be construed in a manner consistent with this act.

“(b) The Revisor of Statutes may on and after the effective date of this act, correct any reference or citation in the General Statutes that is amended by this act by deleting incorrect references and substituting correct references.

“(c) The Revisor of Statutes may, on and after the first day of January 1998, delete any reference to the North Carolina Mutual Burial Association Commission or to the Burial Association Administrator in any portion of the General Statutes to which conforming amendments are not made by this act and substitute, as appropriate and consistent with this act, any of the following terms: North Carolina Board of

Mortuary Science, Board of Mortuary Science, or Board.”

However, subdivision (1)j of this section is set out above as directed by the Revisor of Statutes.

Session Laws 2001-193, s. 15, provides: “All (i) statutory authority, powers, duties, and functions, including rule making, budgeting, and purchasing, (ii) records, (iii) personnel, personnel positions, and salaries, (iv) property, and (v) unexpended balances of appropriations, allocations, reserves, support costs, and other funds of the Savings Institutions Division of the Department of Commerce are transferred to and vested in the Office of Commissioner of Banks authorized by Article 8 of Chapter 53 of the General Statutes. Though transferred to the Office of Commissioner of Banks pursuant to this section, the Savings Institutions Division shall continue to function under that name. All statutory authority, powers, duties, and functions of the Administrator of the Savings Institutions Division are transferred to and vested in the Commissioner of Banks. This transfer has all the elements of a Type I transfer, as defined in G.S. 143A-6.”

**Effect of Amendments.** — Session Laws 2000-140, s. 76(j), effective September 30, 2000, repealed subdivisions (1)s and (1)t, which read “Energy Policy Council” and “Energy Division,” respectively.

Session Laws 2001-193, s. 11, effective July 1, 2001, substituted “Savings Institutions Division” for “Savings and Loan Association Division” in subdivision (1)f; and deleted subdivision (1)g, which read “The State Savings Institutions Commission.”

## Part 1A. Housing Coordination and Policy Council.

§§ 143B-433.1 through 143B-433.3: Repealed by Session Laws 1993, c. 321, s. 305(c).

**Cross References.** — For present provisions relating to the Housing Coordination and Policy Council, see § 122A-5.10 et seq.

**Editor's Note.** — Session Laws 1993, c. 321, s. 305(a), provides: “The statutory authority, powers, duties, and functions, records, personnel, property, and unexpended balances of ap-

propriations, allocations, or other funds of the Housing Coordination and Policy Council, the HOME program, the Permanent Housing Affordability Strategy, are transferred from the Division of Community Assistance, Department of Commerce, to the Housing Finance Agency.”

## Part 2. Economic Development.

### § 143B-434. Economic Development Board — creation, duties, membership.

(a) Creation and Duties. — There is created within the Department of Commerce an Economic Development Board. The Board shall have the following duties:

- (1) To provide economic and community development planning for the State.
- (2) To recommend economic development policy to the Secretary of Commerce, the General Assembly, and the Governor. The recommendations may cover the following issues as well as any other economic development policy issues:
  - a. Use of tax abatements and other incentives to motivate economic development.
  - b. Definition of which specific activities and programs should be considered economic development activities and programs for the purpose of receiving State appropriations.
  - c. The role of institutions of higher education in economic development.
  - d. The use of State funds to leverage private nonprofit economic development initiatives.
  - e. The linkage of workforce preparedness activities and initiatives, and economic development planning.
- (3) To recommend annually to the Governor biennial and annual appropriations for economic development programs.
- (4) To develop and update annually a comprehensive strategic economic development plan, as provided in G.S. 143B-434.1.

The Board shall meet at least quarterly at the call of its chair or the Secretary. Each quarter the Secretary shall report to the Board on the program and progress of this State's economic development.

(b) Membership. — The Economic Development Board shall consist of 37 members. The Secretary of Commerce shall serve ex officio as a member and as the secretary of the Economic Development Board. The Secretary of Revenue shall serve as an ex officio, nonvoting member. Four members of the House of Representatives appointed by the Speaker of the House of Representatives, four members of the Senate appointed by the President Pro Tempore of the Senate, the President of The University of North Carolina, or designee, the President of the North Carolina Community College System, or designee, the Secretary of State, and the President of the Senate (or the designee of the President of the Senate), shall serve as members of the Board. The Governor shall appoint the remaining 23 members of the Board. Effective with the terms beginning July 1, 1997, one of the Governor's appointees shall be a representative of a nonprofit organization involved in economic development and two of the Governor's appointees shall be county economic development representatives. The Governor shall designate a chair and a vice-chair from among the members of the Board. Appointments to the Board made by the Governor for terms beginning July 1, 1997, and appointments to the Board made by the Speaker of the House of Representatives and the President Pro Tempore of the Senate for terms beginning July 9, 1993, should reflect the ethnic and gender diversity of the State as nearly as practical.

The initial appointments to the Board shall be for terms beginning on July 9, 1993. Of the initial appointments made by the Governor, the terms shall expire July 1, 1997. Of the initial appointments made by the Speaker of the House of Representatives and by the President Pro Tempore of the Senate two appointments of each shall be designated to expire on July 1, 1995; the remaining terms shall expire July 1, 1997. Thereafter, all appointments shall be for a term of four years.

The appointing officer shall make a replacement appointment to serve for the unexpired term in the case of a vacancy.

The members of the Economic Development Board shall receive per diem and necessary travel and subsistence expenses payable to members of State Boards and agencies generally pursuant to G.S. 138-5 and G.S. 138-6, as the

case may be. The members of the Economic Development Board who are members of the General Assembly shall not receive per diem but shall receive necessary travel and subsistence expenses at rates prescribed by G.S. 120-3.1.

(c) Advice and Staff. — The Secretaries of Administration, State, and Transportation, the Commissioners of Agriculture and Labor, and the State Treasurer, or their designees, shall advise the Board on economic development activities within the responsibility of their respective departments. Clerical and professional staff support to the Economic Development Board shall be provided by an Interagency Economic Development Group composed of representatives of the following State agencies:

- (1) The Department of Administration.
- (2) The Department of Agriculture and Consumer Services.
- (3) The Employment Security Commission.
- (4) The Department of Labor.
- (5) The Department of Transportation.

The Department of Commerce shall have the responsibility for coordinating the activities and efforts of the Interagency Economic Development Group. (1977, c. 198, s. 1; 1981, c. 47, s. 6; 1981 (Reg. Sess., 1982), c. 1191, s. 18; 1983, c. 717, s. 83; 1989, c. 751, ss. 7(29), 9(c); 1991 (Reg. Sess., 1992), c. 959, s. 85; c. 1038, s. 22; 1993, c. 321, s. 313(a); c. 561, s. 12; 1993 (Reg. Sess., 1994), c. 773, s. 15.1; 1997-261, s. 105; 2001-487, s. 32; 2001-513, s. 13.)

**Editor's Note.** — Session Laws 1981, c. 47, which amended this section, in s. 7, provided: "When the Speaker, President of the Senate, or Lieutenant Governor has designated a person to serve in his place as permitted by this act, that person shall be compensated in accordance with G.S. 120-3.1 if a member of the General Assembly, in accordance with G.S. 138-6 if a State officer or employee, and in accordance with G.S. 138-5 in any other case, except that a member of the General Assembly so designated may not receive per diem if the Speaker, President of the Senate or Lieutenant Governor may not receive per diem."

**Effect of Amendments.** — Session Laws 2001-487, s. 32, effective December 16, 2001, in

subsection (b), in the first paragraph, divided the former fourth sentence into the present fourth and fifth sentences by substituting "Board, Effective" for "Board, provided that effective" and twice substituted "the Governor's appointees" for "those appointees" in the present fifth sentence, and inserted "G.S." preceding "138-6" in the first sentence of the last paragraph.

Session Laws 2001-513, s. 13, effective July 1, 2001, in subsection (b), substituted "37" for "36" in the first sentence of the first paragraph, added the third sentence to the first paragraph, and added "G.S." preceding "138-6" in the final paragraph.

## § 143B-434.01. Comprehensive Strategic Economic Development Plan.

(a) Definitions. — The following definitions apply in this section:

- (1) Board. — The Economic Development Board.
- (2) Department. — The Department of Commerce.
- (3) Economic distress. — The presence of at least one trend indicator or at least one status indicator:

a. Trend indicators:

1. Weighted average age of industrial plants exceeding statewide average age.
2. Loss of population over the most recent three- to five-year period.
3. Below average job growth over the most recent three- to five-year period.
4. Outmigration over the most recent three- to five-year period.
5. Decline in real wages over the most recent three- to five-year period.

6. Above average rate of business failures over the most recent three- to five-year period.

b. Status indicators:

1. Per capita income below the State average.
2. Earnings or wages per job below the State average.
3. Unemployment above the State average.
4. Poverty rate above the State average.
5. Below average fiscal capacity.

- (4) Plan. — The Comprehensive Strategic Economic Development Plan.
- (5) Region. — One of the major geographic regions of the State defined in the Plan as an economic region based on compatible economic development factors.

(b) Board to Prepare Plan. — The Board shall prepare the Plan by April 1, 1994. The Board shall review and update this Plan by April 1 of each year. The original Plan shall cover a period of four years and each annual update shall extend the time frame by one year so that a four-year plan is always in effect. The Board shall provide copies of the Plan and each annual update to the Governor and the Joint Legislative Commission on Governmental Operations. The Plan shall encompass all of the components set out in this section.

(c) Purpose. — The purpose of this section is to require the Board to apply strategic planning principles to its economic development efforts. This requirement is expected to result in:

- (1) The selection of a set of priority development objectives that recognizes the increasingly competitive economic environment and addresses the changing needs of the State in a more comprehensive manner.
- (2) The effective utilization of available and limited resources.
- (3) A commitment to achieve priority objectives and to sustain the process.

(d)(1) Public and Private Input. — At each stage as it develops and updates the Plan, the Board shall solicit input from all parties involved in economic development in North Carolina, including:

- a. Each of the programs and organizations that, for State budget purposes, identifies economic development as one of its global goals.
- b. Local economic development departments and regional economic development organizations.
- c. The Board of Governors of The University of North Carolina.

(2) The Board shall also hold hearings in each of the Regions to solicit public input on economic development before the initial Plan is completed. The purposes of the public hearings are to:

- a. Assess the strengths and weaknesses of recent regional economic performance.
- b. Examine the status and competitive position of the regional resource base.
- c. Identify and seek input on issues that are key to improving the economic well-being of the Region.

The Board shall hold additional hearings from time to time to solicit public input regarding economic development activities.

(3) Each component of the Plan shall be based on this broad input and, to the extent possible, upon a consensus among all affected parties. The Board shall coordinate its planning process with any State capital development planning efforts affecting State infrastructure such as roads and water and sewer facilities.

(e) Environmental Scan. — The first step in developing the Plan shall be to develop an environmental scan based on the input from economic development

parties and the public and on information about the economic environment in North Carolina. To prepare the scan, the Board shall gather the following information. Thereafter, the information shall be updated periodically.

- (1) Compilation of the latest economic and demographic data on North Carolina by State, Region, and county including population, population projections, employment, and employment projections, income and earnings status and outlook, migration and commuting patterns, unemployment, poverty, and other similar data.
- (2) Compilation of the latest data on the strength of the business environment by State, Region, and county with emphasis on the dynamics of job creation: start-ups, expansions, locations, contractions, and failures. Special assessments are to be made of rural, small, and minority business components of overall activity.
- (3) Compilation of the latest data on labor compensation, construction costs, utility rates, payroll costs, taxes, and other cost data normally considered by manufacturing firms and new businesses and shall be tabulated by State, Region, and county.
- (4) Compilation of data on assets within the State and by Region and county to include the following:
  - a. Available buildings, bona fide industrial parks, and sites.
  - b. Characteristics of the available labor force (number, demographic attributes, skill levels, etc.).
  - c. Special labor situations, such as military base discharges and large plant closings.
  - d. Available infrastructure capacities by county and Region including water, sewer, electrical, natural gas, telecommunication, highway access, and other pertinent services.
  - e. The fiscal capacity of counties and localities within counties to support the infrastructure development necessary to participate in the development process.
  - f. Analyses of assimilative capacity of riverine, estuarine, or ocean outfalls, or other environmental cost considerations.
  - g. Proximity analyses of counties in close alignment with major urban areas in bordering states.
  - h. Special educational and research capabilities.
  - i. Special transportation situations such as major airports, ports, and railyards.
  - j. Available data on the performance, contribution, and impact each economic sector (including, but not limited to, agriculture, finance, manufacturing, public utilities, trade, services, tourism, and government) is having on individual counties, Regions, and the State.
  - k. Available tourist and service assets.
  - l. Analyses of seasonal population and absentee ownership in resort and tourism areas and their impact on the delivery of public services.
  - m. Cost and availability of natural gas and electricity.
- (5) Compilation and analyses of data on economic and industrial changes in competitor states by Region, as applicable. This data shall be entered into a database and kept current. It shall include, specifically, all new plant location information such as origin of the plant, Standard Industrial Classification Code, employment, and investment.
- (6) Compilation of cost data, policies, and strategies in competitive Southeastern states as well as other United States regions and foreign countries.

- (7) Compilation of incentives and special programs being offered by other states.
- (8) Compilation and analyses of other data relating to economic development such as regulatory or legal matters, structural problems, and social considerations, e.g. unemployment, underemployment, poverty, support services, equity concerns, etc.
- (9) The cost of doing business in North Carolina and other competing states, as it may affect decisions by firms to locate in this State.
- (10) Competitive assets within the State and by Region and county, including infrastructure, tourist assets, natural resources, labor, educational and research resources, and transportation.
- (11) Other information relating to economic development such as regulatory or legal matters and social considerations.

(f) Needs Assessment. — The Board, using data from the public input sessions and the environmental scan, shall prepare an assessment of economic development strengths, weaknesses, threats, and opportunities within the State by Region and by county. An assessment shall also be conducted of each county to determine distressed areas existing within the county. The assessment will include the identification of key development issues within each geographic area and options available to address each issue.

(g) Vision and Mission Statements. — The Board shall develop a vision statement for economic development that would describe the preferred future for North Carolina and what North Carolina would be like if all economic development efforts were successful. The Board shall then develop a mission statement that outlines the basic purpose of each of North Carolina's economic development programs. Because special purpose nonprofit organizations are uniquely situated to conduct the entrepreneurial and high-risk activity of investing in and supporting new business creation in the State, they should be assigned a dominant role in this key component of economic development activity.

(h) Goals and Objectives. — The Board using data from the public input and the environmental scan, shall formulate a list of goals and objectives. Goals shall be long-range, four years or more, and shall address both needs of economically distressed Regions and counties as well as opportunities for Regions and counties not distressed. The goals shall be developed with realism but should also be selected so as to encourage every Region and county within the State to develop to its maximum potential. Objectives shall be one year or less in scope and shall, if achieved, lead to the realization of the goals formulated by the Board as provided in this section.

Both goals and objectives should be stated largely in economic terms, that is, they should be related to specific population, employment, demographic targets, or economic sector targets. Both efficiency and equity considerations are to be addressed and balanced with special emphasis placed on the needs of disadvantaged or economically distressed populations and communities. The goals and objectives should not state how the economic targets are to be reached, but rather what the economic conditions will be if they are obtained. So that the progress of North Carolina's economic development efforts can be monitored, the Board shall set objectives for each goal that allow measurement of progress toward the goal. Objectives should be quantifiable and time-specific in order to serve as performance indicators.

(i) Formulation of Economic Development Strategy. — The Plan shall have as its action component a strategy set forth in a blueprint for directing resources of time and dollars toward the satisfaction of the goals and objectives stated in subsection (h) of this section. As a practical consequence of the economic environment, a focus on the competitiveness of indigenous industries and entrepreneurial development is required. The Plan shall include a

strategy for the coordination of initiatives and activities for workforce preparedness, funded by federal or State sources, including, but not limited to, vocational education, applied technology education, remedial education, and job training, and the achievement of the economic development goals of the Plan. A balance of opportunity between rural and urban regions and between majority and minority populations should be an overriding consideration. Equity of opportunity for counties and communities across the State will involve the explicit consideration of local fiscal capacity and the fiscal ability to support development activities.

The concept of differentiation should be employed. The Plan should recognize the various strengths and weaknesses of the State and its component regions, subregions, and, in some cases, individual counties. The concept of market segmentation should be employed. Different Regions and subregions of the State should be promoted to different markets.

(j) Implementation Plan. — Based upon all of the foregoing steps, the Board shall establish an implementation plan assigning to the appropriate parties specific responsibilities for meeting measurable objectives. The implementation plan shall contain all necessary elements so that it may be used as a means to monitor performance, guide appropriations, and evaluate the outcomes of the parties involved in economic development in the State.

(k) Annual Report. — The Plan shall contain a section devoted to measuring results, to be called “An Annual Report on Economic Development for the State of North Carolina”. The Annual Report shall contain a comparison of actual results with stated goals and objectives and significant and meaningful statistics to allow policymakers to adjust strategy and tactics as necessary to achieve the formulated goals.

The Annual Report shall break down data by Regions and counties including:

- (1) The net job change (expansions minus contractions) by the various economic sectors of the county, Region, and State.
  - (2) Realized capital investment in plants and equipment by new and expanding industry in each county, Region, and State.
  - (3) Manufacturing changes by county, Region, and State that affect the value of firms, total payrolls, average wages, value of shipments, contributions to gross State product, and value added.
  - (4) The net change in the number of firms by county, Region, and State with statistics on the dynamics of change: relocations in versus relocations out; births versus deaths; and expansions versus contractions.
  - (5) A measure of the status and performance of all sectors of the county, Region, and State economy including, but not limited to, manufacturing, agriculture, trade, finance, communications, transportation, utilities, services, and travel and tourism.
  - (6) An assessment of the relative status and performance of rural business development as opposed to that in urban areas.
  - (7) An analysis of the status of minority-owned businesses throughout the State.
  - (8) An assessment of the development capability of the various Regions of the State in terms of their environmental, fiscal, and administrative capacity. Those areas that are handicapped by barriers to development should be highlighted.
  - (9) An evaluation of the State’s economic performance as indicated by the above statistics with the goals and objectives outlined in the Plan.
- (l) Accountability. — The Board shall make all data, plans, and reports available to the General Assembly and the Joint Legislative Commission on Governmental Operations at appropriate times and upon request. The Board

shall prepare and make available on an annual basis public reports on each of the major sections of the Plan and the Annual Report indicating the degree of success in attaining each development objective. (1993, c. 321, s. 313(c); 1997-456, s. 27.)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 321, s. 313(c), having been § 143B-434.1.

The subdivisions in subsection (d) of this section were renumbered pursuant to S.L.

1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

### § 143B-434.1. The North Carolina Travel and Tourism Board — creation, duties, membership.

(a) There is created within the Department of Commerce the North Carolina Travel and Tourism Board. The Secretary of Commerce and the Director of the Division of Tourism, Film, and Sports Development will work with the Board to fulfill the duties and requirements set forth in this section, and to promote the sound development of the travel and tourism industry in North Carolina.

(b) The function and duties of the Board shall be:

- (1) To advise the Secretary of Commerce in the formulation of policy and priorities for the promotion and development of travel and tourism in the State.
- (2) To advise the Secretary of Commerce in the development of a budget for the Division of Tourism, Film, and Sports Development.
- (3) To recommend programs to the Secretary of Commerce that will promote the State as a travel and tourism destination and that will develop travel and tourism opportunities throughout the State.
- (4) To advise the Secretary of Commerce every three months as to the effectiveness of agencies with which the Department has contracted for advertising and regarding the selection of an advertising agency that will assist the Department in the promotion of the State as a travel and tourism destination.
- (5) To name a three-member subcommittee, with one member from each of the eastern, central, and western regions of the State, to make recommendations to the Secretary of Commerce regarding any revisions in the matching funds tourism grants program, project applications, and criteria for projects that qualify for participation in the program.
- (6) To advise the Secretary of Commerce from time to time as to the effectiveness of the overall operations of the Division of Tourism, Film, and Sports Development.
- (7) To promote the exchange of ideas and information on travel and tourism between State and local governmental agencies, and private organizations and individuals.
- (8) To advise the Secretary of Commerce upon any matter that the Secretary, Governor, or Director of the Division of Tourism, Film, and Sports Development may refer to it.

(c) The Board shall consist of 27 members as follows:

- (1) The Secretary of Commerce, who shall not be a voting member.
- (2) The Director of the Division of Tourism, Film, and Sports Development, who shall not be a voting member.
- (3) Two members designated by the Board of Directors of the North Carolina Hotel and Motel Association.

- (4) Two members designated by the Board of Directors of the North Carolina Restaurant Association.
- (5) Three Directors of Convention and Visitor Bureaus designated by the Board of Directors of the North Carolina Association of Convention and Visitor Bureaus.
- (6) The Chairperson of the Travel and Tourism Coalition.
- (7) The President of the Travel Council of North Carolina.
- (8) A member designated by the Board of Directors of the Travel Council of North Carolina.
- (9) The President of North Carolina Citizens for Business and Industry.
- (10) One member designated by the North Carolina Petroleum Marketers Association.
- (11) One person associated with tourism attractions in North Carolina, appointed by the Speaker of the House of Representatives. One person who is not a member of the General Assembly, appointed by the Speaker of the House of Representatives.
- (12) One person associated with the tourism-related transportation industry, appointed by the President Pro Tempore of the Senate. One person who is not a member of the General Assembly, appointed by the President Pro Tempore of the Senate.
- (13) Four public members each interested in matters relating to travel and tourism, two appointed by the Governor (one from a rural area and one from an urban area), one appointed by the Speaker of the House, and one appointed by the President Pro Tempore of the Senate.
- (14) One member associated with the major cultural resources and activities of the State in North Carolina, appointed by the Governor.
- (15) Two members of the House of Representatives, appointed by the Speaker of the House of Representatives.
- (16) Two members of the Senate, appointed by the President Pro Tempore of the Senate.

(d) The members of the Board shall serve the following terms: the Secretary of Commerce, the Director of the Division of Tourism, Film, and Sports Development, the Chairperson of the Travel and Tourism Coalition, the President of the Travel Council of North Carolina, and the President of North Carolina Citizens for Business and Industry shall serve on the Board while they hold their respective offices. Each member of the Board appointed by the Governor shall serve during his or her term of office. The members of the Board appointed by the General Assembly shall serve two-year terms beginning on January 1 of odd-numbered years and ending on December 31 of the following year. The first such term shall begin on January 1, 1991, or as soon thereafter as the member is appointed to the Board, and end on December 31, 1992. All other members of the Board shall serve a term which consists of the portion of calendar year 1991 that remains following their appointment or designation and, thereafter, two-year terms which shall begin on January 1 of an even-numbered year and end on December 31 of the following year. The first such two-year term shall begin on January 1, 1992, and end on December 31, 1994.

(e) No member of the Board, except a member serving by virtue of his or her office, shall serve during more than five consecutive calendar years, except that a member shall continue to serve until his or her successor is appointed.

(f) Appointments to fill vacancies in the membership of the Board that occur due to resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term and shall be made by the same appointing authority that made the initial appointment.

(g) Board members who are employees of the State shall receive travel allowances at the rate set forth in G.S. 138-6. Board members who are

legislators shall be reimbursed for travel and subsistence in accordance with G.S. 120-3.1. All other Board members, except those serving pursuant to subdivisions (3) through (10) of subsection (c) of this section, shall receive per diem, subsistence, and travel expenses at the rate set forth in G.S. 138-5. Board members serving pursuant to subdivisions (3) through (10) of subsection (c) of this section shall not receive per diem, subsistence, or travel expenses. The expenses set forth in this section shall be paid by the Division of Tourism, Film, and Sports Development of the Department of Commerce.

(h) At its first meeting in 1991, the Board shall elect one of its voting members to serve as Chairperson during calendar year 1991. At its last regularly scheduled meeting in 1991, and at its last regularly scheduled meeting in each year thereafter, the Board shall elect one of its voting members to serve as Chairperson for the coming calendar year. No person shall serve as Chairperson during more than three consecutive calendar years. The Chairperson shall continue to serve until his or her successor is elected.

(i) A majority of the current voting membership shall constitute a quorum.

(j) The Secretary of Commerce shall provide clerical and other services as required by the Board. (1991, c. 406, s. 1; 1991 (Reg. Sess., 1992), c. 959, s. 54; 1997-495 s. 89(a); 2000-140, s. 79(a).)

**Effect of Amendments.** — Session Laws 2000-140, s. 79(a), effective July 21, 2000, substituted “Division of Tourism, Film, and Sports

Development” for “Division of Travel and Tourism” throughout the section.

## § 143B-434.2. Travel and Tourism Policy Act.

(a) This section shall be known as the Travel and Tourism Policy Act.

(b) The General Assembly of North Carolina finds that:

- (1) The State of North Carolina is endowed with great scenic beauty, historical sites, and cultural resources, and with a population whose ethnic diversity and traditions are attractive to visitors.
- (2) These resources should be preserved and nurtured, not only because they are appreciated by other Americans and by visitors from other lands, but because they are valued by the State’s own residents.
- (3) Tourism provides economic well-being by contributing to employment and economic development, generating State revenues and receipts for local businesses, and increasing international trade.
- (4) Tourism is an educational and informational medium for personal growth which informs residents about their State’s geography and history, their political institutions, their cultural resources, and their environment, and about each other.
- (5) Tourism instills State pride and a sense of common interest among the people of the State.
- (6) Tourism enhances the quality of life and well-being of the State’s residents by affording recreation, new experiences, and opportunities for relief from job stress.
- (7) Tourism promotes international understanding and goodwill, and contributes to intercultural appreciation.
- (8) Tourism engenders appreciation of the State’s cultural, architectural, technological, and industrial achievements.
- (9) The development and promotion of tourism to and within the State is in the interest of the people of North Carolina.
- (10) Tourism should develop in an orderly manner in order to provide the maximum benefit to the State and its residents.
- (11) A comprehensive tourism policy is essential if tourism is to grow in an orderly way.

(c) The policy of the State of North Carolina is to:

- (1) Encourage the orderly growth and development of travel and tourism to and within the State.
- (2) Promote the State's travel and tourism resources to the residents of the State, and to potential visitors from other states and other countries.
- (3) Instill a sense of history in the State's young people by encouraging family visits to State historic sites, and by promoting the preservation and restoration of historic sites, trails, buildings, and districts.
- (4) Promote the mental, emotional, and physical well-being of the people of North Carolina by encouraging outdoor recreational activities within the State.
- (5) Strengthen a sense of common interest among the residents of the State by encouraging them to visit each other's communities and discover each other's traditions and ways of life.
- (6) Increase national and international awareness of the State's cultural contributions by encouraging attendance at orchestral, operatic, dramatic, and other productions by artistic groups performing in the State.
- (7) Cultivate the State's commercial interests by encouraging local and county fairs so that visitors may learn about local products and crafts.
- (8) Encourage the talents and strengthen the economic independence of State residents by encouraging the preservation of traditional craft skills; the production of handicrafts and folk art by private artisans and craftspeople; and the holding of craft demonstrations.
- (9) Provide visitors to the State with a hospitable reception.
- (10) Develop and maintain a statewide tourism data base.
- (11) Encourage the protection of wildlife and natural resources and the preservation of geological, archaeological, and cultural treasures in tourist areas.
- (12) Encourage, assist, and coordinate, where possible, the tourism activities of local and area promotional organizations.
- (13) Ensure that the tourism interest of the State is fully considered by State agencies and the General Assembly in their deliberations; and coordinate, to the maximum extent possible, all State activities in support of tourism with the needs of the general public, the political subdivisions of the State, and the tourism industry.

(d) The Department of Commerce, and the Division of Tourism, Film, and Sports Development within that Department, shall implement the policies set forth in this section. The Division of Tourism, Film, and Sports Development shall make an annual report to the General Assembly regarding the status of the travel and tourism industry in North Carolina; the report shall be submitted to the General Assembly by January 15 of each year beginning January 15, 1992. The duties and responsibilities of the Department of Commerce through the Division of Tourism, Film, and Sports Development shall be to:

- (1) Organize and coordinate programs designed to promote tourism within the State and to the State from other states and foreign countries.
- (2) Measure and forecast tourist volume, receipts, and impact, both social and economic.
- (3) Develop a comprehensive plan to promote tourism to the State.
- (4) Encourage the development of the State's tourism infrastructure, facilities, services, and attractions.

- (5) Cooperate with neighboring states and the federal government to promote tourism to the State from other countries.
- (6) Develop opportunities for professional education and training in the tourism industry.
- (7) Provide advice and technical assistance to local public and private tourism organizations in promoting tourism to the State.
- (8) Encourage cooperation between State agencies and private individuals and organizations to advance the State's tourist interests and seek the views of these agencies and the private sector in the development of State tourism programs and policies.
- (9) Give leadership to all concerned with tourism in the State.
- (10) Perform other functions necessary to the orderly growth and development of tourism.
- (11) Develop informational materials for visitors which, among other things, shall:
  - a. Describe the State's travel and tourism resources and the State's history, economy, political institutions, cultural resources, outdoor recreational facilities, and principal festivals.
  - b. Urge visitors to protect endangered species, natural resources, archaeological artifacts, and cultural treasures.
  - c. Instill the ethic of stewardship of the State's natural resources.
- (12) Foster an understanding among State residents and civil servants of the economic importance of hospitality and tourism to the State.
- (13) Work with local businesses, including banks and hotels, with educational institutions, and with the United States Travel and Tourism Administration, to provide special services for international visitors, such as currency exchange facilities.
- (14) Encourage the reduction of architectural and other barriers which impede travel by physically handicapped persons. (1991, c. 144, ss. 1-4; 1991 (Reg. Sess., 1992), c. 959, s. 85; 2000-140, s. 79(b).)

**Editor's Note.** — The number of this section was designated by the Revisor of Statutes.

**Effect of Amendments.** — Session Laws 2000-140, s. 79(b), effective July 21, 2000, sub-

stituted "Division of Tourism, Film, and Sports Development" for "Division of Travel and Tourism" three times in subsection (d).

### § 143B-434.3. Film Industry Development Account.

(a) **Creation and Purpose of Account.** — There is created in the Department of Commerce, Division of Tourism, Film, and Sports Development, the Film Industry Development Account to provide annual grants as incentives to production companies that engage in production activities in this State. The Division of Tourism, Film, and Sports Development shall administer this program in accordance with the following provisions:

- (1) To be eligible for a grant, a production company must engage in production activities in this State. A grant may not be used for political or issue advertising.
- (2) A grant may not exceed fifteen percent (15%) of the amount the production company spends for goods and services in this State during the calendar year.
- (3) A grant may not exceed two hundred thousand dollars (\$200,000) per production.

(b) **Production Company Defined.** — As used in this section, the term "production company" has the meaning provided in G.S. 105-164.3.

(c) **Limitation on eligibility.** — No production company shall be eligible for a grant under this section if an original motion picture, television, or radio image for theatrical, commercial, advertising, or educational purposes made by that

company contains material that is considered obscene, as defined by G.S. 14-190.1(b).

(d) Reports. — The Department of Commerce shall report annually to the General Assembly concerning the applications made to the account, the payments made from the account, and the effect of the payments on job creation in the State. The Department of Commerce shall also report quarterly to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division on the use of the moneys in the account, including information regarding to whom payments were made and in what amounts. (2000-140, s. 79(c); 2000-153, ss. 1, 6.)

**Editor's Note.** — At the direction of the Revisor of Statute, Session Laws 2000-153, s. 6, has been codified as subsection (c) and present subsection (d) has been designated as such.

Session Laws 2000-153, s. 7, made this section effective August 2, 2000.

**Effect of Amendments.** — Session Laws 2000-140, s. 79(c), effective July 21, 2000, substituted "Division of Tourism, Film, and Sports Development" for Division of Travel and Tourism" in subsection (a).

## § 143B-435. Publications.

The Department of Commerce may also cause to be prepared for publication, from time to time, reports and statements, with illustrations, maps and other descriptions, which may adequately set forth the natural and material resources of the State and its industrial and commercial developments, with a view to furnishing information to educate the people with reference to the material advantages of the State, to encourage and foster existing industries, and to present inducements for investment in new enterprises. Such information shall be published and distributed as the Department of Commerce may direct. The costs of publishing and distributing such information shall be paid from:

- (1) State funds as other public documents; or
- (2) Private funds received:
  - a. As donations, or
  - b. From the sale of appropriate advertising in such published information. (1925, c. 122, s. 11; 1973, c. 1262, s. 28; 1977, c. 198, ss. 20, 26; 1989, c. 751, s. 7(30); 1989 (Reg. Sess., 1990), c. 1066, s. 55; 1991 (Reg. Sess., 1992), c. 959, s. 55.)

**Editor's Note.** — The above section was formerly § 113-14. It was recodified in this Article by Session Laws 1977, c. 198, s. 26.

## § 143B-436. Advertising of State resources and advantages.

It is hereby declared to be the duty of the Department of Commerce to map out and to carry into effect a systematic plan for the nationwide advertising of North Carolina, properly presenting, by the use of any available advertising media, the true facts concerning the State of North Carolina and all of its resources. (1937, c. 160; 1953, c. 808, s. 4; 1973, c. 1262, s. 86; 1977, c. 198, ss. 20, 26; 1989, c. 751, s. 7(31); 1991 (Reg. Sess., 1992), c. 959, s. 56.)

**Editor's Note.** — The above section was formerly § 113-15. It was recodified in this Article by Session Laws 1977, c. 198, s. 26.

## § 143B-437. Investigation of impact of proposed new and expanding industry.

The Department of Commerce shall conduct an evaluation in conjunction with the Department of Environment and Natural Resources of the effects on the State's natural and economic environment of any new or expanding industry or manufacturing plant locating in North Carolina. (1971, c. 824; 1973, c. 1262, ss. 28, 86; 1977, c. 198, ss. 19, 26; c. 771, s. 4; 1989, c. 727, s. 218(153); c. 751, s. 7(32); 1991 (Reg. Sess., 1992), c. 959, s. 57; 1997-443, s. 11A.119(a).)

**Editor's Note.** — The above section was formerly § 113-15.2. It was rewritten by Session Laws 1977, c. 198, s. 19, and recodified in this Article by s. 26 of the same act.

### § 143B-437.01. Industrial Development Fund.

(a) **Creation and Purpose of Fund.** — There is created in the Department of Commerce the Industrial Development Fund to provide funds to assist the local government units of the most economically distressed counties in the State in creating jobs in certain industries. The Department of Commerce shall adopt rules providing for the administration of the program. Those rules shall include the following provisions, which shall apply to each grant from the fund:

- (1) The funds shall be used for (i) installation of or purchases of equipment for eligible industries, (ii) structural repairs, improvements, or renovations of existing buildings to be used for expansion of eligible industries, or (iii) construction of or improvements to new or existing water, sewer, gas, or electrical utility distribution lines or equipment for existing or new or proposed industrial buildings to be used for eligible industries. To be eligible for funding, the water, sewer, gas, or electrical utility lines or facilities shall be located on the site of the building or, if not located on the site, shall be directly related to the operation of the specific eligible industrial activity.
- (1a) The funds shall be used for projects located in economically distressed counties except that the Secretary of Commerce may use up to one hundred thousand dollars (\$100,000) to provide emergency economic development assistance in any county that is documented to be experiencing a major economic dislocation.
- (2) The funds shall be used by the city and county governments for projects that will directly result in the creation of new jobs. The funds shall be expended at a maximum rate of five thousand dollars (\$5,000) per new job created up to a maximum of five hundred thousand dollars (\$500,000) per project.
- (3) There shall be no local match requirement if the project is located in an enterprise tier one area as defined in G.S. 105-129.3.
- (4) The Department may authorize a local government that receives funds under this section to use up to two percent (2%) of the funds, if necessary, to verify that the funds are used only in accordance with law and to otherwise administer the grant or loan.
- (5) No project subject to the Environmental Policy Act, Article 1 of Chapter 113A of the General Statutes, shall be funded unless the Secretary of Commerce finds that the proposed project will not have a significant adverse effect on the environment. The Secretary of Commerce shall not make this finding unless the Secretary has first received a certification from the Department of Environment and Natural Resources that concludes, after consideration of avoidance and mitigation measures, that the proposed project will not have a significant adverse effect on the environment.

- (6) The funds shall not be used for any nonmanufacturing project that does not meet the wage standard set out in G.S. 105-129.4(b).
- (a1) Definitions. — The following definitions apply in this section:
- (1) Air courier services. — A person is engaged in the air courier services business if the person's primary business is furnishing air delivery of individually addressed letters and packages, except by the United States Postal Service.
  - (2) Central administrative office. — Defined in the North American Industry Classification System adopted by the United States Office of Management and Budget.
  - (3) Data processing. — Defined in the North American Industry Classification System adopted by the United States Office of Management and Budget.
  - (4) Economically distressed county. — A county designated as an enterprise tier one, two, or three area pursuant to G.S. 105-129.3.
  - (5) Eligible industry. — A central administrative office or a person engaged in the business of air courier services, data processing, manufacturing, or warehousing and wholesale trade.
  - (6) Reserved.
  - (7) Major economic dislocation. — The actual or imminent loss of 500 or more manufacturing jobs in the county or of a number of manufacturing jobs equal to at least ten percent (10%) of the existing manufacturing workforce in the county.
  - (8) Manufacturing. — Defined in the North American Industry Classification System adopted by the United States Office of Budget and Management.
  - (9) Reserved.
  - (10) Warehousing and wholesale trade. — Defined in the North American Industry Classification System adopted by the United States Office of Management and Budget.
- (b) Repealed by Session Laws 1996, Second Extra Session, c. 13, s. 3.5.
- (b1) Utility Account. — There is created within the Industrial Development Fund a special account to be known as the Utility Account to provide funds to assist the local government units of enterprise tier one and tier two areas, as defined in G.S. 105-129.3, in creating jobs in eligible industries. The Department of Commerce shall adopt rules providing for the administration of the program. Except as otherwise provided in this subsection, those rules shall be consistent with the rules adopted with respect to the Industrial Development Fund. The rules shall provide that the funds in the Utility Account may be used only for construction of or improvements to new or existing water, sewer, gas, or electrical utility distribution lines or equipment for existing or new or proposed industrial buildings to be used for eligible industrial operations. To be eligible for funding, the water, sewer, gas, or electrical utility lines or facilities shall be located on the site of the building or, if not located on the site, shall be directly related to the operation of the specific industrial activity. There shall be no maximum funding amount per new job to be created or per project.
- (c) Reports. — The Department of Commerce shall report annually to the General Assembly concerning the applications made to the fund and the payments made from the fund and the impact of the payments on job creation in the State. The Department of Commerce shall also report quarterly to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division on the use of the moneys in the fund, including information regarding to whom payments were made, in what amounts, and for what purposes.

(c1) In addition to the reporting requirements of subsection (c) of this section, the Department of Commerce shall report annually to the General Assembly concerning the payments made from the Utility Account and the impact of the payments on job creation in the State. The Department of Commerce shall also report quarterly to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division on the use of the moneys in the Utility Account including information regarding to whom payments were made, in what amounts, and for what purposes.

(d) Repealed by Session Laws 1996, Second Extra Session, c. 13, s. 3.5. (1989, c. 751, s. 9(c); c. 754, s. 54; 1991 (Reg. Sess., 1992), c. 959, s. 60; 1993, c. 444, s. 1; 1996, 2nd Ex. Sess., c. 13, s. 3.5; 1997-456, s. 27; 1998-55, s. 6; 1999-360, s. 17; 2000-56, s. 3(b).)

**Editor's Note.** — This section was formerly numbered 143B-437A. It was renumbered as this section pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Session Laws 1996, Second Extra Session, c.

18, s. 26.5 (b) was codified as subsection (c1) of this section at the direction of the Revisor of Statutes.

**Effect of Amendments.** — Session Laws 2000-56, s. 3(b), effective July 1, 2000, and applicable to funds appropriated, grants awarded, or loans made on or after that date, added subdivision (a)(6).

§ **143B-437.02:** Reserved for future codification purposes.

### § **143B-437.03. Allocation of economic development responsibilities.**

The Economic Development Board created in G.S. 143B-434 shall coordinate economic development efforts among the various agencies and entities, including those created by executive order of the Governor, that receive economic development appropriations and the Board shall recommend to the Governor and to the General Assembly the assignment of key responsibilities for different aspects of economic development. The Board shall recommend to the Governor and to the General Assembly resource allocation and planning designed to encourage each agency to focus on its area of primary responsibility and not diffuse its resources by conducting activities assigned to other agencies. (1993, c. 321, s. 313(e); 1997-456, s. 27.)

**Editor's Note.** — This section was formerly numbered 143B-437C. It was renumbered as this section pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to

renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

### § **143B-437.04. Community development block grants.**

(a) The Department of Commerce shall adopt guidelines for the awarding of Community Development Block Grants to ensure that:

- (1) No local match is required for grants awarded for projects located in enterprise tier one areas as defined in G.S. 105-129.3.
- (2) To the extent practicable, priority consideration for grants is given to projects located in enterprise tier one areas as defined in G.S. 105-129.3 or in development zones that have met the conditions of subsection (b) of this section.

(b) In order to qualify for the benefits of this section, after an area is designated a development zone under G.S. 105-129.3A, the governing body of

the city in which the zone is located must adopt a strategy to improve the zone and establish a development zone committee to oversee the strategy. The strategy and the committee must conform with requirements established by the Secretary of Commerce. (1996, 2nd Ex. Sess., c. 13, s. 3.6; 1997-456, s. 27; 1998-55, s. 3.)

**Editor's Note.** — This section was formerly numbered 143B-437D. It was renumbered as this section pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sec-

tions having a number or letter designation that is incompatible with the General Assembly's computer database.

**Legal Periodicals.** — See Legislative Survey, 21 Campbell L. Rev. 323 (1999).

## § 143B-437.05. Regional Development.

The Department of Commerce shall review the Economic Development Board's annual report on economic development to evaluate the progress of development in each of the economic regions defined by the Board in its Comprehensive Strategic Economic Development Plan. In its recruitment and development work, the Department shall strive for balance and equality among the economic regions and shall use its best efforts to locate new industries in the less developed areas of the State. (1996, 2nd Ex. Sess., c. 13, s. 3.10; 1997-456, s. 27.)

**Editor's Note.** — This section was formerly numbered 143B-437E. The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1996, Second Extra Session, c. 13, s. 3.10, having been 143B-437D. This section was renumbered as 143B-

437.05 pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

### Part 2A. Community Development Council.

## § 143B-437.1. Community Development Council — creation; powers and duties.

There is hereby created the Community Development Council to be located in the Department of Commerce. The Community Development Council shall have the following functions and duties:

- (1) To advise the Secretary of Commerce with respect to promoting and assisting in the orderly development of North Carolina counties and communities.
- (2) To advise the Secretary of Commerce with respect to the type and effectiveness of planning and management services provided to local government.
- (3), (4) Repealed by Session Laws 1977, c. 198, s. 13.
- (5) The Council shall consider and advise the Secretary of Commerce upon any matter the Secretary may refer to it. (1973, c. 1262, s. 48; 1977, c. 198, ss. 13, 14; c. 771, ss. 4, 8; 1989, c. 727, ss. 199, 200; c. 751, ss. 7(33), 8(19); 1991 (Reg. Sess., 1992), c. 959, s. 58.)

**Editor's Note.** — This Part is former Part 11 of Article 7 (§§ 143B-305 through 143B-307), as recodified by Session Laws 1989, c. 727, s. 199. Where appropriate, the historical citations

to the sections in the former Part have been added to corresponding sections in the Part as rewritten and recodified.

**§ 143B-437.2. Community Development Council — members; chairman; selection; removal; compensation; quorum; services.**

(a) The Community Development Council shall consist of 11 members appointed by the Governor. The composition of the Council shall be as follows: one member who shall be a local government official, one member who shall be the Executive Secretary of the League of Municipalities, one member who shall be the Executive Secretary of the County Commissioners Association, one member who shall represent industry, one member who shall represent labor, and six members at large.

(b) The Governor shall designate one member of the Council to serve as Chairman at the pleasure of the Governor.

(c) The initial members of the Council other than those members serving in an ex officio capacity shall be appointed to serve for terms of four years and until their successors are appointed and qualify. Any appointment to fill a vacancy on the Council created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term.

(d) The Governor shall have the power to remove any member of the Council from office in accordance with the provisions of G.S. 143B-16 of the Executive Organization Act of 1973.

(e) Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

(f) A majority of the Council shall constitute a quorum for the transaction of business.

(g) All clerical and other services required by the Council shall be supplied by the Secretary of Commerce. (1973, c. 1262, s. 49; 1977, c. 198, s. 14; c. 771, ss. 4, 9; 1989, c. 727, ss. 199, 201; c. 751, s. 8(20); 1991 (Reg. Sess., 1992), c. 959, s. 59.)

**§ 143B-437.3. Community Development Council — meetings.**

The Community Development Council shall meet at least semiannually and may hold special meetings at any time and place within the State at the call of the chairman or upon the written request of at least a majority of the members. (1973, c. 1262, s. 50; 1977, c. 198, s. 14; 1989, c. 727, s. 199.)

Part 2B. Reserved.

§§ 143B-437.4 through 143B-437.11: Reserved for future codification purposes.

Part 2C. Reserved.

§§ 143B-437.12 through 143B-437.19: Reserved for future codification purposes.

Part 2D. North Carolina Rural Redevelopment Authority.

**§ 143B-437.20. Short title and intent.**

This Part is the “North Carolina Rural Redevelopment Authority Act”. The purpose of the North Carolina Redevelopment Authority is to finance rural

economic development projects and invest in rural business development. (2000-148, s. 1.)

**Editor's Note.** — Session Laws 2000-148, s. 7, made this Part effective July 1, 2000.

## § 143B-437.21. Definitions.

The following definitions apply in this Part:

- (1) Authority. — The North Carolina Rural Redevelopment Authority.
- (2) Board. — The Board of Directors of the Authority.
- (3) Development project. — Any investment that enables or makes more likely the location or expansion of industrial and commercial businesses in rural counties, which may include sites and industrial parks or centers, together with improvements, such as shell buildings and internal infrastructure.
- (4) Financial institution. — A business that is (i) a bank holding company, as defined in the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841, et seq., or its wholly owned subsidiary, (ii) registered as a broker-dealer under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a, et seq., or its wholly owned subsidiary, (iii) an investment company as defined in the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1, et seq., whether or not it is required to register under that act, (iv) a small business investment company as defined in the Small Business Investment Act of 1958, 15 U.S.C. §§ 661, et seq., (v) a pension or profit-sharing fund or trust, or (vi) a bank, savings institution, trust company, financial services company, or insurance company. The term does not include, however, a business that does not generally market its services to the public and is controlled by a business that is not a financial institution.
- (5) Intermediate-term loan. — A loan whose term does not exceed three years.
- (6) Regional partnership. — Any of the following:
  - a. The Western North Carolina Regional Economic Development Commission created in G.S. 158-8.1.
  - b. The Northeastern North Carolina Regional Economic Development Commission created in G.S. 158-8.2.
  - c. The Southeastern North Carolina Regional Economic Development Commission created in G.S. 158-8.3.
  - d. The Global TransPark Development Commission created in G.S. 158-33.
  - e. The Carolinas Partnership, Inc.
  - f. The Research Triangle Regional Partnership.
  - g. The Piedmont Triad Partnership.
- (7) Revenues. — The receipts of the Authority during an accounting period, including interest and dividends on investments, realized capital gains, income from lending and consulting activities, rent or lease income, appropriations from the General Assembly, grants from the Golden L.E.A.F. (Long-term Economic Advancement Foundation), Inc., and grants and gifts from public and private entities to further the purposes of the Authority.
- (8) Rural county. — A county in North Carolina with a density of fewer than 200 people per square mile based on the most recent United States decennial census.
- (9) Small business investment company. — A small business investment company as defined in the Small Business Investment Act of 1958, 15 U.S.C. §§ 661, et seq. (2000-148, s. 1.)

**Editor's Note.** — Session Laws 2000-149, s. 3, directs each regional partnership, as defined in G.S. 143B-437.21, with the assistance of the North Carolina Rural Economic Development Center, to study the information technology infrastructure and information technology needs of each county within its particular region. Each study is to include an inventory of existing information technology infrastructure, an inventory of information technology needs, an analysis of how the information technology needs affect industrial and business recruit-

ment, and recommendations that address the information technology needs of each region. In conducting the studies required by this section, the regional partnerships are to consider the findings of the Connect NC study. The regional partnerships may contract with the North Carolina Rural Economic Development Center as needed to undertake these studies. No later than November 1, 2001, each regional partnership is to report the results of its study, including any legislative proposals, to the Joint Select Committee on Information Technology.

## § 143B-437.22. Creation of Authority and Board.

(a) **Creation.** — The North Carolina Rural Redevelopment Authority is created as a body corporate and politic with the powers and jurisdiction as provided under this Part or any other law. The Authority is a State agency created to perform essential governmental and public functions. The Authority is located within the Department of Commerce, but exercises all of its powers, including the power to employ, direct, and supervise all personnel, independently of the Secretary of Commerce and, notwithstanding any other provision of law, is subject to the direction and supervision of the Secretary of Commerce only with respect to the management functions of coordinating and reporting.

(b) **Board of Directors.** — The Authority is governed by a Board of Directors, which consists of the following 11 members:

- (1) Three members appointed by the Governor, two of whom must be representatives of financial institutions and one of whom must be an elected official representing a local government of or in a rural county.
- (2) Three members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121, one of whom must be a representative of a regional partnership with a predominantly rural constituency and one of whom must be a representative of a financial institution.
- (3) Three members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121, two of whom must be representatives of financial institutions.
- (4) The Secretary of Commerce, who shall serve *ex officio*.
- (5) The chief executive officer of the Authority.

(c) **Oath.** — As the holder of an office, each member of the Board must take the oath required by Section 7 of Article VI of the North Carolina Constitution before assuming the duties of a Board member.

(d) **Selection Criteria.** — In making appointments to the Board, the Governor and the General Assembly shall give consideration to the geographical representation of the State. In addition, members appointed representing financial institutions ideally would be experienced in areas such as commercial lending and commercial real estate lending, public finance, and economic development; work assignments or experiences in rural counties also would be desirable.

(e) **Terms.** — The term of office of a member of the Board is three years, except that the Governor shall designate two of the initial members appointed under subdivision (b)(1) of this section to serve a term of one year, and the General Assembly shall designate one of the initial members appointed under subdivision (b)(2) of this section and one of the initial members appointed under subdivision (b)(3) of this section to serve a term of two years. The term of office for the chief executive officer of the Authority shall coincide with the officer's employment by the Board.

(f) Chair and Vice-Chair of the Board. — The Governor shall designate one of the members appointed by the Governor as the Chair of the Board. The Governor shall convene the first meeting of the Board, at which time the members of the Board shall elect from their membership a Vice-Chair of the Board.

(g) Vacancies. — All members of the Board shall remain in office until their successors are appointed and qualify. A vacancy in an appointment made by the Governor shall be filled by the Governor for the remainder of the unexpired term. A vacancy in an appointment made by the General Assembly shall be filled in accordance with G.S. 120-122. A person appointed to fill a vacancy must qualify in the same manner as a person appointed for a full term.

(h) Removal of Board Members. — The Governor may remove any member of the Board for misfeasance, malfeasance, or nonfeasance in accordance with G.S. 143B-13(d). The Governor or the person who appointed a member of the Board may remove the member for using improper influence in accordance with G.S. 143B-13(c).

(i) Organization of the Board. — The Board shall adopt bylaws with respect to the calling of meetings, quorums, voting procedures, the keeping of records, and other organizational and administrative matters as the Board may determine. A quorum shall consist of a majority of the members of the Board. No vacancy in the membership of the Board shall impair the right of a quorum to exercise all rights and to perform all the duties of the Board and the Authority.

(j) Compensation of the Board. — No part of the revenues or assets of the Authority shall inure to the benefit of or be distributable to the members of the Board or officers or other private persons. The members of the Board other than the chief executive officer shall receive no salary for their services but may receive per diem and allowances in accordance with G.S. 138-5.

(k) Treasurer. — The Board shall select the Authority's treasurer. The Board shall require a surety bond of the appointee in the amount as the Board may fix, and the premium shall be paid by the Authority as a necessary expense of the Authority.

(l) Chief Executive Officer and Other Employees. — The Board shall appoint a full-time professional chief executive officer, whose salary shall be fixed by the Board, to serve at its pleasure. The chief executive officer or a person designated by the chief executive officer shall appoint, employ, dismiss, and, within the limits of available funding, fix the compensation of other employees as considered necessary.

(m) Office. — The Board shall establish an office for the transaction of the Authority's business at the place the Board finds advisable or necessary to implement the provisions of this Part. (2000-148, s. 1.)

### § 143B-437.23. Powers of the Authority.

(a) The Authority has all of the powers necessary to execute the provisions of this Part, including at least the following powers:

- (1) The powers of a corporate body, including the power to sue and be sued, to make contracts, to adopt and use a common seal, and to alter the adopted seal as needed.
- (2) To finance the purchase of real or personal property.
- (3) To contract and enter into agreements with the State, local governments, other authorities of North Carolina, and other states for the interchange of business.
- (4) To create and operate agencies and departments needed to implement this Part.
- (5) To pay all necessary costs and expenses in the formation, organization, administration, and operation of the Authority.

- (6) To apply for, accept, and administer grants of money from any federal agency, from the State or its political subdivisions, or from any other public or private sources available, and to expend the money in accordance with the requirements imposed by the donor.
  - (7) To adopt, alter, or repeal its own bylaws or rules implementing the provisions of this Part.
  - (8) To execute financing agreements, security documents, and other instruments necessary in exercising its power under this Part.
  - (9) To fix, charge, collect, pledge, or assign revenues of the Authority.
  - (10) To employ consulting engineers, architects, attorneys, real estate counselors, appraisers, and other consultants and employees as may be required in the judgment of the Board and to fix and pay their compensation from funds available to the Authority.
  - (11) To provide consulting and advisory services to government entities and to private, nonprofit entities.
  - (12) To procure and maintain adequate insurance or otherwise provide for adequate protection to indemnify the Authority and its officers, directors, agents, employees, adjoining property owners, or the general public against loss or liability resulting from any act or omission by or on behalf of the Authority.
  - (13) To exercise the powers granted counties and cities under G.S. 158-7.1(a).
  - (14) With the approval of any unit of local government, to use officers, employees, agents, and facilities of the unit of local government for the purposes and upon the terms as may be mutually agreeable.
  - (15) To receive and use appropriations from the State, including an appropriation from the proceeds of State general obligation bonds or notes.
  - (16) To create and administer the Rural Investment Fund and the Long-Term Rural Development Fund, as provided in this Part.
  - (17) To invest in securities of a small business investment company or in a limited partnership interest in a partnership that invests principally in companies in rural counties.
  - (18) To act as a regrantee agency for government grants specifically designated for that purpose.
- (b) To execute the powers provided in subsection (a) of this section, the Board shall determine the policies of the Authority by majority vote of the members of the Board present and voting, a quorum having been established. Once a policy is determined, the Board shall communicate it to the chief executive officer, who has the exclusive authority to execute the policy of the Authority. No member of the Board is authorized to give operational directives to any employee of the Authority other than the chief executive officer.
- (c) The Authority does not have the power of eminent domain or the power to levy any tax. (2000-148, s. 1.)

**§§ 143B-437.24, 143B-437.25:** Reserved for future codification purposes.

### **§ 143B-437.26. Authority funds.**

Funds of the Authority may be paid out only upon warrants signed by the treasurer or assistant treasurer of the Authority and countersigned by the Chair, the acting Chair, or the chief executive officer. No warrants may be drawn or issued disbursing any of the funds of the Authority except for a purpose authorized by this Part and unless the account or expenditure has

been audited and approved by the Authority or its chief executive officer. (2000-148, s. 1.)

### § 143B-437.27. Rural Investment Fund.

The Authority may create a revolving loan fund to be called the Rural Investment Fund. The Authority shall use monies in the Investment Fund only to make intermediate-term loans to government entities and to private, nonprofit entities for self-liquidating projects, such as shell buildings, in rural counties. The Authority shall adopt rules establishing interest rates, maximum loans, security requirements, eligibility standards, application procedures, award criteria, and award schedules, and otherwise providing for the administration of the Investment Fund. The Authority shall give priority to applications from regional partnerships. (2000-148, s. 1.)

### § 143B-437.28. Long-Term Rural Development Fund.

(a) The Authority may create a fund to be known as the Long-Term Rural Development Fund. The Authority may invest and reinvest the assets of the Development Fund.

(b) The income derived from the investment or deposit of the Development Fund shall be used for the following purposes:

- (1) To pay the administrative expenses of the Authority.
- (2) To make intermediate-term loans and longer-term loans to government entities and to private, nonprofit entities for self-liquidating projects, such as shell buildings, in rural counties.
- (3) To provide for the development of property for industrial sites and industrial parks in rural counties, including any of the following:
  - a. Providing water, sewer, gas, or electrical distribution lines or equipment for an industrial site or industrial park.
  - b. Providing road or railroad improvements for an industrial site or industrial park.
  - c. Providing fiber optic or coaxial cable, towers, and other infrastructure items to accommodate high-speed Internet access.
  - d. Providing air or water pollution control facilities.

(c) The Authority shall adopt rules establishing interest rates, maximum loans, security requirements, eligibility standards, application procedures, award criteria, and award schedules, and otherwise providing for the administration of the Development Fund. The Authority shall give priority to applications from regional partnerships. (2000-148, s. 1.)

### § 143B-437.29. Contracting with minority businesses.

The Authority must comply with the policies regarding contracting with minority businesses as set out in G.S. 143-48, 143-128.2, and 143-135.5 and with any other applicable laws. The Authority is subject to Executive Order Number 150, issued April 20, 1999, regarding contracting with historically underutilized businesses. (2000-148, s. 1; 2001-496, s. 3.4.)

**Editor's Note.** — Session Laws 2001-496, s. 13.1 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-496, s. 3.4, effective January 1, 2002, and

applicable to construction projects for which bids or proposals are solicited on or after that date, substituted "143-128.2" for "143-128(f)."

### § 143B-437.30. Conflicts of interest.

If any member, officer, or employee of the Authority is interested either directly or indirectly, or is an officer or employee of or has an ownership interest in any firm or corporation, not including units of local government, interested directly or indirectly, in any contract with the Authority, the member, officer, or employee must disclose the interest to the Board, which must set forth the disclosure in the minutes of the Board. The member, officer, or employee having an interest may not participate on behalf of the Authority in the authorization of any contract. (2000-148, s. 1.)

### § 143B-437.31. Cooperation by other State agencies.

All State officers and agencies shall cooperate and may render services where appropriate to the Authority within their respective functions as may be requested by the Authority. (2000-148, s. 1.)

### § 143B-437.32. Annual and quarterly reports.

The Authority must, promptly following the close of each fiscal year, submit an annual report of its activities for the preceding year to the Governor and the General Assembly. Each report must be accompanied by an audit of its books and accounts. The audit must be conducted by the State Auditor. The costs of all audits shall be paid from funds of the Authority.

Each annual report must be accompanied by data indicating the geographical distribution of development projects funded directly or indirectly by the Authority. Every three years, the Authority shall provide to the Governor and to the General Assembly an analysis of the data for the previous three-year period showing the extent to which the funding of development projects has been distributed among the rural counties of every geographical region in an equitable manner.

The Authority must submit quarterly reports to the Joint Legislative Commission on Governmental Operations. The reports must summarize the Authority's activities during the quarter and contain any information about the Authority's activities that is requested by the Commission. (2000-148, s. 1.)

### § 143B-437.33. Dissolution.

Whenever the Board by resolution determines that the purposes for which the Authority was formed have been substantially fulfilled and that all obligations incurred by the Authority have been fully paid or satisfied, the Board may declare the Authority dissolved. On the effective date of the resolution, the title to all funds and other property owned by the Authority at the time of the dissolution vests in the State and possession of the funds and other property must be delivered to the State. (2000-148, s. 1.)

§§ 143B-437.34 through 143B-347.39: Reserved for future codification purposes.

Part 2E. North Carolina Rural Internet Access Authority

(Repealed effective December 1, 2003).

### § 143B-437.40. (Repealed effective December 1, 2003) Short title and intent.

This Part is the "North Carolina Rural Internet Access Authority Act." The General Assembly finds as follows:

**Part 2E has a postponed repeal date. See notes.**

- (1) Access to computers and the Internet, along with the ability to effectively use these technologies, are becoming increasingly important for full participation in America's economic, political, and social life.
- (2) Affordable, high-speed Internet access is a key competitive factor for economic development and quality of life in the New Economy of the global marketplace.
- (3) In the digital age, universal connectivity at affordable prices is a necessity for business transactions, education and training, health care, government services, and the democratic process.
- (4) Unequal access to computer technology and Internet connectivity by income, educational level and/or geography could deepen and reinforce the divisions that exist in our society.
- (5) The intent of the Rural Internet Access Authority is to close this digital divide for the citizens of North Carolina. (2000-149, s. 1.)

**Editor's Note.** — Session Laws 2000-149, s. 3, directs each regional partnership, as defined in G.S. 143B-437.21, with the assistance of the North Carolina Rural Economic Development Center, to study the information technology infrastructure and information technology needs of each county within its particular region. Each study is to include an inventory of existing information technology infrastructure, an inventory of information technology needs, an analysis of how the information technology needs affect industrial and business recruitment, and recommendations that address the information technology needs of each region. In conducting the studies required by this section, the regional partnerships are to consider the findings of the Connect NC study. The regional partnerships may contract with the North

Carolina Rural Economic Development Center as needed to undertake these studies. No later than November 1, 2001, each regional partnership is to report the results of its study, including any legislative proposals, to the Joint Select Committee on Information Technology.

Session Laws 2000-149, s. 4, provides that the act does not obligate the General Assembly to appropriate funds.

Session Laws 2000-149, s. 5, makes Part 2E effective August 2, 2000. The North Carolina Rural Internet Access Authority created in the act is dissolved effective December 31, 2003. The act is repealed effective December 31, 2003. Part 2E of Article 10 of Chapter 143B of the General Statutes and G.S. 120-123(73), as enacted by the act, are repealed effective December 1, 2003.

**§ 143B-437.41. (Repealed effective December 1, 2003) Definitions.**

The following definitions apply in this Part:

- (1) Authority. — The North Carolina Rural Internet Access Authority.
- (2) Commission. — The governing body of the Authority.
- (3) High-speed broadband Internet access. — Internet access with transmission speeds of at least 128 kilobits per second for residential customers and at least 256 kilobits per second for business customers.
- (4) Regional partnership. — Defined in G.S. 143B-437.21.
- (5) Rural county. — A county with a density of fewer than 200 people per square mile based on the 1990 United States decennial census. (2000-149, s. 1.)

**Editor's Note.** — For repeal of Part 2E, and dissolution of the North Carolina Rural Internet Access Authority, see the editor's note under § 143B-437.40.

**§ 143B-437.42. (Repealed effective December 1, 2003) Creation of Authority and Commission.**

- (a) Creation. — The North Carolina Rural Internet Access Authority is

**Part 2E has a postponed repeal date. See notes.**

created within the Department of Commerce and, notwithstanding any other provision of law, is subject to the direction and supervision of the Secretary of Commerce only with respect to the management functions of coordinating and reporting. These functions of the Secretary of Commerce are ministerial and shall be performed only pursuant to the direction and policy of the Commission.

The purpose of the Authority is to manage, oversee, and monitor efforts to provide rural counties with high-speed broadband Internet access. The Authority shall also serve as the central rural Internet access policy planning body of the State and shall communicate and coordinate with State, regional, and local agencies and private entities in order to implement a coordinated rural Internet access policy.

(b) Commission. — The Authority is governed by a Commission that consists of 21 members, six members appointed by the Governor, six members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121, six members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121, and the following three ex officio, voting members: the State's Chief Information Officer, the president of the North Carolina Rural Economic Development Center, and the Secretary of Commerce.

It is the intent of the General Assembly that the appointing authorities, in making appointments, shall appoint members who represent the geographic, gender, and racial diversity of the State, members who represent rural counties, members who represent regional partnerships, and members who represent the communications industry, which may include local telephone exchange companies, rural telephone cooperatives, Internet service providers, commercial wireless communications carriers, and other communications businesses.

(c) Oath. — As the holder of an office, each member of the Commission must take the oath required by Section 7 of Article VI of the North Carolina Constitution before assuming the duties of a Commission member.

(d) Terms; Commencement; Staggering. — Except as provided in subsection (f) of this section, all terms of office shall commence on August 1 of the year the appointment is made. The appointing officers shall designate one-half of their appointees to serve one-year terms; members may serve up to four consecutive one-year terms. The appointing officers shall designate their remaining appointees to serve three-year terms; members may serve up to two consecutive three-year terms.

(e) Chair. — The Governor shall designate one of the members appointed by the Governor as the Chair of the Commission. The Governor shall convene the first meeting of the Commission.

(f) Vacancies. — All members of the Commission shall remain in office until their successors are appointed and qualify. A vacancy in an appointment made by the Governor shall be filled by the Governor for the remainder of the unexpired term. A vacancy in an appointment made by the General Assembly shall be filled in accordance with G.S. 120-122. A person appointed to fill a vacancy must qualify in the same manner as a person appointed for a full term.

(g) Removal of Commission Members. — The Governor may remove any member of the Commission for misfeasance, malfeasance, or nonfeasance in accordance with G.S. 143B-13(d). The Governor or the person who appointed a member may remove the member for using improper influence in accordance with G.S. 143B-13(c).

**Part 2E has a postponed repeal date. See notes.**

(h) Compensation of the Commission. — No part of the revenues or assets of the Authority shall inure to the benefit of or be distributable to the members of the Commission or officers or other private persons. The members of the Commission shall receive no salary for their services but may receive per diem and allowances in accordance with G.S. 138-5.

(i) Staff. — The North Carolina Rural Economic Development Center, Inc., shall provide administrative and professional staff support for the Authority under contract.

(j) Conflicts of Interest. — Members of the Authority shall comply with the provisions of G.S. 14-234 prohibiting conflicts of interest. In addition, if any member, officer, or employee of the Authority is interested either directly or indirectly, or is an officer or employee of or has an ownership interest in any firm or corporation, not including units of local government, interested directly or indirectly, in any contract with the Authority, the member, officer, or employee must disclose the interest to the Commission, which must set forth the disclosure in the minutes of the Commission. The member, officer, or employee having an interest may not participate on behalf of the Authority in the authorization of any contract. (2000-149, s. 1; 2001-171, s. 1.)

**Editor's Note.** — For repeal of Part 2E, and dissolution of the North Carolina Rural Internet Access Authority, see the editor's note under § 143B-437.40.

**Effect of Amendments.** — Session Laws 2001-171, s. 1, effective June 7, 2001, substituted "president" for "chair" in the first paragraph of subsection (b).

**§ 143B-437.43. (Repealed effective December 1, 2003) Powers, duties, and goals of the Authority.**

- (a) Powers. — The Authority shall have the following powers:
- (1) To employ, contract with, direct, and supervise all personnel and consultants.
  - (2) To apply for, accept, and utilize grants, contributions, and appropriations in order to carry out its duties and goals as defined in this Part.
  - (3) To enter into contracts and to provide support and assistance to local governments, nonprofit entities, and regional partnerships, in carrying out its duties and goals under this Part.
  - (4) To review and recommend changes in all laws, rules, programs, and policies of this State or any agency or subdivision thereof to further the goals of rural Internet access.
- (b) Duties. — The Authority shall have the following duties:
- (1) To develop and recommend to the Governor, the General Assembly, and the North Carolina Rural Redevelopment Authority a plan to provide rural counties with high-speed broadband Internet access.
  - (2) To propose funding that may be needed from the North Carolina Rural Redevelopment Authority established in Part 2D of this Article and from other appropriate sources for incentives for the private sector to make necessary investments to achieve the Authority's goals and objectives.
  - (3) To set specific targets and milestones to achieve the goals and objectives set out in subsection (c) of this section.
- (c) Goals. — The goals and objectives of the Authority are:
- (1) Local dial-up Internet access provided from every telephone exchange within one year.
  - (2) High-speed Internet access available to every citizen of North Carolina within three years, at prices in rural counties that are comparable to prices in urban North Carolina.

**Part 2E has a postponed repeal date. See notes.**

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- (3) Two model Telework Centers in either enterprise tier one or enterprise tier two area established by January 1, 2002. To the extent practicable, the Centers should be established in existing facilities.
  - (4) Significant increases in ownership of computers, related web devices, and Internet subscriptions promoted throughout North Carolina.
  - (5) Accurate, current, and complete information provided through the Internet to citizens about the availability of present telecommunications and Internet services with periodic updates on the future deployment of new telecommunications and Internet services.
  - (6) Development of government Internet applications promoted to make citizen interactions with government agencies and services easier and more convenient and to facilitate the delivery of more comprehensive programs, including training, education, and health care.
  - (7) Open technology approaches employed to encourage all potential providers to participate in the implementation of high-speed Internet access with no technology bias.
  - (8) To coordinate activities, conduct and sponsor research, and recommend and advocate actions, including regulatory and legislative actions to achieve its goals and objectives.
- (d) Limitations. — The Authority does not have the power of eminent domain or the power to levy any tax.
- (e) Reports. — The Authority must submit quarterly reports to the Governor, the Joint Select Committee on Information Technology, and the Joint Legislative Commission on Governmental Operations. The reports must summarize the Authority's activities during the quarter and contain any information about the Authority's activities that is requested by the Governor, the Committee, or the Commission. (2000-149, s. 1.)

**Editor's Note.** — For repeal of Part 2E, and Internet Access Authority, see the editor's note dissolution of the North Carolina Rural under § 143B-437.40.

**Part 3. Labor Force Development.**

§ **143B-438:** Repealed by Session Laws 1981, c. 380, s. 1.

**Part 3A. Employment and Training Act of 1985.**

§§ **143B-438.1 through 143B-438.6:** Repealed by Session Laws 1999-237, s. 16.15(a), effective July 1, 1999.

**Editor's Note.** — This Part was former Part through 143B-344.15), as rewritten and 27 of Article 7 of Chapter 143B (§§ 143B-344.11 recodified by Session Laws 1989, c. 727, s. 202.

§§ **143B-438.7 through 143B-438.9:** Reserved for future codification purposes.

**Part 3B. Workforce Development.**

§ **143B-438.10. Commission on Workforce Development.**

(a) Creation and Duties. — There is created within the Department of

Commerce the North Carolina Commission on Workforce Development. The Commission shall have the following powers and duties:

- (1) To develop strategies to produce a skilled, competitive workforce that meets the needs of the State's changing economy.
- (2) To advise the Governor, the General Assembly, State and local agencies, and the business sector regarding policies and programs to enhance the State's workforce.
- (3) To coordinate and develop strategies for cooperation between the academic, governmental, and business sectors.
- (4) To establish, develop, and provide ongoing oversight of the "One-Stop Delivery System" for employment and training services in the State.
- (5) To develop a unified State plan for workforce training and development.
- (6) To review the plans and programs of agencies, boards, and organizations operating federally funded or State-funded workforce development programs for effectiveness, duplication, fiscal accountability, and coordination.
- (7) To develop and continuously improve performance measures to assess the effectiveness of workforce training and employment in the State.
- (8) To submit to the Governor and to the General Assembly by April 1, 2000, and biennially thereafter, a comprehensive Workforce Development Plan that shall include at least the following:
  - a. Goals and objectives for the biennium.
  - b. An assessment of current workforce programs and policies.
  - c. An assessment of the delivery of employment and training services to special populations, such as youth and dislocated workers.
  - d. Recommendations for policy, program, or funding changes.
- (9) To serve as the State's Workforce Investment Board for purposes of the federal Workforce Investment Act of 1998.

(b) Membership; Terms. — The Commission on Workforce Development shall consist of 38 members appointed as follows:

- (1) By virtue of their offices, the following department and agency heads or their respective designees shall serve on the Commission: the Secretary of the Department of Health and Human Services, the Chair of the Employment Security Commission, the Superintendent of Public Instruction, the President of the Community Colleges System Office, the Commissioner of the Department of Labor, and the Secretary of the Department of Commerce.
- (2) The Governor shall appoint 32 members as follows:
  - a. Six members representing public, postsecondary, and vocational education.
  - b. Two members representing community-based organizations.
  - c. Six members representing labor.
  - d. Eighteen members representing business and industry.
- (3) The terms of the members appointed by the Governor shall be for four years.

(c) Appointment of Chair; Meetings. — The Governor shall appoint the Chair of the Commission from among the business and industry members, and that person shall serve at the pleasure of the Governor. The Commission shall meet at least quarterly upon the call of the Chair.

(d) Staff; Funding. — The clerical and professional staff to the Commission shall be provided by the Department of Commerce. Funding for the Commission shall derive from State and federal resources as allowable and from the partner agencies to the Commission. Members of the Commission shall receive necessary travel and subsistence in accordance with State law. (1999-237, s. 16.15(b).)

**Editor's Note.** — Session Laws 1999-237, s. 30.5, made this Part effective July 1, 1999.

Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999'."

Session Laws 1999-237, s. 16.15(c), provides that the Commission on Workforce Preparedness appointed in accordance with Executive Order #4 of March 10, 1993, shall continue to serve as the State's Commission on Workforce Development until January 1, 2001, or until appointments to the North Carolina Commission on Workforce Development created by this section are made consistent with the provisions of G.S. 143B-438.10, whichever comes first.

Session Laws 1999-237, s. 30.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have

effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 30.4, contains a severability clause.

Session Laws 1999-395, ss. 14.1(a) through (g), created a Legislative Study Commission on Job Training Programs so as to review State and federally funded job training programs and services currently in existence to determine the feasibility of eliminating or consolidating those which are duplicative, inefficient, or ineffective in carrying out their purposes and activities. The act also outlined provisions concerning membership composition, Commission meetings and expenses, professional staff, and the powers and duties of the Commission.

### § 143B-438.11. Local Workforce Development Boards.

(a) Duties. — Local Workforce Development Boards shall have the following powers and duties:

- (1) To develop policy and act as the governing body for local workforce development.
- (2) To provide planning, oversight, and evaluation of local workforce development programs, including the local One-Stop Delivery System.
- (3) To provide advice regarding workforce policy and programs to local elected officials, employers, education and employment training agencies, and citizens.
- (4) To develop a local plan in coordination with the appropriate community partners to address the workforce development needs of the service area.
- (5) To develop linkages with economic development efforts and activities in the service area and promote cooperation and coordination among public organizations, education agencies, and private businesses.
- (6) To review local agency plans and grant applications for workforce development programs for coordination and achievement of local goals and needs.
- (7) To serve as the Workforce Investment Board for the designated substate area for the purpose of the federal Workforce Investment Act of 1998.

(b) Members. — Members of local Workforce Development Boards shall be appointed by local elected officials in accordance with criteria established by the Governor and with provisions of the federal Workforce Investment Act. The local Workforce Development Boards shall have a majority of business members and shall also include representation of workforce and education providers, labor organizations, community-based organizations, and economic development boards as determined by local elected officials. The Chairs of the local Workforce Development Boards shall be selected from among the business members. (1999-237, s. 16.15(b).)

### § 143B-438.12. Federal Program Administration.

(a) Federal Workforce Investment Act. — In accordance with the federal Workforce Investment Act, the Commission on Workforce Development shall develop a Five-Year Strategic Plan to be submitted to the U.S. Secretary of

Labor. The Strategic Plan shall describe the workforce development activities to be undertaken in the State to implement the federal Workforce Investment Act and how special populations shall be served.

(b) Other Workforce Grant Applications. — The Commission on Workforce Development may submit grant applications for workforce development initiatives and may manage the initiatives and demonstration projects. (1999-237, s. 16.15(b).)

### § 143B-438.13. Employment and Training Grant Program.

(a) Employment and Training Grant Program. — There is established in the Department of Commerce, Division of Employment and Training, an Employment and Training Grant Program. Grant funds shall be allocated to local Workforce Development Boards for the purposes of enabling recipient agencies to implement local employment and training programs in accordance with existing resources, local needs, local goals, and selected training occupations. The State program of workforce performance standards shall be used to measure grant program outcomes.

(b) Use of Grant Funds. — Local agencies may use funds received under this section for the purpose of providing services, such as training, education, placement, and supportive services. Local agencies may use grant funds to provide services only to individuals who are (i) 18 years of age or older and meet the federal Workforce Investment Act, title I adult eligibility definitions, or meet the federal Workforce Investment Act, title I dislocated worker eligibility definitions, or (ii) incumbent workers with annual family incomes at or below two hundred percent (200%) of poverty guidelines established by the federal Department of Health and Human Services.

(c) Allocation of Grants. — The Department of Commerce may reserve and allocate up to ten percent (10%) of the funds available to the Employment and Training Grant Program for State and local administrative costs to implement the Program. The Division of Employment and Training shall allocate employment and training grant funds to local Workforce Development Boards serving federal Workforce Investment Act local workforce investment areas based on the following formula:

- (1) One-half of the funds shall be allocated on the basis of the relative share of the local workforce investment area's share of federal Workforce Investment Act, title I adult funds as compared to the total of all local areas adult shares under the federal Workforce Investment Act, title I.
- (2) One-half of the funds shall be allocated on the basis of the relative share of the local workforce investment area's share of federal Workforce Investment Act, title I dislocated worker funds as compared to the total of all local areas dislocated worker shares under the federal Workforce Investment Act, title I.
- (3) Local workforce investment area adult and dislocated shares shall be calculated using the current year's allocations to local areas under the federal Workforce Investment Act, title I.

(d) Reports and Coordination. — The Department of Commerce shall report quarterly to the Governor and to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the North Carolina Employment and Training Grant Program. The Department shall also provide a copy of these quarterly reports to the North Carolina Commission on Workforce Development.

(e) Nonreverting Funds. — Funds appropriated to the Department of Commerce for the Employment and Training Grant Program that are not expended at the end of the fiscal year shall not revert to the General Fund, but

shall remain available to the Department for the purposes established in this section. (1999-237, s. 16.15(b).)

#### Part 4. Credit Union Commission.

### § 143B-439. Credit Union Commission.

(a) There shall be created in the Department of Commerce a Credit Union Commission which shall consist of seven members. The members of the Credit Union Commission shall elect one of its members to serve as chairman of the Commission to serve for a term to be specified by the Commission. On the initial Commission three members shall be appointed by the Governor for terms of two years and three members shall be appointed by the Governor for terms of four years. Thereafter all members of the Commission shall be appointed by the Governor for terms of four years. The Governor shall appoint the seventh member for the same term and in the same manner as the other six members are appointed. In the event of a vacancy on the Commission the Governor shall appoint a successor to serve for the remainder of the term. Three members of the Commission shall be persons who have had three years' or more experience as a credit union director or in management of state-chartered credit unions. At least four members shall be appointed as representatives of the borrowing public and may be members of a credit union but shall not be employees of, or directors of any financial institution or have any interest in any financial institution other than as a result of being a depositor or borrower. No two persons on the Commission shall be residents of the same senatorial district. No person on the Commission shall be on a board of directors or employed by another type of financial institution. The Commission shall meet at least every six months, or more often upon the call of the chairman of the Credit Union Commission or any three members of the Commission. A majority of the members of the Commission shall constitute a quorum. The members of the Commission shall be reimbursed for expenses incurred in the performance of their duties under this Chapter as prescribed in G.S. 138-5. In the event that the composition of the Commission on April 30, 1979, does not conform to that prescribed in the preceding sentences, such composition shall be corrected thereafter by appropriate appointments as terms expire and as vacancies occur in the Commission; provided that no person shall serve on the Commission for more than two complete consecutive terms.

(b) The relationship between the Secretary of Commerce and the Credit Union Commission shall be as defined for a Type II transfer under this Chapter.

(c) The Credit Union Commission is hereby vested with full power and authority to review, approve, or modify any action taken by the Administrator of Credit Unions in the exercise of all powers, duties, and functions vested by law in or exercised by the Administrator of Credit Unions under the credit union laws of this State.

An appeal may be taken to the Commission from any finding, ruling, order, decision or the final action of the Administrator by any credit union which feels aggrieved thereby. Notice of such appeal shall be filed with the chairman of the Commission within 30 days after such finding, ruling, order, decision or other action, and a copy served upon the Administrator. Such notice shall contain a brief statement of the pertinent facts upon which such appeal is grounded. The Commission shall fix a date, time and place for hearing said appeal, and shall notify the credit union or its attorney of record thereof at least 30 days prior to

the date of said hearing. (1971, c. 864, s. 17; 1973, cc. 97, 1254; 1975, c. 709, ss. 4-6; 1977, c. 198, s. 26; 1979, c. 478, s. 3; 1989, c. 751, ss. 7(36), 8(22); 1991 (Reg. Sess., 1992), c. 959, s. 63.)

**Editor's Note.** — This section was formerly § 143A-181. It was recodified in this Article by Session Laws 1977, c. 198, s. 26.

## Part 5. North Carolina Board of Science and Technology.

§§ **143B-440, 143B-441:** Recodified as §§ 143B-426.30, 143B-426.31 by Session Laws 1985, c. 757, s. 179(c).

## Part 6. North Carolina Science and Technology Research Center.

### § 143B-442. Creation of Center.

There is hereby created the "North Carolina Science and Technology Research Center" at the Research Triangle. (1963, c. 846, s. 1; 1967, c. 69; 1977, c. 198, s. 26.)

**Editor's Note.** — This section was formerly § 143-374. It was recodified in this Article by Session Laws 1977, c. 198, s. 26.

### § 143B-443. Administration by Department of Commerce.

The activities of the North Carolina Science and Technology Research Center will be administered by the Department of Commerce. (1963, c. 846, s. 2; 1967, c. 69; 1977, c. 198, ss. 3, 4, 26; 1979, c. 668, s. 3; 1989, c. 751, s. 7(37); 1991 (Reg. Sess., 1992), c. 959, s. 64.)

**Editor's Note.** — This section was formerly § 143-375. It was recodified in this Article by Session Laws 1977, c. 198, s. 26.

### § 143B-444. Acceptance of funds.

The North Carolina Science and Technology Research Center is authorized and empowered to accept funds from private sources and from governmental and institutional agencies to be used for construction, operation and maintenance of the Center. (1963, c. 846, s. 4; 1967, c. 69; 1977, c. 198, s. 26.)

**Editor's Note.** — This section was formerly § 143-376. It was recodified in this Article by Session Laws 1977, c. 198, s. 26.

### § 143B-445. Applicability of Executive Budget Act.

The North Carolina Science and Technology Research Center is subject to the provisions of Article 1, Chapter 143, of the General Statutes of North Carolina. (1963, c. 846, s. 5; 1967, c. 69; 1977, c. 198, s. 26.)

**Editor's Note.** — This section was formerly § 143-377. It was recodified in this Article by Session Laws 1977, c. 198, s. 26.

## Part 7. North Carolina National Park, Parkway and Forests Development Council.

**§§ 143B-446 through 143B-447.1:** Recodified as §§ 143B-324.1 through 143B-324.3 by Session Laws 1997-443, s. 15.36(b).

**Editor's Note.** — Session Laws 1997-443, s. 15.36(a), provides: "All functions, powers, duties, and obligations heretofore vested in the North Carolina National Park, Parkway and Forests Development Council of the Department of Commerce are hereby transferred to and vested in the Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] by a Type II transfer, as defined in G.S. 143A-6."

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997.'"

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

## Part 8. Energy Division.

**§§ 143B-448 through 143B-450.1:** Repealed by Session Laws 2000-140, s. 76, effective September 30, 2000.

**Cross References.** — As to reporting and data collection regarding stocks of coal and petroleum fuels, see § 143-345.13 et seq.

## Part 9. Navigation and Pilotage Commissions.

### § 143B-451. Navigation and pilotage commissions.

The Board of Commissioners of Navigation and Pilotage for the Cape Fear River as provided for by G.S. 76-1, and the Board of Commissioners of Navigation and Pilotage for Old Topsail Inlet and Beaufort Bar as provided for by G.S. 76-59 are hereby transferred to the Department of Commerce. All powers, duties and authority of the Board of Commissioners of Navigation and Pilotage for the Cape Fear River and Bar and the Board of Commissioners of Navigation and Pilotage for Old Topsail Inlet and Beaufort Bar, as provided for in Chapter 76 of the General Statutes, shall continue to vest in the boards, as now provided by statute, independently of the direction, supervision, and control of the Secretary of Commerce. The commissions shall report their activity to the Governor through the Secretary of Commerce. The appointment to the boards shall continue to be made in the manner as provided by Chapter 76 of the General Statutes. (1975, c. 716, s. 1; 1977, c. 65, s. 4; c. 198, s. 26; 1989, c. 751, s. 8(24); 1991 (Reg. Sess., 1992), c. 959, s. 69.)

**Editor's Note.** — The above section was formerly § 143B-354. It was recodified in this Article by Session Laws 1977, c. 198, s. 26.

Session Laws 1977, c. 198, which amended this section, in s. 6, as amended by Session Laws 1977, c. 802, s. 50.46, provided that the

navigation and pilotage commissions be transferred by a type I transfer, as defined by § 143A-6.

Section 76-1, referred to in this section, was repealed by Session Laws 1981, c. 910, s. 2. See now Chapter 76A.

Section 76-59, referred to in this section, was repealed by Session Laws 1981 (Reg. Sess., 1982), c. 1176, s. 2. See now Chapter 76A.

## Part 10. North Carolina State Ports Authority.

### § 143B-452. Creation of Authority — membership; appointment, terms and vacancies; officers; meetings and quorum; compensation.

(a) The North Carolina State Ports Authority is hereby created. It shall be governed by a board composed of nine members and hereby designated as the Authority. Effective July 1, 1983, it shall be governed by a board composed of 11 members and hereby designated as the Authority. The General Assembly suggests and recommends that no person be appointed to the Authority who is domiciled in the district of the North Carolina House of Representatives or the North Carolina Senate in which a State port is located. The Governor shall appoint seven members to the Authority, and the General Assembly shall appoint two members of the Authority. Effective July 1, 1983, the Authority shall consist of seven persons appointed by the Governor, and four persons appointed by the General Assembly. Effective July 1, 1989, the Governor shall appoint six members to the Authority, in addition to the Secretary of Commerce, who shall serve as a voting member of the Authority by virtue of his office. The Secretary of Commerce shall fill the first vacancy occurring after July 1, 1989, in a position on the Authority over which the Governor has appointive power.

(b) The initial appointments by the Governor shall be made on or after March 8, 1977, two terms to expire July 1, 1979; two terms to expire July 1, 1981; and three terms to expire July 1, 1983. Thereafter, at the expiration of each stipulated term of office all appointments made by the Governor shall be for a term of six years.

(c) To stagger further the terms of members:

- (1) Of the members appointed by the Governor to replace the members whose terms expire on July 1, 1991, one member shall be appointed to a term of five years, to expire on June 30, 1996; the other member shall be appointed for a term of six years, to expire on June 30, 1997;
- (2) Of the members appointed by the Governor to replace the members whose terms expire on July 1, 1993, one member shall be appointed to a term of five years, to expire on June 30, 1998; the other member shall be appointed to a term of six years, to expire on June 30, 1999;
- (3) Of those members appointed by the Governor to replace the members whose terms expire on July 1, 1995, one member shall be appointed to a term of five years, to expire on June 30, 2000; the other member shall be appointed to a term of six years, to expire on June 30, 2001.

Thereafter, at the expiration of each stipulated term of office all appointments made by the governor shall be for a term of six years.

(d) The members of the Authority appointed by the Governor shall be selected from the State-at-large and insofar as practicable shall represent each section of the State in all of the business, agriculture, and industrial interests of the State. At least one member appointed by the Governor shall be affiliated with a major exporter or importer currently using the State Ports. Any vacancy occurring in the membership of the Authority appointed by the Governor shall be filled by the Governor for the unexpired term. The Governor may remove a member appointed by the Governor only for reasons provided by G.S. 143B-13.

(e) The General Assembly shall appoint two persons to serve terms expiring June 30, 1983. The General Assembly shall appoint four persons to serve terms beginning July 1, 1983, to serve until June 30, 1985, and successors shall serve for two-year terms. Of the two appointments to be made in 1982, one shall be made upon the recommendation of the Speaker, and one shall be made upon the recommendation of the President of the Senate. Of the four appointments made in 1983 and biennially thereafter, two shall be made upon the recommendation of the President of the Senate, and two shall be made upon the recommendation of the Speaker. To stagger further the terms of members:

- (1) Of the members appointed upon the recommendation of the Speaker to replace the members whose terms expire on June 30, 1991, one member shall be appointed to a term of one year, to expire on June 30, 1992; the other member shall be appointed to a term of two years, to expire on June 30, 1993;
- (2) Of the members appointed upon the recommendation of the President of the Senate to replace the members whose terms expire on June 30, 1991, one member shall be appointed to a term of one year, to expire on June 30, 1992; the other member shall be appointed to a term of two years, to expire on June 30, 1993. Successors to these persons for terms beginning on or after January 1, 1997, shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate.

Thereafter, at the expiration of each stipulated term of office all appointments made by the General Assembly shall be for terms of two years.

(f) Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. Members appointed by the General Assembly may be removed only for reasons provided by G.S. 143B-13.

(g) The Governor shall appoint from the members of the Authority the chairman and vice-chairman of the Authority. The members of the Authority shall appoint a treasurer and secretary of the Authority.

(h) The Authority shall meet once in each 60 days at such regular meeting time as the Authority by rule may provide and at any place within the State as the Authority may provide, and shall also meet upon the call of its chairman or a majority of its members. A majority of its members shall constitute a quorum for the transaction of business. The members of the Authority shall not be entitled to compensation for their services, but they shall receive per diem and necessary travel and subsistence expense in accordance with G.S. 138-5. No member of the Authority may participate in any discussion or vote on any matter before the Authority on which the member has a conflict of interest. (1945, c. 1097, s. 1; 1949, c. 892, s. 1; 1953, c. 191, s. 1; 1959, c. 523, s. 1; 1961, c. 242; 1975, c. 716, s. 2; 1977, c. 65, s. 1; c. 198, s. 9; 1981 (Reg. Sess., 1982), c. 1191, ss. 69-71; 1983, c. 717, s. 2.1; 1989, c. 273, s. 2; c. 751, s. 8(25); 1989 (Reg. Sess., 1990), c. 1072; 1991 (Reg. Sess., 1992), c. 959, s. 70; 1995, c. 490, s. 54; 1997-235, s. 1; 1997-456, s. 27.)

**Editor's Note.** — This section was formerly § 143-216. It was recodified in this Article by Session Laws 1977, c. 198, s. 9.

The subsection designations in this section were added pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

For act transferring to the State Ports Authority all property and functions of the

Morehead City Port Commission and providing for cancellation of outstanding bonds of said Commission, see Session Laws 1951, c. 776, as amended by Session Laws 1975, c. 638.

Session Laws 1983, c. 577, the Separation of Powers Bond Act of 1983, provided in s. 19:

"Validation. All actions, appropriations, regulations or bonds taken, made or issued under the provisions of Chapter 909, Session Laws of 1971, Chapter 677, Session Laws of 1977, Part 4 of Article 1 of Chapter 116 of the General Statutes, Articles 19 or 21 of Chapter 116 of the

General Statutes, Article 23C of Chapter 113 of the General Statutes or Part 10 of Article 10 of Chapter 143B of the General Statutes are valid notwithstanding the fact that certain powers were granted to and exercised by the Advisory Budget Commission.”

**State Government Reorganization.** — The State Ports Authority was transferred to

the Department of Transportation and Highway Safety (now Department of Transportation) by former § 143A-107, enacted by Session Laws 1971, c. 864, and repealed by Session Laws 1975, c. 716, s. 5. For present provisions as to the Department of Transportation, see § 143B-345 et seq.

#### CASE NOTES

**The State Ports Authority is an agency of the State**, and, as such, is entitled to claim the defense of sovereign immunity. *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 299 S.E.2d 618 (1983).

**The State Ports Authority is a carrier under the Federal Railway Labor Act.** *International Longshoremen's Ass'n v. North Carolina Ports Auth.*, 463 F.2d 1 (4th Cir. 1972),

cert. denied, 409 U.S. 982, 93 S. Ct. 318, 34 L. Ed. 245 (1972).

**Applied** in *Wood-Hopkins Contracting Co. v. North Carolina State Ports Auth.*, 284 N.C. 732, 202 S.E.2d 473 (1974).

**Quoted** in *Guthrie v. North Carolina State Ports Auth.*, 56 N.C. App. 68, 286 S.E.2d 823 (1982).

### § 143B-453. Purposes of Authority.

Through the Authority hereinbefore created, the State of North Carolina may engage in promoting, developing, constructing, equipping, maintaining and operating the harbors and seaports within the State, or within the jurisdiction of the State, and works of internal improvements incident thereto, including the acquisition or construction, maintenance and operation at such seaports or harbors of watercraft and highways and bridges thereon or essential for the proper operation thereof. Said Authority is created as an instrumentality of the State of North Carolina for the accomplishment of the following general purposes:

- (1) To develop and improve the harbors or seaports at Wilmington, Morehead City and Southport, North Carolina, and such other places, including inland ports and facilities, as may be deemed feasible for a more expeditious and efficient handling of waterborne commerce from and to any place or places in the State of North Carolina and other states and foreign countries.
- (2) To acquire, construct, equip, maintain, develop and improve the port facilities at said ports and to improve such portions of the waterways thereat as are within the jurisdiction of the federal government.
- (3) To foster and stimulate the shipment of freight and commerce through said ports, whether originating within or without the State of North Carolina, including the investigation and handling of matters pertaining to all transportation rates and rate structures affecting the same.
- (4) To cooperate with the United States of America and any agency, department, corporation or instrumentality thereof in the maintenance, development, improvement and use of said harbors and seaports in connection with and in furtherance of the war operations and needs of the United States.
- (5) To accept funds from any of said counties or cities wherein said ports are located and to use the same in such manner, within the purposes of said Authority, as shall be stipulated by the said county or city, and to act as agent or instrumentality, of any of said counties or cities in any matter coming within the general purposes of said Authority.
- (6) To act as agent for the United States of America, or any agency, department, corporation or instrumentality thereof, in any matter coming within the purposes or powers of the Authority.

- (7) And in general to do and perform any act or function which may tend or be useful toward the development and improvement of harbors, seaports and inland ports of the State of North Carolina, and to increase the movement of waterborne commerce, foreign and domestic, to, through, and from such harbors and ports.

The enumeration of the above purposes shall not limit or circumscribe the broad objective of developing to the utmost the port possibilities of the State of North Carolina. (1945, c. 1097, s. 2; 1953, c. 191, ss. 3, 4; 1977, c. 198, s. 9; 1979, c. 159, s. 2.)

**Editor's Note.** — This section was formerly § 143-217. It was recodified in this Article by Session Laws 1977, c. 198, s. 9.

#### CASE NOTES

**The Authority was created and empowered to act to accomplish a public purpose.** North Carolina State Ports Auth. v. First-Citizens Bank & Trust Co., 242 N.C. 416, 88 S.E.2d 109 (1955).

**And Is an Instrumentality and Agency of the State.** — The State Ports Authority is an instrumentality and agency of the State, created and empowered to accomplish a public purpose. Nat Harrison Assocs. v. North Carolina State Ports Auth., 280 N.C. 251, 185 S.E.2d 793 (1972); Guthrie v. North Carolina State

Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983).

**Which Is Entitled to Defense of Sovereign Immunity.** — The State Ports Authority is an agency of the State, and, as such, is entitled to claim the defense of sovereign immunity. Guthrie v. North Carolina State Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983).

**Quoted** in Guthrie v. North Carolina State Ports Auth., 56 N.C. App. 68, 286 S.E.2d 823 (1982).

### § 143B-454. Powers of Authority.

(a) In order to enable it to carry out the purposes of this Part, the said Authority shall:

- (1) Have the powers of a body corporate, including the power to sue and be sued, to make contracts, and to adopt and use a common seal and to alter the same as may be deemed expedient;
- (2) Have the authority to make all necessary contracts and arrangements with other port authorities of this and other states for the interchange of business, and for such other purposes as will facilitate and increase the business of the North Carolina State Ports Authority;
- (3) Be authorized and empowered to rent, lease, buy, own, acquire, mortgage, otherwise encumber, and dispose of such property, real or personal, as said Authority may deem proper to carry out the purposes and provisions of this Part, all or any of them;
- (4) Be authorized and empowered to acquire, construct, maintain, equip and operate any wharves, docks, piers, quays, elevators, compresses, refrigeration storage plants, warehouses and other structures, and any and all facilities needful for the convenient use of the same in the aid of commerce, including the dredging of approaches thereto, and the construction of beltline roads and highways and bridges and causeways thereon, and other bridges and causeways necessary or useful in connection therewith, and shipyards, shipping facilities, and transportation facilities incident thereto and useful or convenient for the use thereof, excluding terminal railroads;
- (5) The Authority shall appoint an Executive Director, whose salary shall be fixed by the Authority, to serve at its pleasure. The Executive Director or his designee shall appoint, employ, dismiss and, within the

- limits of available funding, fix the compensation of such other employees as he deems necessary to carry out the purposes of this Part. There shall be an executive committee consisting of the chairman of the Authority and two other members elected annually by the Authority. The executive committee shall be vested with authority to do all acts which are authorized by the bylaws of the Authority. Members of the executive committee shall serve until their successors are elected;
- (6) Establish an office for the transaction of its business at such place or places as, in the opinion of the Authority, shall be advisable or necessary in carrying out the purposes of this Part;
  - (7) Be authorized and empowered to create and operate such agencies and departments as said board may deem necessary or useful for the furtherance of any of the purposes of this Part;
  - (8) Be authorized and empowered to pay all necessary costs and expenses involved in and incident to the formation and organization of said Authority, and incident to the administration and operation thereof, and to pay all other costs and expenses reasonably necessary or expedient in carrying out and accomplishing the purposes of this Part;
  - (9) Be authorized and empowered to apply for and accept loans and grants of money from any federal agency or the State of North Carolina or any political subdivision thereof or from any public or private sources available for any and all of the purposes authorized in this Article, and to expend the same in accordance with the directions and requirements attached thereto, or imposed thereon by any such federal agency, the State of North Carolina, or any political subdivision thereof, or any public or private lender or donor, and to give such evidences of indebtedness as shall be required, provided, however, that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State of North Carolina, or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State of North Carolina, or any political subdivision thereof;
  - (10) Be authorized and empowered to act as agent for the United States of America, or any agency, department, corporation, or instrumentality thereof, in any matter coming within the purposes or powers of the Authority;
  - (11) Have power to adopt, alter or repeal its own bylaws, rules and regulations governing the manner in which its business may be transacted and in which the power granted to it may be enjoyed, and may provide for the appointment of such committees, and the functions thereof, as the Authority may deem necessary or expedient in facilitating its business;
  - (12) Be authorized and empowered to do any and all other acts and things in this Part authorized or required to be done, whether or not included in the general powers in this section mentioned; and
  - (13) Be authorized and empowered to do any and all things necessary to accomplish the purposes of this Part: Provided, that said Authority shall not engage in shipbuilding.

The property of the Authority shall not be subject to any taxes or assessments thereon.

Prior to taking any action under this subsection, the Authority may consult with the Advisory Budget Commission.

(b) In order to execute the powers enumerated in subsection (a), the Authority shall determine the policies of the North Carolina State Ports Authority by majority vote of all members of the Authority present and voting. Once a policy is determined, the Authority shall communicate it to the

Executive Director, who shall have the sole and exclusive authority to execute the policy of the Authority. No member of the Authority shall have responsibility or authority to give operational directives to any employee of the North Carolina State Ports Authority other than the Executive Director. (1945, c. 1097, s. 3; 1949, c. 892, s. 2; 1953, c. 191, s. 5; 1959, c. 523, ss. 3-5; 1975, c. 716, s. 2; 1977, c. 65, s. 2; c. 198, ss. 7, 9; c. 802, s. 50.45; 1979, c. 159, s. 3; 1981 (Reg. Sess., 1982), c. 1181, s. 2; 1983, c. 717, s. 84; 1985, c. 479, s. 219; 1985 (Reg. Sess., 1986), c. 955, ss. 102, 103; 1987, c. 275, ss. 1, 2; 1989, c. 273, s. 1.)

**Editor's Note.** — This section was formerly § 143-218. It was recodified in this Article by Session Laws 1977, c. 198, s. 9.

#### CASE NOTES

**The State Ports Authority is an agency of the State**, and, as such, is entitled to claim the defense of sovereign immunity. *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 299 S.E.2d 618 (1983).

**Empowered to Accomplish a Public Purpose.** — The State Ports Authority is an instrumentality and agency of the State, created and empowered to accomplish a public purpose. *Nat Harrison Assocs. v. North Carolina State Ports Auth.*, 280 N.C. 251, 185 S.E.2d 793 (1972); *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 299 S.E.2d 618 (1983).

**The legislature did not waive the sovereign immunity of the State by enacting subdivision (1)** permitting the Ports Authority to "sue or be sued" and has consented that tort claims against the Authority may be prosecuted in the civil courts. *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 299 S.E.2d 618 (1983).

**Tort Claims to Be Pursued Under Tort Claims Act.** — The language of the State Tort Claims Act (see § 143-291) and subdivision (1) of this section, vesting the Ports Authority with

authority to sue or be sued, when read together, evidence a legislative intent that the Authority be authorized to sue as plaintiff in its own name in the courts of the State, but contemplates that all tort claims against the Authority for money damages will be pursued under the State Tort Claims Act. *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 299 S.E.2d 618 (1983).

**Lease of Facility to Private Corporation.** — A lease by the Ports Authority of a grain handling facility to a private corporation, under the terms of which the corporation would pay during a five-year term all costs of operation of the facility and rentals sufficient to pay in full revenue bonds issued by the Authority, was within the power of the Authority, and did not constitute a loan of the credit of the State or the agency. *North Carolina State Ports Auth. v. First-Citizens Bank & Trust Co.*, 242 N.C. 416, 88 S.E.2d 109 (1955).

**Quoted** in *Guthrie v. North Carolina State Ports Auth.*, 56 N.C. App. 68, 286 S.E.2d 823 (1982).

#### OPINIONS OF ATTORNEY GENERAL

**Ports Authority Has Power to Lease Property to a Private Investor.** — See opinion of Attorney General to Mr. Woodrow Price, Chairman, State Ports Authority, 41 N.C.A.G. 78 (1970).

**As to the transfer of management func-**

**tions to the Secretary of Transportation by the Executive Organization Act of 1971**, see opinion of Attorney General to Mr. H.Y. Kinard, Department of Transportation, 44 N.C.A.G. 166 (1974).

### § 143B-454.1. Container shipping.

The State Ports Authority shall provide at the ports of Morehead City and Wilmington adequate equipment and facilities including container cranes at each port as needed, in order to maintain existing and future levels of containerized cargo shipping at both ports and provide and encourage growth in handling of containerized cargoes at both ports. (1979, c. 934.)

## § 143B-455. Approval of acquisition and disposition of real property.

Any transactions relating to the acquisition or disposition of real property or any estate or interest in real property, by the North Carolina State Ports Authority, shall be subject to prior review by the Governor and Council of State, and shall become effective only after the same has been approved by the Governor and Council of State. Upon the acquisition of real property or other estate therein, by the North Carolina State Ports Authority, the fee title or other estate shall vest in and the instrument of conveyance shall name the "North Carolina State Ports Authority" as grantee, lessee, or transferee. Upon the disposition of real property or any interest or estate therein, the instrument of conveyance or transfer shall be executed by the North Carolina State Ports Authority. The approval of any transaction by the Governor and Council of State may be evidenced by a duly certified copy of excerpt of minutes of the meeting of the Governor and Council of State, attested by the private secretary to the Governor or the Governor, reciting such approval, affixed to the instrument of acquisition or transfer, and said certificate may be recorded as a part thereof, and the same shall be conclusive evidence of review and approval of the subject transaction by the Governor and Council of State. The Governor, acting with the approval of the Council of State, may delegate the review and approval of such classes of lease, rental, easement, or right-of-way transactions as he deems advisable, and he may likewise delegate the review and approval of the severance of buildings and timber from the land. (1959, c. 523, s. 6; 1977, c. 198, s. 9.)

**Editor's Note.** — This section was formerly § 143-218.1. It was recodified in this Article by Session Laws 1977, c. 198, s. 9.

### CASE NOTES

**The Authority is not freed from the provisions of this section** merely because the Authority has the right under § 143-220 (now § 143B-457) to select the particular procedure it will follow in exercising its power of eminent domain. *North Carolina State Ports Auth. v. Southern Felt Corp.*, 1 N.C. App. 231, 161 S.E.2d 47 (1968).

**Quoted** in *State Hwy. Comm'n v. Matthis*, 2 N.C. App. 233, 163 S.E.2d 35 (1968).

**Cited** in *Guthrie v. North Carolina State Ports Auth.*, 56 N.C. App. 68, 286 S.E.2d 823 (1982).

## § 143B-456. Issuance of bonds and notes.

(a) As a means of raising the funds needed from time to time in the acquisition, construction, equipment, maintenance or operation of any facility, building, structure or any other matter or thing which the Authority is authorized to acquire, construct, equip, maintain, or operate, all or any of them, including authorized special user projects, the Authority is hereby authorized, at one time or from time to time, to borrow money and in evidence thereof to issue bonds, notes and other obligations of the Authority as provided in this Part. Bonds, notes and other obligations may also be issued to (i) establish such reserves as the Authority may determine to be desirable including, without limitation, a debt service reserve fund, and (ii) provide for interest during the estimated period of construction and for a reasonable period thereafter and to provide for working capital.

The principal of and the interest on such bonds or notes shall be payable solely from the funds herein provided for such payment. Any such notes may

be made payable from the proceeds of bonds or renewal notes or, in the event bond or renewal note proceeds are not available, such notes may be paid from any available revenues, income or assets of the Authority. The bonds or notes of each issue shall be dated and may be made redeemable before maturity at the option of the Authority at such price or prices and under such terms and conditions as may be determined by the Authority. Any such bonds or notes shall bear interest at such rate or rates, including variable rates, as may be determined by the Authority. Such bonds or notes shall mature at such time or times not exceeding 40 years from their date or dates, as may be determined by the Authority.

(b) Prior to the sale and delivery of any bonds or notes by the Authority, the Governor shall approve the general purposes of and the general security provisions for any such bonds or notes. Such bonds or notes may be sold in such manner, either at public or private sale, and for such price as the Authority shall determine. Bonds or notes may be issued under the provisions of this Part without obtaining, except as otherwise expressly provided in this Part, the consent of any department, division, commission, board, body, bureau or agency of the State, and without any other proceedings or the happening of any conditions or things other than those proceedings, conditions or things which are specifically required by this Part and the provisions of the resolution authorizing the issuance of such bonds or notes or the trust agreement securing the same. Prior to taking any action under this subsection, the Governor may consult with the Advisory Budget Commission.

(c) In the discretion of the Authority any obligations issued under the provisions of this Part may be secured by a trust agreement by and between the Authority and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or without the State and, in the case of an authorized special user project, a deed of trust of which the trustee may be an individual who is a resident of the State. It shall be lawful for any bank or trust company incorporated under the laws of the State which may act as depository of the proceeds of obligations, revenues or other money under this Part to furnish such indemnifying bonds or to pledge such securities as may be required by the Authority. The pledge of any assets, income or revenues of the Authority to the payment of the principal of or the interest on any obligations of the Authority shall be valid and binding from the time when the pledge is made and any such assets, income or revenues shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act, and the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the Authority, irrespective of whether such parties have notice thereof.

(d) The resolution authorizing any obligations or the trust agreement securing the same may provide that any moneys held pursuant thereto may be temporarily invested pending the disbursement thereof and shall provide that any officer with whom, or any bank or trust company with which, such moneys shall be deposited shall act as trustee of such moneys and shall hold and apply the same for the purposes hereof, subject to such regulations as this Part and such resolution or trust agreement may provide. Any such moneys or any other moneys of the Authority may be invested as provided in G.S. 159-30 or any successor provision thereof.

(e) Obligations issued under the provisions of this Part are hereby made securities in which all public officers and public bodies of the State and its political subdivisions, all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. Such obligations are hereby made securities which may properly and legally be deposited with and received by any State or

municipal officer or any agency or political subdivision of the State for any purpose for which the deposit of bonds, notes or obligations of the State is now or may hereafter be authorized by law.

(f) The Authority is hereby authorized to provide for the issuance of refunding obligations for the purpose of refunding any obligations then outstanding which shall have been issued under the provisions of this Part, including the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption of such obligations and, if deemed advisable by the Authority, for any corporate purpose of the Authority. The issuance of such obligations, the maturities and other details thereof, the rights of the holders thereof, and the rights, duties and obligations of the Authority in respect of the same shall be governed by the provisions of this Part which relate to the issuance of obligations, insofar as such provisions may be appropriate therefor.

Refunding obligations may be sold or exchanged for outstanding obligations issued under this Part and, if sold, the proceeds thereof may be applied, in addition to any other authorized purposes, to the purchase, redemption or payment of such outstanding obligations.

(g) Any obligations issued by the Authority under the provisions of this Part shall at all times be free from taxation by the State or any local unit or political subdivision or other instrumentality of the State, excepting inheritance or gift taxes, income taxes on the gain from the transfer of the obligations, and franchise taxes. The interest on the obligations is not subject to taxation as income.

(h) Obligations issued under the provisions of this Part shall not be deemed to constitute a debt, liability or obligation of the State or of any other public body in the State secured by a pledge of the faith and credit of the State or of any other public body in the State, respectively, but shall be payable solely from the revenues, income or assets of the Authority pledged thereto. Each obligation issued under this Part shall contain on the face thereof a statement to the effect that the Authority shall not be obligated to pay the same or the interest thereon except from the revenues, income or assets pledged therefor and that neither the faith and credit nor the taxing power of the State or of any other public body in the State is pledged to the payment of the principal or of the interest on such obligation. (1945, c. 1097, s. 4; 1975, c. 716, s. 2; 1977, c. 198, s. 9; 1979, c. 159, s. 4; 1981, c. 856, s. 1; 1981 (Reg. Sess., 1982), c. 1181, s. 1; 1985 (Reg. Sess., 1986), c. 955, ss. 104, 105; 1987, c. 275, s. 3; 1995, c. 46, s. 16.)

**Editor's Note.** — This section was formerly § 143-219. It was recodified in this Article by Session Laws 1977, c. 198, s. 9.

Section Laws 1981, c. 856, which amended this section, provided in ss. 4 through 6:

“Sec. 4. The foregoing provisions of this act shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing;

provided, however, that the issuance of bonds or notes under the provisions of this act need not comply with the requirements of any other law applicable to the issuance of bonds or notes.

“Sec. 5. This act, being necessary for the prosperity of the State and its inhabitants, shall be liberally construed to effect the purposes thereof.

“Sec. 6. Insofar as the provisions of this act are inconsistent with the provisions of any general or special laws or parts thereof, the provisions of this act shall be controlling.”

#### CASE NOTES

**Cited** in North Carolina State Ports Auth. v. First-Citizens Bank & Trust Co., 242 N.C. 416, 88 S.E.2d 109 (1955); Guthrie v. North Carolina

State Ports Auth., 56 N.C. App. 68, 286 S.E.2d 823 (1982).

### § 143B-456.1. Bonds and notes for special user projects.

(a) The Authority is also hereby authorized, subject to the provisions of this section, to issue, at one time or from time to time, bonds and notes to finance special user projects. The term "special user project" shall mean any land, equipment or any one or more buildings or other structures, whether or not on the same site or sites, and any rehabilitation, improvement, renovation or enlargement of, or any addition to, any building or structure for use as or in connection with any commercial, industrial, manufacturing, processing, mining, transportation, distribution, storage, marine or environmental facility or improvement primarily for the use of one or more private parties. Any such special user project may include all appurtenances and incidental facilities such as land, headquarters or office facilities, restaurant and lodging facilities, warehouses, distribution centers, pollution control facilities, access roads, sidewalks, utilities, railway sidings, trucking and similar facilities, parking facilities, waterways, docks, wharves and other improvements necessary or convenient for ships, tugboats, barges or other vessels or for the construction, maintenance and operation of any building or structure, or addition thereto.

(b) Bonds and notes may be sold to finance special user projects irrespective of the interest limitations set forth in G.S. 24-1.1, as amended, and successor provisions.

(c) The bonds or notes of each issue of the Authority under this section shall be special, limited obligations of the Authority payable solely from such other revenues, income or assets of the Authority as the Authority shall specifically assign or pledge and such funds, collateral and undertakings as any private parties may assign or pledge therefor.

The financing agreement may provide the Authority with rights and remedies in the event of a default by the obligor thereunder including, without limitation, reentry and repossession or leasing or sale or foreclosure of the special user project to others.

The Authority's interest in a special user project may be that of owner, lessor, operator, lessee, conditional or installment vendor, mortgagor, mortgagee, secured party or otherwise, but the Authority need not have any ownership or possessory interest in the project, and if that of lessor, the lessee may have an option or an obligation to purchase the special user project upon the expiration or termination of the lease.

(d) Bonds and notes issued under the provisions of this section may be secured by one or more agreements, including forecloseable deeds of trust and other trust instruments, which may pledge and assign to the trustee or the holders of its obligations the assets, revenues, and income provided for the security of the bonds or notes, including proceeds from the sale of any special user project, or part thereof, insurance proceeds and condemnation awards, and third-party agreements, and may convey or mortgage the project and other property and collateral to secure a bond issue.

The Authority may subordinate the bonds or notes or its rights, assets, revenues and income derived from any special user project to any prior, contemporaneous or future securities or obligations or lien, mortgage or other security interest.

(e) Notwithstanding any other provision of law, the Authority may agree that all contracts relating to the acquisition, construction, installation and equipping of the special user project shall be solicited, negotiated, awarded and executed by the private party or parties for which the Authority is financing the special user project or their agents subject only to such approvals by the Authority as the Authority may require. The Authority may, out of the proceeds of bonds or notes, make advances to or reimburse such private parties or such agents for all or a portion of the costs incurred in connection with such

contracts. The provisions of G.S. 143B-463 of this Part shall have no application to funds and moneys derived pursuant to this section.

(f) Repealed by Session Laws 2001-218, s. 5, effective July 1, 2001. (1981, c. 856, s. 2; 2000-169, s. 41; 2001-218, s. 5; 2001-487, s. 33.)

**Editor's Note.** — Session Laws 1981, c. 856, s. 7, as amended by Session Laws 1981, c. 988, s. 1, provided: "Sec. 7. The provisions of this act shall become effective upon ratification, except for the provisions of Section 2 of this act [which added § 143B-456.1], which shall become effective upon there becoming effective an amendment to the North Carolina Constitution authorizing the General Assembly to enact laws dealing with the subject matter of said Section 2." Such an amendment was proposed by Session Laws 1981, c. 808, as amended by Session Laws 1981, c. 987, and submitted to the People at an election held June 29, 1982, and was defeated. Such an amendment was again proposed by Session Laws 1985 (Reg. Sess., 1986),

c. 933, and was adopted by the People at an election held on November 4, 1986. (See Article V, § 13, N.C. Const.). This amendment was certified to the Secretary of State on November 25, 1986. Therefore, § 143B-456.1 became effective on November 25, 1986.

**Effect of Amendments.** — Session Laws 2000-169, s. 41, effective July 1, 2001, rewrote subsection (f).

Session Laws 2001-218, s. 5, effective July 1, 2001, repealed subsection (f), which read: "Article 9 of Chapter 25 of the General Statutes applies to transactions under this section."

Session Laws 2001-487, s. 33, effective December 16, 2001, substituted "G.S." for "Section" in the last sentence in subsection (e).

## § 143B-457. Power of eminent domain.

For the acquiring of rights-of-way and property necessary for the construction of structures, including railroad crossings, airports, seaplane bases, naval bases, wharves, piers, ships, docks, quays, elevators, compresses, refrigerator storage plants, warehouses and other riparian and littoral terminals and structures and approaches thereto and transportation facilities needful for the convenient use of same, and belt line roads and highways and causeways and bridges and other bridges and causeways, the Authority shall have the right and power to acquire the same by purchase, by negotiation, or by condemnation, and should it elect to exercise the right of eminent domain, condemnation proceedings shall be maintained by and in the name of the Authority, and it may proceed in the manner provided by the general laws of the State of North Carolina for the procedure by any county, municipality or authority organized under the laws of this State, or by the Board of Transportation, or in any other manner provided by law, as the Authority may, in its discretion, elect. The power of eminent domain shall not apply to property of persons, State agency or corporations already devoted to public use. (1945, c. 1097, s. 5; 1973, c. 507, s. 5; 1977, c. 198, s. 9; 1979, c. 159, s. 5.)

**Editor's Note.** — This section was formerly § 143-220. It was recodified in this Article by Session Laws 1977, c. 198, s. 9.

### CASE NOTES

**Strict Construction.** — The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed. *North Carolina State Ports Auth. v. Southern Felt Corp.*, 1 N.C. App. 231, 161 S.E.2d 47 (1968).

**Statutes Not to Be Construed to Hamper Authority in Accomplishment of Its Purpose.** — Recognizing the dominant intent of the General Assembly to provide maximum development and use of our seaports, no con-

struction should be placed on statutes relating to the Authority, unless plainly required by the express terms thereof, that would tend to hamper the Authority in its efforts to accomplish the very purposes of its existence. *North Carolina State Ports Auth. v. First-Citizens Bank & Trust Co.*, 242 N.C. 416, 88 S.E.2d 109 (1955).

**The right to authorize the power of eminent domain** and the mode of exercise thereof is wholly legislative, limited only by constitutional provisions which require reasonable no-

tice and opportunity to be heard and payment of just compensation for the taking of private property for public uses. *North Carolina State Ports Auth. v. Southern Felt Corp.*, 1 N.C. App. 231, 161 S.E.2d 47 (1968).

**Authority is not freed from the provi-**

**sions of § 143-218.1 (now § 143B-455)** merely because it has the right under this section to select the particular procedure it will follow in exercising power of eminent domain. *North Carolina State Ports Auth. v. Southern Felt Corp.*, 1 N.C. App. 231, 161 S.E.2d 47 (1968).

### § 143B-458. Exchange of property; removal of buildings, etc.

The Authority may exchange any property or properties acquired under the authority of this Chapter for other property, or properties usable in carrying out the powers hereby conferred, and also may remove from lands needed for its purposes and reconstruct on other locations, buildings, terminals, or other structures, upon the payment of just compensation, if in its judgment, it is necessary or expedient so to do in order to carry out any of its plans for port development, under the authorization of this Article. (1945, c. 1097, s. 6; 1977, c. 198, s. 9; 1979, c. 159, s. 6.)

**Editor's Note.** — This section was formerly § 143-221. It was recodified in this Article by Session Laws 1977, c. 198, s. 9.

§ 143B-459: Repealed by Session Laws 1987, c. 275, s. 4.

§ 143B-460: Repealed by Session Laws 1979, c. 159, s. 8.

### § 143B-461. Jurisdiction of the Authority; application of Chapter 20; appointment and authority of special police.

(a) The jurisdiction of the Authority in any of said harbors or seaports within the State shall extend to all properties owned by or under control of the Authority and shall also extend over the waters and shores of such harbors or seaports and over that part of all tributary streams flowing into such harbors or seaports in which the tide ebbs and flows, and shall extend to the outer edge of the outer bar at such harbors or seaports.

(b) All the provisions of Chapter 20 of the General Statutes relating to the use of the highways of the State and the operation of motor vehicles thereon are hereby made applicable to the streets, alleys and driveways on the properties owned by or under the control of the North Carolina State Ports Authority. Any person violating any of the provisions of said Chapter in or on such streets, alleys or driveways shall, upon conviction thereof, be punished as therein prescribed. Nothing herein contained shall be construed as in any way interfering with the ownership and control of such streets, alleys and driveways on the properties of said Authority as is now vested by law in the said Authority.

(c) The North Carolina State Ports Authority is hereby authorized to make such reasonable rules, regulations, and adopt such additional ordinances with respect to the use of the streets, alleys, driveways and to the establishment of parking areas on the properties of the Authority and relating to the safety and welfare of persons using the property of the Authority. All rules, regulations and ordinances adopted pursuant to the authority of this subsection shall be recorded in the proceedings of the Authority and printed and copy of such

rules, regulations and ordinances shall be filed in the office of the Attorney General of North Carolina and the Authority shall cause to be posted, at appropriate places on the properties of the Authority, notice to the public of applicable rules, regulations and ordinances as may be adopted under the authority of this subsection. Any person violating any such rules, regulations or ordinances shall, upon conviction thereof, be guilty of a Class 3 misdemeanor.

(d) The Executive Director of the Authority is authorized to appoint such number of employees of the Authority as he may think proper as special policemen, who, when so appointed, shall have all the powers of policemen of incorporated towns. Such policemen shall have the power of arrest of persons committing violations of State law or any reasonable rules, regulations and ordinances lawfully adopted by the Authority as herein authorized. Employees appointed as such special policemen shall take the general oath of office prescribed by G.S. 11-11. (1945, c. 1097, s. 9; 1959, c. 523, s. 7; 1965, c. 1074; 1975, 2nd Sess., c. 983, s. 83; 1977, c. 198, ss. 8, 9; 1987, c. 275, s. 5; 1993, c. 539, s. 1041; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — This section was formerly § 143-224. It was recodified in this Article by Session Laws 1977, c. 198, s. 9.

### § 143B-462. Treasurer of the Authority.

The Authority shall select its own treasurer. The Authority shall require a surety bond of such appointee in such amount as the Authority may fix, and the premium or premiums thereon shall be paid by said Authority as a necessary expense of said Authority. (1945, c. 1097, s. 10; 1959, c. 523, s. 8; 1977, c. 198, s. 9.)

**Editor's Note.** — This section was formerly § 143-225. It was recodified in this Article by Session Laws 1977, c. 198, s. 9.

### § 143B-463. Deposit and disbursement of funds.

All Authority funds shall be deposited in a bank or banks to be designated by the Authority. Funds of the Authority shall be paid out only upon warrants signed by the treasurer or assistant treasurer of the Authority and countersigned by the chairman, the acting chairman or the executive director. No warrants shall be drawn or issued disbursing any of the funds of the Authority except for a purpose authorized by this Article and only when the account or expenditure for which the same is to be given in payment has been audited and approved by the Authority or its executive director. (1945, c. 1097, s. 11; 1951, c. 1088, s. 1; 1977, c. 198, s. 9; 1981, c. 856, s. 3.)

**Editor's Note.** — This section was formerly § 143-226. It was recodified in this Article by Session Laws 1977, c. 198, s. 9.

Session Laws 1981, ch. 856, which amended this section, provided in ss. 4 through 6:

“Sec. 4. The foregoing provisions of this act shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded

as in derogation of any powers now existing; provided, however, that the issuance of bonds or notes under the provisions of this act need not comply with the requirements of any other law applicable to the issuance of bonds or notes.

“Sec. 5. This act, being necessary for the prosperity of the State and its inhabitants, shall be liberally construed to effect the purposes thereof.

“Sec. 6. Insofar as the provisions of this act are inconsistent with the provisions of any

general or special laws or parts thereof, the provisions of this act shall be controlling.”

### § 143B-464. Audit.

The operations of the State Ports Authority shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. (1945, c. 1097, s. 12; 1951, c. 1088, s. 2; 1957, c. 269, s. 1; 1977, c. 198, s. 9; 1983, c. 913, s. 43.)

**Editor's Note.** — This section was formerly § 143-227. It was recodified in this Article by Session Laws 1977, c. 198, s. 9.

### § 143B-465. Purchase of supplies, material and equipment and building contracts.

(a) All of the provisions of Article 3 of Chapter 143 of the General Statutes relating to the purchase of supplies, material and equipment by the State government are hereby made applicable to the North Carolina State Ports Authority.

(b) All of the provisions of Chapter 143 of the General Statutes relating to public building contracts are hereby made applicable to the North Carolina State Ports Authority for those construction projects which may be funded, in whole or in part, by appropriations from the General Assembly.

(c) Notwithstanding subsections (a) and (b) of this section, if the North Carolina State Ports Authority finds that the delivery of a particular port facility must be expedited for good cause, the Authority shall be exempt from the following statutes, and rules implementing those statutes, to the extent necessary to expedite delivery: G.S. 133-1.1(g), G.S. 143-128(a) through (e), G.S. 143-132, and G.S. 143-135.26. Prior to exercising an exemption authorized under this subsection, the North Carolina State Ports Authority, through its Executive Director, shall give notice in writing of the Authority's intent to exercise the exemption to the Secretary of Administration. The notice shall contain, at a minimum, the following information: (i) the specific statutory requirement or requirements from which the Authority intends to exercise an exemption; (ii) the reason the exemption is necessary to expedite delivery of a port facility; and (iii) the way the Authority anticipates the exemption will expedite the delivery of a port facility. The Authority shall report quarterly to the Joint Legislative Commission on Governmental Operations on any building contracts exceeding two hundred fifty thousand dollars (\$250,000) to which an exemption authorized by this subsection is applied. (1953, c. 191, s. 6; 1977, c. 198, s. 9; 1987, c. 275, s. 6; 1997-331, s. 1; 1999-368, s. 2.)

**Editor's Note.** — This section was formerly § 143-227.1. It was recodified in this Article by Session Laws 1977, c. 198, s. 9.

### § 143B-466. Liberal construction of Article.

It is intended that the provisions of this Article shall be liberally construed to accomplish the purposes provided for, or intended to be provided for, herein, and where strict construction would result in the defeat of the accomplishment of any of the acts authorized herein, and a liberal construction would permit or assist in the accomplishment thereof, the liberal construction shall be chosen. (1945, c. 1097, s. 13; 1977, c. 198, s. 9.)

**Editor's Note.** — This section was formerly § 143-228. It was recodified in this Article by Session Laws 1977, c. 198, s. 9.

### § 143B-467. Warehouses, wharves, etc., on property abutting navigable waters.

The powers, authority and jurisdiction granted to the North Carolina State Ports Authority under this Article and Chapter shall not be construed so as to prevent other persons, firms and corporations, including municipalities, from owning, constructing, leasing, managing and operating warehouses, structures and other improvements on property owned, leased or under the control of such other persons, firms and corporations abutting upon and adjacent to navigable waters and streams in this State, nor to prevent such other persons, firms and corporations from constructing, owning, leasing and operating in connection therewith wharves, docks and piers, nor to prevent such other persons, firms and corporations from encumbering, leasing, selling, conveying or otherwise dealing with and disposing of such properties, facilities, lands and improvements after such construction. (1955, c. 727; 1977, c. 198, s. 9.)

**Editor's Note.** — This section was formerly § 143-228.1. It was recodified in this Article by Session Laws 1977, c. 198, s. 9.

§ 143B-468: Reserved for future codification purposes.

## Part 11. North Carolina Ports Railway Commission.

### § 143B-469. Creation of Commission.

(a) The North Carolina Ports Railway Commission is hereby created. It shall be governed by a board composed of five members appointed by the Governor, and hereby designated as the Commission.

(b) Members of the Commission shall serve for terms of four years, except that the original members shall be appointed as follows: one shall be appointed for a term of one year, one for a term of two years, one for a term of three years, one for a term of four years, and one for a term of five years. Thereafter, all appointments shall be for terms of four years. Any vacancy occurring in the membership of the board for any cause shall be filled by the Governor for the unexpired term. The Governor shall appoint a chairman from the membership to serve at his pleasure. The board shall elect one of its members as vice-chairman and shall also elect a secretary and a treasurer who need not be a member of the Commission. The board shall meet upon the call of its chairman. A majority of its members shall constitute a quorum for the transaction of its business.

(c) Members of the Commission shall not be entitled to compensation for their services but shall be reimbursed for actual expenses necessarily incurred in the performance of their duties and shall be compensated as provided in G.S. 138-5(a)(1). (1979, c. 159, s. 1.)

### § 143B-469.1. Powers of Commission.

The Commission shall be an agency of the State with all the powers of a body corporate including the following:

- (1) To sue and be sued, to make contracts, and to adopt and use a common seal and to alter the same as may be deemed expedient;

- (2) To rent, lease, buy, own, acquire, mortgage, otherwise encumber, and dispose of all such property, real or personal, as the Commission may deem necessary;
- (3) To operate, maintain and control all railway equipment and railway operations transferred to it by the State Ports Authority;
- (4) To acquire, own, lease, locate, install, construct, equip, hold, maintain, control and operate at harbors and seaports terminal railroads in addition to those transferred to it by the State Ports Authority with necessary sidings, turnouts, spurs, branches, switches, yard tracks, bridges, trestles, and causeways and in connection therewith shall have the further right to lease, install, construct, acquire, own, maintain, control and use any and every kind or character of motive power and conveyances or appliances necessary or proper to carry goods, wares and merchandise over, along or upon the track of such railway or other conveyance;
- (5) To make agreements as to scale of wages, seniority and working conditions with railroad employees, including but not limited to, locomotive engineers, locomotive firemen, switchmen, switch engine foremen and hostlers engaged in the operation and servicing of the terminal railways and their equipment;
- (6) To connect with or cross any other railway upon payment of just compensation and to receive, deliver to and transport the freight, passengers and the cars of common carrier railroads as though it were an ordinary common carrier;
- (7) To appoint, with the approval of the Governor, a general manager of the Commission who shall serve at the pleasure of the board. The salary for the general manager shall be fixed by the General Assembly in the Current Operations Appropriations Act. The general manager shall have the authority to appoint, employ and dismiss such number of employees as may be deemed necessary by the board to accomplish the purposes of this Article. The compensation of such employees shall be fixed by the board;
- (8) To establish an office for the transaction of its business at such place or places, as in the opinion of the Commission, shall be advisable or necessary in carrying out the purposes of this Part;
- (9) To pay all necessary costs and expenses involved in and incident to the formation and organization of the Commission, and incident to the administration and operation thereof, and to pay all other costs and expenses reasonably necessary or expedient in carrying out and accomplishing the purposes of this Part;
- (10) To apply for and accept loans and grants of money from any federal agency or the State of North Carolina or any political subdivision thereof or from any public or private sources available for any and all of the purposes authorized in this Article, and to expend the same in accordance with the directions and requirements attached thereto, or imposed thereon by any such federal agency, the State of North Carolina, or any political subdivision thereof, or any public or private lender or donor, and to give such evidences of indebtedness as shall be required, provided, however, that no indebtedness of any kind incurred or created by the Commission shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing powers of the State, or any political subdivision thereof;
- (11) To act as agent for the United States of America, or any agency, department, corporation or instrumentality thereof, in any manner coming within the purposes or powers of the Commission;

- (12) To acquire rights-of-way and the property necessary for the construction of administration buildings, equipment, servicing facilities, terminal railways and structures, railway crossings, bridges and causeways by purchase, by negotiation or by condemnation, and should the Commission elect to exercise the right of eminent domain, condemnation proceedings shall be maintained by and in the name of the Commission, and it may proceed in any manner provided for by the general laws of this State;
- (13) To do any and all things necessary to carry out and accomplish the purposes of this Article. (1979, c. 159, s. 1; 1983, c. 717, s. 85; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

### § 143B-469.2. Cooperation with Ports Authority.

It shall be the duty and responsibility of the Commission to cooperate with the North Carolina State Ports Authority to insure that the State ports shall operate efficiently and effectively and to insure the orderly and effective development of the State ports. (1979, c. 159, s. 1.)

### § 143B-469.3. Commission not required to be a common carrier.

None of the powers and duties of the Commission shall be construed as requiring it to become a carrier subject to the Interstate Commerce Act. (1979, c. 159, s. 1.)

## Part 11A. North Carolina Hazardous Waste Treatment Commission.

§§ 143B-470 through 143B-470.6: Repealed by Session Laws 1989, c. 168, s. 2(a).

**Editor's Note.** — For reorganization of the North Carolina Hazardous Waste Treatment Commission as the North Carolina Hazardous Waste Management Commission [now abrogat-

ed] and transfer of records, personnel, property, etc., and rights and obligations of contracts, see Session Laws 1989, c. 168, s. 2(b).

## Part 12. North Carolina Technological Development Authority.

§§ 143B-471 through 143B-471.5: Repealed by Session Laws 1991, c. 689, s. 154.1(f).

**Editor's Note.** — Session Laws 1991, c. 689, which repealed this Part, in s. 154.1(e) provides: "Effective September 1, 1991, the statutory unexpended balances of appropriations, allocations, or other funds and all assets of the Technological Development Authority created in G.S. 143B-471 shall be transferred to the North Carolina Technological Development Authority, Inc., a private, nonprofit corporation. The North Carolina Technological Development Authority, Inc., shall use the funds and other assets transferred to it pursuant to this act for (i) an incubator facilities program, (ii) an inno-

vation research fund, and (iii) the First Flight System, a network of incubators across the State to transfer technologies into commercial applications. The incubator facilities program shall be administered in accordance with the provisions of former G.S. 143B-471.4, repealed by this section. The innovation research fund shall be administered in accordance with the provisions of former G.S. 143B-471.5, repealed by this section."

Session Laws 1991, c. 689, s. 154.1(g), as amended by Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 158, provides that effective

September 1, 1991, certain land and improvements formerly known as the "Science and Technology Research Center" together with property installed in the building and other movable equipment and supplies shall be transferred by the State of North Carolina to The North Carolina Technological Development Authority, Inc., that this transaction shall be evidenced by a deed which shall provide that the property transferred shall automatically revert to the State of North Carolina if the property is used for any purposes other than that the North Carolina Technological Develop-

ment Authority, Inc., shall use the property solely as a business incubator serving technology research-base entrepreneurial companies in Research Triangle Park. Use of the property pursuant to any prior instrument of occupancy in which the State of North Carolina is grantor of the property right and that is in force immediately prior to September 1, 1991, shall be deemed use of the property to the extent of use during the original term of the prior instrument of occupancy or any renewal or extension thereof.

### Part 13. Mutual Burial Associations.

§§ 143B-472, 143B-472.1: Repealed by Session Laws 1997-313, s. 2, effective January 1, 1998.

**Editor's Note.** — Session Laws 1997-313, s. 1, provides that effective January 1, 1998, the authority, powers, duties, and functions vested in the North Carolina Mutual Burial Association Commission and in the Burial Association Administrator, along with all records, property, and unexpended balances of funds, are transferred to the North Carolina Board of Mortuary Science, and the North Carolina Mutual Burial Association Commission is abolished. On and after January 1, 1998, the Board of Mortuary Science shall be responsible for the administration of Part 13 of Article 10 of Chapter 143B of the General Statutes.

Session Laws 1997-313, s. 7, provides that "(a) Effective January 1, 1998, references in the Session Laws to the North Carolina Mutual Burial Association Commission or the Burial Association Administrator shall be deemed to refer to the Board of Mortuary Science. Every Session Law that refers to the North Carolina Mutual Burial Association Commission or the Burial Association Administrator and that relates to any power, duty, function, or obligation of the Commission or the Administrator that continues in effect after the provisions of this act become effective shall be construed in a

manner consistent with this act.

"(b) The Revisor of Statutes may on and after the effective date of this act, correct any reference or citation in the General Statutes that is amended by this act by deleting incorrect references and substituting correct references.

"(c) The Revisor of Statutes may, on and after the first day of January 1998, delete any reference to the North Carolina Mutual Burial Association Commission or to the Burial Association Administrator in any portion of the General Statutes to which conforming amendments are not made by this act and substitute, as appropriate and consistent with this act, any of the following terms: North Carolina Board of Mortuary Science, Board of Mortuary Science, or Board."

Session Laws 1997-313, s. 8, provides that every act of the North Carolina Mutual Burial Association Commission and the Burial Association Administrator that occurred prior to the date that act became law or to the date that provisions of that act became effective, and which was otherwise valid, continues to be valid and effective, notwithstanding any change in name or transfer of authority, powers, duties, and functions by that act.

### § 143B-472.2. Duties of Board; meetings.

It shall be the duty of the North Carolina Board of Mortuary Science to supervise, pursuant to this Article, all burial associations authorized by this Article to operate in North Carolina, to determine that such associations are operated in conformity with this Article and the rules adopted pursuant to this Article; to prosecute violations of this Article or rules adopted pursuant thereto; and to protect the interest of members of mutual burial associations.

The North Carolina Board of Mortuary Science, after a public hearing, may promulgate reasonable rules and regulations for the enforcement of this Article and in order to carry out the intent thereof. The Board is authorized and directed to adopt specific rules to provide for the orderly transfer of a

member's benefits in cash or merchandise and services from the funeral director sponsoring the member's association to the funeral establishment which furnishes a funeral service, or merchandise, or both, for the burial of the member, provided that any funeral establishment to which the member's benefits are transferred in accordance with such rules shall, if located in North Carolina, be a funeral establishment registered and permitted under the provisions of G.S. 90-210.25 or shall, if located in any other state, territory or foreign country, be a funeral establishment recognized by and operating in conformity with the laws of such other state, territory or foreign country. One or more burial associations operating in North Carolina may merge into another burial association operating in North Carolina and two or more burial associations operating in North Carolina may consolidate into a new burial association provided that any such plan of merger or plan of consolidation shall be adopted and carried out in accordance with rules adopted by the Board pursuant to this Article.

All rules heretofore adopted by the North Carolina Mutual Burial Association Commission or the North Carolina Board of Mortuary Science in accordance with prior law and which have not been amended, rescinded, revoked or otherwise changed, or which have not been nullified or made inoperative or unenforceable because of any statute enacted after the adoption of any such rule, shall remain in full force and effect until amended, rescinded, revoked or otherwise changed by action of the North Carolina Board of Mortuary Science as set out above, or until nullified or made inoperative or unenforceable because of statutory enactment or court decision.

Members of the Board shall receive, when attending such regular or special meetings such per diem, expense allowance and travel allowance as are allowed other commissions and boards of the State. The legal adviser to the Board shall be entitled to actual expenses when attending regular or special meetings of the Board held other than in Raleigh. All expenses of the Board shall be paid from funds coming to the Board pursuant to this Article or appropriated for this purpose. (1967, c. 1197, s. 2; 1971, c. 1151; 1973, c. 1147, s. 1; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, ss. 3, 5; 1999-425, s. 1.)

**Editor's Note.** — This section was formerly § 58-241.8. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

The Article containing § 90-210.17, referred

to in this section, was rewritten by Session Laws 1975, c. 571, and recodified as § 90-210.18 et seq. See now § 90-210.25 as to permits to operate funeral establishments.

#### CASE NOTES

**Modification Permitting Selection of Funeral Director by Decedent's Representatives.** — Modification in statute and regulations which would permit the selection of a funeral director by representatives of decedent was a reasonable change and would seem to be within the general purpose for which the association was formed. Present-day society is so

mobile that provisions which will facilitate transfer of benefits would appear to be in the public interest. *Adair v. Orrell's Mut. Burial Ass'n*, 19 N.C. App. 492, 199 S.E.2d 129 (1973), aff'd, 284 N.C. 534, 201 S.E.2d 905, appeal dismissed, 417 U.S. 927, 94 S. Ct. 2637, 41 L. Ed. 2d 231 (1974), decided under former § 58-224.2.

### § 143B-472.3. Requirements as to rules and bylaws.

All burial associations now operating within the State of North Carolina shall have and maintain rules and bylaws embodying the following:

Article 1. The name of this association shall be \_\_\_\_\_, which shall indicate that said association is a mutual burial association.

Article 2. The objects and purposes for which this association is formed and the purposes for which it has been organized, and the methods and plan of

operation of this association shall be to provide a plan for each member of this association for the payment of one funeral benefit for each member, which shall consist of a funeral benefit in cash or merchandise and service, with no free embalming or free ambulance service included in this benefit. No other free service or any other thing free shall be held out, promised or furnished, in any case. Such funeral benefit shall be in the amount of one hundred dollars (\$100.00) of cash or merchandise and service, without free embalming or free ambulance service, for persons of the age of 10 years and over, or in the amount of fifty dollars (\$50.00) for persons under the age of 10 years; provided, however, that any member of this association of the age of 10 years or more may purchase a double benefit (for a total benefit of two hundred dollars (\$200.00)), and provided further, however, that any member of this association under the age of 10 years may purchase a double benefit (for a total benefit of one hundred dollars (\$100.00)) or a quadruple benefit (for a total benefit of two hundred dollars (\$200.00)); however, any additional benefit (as set out herein) shall be based on the assessment rate, as provided in Article 6 of this section, at the attained age of applicant at the time the additional benefit takes effect. The purchase of an additional benefit shall not be available to any member who cannot fulfill the requirements as set forth in Article 3 of this section.

Provided, further, that mutual burial associations organized and operating pursuant to this Article may offer for sale to its members in good standing, funeral benefits payable only in cash in excess of two hundred dollars (\$200.00), but those sales shall be subject to all applicable insurance laws of this State and shall in no manner be subject to the provisions of this Article or impair whatsoever funds heretofore or hereafter collected and held by that Association pursuant to this Article. All mutual burial association policies heretofore or hereafter sold in this State in an amount of two hundred dollars (\$200.00) or less shall continue to be administered by the Board of Mortuary Science and shall be subject to all provisions of this Article.

Article 3. Any person who has passed his or her first birthday, and who has not passed his or her sixty-fifth birthday, and who is in good health and not under treatment of any physician, nor confined in any institution for the treatment of mental or other disease, may become a member of this burial association by the payment by such person, or for such person, of a membership fee in accordance with the provisions of this Article and the first assessment due on the membership issued for such member in accordance with the provisions of Article 6 herein. The membership fee for any person joining prior to July 1, 1975, is twenty-five cents (25¢). The membership fee of any person joining after July 1, 1975, is twenty-five cents (25¢) for each one hundred dollars (\$100.00) of benefits provided in such membership, with a minimum membership fee of twenty-five cents (25¢). The payment of the membership fee, without the payment of the first quarterly assessment due on the membership, shall not authorize the issuance of a certificate of membership in this burial association, and a certificate of membership for such person shall not be issued until the first such assessment is paid. Any member of this association joining after July 1, 1975, and who shall thereafter purchase an increased benefit shall pay an additional membership fee in accordance with this Article so that the total membership fee paid by such person shall equal twenty-five [cents] (25¢) for each one hundred dollars (\$100.00) of benefits in such member's membership; provided, that any member with a fifty-dollar (\$50.00) benefit who increases his benefit from fifty dollars (\$50.00) to one hundred dollars (\$100.00) shall not be required to pay any additional membership fee. The payment of any additional membership fee, without the payment of the first additional assessment due for the increased benefit, shall not make such member eligible for any additional benefit, and such member shall not be eligible for any additional benefit until the first such additional

assessment due for such additional benefit is paid. Notwithstanding the foregoing, the provisions of the last paragraph of Article 6, hereinafter set out, shall control the increase of benefits from fifty dollars (\$50.00) to one hundred dollars (\$100.00) for any member of this association joining under the age of 10 whose benefits in force upon such member attaining his or her tenth birthday are in the amount of fifty dollars (\$50.00).

Applicant's birthday must be written in the application and subject to verification by any record the Board of Mortuary Science may deem necessary to prove or establish a true date of the birth of any applicant.

Article 4. The annual meeting of the association shall be held at \_\_\_\_\_ (here insert the place, date and hour); each member shall have one vote at said annual meeting and 15 members of the association shall constitute a quorum. There shall be elected at the annual meeting of said association a board of directors of seven members, each of whom shall serve for a period of from one to five years as the membership may determine and until his or her successor shall have been elected and qualified. Any member of the board of directors who shall fail to maintain his or her membership, as provided in the rules and bylaws of said association, shall cease to be a member of the board of directors and a director shall be appointed by the president of said association for the unexpired term of such disqualified member. There shall be at least an annual meeting of the board of directors, and such meeting shall be held immediately following the annual meeting of the membership of the association. The directors of the association may, by a majority vote, hold other meetings of which notice shall be given to each member by mailing such notice five days before the meeting to be held. At the annual meetings of the directors of the association, the board of directors shall elect a president, a vice-president, and a secretary-treasurer. The president and vice-president shall be elected from among the directors, but the secretary-treasurer may be selected from the director membership or from the membership of the association, it being provided that it is not necessary that the secretary-treasurer shall be a member of the board of directors. Among other duties that the secretary-treasurer may perform, he shall be chargeable with keeping an accurate and faithful roll of the membership of this association at all times and he shall be chargeable with the duty of faithfully preserving and faithfully applying all moneys coming into his hands by virtue of his said office. The president, vice-president and secretary-treasurer shall constitute a board of control who shall direct the affairs of the association in accordance with these Articles and bylaws of the association, and subject to such modification as may be made or authorized by an act of the General Assembly. The secretary-treasurer shall keep a record of all assessments made, dues collected and benefits paid. The books of the association, together with all records and bank accounts shall be at all times open to the inspection of the Board of Mortuary Science or its duly constituted auditors or representatives. It shall be the duty of the secretary or secretary-treasurer of each association to keep the books of the association posted up-to-date so that the financial standing of the association may be readily ascertained by the Board of Mortuary Science or any auditor or representative employed by it. Upon the failure of any secretary or secretary-treasurer to comply with this provision, it shall be the duty of the Board of Mortuary Science to take charge of the books of the association and do whatever work is necessary to bring the books up-to-date. The actual costs of said work may be charged the burial association and shall be paid from the thirty percent (30%) allowed by law for the operation of the burial association.

Whenever in the opinion of the Board of Mortuary Science, it is necessary to audit the books of any burial association more than once in any calendar year, the Board of Mortuary Science shall have authority to assess such burial association the actual cost of any audit in excess of one per calendar year,

provided that no more than one audit may be deemed necessary unless a discrepancy exists at the last regular audit. Such cost shall be paid from the thirty percent (30%) allowed by law for the operation of the burial association.

Every burial association shall file with the Board of Mortuary Science an annual report of its financial condition on a form furnished to it by the Board of Mortuary Science. Such report shall be filed on or before February 15 of each calendar year and shall cover the complete financial condition of the burial association for the immediate preceding calendar year. The Board of Mortuary Science shall levy and collect a penalty of twenty-five dollars (\$25.00) for each day after February 15 that the report called for herein is not filed. The Board may, in its discretion, grant any reasonable extension of the above filing date without the penalty provided in this section. Such penalty shall be paid from the thirty percent (30%) allowed by law for the operation of the burial association. Any secretary or secretary-treasurer who fails to file such financial report on or before February 15 of each calendar year or on or before the last day of any period of extension for the filing of such report granted by the Board to the burial association of such secretary or secretary-treasurer shall be guilty of a Class 3 misdemeanor. Each day after February 15, or the last day of any period of extension for the filing of the report granted by the Board to the burial association of such secretary or secretary-treasurer, that said report is not filed by the secretary or secretary-treasurer of a burial association, shall constitute a separate offense.

Article 5. Upon the death of any officer, his successor shall be elected by the board of directors for the unexpired term. The president, vice-president and secretary-treasurer shall be elected for a term of from one to five years, and shall hold office until his successor is elected and qualified, subject to the power of the board of directors to remove any officer for good cause shown; provided, that any officer removed by the board of directors shall have the right of appeal to the membership of the association, such appeal to be heard at the next ensuing annual meeting of said membership.

Article 6. Each member shall be assessed according to the following schedule for the benefit indicated (or in multiples thereof for additional benefit) at the age of entry of the member.

ASSESSMENT RATE FOR AGE GROUPS:

First to tenth birthday (\$50.00) benefit	five cents (5¢)
Tenth to thirtieth birthday (\$100.00) benefit	ten cents (10¢)
Thirtieth to fiftieth birthday (\$100.00) benefit	twenty cents (20¢)
Fiftieth to sixty-fifth birthday (\$100.00) benefit	thirty cents (30¢)

(Ages shall be defined as having passed a certain birthday instead of nearest birthday.) Assessment shall always be made on the entire membership in good standing.

Any member joining under the age of 10 shall, upon attaining his or her tenth birthday, pay thereafter the assessment for a member age 10 as set out above.

Any member joining under the age of 10 whose benefits in force upon such member attaining his or her tenth birthday are in the amount of fifty dollars (\$50.00) shall, if such member is in good standing upon attaining his or her tenth birthday, thereafter have benefits in force in the amount of one hundred dollars (\$100.00) without the necessity of making application for such increased benefit. Assessments made thereafter for such member shall be the

same as an assessment for a member age 10 as set out above. Such one-hundred-dollar (\$100.00) benefit shall be in full force and effect for any such member in good standing immediately upon such member attaining his or her tenth birthday even though the increased assessment provided for herein shall not yet be due and payable, it being the intent of this Article that, notwithstanding any other provisions in these Articles, any member in good standing with a fifty-dollar (\$50.00) benefit shall immediately upon attainment of his or her tenth birthday have a one-hundred-dollar (\$100.00) benefit in force whether or not the increased assessment is then due and payable by such member in accordance with the assessment period of this association.

Article 7. No benefit will be paid for natural death occurring within 30 days from the date of the certificate of membership, which certificate shall express the true date such person becomes a member of this association, and the certificate issued shall be in acknowledgment of membership in this association. Benefits will be paid for death caused by accidental means occurring any time after date of membership certificate. No benefits will be paid in case of suicidal death of any member within one year from the date of the membership certificate. No agent or other person shall have authority to issue membership certificates in the field, but such membership certificates shall be issued at the home office of the association by duly authorized officers: the president, vice-president or secretary, and a record thereof duly made.

Article 8. Any member failing to pay any assessment within 30 days after notice shall be in bad standing, and unless and until restored, shall not be entitled to benefits. Notice shall be presumed duly given when mailed, postage paid, to the last known address of such members: Provided, moreover, that notice to the head of a family shall be construed as notice to the entire membership of such family in said association. Any member or head of a family changing his or her address shall give notice to the secretary-treasurer in writing of such change, giving the old address as well as the new, and the head of a family notifying the secretary-treasurer of change in address shall list with the secretary in such notice all the members of his or her family having membership in said association. Any member in bad standing may, within 90 days after the date of an assessment notice, be reinstated to good standing by the payment of all delinquent dues and assessments: Provided such person shall at the same time submit to the secretary-treasurer satisfactory evidence of good health, in writing, and no benefit will be paid for natural death occurring within 30 days after reinstatement. In case of death caused by accidental means, benefit will be in force immediately after reinstatement. Any person desiring to discontinue his membership for any reason shall communicate such desire to the secretary-treasurer immediately and surrender his or her certificate of membership. Any adult member who is the head of a family and who, with his family, has become in bad standing, shall furnish to the secretary-treasurer satisfactory evidence of the good health of each member desired to be reinstated in writing.

Article 9. The benefits herein provided are for the purpose of furnishing a funeral and burial benefit, in cash or merchandise and service, for a deceased member. The funeral and burial benefit, if furnished in merchandise and service, shall be in keeping with and similar to the merchandise and service sold and furnished at the same price by reputable funeral directors of this or other like communities.

Article 10. It is understood and stipulated that the benefits provided for shall be payable only to a funeral establishment which provides a funeral service for a deceased member and which, if located in North Carolina, is a funeral establishment registered under the provisions of G.S. 90-210.25 or which, if located in any other state, territory or foreign country, is a funeral establishment recognized by and operating in conformity with the laws of such other

state, territory or foreign country. Upon the death of any member, it shall be the duty of the person or persons making the funeral arrangements for such deceased member to notify the secretary of the member's burial association of the death of such member. The person or persons making the funeral arrangements for such deceased member shall have 30 days from the date of the death of such member in which to make demand upon the burial association for the funeral benefits to which such member is entitled.

The benefits provided for are to be paid by the burial association to the funeral director providing such funeral and burial service either in cash or in merchandise and service as elected by the person or persons making the funeral arrangements for such deceased member. If the burial association shall fail, on demand, to provide the benefits to which the deceased member was entitled to the funeral establishment which provided the funeral service for the deceased member, then the benefits shall be paid in cash to the representative of the deceased member qualified under law to receive such benefits.

Article 11. Assessments shall be made as provided in G.S. 143B-472.18. Whenever possible, assessments will be made at definitely stated intervals so as to reduce the cost of collection and to prevent lapse.

Article 12. In the event the proceeds of the annual assessments imposed on the entire membership for one year, as provided in G.S. 143B-472.18, do not prove sufficient at any time to yield the benefit provided for in these bylaws, then the secretary-treasurer shall notify the Board of Mortuary Science who shall be authorized, unless the membership is increased to that point where such assessments are sufficient, to cause liquidation of said association, and may transfer all members in good standing to a like organization or association.

Article 13. (a) All legitimate operating expenses of the association shall be paid out of the assessments, but in no case shall the entire expenses exceed thirty percent (30%) of the total of the assessments collected and the investment income of the burial association in one calendar year.

(b) Each burial association shall establish and maintain a reserve account for the payment of member's benefits. On the thirty-first day of December following July 1, 1975, each burial association shall transfer to such burial association's reserve account established in accordance with this Article all funds which such burial association is maintaining on that date in an account designated by such burial association as either a surplus account or a reserve account. Thereafter, beginning on January 1, 1976, each burial association shall place in such reserve account five percent (5%) of the assessments collected from and after that date and five percent (5%) of the investment income of the association earned from and after that date. These sums shall continue to be placed in the association's reserve account until the association's reserve account shall equal twenty-one dollars (\$21.00) per member. Thereafter if the reserve account shall fall below twenty-one dollars (\$21.00) per member, such sums shall again be deposited in the account until such time as the reserve account shall again be equal to twenty-one dollars (\$21.00) per member. If the reserve account shall at any time exceed twenty-one dollars (\$21.00) per member, amounts in excess of twenty-one dollars (\$21.00) per member may be withdrawn from the reserve account.

Article 14. Special meetings of the association membership may be called by the secretary-treasurer when by him deemed necessary or advisable, and he shall call a meeting when petitioned to do so by sixty-six and two-thirds percent (66 $\frac{2}{3}$ %) of the members of said association who are in good standing.

Article 15. The secretary-treasurer shall, upon satisfactory evidence that membership was granted to any person not qualified at the time of entry as provided under Article 3 of these bylaws, refund any amounts paid as assessment, and shall remove the name from the membership roll.

Article 16. Any member may pay any number of assessments in advance, in which case such member will not be further assessed until a like number of assessments shall have been levied against the remaining membership.

Article 17. No person may maintain active membership in two or more separate burial associations. Any person who is found to have membership in two or more separate burial associations shall forfeit all benefits and fees paid in all associations of which he is a member except in the association which he first joined and of which he is still then a member. A person is not a member of an association for purposes of this Article if he has discontinued his membership in such association or if such association has been placed in liquidation.

Article 18. Each year, before the annual meeting of the membership of this association, the association shall cause to be published in a newspaper of general circulation in the county in which such association has its principal place of business, or shall cause to be mailed to each member in good standing a statement showing total income collected, expenses paid and burial benefits provided for by such association during the next preceding year.

Article 19. These rules and bylaws shall not be modified, canceled or abridged by any association or other authority except by act of the General Assembly of North Carolina. (1941, c. 130, s. 4; 1943, c. 272, ss. 1, 2; 1945, c. 125, s. 1; 1947, c. 100, s. 1; 1949, c. 201, ss. 1, 2; 1953, c. 1201; 1955, c. 259, ss. 3, 4; 1967, c. 1197, s. 4; 1969, c. 1041, ss. 2, 3; 1973, c. 688; 1975, c. 837; 1977, c. 748, ss. 1, 2, 6; 1981, c. 989, s. 4; 1987, c. 864, ss. 12, 50; 1991, c. 62, s. 1; 1991 (Reg. Sess., 1992), c. 1007, s. 39; 1993, c. 539, s. 1042; c. 553, ss. 48, 49; 1994, Ex. Sess., c. 24, s. 14(c); 1997-313, ss. 4-6; 1999-425, s. 2.)

**Editor's Note.** — This section was formerly § 58-241.9. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

The Article containing § 90-210.17, referred

to in this section, was rewritten by Session Laws 1975, c. 571, and recodified as § 90-210.18 et seq. See now § 90-210.25 as to permits to operate funeral establishments.

#### CASE NOTES

**The General Assembly may reserve the right to amend bylaws and regulations** of a mutual burial association which it created so as to bind the association and its members. *Adair v. Orrell's Mut. Burial Ass'n*, 284 N.C. 534, 201 S.E.2d 905, appeal dismissed, 417 U.S. 927, 94 S. Ct. 637, 41 L. Ed. 2d 231 (1974), decided under former § 58-226.

**Members are bound by subsequent legislation making changes in the rules and bylaws** of burial associations, and changes so made are not offensive to the constitutional provision against the passage of a law which impairs the obligation of a contract. *Spearman v. United Mut. Burial Ass'n*, 225 N.C. 185, 33 S.E.2d 895 (1945), decided under former § 58-226.

**And Statutory Changes Subsequent to Issuance of Certificate Did Not Impair Contract.** — Where the provisions of former § 58-226 and the certificate issued to the member by her burial association contained an express reservation of power by the General Assembly to modify, cancel, or abridge the rules and bylaws of the association, this was ample

notice to both of the reservation of power by the General Assembly, and the statutory changes subsequent to the issuance of the certificate did not result in impairment of the contract in violation of Art. I, § 10, clause 1, of the United States Constitution. *Adair v. Orrell's Mut. Burial Ass'n*, 284 N.C. 534, 201 S.E.2d 905, appeal dismissed, 417 U.S. 927, 94 S. Ct. 637, 41 L. Ed. 2d 231 (1974), decided under former § 58-226.

**Payment of Benefits to Funeral Director of Another Association Who Renders Services.** — When funeral services are provided by a funeral director of any mutual burial association in good standing in North Carolina for a decedent who was a member of another such association, the benefits of the decedent are not forfeited, but are required to be paid in cash to the funeral director who actually renders the services. *Adair v. Orrell's Mut. Burial Ass'n*, 19 N.C. App. 492, 199 S.E.2d 129 (1973), aff'd, 284 N.C. 534, 201 S.E.2d 905, appeal dismissed, 417 U.S. 927, 94 S. Ct. 637, 41 L. Ed. 2d 231 (1974), decided under former § 58-226.

#### **§ 143B-472.4. Limitation of soliciting agents; licensing and qualifications; officers exempt from license; issuance of membership certificates.**

Each burial association shall have for each funeral home sponsoring the said burial association not more than five agents or representatives soliciting members other than the secretary-treasurer and president, and before any agent or representative shall or may represent any burial association in North Carolina, he or she shall first apply to the Board of Mortuary Science for a license, and the Board of Mortuary shall have full power and authority to issue such license upon proof satisfactory to such Board that such person is capable of soliciting burial association memberships, is of good moral character and recommended by the association in behalf of which such membership solicitations are to be made. The Board of Mortuary Science may reject the application of any person who does not meet the requirements as to capacity and moral fitness. The Board of Mortuary Science may, upon proof satisfactory to it that said licensed agent has violated any section of this law, revoke said license. Upon the issuing of a license to solicit membership in any burial association, such person shall be required to pay in cash, at the time of issuing license to such applicant, to the Board of Mortuary Science, the sum of five dollars (\$5.00); moneys derived from this fee or charge, are to be and remain in the department or office of such Board of Mortuary Science, for supervision of burial associations in this State, subject to withdrawal for expenses of supervision by authority of the Board of Mortuary Science. It shall not be necessary that the president or secretary-treasurer of any burial association obtain a license for soliciting membership in the association of which such person is president or secretary-treasurer. Membership certificates shall not be issued by a solicitor in the field, but shall be reported to the office of the association and there issued and a record made of such issuance at the time such certificate is so issued. (1941, c. 130, s. 5; 1945, c. 125, s. 2; 1947, c. 100, s. 2; 1949, c. 201, s. 3; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, ss. 5, 6, 7.)

**Editor's Note.** — This section was formerly § 58-241.10. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

#### **§ 143B-472.5. Assessments against association for expenses of Board of Mortuary Science.**

In order to meet the expenses of the supervision of the burial associations, the Board of Mortuary Science shall prepare an annual budget for the office of the Board of Mortuary Science. Thereafter, the Board of Mortuary Science shall assess each burial association one hundred dollars (\$100.00) and shall prorate the remaining amount of this budget, over and above any other funds made available to it for this purpose, and assess each association on a pro rata basis in accordance with the number of members of each association. Each burial association shall remit to the Board of Mortuary Science its pro rata part of the total assessment, which expense shall be included in the thirty per centum (30%) expense allowance as provided in G.S. 143B-472.3. This assessment shall be made on the first day of July of each and every year and said assessment shall be paid within 30 days thereafter. If any association shall fail or refuse to pay such assessment within 30 days, the Board of Mortuary Science is authorized to transfer all memberships and assets of every kind and description to the nearest association that is found by the Board of Mortuary Science to be in good sound financial condition. (1941, c. 130, s. 6; 1943, c. 272, s. 3; 1945, c. 125, s. 3; 1947, c. 100, s. 3; 1949, c. 201, s. 4; 1951, c. 901, s. 1; 1955,

c. 259, ss. 1, 2; 1967, c. 985, s. 1; 1969, c. 1006, s. 2; 1973, c. 1476, s. 1; 1975, c. 837; 1977, c. 748, s. 3; 1981, c. 989, s. 6; 1983, c. 717, s. 12; 1987, c. 864, ss. 12, 14; 1997-313, ss. 5, 6, 7.)

**Editor's Note.** — This section was formerly § 58-241.11. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### **§ 143B-472.6. Unlawful to operate without written authority of Board.**

It shall be unlawful for any person, firm or corporation, association or organization to organize, operate, or in any way solicit members for a burial association, or for participation in any plan, scheme, or device similar to burial associations, without the written authority of the Board of Mortuary Science, and any person, firm or corporation violating the provisions of this section shall be guilty of a Class 1 misdemeanor; provided, however, the Board of Mortuary Science shall not withhold authority for the organization or operation of a bona fide burial association, meeting the requirements of this Article, unless it shall be found and established to the satisfaction of the Board of Mortuary Science that the person or persons applying for authority to organize and operate such bona fide burial association is disqualified or does not meet the requirements of this Article. (1941, c. 130, s. 7; 1975, c. 837; 1987, c. 864, s. 12; 1993, c. 539, s. 1043; 1994, Ex. Sess., c. 24, s. 14(c); 1997-313, s. 5.)

**Editor's Note.** — This section was formerly § 58-241.12. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### **§ 143B-472.7. Revocation of license.**

In the event it is proven to the satisfaction of the Board of Mortuary Science that any burial association is being operated not in conformity with any provision of this Article, then it shall become the duty of the Board of Mortuary Science upon hearing to revoke the license of said burial association and transfer said burial association, its membership and all its assets of every kind and description to another burial association that is found by the Board of Mortuary Science to be in good sound financial condition; provided, that if said burial association gives notice of appeal as provided for in G.S. 143B-472.16, then said burial association may continue to operate as before the revocation and until final adjudication. (1945, c. 125, s. 4; 1975, c. 837; 1987, c. 864, ss. 12, 15; 1997-313, s. 5.)

**Editor's Note.** — This section was formerly § 58-241.13. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### **§ 143B-472.8. Deposit or investment of funds of mutual burial associations.**

Funds belonging to each mutual burial association over and above the amount determined by the Board of Mortuary Science to be necessary for operating capital shall be invested in:

- (1) Deposits in any bank or trust company in this State.
- (2) Obligations of the United States of America.

- (3) Obligations of any agency or instrumentality of the United States of America if the payment of interest and principal of such obligations is fully guaranteed by the United States of America.
- (4) Obligations of the State of North Carolina.
- (5) Bonds and notes of any North Carolina local government or public authority, subject to such restrictions as the Board of Mortuary Science may impose.
- (6) Shares of or deposits in any savings and loan association organized under the laws of this State and shares of or deposits in any federal savings and loan association having its principal office in this State, provided that any such savings and loan association is insured by the United States of America or any agency thereof or by any mutual deposit guaranty association authorized by the Commissioner of Insurance of North Carolina to do business in North Carolina pursuant to Article 7A of Chapter 54 of the General Statutes.
- (7) Obligations of the Federal Intermediate Credit Banks, the Federal Home Loan Banks, Fannie Mae, the Banks for Cooperatives, and the Federal Land Banks, maturing no later than 18 months after the date of purchase.

Violation of the provisions of this section shall, after hearing, be cause for revocation or suspension of license to operate a mutual burial association. (1957, c. 820, s. 1; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, s. 5; 2001-487, s. 14(l).)

**Editor's Note.** — This section was formerly § 58-241.14. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

Article 7A of Chapter 54, referred to in this section, was repealed by Session Laws 1981, c.

282. See now Article 12 of Chapter 54B.

**Effect of Amendments.** — Session Laws 2001-487, s. 14(l), effective December 16, 2001, substituted "Fannie Mae" for "the Federal National Mortgage Association" in subdivision (7).

### § 143B-472.9. Unclaimed funds of defunct burial association.

All unclaimed funds of any burial association that is no longer in operation shall be disposed of in accordance with Chapter 116B. (1969, c. 1083; 1975, c. 837; 1979, 2nd Sess., c. 1311, s. 7; 1987, c. 864, s. 12.)

**Editor's Note.** — This section was formerly § 58-241.15. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### § 143B-472.10. Penalty for failure to operate in substantial compliance with bylaws.

If any burial association or other organization or official thereof, or any person operates or allows to be operated a burial association on any plan, scheme or bylaws not in substantial compliance with the bylaws set forth in G.S. 143B-472.3, the Board of Mortuary Science may revoke any authority or license granted for the operation of such burial association, and any person, firm or corporation or association convicted of the violation of this section shall be guilty of a Class 1 misdemeanor. (1941, c. 130, s. 8; 1975, c. 837; 1987, c. 864, ss. 12, 16; 1993, c. 539, s. 1044; 1994, Ex. Sess., c. 24, s. 14(c); 1997-313, s. 5.)

**Editor's Note.** — This section was formerly § 58-241.16. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### **§ 143B-472.11. Penalty for wrongfully inducing person to change membership.**

Any burial association official, agent or representative thereof or any person who shall use fraud or make any promise not part of the printed bylaws, or who shall offer any rebate, gratuity or refund to cause a member of one association to change membership to another association, shall be guilty of a Class 1 misdemeanor. (1941, c. 130, s. 9; 1975, c. 837; 1987, c. 864, s. 12; 1993, c. 539, s. 1045; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — This section was formerly § 58-241.17. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### **§ 143B-472.12. Penalty for making false and fraudulent entries.**

Any person or burial association official who makes or allows to be made any false entry on the books of the association with intent to deceive or defraud any member thereof, or with intent to conceal from the Board of Mortuary Science or its deputy or agent, or any auditor authorized to examine the books of such association, under the supervision of the Board of Mortuary Science, shall be guilty of a Class 1 misdemeanor. (1941, c. 130, s. 10; 1945, c. 125, s. 5; 1975, c. 837; 1987, c. 864, s. 12; 1993, c. 539, s. 1046; 1994, Ex. Sess., c. 24, s. 14(c); 1997-313, ss. 5, 6.)

**Editor's Note.** — This section was formerly § 58-241.18. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### **§ 143B-472.13. Accepting applications without collecting fee and first assessment.**

Any burial association official, agent or representative, or any other person who shall accept any application for membership in any association without collecting the membership fee and first assessment due thereon from any such person making such an application for membership, shall be guilty of a Class 1 misdemeanor.

Any burial association official, agent or representative, or any other person who shall accept an application for an additional benefit from a member of a burial association without collecting the additional membership fee and the additional assessment due thereon from any such person making such an application for an additional benefit shall be guilty of a Class 1 misdemeanor. (1941, c. 130, s. 11; 1975, c. 837; 1987, c. 864, s. 12; 1993, c. 539, s. 1047; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — This section was formerly § 58-241.19. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### **§ 143B-472.14. Removal of secretary-treasurer for failure to maintain proper records.**

Any burial association secretary-treasurer who fails to maintain records to the minimum standards required by the Board of Mortuary Science shall be by such Board removed from office and another elected in his stead, such election

to be immediate and by the board of directors of said burial association upon notice of such removal. (1941, c. 130, s. 12; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, s. 5.)

**Editor's Note.** — This section was formerly § 58-241.20. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### **§ 143B-472.15. Free services; failure to make proper assessments, etc., made a misdemeanor.**

Any person or persons who offer free funeral services or free embalming, free ambulance service or any other thing free of charge, acting for any burial association, directly or indirectly, or who so acting shall in any way fail to assess for the amount needed to pay death losses and allowable expenses, shall be guilty of a Class 1 misdemeanor. (1941, c. 130, s. 13; 1967, c. 1197, s. 5; 1975, c. 837; 1987, c. 864, s. 12; 1993, c. 539, s. 1048; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — This section was formerly § 58-241.21. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### **§ 143B-472.16. Right of appeal upon revocation or suspension of license.**

Upon the revocation or suspension of any license or authority by the Board of Mortuary Science, under any of the provisions of this Article, the said association or individual whose license or authority has been revoked or suspended shall have the right of appeal from the action of the Board of Mortuary Science in revoking or suspending such license or authority to the Superior Court of Wake County or to the superior court of the county in which the said association or the said individual is domiciled or, upon agreement of the parties to the appeal, to any other superior court of the State. The association or individual appealing from the order of the Board of Mortuary Science shall give notice of appeal in writing to the Board of Mortuary Science, with a copy of such notice to the clerk of the superior court to which the appeal is taken, within 10 days of the date of notice of the order revoking or suspending the said license or authority and shall pay such appeal fees to the clerk of superior court as are required by law. Within 30 days after receipt of the notice of appeal, the Board of Mortuary Science shall file with the clerk of the superior court of the county in which the appeal is to be heard the decision of the Board of Mortuary Science. Upon receipt of such decision, the clerk of superior court shall place the matter upon the civil issue docket of the superior court and the same shall be heard de novo. Pending such appeal, the burial association or individual whose license or authority has been suspended or revoked shall continue to operate or function as before the revocation or suspension and until final adjudication by the superior court. (1941, c. 130, s. 14; 1943, c. 272, s. 4; 1957, c. 820, s. 3; 1973, c. 108, s. 20; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, s. 5.)

**Editor's Note.** — This section was formerly § 58-241.22. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### § 143B-472.17. Bond of secretary or secretary-treasurer of burial associations.

The secretary or secretary-treasurer of each burial association shall, before entering upon the duties of his office, and for the faithful performance thereof, execute a bond payable to the Board of Mortuary Science as trustee for the burial association in some bonding company licensed to do business in this State, to be approved by the Board of Mortuary Science. Said bond shall be in an amount not less than one thousand dollars (\$1,000), nor more than ten thousand dollars (\$10,000), in the discretion of the Board, for those associations whose assets, as determined by the Board's audit, are ten thousand dollars (\$10,000) or less. For those associations whose assets, as determined by the Board's audit, are in excess of ten thousand dollars (\$10,000), said bond shall be in an amount of ten thousand dollars (\$10,000) plus twenty-five per centum (25%) of all assets over ten thousand dollars (\$10,000); provided, however, that the bond required by this section shall not in any event exceed fifty thousand dollars (\$50,000). If any association operates a branch or subsidiary and the officers of both associations are the same, for purposes of this section, it shall be treated as one association. Any burial association, with the consent of the Board of Mortuary Science, may give a bond secured by a deed of trust on real estate situated in North Carolina, in lieu of procuring said bond from a bonding company. The bond thus given shall not be acceptable in excess of the ad valorem tax value for the current year of the real estate securing said bond. The deed of trust shall be recorded in the county or counties wherein the land lies and shall be deposited with the Board of Mortuary Science, name the Board as trustee for the burial association and must constitute a first lien on the property secured by the deed of trust. Said deed of trust shall contain a description of the encumbered property by metes and bounds together with evidence by title insurance policy or by certificate of an attorney-at-law, certifying that said trustor is the owner of a marketable fee simple title to such lands. (1941, c. 130, s. 15; 1943, c. 272, s. 5; 1967, c. 985, s. 2; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, s. 5.)

**Editor's Note.** — This section was formerly § 58-241.23. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### § 143B-472.18. Assessments.

Every burial association now or hereinafter organized shall make 12 assessments, or their equivalent, per year per member. The Board of Mortuary Science shall order any association to make more than 12 assessments per year when, after notice and hearing, it shall appear to the Board of Mortuary Science that the death loss of any association so requires in order to protect the interest of the members. (1943, c. 272, s. 6; 1969, c. 1041, s. 1; 1971, c. 650; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, s. 5.)

**Editor's Note.** — This section was formerly § 58-241.24. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### § 143B-472.19. Making false or fraudulent statement a misdemeanor.

Any officer or employee of any burial association authorized to do business under this Article, who shall knowingly or willfully make any false or

fraudulent statement or representation in or with reference to any application for membership or for the purpose of obtaining money or any benefit from any burial association transacting business under this Article, or who shall make any false financial statement to the Board of Mortuary Science or to the membership of the burial association of which such person is an officer or employee shall be guilty of a Class 1 misdemeanor. (1943, c. 272, s. 6; 1975, c. 837; 1987, c. 864, s. 12; 1993, c. 539, s. 1049; 1994, Ex. Sess., c. 24, s. 14(c); 1997-313, s. 5.)

**Editor's Note.** — This section was formerly § 58-241.25. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### **§ 143B-472.20. Statewide organization of associations.**

It shall be lawful for the several mutual burial associations of the State of North Carolina, in good standing, to organize and provide for a statewide organization of mutual burial associations, which organization shall be for the mutual and general suggestive control of mutual burial associations in the State of North Carolina. Such organization shall be known as the North Carolina Burial Association, Incorporated, and shall be composed of members who are lawfully operating burial associations in this State and who pay their dues to such association. (1941, c. 130, s. 16; 1975, c. 837; 1987, c. 864, s. 12.)

**Editor's Note.** — This section was formerly § 58-241.26. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### **§ 143B-472.21. Article deemed exclusive authority for organization, etc., of mutual burial associations.**

This Article shall be deemed and held exclusive authority for the organization and operation of mutual burial associations within the State of North Carolina, and such associations shall not be subject to any other laws respecting insurance companies of any class. (1941, c. 130, s. 17; 1975, c. 837; 1987, c. 864, s. 12.)

**Editor's Note.** — This section was formerly § 58-241.27. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### **§ 143B-472.22. Operation of association in violation of law prohibited.**

No person, firm or corporation shall operate as a burial association in this State unless incorporated under the laws of the State of North Carolina and unless such association shall be operated in compliance with all the provisions of this Article, and unless such association shall be licensed and approved by the Board of Mortuary Science. (1941, c. 130, s. 18; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, s. 5.)

**Editor's Note.** — This section was formerly § 58-241.28. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### **§ 143B-472.23. Member in armed forces failing to pay assessments; reinstatement.**

If a member of a burial association who is in the military or naval forces of the United States fails to pay any assessment, he shall be in bad standing, and unless and until restored, shall not be entitled to benefits. However, the said member shall be reinstated in the burial association upon application made by him at any time until 12 months after his discharge from the military or naval forces of the United States, notwithstanding his physical condition and without the payment of assessments which have become due during his service in the military or naval forces of the United States. Benefits will be in force immediately after such reinstatement. (1943, c. 732, s. 2; 1975, c. 837; 1987, c. 864, s. 12.)

**Editor's Note.** — This section was formerly § 58-241.29. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### **§ 143B-472.24. Hearing by Board of dispute over liability for funeral benefits; appeal.**

In case of a disagreement between the representative of a deceased member of any burial association and such deceased member's burial association a hearing may be held by the Board of Mortuary Science, on request of either party, to determine whether the association is liable for the benefits set forth in the policy issued to the said deceased member of said burial association. The Board of Mortuary Science shall render a decision which shall have the same force and effect as judgments rendered by courts of competent jurisdiction in North Carolina. Either party may appeal from the decision of the Board of Mortuary Science. Appeal shall be to the district court division of the General Court of Justice in the county in which the burial association is located. The procedure for appeal shall be the same as the appeal procedure set forth in Article 19 of Chapter 7A of the General Statutes of North Carolina regulating appeals from the magistrate to the district court. Upon appeal trial shall be de novo. (1947, c. 100, s. 5; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, s. 5.)

**Editor's Note.** — This section was formerly § 58-241.30. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### **§ 143B-472.25. Board authorized to subpoena witnesses, administer oaths and compel attendance at hearings.**

For the purpose of holding hearings the Board of Mortuary Science shall have power to subpoena witnesses, administer oaths, and compel attendance of witnesses and parties. (1957, c. 820, s. 2; 1975, c. 837; 1987, c. 864, s. 12; 1997-313, s. 5.)

**Editor's Note.** — This section was formerly § 58-241.31. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### § 143B-472.26. Authority of Board to examine financial records.

The Board of Mortuary Science shall have authority to examine all records relating to a burial association's financial condition wherever such records are located, including records maintained by any corporation, building and loan association, savings and loan association, credit union, or other legal entity organized and operating pursuant to the authority contained in Chapters 53 and 54 of the General Statutes. (1977, c. 748, s. 4; 1987, c. 864, s. 12; 1997-313, s. 5.)

**Editor's Note.** ← This section was formerly § 58-241.32. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### § 143B-472.27. Board authorized to freeze certain funds of Association.

Whenever in the opinion of the Board of Mortuary Science it deems it necessary for the protection of the interest of members of a burial association, it shall have authority by written order to direct that the funds of any burial association on deposit in any institution organized and operating under Chapters 53 and 54 of the General Statutes be frozen and not paid out by such legal entity. Any legal entity freezing the funds of a burial association pursuant to the directive of the Board of Mortuary Science shall not be liable to any burial association for freezing said account pursuant to the order of the Board. (1977, c. 748, s. 5; 1987, c. 864, s. 12; 1997-313, ss. 5, 6.)

**Editor's Note.** — This section was formerly § 58-241.33. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### § 143B-472.28. Authority of foreign or domestic mutual burial association or domestic or foreign insurance company to purchase, merge or consolidate with North Carolina mutual burial associations.

(a) Any mutual burial association or insurance company operating pursuant to the laws of this State or any other state may purchase the assets of, merge, or consolidate with a North Carolina chartered mutual burial association in accordance with the laws of this State and any rules promulgated by the Board of Mortuary Science to protect the interest of members of mutual burial associations prior to the purchase, merger, or consolidation of the association.

(b) Notwithstanding any provision of Chapter 55 or Chapter 55A, any domestic or foreign insurance company which if organized in North Carolina would have to be organized under Chapter 55 may merge or consolidate with any domestic mutual burial association. When a domestic or foreign insurance company consolidates or merges with a domestic mutual burial association and sells insurance or burial benefits in excess of two hundred dollars (\$200.00), it shall be subject to all of the provisions of the insurance laws of North Carolina.

(c) If the assets and liabilities of a North Carolina mutual burial association are purchased, and no merger, consolidation or dissolution is effectuated in connection with the purchase, the management and administrative operations of the North Carolina mutual burial association shall be transferred to the purchasing entity.

(d) In any purchase, merger, or consolidation pursuant to this section, the membership of the mutual burial association shall be guaranteed coverage in the amounts held by each member at the time of such purchase, merger, or consolidation. During the life of the member, this coverage shall not exceed the annual rate charged by the mutual burial association that is being purchased, merged, or consolidated. An insurance company which purchases, merges with, or consolidates with a North Carolina mutual burial association shall establish and maintain life insurance reserves in accordance with the insurance laws of North Carolina for those burial insurance policies existing at the time of the purchase, merger, or consolidation. A North Carolina mutual burial association or foreign mutual burial association which purchases, merges with, or consolidates with a North Carolina mutual burial association shall establish and maintain burial insurance reserves in accordance with the burial insurance laws of North Carolina for those burial insurance policies existing at the time of the purchase, merger, or consolidation. (1981, c. 989, s. 5; 1983, c. 766; 1987, c. 864, s. 12; 1997-313, s. 5.)

**Editor's Note.** — This section was formerly § 58-241.34. It was recodified by Session Laws 1987, c. 864, s. 12, effective August 14, 1987.

### § 143B-472.29. Acquisition, merger, dissolution, and liquidation of mutual burial associations.

(a) Any insurance company which desires to purchase the assets of or to merge with a burial association as provided in G.S. 143B-472.28 shall submit to the Board of Mortuary Science and to the secretary of the association a written proposal containing the terms and conditions of the proposed purchase or merger. A proposal may be conditioned upon an increase in the assessments of an association in the manner set out in subsection (g) of this section. In such a case, the issues of purchase or merger and an increase in assessments may be considered at the same meeting of the association.

(b) Upon receipt of a written proposal:

- (1) The Board shall issue an order directing the association to hold a meeting of the membership within 30 days following receipt of the order for the purpose of voting on the proposal.
- (2) Within 10 days of receiving the order from the Board, the association shall give at least 10 days' written notice of the meeting to each of its members. The notice shall:
  - a. State the date, time, and place of the meeting.
  - b. State the purpose of the meeting.
  - c. Contain or have attached the proposal submitted by the insurance company.
  - d. Contain a statement limiting the time that each member will be permitted to speak to the proposal, if the association deems it advisable.

(c) A representative of the insurance company shall be permitted to attend the meeting held by the association for the purposes of explaining the proposal and answering any questions from the members. The officers of the association may present their views concerning the proposal. Any member of the association who wishes to speak to the proposal shall be permitted to do so subject to any time limitation stated in the notice of the meeting.

(d) The secretary of the association shall record the name of every member who is present at the meeting and shall determine whether there is a quorum. The presence of 15 members or ten percent (10%) of the membership,

whichever is greater, shall constitute a quorum. Acceptance or rejection of the proposal shall be by majority vote of the members present and voting. Any member who is at least 18 years of age shall be permitted to vote. A parent or guardian of any member who is under 18 years of age may vote on behalf of his or her child or ward, but only one vote may be cast on behalf of that member.

(e) The secretary of the association shall certify the result of the vote and the presence of a quorum to the Board within five days following the meeting and shall include with the certification a copy of the notice of the meeting that was sent to the members of the association.

(f) The Board shall immediately review the certification, the notice, and any other records that may be necessary to determine the adequacy of notice, the presence of a quorum, and the validity of the vote. Upon determining that the meeting and vote were regular and held following proper notice and that a majority of a quorum of the members voted in favor of the proposal, the Board shall issue an order approving the purchase or merger and directing that the purchase or merger proceed in accordance with the proposal.

(g) Any burial association whose current assessments are not, or are unlikely to be within the next three years, adequate to reach or maintain a reserve of at least twenty-one dollars (\$21.00) per member or are inadequate to meet the requirements of a proposal from an insurance company to acquire the assets of or to merge with the association may increase its assessments by an amount necessary to reach and maintain the reserve or to meet the proposal. The increase shall be approved by a vote of the members of the association at a regular meeting of the association or at a special meeting called for the purpose of increasing assessments.

- (1) Any officer or director of the association may call a special meeting for the purpose of increasing assessments, and the secretary shall call a special meeting for such purpose upon the request of at least ten percent (10%) of the members or upon receipt of a proposal from an insurance company that is conditioned upon an increase in assessments.
- (2) Written notice setting out the date, time, place, and the purpose of the meeting shall be hand delivered or sent by first-class mail, postage prepaid, to the last known address of each member of the association at least 10 days in advance of the meeting.
- (3) No vote may be had on the question of an increase in assessments unless a quorum of the members of the association is present at the meeting. A quorum shall be conclusively presumed if 15 members or ten percent (10%) of the membership of the association, whichever is greater, is present at the meeting.
- (4) The proposal to increase the assessments shall be approved by an affirmative vote of a majority of the members present and voting.
- (5) The secretary of the association within five days following the meeting shall certify the result of the vote and the presence of a quorum to the Board in the manner and for the purposes set out in subsections (e) and (f) of this section.

(h) Upon a written request from an association that has held a valid meeting and voted for voluntary dissolution in accordance with G.S. 143B-472.3, the Board shall issue an order of liquidation for that association.

(i) Upon receipt of a request for voluntary dissolution under subsection (h), the Board shall issue an order of liquidation. The Board's order may direct that the agreements for members' benefits be transferred to a financially sound mutual burial association, as well as all records, property, and unexpended balances of funds of the association to be liquidated, if the financially sound mutual burial association agrees in writing to accept the transfer. The Board's

order shall direct the burial association to complete the liquidation and to file a final report with the Board no later than December 31 of the year of the liquidation. Upon receipt of the order of liquidation, the burial association shall:

- (1) Cease accepting new members.
- (2) Collect all debts owed to the association and pay all debts owed by the association from monies on hand, including the reserve.
- (3) Distribute pro rata any remaining monies on hand and in the reserve among those who were members of the association and whose transfer could not be accomplished on the date that the liquidation order was issued by the Board. Each member's distributive share shall be determined by dividing the amount of the member's benefit by the aggregate benefits of all members of the association and then multiplying the total amount of money available for distribution by the percentage so derived. Assessments owed by the members to the association at the time of distribution shall be taken into account and shall be offset against the members' distributive shares.
- (4) Issue a certificate to members in an amount that equals the difference between the distributive share issued in subdivision (3) of this subsection and the full amount of the member's association benefit. Any certificate issued shall supersede and supplant any other certificate already issued by the association. The certificate shall be on a form prescribed by the Board and shall be prepared and distributed by the association at its expense.
- (5) File a final report with the Board on or before December 31 in the year in which the order of liquidation was issued. This report shall show all receipts and disbursements, including the amount distributed to each member, since the last annual report of the association was filed with the Board.

(j) A certificate issued under subsection (i) of this section may be used as a credit toward the cost of funeral services, facilities, and merchandise at any funeral establishment that agrees on forms prescribed by the Board to accept such certificates. A funeral establishment that agrees to accept certificates shall do so until the agreement with the Board expires. The Board shall maintain and distribute to the public a list of funeral establishments that will accept certificates.

(k) Upon receipt of the final report of dissolution by the association, which is required by subsection (i) of this section, the Board shall immediately review the final report and shall notify the association whether the report is complete and has been accepted. Upon acceptance of the final report by the Board, all licenses issued to soliciting agents of the association pursuant to G.S. 143B-472.6 are automatically cancelled. (1999-425, s. 3.)

#### Part 14. Business Energy Improvement Program.

**§§ 143B-472.30 through 143B-472.34:** Repealed by Session Laws 2000-140, s. 76, effective September 30, 2000.

**Cross References.** — As to the Energy Improvement Loan Program, see now § 143-345.16 et seq.

**Editor's Note.** — Sections 143B-473.33 and 143B-473.34 were formerly reserved for future codification purposes.

## Part 15. Main Street Financial Incentive Fund.

**§ 143B-472.35. Establishment of fund; use of moneys; application for grants and loans; disbursement; re-payment; inspections; rules; reports.**

(a) A revolving fund to be known as the Main Street Financial Incentive Fund is established in the Department of Commerce. This Fund shall be administered by the Department of Commerce. The Department of Commerce shall be responsible for receipt and disbursement of all moneys as provided in this section. Interest earnings shall be credited to the Main Street Financial Incentive Fund.

(b) Moneys in the Main Street Financial Incentive Fund shall be available to the North Carolina cities affiliated with the North Carolina Main Street Center Program. Moneys in the Main Street Financial Incentive Fund shall be used for the following eligible activities:

- (1) The acquisition or rehabilitation of properties in connection with private investment in a designated downtown area;
- (2) The establishment of revolving loan programs for private investment in a designated downtown area;
- (3) The subsidization of interest rates for these revolving loan programs;
- (4) The establishment of facade incentive grants in connection with private investment in a designated downtown area;
- (5) Market studies, design studies, design assistance, or strategic planning efforts, provided the activity can be shown to lead directly to private investment in a designated downtown area;
- (6) Any approved project that provides construction or rehabilitation in a designated downtown area and can be shown to lead directly to private investment in the designated downtown area; and
- (7) Public improvements and public infrastructure within a designated downtown area, provided these improvements are necessary to create or stimulate private investment in the designated downtown area.

(c) Any North Carolina city affiliated with the North Carolina Main Street Center Program may apply for moneys from the Main Street Financial Incentive Fund by submitting an application to the Main Street Center in the Division of Community Assistance, Department of Commerce. Any city affiliated with the North Carolina Main Street Center Program may apply for a grant equal to ten percent (10%) of the projected cost of the proposed project. A city may apply for additional moneys as one or more loans from the Fund. Specifically, a city may apply for a loan for:

- (1) Up to fifteen percent (15%) of the projected cost of the proposed project in excess of the amount to be received as a grant, subject to repayment within fifteen years at five percent (5%) interest;
  - (2) Up to twenty percent (20%) of the projected cost of the proposed project in excess of the amount to be received as a grant, subject to repayment within ten years at eight percent (8%) interest; and
  - (3) Up to thirty-five percent (35%) of the projected cost of the proposed project in excess of the amount to be received as a grant, subject to repayment within seven years at ten percent (10%) interest.
- (c1) The application shall list:
- (1) The proposed activities for which the moneys are to be used and the projected cost of the project;
  - (2) The amount of grant moneys and any loans requested for these activities;
  - (3) Projections of the dollar amount of private investment that is expected to occur in the designated downtown area as a direct result of the city's proposed activities;

- (4) Whether local public dollars are required to match any grant plus any loan moneys according to the provisions of subdivision (g)(2) of this section, and if so, the amount of local public dollars required;
- (5) An explanation of the nature of the private investment in the designated downtown area that will result from the city's proposed activities;
- (6) Projections of the time needed to complete the city's proposed activities;
- (7) Projections of the time needed to realize the private investment that is expected to result from the city's proposed activities; and
- (8) Identification of the proposed source of funds to be used for repayment of any loan obligations.

The applicant shall furnish additional or supplemental information upon written request.

(d) A committee, comprised of representatives of: the Division of Community Assistance of the Department of Commerce, the North Carolina Main Street Program, the Local Government Commission, and the League of Municipalities shall:

- (1) Review a city's application,
- (2) Determine whether the activities listed in the application are activities that are eligible for a loan, and
- (3) Determine which applicants are selected to receive moneys from the Main Street Financial Incentive Fund.

A city whose application is denied may file a new or amended application.

(e) A Main Street City that is selected may not receive a grant plus any loans pursuant to this section totaling less than twenty thousand dollars (\$20,000) or more than three hundred thousand dollars (\$300,000).

(f) The Department of Commerce may not disburse moneys for any loans until the city has confirmed a method of repayment of the loan. The terms for repayment established for a given loan shall apply throughout the period of that loan.

The Department of Commerce shall establish an account in the amount of the grant plus any loans for each city that is selected. These moneys shall be disbursed as expended through warrants drawn on the Department of Commerce.

- (g)(1) A city that has been selected to receive a grant plus any loans shall use the full amount of the grant plus any loans for the activities that were approved pursuant to subsection (d) of this section. Moneys are deemed used if the city is legally committed to spend the moneys on the approved activities.
- (2) If a city has received approval to use the grant plus any loans for public improvements or public infrastructure, that city shall be required to raise, before moneys for these public improvements may be drawn from the city's account, local public funds to match the amount of the grant plus any loans from the Main Street Financial Incentive Fund on the basis of at least one local public dollar (\$1.00) for every one dollar (\$1.00) from the Main Street Financial Incentive Fund. This match requirement applies only to those moneys received for public improvements or public infrastructure and is in addition to the requirement set forth in subdivision (1) of this subsection.
- (3) A city that fails to satisfy the condition set forth in subdivision (1) of this subsection shall lose any moneys that have not been used within three years of being selected. These unused moneys shall be credited to the Main Street Financial Incentive Fund. A city that fails to satisfy the conditions set forth in subdivisions (1) and (2) of this subsection may file a new application.

- (4) Any moneys repaid or credited to the Main Street Financial Incentive Fund pursuant to subdivision (3) of this subsection shall be available to other applicants as long as the Main Street Financial Incentive Fund is in effect.

(h) Each city is authorized to agree to apply any available revenues of that city to the repayment of a loan obligation to the extent the generation of these revenues is within the power of that city to enter into covenants to take action in order to generate these revenues; provided:

- (1) The agreement to use this source of funds to make repayment or the covenant to generate these revenues does not constitute a pledge of the city's taxing power; and
- (2) The repayment agreement specifically identifies the source of funds to be pledged.

(i) After a project financed in whole or in part pursuant to this section has been completed, the city shall report the actual cost of the project to the Department of Commerce. If the actual cost of the project exceeds the projected cost upon which the grant plus any loans were based, the city may submit an application to the Department of Commerce for a grant or loans for the difference. If the actual cost of the project is less than the projected cost, the city shall arrange to pay the difference to the Main Street Financial Incentive Fund according to terms set by the Department.

(j) Inspection of a project for which a grant plus any loans have been awarded may be performed by personnel of the Department of Commerce. No person may be approved to perform inspections who is an officer or employee of the unit of local government to which the grant plus any loans were made or who is an owner, officer, employee, or agent of a contractor or subcontractor engaged in the construction of any project for which the grant plus any loans were made.

(k) The Department of Commerce may adopt, modify, and repeal rules establishing the procedures to be followed in the administration of this section and regulations interpreting and applying the provisions of this section, as provided in the Administrative Procedure Act.

(l) The Department of Commerce and cities that have been selected to receive a grant plus any loans from the Main Street Financial Incentive Fund shall prepare and file on or before July 31 of each year with the Joint Legislative Commission on Governmental Operations a consolidated report for the preceding fiscal year concerning the allocation of grants plus any loans authorized by this section.

The portion of the annual report prepared by the Department of Commerce shall set forth for the preceding fiscal year itemized and total allocations from the Main Street Financial Incentive Fund for grants and loans. The Department of Commerce shall also prepare a summary report of all allocations made from the fund for each fiscal year; the total funds received and allocations made; the total amount of loan moneys repaid to the Fund, and the total unallocated funds in the Fund.

The portion of the report prepared by the city shall include:

- (1) The total amount of private funds that was committed and the amount that was invested in the designated downtown area during the preceding fiscal year;
- (2) The total amount of local public matching funds that was raised, if required by subdivision (g)(2) of this section;
- (3) The total amount of grant plus any loans received from the Main Street Financial Incentive Fund during the preceding fiscal year;
- (4) The total amount of loan moneys repaid to the Main Street Financial Incentive Fund during the preceding fiscal year;

- (5) A description of how the grant and loan moneys and funds from private investors were used during the preceding fiscal year;
- (6) Details regarding the types of private investment created or stimulated, the dates of this activity, the amount of public money involved, and any other pertinent information, including any jobs created, businesses started, and number of jobs retained due to the approved activities. (1989, c. 751, s. 9(c); c. 754, ss. 40(b)-(m); 1991, c. 689, s. 140(a); 1991 (Reg. Sess., 1992), c. 959, s. 72; 1993, c. 553, ss. 50, 51; 1997-456, s. 27.)

**Editor's Note.** — The subsection (c1) designation was added pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sec-

tions having a number or letter designation that is incompatible with the General Assembly's computer database.

**§§ 143B-472.36 through 143B-472.39:** Reserved for future codification purposes.

## Part 16. Information Technology Related State Government Functions.

**§§ 143B-472.40 through 143B-472.67:** Repealed by Session Laws 2000-174, s. 1, effective September 1, 2000.

**Cross References.** — For the Office of Information Technology Services, see now § 147-33.75 et seq.

**Editor's Note.** — Repealed §§ 143B-472.41, 143B-472.52 and 143B-472.64 were amended effective July 21, 2000, by Session Laws 2000-140, ss. 93.1(a), (c), (h), and (l), which updated

references therein to refer to the Office of State Budget, Planning and Management.

Repealed § 143B-472.51, 143B-472.54, 143B-472.58, and 143B-472.63 were amended effective July 14, 2000, by Session Laws 2000-130, ss. 1 to 4.

**§§ 143B-472.68, 143B-472.69:** Reserved for future codification purposes.

## Part 17. Electronic Procurement in Government.

**§ 143B-472.70:** Recodified as § 143-48.3 by Session Laws 2000-140, s. 5.95(a), effective July 1, 2000.

**Editor's Note.** — Session Laws 2000-67, s. 7.8, effective July 1, 2001, added new Part 17, with new § 143B-472.70, relating to electronic procurement. Subsequently, § 143B-472.70 was recodified as § 143-48.3, by Session Laws 2000-140, s. 95(a), effective July 21, 2000. Session Laws 2000-140, s. 95(b), effective July 21,

2000, repealed Part 17.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as the 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.4, contains a severability clause.

**§§ 143B-472.71 through 143B-472.79:** Reserved for future codification purposes.

## Part 18. North Carolina Board of Science and Technology.

### § 143B-472.80. North Carolina Board of Science and Technology; creation; powers and duties.

The North Carolina Board of Science and Technology of the Department of Commerce is created. The Board has the following powers and duties:

- (1) To identify, and to support and foster the identification of, important research needs of both public and private agencies, institutions and organizations in North Carolina that relate to the State's economic growth and development;
- (2) To make recommendations concerning policies, procedures, organizational structures and financial requirements that will promote effective use of scientific and technological resources in fulfilling the research needs identified and that will promote the economic growth and development of North Carolina;
- (3) To allocate funds available to the Board to support research projects, to purchase research equipment and supplies, to construct or modify research facilities, to employ consultants, and for other purposes necessary or appropriate in discharging the duties of the Board;
- (4) To advise and make recommendations to the Governor, the Secretary of Commerce, and the Economic Development Board on the role of science and technology in the economic growth and development of North Carolina. (1973, c. 1262, s. 77; 1977, c. 198, ss. 2, 26; 1979, c. 668, s. 1; 1985, c. 757, s. 179(a), (c); 2001-424, s. 7.6; 2001-486, s. 2.21.)

**Editor's Note.** — This Part is derived from Part 27 of Article 9 of Chapter 143B, §§ 143B-426.30, 143B-426.31, as recodified by Session Laws 2001-424, s. 7.6, effective July 1, 2001. Formerly this Part was Part 5 of Article 10 of Chapter 143B, §§ 143B-440 and 143B-441, as recodified by Session Laws 1985, c. 757, s. 179(c), effective July 15, 1985.

The numbers of §§ 143B-472.80, 143B-472.81 were assigned by the Revisor of Statutes.

Session Laws 1987, c. 830, s. 75 provided: "The Pollution Prevention Pays Program is transferred from the Board of Science and Technology to the Department of Natural Resources and Community Development. The transfer has all the elements of a Type I transfer as defined in G.S. 143A-6(a)."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 7.6, effective September 26, 2001, provides: "The statutory authority, power, duties, functions, records, personnel, property, unexpended balances of appropriations, allocations, or other funds, including the functions of budgeting and purchasing, of the North Carolina Board of Science and Technology, as established in G.S. 143B-426.30, are transferred to the Department of Com-

merce. Part 27 of Article 9 of Chapter 143B of the General Statutes is recodified as Part 18 of Article 10 of Chapter 143B of the General Statutes and the Revisor of Statutes shall substitute the term 'Commerce' for the term 'Administration' everywhere that term appears in Part 18 of Article 10 of Chapter 143B of the General Statutes."

Session Laws 2001-424, ss. 15.1(c) to (e), provide: "(c) The Board of Science and Technology shall study the transfer and use of intellectual property developed with State resources, including State funds, State personnel, or facilities. The Board shall recommend to the Governor and the General Assembly legislation or other mechanisms to promote and regulate the transfer and use of intellectual property assets developed with State resources. In conducting the study required by this section, the Board of Science and Technology shall consider the following:

"(1) Economic benefits, including accelerated State revenue growth, that result from the commercialization of intellectual property assets developed with State resources.

"(2) Potential methods, benefits, and detriments of recouping costs incurred by the State in the development of intellectual property assets that are subsequently commercialized.

"(3) Potential methods, benefits, and detriments of sharing between the public and pri-

vate sectors the profits or losses resulting from the commercialization of intellectual property assets developed with State resources.

“(4) Existing and potential mechanisms for assuring that intellectual property assets developed with State resources do not inappropriately inure to the benefit of individuals serving in an official capacity for the State, a State agency, or an entity receiving or using State resources.

“(5) Current and potential interplay between State and federal law governing the use and transfer of intellectual property assets developed with State resources.

“(6) The experience of other states in addressing the transfer and use of intellectual property assets developed using State resources.

“(7) Any other factors that the Board considers appropriate.

“(d) In formulating the recommendations enumerated in subsection (c) of this section [s. 15.1(c) of Session Laws 2001-424], the Board of Science and Technology shall solicit input from affected parties, including State agencies, public and private universities, businesses with

experience in the development, financing, and valuation of intellectual property assets, and organizations representing information technology and biotechnology businesses.

“(e) The Board of Science and Technology shall report the recommendations required by subsection (c) of this section to the Governor and to the 2002 Regular Session of the 2001 General Assembly.”

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-486, s. 2.21, effective December 16, 2001, substituted “Department of Commerce” for “Department of Administration” in the introductory language; added “that relate to the State’s economic growth and development” at the end of subdivision (1); added “and that will promote the economic growth and development of North Carolina” at the end of subdivision (2); added subdivision (4); and made a minor punctuation change.

Session Laws 2001-424, s. 7.6, effective July 1, 2001, substituted “Commerce” for “Administration” in the introductory paragraph.

## **§ 143B-472.81. North Carolina Board of Science and Technology; membership; organization; compensation; staff services.**

(a) The North Carolina Board of Science and Technology consists of the Governor, the Secretary of Commerce, and 17 members appointed as follows: the Governor shall appoint one member from the University of North Carolina at Chapel Hill, one member from North Carolina State University at Raleigh, and two members from other components of the University of North Carolina, all nominated by the President of the University of North Carolina; one member from Duke University, nominated by the President of Duke University; one member from a private college or university, other than Duke University, in North Carolina, nominated by the President of the Association of Private Colleges and Universities; one member from the Research Triangle Institute, nominated by the executive committee of the board of that institute; one member from the Microelectronics Center of North Carolina, nominated by the executive committee of the board of that center; one member from the North Carolina Biotechnology Center, nominated by the executive committee of the board of that center; four members from private industry in North Carolina, at least one of whom shall be a professional engineer registered pursuant to Chapter 89C of the General Statutes or a person who holds at least a bachelors degree in engineering from an accredited college or university; and two members from public agencies in North Carolina. Two members shall be appointed by the General Assembly, one shall be appointed upon the recommendation of the President Pro Tempore of the Senate, and one shall be appointed upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121. The nominating authority for any vacancy on the Board among members appointed by the Governor shall submit to the Governor two nominations for each position to be filled, and the persons so nominated shall represent different disciplines.

(b) Members appointed to the Board by the General Assembly shall serve for two-year terms beginning 1 July of odd-numbered years. Vacancies in appoint-

ments made by the General Assembly shall be filled in accordance with G.S. 120-122. The two members from public agencies shall serve for terms expiring at the end of the term of the Governor appointing them. The other 13 members appointed to the Board by the Governor shall serve for four-year terms, and until their successors are appointed and qualified. Of those 13 members, six shall serve for terms that expire on 30 June of years that follow by one year those years that are evenly divisible by four, and seven shall serve for terms that expire on 30 June of years that follow by three years those years that are evenly divisible by four. Any appointment to fill a vacancy on the Board created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

(c) The Governor or the Governor's designee shall serve as chair of the Board. The vice-chair and the secretary of the Board shall be designated by the Governor or the Governor's designee from among the members of the Board.

(d) The Governor may remove any member of the Board from office in accordance with the provisions of G.S. 143B-16.

(e) Members of the Board who are employees of State agencies or institutions shall receive subsistence and travel allowances authorized by G.S. 138-6. Legislative members of the Board shall receive subsistence and travel allowances authorized by G.S. 120-3.1.

(f) A majority of the Board constitutes a quorum for the transaction of business.

(g) The Secretary of Commerce shall provide all clerical and other services required by the Board. (1979, c. 668, s. 1; 1981 (Reg. Sess., 1982), c. 1191, ss. 44-46; 1985, c. 757, s. 179(b), (c); 1989, c. 751, s. 8(17); 1991, c. 573, s. 1; 1995, c. 490, s. 46; 2001-424, s. 7.6; 2001-486, s. 2.21.)

**Editor's Note.** — Session Laws 1995, c. 490, which amended this section by adding "Pro Tempore" in the next to last sentence of subsection (a), in s. 65 provides: "This act applies with respect to terms beginning on or after January 1, 1997, and to vacancies occurring on or after that date regardless of the date the term began."

Session Laws 1995, c. 490, which amended this section by adding "Pro Tempore" in the next to last sentence of subsection (a), in s. 65 provides: "This act applies with respect to terms beginning on or after January 1, 1997, and to vacancies occurring on or after that date regardless of the date the term began."

**Effect of Amendments.** — Session Laws 2001-486, s. 2.21, effective December 16, 2001, substituted "Department of Commerce" for "Department of Administration" in the introductory language; added "that relate to the State's economic growth and development" at the end of subdivision (1); added "and that will promote the economic growth and development of North Carolina" at the end of subdivision (2); added subdivision (4); and made a minor punctuation change.

Session Laws 2001-424, s. 7.6, effective July 1, 2001, substituted "Commerce" for "Administration" in subsections (c) and (g).

## ARTICLE 11.

### *Department of Crime Control and Public Safety.*

#### Part 1. General Provisions.

### **§ 143B-473. Department of Crime Control and Public Safety — creation.**

There is hereby created and constituted a department to be known as the "Department of Crime Control and Public Safety," with the organization, powers, and duties defined in Article 1 of this Chapter, except as modified in this Article. (1977, c. 70, s. 1.)

**Editor's Note.** — Session Laws 2000-67, s. 19.7, transfers the Guard Response Alternative Sentencing Program and all its functions, powers, duties, and obligations from the Department of Crime Control and Public Safety for the Guard Response Alternative Sentencing Program to the Office of Juvenile Justice (now the Department of Juvenile Justice and Delinquency Prevention). The Program is to continue to function as an additional probation option for certain first-time juveniles who have been adjudicated delinquent and who are subject to Level 2 disposition.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 424, s. 26.2, provides: "The Department of Crime Control and Public Safety shall report to the Chairs of the House of Representatives and Senate Appropriations Committees and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety by April 1 of each year on the operations and effectiveness of the National Guard Tarheel

Challenge Program. The report should evaluate the program's effectiveness as an intervention method for preventing juveniles from becoming undisciplined or delinquent. The report shall also evaluate the Program's role in improving individual skills and employment potential for participants and shall include:

"(1) The source of referrals for individuals participating in the Program;

"(2) The summary of types of actions or offenses committed by the participants of the Program;

"(3) An analysis outlining the cost of providing services for each participant, including a breakdown of all expenditures related to the administration and operation of the Program and the education and treatment of the Program participants;

"(4) The number of individuals who successfully complete the Program; and

"(5) The number of participants who commit offenses after completing the Program."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

## § 143B-474. Department of Crime Control and Public Safety — duties.

It shall be the duty of the Department of Crime Control and Public Safety to provide assigned law-enforcement and emergency services to protect the public against crime and against natural and man-made disasters; to plan and direct a coordinated effort by the law-enforcement agencies of State government and to insure maximum cooperation between State and local law-enforcement agencies in the fight against crime; to prepare annually a State plan for the State's criminal justice system; to serve as the State's chief coordinating agency to control crime, to insure the safety of the public and to insure an effective and efficient State criminal justice system; to have charge of investigations of criminal matters particularly set forth in this Article and of such other crimes and areas of concern in the criminal justice system as the Governor may direct; to regularly patrol the highways of the State and enforce all laws and regulations respecting travel and the use of vehicles upon the highways of the State and all laws for the protection of the highways of the State; to provide national guard troops trained by the State to federal standards; to insure the preparation, coordination, and currency of military and civil preparedness plans and the effective conduct of emergency operations by all participating agencies to sustain life, and prevent, minimize, or remedy injury to persons and damage to property resulting from disasters caused by enemy attack or other hostile actions or from disasters due to natural or man-made causes; and to develop a plan for a coordinated and integrated

electronic communications system for State government and cooperating local agencies, including coordination and integration of existing electronic communications systems. (1977, c. 70, s. 1.)

**Editor's Note.** — As to reports on vacant positions in the Judicial Department and three other departments, see § 120-12.1.

## § 143B-475. Department of Crime Control and Public Safety — functions.

(a) All functions, powers, duties and obligations heretofore vested in the following subunits of the following departments are hereby transferred to and vested in the Department of Crime Control and Public Safety:

- (1) The National Guard, Department of Military and Veterans Affairs;
- (2) Civil Preparedness, Department of Military and Veterans Affairs;
- (3) State Civil Air Patrol, Department of Military and Veterans Affairs;
- (4) State Highway Patrol, Department of Transportation;
- (5) State Board of Alcoholic Control Enforcement Division, Department of Commerce;
- (6) Governor's Crime Commission, Department of Natural and Economic Resources;
- (7) Crime Control Division, Department of Natural and Economic Resources;
- (8) Criminal Justice Information System Board, Department of Natural and Economic Resources; and
- (9) Criminal Justice Information System Security and Privacy Board, Department of Natural and Economic Resources.

(b) The Department shall perform such other functions as may be assigned by the Governor.

(c) All such functions, powers, duties and obligations heretofore vested in any existing agency in Article 5 of Chapter 143B of the General Statutes are hereby transferred to and vested in the Department of Crime Control and Public Safety, except as otherwise provided by the Executive Organization Act of 1973, as amended.

(d) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1034, s. 103.

(e) The Crime Victims Compensation Commission established by Chapter 15B is vested in the Department of Crime Control and Public Safety. The Commission shall be administered as provided in Chapter 15B. (1977, c. 70, s. 1; 1981, c. 929; 1983, c. 832, s. 3; 1983 (Reg. Sess., 1984), c. 1034, s. 103; 1989, c. 751, s. 7(42); 1991, c. 301, s. 1; 1991 (Reg. Sess., 1992), c. 959, s. 73.)

**Cross References.** — As to transfer of the Governor's Crime Commission to the Department of Crime Control and Public Safety, see § 143A-244. As to transfer of the Crime Control Division from the Department of Natural and Economic Resources to the Department of Crime Control and Public Safety, see § 143A-245. For section providing for a deferred prosecution, community service restitution, and volunteer program, see now § 143B-262.4.

**Editor's Note.** — Because this section relates to past events, no changes have been made in it pursuant to Session Laws 1977, c. 771, s. 4, which substituted "Natural Resources and Community Development" for "Natural and Economic Resources."

Session Laws 1981, c. 491, s. 2, provided for transfer of the Butner Public Safety Department to the Department of Crime Control and Public Safety. See now § 122C-408 and note thereto.

Session Laws 1983, c. 832, which added subsection (e) of this section, as amended by Session Laws 1991, c. 301, s. 1, provided in s. 6: "This act shall become effective when funds are appropriated by the General Assembly to the Department of Crime Control and Public Safety to implement the provisions of this act. No claims may be filed under this act for any criminally injurious conduct occurring before the effective date of this act." The Revisor of Statutes is informed that funds were appropri-

ated by Session Laws 1987, c. 738, s. 118.

Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999'."

Session Laws 1999-237, s. 11.18, provides that the Bingo Program in the Department of Health and Human Services, Division of Facility Services, and all functions, powers, duties, and obligations vested in the Department of Health and Human Services for the Bingo Program, are transferred to and vested in the Department of Crime Control and Public Safety by a Type I transfer, as defined in G.S. 143A-6.

Session Laws 1999-237, s. 30.2, provides: "Except for statutory changes or other provi-

sions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 30.4, contains a severability clause.

Sections 143B-246 to 143B-251, which comprise Part 1 of Article 5 of Chapter 143B, referred to in subsection (c) of this section, were repealed by Session Laws 1977, c. 70, s. 33. Sections 143B-252 and 143B-253, which comprise Part 2 of that Article, were transferred to §§ 143B-399 and 143B-400 by Session Laws 1977, c. 70, ss. 24 and 25. The same 1977 act enacted this Article.

**§ 143B-475.1:** Recodified as § 143B-262.4 by Session Laws 2001-487, s. 91(a), effective December 16, 2001.

## **§ 143B-476. Department of Crime Control and Public Safety — head; powers and duties as to emergencies and disasters.**

(a) The head of the Department of Crime Control and Public Safety is the Secretary of Crime Control and Public Safety, who shall be known as the Secretary. The Secretary shall have such powers and duties as are conferred on him by this Chapter, delegated to him by the Governor, and conferred on him by the Constitution and laws of this State. These powers and duties include:

- (1) Accepting gifts, bequests, devises, grants, matching funds and other considerations from private or governmental sources for use in promoting the work of the Governor's Crime Commission;
- (2) Making grants for use in pursuing the objectives of the Governor's Crime Commission;
- (3) Adopting rules as may be required by the federal government for federal grants-in-aid for criminal justice purposes;
- (4) Ascertaining the State's duties concerning grants to the State by the Law Enforcement Assistance Administration of the United States Department of Justice, and developing and administering a plan to ensure that the State fulfills its duties; and
- (5) Administering the Assistance Program for Victims of Rape and Sex Offenses.

(b) The Secretary, through appropriate subunits of the department, shall, at the request of the Governor, provide assistance to State and local law-enforcement agencies, district attorneys, judges, and the Department of Correction, when called upon by them and so directed.

(c) In the event that the Governor, in the exercise of his constitutional and statutory responsibilities, shall deem it necessary to utilize the services of more than one subunit of State government to provide protection to the people from natural or man-made disasters or emergencies, including but not limited to wars, insurrections, riots, civil disturbances, or accidents, the Secretary, under the direction of the Governor, shall serve as the chief coordinating officer for the State between the respective subunits so utilized.

(d) Whenever the Secretary exercises the authority provided in subsection (c) of this section, he shall be authorized to utilize and allocate all available State resources as are reasonably necessary to cope with the emergency or disaster, including directing of personnel and functions of State agencies or

units thereof for the purpose of performing or facilitating the initial response to the disaster or emergency. Following the initial response, the Secretary, in consultation with the heads of the State agencies which have or appear to have the responsibility for dealing with the emergency or disaster, shall designate one or more lead agencies to be responsible for subsequent phases of the response to the emergency or disaster. Pending an opportunity to consult with the heads of such agencies, the Secretary may make interim lead agencies designations.

(e) Every department of State government is required to report to the Secretary, by the fastest means practicable, all natural or man-made disasters or emergencies, including but not limited to wars, insurrections, riots, civil disturbances, or accidents which appear likely to require the utilization of the services of more than one subunit of State government.

(f) The Secretary is authorized to adopt rules and procedures for the implementation of this section.

(g) Nothing contained in this section shall be construed to supersede or modify those powers granted to the Governor or the Council of State to declare and react to a state of disaster as provided in Chapter 166A of the General Statutes, the Constitution or elsewhere.

(h) Prior to any notification of proposed grant awards to State agencies for use in pursuing the objectives of the Governor's Crime Commission pursuant to subsection (a) of this section, the Secretary shall report to the Senate and House Appropriations Committees for review of the proposed grant awards. (1977, c. 70, s. 1; 1979, 2nd Sess., c. 1310, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 17; 1985, c. 757, s. 164(c); 1985 (Reg. Sess., 1986), c. 1018, s. 13; 1998-212, s. 19.5(a).)

## Part 2. Crime Control Division.

### § 143B-477. Crime Control Division of the Department of Crime Control and Public Safety.

(a) There is hereby established, within the Department of Crime Control and Public Safety, the Crime Control Division, which shall be organized and staffed in accordance with applicable laws and regulations and within the limits of authorized appropriations.

(b) The Crime Control Division shall provide clerical and professional services required by the Governor's Crime Commission and shall administer the State Law Enforcement Assistance Program and such additional related programs as may be established by or assigned to the Commission. It shall serve as the single State planning agency for purposes of the Crime Control Act of 1976 (Public Laws 94-503). Administrative responsibilities shall include, but are not limited to, the following:

- (1) Compiling data, establishing needs and setting priorities for funding and policy recommendations for the Commission;
- (2) Preparing and revising statewide plans for adoption by the Commission which are designed to improve the administration of criminal justice and to reduce crime in North Carolina;
- (3) Advising State and local interests of opportunities for securing federal assistance for crime reduction and for improving criminal justice administration and planning within the State of North Carolina;
- (4) Stimulating and seeking financial support from federal, State, and local government and private sources for programs and projects which implement adopted criminal justice administration improvement and crime reduction plans;

- (5) Assisting State agencies and units of general local government and combinations thereof in the preparation and processing of applications for financial aid to support improved criminal justice administration, planning and crime reduction;
- (6) Encouraging and assisting coordination at the federal, State, and local government levels in the preparation and implementation of criminal justice administration improvements and crime reduction plans;
- (7) Applying for, receiving, disbursing, and auditing the use of funds received for the program from any public and private agencies and instrumentalities for criminal justice administration, planning, and crime reduction purposes;
- (8) Entering into, monitoring, and evaluating the results of contracts and agreements necessary or incidental to the discharge of its assigned responsibilities;
- (9) Providing technical assistance to State and local law-enforcement agencies in developing programs for improvement of the law-enforcement and criminal justice system; and
- (10) Taking such other actions as may be deemed necessary or appropriate to carry out its assigned duties and responsibilities.

(c) The Crime Control Division shall also provide professional and clerical staff services to the adjunct committees of the Governor's Crime Commission established in G.S. 143B-480. (1977, c. 11, s. 4.)

**Editor's Note.** — This section is former § 143B-340 as enacted by Session Laws 1977, c. 11, s. 4. It has been recodified in this Article because of the establishment of the Department of Crime Control and Public Safety.

### Part 3. Governor's Crime Commission.

#### § 143B-478. Governor's Crime Commission — creation; composition; terms; meetings, etc.

(a) There is hereby created the Governor's Crime Commission of the Department of Crime Control and Public Safety. The Commission shall consist of 36 voting members and six nonvoting members. The composition of the Commission shall be as follows:

- (1) The voting members shall be:
  - a. The Governor, the Chief Justice of the Supreme Court of North Carolina (or his alternate), the Attorney General, the Director of the Administrative Office of the Courts, the Secretary of the Department of Health and Human Services, the Secretary of the Department of Correction, the Secretary of the Department of Juvenile Justice and Delinquency Prevention, and the Superintendent of Public Instruction;
  - b. A judge of superior court, a judge of district court specializing in juvenile matters, a chief district court judge, a clerk of superior court, and a district attorney;
  - c. A defense attorney, three sheriffs (one of whom shall be from a "high crime area"), three police executives (one of whom shall be from a "high crime area"), six citizens (two with knowledge of juvenile delinquency and the public school system, two of whom shall be under the age of 21 at the time of their appointment, one representative of a "private juvenile delinquency program," and one in the discretion of the Governor), three county commissioners or county officials, and three mayors or municipal officials;

- d. Two members of the North Carolina House of Representatives and two members of the North Carolina Senate.
- (2) The nonvoting members shall be the Director of the State Bureau of Investigation, the Secretary of the Department of Crime Control and Public Safety, the Assistant Secretary of Intervention/Prevention of the Department of Juvenile Justice and Delinquency Prevention, the Assistant Secretary of Youth Development of the Department of Juvenile Justice and Delinquency Prevention, the Director of the Division of Prisons and the Director of the Division of Community Corrections.
- (b) The membership of the Commission shall be selected as follows:
  - (1) The following members shall serve by virtue of their office: the Governor, the Chief Justice of the Supreme Court, the Attorney General, the Director of the Administrative Office of the Courts, the Secretary of the Department of Health and Human Services, the Secretary of the Department of Correction, the Director of the State Bureau of Investigation, the Secretary of the Department of Crime Control and Public Safety, the Director of the Division of Prisons, the Director of the Division of Community Corrections, the Secretary of the Department of Juvenile Justice and Delinquency Prevention, the Assistant Secretary of Intervention/Prevention of the Department of Juvenile Justice and Delinquency Prevention, the Assistant Secretary of Youth Development of the Department of Juvenile Justice and Delinquency Prevention, and the Superintendent of Public Instruction. Should the Chief Justice of the Supreme Court choose not to serve, his alternate shall be selected by the Governor from a list submitted by the Chief Justice which list must contain no less than three nominees from the membership of the Supreme Court.
  - (2) The following members shall be appointed by the Governor: the district attorney, the defense attorney, the three sheriffs, the three police executives, the six citizens, the three county commissioners or county officials, the three mayors or municipal officials.
  - (3) The following members shall be appointed by the Governor from a list submitted by the Chief Justice of the Supreme Court, which list shall contain no less than three nominees for each position and which list must be submitted within 30 days after the occurrence of any vacancy in the judicial membership: the judge of superior court, the clerk of superior court, the judge of district court specializing in juvenile matters, and the chief district court judge.
  - (4) The two members of the House of Representatives provided by subdivision (a)(1)d. of this section shall be appointed by the Speaker of the House of Representatives and the two members of the Senate provided by subdivision (a)(1)d. of this section shall be appointed by the President Pro Tempore of the Senate. These members shall perform the advisory review of the State plan for the General Assembly as permitted by section 206 of the Crime Control Act of 1976 (Public Law 94-503).
  - (5) The Governor may serve as chairman, designating a vice-chairman to serve at his pleasure, or he may designate a chairman and vice-chairman both of whom shall serve at his pleasure.
- (c) The initial members of the Commission shall be those appointed under subsection (b) above, which appointments shall be made by March 1, 1977. The terms of the present members of the Governor's Commission on Law and Order shall expire on February 28, 1977. Effective March 1, 1977, the Governor shall appoint members, other than those serving by virtue of their office, to serve staggered terms; seven shall be appointed for one-year terms, seven for

two-year terms, and seven for three-year terms. At the end of their respective terms of office their successors shall be appointed for terms of three years and until their successors are appointed and qualified. The Commission members from the House and Senate shall serve two-year terms effective March 1, of each odd-numbered year; and they shall not be disqualified from Commission membership because of failure to seek or attain reelection to the General Assembly, but resignation or removal from office as a member of the General Assembly shall constitute resignation or removal from the Commission. Any other Commission member no longer serving in the office from which he qualified for appointment shall be disqualified from membership on the Commission. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death, disability, or disqualification of a member shall be for the balance of the unexpired term.

(d) The Governor shall have the power to remove any member from the Commission for misfeasance, malfeasance or nonfeasance.

(e) The Commission shall meet quarterly and at other times at the call of the chairman or upon written request of at least eight of the members. A majority of the voting members shall constitute a quorum for the transaction of business. (1965, c. 663; 1977, c. 11, s. 1; 1981, c. 467, ss. 1-5; 1981 (Reg. Sess., 1982), c. 1189, s. 4; 1991, c. 739, s. 32; 1997-443, s. 11A.118(a); 1998-170, s. 3; 1998-202, s. 4(aa); 1999-423, s. 11; 2000-137, s. 4(ee); 2001-95, s. 6; 2001-487, s. 47(g).)

**Cross References.** — As to transfer of the Crime Control Division from the Department of Natural and Economic Resources (now Department of Natural Resources and Community Development) to the Department of Crime Control and Public Safety, see § 143A-245.

**Editor's Note.** — This section is § 143B-337 as amended by Session Laws 1977, c. 11, s. 1. It has been recodified in this Article because of the transfer of the Governor's Crime Commission (formerly the Governor's Law and Order Commission) to the Department of Crime Control and Public Safety.

**Effect of Amendments.** — Session Laws 2000-137, s. 4(ee), effective July 20, 2000, substituted "Secretary of the Department of Juvenile Justice and Delinquency Prevention" for "Director of the Office of Juvenile Justice" in subdivisions (a)(1)a. and (b)(1); substituted "Division of the Department of Juvenile Justice and Delinquency Prevention" for "Bureau of the

Office of Juvenile Justice" twice each in subdivisions (a)(2) and (b)(1); and deleted "the representative of the Office of Juvenile Justice" following "by the Governor" in subdivision (b)(2).

Session Laws 2001-95, s. 6, effective May 18, 2001, substituted "Assistant Secretary of Intervention/Prevention" for "Assistant Director of the Intervention/Prevention Division" and substituted "Assistant Secretary of Youth Development" for "Assistant Director of the Detention Division" in subdivisions (a)(2) and (b)(1).

Session Laws 2001-487, s. 47(g), effective December 16, 2001, in this section as rewritten by s. 6 of Session Laws 2001-95, substituted "Community Corrections" for "Adult Probation and Parole" in subdivisions (a)(2) and (b)(1).

**Legal Periodicals.** — For article, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

## § 143B-479. Governor's Crime Commission — powers and duties.

(a) The Governor's Crime Commission shall have the following powers and duties:

- (1) To serve, along with its adjunct committees, as the chief advisory board to the Governor and to the Secretary of the Department of Crime Control and Public Safety on matters pertaining to the criminal justice system.
- (2) To recommend a comprehensive statewide plan for the improvement of criminal justice throughout the State which is consistent with and serves to foster the following established goals of the criminal justice system:

- a. To reduce crime,
  - b. To protect individual rights,
  - c. To achieve justice,
  - d. To increase efficiency in the criminal justice system,
  - e. To promote public safety,
  - f. To provide for the administration of a fair and humane system which offers reasonable opportunities for adjudicated offenders to develop progressively responsible behavior, and
  - g. To increase professional skills of criminal justice officers.
- (3) To advise State and local law-enforcement agencies in improving law enforcement and the administration of criminal justice;
  - (4) To make studies and recommendations for the improvement of law enforcement and the administration of criminal justice;
  - (5) To encourage public support and respect for the criminal justice system in North Carolina;
  - (6) To seek ways to continue to make North Carolina a safe and secure State for its citizens;
  - (7) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1191, s. 15.
  - (8) To recommend objectives and priorities for the improvement of law enforcement and criminal justice throughout the State;
  - (9) To recommend recipients of grants for use in pursuing its objectives, under such conditions as are deemed to be necessary;
  - (9a) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1191, s. 15.
  - (10) To serve as a coordinating committee and forum for discussion of recommendations from its adjunct committees formed pursuant to G.S. 143B-480; and
  - (11) To serve as the primary channel through which local law-enforcement departments and citizens can lend their advice, and state their needs, to the Department of Crime Control and Public Safety.

(b) All directives of the Governor's Crime Commission shall be administered by the Director, Crime Control Division of the Department of Crime Control and Public Safety. (1975, c. 663; 1977, c. 11, s. 2; 1979, c. 107, s. 11; 1981, c. 931, s. 3; 1981 (Reg. Sess., 1982), c. 1191, s. 15.)

**Editor's Note.** — This section is § 143B-338 as rewritten by Session Laws 1977, c. 11, s. 2. It has been recodified in this Article because of the transfer of the Governor's Crime Commission (formerly the Governor's Law and Order Commission) to the Department of Crime Control and Public Safety.

Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999'."

Session Laws 1999-237, ss. 20(a) and 20(b), provide that the Governor's Crime Commission of the Department of Crime Control and Public Safety shall report on the State application for grants under the State and Local Law Enforcement Assistance Act of 1986 (Part M of the Omnibus Crime Control and Safe Streets Act of 1968 as enacted by Subtitle K of P.L. 99-570, the Anti-Drug Abuse Act of 1986) to the Senate and House Appropriations Subcommittees on

Justice and Public Safety when the General Assembly is in session. When the General Assembly is not in session, the Governor's Crime Commission shall report on the State application to the Joint Legislative Commission on Governmental Operations, as applications for grants shall be reviewed by the Joint Legislative Commission on Governmental Operations when the General Assembly is not in session unless a State statute provides a different forum for review.

Session Laws 1999-237, s. 30.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 30.4, contains a severability clause.

### § 143B-480. Adjunct committees of the Governor's Crime Commission — creation; purpose; powers and duties.

(a) There are hereby created by way of extension and not limitation, the following adjunct committees of the Governor's Crime Commission: the Judicial Planning Committee, the Juvenile Justice Planning Committee, the Law Enforcement Planning Committee, the Corrections Planning Committee, and the Juvenile Code Revision Committee.

(b) The composition of the adjunct committees shall be as designated by the Governor by executive order, except for the Judicial Planning Committee, the composition of which shall be designated by the Supreme Court. The Governor's appointees shall serve two-year terms beginning March 1, of each odd-numbered year, and members of the Judicial Planning Committee shall serve at the pleasure of the Supreme Court.

(c) The adjunct committees created herein shall report directly to the Governor's Crime Commission and shall have the following powers and duties:

- (1) Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 8, effective June 27, 1984.
- (2) The Law Enforcement Planning Committee shall advise the Governor's Crime Commission on all matters which are referred to it relevant to law enforcement, including detention; shall participate in the development of the law-enforcement component of the State's comprehensive plan; shall consider and recommend priorities for the improvement of law-enforcement services; and shall offer technical assistance to State and local agencies in the planning and implementation of programs contemplated by the comprehensive plan for the improvement of law-enforcement services.

The Law Enforcement Planning Committee shall maintain contact with the National Commission on Accreditation for Law Enforcement Agencies, assist the National Commission in the furtherance of its efforts, adapt the work of the National Commission by an analysis of law-enforcement agencies in North Carolina, develop standards for the accreditation of law-enforcement agencies in North Carolina, make these standards available to those law-enforcement agencies which desire to participate voluntarily in the accreditation program, and assist participants to achieve voluntary compliance with the standards.

- (3) The Judicial Planning Committee (which shall be appointed by the Supreme Court) shall establish court improvement priorities, define court improvement programs and projects, and develop an annual judicial plan in accordance with the Crime Control Act of 1976 (Public Law 94-503); shall advise the Governor's Crime Commission on all matters which are referred to it relevant to the courts; shall consider and recommend priorities for the improvement of judicial services; and shall offer technical assistance to State agencies in the planning and implementation of programs contemplated by the comprehensive plan for the improvement of judicial services.
- (4) The Corrections Planning Committee shall advise the Governor's Crime Commission on all matters which are referred to it relevant to corrections; shall participate in the development of the adult corrections component of the State's comprehensive plan; shall consider and recommend priorities for the improvement of correction services; and shall offer technical assistance to State agencies in the planning and implementation of programs contemplated by the comprehensive plan for the improvement of corrections.

- (5) The Juvenile Justice Planning Committee shall advise the Governor's Crime Commission on all matters which are referred to it relevant to juvenile justice; shall participate in the development of the juvenile justice component of the State's comprehensive plan; shall consider and recommend priorities for the improvement of juvenile justice services; and shall offer technical assistance to State and local agencies in the planning and implementation of programs contemplated by the comprehensive plan for the improvement of juvenile justice.
- (6) The Juvenile Code Revision Committee shall study problems relating to young people who come within the juvenile jurisdiction of the district court as defined by Article 23 of Chapter 7A of the General Statutes and develop a legislative plan which will best serve the needs of young people and protect the interests of the State; shall study the existing laws, services, agencies and commissions and recommend whether they should be continued, amended, abolished or merged; and shall take steps to insure that all agencies, organizations, and private citizens in the State of North Carolina have an opportunity to lend advice and suggestions to the development of a revised juvenile code. If practical, the Committee shall submit a preliminary report to the General Assembly prior to its adjournment in 1977. It shall make a full and complete report to the General Assembly by March 1, 1979. This adjunct committee shall terminate on February 28, 1979.

(d) The Governor shall have the power to remove any member of any adjunct committee from the Committee for misfeasance, malfeasance or nonfeasance. Each Committee shall meet at the call of the chairman or upon written request of one third of its membership. A majority of a committee shall constitute a quorum for the transaction of business.

(e) The actions and recommendations of each adjunct committee shall be subject to the final approval of the Governor's Crime Commission. (1975, c. 663; 1977, c. 11, s. 3; 1981, c. 605, s. 1; 1983 (Reg. Sess., 1984), c. 995, s. 8.)

**Editor's Note.** — This section is § 143B-339 as rewritten by Session Laws 1977, c. 11, s. 3. It has been recodified in this Article because of the transfer of the Governor's Crime Commission (formerly the Governor's Law and Order Commission) to the Department of Crime Control and Public Safety.

Article 23 of Chapter 7A, referred to in subdivision (6) of subsection (c), has been repealed. For present provisions concerning the juvenile jurisdiction of the district court, see now §§ 7B-

200 and 7B-201, and § 7B-1600 et seq.

Session Laws 1998-202, s. 16, directs the Department of Justice to revise the Division of Criminal Information's juvenile arrest form to provide more realistic reporting options and case disposition information and further directs that the name of the form be changed from the "Juvenile Arrest" form to the "Juvenile Contact Report."

**Legal Periodicals.** — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

#### CASE NOTES

**Cited** in *Taylor v. Robinson*, 131 N.C. App. 337, 508 S.E.2d 289 (1998).

### Part 3A. Assistance Program for Victims of Rape and Sex Offenses.

#### § 143B-480.1. Assistance Program for Victims of Rape and Sex Offenses.

There is established an Assistance Program for Victims of Rape and Sex

Offenses, hereinafter referred to as the "Program." The Secretary shall administer and implement the Program and shall have authority over all assistance awarded through the Program. The Secretary shall promulgate rules and guidelines for the Program. (1981, c. 931, s. 2; 1981 (Reg. Sess., 1982), c. 1191, s. 16.)

**Editor's Note.** — Session Laws 2001-424, s. 26.4, provides: "The Department of Crime Control and Public Safety shall report on the expenditure of funds allocated pursuant to this section [s. 26.4 of Session Laws 2001-424] for the Victims Assistance Network. The Department shall also report on the Network's efforts to gather data on crime victims and their needs, act as a clearinghouse for crime victims' services, provide an automated crime victims' bulletin board for subscribers, coordinate and support activities of other crime victims' advocacy groups, identify the training needs of crime victims' services providers and criminal justice personnel, and coordinate training for these personnel. The Department shall submit its report to the Chairs of the Appropriations Sub-

committees on Justice and Public Safety of the Senate and House of Representatives by December 1 of each year of the biennium."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

## § 143B-480.2. Victim assistance.

(a) Only victims who have reported the following crimes are eligible for assistance under this Program: first-degree rape as defined in G.S. 14-27.2, second-degree rape as defined in G.S. 14-27.3, first-degree sexual offense as defined in G.S. 14-27.4, second-degree sexual offense as defined in G.S. 14-27.5, or attempted first-degree or second-degree rape or attempted first-degree or second-degree sexual offense as defined in G.S. 14-27.6. Assistance is limited to immediate and short-term medical expenses, ambulance services, and mental health services provided by a professional licensed or certified by the State to provide such services, not to exceed one thousand dollars (\$1,000) incurred by the victim for the medical examination, medical procedures to collect evidence, or counseling treatment which follow the attack, or ambulance services from the place of the attack to a place where medical treatment is provided. Assistance not to exceed fifty dollars (\$50.00) shall be provided to victims to replace clothing that was held for evidence tests.

(b) With the exception of assistance authorized under subsection (e) of this section, assistance for expenses authorized under this section is to be paid directly to any hospital, ambulance service, attending physicians, or mental health professionals providing counseling, upon the filing of proper forms.

(c) Assistance shall not be awarded unless the rape, attempted rape, sexual offense, or attempted sexual offense was reported to a law-enforcement officer within 72 hours after its occurrence or the Secretary finds there was good cause for the failure to report within that time.

(d) Upon an adverse determination by the Secretary on a claim for medical expenses, a victim is entitled to judicial review of that decision. The person seeking review shall file a petition in the Superior Court of Wake County.

(e) In lieu of any payment which may otherwise have been made under subsection (b), assistance for expenses for services authorized under this section that are provided for the purpose of collecting evidence from victims of crimes identified in G.S. 90-171.38(b) may be paid directly to any licensed registered nurse who has successfully completed a program approved under G.S. 90-171.38(b). The Secretary shall adopt rules to facilitate the payments authorized under this subsection and to encourage, whenever practical, the

use of licensed registered nurses trained under G.S. 90-171.38(b) to conduct medical examinations and procedures. (1981, c. 931, s. 2; 1981 (Reg. Sess., 1982), c. 1191, s. 16; 1983, c. 715, ss. 1, 2; 1997-375, s. 4; 1998-212, s. 19.4(n).)

### § 143B-480.3. Reduction of benefits; restitution; actions.

(a) Assistance shall be reduced or denied to the extent the medical expenses are recouped through a public or private insurance plan or other victim benefit source.

(b) The Program shall be an eligible recipient for restitution or reparation under G.S. 15A-1021, 15A-1343, 148-33.1, 148-33.2, 148-57.1, and any other applicable statutes.

(c) When any victim who:

- (1) Has received assistance under this Part;
- (2) Brings an action for damages arising out of the rape, attempted rape, sexual offense, or attempted sexual offense for which she received that assistance; and
- (3) Recovers damages including the expenses for which she was awarded assistance,

the court shall make as part of its judgment an order for reimbursement to the Program of the amount of any assistance awarded less reasonable expenses allocated by the court to that recovery.

(d) Funds appropriated to the Department of Crime Control and Public Safety for this program may be used to purchase and distribute rape evidence collection kits approved by the State Bureau of Investigation. (1981, c. 931, s. 2; 1983, c. 715, s. 3.)

**Editor's Note.** — Session Laws 1981, c. 931, which enacted this section, in s. 1, provided that the act shall be known and may be cited as the "Assistance Act for Victims of Rape and Sex Offenses."

## Part 4. State Fire Commission.

§§ 143B-481 through 143B-485: Recodified as §§ 58-27.30 through 58-27.34 by Session Laws 1985, c. 757, s. 167(b).

§§ 143B-486 through 143B-489: Reserved for future codification purposes.

## Part 5. Civil Air Patrol.

### § 143B-490. Civil Air Patrol Division — powers and duties.

(a) There is hereby established, within the Department of Crime Control and Public Safety, the Civil Air Patrol Division, which shall be organized and staffed in accordance with this Part and within the limits of authorized appropriations.

(b) The Civil Air Patrol Division shall:

- (1) Receive and supervise the expenditure of State funds provided by the General Assembly or otherwise secured by the State of North Carolina for the use and benefit of the North Carolina Wing-Civil Air Patrol;
- (2) Supervise the maintenance and use of State provided facilities and equipment by the North Carolina Wing-Civil Air Patrol;
- (3) Receive, from State and local governments, their agencies, and private citizens, requests for State approval for assistance by the North

Carolina Wing-Civil Air Patrol in natural or man-made disasters or other emergency situations. Such State requested and approved missions shall be approved or denied by the Secretary of Crime Control and Public Safety or his designee under such rules, terms and conditions as are adopted by the Department. (1979, c. 516, s. 1.)

### **§ 143B-491. Personnel and benefits.**

(a) The Wing Commander of the North Carolina Wing-Civil Air Patrol shall certify to the Secretary or his designee those members who are in good standing as members eligible for benefits. The Wing Commander shall provide the Secretary with two copies of the certification. The Secretary shall acknowledge receipt of, sign, and date both copies and return one to the Wing Commander. The Wing Commander shall, in the form and manner provided above, notify the Secretary of any changes in personnel within 30 days thereof. Upon the Secretary's signature, those members listed on the certification shall be eligible for the benefits listed below.

(b) Those members of the North Carolina Wing-Civil Air Patrol certified under subsection (a) of this section shall be deemed and considered employees of the Department of Crime Control and Public Safety for workers' compensation purposes, and for no other purposes, while performing duties incident to a State approved mission. Such period of employment shall not extend to said members while performing duties incident to a United States Air Force authorized mission or any other Wing activities. (1979, c. 516, s. 1; c. 714, s. 2; 1993, c. 389, s. 2.)

### **§ 143B-492. State liability.**

Unless otherwise specifically provided, the members of the North Carolina Wing-Civil Air Patrol shall serve without compensation and shall not be entitled to the benefits of the retirement system for teachers and State employees as set forth in Chapter 135 of the General Statutes. The provisions of Article 31 of Chapter 143 of the General Statutes, with respect to tort claims against State departments and agencies, shall not be applicable to the activities of the North Carolina Wing-Civil Air Patrol, unless those activities are State-approved missions which are not covered by the Federal Tort Claims Act. The State shall not in any manner be liable for any of the contracts, debts, or obligations of the said organization. (1979, c. 516, s. 1; 1993, c. 389, s. 1.)

**§§ 143B-493, 143B-494:** Reserved for future codification purposes.

## **Part 5A. North Carolina Center for Missing Persons.**

### **§ 143B-495. North Carolina Center for Missing Persons established.**

There is established within the Department of Crime Control and Public Safety the North Carolina Center for Missing Persons, which shall be organized and staffed in accordance with applicable laws. The purpose of the Center is to serve as a central repository for information regarding missing persons and missing children, with special emphasis on missing children. The Center may utilize the Federal Bureau of Investigation/National Crime Information Center's missing person computerized file (hereinafter referred to as FBI/NCIC) through the use of the Police Information Network in the North

Carolina Department of Justice. (1985, c. 765, s. 1; 1985 (Reg. Sess., 1986), c. 1000, s. 1.)

### § 143B-496. Definitions.

For the purpose of this Part:

- (1) "Missing child" means a juvenile as defined in G.S. 7B-101 whose location has not been determined, who has been reported as missing to a law-enforcement agency, and whose parent's, spouse's, guardian's or legal custodian's temporary or permanent residence is in North Carolina or is believed to be in North Carolina.
- (2) "Missing person" means any individual who is 18 years of age or older, whose temporary or permanent residence is in North Carolina, or is believed to be in North Carolina, whose location has not been determined, and who has been reported as missing to a law-enforcement agency.
- (3) "Missing person report" is a report prepared on a prescribed form for transmitting information about a missing person or a missing child to an appropriate law-enforcement agency. (1985 (Reg. Sess., 1986), c. 1000, s. 1; 1998-202, s. 13(mm).)

### § 143B-497. Control of the Center.

The Center is under the direction of the Secretary of the Department of Crime Control and Public Safety and may be organized and structured in a manner as the Secretary deems appropriate to ensure that the objectives of the Center are achieved. The Secretary may employ those Center personnel as the General Assembly may authorize and provide funding for. (1985 (Reg. Sess., 1986), c. 1000, s. 1.)

### § 143B-498. Secretary to adopt rules.

The Secretary shall adopt rules prescribing:

- (1) procedures for accepting and disseminating information maintained at the Center;
- (2) the confidentiality of the data and information, including the missing person report, maintained by the Center;
- (3) the proper disposition of all obsolete data, including the missing person report; provided, data for an individual who has reached the age of 18 and remains missing must be preserved;
- (4) procedures allowing a communication link with the Police Information Network and the FBI/NCIC's missing person file to ensure compliance with FBI/NCIC policies; and
- (5) forms, including but not limited to a missing person report, considered necessary for the efficient and proper operation of the Center. (1985 (Reg. Sess., 1986), c. 1000, s. 1.)

### § 143B-499. Submission of missing person reports to the Center.

Any parent, spouse, guardian, or legal custodian may submit a missing person report to the Center of any missing child or missing person, regardless of the circumstances, after having first submitted a missing person report on the individual to the law-enforcement agency having jurisdiction of the area in which the individual became or is believed to have become missing, regardless of the circumstances. (1985 (Reg. Sess., 1986), c. 1000, s. 1.)

### § 143B-499.1. Dissemination of missing persons data by law-enforcement agencies.

A law-enforcement agency, upon receipt of a missing person report by a parent, spouse, guardian, or legal custodian, shall immediately make arrangements for the entry of data about the missing person or missing child into the national missing persons file in accordance with criteria set forth by the FBI/NCIC, immediately inform all of its on-duty law-enforcement officers of the missing person report, initiate a statewide broadcast to all appropriate law-enforcement agencies to be on the lookout for the individual, and transmit a copy of the report to the Center. (1985 (Reg. Sess., 1986), c. 1000, s. 1.)

### § 143B-499.2. Responsibilities of Center.

The Center shall:

- (1) Assist local law-enforcement agencies with entering data about missing persons or missing children into the national missing persons file, ensure that proper entry criteria have been met as set forth by the FBI/NCIC, and confirm entry of the data about the missing persons or missing children;
- (2) Gather and distribute information and data on missing children and missing persons;
- (3) Encourage research and study of missing children and missing persons, including the prevention of child abduction and the prevention of the exploitation of missing children;
- (4) Serve as a statewide resource center to assist local communities in programs and initiatives to prevent child abduction and the exploitation of missing children;
- (5) Continue increasing public awareness of the reasons why children are missing and vulnerability of missing children;
- (6) Achieve maximum cooperation with other agencies of the State, with agencies of other states and the federal government and with the National Center for Missing and Exploited Children in rendering assistance to missing children and missing persons and their parents, guardians, spouses, or legal custodians; and cooperate with interstate and federal efforts to identify deceased individuals;
- (7) Forward the appropriate information to the Police Information Network to assist it in maintaining and publishing a bulletin of currently missing children and missing persons;
- (8) Maintain a directory of existing public and private agencies, groups, and individuals that provide effective assistance to families in the areas of prevention of child abduction, location of missing children and missing persons, and follow-up services to the child or person and family, as determined by the Secretary of Crime Control and Public Safety;
- (9) Annually compile and publish reports on the actual number of children and persons missing each year, listing the categories and causes, when known, for the disappearances;
- (10) Provide follow-up referrals for services to missing children or persons and their families;
- (11) Maintain a toll-free 1-800 telephone service that will be in service at all times; and
- (12) Perform such other activities that the Secretary of Crime Control and Public Safety considers necessary to carry out the intent of its mandate. (1985 (Reg. Sess., 1986), c. 1000, s. 1.)

### **§ 143B-499.3. Duty of individuals to notify Center and law-enforcement agency when missing person has been located.**

Any parent, spouse, guardian, or legal custodian who submits a missing person report to a law-enforcement agency or to the Center, shall immediately notify the law-enforcement agency and the Center of any individual whose location has been determined. The Center shall confirm the deletion of the individual's records from the FBI/NCIC's missing person file, as long as there are no grounds for criminal prosecution, and follow up with the local law-enforcement agency having jurisdiction of the records. (1985 (Reg. Sess., 1986), c. 1000, s. 1.)

### **§ 143B-499.4. Release of information by Center.**

The following may make inquiries of, and receive data or information from, the Center:

- (1) Any police, law-enforcement, or criminal justice agency investigating a report of a missing or unidentified person or child, whether living or deceased.
- (2) A court, upon a finding by the court that access to the data, information, or records of the Center may be necessary for the determination of an issue before the court.
- (3) Any district attorney of a prosecutorial district as defined in G.S. 7A-60 in this State or the district attorney's designee or representative.
- (4) Any person engaged in bona fide research when approved by the Secretary; provided, no names or addresses may be supplied to this person.
- (5) Any other person authorized by the Secretary of the Department of Crime Control and Public Safety pursuant to G.S. 143B-498(1). (1985 (Reg. Sess., 1986), c. 1000, s. 1; 1987, c. 282, s. 28; 1987 (Reg. Sess., 1988), c. 1037, s. 119.)

### **§ 143B-499.5. Provision of toll-free service; instructions to callers; communication with law-enforcement agencies.**

The Center shall provide a toll-free telephone line for anyone to report the disappearance of any individual or the sighting of any missing child or missing person. The Center personnel shall instruct the caller, in the case of a report concerning the disappearance of an individual, of the requirements contained in G.S. 143B-499.3 of first having to submit a missing person report on the individual to the law-enforcement agency having jurisdiction of the area in which the individual became or is believed to have become missing. Any law-enforcement agency may retrieve information imparted to the Center by means of this phone line. The Center shall directly communicate any report of a sighting of a missing person or a missing child to the law-enforcement agency having jurisdiction in the area of disappearance or sighting. (1985 (Reg. Sess., 1986), c. 1000, s. 1.)

### **§ 143B-499.6. Improper release of information; penalty.**

Any person working under the supervision of the Director of Victims and Justice Services who knowingly and willfully releases, or authorizes the release of, any data, information, or records maintained or possessed by the

Center to any agency, entity, or person other than as specifically permitted by Part 5A or in violation of any rule adopted by the Secretary is guilty of a Class 2 misdemeanor. (1985 (Reg. Sess., 1986), c. 1000, s. 1; 1993, c. 539, s. 1050; 1994, Ex. Sess., c. 24, s. 14(c).)

## Part 6. Community Penalties Program.

**§§ 143B-500 through 143B-507:** Recodified as Article 61 of Subchapter XIII of Chapter 7A, §§ 7A-770 through 7A-777, by Session Laws 1991, c. 566, s. 2.

**§§ 143B-508 through 143B-510:** Reserved for future codification purposes.

## ARTICLE 12.

### *Department of Juvenile Justice and Delinquency Prevention.*

#### Part 1. Creation of Department.

### **§ 143B-511. Creation of the Department of Juvenile Justice and Delinquency Prevention.**

There is hereby created and constituted a department to be known as the "Department of Juvenile Justice and Delinquency Prevention", with the organization, powers, and duties defined in Article 1 of this Chapter, except as modified in this Article. (1998-202, s. 1(b); 2000-137, s. 1(b).)

**Cross References.** — As to the Child Residential Treatment Services Program, see editor's note at § 143B-137.1. As to services to children at risk for institutionalization or other out-of-home placement, see editor's note at § 143B-137.1.

**Editor's Note.** — Session Laws 2000-137, s. 1(a) repealed former Article 3C of Chapter 147. Session Laws 2000-137, s. 1(b) enacted a new Article 12 of Chapter 143B. Historical citations to the sections in former Article 3C of Chapter 147 have been added to the corresponding sections in new Article 12 of Chapter 143B as recodified.

The sections in Article 12 have been numbered at the direction of the Revisor of Statutes, the section numbers in Session Laws 2000-137, s. 1(b) having been §§ 143B-511 to 143B-537.

Session Laws 2000-137, s. 5, made this Article effective July 20, 2000.

Session Laws 2000-67, s. 19, transfers the Center for Prevention of School Violence and all functions, powers, duties, and obligations from the University of North Carolina to the Office of Juvenile Justice (Department of Juvenile Justice and Delinquency Prevention). The Center is to continue to consult with the University and the Department of Public Instruction to

enhance research opportunities and specialized study areas such as teacher preparation, school resource officer development, suicide prevention, and best practices.

Session Laws 2000-67, s. 19.7, transfers the Guard Response Alternative Sentencing Program and all functions, powers, duties, and obligations vested in the Department of Crime Control and Public Safety for the Guard Response Alternative Sentencing Program to the Office of Juvenile Justice (Department of Juvenile Justice and Delinquency Prevention). The Program is to continue to function as an additional probation option for certain first-time juveniles who have been adjudicated delinquent and who are subject to Level 2 disposition.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

### **§ 143B-512. Transfer of Office of Juvenile Justice authority to the Department of Juvenile Justice and Delinquency Prevention.**

(a) All (i) statutory authority, powers, duties, and functions, including directives of S.L. 1998-202, rule making, budgeting, and purchasing, (ii) records, (iii) personnel, personnel positions, and salaries, (iv) property, and (v) unexpended balances of appropriations, allocations, reserves, support costs, and other funds of the Office of Juvenile Justice under the Office of the Governor are transferred to and vested in the Department of Juvenile Justice and Delinquency Prevention. This transfer has all of the elements of a Type I transfer as defined in G.S. 143A-6.

(b) The Department shall be considered a continuation of the Office of Juvenile Justice for the purpose of succession to all rights, powers, duties, and obligations of the Office and of those rights, powers, duties, and obligations exercised by the Office of the Governor on behalf of the Office of Juvenile Justice. Where the Office of Juvenile Justice is referred to by law, contract, or other document, that reference shall apply to the Department. Where the Office of the Governor is referred to by contract or other document, where the Office of the Governor is acting on behalf of the Office of Juvenile Justice, that reference shall apply to the Department.

(c) All institutions previously operated by the Office of Juvenile Justice and the present central office of the Office of Juvenile Justice, including land, buildings, equipment, supplies, personnel, or other properties rented or controlled by the Office or by the Office of the Governor for the Office of Juvenile Justice, shall be administered by the Department of Juvenile Justice and Delinquency Prevention. (1998-202, s. 1(b); 2000-137, s. 1(b).)

**§§ 143B-513, 143B-514:** Reserved for future codification purposes.

## Part 2. General Provisions.

### **§ 143B-515. Definitions.**

In this Article, unless the context clearly requires otherwise, the following words have the listed meanings:

- (1) Chief court counselor. — The person responsible for administration and supervision of juvenile intake, probation, and post-release supervision in each judicial district, operating under the supervision of the Department of Juvenile Justice and Delinquency Prevention.
- (2) Community-based program. — A program providing nonresidential or residential treatment to a juvenile under the jurisdiction of the juvenile court in the community where the juvenile's family lives. A community-based program may include specialized foster care, family counseling, shelter care, and other appropriate treatment.
- (3) County Councils. — Juvenile Crime Prevention Councils created under G.S. 143B-544.
- (4) Court. — The district court division of the General Court of Justice.
- (5) Repealed by Session Laws 2001-490, s. 2.39, effective June 30, 2001.
- (6) Custodian. — The person or agency that has been awarded legal custody of a juvenile by a court.

- (7) Delinquent juvenile. — Any juvenile who, while less than 16 years of age but at least 6 years of age, commits a crime or infraction under State law or under an ordinance of local government, including violation of the motor vehicle laws.
- (8) Department. — The Department of Juvenile Justice and Delinquency Prevention.
- (9) Detention. — The secure confinement of a juvenile under a court order.
- (10) Detention facility. — A facility approved to provide secure confinement and care for juveniles. Detention facilities include both State and locally administered detention homes, centers, and facilities.
- (11) District. — Any district court district as established by G.S. 7A-133.
- (12) Judge. — Any district court judge.
- (13) Judicial district. — Any district court district as established by G.S. 7A-133.
- (14) Juvenile. — Except as provided in subdivisions (7) and (22) of this section, any person who has not reached the person's eighteenth birthday and is not married, emancipated, or a member of the armed forces of the United States. Wherever the term "juvenile" is used with reference to rights and privileges, that term encompasses the attorney for the juvenile as well.
- (15) Juvenile court. — Any district court exercising jurisdiction under this Chapter.
- (15a) Juvenile court counselor. — A person responsible for intake services and court supervision services to juveniles under the supervision of the chief court counselor.
- (16) Post-release supervision. — The supervision of a juvenile who has been returned to the community after having been committed to the Department for placement in a training school.
- (17) Probation. — The status of a juvenile who has been adjudicated delinquent, is subject to specified conditions under the supervision of a juvenile court counselor, and may be returned to the court for violation of those conditions during the period of probation.
- (18) Protective supervision. — The status of a juvenile who has been adjudicated undisciplined and is under the supervision of a juvenile court counselor.
- (19) Secretary. — The Secretary of Juvenile Justice and Delinquency Prevention.
- (20) State Council. — The State Advisory Council on Juvenile Justice and Delinquency Prevention established under G.S. 143B-556.
- (21) Repealed by Session Laws 2001-95, s. 3, effective May 18, 2001.
- (22) Undisciplined juvenile. —
  - a. A juvenile who, while less than 16 years of age but at least 6 years of age, is unlawfully absent from school; or is regularly disobedient to and beyond the disciplinary control of the juvenile's parent, guardian, or custodian; or is regularly found in places where it is unlawful for a juvenile to be; or has run away from home for a period of more than 24 hours; or
  - b. A juvenile who is 16 or 17 years of age and who is regularly disobedient to and beyond the disciplinary control of the juvenile's parent, guardian, or custodian; or is regularly found in places where it is unlawful for a juvenile to be; or has run away from home for a period of more than 24 hours.
- (23) Youth development center. — A secure residential facility authorized to provide long-term treatment, education, and rehabilitative services for delinquent juveniles committed by the court to the Department. (1998-202, ss. 1(b), 2(a); 2000-137, s. 1(b); 2001-95, ss. 3, 4; 2001-490, s. 2.39.)

**Effect of Amendments.** — Session Laws 2001-95, ss. 3 and 4, effective May 18, 2001, deleted subdivision (21), defining “training school”; and added subdivision (23).

Session Laws 2001-490, s. 2.39, effective June 30, 2001, deleted former subdivision (5), defining court counselor, and added subdivision (15a), defining juvenile court counselor.

## § 143B-516. Duties and powers of the Department of Juvenile Justice and Delinquency Prevention.

(a) The head of the Department is the Secretary. The Secretary shall have the powers and duties conferred by this Chapter, delegated by the Governor, and conferred by the Constitution and laws of this State. The Secretary shall be responsible for effectively and efficiently organizing the Department to promote the policy of the State as set forth in this Article and to promote public safety and to prevent the commission of delinquent acts by juveniles.

(b) The Secretary shall have the following powers and duties:

- (1) Give leadership to the implementation as appropriate of State policy that requires that youth development centers be phased out as populations diminish.
- (2) Close a State youth development center when its operation is no longer justified and transfer State funds appropriated for the operation of that youth development center to fund community-based programs, to purchase care or services for predelinquents, delinquents, or status offenders in community-based or other appropriate programs, or to improve the efficiency of existing youth development centers, provided the Advisory Budget Commission reviews this action.
- (3) Administer a sound admission or intake program for juvenile facilities, including the requirement of a careful evaluation of the needs of each juvenile prior to acceptance and placement.
- (4) Operate juvenile facilities and implement programs that meet the needs of juveniles receiving services and that assist them to become productive, responsible citizens.
- (5) Adopt rules to implement this Article and the responsibilities of the Secretary and the Department under Chapter 7B of the General Statutes. The Secretary may adopt rules applicable to local human services agencies providing juvenile court and delinquency prevention services for the purpose of program evaluation, fiscal audits, and collection of third-party payments.
- (6) Ensure a statewide and uniform system of juvenile intake, protective supervision, probation, and post-release supervision services in all district court districts of the State. The system shall provide appropriate, adequate, and uniform services to all juveniles who are alleged or found to be undisciplined or delinquent.
- (7) Establish procedures for substance abuse testing for juveniles adjudicated delinquent for substance abuse offenses.
- (8) Plan, develop, and coordinate comprehensive multidisciplinary services and programs statewide for the prevention of juvenile delinquency, early intervention, and rehabilitation of juveniles.
- (9) Develop standards, approve yearly program evaluations, and make recommendations based on the evaluations to the General Assembly concerning continuation funding.
- (10) Collect expense data for every program operated and contracted by the Department.
- (11) Develop a formula for funding, on a matching basis, juvenile court and delinquency prevention services as provided for in this Article. This formula shall be based upon the county's or counties' relative ability to fund community-based programs for juveniles.

Local governments receiving State matching funds for programs under this Article must maintain the same overall level of effort that existed at the time of the filing of the county assessment of juvenile needs with the Department.

- (12) Assist local governments and private service agencies in the development of juvenile court services and delinquency prevention services and provide information on the availability of potential funding sources and assistance in making application for needed funding.
  - (13) Assist the Criminal Justice Information Network Governing Board with administering a comprehensive juvenile justice information system to collect data and information about delinquent juveniles for the purpose of developing treatment and intervention plans and allowing reliable assessment and evaluation of the effectiveness of rehabilitative and preventive services provided to delinquent juveniles.
  - (14) Coordinate State-level services in relation to delinquency prevention and juvenile court services so that any citizen may go to one place in State government to receive information about available juvenile services.
  - (15) Appoint the chief court counselor in each district upon the recommendation of the chief district court judge of that district.
  - (16) Develop a statewide plan for training and professional development of chief court counselors, court counselors, and other personnel responsible for the care, supervision, and treatment of juveniles. The plan shall include attendance at appropriate professional meetings and opportunities for educational leave for academic study.
  - (17) Study issues related to qualifications, salary ranges, appointment of personnel on a merit basis, including chief court counselors, court counselors, secretaries, and other appropriate personnel, at the State and district levels in order to adopt appropriate policies and procedures governing personnel.
  - (18) Designate persons, as necessary, as State juvenile justice officers, to provide for the care and supervision of juveniles placed in the physical custody of the Department.
- (c) Except as otherwise specifically provided in this Article and in Article 1 of this Chapter, the Secretary shall prescribe the functions, powers, duties, and obligations of every agency or division in the Department.
- (d) Where Department statistics indicate the presence of minority youth in juvenile facilities disproportionate to their presence in the general population, the Department shall develop and recommend appropriate strategies designed to ensure fair and equal treatment in the juvenile justice system.
- (e) The Department may provide consulting services and technical assistance to courts, law enforcement agencies, and other agencies, local governments, and public and private organizations. The Department may develop or assist Juvenile Crime Prevention Councils in developing community needs, assessments, and programs relating to the prevention and treatment of delinquent and undisciplined behavior.
- (f) The Department shall develop a cost-benefit model for each State-funded program. Program commitment and recidivism rates shall be components of the model. In developing the model, the Department shall consider the recommendations of the State Advisory Council on Juvenile Justice and Delinquency Prevention. (1998-202, ss. 1(b), 2(b), 2(f); 1998-217, ss. 57(2), 57(3); 2000-137, s. 1(b); 2001-95, s. 5; 2001-490, s. 2.40.)

**Cross References.** — As to legislation regarding a study of programs for screening for and identification of delinquency risk factors, see the editor's note under § 7B-1500. As to

minority sensitivity training for law enforcement personnel, see § 114-21.

**Pilot Program for Multifunctional Juvenile Facility.** — Session Laws 1999-237, s. 21.13(a) through (k), as amended by Session Laws 2000-67, ss. 19.5(a) and (b), provides for the establishment in Eastern North Carolina of a pilot program for a multifunctional juvenile facility to provide juveniles involved in the juvenile justice system with custodial, rehabilitation, treatment, and program services, including substance abuse and sex offender services. In establishing the pilot, the Office of Juvenile Justice (now the Department of Juvenile Justice and Delinquency Prevention) shall contract with a private for-profit or nonprofit firm for the construction and operation of such a multifunctional facility totaling up to 100 beds. Any contract entered under the authority of this section shall be for a period not to exceed 10 years. The Office of Juvenile Justice (Department of Juvenile Justice and Delinquency Prevention) is to house only juveniles who are in the North Carolina juvenile justice system in the facility. Juvenile offenders housed in private facilities shall be governed by the State laws applicable to juvenile offenders housed in State facilities. The Office of Juvenile Justice (Department of Juvenile Justice and Delinquency Prevention) shall make a written report no later than March 1, 2001, on the status of the pilot program and shall evaluate the program annually and report on the findings of the evaluations by May 1, 2001, and May 1, 2003.

**Editor's Note.** — Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2001-178, ss. 1(a)-(j), provide that the State Board of Education, in cooperation with the Department of Juvenile Justice and Delinquency Prevention, shall establish a pilot program under which participating local school administrative units place all students who are on short-term out-of-school suspension in alternative learning programs. These alternative placements may be in alternative learning programs, day reporting centers, and other similar supervised programs for students.

**Grant Reporting and Funding.** — Session Laws 2001-424, ss. 24.2 (a) to (c), provide: "(a) On or before May 1 each year, the Department of Juvenile Justice and Delinquency Prevention shall submit to the Joint Legislative Commis-

sion on Governmental Operations and the Appropriations Committees of the Senate and House of Representatives a list of the recipients of the grants awarded, or preapproved for award, from funds appropriated to the Department for local Juvenile Crime Prevention Council grants. The list shall include for each recipient the amount of the grant awarded, the membership of the local committee or council administering the award funds on the local level, and a short description of the local services, programs, or projects that will receive funds. The list shall also identify any programs that received grant funds at one time but for which funding has been eliminated by the Department of Juvenile Justice and Delinquency Prevention. A written copy of the list and other information regarding the projects shall also be sent to the Fiscal Research Division of the General Assembly.

"(b) Each county in which local programs receive Juvenile Crime Prevention Council grant funds from the Department of Juvenile Justice and Delinquency Prevention shall certify annually through its local council to the Department that funds received are not used to duplicate or supplant other programs within the county.

"(c) The General Assembly recognizes the importance of evaluation and outcome measurements of the programs serving adjudicated juvenile offenders in order to ensure the cost-effective use of Juvenile Crime Prevention Council grant funds. The Department of Juvenile Justice and Delinquency Prevention shall establish and implement a system to collect and report on information and data regarding the expenditures and impact of the Juvenile Crime Prevention Council formula grant funds used by the individual counties to serve juveniles who have been adjudicated delinquent or who have been diverted for delinquent offenses.

"The Department of Juvenile Justice and Delinquency Prevention, in consultation with the North Carolina Sentencing Commission, the Governor's Crime Commission, and the Juvenile Justice Institute, shall develop standards for measuring the effectiveness of programs that receive Juvenile Crime Prevention Council grant funds and that serve juveniles who have been adjudicated delinquent or who have been diverted for delinquent offenses. The standards shall include methods for measuring success factors following intervention, including those factors that:

"(1) Reduce the use of alcohol or controlled substances.

"(2) Reduce subsequent complaints.

"(3) Reduce violations of terms of community supervision.

"(4) Reduce convictions for subsequent offenses.

"(5) Fulfill restitution to victims.

“(6) Increase parental accountability.

“The Department of Juvenile Justice and Delinquency Prevention shall report to the Chairs of the Appropriations Committees of the Senate and House of Representatives, the Chairs of the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee, and the Fiscal Research Division no later than April 1, 2002, on the progress of the establishment of the system mandated by this section [s. 24.2 of Session Laws 2001-424]. The system shall be implemented no later than June 30, 2003.

“After June 30, 2003, on or before April 1 each year, the Department of Juvenile Justice and Delinquency Prevention shall report to the Chairs of the Appropriations Committees of the Senate and House of Representatives and the Chairs of the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee on the following:

“(1) The number of diverted and adjudicated juveniles served.

“(2) The specific methods used by the Juvenile Crime Prevention Councils to determine services, programs, and intervention strategies most likely to change behaviors of juvenile offenders.

“(3) The total cost for each funded program, including the cost per juvenile and the essential elements of the program.

“(4) An assessment of the extent to which programs funded by Juvenile Crime Prevention Council grants:

“a. Are compatible with research that shows prevention and early intervention strategies that are effective with juvenile offenders.

“b. Are outcome-based in that the grantee describes what outcomes will be achieved or what outcomes have already been achieved.

“c. Include an evaluation component.

“d. Have a demonstrable impact on success factors.”

Session Laws 2001-424, s. 24.3, provides: “(a) Project Challenge North Carolina, Inc., shall report to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety by April 1 each year on the operation and the effectiveness of its program in providing alternative dispositions and services to juveniles who have been adjudicated delinquent or undisciplined. The report shall include information on the source of referrals for juveniles, the types of offenses committed by juveniles participating in the program, the amount of time those juveniles spend in the program, the number of juveniles who successfully complete the program, and the number of juveniles who commit additional offenses after completing the program.

“(b) The Department of Juvenile Justice and Delinquency Prevention shall report to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the effectiveness of the Juvenile Assessment Center by April 1 each year. The report on the Juvenile Assessment Center shall include information on the number of juveniles served and an evaluation of the effectiveness of juvenile assessment plans and services provided as a result of these plans.

“(c) Communities in Schools shall report to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety, the Joint Legislative Commission on Governmental Operations, the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee, and the Joint Legislative Education Oversight Committee by April 1 each year on the operation and the effectiveness of its program. The report shall include information on the number of children served, the number of volunteers used, the impact on the children who have received services from Communities in Schools, and the operating budget of Communities in Schools.”

Session Laws 2001-424, s. 24.5, provides: “The Department of Juvenile Justice and Delinquency Prevention shall conduct an evaluation of the Eckerd and Camp Woodson wilderness camp programs, the teen court programs, the program that grants funds to the local organizations of the Boys and Girls Clubs established pursuant to Section 21.10 of S.L. 1999-237, the Save Our Students program, the Governor’s One-on-One Programs, and multi-purpose group homes. The teen court report shall include statistical information on the number of juveniles served, the number and type of offenses considered by teen courts, referral sources for teen courts, and the number of juveniles that become court-involved after participation in teen courts. The report on the Boys and Girls Clubs program shall include information on:

“(1) The expenditure of State appropriations on the program;

“(2) The operations and the effectiveness of the program; and

“(3) The number of juveniles served under the program.

“In conducting the evaluation of each of these programs, the Department shall consider whether participation in each program results in a reduction of court involvement among juveniles. The Department shall also identify whether the programs are achieving the goals and objectives of the Juvenile Justice Act, S.L. 1998-202. The Department shall report the results of the evaluation to the Chairs of the

House of Representatives and Senate Appropriations Committees and the Chairs of the Subcommittees of Justice and Public Safety of the House of Representatives and Senate Appropriations Committees by March 1 of each year.”

Session Laws 2001-424, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2001.’”

Session Laws 2001-424, s. 36.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have

effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium.”

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-95, s. 5, effective May 18, 2001, substituted “youth development center” for “training school” in subdivisions (b)(1) and (2).

Session Laws 2001-490, s. 2.40, effective June 30, 2001, added subdivision (b)(18).

## § 143B-517. Authority to contract with other entities.

(a) The Department may contract with any governmental agency, person, or association for the accomplishment of its duties and responsibilities. The expenditure of funds under these contracts shall be for the purposes for which the funds were appropriated and not otherwise prohibited by law.

(b) The Department may enter into contracts with, and act as intermediary between, any federal government agency and any county of this State for the purpose of assisting the county to recover monies expended by a county-funded financial assistance program. As a condition of assistance, the county shall agree to hold and save harmless the Department against any claims, loss, or expense which the Department might incur under the contracts by reason of any erroneous, unlawful, or tortious act or omission of the county or its officials, agents, or employees.

(c) The Department and any other appropriate State or local agency may purchase services from public or private agencies providing delinquency prevention programs or juvenile court services, including parenting responsibility classes. The programs shall meet State standards. As institutional populations are reduced, the Department may divert State funds appropriated for institutional programs to purchase the services under the Executive Budget Act.

(d) Each programmatic, residential, and service contract or agreement entered into by the Department shall include a cooperation clause to ensure compliance with the Department’s quality assurance requirements and cost-accounting requirements. (1998-202, s. 1(b); 2000-137, s. 1(b).)

**Editor’s Note.** — The Executive Budget Act, referred to in subsection (c), is codified at G.S. 143-1 et seq.

For establishment of a pilot program for a

multifunctional juvenile facility in Eastern North Carolina, see the Editor’s note under § 143B-516.

## § 143B-518. Authority to assist private nonprofit foundations.

The Department may provide appropriate services or allow employees of the Department to assist any private nonprofit foundation that works directly with the Department’s services or programs and whose sole purpose is to support these services and programs. A Department employee shall be allowed to work with a foundation no more than 20 hours in any one month. These services are not subject to Chapter 150B of the General Statutes.

The board of directors of each private, nonprofit foundation shall secure and pay for the services of the Department of State Auditor or employ a certified public accountant to conduct an annual audit of the financial accounts of the foundation. The board of directors shall transmit to the Department a copy of

the annual financial audit report of the private nonprofit foundation. (1998-202, s. 1(b); 2000-137, s. 1(b).)

### § 143B-519. Annual report.

On or before April 1 each year, beginning with the year 2001, the Department shall report to the General Assembly on the effectiveness and cost benefit of every program operated and contracted by the Department and a summary of the local programs that receive State funding. The report shall include the most current institutional populations of juveniles being served by the Department, a comparison of the costs of the services, and a ranking of all programs that provide services to juveniles. The Department shall submit the report to the various State agencies providing services to juveniles. (1998-202, s. 1(b); 2000-137, s. 1(b).)

### § 143B-520. Teen court programs.

(a) All teen court programs administered by the Department of Juvenile Justice and Delinquency Prevention shall operate as community resources for the diversion of juveniles pursuant to G.S. 7B-1706(c). A juvenile diverted to a teen court program shall be tried by a jury of other juveniles, and, if the jury finds the juvenile has committed the delinquent act, the jury may assign the juvenile to a rehabilitative measure or sanction, including counseling, restitution, curfews, and community service.

Teen court programs may also operate as resources to the local school administrative units to handle problems that develop at school but that have not been turned over to the juvenile authorities.

(b) Every teen court program that receives State funds, including funds from Juvenile Crime Prevention Councils, shall comply with rules and reporting requirements of the Department of Juvenile Justice and Delinquency Prevention. In particular, teen court programs receiving State funds shall report to the Department on the expenditure of State funds and the number of cases served each year. (2001-424, s. 24.8.)

**Editor's Note.** — Session Laws 2001-424, s. 36.6, made this section effective July 1, 2001.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Oper-

ations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

§§ 143B-521 through 143B-524: Reserved for future codification purposes.

## Part 3. Juvenile Facilities.

### § 143B-525. Juvenile facilities.

In order to provide any juvenile in a juvenile facility with appropriate treatment according to that juvenile's need, the Department shall be responsible for the administration of statewide educational, clinical, psychological, psychiatric, social, medical, vocational, and recreational services or programs. (1998-202, s. 1(b); 2000-137, s. 1(b).)

**Editor's Note.** — For establishment of a facility in Eastern North Carolina, see the pilot program for a multifunctional juvenile

Editor's note under § 143b-516.

### **§ 143B-526. Authority to provide necessary medical or surgical care.**

The Department may provide any medical and surgical treatment necessary to preserve the life and health of juveniles committed to the custody of the Department; however, no surgical operation may be performed except as authorized in G.S. 148-22.2. (1998-202, s. 1(b); 2000-137, s. 1(b).)

### **§ 143B-527. Compensation to juveniles in care.**

A juvenile who has been committed to the Department may be compensated for work or participation in training programs at rates approved by the Secretary within available funds. The Secretary may provide for a reasonable allowance to the juvenile for incidental personal expenses, and any balance of the juvenile's earnings remaining at the time the juvenile is released shall be paid to the juvenile or the juvenile's parent or guardian. The Department may accept grants or funds from any source to compensate juveniles under this section. (1998-202, s. 1(b); 2000-137, s. 1(b).)

### **§ 143B-528. Visits and community activities.**

(a) The Department shall encourage visits by parents or guardians and responsible relatives of juveniles committed to the custody of the Department.

(b) The Department shall develop a program of home visits for juveniles in the custody of the Department. The visits shall begin after the juvenile has been in the custody of the Department for a period of at least six months. In developing the program, the Department shall adopt criteria that promote the protection of the public and the best interests of the juvenile. (1998-202, ss. 1(b), (2)c; 2000-137, s. 1(b).)

### **§ 143B-529. Regional detention services.**

The Department is responsible for juvenile detention services, including the development of a statewide plan for regional juvenile detention services that offer juvenile detention care of sufficient quality to meet State standards to any juvenile requiring juvenile detention care within the State in a detention facility as follows:

- (1) The Department shall plan with the counties operating a county detention facility to provide regional juvenile detention services to surrounding counties. The Department has discretion in defining the geographical boundaries of the regions based on negotiations with affected counties, distances, availability of juvenile detention care that meets State standards, and other appropriate factors.
- (2) The Department may plan with any county that has space within its county jail system to use the existing space for a county detention facility when needed, if the space meets the State standards for a detention facility and meets all of the requirements of G.S. 153A-221. The use of space within the county jail system shall be constructed to ensure that juveniles are not able to converse with, see, or be seen by the adult population, and juveniles housed in a space within a county jail shall be supervised closely.
- (3) The Department shall plan for and administer regional detention facilities. The Department shall carefully plan the location, architectural design, construction, and administration of a program to meet the needs of juveniles in juvenile detention care. The physical facility of a regional detention facility shall comply with all applicable State

and federal standards. The programs of a regional detention facility shall comply with the standards established by the Department. (1998-202, ss. 1(b), 2(f); 1998-217, s. 57(3); 2000-137, s. 1(b).)

### **§ 143B-530. State subsidy to county detention facilities.**

The Department shall administer a State subsidy program to pay a county that provides juvenile detention services and meets State standards a certain per diem per juvenile. In general, this per diem should be fifty percent (50%) of the total cost of caring for a juvenile from within the county and one hundred percent (100%) of the total cost of caring for a juvenile from another county. Any county placing a juvenile in a detention facility in another county shall pay fifty percent (50%) of the total cost of caring for the juvenile to the Department. The Department may vary the exact funding formulas to operate within existing State appropriations or other funds that may be available to pay for juvenile detention care. (1998-202, ss. 1(b), 2(f); 1998-217, s. 57(3); 2000-137, s. 1(b).)

### **§ 143B-531. Authority for implementation.**

In order to allow for effective implementation of a statewide regional approach to juvenile detention, the Department may:

- (1) Release or transfer a juvenile from one detention facility to another when necessary to administer the juvenile's detention appropriately.
- (2) Plan with counties that operate county detention facilities to provide regional services and to upgrade physical facilities to contract with counties for services and care, and to pay State subsidies to counties providing regional juvenile detention services that meet State standards.
- (3) Allow the State to reimburse law enforcement officers or other appropriate employees of local government for the costs of transportation of a juvenile to and from any juvenile detention facility.
- (4) Seek funding for juvenile detention services from federal sources, and accept gifts of funds from public or private sources. (1998-202, ss. 1(b), 2(f); 1998-217, s. 57(3); 2000-137, s. 1(b).)

**§§ 143B-532 through 143B-534:** Reserved for future codification purposes.

## **Part 4. Juvenile Court Services.**

### **§ 143B-535. Duties and powers of chief court counselors.**

The chief court counselor in each district appointed under G.S. 143B-516(b)(15) may:

- (1) Appoint court counselors, secretaries, and other personnel authorized by the Department in accordance with the personnel policies adopted by the Department.
- (2) Supervise and direct the program of juvenile intake, protective supervision, probation, and post-release supervision within the district.
- (3) Provide in-service training for staff as required by the Department.
- (4) Keep any records and make any reports requested by the Secretary in order to provide statewide data and information about juvenile needs and services. (1998-202, ss. 1(b), 2(f); 1998-217, s. 57(3); 2000-137, s. 1(b).)

**Cross References.** — As to the duties of the chief court counselor with regard to the development of a plan for a pilot program under which participating local school administrative units place all students who are on short-term out-of-school suspension in alternative learning programs, see the (identical) notes regarding

Session Laws 2001-178 at §§ 115C-391 and 143B-516.

**Editor's Note.** — For establishment of a pilot program for a multifunctional juvenile facility in Eastern North Carolina, see the Editor's note under § 143B-516.

### § 143B-536. Duties and powers of juvenile court counselors.

As the court or the chief court counselor may direct or require, all juvenile court counselors shall have the following powers and duties:

- (1) Secure or arrange for any information concerning a case that the court may require before, during, or after the hearing.
- (2) Prepare written reports for the use of the court.
- (3) Appear and testify at court hearings.
- (4) Assume custody of a juvenile as authorized by G.S. 7B-1900, or when directed by court order.
- (5) Furnish each juvenile on probation or protective supervision and that juvenile's parents, guardian, or custodian with a written statement of the juvenile's conditions of probation or protective supervision, and consult with the juvenile's parents, guardian, or custodian so that they may help the juvenile comply with the conditions.
- (6) Keep informed concerning the conduct and progress of any juvenile on probation or under protective supervision through home visits or conferences with the parents or guardian and in other ways.
- (7) See that the juvenile complies with the conditions of probation or bring to the attention of the court any juvenile who violates the juvenile's probation.
- (8) Make periodic reports to the court concerning the adjustment of any juvenile on probation or under court supervision.
- (9) Keep any records of the juvenile's work as the court may require.
- (10) Account for all funds collected from juveniles.
- (11) Serve necessary court documents pertaining to delinquent and undisciplined juvenile matters.
- (12) Assume custody of juveniles under the jurisdiction of the court when necessary for the protection of the public or the juvenile, and when necessary to carry out the responsibilities of juvenile court counselors under this section and under Chapter 7B of the General Statutes.
- (13) Use reasonable force and restraint necessary to secure custody assumed under subdivision (12) of this section.
- (14) Provide supervision for a juvenile transferred to the counselor's supervision from another court or another state, and provide supervision for any juvenile released from an institution operated by the Department when requested by the Department to do so.
- (15) Assist in the development of post-release supervision and the supervision of juveniles.
- (16) Screen and evaluate a complaint alleging that a juvenile is delinquent or undisciplined to determine whether the complaint should be filed as a petition.
- (17) Have any other duties as the court may direct.
- (18) Have any other duties as the Department may direct. (1998-202, ss. 1(b), 2(d), 2(e), 2(f); 1998-217, s. 57(3); 2000-137, s. 1(b); 2001-490, s. 2.41.)

**Effect of Amendments.** — Session Laws 2001-490, s. 2.41, effective June 30, 2001, inserted “juvenile” preceding “court counselors”

in subdivision (12), added subdivision (16), redesignated former subdivision (16) as present subdivision (17), and added subdivision (18).

**§§ 143B-537 through 143B-539:** Reserved for future codification purposes.

## Part 5. Comprehensive Juvenile Delinquency and Substance Abuse Prevention Plan.

### § 143B-540. Comprehensive Juvenile Delinquency and Substance Abuse Prevention Plan.

(a) The Department shall implement the comprehensive juvenile delinquency and substance abuse prevention plan developed by the Office of Juvenile Justice and shall coordinate with County Councils for implementation of a continuum of services and programs at the community level.

The Department shall ensure that localities are informed about best practices in juvenile delinquency and substance abuse prevention.

(b) The plan shall contain the following:

- (1) Identification of the risk factors at the developmental stages of a juvenile’s life that may result in delinquent behavior.
- (2) Identification of the protective factors that families, schools, communities, and the State must support to reduce the risk of juvenile delinquency.
- (3) Programmatic concepts that are effective in preventing juvenile delinquency and substance abuse and that should be made available as basic services in the communities, including:
  - a. Early intervention programs and services.
  - b. In-home training and community-based family counseling and parent training.
  - c. Adolescent and family substance abuse prevention services, including alcohol abuse prevention services, and substance abuse education.
  - d. Programs and activities offered before and after school hours.
  - e. Life and social skills training programs.
  - f. Classes or seminars that teach conflict resolution, problem solving, and anger management.
  - g. Services that provide personal advocacy, including mentoring relationships, tutors, or other caring adult programs.

(c) The Department shall cooperate with all other affected State agencies and entities in implementing this section. (1998-202, s. 1(b); 2000-137, s. 1(b).)

**Editor’s Note.** — For establishment of a facility in Eastern North Carolina, see the pilot program for a multifunctional juvenile Editor’s note under § 143B-516.

**§§ 143B-541, 143B-542:** Reserved for future codification purposes.

## Part 6. Juvenile Crime Prevention Councils.

### § 143B-543. Legislative intent.

It is the intent of the General Assembly to prevent juveniles who are at risk from becoming delinquent. The primary intent of this Part is to develop

community-based alternatives to youth development centers and to provide community-based delinquency and substance abuse prevention strategies and programs. Additionally, it is the intent of the General Assembly to provide noninstitutional dispositional alternatives that will protect the community and the juveniles.

These programs and services shall be planned and organized at the community level and developed in partnership with the State. These planning efforts shall include appropriate representation from local government, local public and private agencies serving juveniles and their families, local business leaders, citizens with an interest in youth problems, youth representatives, and others as may be appropriate in a particular community. The planning bodies at the local level shall be the Juvenile Crime Prevention Councils. (1998-202, s. 1(b); 2000-137, s. 1(b); 2001-95, s. 5.)

**Effect of Amendments.** — Session Laws 2001-95, s. 5, effective May 18, 2001, substituted “youth development centers” for “training schools” in the first paragraph of the subsection.

### § 143B-544. Creation; method of appointment; membership; chair and vice-chair.

(a) As a prerequisite for a county receiving funding for juvenile court services and delinquency prevention programs, the board of commissioners of a county shall appoint a Juvenile Crime Prevention Council. Each County Council is a continuation of the corresponding Council created under G.S. 147-33.61. The County Council shall consist of not more than 26 members and should include, if possible, the following:

- (1) The local school superintendent, or that person’s designee;
- (2) A chief of police in the county;
- (3) The local sheriff, or that person’s designee;
- (4) The district attorney, or that person’s designee;
- (5) The chief court counselor, or that person’s designee;
- (6) The director of the area mental health, developmental disabilities, and substance abuse authority, or that person’s designee;
- (7) The director of the county department of social services, or consolidated human services agency, or that person’s designee;
- (8) The county manager, or that person’s designee;
- (9) A substance abuse professional;
- (10) A member of the faith community;
- (11) A county commissioner;
- (12) Two persons under the age of 18 years, one of whom is a member of the State Youth Council;
- (13) A juvenile defense attorney;
- (14) The chief district court judge, or a judge designated by the chief district court judge;
- (15) A member of the business community;
- (16) The local health director, or that person’s designee;
- (17) A representative from the United Way or other nonprofit agency;
- (18) A representative of a local parks and recreation program; and
- (19) Up to seven members of the public to be appointed by the board of commissioners of a county.

The board of commissioners of a county shall modify the County Council’s membership as necessary to ensure that the members reflect the racial and socioeconomic diversity of the community and to minimize potential conflicts of interest by members.

(b) Two or more counties may establish a multicounty Juvenile Crime Prevention Council under subsection (a) of this section. The membership shall be representative of each participating county.

(c) The members of the County Council shall elect annually the chair and vice-chair. (1998-202, s. 1(b); 2000-137, s. 1(b); 2001-199, s. 1.)

**Effect of Amendments.** — Session Laws 2001-199, s. 1, effective June 13, 2001, substituted “26 members” for “25 members” in the

last sentence of subsection (a); and rewrote subdivision (a)(12), which had read “A person under the age of 21.”

### § 143B-545. Terms of appointment.

Each member of a County Council shall serve for a term of two years, except for initial terms as provided in this section. Each member’s term is a continuation of that member’s term under G.S. 147-33.62. Members may be reappointed. The initial terms of appointment began January 1, 1999. In order to provide for staggered terms, persons appointed for the positions designated in subdivisions (9), (10), (12), (15), (17), and (18) of G.S. 143B-544(a) were appointed for an initial term ending on June 30, 2000. The initial term of the second member added to each County Council pursuant to G.S. 143B-544(a)(12) shall begin on July 1, 2001, and end on June 30, 2002. After the initial terms, persons appointed for the positions designated in subdivisions (9), (10), (12), (15), (17), and (18) of G.S. 143B-544(a) shall be appointed for two-year terms, beginning on July 1. All other persons appointed to the Council were appointed for an initial term ending on June 30, 2001, and, after those initial terms, persons shall be appointed for two-year terms beginning on July 1. (1998-202, s. 1(b); 1999-423, s. 15; 2000-137, s. 1(b); 2001-199, s. 2.)

**Editor’s Note.** — Section 147-33.62, referred to above, was repealed by Session Laws 2000-137, which enacted this article.

2001-199, s. 2, effective June 13, 2001, inserted the sixth sentence, relating to the initial term of the second member added to each County Council.

**Effect of Amendments.** — Session Laws

### § 143B-546. Vacancies; removal.

Appointments to fill vacancies shall be for the remainder of the former member’s term.

Members shall be removed only for malfeasance or nonfeasance as determined by the board of county commissioners. (1998-202, s. 1(b); 2000-137, s. 1(b).)

### § 143B-547. Meetings; quorum.

County Councils shall meet at least bimonthly, or more often if a meeting is called by the chair.

A majority of members constitutes a quorum. (1998-202, s. 1(b); 1999-423, s. 16; 2000-137, s. 1(b).)

### § 143B-548. Compensation of members.

Members of County Councils shall receive no compensation but may receive a per diem in an amount established by the board of county commissioners. (1998-202, s. 1(b); 2000-137, s. 1(b).)

### § 143B-549. Powers and duties.

(a) Each County Council shall review annually the needs of juveniles in the county who are at risk of delinquency or who have been adjudicated undisci-

plined or delinquent and the resources available to address those needs. The Council shall develop and advertise a request for proposal process and submit a written plan of action for the expenditure of juvenile sanction and prevention funds to the board of county commissioners for its approval. Upon the county's authorization, the plan shall be submitted to the Department for final approval and subsequent implementation.

(b) Each County Council shall ensure that appropriate intermediate dispositional options are available and shall prioritize funding for dispositions of intermediate and community-level sanctions for court-adjudicated juveniles under minimum standards adopted by the Department.

(c) On an ongoing basis, each County Council shall:

- (1) Assess the needs of juveniles in the community, evaluate the adequacy of resources available to meet those needs, and develop or propose ways to address unmet needs.
- (2) Evaluate the performance of juvenile services and programs in the community. The Council shall evaluate each funded program as a condition of continued funding.
- (3) Increase public awareness of the causes of delinquency and of strategies to reduce the problem.
- (4) Develop strategies to intervene and appropriately respond to and treat the needs of juveniles at risk of delinquency through appropriate risk assessment instruments.
- (5) Provide funds for services for treatment, counseling, or rehabilitation for juveniles and their families. These services may include court-ordered parenting responsibility classes.
- (6) Plan for the establishment of a permanent funding stream for delinquency prevention services.

(d) The Councils may examine the benefits of joint program development between counties within the same judicial district. (1998-202, s. 1(b); 2000-137, s. 1(b).)

### § 143B-550. Funding for programs.

(a) Annually, the Department shall develop and implement a funding mechanism for programs that meet the standards developed under this Part. The Department shall ensure that the guidelines for the State and local partnership's funding process include the following requirements:

- (1) Fund effective programs. — The Department shall fund programs that it determines to be effective in preventing delinquency and recidivism. Programs that have proven to be ineffective shall not be funded.
- (2) Use a formula for the distribution of funds. — A funding formula shall be developed that ensures that even the smallest counties will be able to provide the basic prevention and alternative services to juveniles in their communities.
- (3) Allow and encourage local flexibility. — A vital component of the State and local partnership established by this section is local flexibility to determine how best to allocate prevention and alternative funds.
- (4) Combine resources. — Counties shall be allowed and encouraged to combine resources and services.

(b) The Department shall adopt rules to implement this section. The Department shall provide technical assistance to County Councils and shall require them to evaluate all State-funded programs and services on an ongoing and regular basis. (1998-202, s. 1(b); 2000-137, s. 1(b).)

§§ 143B-551 through 143B-555: Reserved for future codification purposes.

Part 7. State Advisory Council on Juvenile Justice and  
Delinquency Prevention.

**§ 143B-556. Creation of Council; purpose; members; duties.**

(a) There is created the State Advisory Council on Juvenile Justice and Delinquency Prevention. The State Council shall be located within the Department for organizational, budgetary, and administrative purposes.

(b) The purpose of the State Council is to review and advise the Department in the development of a comprehensive interagency plan to reduce juvenile delinquency and substance abuse and to coordinate efforts among State agencies providing services and supervision to juveniles who are at risk of delinquency and for juveniles who have been adjudicated of delinquent and undisciplined behavior.

(c) The State Council shall consist of 23 members as follows:

- (1) The Governor shall appoint six persons, one of whom is a private citizen who has demonstrated an interest in and commitment to juvenile justice issues; and one of whom is a person under the age of 18 years that is a member of the State Youth Council.
- (2) The Chief Justice of the Supreme Court shall appoint five persons, one of whom is a person under the age of 18 years.
- (3) The following persons, or their designees, shall serve ex officio:
  - a. The Governor.
  - b. The Chief Justice of the Supreme Court.
  - c. The President Pro Tempore of the Senate.
  - d. The Speaker of the House of Representatives.
  - e. The Director of the Administrative Office of the Courts.
  - f. The Superintendent of Public Instruction.
  - g. The Secretary of Administration.
  - h. The Secretary of Health and Human Services.
  - i. The Secretary of Correction.
  - j. The Secretary of Crime Control and Public Safety.
  - k. The President of The University of North Carolina.
  - l. The Attorney General.

(d) Initial members, other than ex officio members, who were appointed under former G.S. 147-33.70 and whose terms began January 1, 1999, shall serve for terms as follows:

- (1) Three members appointed by the Governor shall serve for terms of two years and two members for terms of three years.
- (2) Two members appointed by the Chief Justice of the Supreme Court shall serve for terms of two years and two members for terms of three years.

The initial members who are under the age of 18 years shall serve for terms of one year, beginning on January 1, 2002. Thereafter, members, other than ex officio members, shall serve for two-year terms. There is no prohibition against initial members being reappointed.

(e) The Governor and Chief Justice of the Supreme Court shall serve as cochairs of the State Council.

(f) A vacancy on the State Council resulting from the resignation of a member or otherwise shall be filled in the same manner in which the original appointment was made, and the term shall be for the balance of the unexpired term.

(g) State Council members shall receive no salary as a result of serving on the Council but shall receive per diem, subsistence, and travel expenses in accordance with G.S. 120-3.1, 138-5, and 138-6, as applicable.

(h) Members may be removed in accordance with G.S. 143B-13 as if that section applied to this Article.

(i) The chairs shall convene the Council. Meetings shall be held as often as necessary but not less than four times a year.

(j) A majority of the members of the Council shall constitute a quorum for the transaction of business. The affirmative vote of a majority of the members present at meetings of the Council is necessary for action to be taken by the Council. (1998-202, s. 1(b); 2000-137, s. 1(b); 2001-199, s. 3.)

**Effect of Amendments.** — Session Laws 2001-199, s. 3, effective June 13, 2001, substituted “23 members” for “20 members” in subsection (c); in subdivision (c)(1), substituted “six” for “five” preceding persons, and added “and one of whom is a person under the age of 18 years that is a member of the State Youth

Council” at the end thereof; substituted “five persons, one of whom is a person under the age of 18 years” for “four persons” at the end of subdivision (c)(2); added subdivision (c)(3)L; and added the first sentence of the second paragraph of subsection (d).

## § 143B-557. Powers and duties of the Council.

The State Council shall have the following powers and duties:

- (1) Advise the Department in the review of the State’s juvenile justice planning, the development of the community juvenile justice councils, and the development of a formula for the distribution of funds to Juvenile Crime Prevention Councils.
- (2) Advise all State agencies serving juveniles for the purpose of developing a consistent philosophy with regard to providing services to juveniles and promoting collaboration and the efficient and effective delivery of services to juveniles and families through State, local, and district programs and fully address problems of collaboration across State agencies with the goal of serving juveniles.
- (3) Review and comment on juvenile justice, delinquency prevention, and juvenile services grant applications prepared for submission under any federal grant program by any governmental entity of the State.
- (4) Review the juvenile justice system’s operation and prioritization of funding needs.
- (5) Review the progress and accomplishment of State and local juvenile justice, delinquency prevention, and juvenile services projects.
- (6) Develop recommendations concerning the establishment of priorities and needed improvements with respect to juvenile justice, delinquency prevention, and juvenile services and report its recommendations to the General Assembly on or before March 1 each year.
- (7) Review and comment on the proposed budget for the Department. (1998-202, s. 1(b); 2000-137, s. 1(b).)

## Chapter 144.

### State Flag, Motto and Colors.

Sec.

144-1. State flag.

144-2. State motto.

144-3. Flags to be displayed on public buildings and institutions.

Sec.

144-4. Flags to be displayed at county court-houses.

144-5. Flags to conform to law.

144-6. State colors.

#### § 144-1. State flag.

The flag of North Carolina shall consist of a blue union, containing in the center thereof a white star with the letter "N" in gilt on the left and the letter "C" in gilt on the right of said star, the circle containing the same to be one third the width of said union. The fly of the flag shall consist of two equally proportioned bars, the upper bar to be red, the lower bar to be white; the length of the bars horizontally shall be equal to the perpendicular length of the union, and the total length of the flag shall be one half more than its width. Above the star in the center of the union there shall be a gilt scroll in semicircular form, containing in black letters this inscription: "May 20th 1775" and below the star there shall be a similar scroll containing in black letters the inscription: "April 12th 1776". (1885, c. 291; Rev., s. 5321; C.S., s. 7535; 1991, c. 361, s. 1.)

#### § 144-2. State motto.

The words "esse quam videri" are hereby adopted as the motto of this State, and as such shall be engraved on the great seal of North Carolina and likewise at the foot of the coat of arms of the State as a part thereof. On the coat of arms, in addition to the motto, at the bottom, there shall be inscribed at the top the words, "May 20th, 1775." (1893, c. 145; Rev., s. 5320; C.S., s. 7536.)

#### § 144-3. Flags to be displayed on public buildings and institutions.

The board of trustees or managers of the several State institutions and public buildings shall provide a North Carolina flag, of such dimensions and material as they may deem best, and the same shall be displayed from a staff upon the top of each and every such building, at all times except during inclement weather, and upon the death of any State officer or any prominent citizen the flag shall be put at half-mast until the burial of such person has taken place. (1907, c. 838, s. 2; C.S., s. 7537.)

#### § 144-4. Flags to be displayed at county courthouses.

The boards of county commissioners of the several counties in this State shall likewise authorize the procuring of a North Carolina flag, to be displayed either on a staff upon the top or draped behind the judge's stand, in each and every courthouse in the State, and the State flag shall be displayed at each and every term of court held, and on such other public occasions as the commissioners may deem proper. (1907, c. 838, s. 3; C.S., s. 7538.)

#### § 144-5. Flags to conform to law.

No State flag shall be allowed in or over any building here mentioned unless such flag conforms to the description of the State flag contained in this chapter. (1907, c. 838, s. 4; C.S., s. 7539.)

**§ 144-6. State colors.**

Red and blue, of shades as adopted and appearing in the North Carolina State flag and the American flag, shall be, and hereby are, declared to be the official State colors for the State of North Carolina.

The use of such official State colors on ribbons attached to State documents with the great seal and/or seals of State departments is permissive and discretionary but not directory. (1945, c. 878.)

## Chapter 145.

### State Flower, Bird, Tree, Shell, Mammal, Fish, Insect, Stone, Reptile and Rock, Beverage, Historical Boat, Language, Dog, Military Academy, Tartan, Watermelon Festival and Other Official Adoptions.

Sec.

- 145-1. State flower.
- 145-2. State bird.
- 145-3. State tree.
- 145-4. State shell.
- 145-5. State mammal.
- 145-6. State saltwater fish.
- 145-7. State insect.
- 145-8. State stone.
- 145-9. State reptile.
- 145-10. State rock.

Sec.

- 145-10.1. State beverage.
- 145-11. State historical boat.
- 145-12. State language.
- 145-13. The State dog.
- 145-14. The State Military Academy.
- 145-15. State tartan.
- 145-16. State Watermelon Festivals.
- 145-17. State vegetable.
- 145-18. State fruit and State berries.

#### § 145-1. State flower.

The dogwood is hereby adopted as the official flower of the State of North Carolina. (1941, c. 289.)

**Editor's Note.** — Session Laws 1999-237, s. 27.22, directs the Department of Transportation, in consultation with the United States Forest Service and the Forest Resources Division of the North Carolina Department of Environment and Natural Resources, to develop and implement a plan to plant the State tree and State flower along the State's roads and highways and, to the fullest extent possible, use inmates of the Department of Correction to plant and maintain the trees. The Department is to submit the plan by October 1, 1999, and begin implementation by January 1, 2000.

Session Laws 1999-237, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvement Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.4 contains a severability clause.

#### § 145-2. State bird.

The cardinal is hereby declared to be the official State bird of North Carolina. (1943, c. 595.)

#### § 145-3. State tree.

The pine is hereby adopted as the official State tree of the State of North Carolina. (1963, c. 41.)

**Editor's Note.** — Session Laws 1999-237, s. 27.22, directs the Department of Transportation, in consultation with the United States Forest Service and the Forest Resources Division of the North Carolina Department of Environment and Natural Resources, to develop and implement a plan to plant the State tree and State flower along the State's roads and highways and, to the fullest extent possible, use inmates of the Department of Correction to

plant and maintain the trees. The Department is to submit the plan by October 1, 1999, and begin implementation by January 1, 2000.

Session Laws 1999-237, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvement Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.4 contains a severability clause.

#### **§ 145-4. State shell.**

The Scotch bonnet is hereby adopted as the official State shell of the State of North Carolina. (1965, c. 681.)

#### **§ 145-5. State mammal.**

The gray squirrel (*Sciurus carolinensis*) is hereby adopted as the official State mammal of the State of North Carolina. (1969, c. 1207.)

#### **§ 145-6. State saltwater fish.**

The channel bass (red drum) is hereby adopted as the official State saltwater fish of the State of North Carolina. (1971, c. 274.)

#### **§ 145-7. State insect.**

The honeybee is hereby adopted as the official State insect of the State of North Carolina. (1973, c. 55.)

#### **§ 145-8. State stone.**

The emerald is hereby adopted as the official State precious stone of the State of North Carolina. (1973, c. 136, s. 1.)

#### **§ 145-9. State reptile.**

The turtle is adopted as the official State reptile of the State of North Carolina, and the eastern box turtle is designated as the emblem representing the turtles inhabiting North Carolina. (1979, c. 154, s. 1.)

#### **§ 145-10. State rock.**

Granite is adopted as the official State rock of the State of North Carolina. (1979, c. 906, s. 1.)

#### **§ 145-10.1. State beverage.**

Milk is hereby adopted as the official State beverage of the State of North Carolina. (1987, c. 347, s. 1.)

#### **§ 145-11. State historical boat.**

The Shad Boat is adopted as the official State historical boat of the State of North Carolina. (1987, c. 366, § 1.)

#### **§ 145-12. State language.**

(a) Purpose. — English is the common language of the people of the United States of America and the State of North Carolina. This section is intended to preserve, protect and strengthen the English language, and not to supersede

any of the rights guaranteed to the people by the Constitution of the United States or the Constitution of North Carolina.

(b) English as the Official Language of North Carolina. — English is the official language of the State of North Carolina.

(c) Expired. (1987, c. 480, s. 1; c. 877, s. 1.1.)

**Legal Periodicals.** — For comment, “Language Rights and the Legal Status of English- Only Law in the Public and Private Sector,” see 20 N.C. Cent. L.J. 65 (1992).

### § 145-13. The State dog.

The Plott Hound is adopted as the official dog of the State of North Carolina. (1989, c. 773, s. 1.)

### § 145-14. The State Military Academy.

Oak Ridge Military Academy, in Oak Ridge, North Carolina, as long as it remains a military academy is adopted as the official military academy of the State of North Carolina. (1991, c. 728, s. 1.)

**Editor’s Note.** — Session Laws 1991, c. 728, s. 2 provides: “It is the intent of the General Assembly to give Oak Ridge Military Academy an honorary designation as the official military academy of North Carolina. It is not the intent of the General Assembly to establish a new State agency or educational institution or qualify Oak Ridge Military Academy for State funds and this act confers no liability on the State.”

### § 145-15. State tartan.

The Carolina Tartan is adopted as the official tartan of the State of North Carolina. (1991, c. 85, s. 1.)

### § 145-16. State Watermelon Festivals.

(a) The Hertford County Watermelon Festival is adopted as the official Northeastern North Carolina Watermelon Festival. The Hertford County Watermelon Festival shall be observed annually during the last four days of the first week in August.

(b) The Fair Bluff Watermelon Festival in Columbus County is adopted as the official Southeastern North Carolina Watermelon Festival. The Fair Bluff Watermelon Festival shall be observed annually during mid-July.

(c) Nothing in this act shall be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act.

(d) Nothing in this act shall be construed to obligate Hertford County or Columbus County to expend funds for the purposes of this act. (1993, c. 212, s. 1.)

### § 145-17. State vegetable.

The sweet potato is adopted as the official vegetable of the State of North Carolina. (1995, c. 521, s. 3.)

### § 145-18. State fruit and State berries.

(a) The official fruit of the State of North Carolina is the Scuppernong grape (*Vitis* genus).

(b) The official red berry of the State is the strawberry (*Fragaria* genus).

(c) The official blue berry of the State is the blueberry (*Vaccinium* genus). (2001-488, s. 1.)

**Editor's Note.** — Session Laws 2001-488, s. 2, makes this section effective December 16, 2001.

The preamble to Session Laws 2001-488, provides:

**"PART I. NORTH CAROLINA'S HERITAGE OF FARMING.**

"Whereas, North Carolina's economy originated and developed as an agrarian economy with a cornucopia of fruits and vegetables; and

"Whereas, the State takes great pride in its rich heritage of farming; and

"Whereas, there are still many families who base their livelihood in farming and who are continuing the North Carolina tradition of producing goods from our land; and

"Whereas, one of the main sources of agricultural production in the State is the production of fruits and berries of several varieties; and

**"PART II. THE SCUPPERNONG GRAPE.**

"Whereas, North Carolina is the home of our nation's first cultivated grape, the Scuppernong; and

"Whereas, the Scuppernong grape was named after the Scuppernong River in North Carolina; and

"Whereas, British explorers in 1584 and 1585 reported to Queen Elizabeth and Sir Walter Raleigh that the barrier islands of what is now, in part, Roanoke Island were full of grapes and that the soil of the land was 'so abounding with sweet trees that bring rich and most pleasant gummess, grapes of such greatness, yet wild, as France, Spain, nor Italy hath not greater ...'; and

"Whereas, Sir Walter Raleigh's colony discovered the famous Scuppernong 'Mother Vineyard' on Roanoke Island, a vine that is now over 400 years old and has a trunk over two feet thick; and

"Whereas, the State toast, penned in 1904, references North Carolina as the land '[w]here the scuppernong perfumes the breeze at night,'; and

**"PART III. THE STRAWBERRY AND THE BLUEBERRY.**

"Whereas, there are over 1,700 acres of strawberries and over 3,600 acres of blueberries harvested in North Carolina each year; and

"Whereas, in 2000, strawberry growers in the State produced 23,000,000 pounds of strawberries, yielding \$17,325,000 in revenues; and

"Whereas, in 2000, blueberry growers in the State produced 17,500,000 pounds of blueberries, resulting in an increase in the State's economy of over \$18,000,000 in revenues; and

"Whereas, these delicious berries are a good source of vitamins, a number of life-sustaining minerals, and dietary fiber;

"Whereas, the blueberry is an antioxidant, which has been proven to reduce cholesterol and lower the risk of heart disease; and

"Whereas, each year the Town of Chadbourn in Columbus County hosts the North Carolina Strawberry Festival, which is one of the most celebrated traditions in the State; and

"Whereas, the State of North Carolina does not have an official fruit nor an official berry; Now, therefore,"

## Chapter 146.

### State Lands.

#### SUBCHAPTER I. UNALLOCATED STATE LANDS.

##### Article 1.

###### General Provisions.

Sec.

- 146-1. Intent of Subchapter.
- 146-2. Department of Administration given control of certain State lands; general powers.

##### Article 2.

###### Dispositions.

- 146-3. What lands may be sold.
- 146-4. Sales of certain lands; procedure; deeds; disposition of proceeds.
- 146-5. Reservation to the State.
- 146-6. Title to land raised from navigable water.
  - 146-6.1. [Repealed.]
- 146-7. Sale of timber rights; procedure; instruments conveying rights; disposition of proceeds.
- 146-8. Disposition of mineral deposits in State lands under water.
- 146-9. Disposition of mineral deposits in State lands not under water.
- 146-10. Leases.
- 146-11. Easements, rights-of-way, etc.
- 146-12. Easements in lands covered by water.
- 146-13. Erection of piers on State lakes restricted.
- 146-14. Proceeds of dispositions of certain State lands.
  - 146-14.1. Natural Resources Easement Fund.
- 146-15. Definition of net proceeds.

##### Article 3.

###### Discovery and Reclamation.

- 146-16. Department of Administration to supervise.
- 146-17. Mapping and discovery agreements.
  - 146-17.1. Rewards; reclamation of certain State lands; wrongful removal of timber from State lands.

##### Article 4.

###### Miscellaneous Provisions.

- 146-18. Recreational use of State lakes regulated.
- 146-19. Fishing license fees for nonresidents of counties in which State lakes are situated.

Sec.

- 146-20. Forfeiture for failure to register deeds.
- 146-20.1. Conveyance of certain marshlands validated; public trust rights reserved.

#### SUBCHAPTER II. ALLOCATED STATE LANDS.

##### Article 5.

###### General Provisions.

- 146-21. Intent of Subchapter.

##### Article 6.

###### Acquisitions.

- 146-22. All acquisitions to be made by Department of Administration.
  - 146-22.1. Acquisition of property.
  - 146-22.2. Appraisal of property to be acquired by State.
- 146-23. Agency must file statement of needs; Department must investigate.
  - 146-23.1. Buildings having historic, architectural or cultural significance.
- 146-24. Procedure for purchase or condemnation.
  - 146-24.1. The power of eminent domain.
- 146-25. Leases and rentals.
  - 146-25.1. Proposals to be secured for leases.
- 146-26. Donations and devises to State.
  - 146-26.1. Relocation assistance.

##### Article 7.

###### Dispositions.

- 146-27. The role of the Department of Administration in sales, leases, and rentals.
- 146-28. Agency must file application with Department; Department must investigate.
- 146-29. Procedure for sale, lease, or rental.
  - 146-29.1. Lease or sale of real property for less than fair market value.
  - 146-29.2. Lease provisions for communications towers.
- 146-30. Application of net proceeds.

##### Article 8.

###### Miscellaneous Provisions.

- 146-31. Right of appeal to Governor and Council of State.
- 146-32. Exemptions as to leases, etc.

- Sec.  
 146-33. State agencies to locate and mark boundaries of lands.  
 146-34. Agencies may establish agreed boundaries.  
 146-35. Severance approval delegation.  
 146-36. Acquisitions for and conveyances to federal government.

SUBCHAPTER III. ENTRIES AND GRANTS.

**Article 9.**

**General Provisions.**

- 146-37. Intent of Subchapter.  
 146-38. Pending entries.  
 146-39. Void grants; not color of title.

**Article 10.**

**Surveys.**

- 146-40. Record of surveys to be kept.  
 146-41. Former surveys recorded.  
 146-42. What record must show; received as evidence.

**Article 11.**

**Grants.**

- 146-43. Cutting timber on land before obtaining a grant.  
 146-44. Card index system for grants.  
 146-45. Grant of Moore's Creek Battlefield authorized.

**Article 12.**

**Correction of Grants.**

- 146-46. When grants may issue.  
 146-47. Change of county line before grant issued or registered.  
 146-48. Entries in wrong county.  
 146-49. Errors in surveys of plots corrected.  
 146-50. Resurvey of lands to correct grants.  
 146-51. Lost seal replaced.  
 146-52. Errors in grants corrected.  
 146-53. Irregular entries validated.  
 146-54. Grant signed by deputy Secretary of State validated.  
 146-55. Registration of grants.  
 146-56. Time for registering grants extended.  
 146-57. Time for registering grants and other instruments extended.  
 146-58. Time for registering grants further extended.  
 146-59. Time for registering grants or copies extended.  
 146-60. Further extension of time for registering grants or copies for two years from January 1, 1947.

- Sec.  
 146-60.1. Further extension of time for registering grants or copies for four years from January 1, 1977.

**Article 13.**

**Grants Vacated.**

- 146-61. Civil action to vacate grant.  
 146-62. Judgment recorded in Secretary of State's office.  
 146-63. Action by State to vacate grants.

SUBCHAPTER IV. MISCELLANEOUS.

**Article 14.**

**General Provisions.**

- 146-64. Definitions.  
 146-65. Exemptions from Chapter.  
 146-66. Voidability of transactions contrary to Chapter.  
 146-67. Governor to employ persons.  
 146-68. Statutes of limitation.  
 146-69. Service on State in land actions.  
 146-70. Institution of land actions by the State.

**Article 15.**

**State Land Fund.**

- 146-71. State Land Fund created.  
 146-72. Purpose.  
 146-73. Administration.

**Article 16.**

**Form of Conveyances.**

- 146-74. Approval of conveyances.  
 146-75. Execution; signature; attestation; seal.  
 146-76. Exclusive method of conveying State lands.  
 146-77. Admission to registration in counties.  
 146-78. Validation of conveyances of state-owned lands.

**Article 17.**

**Title in State.**

- 146-79. Title presumed in the State; tax titles.  
 146-80. Statute of limitations.  
 146-81. Title to lands sold for taxes.  
 146-82. Protection of interest in lands sold for taxes.

**Article 18.**

**Miscellaneous.**

- 146-83. Vested rights protected.

## SUBCHAPTER I. UNALLOCATED STATE LANDS.

## ARTICLE 1.

*General Provisions.***§ 146-1. Intent of Subchapter.**

(a) It is the purpose and intent of this Subchapter to vest in the Department of Administration, subject to rules and regulations adopted by the Governor and approved by the Council of State as hereinafter provided, responsibility for the management, control and disposition of all vacant and unappropriated lands, swamplands, lands acquired by the State by virtue of being sold for taxes, and submerged lands, title to which is vested in the State or in any State agency, to be exercised subject to the provisions of this Subchapter.

(b) Further, it is the intent of this Subchapter to establish within the Department, a method for obtaining easements for State-owned lands covered by navigable waters that includes compensation, recognizes the common law rights of riparian or littoral property owners, and balances those rights with the State's obligation to protect public trust rights for all of its citizens. The North Carolina General Assembly finds that the State is unable to provide the necessary access for its citizens to exercise public trust rights and, therefore, recognizes the role that publicly and privately owned piers, docks, wharves, marinas, and other structures located in or over State-owned lands covered by navigable waters generally serve in furthering public trust purposes including:

- (1) Providing citizens with access and ability to exercise public trust boating, fishing, and swimming activities;
- (2) Enhancing the value of appurtenant upland property values with the resulting increased collection of ad valorem taxes;
- (3) Enhancing tourism which is essential to the economy of the State and, in particular, to the coastal counties; and
- (4) Increasing local participation in boating and fishing activities with the resulting increase in taxes paid for fuel, fishing tackle, boat equipment, and imported boats and motors which taxes contribute to the sound economy of the State, and some of which are paid into the federal Wallop-Breaux Fund for redistribution to the State for water resource enhancements and water access improvements.

(c) Nothing in this Subchapter shall apply to a privately owned lake or any hydroelectric reservoir licensed by the Federal Energy Regulatory Commission.

(d) Nothing in this Subchapter shall be construed to limit or expand the full exercise of common law riparian or littoral rights. (1959, c. 683, s. 1; 1995, c. 529, s. 1.)

**Editor's Note.** — Session Laws 1995, c. 529, s. 5, provides in part that nothing in the act shall require the adoption of rules to implement the provisions therein, and further provides that authorization established under the act applies only to the Department of Administration and shall not be used by any other agency to administer or regulate activities affecting the public trust.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 33.12, provides: "The Department of Juvenile Justice and Delinquency Prevention shall harvest and sell a portion of the timber on the real property at Samarkand Youth Academy. Notwithstanding Chapter 146 of the General Statutes, G.S. 66-58, and any other provision of law, the net proceeds derived from the sale of the timber in an amount not to exceed two hundred fifty thousand dollars (\$250,000) shall be deposited with the State Treasurer in a capital improvement and repair and renovation account to the credit of the Department of Juvenile Justice

and Delinquency Prevention. The Department shall use the funds for major repair to the streets and parking lots at the Samarkand Youth Academy and for additional street lighting and repairs of buildings at the Academy.

"The remainder of the net proceeds from the sale of the timber at Samarkand Youth Academy, if any, shall revert to the General Fund."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium,

the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Legal Periodicals.** — For article, "Estuarine Land of North Carolina: Legal Aspect of Ownership, Use and Control," see 46 N.C.L. Rev. 779 (1968).

For article, "Public Rights and Coastal Zone Management," see 51 N.C.L. Rev. 1 (1972).

#### CASE NOTES

**Stated** in *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985).

**Cited** in *Roberson v. Dale*, 464 F. Supp. 680

(M.D.N.C. 1979); *Gwathmey v. State ex rel. Dep't of Env't, Health & Natural Resources*, 342 N.C. 287, 464 S.E.2d 674 (1995).

### § 146-2. Department of Administration given control of certain State lands; general powers.

The power to manage, control, and dispose of the vacant and unappropriated lands, swamplands, lands acquired by the State by virtue of being sold for taxes, and submerged lands is hereby vested in the Department of Administration, subject to rules and regulations adopted by the Governor and approved by the Council of State, and subject to the provisions of this Subchapter. The Department of Administration shall have the following general powers and duties with respect to those lands:

- (1) To take such measures as it deems necessary to establish, protect, preserve, and enhance the interest of the State in those lands, and to call upon the Attorney General for legal assistance in performing this duty.
- (2) Subject to the approval of the Governor and Council of State, to adopt such rules and regulations at it may deem necessary to carry out its duties under the provisions of this Subchapter. (1959, c. 683, s. 1.)

**Legal Periodicals.** — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims

to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

#### ARTICLE 2.

#### *Dispositions.*

### § 146-3. What lands may be sold.

Any State lands may be disposed of by the State in the manner prescribed in this Chapter, with the following exceptions:

- (1) No submerged lands may be conveyed in fee, but easements therein may be granted, as provided in this Subchapter.
- (2) No natural lake belonging to the State or to any State agency on January 1, 1959, and having an area of 50 acres or more, may be in any manner disposed of, but all such lakes shall be retained by the State for the use and benefit of all the people of the State and administered as provided for other recreational areas owned by the State. (1854-5, c. 21; R.C., c. 42, s. 1; Code, s. 2751; Rev., s. 1693; 1911,

c. 8; C.S., ss. 7540, 7544; 1929, c. 165; G.S., ss. 146-1, 146-7, 146-12; 1959, c. 683, s. 1.)

**Legal Periodicals.** — For note on defining navigable waters and the application of the public trust doctrine in North Carolina, see 49 N.C.L. Rev. 888 (1971).

For article, "Public Rights and Coastal Zone

Management," see 51 N.C.L. Rev. 1 (1972).

For comment, "Sunbathers Versus Property Owners: Public Access to North Carolina Beaches," see 64 N.C.L. Rev. 159 (1985).

#### CASE NOTES

**Littoral rights do not include ownership of the foreshore.** The littoral owner may, however, in exercise of his right of access, construct a pier in order to provide passage from the upland to the sea. But the passage under the pier must be free and substantially unobstructed over the entire width of the foreshore. This means that from low to high water mark it must be at such a height that the public will have no difficulty in walking under it when the tide is low or in going under it in boats when the tide is high. *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985).

**Ownership of Foreshore Remains in State.** — There is nothing in this section or § 146-64 to change the general rule that ownership of the foreshore remains in the State. On the contrary, it is noteworthy that a special class was created for the protection of the foreshore and the marginal seas. Therefore, littoral rights do not include ownership of the foreshore. *Carolina Beach Fishing Pier, Inc. v.*

*Town of Carolina Beach*, 277 N.C. 297, 177 S.E.2d 513 (1970). See also *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985).

**The foreshore is reserved for the use of the public.** *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985).

**Controlling Effect of Local Act over Inconsistent Provision of Subdivision (1).** — Session Laws 1963, c. 511, which granted the town of Carolina Beach title in reclaimed seashore lands down to the low watermark, controls over an inconsistent provision in subdivision (1) of this section which provides that State land under navigable waters cannot be conveyed in fee. *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 177 S.E.2d 513 (1970).

**Applied** in *State v. Forehand*, 67 N.C. App. 148, 312 S.E.2d 247 (1984).

**Stated** in *Capune v. Robbins*, 273 N.C. 581, 160 S.E.2d 881 (1968).

### § 146-4. Sales of certain lands; procedure; deeds; disposition of proceeds.

The Department of Administration may sell the vacant and unappropriated lands, swamplands, and lands acquired by the State by virtue of being sold for taxes, at public or private sale, at such times, upon such consideration, in such portions, and upon such terms as are deemed proper by the Department and approved by the Governor and Council of State. Every deed conveying any part of those lands in fee shall be executed in the manner required by G.S. 146-74 through 146-78, and shall be approved by the Governor and Council of State as therein required. The net proceeds of all such sales of those lands shall be paid into the State Literary Fund. Whenever negotiations are begun by the Department for the purpose of selling swampland or the timber thereon, the Department shall promptly notify the State Board of Education of that fact. If the Board deems the proposed sale inadvisable, it may so inform the Governor and Council of State, who may give due consideration to the representations of the Board in determining whether to approve or disapprove the proposed transaction. (R.C., c. 66, s. 12; 1872-3, c. 194, s. 2; Code, ss. 2514, 2515, 2529; 1889, c. 243, s. 4; Rev., s. 4049; C.S., s. 7621; G.S., s. 146-94; 1959, c. 683, s. 1.)

**Legal Periodicals.** — For article, "Public Rights and Coastal Zone Management," see 51 N.C.L. Rev. 1 (1972).

### § 146-5. Reservation to the State.

In any sale of the vacant and unappropriated lands or swamplands by the State, the following powers may be expressly reserved to the State, to be exercised according to law:

- (1) The State may make any reasonable and expedient regulations respecting the repair of the canals which have been cut by the State, or the enlargement of such canals.
- (2) The State may impose taxes on the lands benefited by those canals for their repair, and they shall not be closed.
- (3) The navigation of the canals shall be free to all persons, subject to a right in the State to impose tolls.
- (4) All landowners on the canals may drain into them, subject only to such general regulations as now are or hereafter may be made by law in such cases.
- (5) The roads along the banks of the canals shall be public roads. (1872-3, c. 118; Code, s. 2534; Rev., s. 4050; C.S., s. 7622; G.S., s. 146-95; 1959, c. 683, s. 1.)

### § 146-6. Title to land raised from navigable water.

(a) If any land is, by any process of nature or as a result of the erection of any pier, jetty or breakwater, raised above the high watermark of any navigable water, title thereto shall vest in the owner of that land which, immediately prior to the raising of the land in question, directly adjoined the navigable water. The tract, title to which is thus vested in a riparian owner, shall include only the front of his formerly riparian tract and shall be confined within extensions of his property lines, which extensions shall be perpendicular to the channel, or main watercourses.

(b) If any land is, by act of man, raised above the high watermark of any navigable water by filling, except such filling be to reclaim lands theretofore lost to the owner by natural causes or as otherwise provided under the proviso of subsection (d), title thereto shall vest in the State and the land so raised shall become a part of the vacant and unappropriated lands of the State, unless the commission of the act which caused the raising of the land in question shall have been previously approved in the manner provided in subsection (c) of this section. Title to land so raised, however, does not vest in the State if the land was raised within the bounds of a conveyance made by the State Board of Education, which included regularly flooded estuarine marshlands or lands beneath navigable waters, or if the land was raised under permits issued to private individuals pursuant to G.S. 113-229, G.S. 113A-100 through 113A-128, or both.

(c) If any owner of land adjoining any navigable water desires to fill in the area immediately in front of his land, he may apply to the Department of Administration for an easement to make such fill. The applicant shall deliver to each owner of riparian property adjoining that of the applicant, a copy of the application filed with the Department of Administration, and each such person shall have 30 days from the date of such service to file with the Department of Administration written objections to the granting of the proposed easement. If the Department of Administration finds that the purpose of the proposed fill is to reclaim lands theretofore lost to the owner by natural causes, no easement to fill shall be required. In such a case the Department shall give the applicant written permission to proceed with the project. If the purpose of the proposed fill is not to reclaim lands lost by natural causes and the Department finds that the proposed fill will not impede navigation or otherwise interfere with the use of the navigable water by the public or injure any adjoining riparian owner, it

shall issue to such applicant an easement to fill and shall fix the consideration to be paid for the easement, subject to the approval of the Governor and Council of State in each instance. The granting by the State of the written permission or easement so to fill shall be deemed conclusive evidence and proof that the applicant has complied with all requisite conditions precedent to the issuance of such written permission or easement, and his right shall not thereafter be subject to challenge by reason of any alleged omission on his part. None of the provisions of this section shall relieve any riparian owner of the requirements imposed by the applicable laws and regulations of the United States. Upon completion of such filling, the Governor and Council of State may, upon request, direct the execution of a quitclaim deed therefor to the owner to whom the easement was granted, conveying the land so raised, upon such terms as are deemed proper by the Department and approved by the Governor and Council of State.

(d) If an island is, by any process of nature or by act of man, formed in any navigable water, title to such island shall vest in the State and the island shall become a part of the vacant and unappropriated lands of the State. Provided, however, that if in any process of dredging, by either the State or federal government, for the purpose of deepening any harbor or inland waterway, or clearing out or creating the same, a deposit of the excavated material is made upon the lands of any owner, and title to which at the time is not vested in either the State or federal government, or any other person, whether such excavation be deposited with or without the approval of the owner or owners of such lands, all such additions to lands shall accrue to the use and benefit of the owner or owners of the land or lands on which such deposit shall have been made, and such owner or owners shall be deemed vested in fee simple with the title to the same.

(e) The Governor and Council of State may, upon proof satisfactory to them that any land has been raised above the high watermark of any navigable water by any process of nature or by the erection of any pier, jetty or breakwater, and that this, or any other provision of this section vests title in the riparian owner thereof, whenever it may be necessary to do so in order to establish clear title to such land in the riparian owner, direct execution of a quitclaim deed thereto, conveying to such owner all of the State's right, title, and interest in such raised land.

(f) Notwithstanding the other provisions of this section, the title to land in or immediately along the Atlantic Ocean raised above the mean high water mark by publicly financed projects which involve hydraulic dredging or other deposition of spoil materials or sand vests in the State. Title to such lands raised through projects that received no public funding vests in the adjacent littoral proprietor. All such raised lands shall remain open to the free use and enjoyment of the people of the State, consistent with the public trust rights in ocean beaches, which rights are part of the common heritage of the people of this State. (1959, c. 683, s. 1; 1979, c. 414; 1985, c. 276.)

**Legal Periodicals.** — For article, "Public Rights and Coastal Zone Management," see 51 N.C.L. Rev. 1 (1972).

For comment, "Sunbathers Versus Property Owners: Public Access to North Carolina Beaches," see 64 N.C.L. Rev. 159 (1985).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes,

Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For article, "The Pearl in the Oyster: The Public Trust Doctrine in North Carolina," see 12 Campbell L. Rev. 23 (1989).

For article, "Coastal Management Law in North Carolina: 1974-1994," see 72 N.C.L. Rev. 1413 (1994).

## CASE NOTES

**“Any Other Provision of This Section” Construed.** — Although the language of subsection (e) is rather awkward, the reference in subsection (e) to “any other provision of this section” encompasses subsection (d) as well as subsection (a). *Lackey v. Tripp*, 63 N.C. App. 765, 306 S.E.2d 464, cert. denied, 309 N.C. 821, 310 S.E.2d 350 (1983).

**Extension of Property Lines Under Subsection (e).** — Since subsection (e) is silent on

how property lines are to be extended, the lines may be drawn as the Governor and Council of State in their discretion deem proper in a case controlled by subsection (e) and not by subsection (a). *Lackey v. Tripp*, 63 N.C. App. 765, 306 S.E.2d 464, cert. denied, 309 N.C. 821, 310 S.E.2d 350 (1983).

**Applied** in *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 177 S.E.2d 513 (1970).

## OPINIONS OF ATTORNEY GENERAL

**Title to Raised Land Vested in State.** — Although good title to beach property was conveyed to a town through a special legislative grant in 1939, recent publicly funded projects, which raised land above the mean high water mark by hydraulic dredging or deposition of

spoil or sand, would have vested title in the State by operation of law pursuant to this section. See opinion of Attorney General to P.A. Wojciechowski, Division of Marine Fisheries, 1998 N.C.A.G. 18 (4/6/98).

§ 146-6.1: Repealed by Session Laws 1977, c. 366.

### § 146-7. Sale of timber rights; procedure; instruments conveying rights; disposition of proceeds.

The Department of Administration may sell timber rights in the vacant and unappropriated lands, swamplands, and lands acquired by the State by virtue of being sold for taxes, at public or private sale, at such times, upon such consideration, in such portions, and upon such terms as are deemed proper by the Department and approved by the Governor and Council of State. Every instrument conveying timber rights shall be executed in the manner required of deeds by G.S. 146-74 through 146-78, and shall be approved by the Governor and Council of State as therein required, or by the agency designated by the Governor and Council of State to approve conveyances of such rights. The net proceeds of all sales of timber from those lands shall be paid into the State Literary Fund. (1959, c. 683, s. 1.)

### § 146-8. Disposition of mineral deposits in State lands under water.

The State, acting at the request of the Department of Environment and Natural Resources, is fully authorized and empowered to sell, lease, or otherwise dispose of any and all mineral deposits belonging to the State which may be found in the bottoms of any sounds, rivers, creeks, or other waters of the State. The State, acting at the request of the Department of Environment and Natural Resources, is authorized and empowered to convey or lease to such person or persons as it may, in its discretion, determine, the right to take, dig, and remove from such bottoms such mineral deposits found therein belonging to the State as may be sold, leased, or otherwise disposed of to them by the State. The State, acting at the request of the Department of Environment and Natural Resources, is authorized to grant to any person, firm, or corporation, within designated boundaries for definite periods of time, the right to such mineral deposits, or to sell, lease, or otherwise dispose of same upon such other terms and conditions as may be deemed wise and expedient by

the State and to the best interest of the State. Before any such sale, lease, or contract is made, it shall be approved by the Department of Administration and by the Governor and Council of State.

Any sale, lease, or other disposition of such mineral deposits shall be made subject to all rights of navigation and subject to such other terms and conditions as may be imposed by the State.

The net proceeds derived from the sale, lease, or other disposition of such mineral deposits shall be paid into the treasury of the State, but the same shall be used exclusively by the Department of Environment and Natural Resources in paying the costs of administration of this section and for the development and conservation of the natural resources of the State, including any advertising program which may be adopted for such purpose, all of which shall be subject to the approval of the Governor, acting by and with the advice of the Council of State. (1937, c. 285; C.S., s. 113-26; 1959, c. 683, s. 1; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 218; 1997-443, s. 11A.119(a).)

### **§ 146-9. Disposition of mineral deposits in State lands not under water.**

The Department of Administration may sell, lease, or otherwise dispose of mineral rights or deposits in the vacant and unappropriated lands, swamplands, and lands acquired by the State by virtue of being sold for taxes, not lying beneath the waters of the State, at such times, upon such consideration, in such portions, and upon such terms as are deemed proper by the Department and approved by the Governor and Council of State. Every instrument conveying such rights shall be executed in the manner required of deeds by G.S. 146-74 through 146-78, and shall be approved by the Governor and Council of State as therein provided, or by the agency designated by the Governor and Council of State to approve conveyances of such rights. The net proceeds of dispositions of all such mineral rights or deposits shall be paid into the State Literary Fund. (1959, c. 683, s. 1.)

### **§ 146-10. Leases.**

The Department of Administration may lease or rent the vacant and unappropriated lands, swamplands, and lands acquired by the State by virtue of being sold for taxes, at such times, upon such consideration, in such portions, and upon such terms as it may deem proper. Every lease or rental of such lands by the Department shall be approved by the Governor and Council of State, or by the agency designated by the Governor and Council of State to approve such leases and rentals. (1959, c. 683, s. 1.)

### **§ 146-11. Easements, rights-of-way, etc.**

The Department of Administration may grant easements, rights-of-way, dumping rights and other interests in State lands, for the purpose of

- (1) Cooperating with the federal government,
- (2) Utilizing the natural resources of the State, or
- (3) Otherwise serving the public interest.

The Department shall fix the terms and consideration upon which such rights may be granted. Every instrument conveying such interests shall be executed in the manner required of deeds by G.S. 146-74 through 146-78, and shall be approved by the Governor and Council of State as therein provided, or by the agency designated by the Governor and Council of State to approve conveyances of such interests. (1959, c. 683, s. 1.)

## § 146-12. Easements in lands covered by water.

(a) The Department of Administration may grant, to adjoining riparian or littoral owners, easements in lands covered by navigable waters or by the waters of any lake owned by the State for such purposes and upon such conditions as it may deem proper, with the approval of the Governor and Council of State. The Department may, with the approval of the Governor and Council of State, revoke any such easement upon the violation by the grantee or his assigns of the conditions upon which it was granted.

Every such easement shall include only the front of the tract owned by the riparian or littoral owner to whom the easement is granted, shall extend no further than the deep water, and shall in no respect obstruct or impair navigation.

When any such easement is granted in front of the lands of any incorporated town, the governing body of the town shall regulate the line on deep water to which wharves may be built.

(b) Easements Not Requiring Approval by the Governor or Council of State. — In accordance with the provisions in subsections (c) through (m) of this section, the Department of Administration shall grant easements to adjoining riparian or littoral owners in State-owned lands covered by navigable waters without the approval of the Governor and the Council of State for:

- (1) Existing structures permitted under Article 7 of Chapter 113A or structures existing prior to the effective date of the permitting requirements of Article 7 of Chapter 113A of the General Statutes.
- (2) New structures permitted under Article 7 of Chapter 113A of the General Statutes after the effective date of this section.

(c) Voluntary Easement Applications for Existing Structures. — Riparian or littoral property owners of existing structures may voluntarily obtain an easement under subsection (b) of this section in accordance with the procedures set forth in this section. For purposes of this section, the term “existing structures” means all presently existing piers, docks, marinas, wharves, and other structures located over or upon State-owned lands covered by navigable waters. Applications for voluntary easements shall be received by the State Property Office no later than October 1, 2001.

(d) Notification of Availability of Voluntary Easements. — The State Property Office shall provide public notice of the availability of voluntary easements by placing an advertisement in one newspaper of general circulation in each of the coastal counties identified under G.S. 113A-103(2) at least once every six months. The final notice shall be placed no later than September 1, 2001.

(e) Mandatory Easement Applications for New Structures. — Riparian or littoral property owners of new structures shall obtain an easement under subsection (b) of this section in accordance with the procedures set forth in this section.

(f) Easement Application. — An application by a riparian or littoral owner of a new or existing structure for an easement under subsection (b) of this section shall include all of the following and shall:

- (1) Be made in writing to the State Property Office and include the full name and address of the easement applicant.
- (2) Include a plat depicting the footprint and total square footage of all structures located in or over State-owned lands covered by navigable waters. The footprint shall include the total square footage of the area of State-owned lands covered by navigable waters that are enclosed on three or more sides by any structure.
- (3) Include a copy of any “CAMA” permit required for structures under Article 7 of Chapter 113A of the General Statutes.
- (4) Include a copy of the deed or other instrument through which the applicant establishes ownership of the adjacent riparian or littoral property.

(5) Specify the use or uses associated with the structure to be covered by the easement.

(6) Include the appropriate easement purchase payment.

(g) Easement Terms. — Any easement granted under subsection (b) of this section shall be in a form suitable for recordation and shall be executed by either the Director or Deputy Director of the State Property Office. The State-owned lands covered by navigable waters included within the easement shall be limited to the footprint of the structure. The terms of each easement shall provide that the easement:

(1) Is appurtenant to specifically described, adjacent riparian or littoral property and runs with the land.

(2) Specifies that the holder of the easement shall not exclude or prevent the public from exercising public trust rights, including commercial and recreational fishing, shellfishing, seine netting, pound netting, and other fishing rights.

(3) Specifies that the holder of the easement obtains no additional rights to interfere with the approval, issuance, or renewal of shellfish or water column leases or to interfere with the use or cultivation of existing shellfish leases, water column leases, or shellfish franchises.

(4) Specifies that any rights conveyed to the holder of the easement are not inconsistent with the rights conferred by previous conveyances made by the State for the same property.

(5) Is valid for a term of 50 years from the date of issuance.

(6) Is eligible for one renewal term of 50 years.

(7) Is granted in the public interest for good and valuable consideration received by the State.

(8) Specifies by metes and bounds description or attached plat the footprint of the structure for which the easement is issued.

(9) Describes the uses of the structure for which the easement is being granted, which may include:

a. Providing reasonable access for all vessels traditionally used in the main watercourse area to deep water or, where present, to a specified navigational channel;

b. Mooring vessels at or adjacent to the structure;

c. Enhancing or improving the value of the adjacent riparian or littoral property; and

d. All other reasonable, nonexclusive public trust uses as specified in the easement application, to the extent not otherwise limited by provisions of this Subchapter or any other law.

(10) Specifies that rights granted include the right to repair, rebuild, or restore existing structures consistent with Article 7 of Chapter 113A of the General Statutes.

(11) Specifies that the exercise of any rights under the easement shall be contingent upon obtaining all required permits.

(h) Easement Purchase Payment. — The easement purchase payment for easements issued under subsection (b) of this section shall be computed on the basis of one thousand dollars (\$1,000) per acre of footprint coverage prorated in increments of two hundred fifty dollars (\$250.00) rounded up to the nearest quarter acre. The minimum payment shall be five hundred dollars (\$500.00) if any payment is owed after the riparian credit is applied. In recognition of common law riparian and littoral rights and a declared public policy concern that easements provided under this section be available to all citizens, a credit shall be given against any easement purchase payment in an amount equal to the number of linear feet of shoreline multiplied by a factor of 54 feet. No linear feet of shoreline may be used in computing the credit if that area of shoreline has been the basis of a previous credit. For purposes of determining the linear

feet of shoreline owned, an application submitted by a corporation or other entity whose members include riparian or littoral lot owners, which owners have the right to use the structure for which the easement is sought, and whose lots are restricted from construction thereon of other structures for similar use, shall be considered an application whose easement purchase payment shall be determined by using the entirety of such use restricted shoreline for purposes of determining the applicable riparian credit. Shoreline utilization shall be considered "use restricted" if riparian or littoral structures are prohibited by either permit condition or by restrictive covenant or similar, enforceable private restriction.

(i) Easement Issuance. — Within 75 days of receipt of a completed application under subsection (f) of this section, the Director or Deputy Director of the State Property Office shall issue the requested easement in a form sufficient for recording in the register of deeds of the county or counties in which any part of the structure is located. The act of easement issuance under subsection (b) of this section shall be exempt from the provisions in Chapter 150B of the General Statutes. Failure to issue the requested easement within 75 days of receipt of a completed application and any applicable easement purchase payments shall be treated as issuance of the requested easement and shall entitle the applicant to execution and issuance of the easement.

(j) Easement Renewal. — Upon written request from the current easement holder, easements shall be renewed for one additional term of 50 years. Renewal easements shall be subject to the terms, conditions, and purchase payments applicable to initial easements at the time of renewal. Written notification of expiring easements shall be provided by the State Property Office at least 180 days prior to expiration of the initial easement term. Letter applications for renewal easements shall be submitted within 180 days of the notice of expiration by the State Property Office.

(k) Easement Modification. — Any expansion of the footprint of an existing structure shall require an easement or modification of any existing easement. The application for a modification of an easement shall be as provided in subsection (f) of this section. The easement purchase payment shall be based only on the footprint of the expansion after applying the riparian credit. The minimum easement purchase payment shall be five hundred dollars (\$500.00) if any payment is owed after the riparian credit is applied. Easement holders may voluntarily apply for modification of an easement to correct any material errors or omissions. No easement purchase payment shall be required for the modification of an existing use that does not expand the footprint of the existing structure. No refunds shall be provided for any modification that reduces the footprint.

(l) Easement Transfers. — An easement granted under subsection (b) of this section shall be transferred to a subsequent owner of the adjacent riparian or littoral property upon written notification to the State Property Office. The notification shall be given within 12 months of the transfer of title to the adjacent riparian or littoral property and shall be accompanied by the instrument of transfer and an easement purchase payment as follows:

- (1) During the first 25 years of the easement term, the easement purchase payment shall be the same as the initial payment; and
- (2) During the second 25 years of the easement term, the easement purchase payment shall be twice the amount of the initial payment.

(m) Easement Revocation. — Easements issued under subsection (b) of this section may be revoked in accordance with the provisions of G.S. 146-12(a). Any revocation shall entitle the easement holder to seek administrative review in accordance with the provisions of Article 3 of Chapter 150B of the General Statutes.

(n) Exemptions. — The following types of structures shall not require an easement under this section:

- (1) Piers, docks, or similar structures for the exclusive use of the owner or occupant of the adjacent riparian or littoral property, which generate no revenue directly related to the structure and which accommodate no more than ten vessels;
- (2) Structures constructed by any public utility that provide or assist in the provision of utility service;
- (3) Structures constructed or owned by the State of North Carolina, or any political subdivision, agency, or department of the State, for the duration that the structures are owned by the entity; or
- (4) Structures on submerged lands or lands covered by navigable waters not owned by or for the benefit of the public that have been created by dredging or excavating lands. (1854-5, c. 21; R.C., c. 42, s. 1; Code, s. 2751; 1889, c. 555; 1891, c. 532; 1893, cc. 4, 17, 349; 1901, c. 364; Rev., s. 1696; C.S., s. 7543; G.S., s. 146-6; 1959, c. 683, s. 1; 1995, c. 529, s. 2; 1998-217, s. 35(a), (b).)

**Local Modification.** — Craven: 1973, c. 1129.

**Cross References.** — For note relating to the State-Owned Submerged Lands Advisory Committee, see editor's notes to § 146-1.

**Editor's Note.** — Session Laws 1995, c. 529, s. 5, provides in part that nothing in this act shall require the adoption of rules to implement the provisions therein, and further provides that authorization established under this act applies only to the Department of Administration and shall not be used by any other agency to administer or regulate activities affecting the public trust.

Session Laws 1998-217, s. 35(c), provides: "This section is effective retroactively to August 31, 1998, and applies to applications for

voluntary easements received by the State Property Office on or after that date."

**Effect of Amendments.** — The 1998 amendment, effective August 31, 1998, substituted "no later than October 1, 2001" for "within 36 months of the effective date of this section" at the end of subsection (c); and in subsection (d), in the first sentence, deleted "during the 36-month period" following "months", and in the second sentence substituted "no later than September 1, 2001" for "at least 30 days prior to the expiration of the 36-month period".

**Legal Periodicals.** — For article, "Public Rights and Coastal Zone Management," see 51 N.C.L. Rev. 1 (1972).

## CASE NOTES

**Editor's Note.** — *Most of the cases below were decided under corresponding sections of this Chapter as it stood before its revision in 1959, or under earlier statutes from which they were derived.*

**Riparian Rights Go with Land.** — Riparian rights, being incident to land abutting on navigable water, cannot be conveyed without a conveyance of such land, and lands covered by navigable water are subject to entry only by the owner of the land abutting thereon. *Zimmerman v. Robinson*, 114 N.C. 39, 19 S.E. 102 (1874); *Land Co. v. Hotel*, 134 N.C. 397, 46 S.E. 748 (1904).

An adjacent riparian owner acquires only an easement in the bed of navigable waters in front of his shore lots for the purpose of building a wharf. *Atlantic & N.C.R.R. v. Way*, 172 N.C. 774, 90 S.E. 937 (1916).

**Easement Required.** — The Department of Administration was required to grant an easement for the construction of a commercial marina by a private developer over public trust waters pursuant to this section (1991) and N.C.

Admin. Code tit. 1, r. 6B.0605 (June 1987). *Walker v. North Carolina Dep't of Env't, Health & Natural Resources*, 111 N.C. App. 851, 433 S.E.2d 767 (1993), cert. denied, 335 N.C. 243, 439 S.E.2d 164 (1993).

**Easement Not Required.** — This section does not require an easement prior to the issuance of a Coastal Area Management Act permit, when a riparian owner constructs piers and docks to gain excess to navigable waters. *Rusher v. Tomlinson*, 119 N.C. App. 458, 459 S.E.2d 285 (1995), aff'd, 343 N.C. 119, 468 S.E.2d 57 (1996).

**Navigable waters may be entered to the deep water line for wharfage purposes.** *Barfoot v. Willis*, 178 N.C. 200, 100 S.E. 303 (1919).

**But this right of entry is restricted to a riparian owner,** and applies only to his immediate water front. *Bond v. Wool*, 107 N.C. 139, 12 S.E. 281 (1890).

**Right to build a wharf in front of riparian property does not give riparian owner exclusive fishing privileges** in the navigable

part of the stream on which his property fronts; but the riparian owner will be protected from wrongful interference. *Beil v. Smith*, 171 N.C. 116, 87 S.E. 987 (1916).

**Correction of Error in Survey of Deep Water Line.** — In case the line marked out is not the deep water line, a riparian owner has a right to have the error corrected, and he will not be estopped because of a grant had under the erroneous survey. *Wool v. Town of Edenton*, 117 N.C. 1, 23 S.E. 40 (1895).

**For case holding that a city whose limits extended to a navigable stream had jurisdiction only to the low watermark**, see *State v. Eason*, 114 N.C. 787, 19 S.E. 88 (1894).

**Mandamus to Compel Regulation of Deep Water Line.** — Mandamus will lie by the riparian owner of land lying within the limits of

an incorporated town or city to compel the town or city to regulate the deep water line to which wharves may be built, as required by statute. *Wool v. Town of Edenton*, 115 N.C. 10, 20 S.E. 165 (1894).

**Under former statutory wording, a riparian owner in a city could not make an entry** and the Secretary of State could not issue a grant until the line of deep water had been regulated by the municipal corporation. *Wool v. Saunders*, 108 N.C. 729, 13 S.E. 294 (1891).

**Applied** in *State v. Forehand*, 67 N.C. App. 148, 312 S.E.2d 247 (1984).

**Quoted** in *Capune v. Robbins*, 273 N.C. 581, 160 S.E.2d 881 (1968).

**Cited** in *MacDonald v. Newsome*, 437 F. Supp. 796 (E.D.N.C. 1977).

## § 146-13. Erection of piers on State lakes restricted.

No person, firm, or corporation shall erect upon the floor of, or in or upon, the waters of any State lake, any dock, pier, pavilion, boathouse, bathhouse, or other structure, without first having secured a permit to do so from the Department of Administration, or from the agency designated by the Department to issue such permits. Each permit shall set forth in required detail the size, cost, and nature of such structure; and any person, firm, or corporation erecting any such structure without a proper permit or not in accordance with the specifications of such permit shall be guilty of a Class 3 misdemeanor. The State may immediately proceed to remove such unlawful structure through due process of law, or may abate or remove the same as a nuisance after five days' notice. (1933, c. 516, s. 3; G.S., s. 146-10; 1959, c. 683, s. 1; 1993, c. 539, s. 1051; 1994, Ex. Sess., c. 24, s. 14(c).)

### CASE NOTES

**Applied** in *Woodlief v. Johnson*, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

## § 146-14. Proceeds of dispositions of certain State lands.

The net proceeds of all sales, leases, rentals, or other dispositions of the vacant and unappropriated lands, swamplands, and lands acquired by the State by virtue of being sold for taxes, and all interests and rights therein, shall be paid into the State Literary Fund, except as otherwise provided in this Chapter. (1959, c. 683, s. 1.)

**Legal Periodicals.** — For article, "Removing Local Elected Officials From Office in North Carolina," see 16 *Wake Forest L. Rev.* 547 (1980).

## § 146-14.1. Natural Resources Easement Fund.

The Natural Resources Easement Fund is established as a nonreverting fund within the Department of Administration. All easement purchase payment monies collected by the Secretary shall be deposited in the Fund. The Fund may be used for direct costs of administering the program. Fifty percent (50%) of the net proceeds in the Fund shall be transferred annually to the Marine Fisheries Commission, and fifty percent (50%) of the net proceeds in

the Fund shall be transferred annually to the Wildlife Resources Commission, to be used by both Commissions for the sole purpose of enhancing public trust resources and increasing the public's access to and use of public trust resources, including, but not limited to, meeting the State's cost share obligations for federal Wallop-Breaux Fund projects, enhancing water resources and expanding the number of public boat ramps and other means of public waters access within the counties designated under G.S. 113A-103(2), and other public trust access purposes. (1995, c. 529, s. 3.)

**Editor's Note.** — Session Laws 1995, c. 529, s. 5, provides in part that nothing in this act shall require the adoption of rules to implement the provisions therein, and further provides that authorization established under this act

applies only to the Department of Administration and shall not be used by any other agency to administer or regulate activities affecting the public trust.

### § 146-15. Definition of net proceeds.

For the purposes of this Subchapter, the term "net proceeds" means the gross amount received from the sale, lease, rental, or other disposition of any State lands, less

- (1) Such expenses incurred incident to that sale, lease, rental, or other disposition as may be allowed under rules and regulations adopted by the Governor and approved by the Council of State; and
- (2) Repealed by Session Laws 1993, c. 553, s. 52, effective July 24, 1993.
- (3) A service charge to be paid into the State Land Fund.

The amount or rate of such service charge shall be fixed by rules and regulations adopted by the Governor and approved by the Council of State, but as to any particular sale, lease, rental, or other disposition, it shall not exceed ten percent (10%) of the gross amount received from such sale, lease, rental, or other disposition. Notwithstanding any other provision of this Subchapter, no service charge shall be paid into the State Land Fund from proceeds derived from the sale of land or products of land owned or held for the use of the Wildlife Resources Commission, or purchased or acquired with funds of the Wildlife Resources Commission. (1959, c. 683, s. 1; 1993, c. 553, s. 52.)

## ARTICLE 3.

### *Discovery and Reclamation.*

### § 146-16. Department of Administration to supervise.

The Department of Administration shall be responsible for discovering, inventorying, surveying, and reclaiming the vacant and unappropriated lands, swamplands, and lands acquired by the State by virtue of being sold for taxes, and shall take all measures necessary to that end. All expenses incurred in the performance of these activities shall be paid from the State Land Fund, unless otherwise provided by the General Assembly. (1959, c. 683, s. 1.)

### § 146-17. Mapping and discovery agreements.

The Department of Administration, acting on behalf of the State, for the purpose of discovering State lands, may, with the approval of the Governor and Council of State, enter into agreements with counties, municipalities, persons, firms, and corporations providing for the discovery of State land by the systematic mapping of the counties of the State and by other appropriate means. All expenses incurred by the Department incident to such mapping and

discovery agreements shall be paid from the State Land Fund, unless otherwise provided by the General Assembly. (1959, c. 683, s. 1.)

#### CASE NOTES

**Stated** in *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985).

### § 146-17.1. Rewards; reclamation of certain State lands; wrongful removal of timber from State lands.

(a) The Department of Administration, acting on behalf of the State, for the purpose of discovering State lands, may, with the approval of the Governor and Council of State, pay any person, firm or corporation who shall provide information that leads to the successful reclamation of any swamplands or vacant and unappropriated lands of the State, a reward equal to one percent (1%) of the appraised value of the reclaimed land, or one thousand dollars (\$1,000), whichever sum is less. All expenses incurred by the Department pursuant to this subsection shall be paid from the State Land Fund, unless otherwise provided by the General Assembly.

(b) The Department of Administration, acting on behalf of the State, may, with the approval of the Governor and Council of State, pay any person, firm or corporation who shall provide information that leads to a successful monetary recovery by the State from any person, firm or corporation who wrongfully cuts or removes timber from State lands, a reward equal to one percent (1%) of the amount of said monetary recovery, or one thousand dollars (\$1,000), whichever sum is less. All expenses incurred by the Department pursuant to this subsection shall be paid from said monetary recovery, unless otherwise provided by the General Assembly.

(c) No State employee or official, or other public employee or official, shall be eligible for a reward pursuant to subsections (a) or (b) of this section for providing any information obtained in the normal course of his or her official duties. (1979, c. 742, s. 1.)

#### ARTICLE 4.

#### *Miscellaneous Provisions.*

### § 146-18. Recreational use of State lakes regulated.

All recreation, except hunting and fishing, in, upon, or above any or all of the State lakes referred to in this Subchapter may be regulated in the public interest by the State agency having administrative authority over these areas. (1933, c. 516, s. 1; G.S., s. 146-8; 1959, c. 683, s. 1.)

### § 146-19. Fishing license fees for nonresidents of counties in which State lakes are situated.

The Wildlife Resources Commission, through its authorized agent or agents, is hereby authorized to require of nonresidents of the county within which a State lake is situated a daily or weekly permit in lieu of the regular "resident State license" for fishing with hook and line or rod and reel within said lake in accordance with the regulations of the Commission relating to said lake. Except for the provisions of this section, the laws and regulations dealing with the issuance of fishing permits by said Commission must be complied with. (1933, c. 516, s. 4; G.S., s. 146-11; 1959, c. 683, s. 1.)

## § 146-20. Forfeiture for failure to register deeds.

All the grants and deeds for swamplands made prior to November 1, 1883, must have been proved and registered, in the county where the lands are situate, within 12 months from November 1, 1883, and every such grant or deed, not being so registered within that time, shall be void, and the title of the proprietor in such lands shall revert to the State; but the provisions of this section shall be applicable only to the swamplands which have been surveyed or taken possession of by, or are vested in, the State or its agencies. (R.S., c. 67, s. 10; R.C., c. 66, s. 10; Code, ss. 2513, 3866; Rev., s. 4046; C.S., s. 7623; G.S., s. 146-96; 1959, c. 683, s. 1.)

### § 146-20.1. Conveyance of certain marshlands validated; public trust rights reserved.

(a) Validation. — All conveyances of swamplands, including regularly flooded estuarine marshlands, that have previously been made by the Literary Fund, the North Carolina Literary Board, or the State Board of Education are declared valid, and the person to whom the conveyance was made or his successor in title is declared to have title to the marshland.

(b) Reservation. — Areas of regularly flooded estuarine marshlands within conveyances validated by subsection (a) remain subject to all public trust rights. (1985, c. 278, s. 1.)

**Legal Periodicals.** — For article, “The Battle to Preserve North Carolina’s Estuarine Marshes: The 1985 Legislation, Private Claims

to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust,” see 64 N.C.L. Rev. 565 (1986).

#### CASE NOTES

**Navigable Waters.** — If a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose. Lands lying beneath such waters that are navigable in law are the subject of the public trust doctrine. *Gwathmey v. State ex rel. Dep’t of Env’t, Health & Natural Resources*, 342 N.C. 287, 464 S.E.2d 674 (1995).

**Marshlands Covered by Navigable Waters.** — The General Assembly did not convey the marshlands covered by navigable waters to the State Board of Education (SBE) free of any applicable public trust rights and, therefore, the SBE could not convey such lands to the plaintiffs’ predecessors in title free of such

public trust rights; thus, to the extent the marshlands at issue were covered by navigable waters, the people of North Carolina retained their full public trust rights. *Gwathmey v. State ex rel. Dep’t of Env’t, Health & Natural Resources*, 342 N.C. 287, 464 S.E.2d 674 (1995).

**Marshlands Not Covered by Navigable Waters Free of Public Trust Rights.** — To apply this section to impose public trust rights on any parts of plaintiffs’ marshlands not covered by navigable waters and which therefore are free of public trusts rights would be contrary to § 146-83. *Gwathmey v. State ex rel. Dep’t of Env’t, Health & Natural Resources*, 342 N.C. 287, 464 S.E.2d 674 (1995).

## SUBCHAPTER II. ALLOCATED STATE LANDS.

### ARTICLE 5.

#### *General Provisions.*

## § 146-21. Intent of Subchapter.

It is the purpose and intent of this Subchapter to provide for and regulate the acquisition, disposition, and management of all State lands other than the

vacant and unappropriated lands, swamplands, lands acquired by the State by virtue of being sold for taxes, and submerged lands. (1959, c. 683, s. 1.)

## ARTICLE 6.

### *Acquisitions.*

#### **§ 146-22. All acquisitions to be made by Department of Administration.**

Every acquisition of land on behalf of the State or any State agency, whether by purchase, condemnation, lease, or rental, shall be made by the Department of Administration and approved by the Governor and Council of State; provided that if the proposed acquisition is a purchase of land with an appraised value of at least twenty-five thousand dollars (\$25,000), and the acquisition is for other than a transportation purpose, the acquisition may only be made after consultation with the Joint Legislative Commission on Governmental Operations, and provided further, that acquisitions on behalf of the University of North Carolina Health Care System shall be made in accordance with G.S. 116-37(i), acquisitions on behalf of the University of North Carolina Hospitals at Chapel Hill shall be made in accordance with G.S. 116-37(a)(4), acquisitions on behalf of the clinical patient care programs of the School of Medicine of the University of North Carolina at Chapel Hill shall be made in accordance with G.S. 116-37(a)(4), and acquisitions on behalf of the Medical Faculty Practice Plan of the East Carolina University School of Medicine shall be made in accordance with G.S. 116-40.6(d). In determining whether the appraised value is at least twenty-five thousand dollars (\$25,000), the value of the property in fee simple shall be used. The State may not purchase land as a tenant-in-common without consultation with the Joint Legislative Commission on Governmental Operations if the appraised value of the property in fee simple is at least twenty-five thousand dollars (\$25,000). (1957, c. 584, s. 6; G.S., s. 146-103; 1959, c. 683, s. 1; 1983 (Reg. Sess., 1984), c. 1116, s. 97; 1998-212, s. 11.8(d).)

#### CASE NOTES

**Procedures for acquisition to the time of condemnation are governed by this Article**, while the condemnation, if required, is regulated by Article 9 of Chapter 136. *State v. Johnson*, 278 N.C. 126, 179 S.E.2d 371 (1971).

**By this Article the legislature merely appointed the Department of Administration as acquisition agent and established the procedure** it should follow in acquiring land. A statute which merely sets forth a mode of procedure will not impliedly grant the power of eminent domain. *State v. Core Banks Club Properties*, 275 N.C. 328, 167 S.E.2d 385 (1969).

**No Carte Blanche to Condemn Property.** — This Article and § 143-341(4)d do not give the Department (with the approval of the Governor and Council of State) carte blanche to condemn property. *State v. Core Banks Club Properties*, 275 N.C. 328, 167 S.E.2d 385 (1969).

**The Department can only effect the con-**

**demnation which the legislature authorizes.** It may not decide the public purpose or initiate the project for which the State's power of eminent domain may be used. *State v. Core Banks Club Properties*, 275 N.C. 328, 167 S.E.2d 385 (1969).

**Steps Required for Acquisition of Land by Purchase or Condemnation.** — This Article provides that all acquisitions of land by the State or any State agency shall be made by the Department of Administration and approved by the Governor and Council of State. Before the Department can acquire land by purchase or condemnation the following steps must be taken: (1) The agency must file with the Department an application setting forth its need for the requested acquisition; (2) The Department must investigate all aspects of the requested acquisition (including the availability of the necessary funds) as detailed in § 146-23; (3) After investigation, the Department must determine that the best interests of the

State require that the land be acquired; (4) The Department must then negotiate with the owners for the purchase. If terms are agreed upon and the Governor and Council of State approve them, the Department buys the land; (5) If negotiations are unsuccessful and the Governor and Council of State give permission, the Department institutes condemnation proceedings as provided in § 146-24 and § 136-103. *State v. Core Banks Club Properties*, 275 N.C. 328, 167 S.E.2d 385 (1969).

**Limits on Authority of Council of State upon Submission to It of Lowest Lease Proposal.** — Once the Department of Admin-

istration has submitted to the Council of State the lowest lease proposal in accordance with requirements set forth in lease specifications, the Council of State does not have the authority to examine all lease proposals and to require the Department of Administration to negotiate and enter a lease other than the lease proposal submitted by the Department of Administration. *Martin v. Thornburg*, 320 N.C. 533, 359 S.E.2d 472 (1987).

**Applied** in *State v. Johnson*, 282 N.C. 1, 191 S.E.2d 641 (1972).

**Stated** in *State v. Williams & Hesse*, 53 N.C. App. 674, 281 S.E.2d 721 (1981).

### OPINIONS OF ATTORNEY GENERAL

**Section 116-40.6(d) does not exempt the Medical Faculty Practice Plan from the requirements contained in this section and § 146-27** pertaining to consultation with the Joint Legislative Commission on Governmental Operations and approval by the Governor and Council of State with regard to acqui-

sitions and dispositions of real property. See opinion of Attorney General to Mr. Layton Getsinger, Associate Vice-Chancellor for Administration & Finance and Executive Director of Business Services, East Carolina University, 1999 N.C.A.G. 6 (3/1/99).

## § 146-22.1. Acquisition of property.

In order to carry out the duties of the Department of Administration as set forth in Chapters 143 and 146 of the General Statutes, the Department of Administration is authorized and empowered to acquire by purchase, gift, condemnation or otherwise:

- (1) Lands necessary for the construction and operation of State buildings and other governmental facilities.
- (2) Lands necessary for construction and operation of parking facilities.
- (3) An area in the City of Raleigh bounded by Edenton Street, Person Street, Peace Street, the right-of-way of the main line of Seaboard Coast Line Railway and North McDowell Street for the expansion of State governmental facilities, the public interest in, public use of, and the necessity for the acquisition of said area, being hereby declared as a matter of legislative determination.
- (4) Lands necessary for the location, expansion, operation and improvement of hospital and mental health facilities and similar institutions maintained by the State of North Carolina.
- (5) Lands necessary for public parks and forestry purposes.
- (6) Lands involving historical sites, together with such adjacent lands as may be necessary for their preservation, maintenance and operation.
- (7) Lands necessary for the location, expansion and improvement of any educational, penal or correctional institution.
- (8) Lands necessary to provide public access to the waters within the State.
- (9) Lands necessary for agricultural, experimental and research facilities.
- (10) Utility and access easement, rights-of-way, estates for terms of years or fee simple title to lands necessary or convenient to the operation of state-owned facilities.
- (11) Lands necessary for the development and preservation of the estuarine areas of the State.
- (12) Lands necessary for the development of waterways within the State.
- (13) Lands necessary for acquisition of all or part of an area of environmental concern, as requested pursuant to G.S. 113A-123.

- (14) Lands necessary for the construction of hazardous waste facilities as defined in G.S. 130A-290, inactive hazardous substance or waste disposal sites as defined in G.S. 130A-310, Superfund sites as described in G.S. 130A-310.22, and lands necessary for the construction of low-level radioactive waste facilities as defined in G.S. 104E-5. (1969, c. 1091, s. 1; 1973, c. 1284, s. 2; 1981, c. 704, s. 23; 1989, c. 286, s. 11.)

**Editor's Note.** — Session Laws 1973, c. 1284, which added subdivision (13), in s. 3, as amended by Session Laws 1975, c. 452, s. 5, provided an expiration date of June 30, 1983. However, Session Laws 1973, c. 1284, was

amended by Session Laws 1981, c. 932, s. 2.1, so as to delete the provision in s. 3 of the 1973 act, as amended, for expiration of the act on June 30, 1983.

#### CASE NOTES

**No request from a State agency is necessary** under present law in order for the Department of Administration to acquire property "by purchase, gift, condemnation or otherwise" for certain authorized purposes. *State v. Johnson*, 278 N.C. 126, 179 S.E.2d 371 (1971).

**The State has the right under this section to condemn property to expand a State park** in order to protect a historic "swimming hole" and to assure the public of continued access to the site. *State v. Williams & Hessee*,

53 N.C. App. 674, 281 S.E.2d 721 (1981).

**Illustrative Case.** — State had express statutory authority, and its statement of public use was sufficient, to condemn defendant's one-fifth land interest, held as tenant in common with State, as necessary and convenient for the operation and maintenance of government-owned impoundments. *State v. Coastland Corp.*, 134 N.C. App. 269, 517 S.E.2d 655 (1999), cert. denied, 351 N.C. 111, 540 S.E.2d 371 (1999).

### § 146-22.2. Appraisal of property to be acquired by State.

(a) Where an appraisal of real estate or an interest in real estate is required by law to be made before acquisition of the property by the State or an agency of the State, the appraisal shall be made by a real estate appraiser licensed or certified by the State under Article 5 of Chapter 93A of the General Statutes.

(b) The provisions of subsection (a) of this section shall not apply to appraisals of real estate or an interest in real estate made by personnel within the Department of Transportation when the appraisal is anticipated to be less than ten thousand dollars (\$10,000). In the event that the real estate or interest in real estate is in fact appraised at ten thousand dollars (\$10,000) or more, the Department of Transportation must comply with the provisions of subsection (a) of this section. (1989 (Reg. Sess., 1990), c. 827, s. 12; 1991, c. 94, s. 1; 1993, c. 519, s. 1; 1993 (Reg. Sess., 1994), c. 691, s. 1; 1995, c. 135, s. 1.)

**Editor's Note.** — Session Laws 1989 (Reg. Sess., 1990), c. 827, s. 15 made this section effective July 1, 1991.

Session Laws 1995, c. 135, s. 1 amended section 2 of Chapter 94 of Session Laws 1991,

as amended by Session Laws 1993, c. 519, s. 1, and by Session Laws 1993 (Reg. Sess., 1994), c. 135, s. 1, so as to delete the expiration date for subsection (b).

### § 146-23. Agency must file statement of needs; Department must investigate.

Any State agency desiring to acquire land, whether by purchase, condemnation, lease, or rental, shall file with the Department of Administration an application setting forth its needs, and shall furnish such additional information as the Department may request relating thereto. Upon receipt of such application, the Department of Administration shall promptly investigate all

aspects of the requested acquisition, including the existence of actual need for the requested property on the part of the requesting agency; the availability of land already owned by the State or by any State agency which might meet the requirements of the requesting agency; the availability, value, and status of title of other land, whether for purchase, condemnation, lease, or rental, which might meet the requirements of the requesting agency; and the availability of funds to pay for land if purchased, condemned, leased, or rented. The Department of Administration may make acquisitions at the request of the Governor and Council of State upon compliance with the investigation herein required. (1957, c. 584, s. 6; G.S., s. 146-104; 1959, c. 683, s. 1; 1969, c. 1091, s. 2.)

#### CASE NOTES

**Compliance Shown.** — Affidavits and exhibits, together with Secretary of Administration's findings, indicated that statutory requirements were addressed, and the trial court reasonably determined that DOA properly investigated "all aspects of the requested acquisition"

in compliance with this section. *State v. Coastland Corp.*, 134 N.C. App. 269, 517 S.E.2d 655 (1999), cert. denied, 351 N.C. 111, 540 S.E.2d 371 (1999).

**Stated** in *State v. Johnson*, 278 N.C. 126, 179 S.E.2d 371 (1971).

### § 146-23.1. Buildings having historic, architectural or cultural significance.

In order to promote the use of buildings having historic, architectural or cultural significance, the Department of Administration shall inform the North Carolina Historical Commission of all geographical areas in the State within which the State is actively seeking to lease space for the accommodation of State agencies. Within 60 days of the receipt of such information, the North Carolina Historical Commission shall identify for the Department of Administration all buildings within such geographical areas that (i) are known to be of historic, architectural or cultural significance (including but not limited to buildings listed or eligible to be listed on the National Register established pursuant to 16 U.S.C. 470(a)), and (ii) which may be suitable, whether or not in need of repair, alteration or addition, for acquisition or lease to meet the public building and space needs of State agencies. In addition, the North Carolina Historical Commission shall furnish the Department of Administration such additional information on the physical condition, usable space, and the nature and approximate costs of necessary historic rehabilitation as the department may request in order for the department to determine whether the acquisition or lease of space in such buildings is feasible and prudent.

In acquiring lease space pursuant to G.S. 146-25.1, the Department of Administration shall give preference to lease proposals involving buildings identified by the North Carolina Historical Commission as having historic, architectural or cultural significance. Provided, however, that such preference shall be given only when the Department of Administration, after investigation as provided in this Article, determines that such proposal is feasible, prudent and in the best interest of the State, as compared with available alternatives, such determination to include the State's policy to preserve historic buildings. (1977, c. 998, s. 1.)

### § 146-24. Procedure for purchase or condemnation.

(a) If, after investigation, the Department determines that it is in the best interest of the State that land be acquired, the Department shall proceed to negotiate with the owners of the desired land for its purchase.

(b) If the purchase price and other terms are agreed upon, the Department shall then submit to the Governor and Council of State the proposed purchase, together with a copy of the deed, for their approval or disapproval. If the Governor and Council of State approve the proposed purchase, the Department shall pay for the land and accept delivery of a deed thereto. All conveyances of purchased real property shall be made to "the State of North Carolina," and no such conveyance shall be made to a particular agency, or to the State for the use or benefit of a particular agency.

(c) If negotiations for the purchase of the land are unsuccessful, or if the State cannot obtain a good and sufficient title thereto by purchase from the owners, then the Department of Administration may request permission of the Governor and Council of State to exercise the right of eminent domain and acquire any such land by condemnation in the same manner as is provided for the Board of Transportation by Article 9 of Chapter 136 of the General Statutes. Upon approval by the Governor and Council of State, the Department may proceed to exercise the right of eminent domain. Approval by no other State agency shall be required as a prerequisite to the exercise of the power of eminent domain by the Department. Provided that when the procedures of Article 9 of Chapter 136 are employed by the Department, any person named in or served with a complaint and declaration of taking shall have 120 days from the date of service thereof within which to file answer. (1957, c. 584, s. 6; G.S., s. 146-105; 1959, c. 683, s. 1; 1967, c. 512, s. 1; 1973, c. 507, s. 5; 1981, c. 245, s. 1.)

#### CASE NOTES

**Strict Construction.** — In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict rather than a liberal construction is the rule. *State v. Core Banks Club Properties*, 275 N.C. 328, 167 S.E.2d 385 (1969).

**Power of Eminent Domain as Prerogative of Sovereign State.** — The right to take private property for public use, the power of eminent domain, is one of the prerogatives of a sovereign state. The right is inherent in sovereignty; it is not conferred by constitutions. Its exercise, however, is limited by the constitutional requirements of due process and payment of just compensation for property condemned. *State v. Core Banks Club Properties*, 275 N.C. 328, 167 S.E.2d 385 (1969).

**The right of eminent domain must be conferred by statute**, either in express words or by necessary implication. *State v. Core Banks Club Properties*, 275 N.C. 328, 167 S.E.2d 385 (1969).

The right of eminent domain lies dormant in the State until the legislature, by statute, confers the power and points out the occasion, mode, conditions and agencies for its exercise. *State v. Core Banks Club Properties*, 275 N.C. 328, 167 S.E.2d 385 (1969).

**As only the legislative branch can authorize exercise of the power of eminent domain** and prescribe the manner of its use. *State v. Core Banks Club Properties*, 275 N.C.

328, 167 S.E.2d 385 (1969).

**And the executive branch cannot, without the authority of some statute, proceed to condemn property** for its own uses. *State v. Core Banks Club Properties*, 275 N.C. 328, 167 S.E.2d 385 (1969).

**But once authority is given to exercise the power of eminent domain, the matter ceases to be wholly legislative.** The executive authorities may then decide whether the power will be invoked and to what extent, and the judiciary must decide whether the statute authorizing the taking violates any constitutional rights; moreover, the fixing of compensation is wholly a judicial question. *State v. Core Banks Club Properties*, 275 N.C. 328, 167 S.E.2d 385 (1969).

**Procedures for acquisition to the time of condemnation are governed by this Article**, while the condemnation, if required, is regulated by Article 9 of Chapter 136. *State v. Johnson*, 278 N.C. 126, 179 S.E.2d 371 (1971).

**Inference That Acquisition Is in Best Interest of State.** — This section does not require a specific written report that the acquisition is in the best interest of the State, and where the Department did in fact proceed to acquire the land, it was a permissible inference that such a determination was made. *State v. Johnson*, 278 N.C. 126, 179 S.E.2d 371 (1971).

**Stated** in *State v. Forehand*, 67 N.C. App. 148, 312 S.E.2d 247 (1984).

### § 146-24.1. The power of eminent domain.

In carrying out the duties and purposes set forth in Chapters 143 and 146 of the General Statutes, the Department of Administration is vested with the power of eminent domain and shall have the right and power to acquire such lands, easements, rights-of-way or estates for years by condemnation in the manner prescribed by G.S. 146-24 of the General Statutes. The power of eminent domain herein granted is supplemental to and in addition to the power of eminent domain which may be now or hereafter vested in any State agency as defined by G.S. 146-64 and the Department of Administration may exercise on behalf of such agency the power vested in said agency or the power vested in the Department of Administration herein; and the Department of Administration may follow the procedure set forth in G.S. 146-24 or the procedure of such agency, at the option of the Department of Administration. Where such acquisition is made at the request of an agency, such agency shall make a determination of the necessity therefor; where such acquisition is on behalf of the State or at the request of the Department of Administration, such findings shall be made by the Director of Administration. Provided, however, that all such acquisitions shall have the approval of the Governor and Council of State as provided in G.S. 146-24.

This section shall not apply to public projects and condemnations for which specific statutory condemnation authority and procedures are otherwise provided. (1969, c. 1091, ss. 3, 4.)

#### CASE NOTES

**Illustrative Case.** — State had express statutory authority, and its statement of public use was sufficient, to condemn defendant's one-fifth land interest, held as tenant in common with State, as necessary and convenient for the

operation and maintenance of government-owned impoundments. *State v. Coastland Corp.*, 134 N.C. App. 269, 517 S.E.2d 655 (1999), cert. denied, 351 N.C. 111, 540 S.E.2d 371 (1999).

### § 146-25. Leases and rentals.

If, after investigation, the Department of Administration determines that it is in the best interest of the State that land be leased or rented for the use of the State or of any State agency, the Department shall proceed to negotiate with the owners for the lease or rental of such property. All lease and rental agreements entered into by the Department shall be promptly submitted to the Governor and Council of State for approval or disapproval. (1957, c. 584, s. 6; G.S., s. 146-106; 1959, c. 683, s. 1.)

#### CASE NOTES

**Limits on Authority of Council of State upon Submission to It of Lowest Lease Proposal.** — Once the Department of Administration has submitted to the Council of State the lowest lease proposal in accordance with requirements set forth in lease specifications, the Council of State does not have the authority

to examine all lease proposals and to require the Department of Administration to negotiate and enter a lease other than the lease proposal submitted by the Department of Administration. *Martin v. Thornburg*, 320 N.C. 533, 359 S.E.2d 472 (1987).

### § 146-25.1. Proposals to be secured for leases.

(a) If pursuant to G.S. 146-25, the Department of Administration determines that it is in the best interest of the State to lease or rent land and the rental is estimated to exceed twenty-five thousand dollars (\$25,000) per year or

the term will exceed three years, the Department shall require the State agency desiring to rent land to prepare and submit for its approval a set of specifications for its needs. Upon approval of specifications, the Department shall prepare a public advertisement. The State agency shall place such advertisement in a newspaper of general circulation in the county for proposals from prospective lessors of said land and shall make such other distribution thereof as the Department directs. The advertisement shall be run for at least five consecutive days, and shall provide that proposals shall be received for at least seven days from the date of the last advertisement in the State Property Office of the Department. The provisions of this section do not apply to property owned by governmental agencies and leased to other governmental agencies.

(b) The Department may negotiate with the prospective lessors for leasing of the needed land, taking into account not only the rental offered, but the type of land, the location, its suitability for the purposes, services offered by the lessor, and all other relevant factors. In the event either no proposal or no acceptable proposal is received after advertising in accordance with subsection (a) of this section, the Department may negotiate in the open market for leasing of the needed land.

(c) The Department of Administration shall present the proposed transaction to the Council of State for its consideration as provided by this Article. In the event the lowest rental proposed is not presented to the Council of State, that body may require a statement of justification, and may examine all proposals. (1973, c. 1448; 1975, c. 523; 1977, c. 485; 1979, c. 43, s. 1; 1983 (Reg. Sess., 1984), c. 1116, s. 97; 1999-252, s. 1.)

CASE NOTES

**Limits on Authority of Council of State upon Submission to It of Lowest Lease Proposal.** — Once the Department of Administration has submitted to the Council of State the lowest lease proposal in accordance with requirements set forth in lease specifications, the Council of State does not have the authority

to examine all lease proposals and to require the Department of administration to negotiate and enter a lease other than the lease proposal submitted by the Department of Administration. *Martin v. Thornburg*, 320 N.C. 533, 359 S.E.2d 472 (1987).

OPINIONS OF ATTORNEY GENERAL

**As to applicability of section** to nonbinding agreements to lease made prior to April 13, 1974, to leases which expire after April 13, 1974, and must be renegotiated, and to “emer-

gency situations,” see opinion of Attorney General to Mr. M.E. White, N.C. Department of Administration, 43 N.C.A.G. 402 (1974).

§ 146-26. Donations and devises to State.

No devise or donation of land or any interest therein to the State or to any State agency shall be effective to vest title to the land or any interest therein in the State or in any State agency until the devise or donation is accepted by the Governor and Council of State. If the land is devised or donated to the State or to any State agency as an historic property, then title shall not vest until the Historical Commission reports to the Joint Legislative Commission on Governmental Operations as provided in G.S. 121-9. Upon acceptance by the Governor and Council of State, title to the said land or interest therein shall immediately vest as of the time title would have vested but for the above requirement of reporting to the Joint Legislative Commission on Governmental Operations if an historic property and acceptance by the Governor and

Council of State. (1957, c. 584, s. 6; G.S., s. 146-107; 1959, c. 683, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 7.7(b).)

### § 146-26.1. Relocation assistance.

In the acquisition of any real property by the Department of Administration for a public use, the Department of Administration shall be vested with the authority as set forth in Article 2 of Chapter 133 of the General Statutes. (1971, c. 540; 1973, c. 507, s. 5; 1977, c. 464, s. 34; 1993, c. 553, s. 52.1.)

## ARTICLE 7.

### *Dispositions.*

### § 146-27. The role of the Department of Administration in sales, leases, and rentals.

(a) General. — Every sale, lease, rental, or gift of land owned by the State or by any State agency shall be made by the Department of Administration and approved by the Governor and Council of State. A lease or rental of land owned by the State may not exceed a period of 99 years. The Department of Administration may initiate proceedings for sales, leases, rentals, and gifts of land owned by the State or by any State agency.

(b) Large Disposition. — If a proposed disposition is a sale or gift of land with an appraised value of at least twenty-five thousand dollars (\$25,000), the sale or gift shall not be made until after consultation with the Joint Legislative Commission on Governmental Operations. (1957, c. 584, s. 6; G.S., s. 146-108; 1959, c. 683, s. 1; 1977, c. 425, ss. 1, 2; 1987, c. 738, s. 47(b); 1993, c. 561, s. 32(a); 1998-159, s. 5.)

**Cross References.** — As to sale, lease, exchange and joint use of governmental property by State and local governmental units, see § 160A-274.

## CASE NOTES

**An agreement to lease should be governed by the same statutory provisions as a lease itself.** To hold otherwise would defeat the legislative intent to protect the State and taxpayers from liability for the unauthorized

and invalid agreements of the State's numerous agents. *Stewart v. Graham*, 72 N.C. App. 676, 325 S.E.2d 53, cert. denied, 313 N.C. 611, 330 S.E.2d 616 (1985).

## OPINIONS OF ATTORNEY GENERAL

**Section 116-40.6(d) does not exempt the Medical Faculty Practice Plan from the requirements contained in § 146-22 and this section** pertaining to consultation with the Joint Legislative Commission on Governmental Operations and approval by the Governor and Council of State with regard to acqui-

sitions and dispositions of real property. See opinion of Attorney General to Mr. Layton Getsinger, Associate Vice-Chancellor for Administration & Finance and Executive Director of Business Services, East Carolina University, 1999 N.C.A.G. 6 (3/1/99).

### § 146-28. Agency must file application with Department; Department must investigate.

Any State agency desiring to sell, lease, or rent any land owned by the State or by any State agency shall file with the Department of Administration an

application setting forth the facts relating to the proposed transaction, and shall furnish the Department with such additional information as the Department may request relating thereto. Upon receipt of such application, the Department of Administration shall promptly investigate all aspects of the proposed transaction, including particularly present and future State need for the land proposed to be conveyed, leased, or rented. (1957, c. 584, s. 6; G.S., s. 146-109; 1959, c. 683, s. 1.)

#### CASE NOTES

**Cited** in Granville County Bd. of Comm'rs v. North Carolina Hazardous Waste Mgt. Comm'n, 329 N.C. 615, 407 S.E.2d 785 (1991).

### § 146-29. Procedure for sale, lease, or rental.

If, after investigation, the Department of Administration determines that it is in the best interest of the State that land be sold, leased, or rented, the Department shall proceed with its sale, lease, or rental, as the case may be, in accordance with rules adopted by the Governor and approved by the Council of State. If an agreement of sale, lease, or rental is reached, the proposed transaction shall then be submitted to the Governor and Council of State for their approval or disapproval. Every conveyance in fee of land owned by the State or by any State agency shall be made and executed in the manner prescribed in G.S. 146-74 through 146-78. (1957, c. 584, s. 6; G.S., s. 146-110; 1959, c. 683, s. 1.)

#### CASE NOTES

**Cited** in Granville County Bd. of Comm'rs v. North Carolina Hazardous Waste Mgt. Comm'n, 329 N.C. 615, 407 S.E.2d 785 (1991).

### § 146-29.1. Lease or sale of real property for less than fair market value.

(a) Real property owned by the State or any State agency may not be sold, leased, or rented at less than fair market value to any private entity that operates, or is established to operate for profit.

(b) Real property owned by the State or by any State agency may be sold, leased, or rented at less than fair market value to a public entity. "Public entity" means a county, municipal corporation, local board of education, community college, special district or other political subdivision of the State and the United States or any of its agencies. Any such sale, lease, or rental shall be reported at least 30 days prior to the sale, lease, or rental to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division of the Legislative Services Office, with the details of such transaction.

(c) Real property owned by the State or by any State agency may be sold, leased, or rented at less than market value to a private, nonprofit corporation, association, organization or society if the Department of Administration determines both of the following:

- (1) The transaction is in consideration of public service rendered or to be rendered by the nonprofit.
- (2) The property will be used in connection with the nonprofit's tax-exempt purpose and not in connection with its unrelated trade or business, as defined in section 513 of the Code. For the purposes of

this subdivision, the term "Code" has the same meaning as in G.S. 105-228.90.

The transaction shall be reported in detail at least 30 days prior to the sale, lease, or rental to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division of the Legislative Services Office. The fact that any sale of property under this subsection shall not be subject to a reversionary interest in the State shall be expressly made known to the Joint Legislative Commission on Government Operations, and the Governor and Council of State, prior to the transaction being authorized.

(d) Any sale, lease, or rental of real property made in conformity with the provisions of this section is not a violation of G.S. 66-58(a).

(e) All sales, leases, or rentals, prior to July 15, 1986, of real property owned by the State or any State agency are not invalid because of a conflict with G.S. 66-58(a) or with a prior version of this section, but any renewal of any such lease or rental agreement on or after July 15, 1986, shall conform to the requirements of this section. (1985, c. 479, s. 172(a); 1985 (Reg. Sess., 1986), c. 1014, s. 188(a); 1993, c. 561, s. 32(c); 1999-252, s. 2.)

**Editor's Note.** — Session Laws 1985, c. 757, s. 173 provided that this section, as enacted by Session Laws 1985, c. 479, s. 172, would not apply to the lease of property for the Ronald McDonald House that was approved by the Board of Governors of the University of North Carolina on June 28, 1985.

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 26 provides: "The Department of Administration may enter into leases with the North Carolina Aquarium Society, a nonprofit corporation whose sole purpose is to assist finan-

cially the three State supported aquariums. Any leases entered into pursuant to this section are exempt from the provisions of G.S. 146-29.1."

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 179 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1992-93 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1992-93 fiscal year."

**§ 146-29.2. Lease provisions for communications towers.**

The State may lease real property, or any interest in real property, for the purposes of construction and placement of communications towers on State land or for placement of antennas upon State-owned structures. The following additional requirements shall apply to such leases:

- (1) The lease shall require the lessee to permit other telecommunications carriers to co-locate on the communications tower on commercially reasonable terms between the lessee and the co-locating carrier until the communications tower reaches its capacity. Unless the State determines that co-location is not feasible at that location, the communications tower shall be designed and constructed to accommodate other carriers on the tower.
- (2) The State shall, in determining the location of lands to be leased for communications towers, encourage communications towers to be located near other communications towers to the extent technically desirable.
- (3) The State shall, when choosing a communications tower or antenna location, choose a location which minimizes the visual impact on surrounding landscape.
- (4) The State shall not lease lands of the State Parks System for such purposes.

For purposes of this section, "co-locate and co-location" mean the sharing of a communications tower by two or more services.

City and county ordinances apply to communications towers and antennas authorized under this section. (1998-158, s. 3.)

**Legal Periodicals.** — See legislative survey, 21 Campbell L. Rev. 323 (1999).

### § 146-30. Application of net proceeds.

(a) The net proceeds of any disposition made in accordance with this Subchapter shall be handled in accordance with the following priority: First, in accordance with the provisions of any trust or other instrument of title whereby title to such real property was heretofore acquired or is hereafter acquired; second, as provided by any other act of the General Assembly; third, the net proceeds shall be deposited with the State Treasurer. Provided, however, nothing herein shall be construed as prohibiting the disposition of any State lands by exchange for other lands, but if the appraised value in fee simple of any property involved in the exchange is at least twenty-five thousand dollars (\$25,000), then such exchange may not be made without consultation with the Joint Legislative Commission on Governmental Operations.

(b) For the purposes of this Subchapter, the term “net proceeds” means the gross amount received from the sale, lease, rental, or other disposition of any State lands, less

- (1) Such expenses incurred incident to that sale, lease, rental, or other disposition as may be allowed under rules and regulations adopted by the Governor and approved by the Council of State; and
- (2) Repealed by Session Laws 1993, c. 553, s. 52.2.
- (3) A service charge to be paid into the State Land Fund.

(b1) Notwithstanding the other provisions of this section, no service charge into the State Land Fund shall be deducted from or levied against the proceeds of any disposition by lease, rental, or easement of State lands that are designated as part of the Centennial Campus as defined by G.S. 116-198.33(4), that are designated as part of the Horace Williams Campus as defined by G.S. 116-198.33(4a), or that are designated as part of a Millennial Campus as defined by G.S. 116-198.33(4b). All net proceeds of those dispositions are governed by G.S. 116-36.5.

(c) The amount or rate of such service charge shall be fixed by rules and regulations adopted by the Governor and approved by the Council of State, but as to any particular sale, lease, rental, or other disposition, it shall not exceed ten percent (10%) of the gross amount received from such sale, lease, rental, or other disposition. Notwithstanding any other provision of this Subchapter, the net proceeds derived from the sale of land or products of land owned by or under the supervision and control of the Wildlife Resources Commission, or acquired or purchased with funds of that Commission, shall be paid into the Wildlife Resources Fund. Provided, however, the net proceeds derived from the sale of land or timber from land owned by or under the supervision and control of the Department of Agriculture and Consumer Services shall be deposited with the State Treasurer in a capital improvement account to the credit of the Department of Agriculture and Consumer Services, to be used for such specific capital improvement projects or other purposes as are provided by transfer of funds from those accounts in the Capital Improvement Appropriations Act. Provided further, the net proceeds derived from the sale of park land owned by or under the supervision and control of the Department of Environment and Natural Resources shall be deposited with the State Treasurer in a capital improvement account to the credit of the Department of Administration to be used for the purpose of park land acquisition as provided by transfer of funds from those accounts in the Capital Improvement Appropriations Act. In the Capital Improvement Appropriations Act, line items for purchase of park and agricultural lands will be established for use by the Departments of Adminis-

tration and Agriculture. The use of such funds for any specific capital improvement project or land acquisition is subject to approval by the Director of the Budget. No other use may be made of funds in these line items without approval by the General Assembly except for incidental expenses related to the project or land acquisition. Additionally with the approval of the Director of the Budget, either Department may request funds from the Contingency and Emergency Fund when the necessity of prompt purchase of available land can be demonstrated and funds in the capital improvement accounts are insufficient. Provided further, the net proceeds derived from the sale of any portion of the land in or around the unincorporated area known as Butner on or after July 1, 1980, shall be deposited with the State Treasurer in a capital improvement account to the credit of the Hospital to provide water and sewers and to bring those streets in the unincorporated area known as Butner not on the State highway system up to standards adequate for acceptance on the system, according to a plan adopted by the Department of Administration, and the Office of State Budget and Management, with the approval of the Board of County Commissioners of Granville County, to build industrial access roads to industries on the Butner lands, to construct new city streets on the Butner lands, extend water and sewer service on the Butner lands, and repair storm drains on the Butner lands. (1959, c. 683, s. 1; 1975, 2nd Sess., c. 983, s. 30; 1977, c. 771, s. 4; c. 1012; 1979, c. 608, s. 1; 1981, c. 859, s. 23.4; c. 1127, s. 33; 1981 (Reg. Sess., 1982), c. 1282, s. 24; 1983, c. 717, ss. 86, 86.1, 86.2, 87; c. 761, s. 166; 1983 (Reg. Sess., 1984), c. 1034, s. 164; c. 1116, s. 97(d); 1989, c. 727, s. 218(155); c. 799, s. 26; 1993, c. 321, s. 260.1; c. 553, s. 52.2; 1997-261, s. 109; 1997-443, s. 11A.119(a); 1998-159, s. 4; 1999-234, s. 8; 2000-140, s. 93.1(a); 2000-177, s. 9; 2001-424, s. 12.2(b).)

**Cross References.** — As to net proceeds from certain University of North Carolina land sales being trust funds of the University, see § 116-36.1.

**Editor's Note.** — Session Laws 1999-237, s. 29.6C provides that, notwithstanding G.S. 146-30, the Stonewall Jackson Training School in Cabarrus County may retain the net proceeds from the sale or lease of historic properties at the school to be used for capital improvements at the school.

Session Laws 1999-237, s. 30.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 1.1, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999.'"

Session Laws 1999-237, s. 30.4, contains a severability clause.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-140, s. 93.1(a), effective July 21, 2000, substituted "Office of State Budget, Planning, and Management" for "Office of State Budget and Management" in the last sentence of subsection (c).

Session Laws 2000-177, s. 9, effective August 2, 2000, in the first sentence of subsection (b1), deleted "or" following "G.S. 116-198.33(4)" and added "or that are designated as part of a Millennial Campus as defined by G.S. 116-198.33(4b)."

Session Laws 2001-424, s. 12.2(b), effective July 1, 2001, substituted "Office of State Budget and Management" for "Office of State Budget, Planning, and Management" in subsection (c).

## OPINIONS OF ATTORNEY GENERAL

**For opinion that service charge was not applicable in gift of trust situation described,** see opinion of Attorney General to Mr.

Carroll L. Mann, Jr., Property Control and Construction Division, Department of Administration, 41 N.C.A.G. 738 (1972).

## ARTICLE 8.

*Miscellaneous Provisions.***§ 146-31. Right of appeal to Governor and Council of State.**

The requesting agency, in the event of disagreement with a decision of the Department of Administration regarding the acquisition or disposition of land pursuant to the provisions of this Subchapter, shall have the right of appeal to the Governor and Council of State. (1957, c. 584, s. 6; G.S., s. 146-113; 1959, c. 683, s. 1.)

**§ 146-32. Exemptions as to leases, etc.**

The Governor, acting with the approval of the Council of State, may adopt rules and regulations:

- (1) Exempting from any or all of the requirements of this Subchapter such classes of lease, rental, easement, and right-of-way transactions as he deems advisable; and
- (2) Authorizing any State agency to enter into and/or approve those classes of transactions exempted by such rules and regulations from the requirements of this Chapter.
- (3) No rule or regulation adopted under this section may exempt from the provisions of G.S. 146-25.1 any class of lease or rental which has a duration of more than 21 days, unless the class of lease or rental:
  - a. Is a lease or rental necessitated by a fire, flood, or other disaster that forces the agency seeking the new lease or rental to cease use of real property;
  - b. Is a lease or rental necessitated because an agency had intended to move to new or renovated real property that was not completed when planned, but a lease or rental exempted under this subparagraph may not be for a period of more than six months; or
  - c. Is a lease or rental which requires a unique location or a location that adjoins or is in close proximity to an existing rental location. (1959, c. 683, s. 1; 1983 (Reg. Sess., 1984), c. 1116, s. 97; 1985, c. 479, s. 173; 1999-252, s. 3; 1999-456, s. 38.)

**§ 146-33. State agencies to locate and mark boundaries of lands.**

Every State agency shall locate and identify, and shall mark and keep marked, the boundaries of all lands allocated to that agency or under its control. The Department of Administration shall locate and identify, and mark and keep marked, the boundaries of all State lands not allocated to or under the control of any other State agency. The chief administrative officer of every State agency is authorized to contract with the State Department of Correction for the furnishing, upon such conditions as may be agreed upon from time to time between the State Department of Correction and the chief administrative officer of that agency, of prison labor for use where feasible in the performance of these duties. (1957, c. 584, s. 2; G.S., s. 143-145.1; 1959, c. 683, s. 1; 1967, c. 996, s. 13.)

**§ 146-34. Agencies may establish agreed boundaries.**

Every State agency may establish agreed boundaries between lands allocated to it or under its control, and the lands of any other owner, subject to the

approval of the Governor and Council of State. The Department of Administration is authorized to establish agreed boundaries between State lands not allocated to or under the control of any other State agency and the lands of any other owner, subject to the approval of the Governor and Council of State. The Attorney General shall represent the State in all proceedings to establish boundaries which cannot be established by agreement. (1957, c. 584, s. 3; G.S., s. 143-145.2; 1959, c. 683, s. 1.)

### § 146-35. Severance approval delegation.

The Governor, acting with the approval of the Council of State, may adopt rules and regulations delegating to any other State agency the authority to approve the severance of buildings and standing timber from State lands. Upon such approval of severance, the buildings or timber affected shall be, for the purposes of this Chapter, treated as personal property. (1959, c. 683, s. 1.)

### § 146-36. Acquisitions for and conveyances to federal government.

The Governor and Council of State may, whenever they find that it is in the best interest of the State to do so, enter into any contract or other agreement which will be sufficient to comply with federal laws or regulations, binding the State to acquire for and to convey to the United States government land or any interest in land, and to do such other acts and things as may be necessary for such compliance.

The Governor and Council of State may authorize any conveyance to the United States government to be made upon nominal consideration whenever they deem it to be in the best interest of the State to do so. (1959, c. 683, s. 1.)

#### CASE NOTES

**This section confers no power of eminent domain.** *State v. Core Banks Club Properties*, 275 N.C. 328, 167 S.E.2d 385 (1969).

## SUBCHAPTER III. ENTRIES AND GRANTS.

### ARTICLE 9.

#### *General Provisions.*

### § 146-37. Intent of Subchapter.

It is the purpose and intent of this Subchapter to protect vested rights, titles, and interests acquired under the laws governing entries and grants as they read immediately prior to June 2, 1959. (1959, c. 683, s. 1.)

**Legal Periodicals.** — For note on defining public trust doctrine in North Carolina, see 49 *N.C.L. Rev.* 888 (1971).

### § 146-38. Pending entries.

All entries which have been filed with entry-takers within one year prior to June 2, 1959, or filed more than one year prior to June 2, 1959, but still pending due to the filing of protest to the entry, shall be processed pursuant to

the provisions of Chapter 146 of the General Statutes as it read immediately prior to June 2, 1959. Every such entry shall be paid for within one year from the date of entry, unless a protest be filed to the entry, in which event it shall be paid for within one year after final judgment on the protest; and all entries not thus paid for shall become null and void, and shall not be subject to renewal. It shall be the duty of both the enterer and protestant to conclude, within 12 months from June 2, 1959, all actions wherein a protest has been filed, and such cases shall be given preference on the dockets of the courts of the State. Any action not so concluded shall be deemed a lapse as to enterer and protestant. It is not the intent of this proviso to void any previous grant of the State of North Carolina, or to divest any vested right, but to terminate all rights accrued on account of an entry wherein no grant has been made. Provided that the resident judge of the superior court or the judge holding the superior courts of the district where the land lies, may, for good cause shown, extend the time within which an action in which a protest has been filed is required by this section to be concluded; but no single extension shall exceed one year in duration. A copy of this section shall be mailed by the Secretary of State to all parties to actions wherein protests have been filed as may be determined by records available in his office, and to all clerks of the superior court of the State. (1959, c. 683, s. 1.)

### § 146-39. Void grants; not color of title.

Every entry made and every grant issued for any lands not authorized by G.S. 146-1 through 146-77, as those sections read immediately prior to June 2, 1959, to be entered or granted shall be void.

Every grant of land issued since March 6, 1893, in pursuance of the statutes regulating entries and grants, shall, if such land or any portion thereof has been heretofore granted by this State, so far as relates to any such land heretofore granted, be absolutely void for all purposes whatever, shall confer no rights upon the grantee therein or those claiming under such grantee, and shall in no case and under no circumstances constitute any color of title to any person. (R.C., c. 42, s. 2; Code, s. 2755; 1893, c. 490; Rev., s. 1699; C.S., s. 7545; G.S., s. 146-13; 1959, c. 683, s. 1.)

**Editor's Note.** — The reference in this section to §§ 146-1 through 146-77 is to those sections as they stood prior to the ratification of

Session Laws 1959, c. 683, which revised this Chapter.

#### CASE NOTES

**Editor's Note.** — *The cases below were decided under corresponding sections of this Chapter as it stood before its revision in 1959, or under earlier statutes from which they were derived.*

**Preference for Elder Title.** — Where there are two or more conflicting titles derived from the State, the elder shall be preferred, upon the familiar maxim that he who is prior in time shall be prior in right and shall be adjudged to have the better title. *Berry v. W. M. Ritter Lumber Co.*, 141 N.C. 386, 54 S.E. 278 (1906).

**Subsequent Grant of Same Land Void.** — Where land in controversy was previously granted to plaintiff's predecessor in title, a subsequent grant of the same land, under which defendants claimed title, was void for all

purposes. *Johnston v. Kramer Bros. & Co.*, 203 F. 733 (E.D.N.C. 1913).

**State's grant of land was held not invalid** where land conveyed by the grant had not been covered by any previous grant. *Peterson v. Sucro*, 101 F.2d 282 (4th Cir. 1939).

**State Not Interested in Conflicting Grants.** — Protest to entry raises the issue of title solely between the enterer and the protestant, in which matter the State is not interested, the burden being on the enterer to prove that the protestant's grant does not cover the land described in his entry. *Walker v. Parker*, 169 N.C. 150, 85 S.E. 306 (1915).

**Title by Adverse Possession.** — Where upon protest to the entry of the State's lands it is ascertained that the lands described in the

entry are not contained in the former grant, the protestant may show that the lands are not vacant and unappropriated by sufficient adverse possession to take the title out of the State and vest it in himself. *Walker v. Parker*, 169 N.C. 150, 85 S.E. 306 (1915).

To mature a title under a junior grant, there must be shown adverse and exclusive possession of the lappage, or the law will presume possession to be in the true owner as to all that portion of the lappage not actually occupied by the junior claimant. *McLean v. Smith*, 106 N.C. 172, 11 S.E. 184 (1890); *Boomer v. Gibbs*, 114

N.C. 76, 19 S.E. 226 (1894); *Currie v. Gilchrist*, 147 N.C. 648, 61 S.E. 581 (1908); *Blue Ridge Land Co. v. Floyd*, 167 N.C. 686, 83 S.E. 687 (1914); *Georgia-Carolina Land & Timber Co. v. Potter*, 189 N.C. 56, 127 S.E. 343 (1925).

**Application to Grants Issued Since March 6, 1893.** — Statute providing that a junior grant shall not be color of title so far as it covers land previously granted applies by its terms only to grants issued since March 6, 1893. *Weaver v. Love*, 146 N.C. 414, 59 S.E. 1041 (1907); *Jones-Onslow Land Co. v. Wooten*, 177 N.C. 248, 98 S.E. 706 (1919).

ARTICLE 10.

*Surveys.*

**§ 146-40. Record of surveys to be kept.**

The county commissioners of the several counties of the State shall provide a suitable book or books for recording of surveys of entries of land, to be known as Record of Surveys, to be kept in the office of register of deeds as other records are kept. Such record shall have an alphabetical and numerical index, the numerical index to run consecutively. It shall be the duty of every county surveyor or his deputy surveyor who makes a survey to record in such book a perfect and complete record of all surveys of lands made upon any warrant issued upon any entry, and date and sign same as of the date such survey was made. (1905, c. 242; Rev., s. 1722; C.S., s. 7570; G.S., s. 146-39; 1959, c. 683, s. 1.)

CASE NOTES

**Notice of Surveys.** — Prior to enactment of the statute from which this section is derived, an entry of the State's vacant and unappropriated lands too vague to give notice of the boundaries of the land intended to be entered was not sufficient notice to a second enterer who had perfected his grant in ignorance of the first; and the mere running of the lines of the lands by survey or the making of a map by the

first enterer, which he could keep in his possession, or the warrant to the county surveyor, necessarily no more definite than the original entry, did not remedy the defective description of the entry. However, the statute from which this section is derived provided for notice of all surveys, so that this problem should not hereafter arise. *Lovin v. Carver*, 150 N.C. 710, 64 S.E. 775 (1911).

**§ 146-41. Former surveys recorded.**

Where any ex-surveyor of a county is alive and has correct minutes or notes of surveys of land on entries made by him during his term of office, it shall be lawful for him to record and index such survey in the Record of Surveys, and the county commissioners shall pay for such services ten cents (10¢) for each survey so recorded and indexed. (1905, c. 242, s. 2; Rev., s. 1725; C.S., s. 7571; G.S., s. 146-40; 1959, c. 683, s. 1.)

**§ 146-42. What record must show; received as evidence.**

All surveys so recorded in such book shall show the number of the tract of land, the name of the party entering, and the name of the assignee if there be any assignee; and shall be duly indexed, both alphabetically and numerically, in such record in the name of the party making the entry and in the name of

the assignee if there be any assignee. Such record of any surveyor or deputy surveyor when so made shall be read in evidence in any action or proceeding in any court: Provided that if such record differs from the original certificates of survey heretofore made or on file in the office of the Secretary of State, such original or certified copy of the certificate in the Secretary of State's office shall control. (1905, c. 242, ss. 2, 3, 6; Rev., s. 1723; C.S., s. 7572; G.S., s. 146-41; 1959, c. 683, s. 1.)

ARTICLE 11.

*Grants.*

**§ 146-43. Cutting timber on land before obtaining a grant.**

If any person shall make an entry of any lands, and before perfecting title to same shall enter upon such lands and cut therefrom any wood, trees, or timber, he shall be guilty of a Class 1 misdemeanor. Any person found guilty under the provisions of this section shall further pay to the State double the value of the wood, trees, or timber taken from the land, and it shall be the duty of the solicitor of the district in which the land lies to sue for the same. (1903, c. 272, s. 4; Rev., s. 3741; C.S., s. 7582; G.S., s. 146-51; 1959, c. 683, s. 1; 1993, c. 539, s. 1052; 1994, Ex. Sess., c. 24, s. 14(c).)

**§ 146-44. Card index system for grants.**

The Secretary of State shall install in his office a card index system for grants, and every warrant, plot, and survey that can be found shall be encased in separate envelopes. Each card and envelope shall show substantially the following:

_____	County _____	_____	Acres _____
Name _____			
Grant No. _____	Issued _____		
Grant Book _____	Page _____		
Entry No. _____	Entered _____		
File No. _____			
Location _____			
Remarks _____			

Such grant books as are old and falling to pieces shall be recopied, and whenever any part of the record of a grant is partly gone or destroyed the Secretary of State shall restore same, if he can do so with accuracy from the description in the plot and survey upon which the grant was issued and original record made. (1909, c. 505, ss. 1, 2, 3; C.S., s. 7584; G.S., s. 146-53; 1959, c. 683, s. 1.)

**§ 146-45. Grant of Moore's Creek Battlefield authorized.**

In conjunction with an act of Congress relating to the establishment of the Moore's Creek National Military Park (June 2, 1926, c. 448, s. 2, 44 Stat. 684; U. S. Code, Title 16, ss. 422-422(d)), the Governor of the State of North Carolina is hereby authorized to execute to the United States government a deed vesting the title to Moore's Creek Battlefield, Pender County, in said United States government on behalf of the State of North Carolina, to preserve the same as an historical battlefield: Provided that the consent of the State of North Carolina to such acquisition by the United States is upon the express condition that the State of North Carolina shall so far retain a concurrent jurisdiction with the United States over such battlefield as that all civil and

criminal processes issued from the courts of the State of North Carolina may be executed thereon in like manner as if this authority had not been given: Provided further, that the title to said battlefield so conveyed to the United States shall revert to the State of North Carolina unless said land is used for the purpose for which it is ceded. (1925, c. 40; 1927, c. 56; G.S., s. 146-54; 1959, c. 683, s. 1.)

## ARTICLE 12.

### *Correction of Grants.*

#### § 146-46. When grants may issue.

In any case where, under the provisions of this Subchapter, the Secretary of State is authorized to issue a grant or a duplicate grant to correct an error in a prior grant, the grant of correction shall be authenticated by the Governor, countersigned by the Secretary of State, and recorded in the office of the Secretary of State. The date of the entry and the number of the survey from the certificate of survey upon which the grant is founded shall be inserted in every such grant, and a copy of the plot shall be attached to the grant. (1777, c. 114, s. 10, P.R.; 1783, c. 185, s. 14, P.R.; 1796, c. 455, P.R.; 1799, c. 525, s. 2, P.R.; R.C., c. 42, ss. 12, 22; Code, ss. 2769, 2779; 1889, c. 522; Rev., ss. 1729, 1734, 1735; C.S., s. 7578; G.S., s. 146-47; 1959, c. 683, s. 1.)

#### CASE NOTES

*Editor's Note.* — The cases below were decided under corresponding sections of this Chapter as it stood before its revision in 1959, or under earlier statutes from which they were derived.

**A grant without the great seal of the State affixed does not show title** under that grant, as it is mandatory that the seal be affixed to authenticate the signature of the Governor and the Secretary of State. *Howell v. Hurley*, 170 N.C. 798, 83 S.E. 699 (1914).

**But a paper signed by the Governor and countersigned by the Secretary of State is admissible** in evidence to show title, even though it does not bear the great seal of the State. *Howell v. Hurley*, 170 N.C. 401, 87 S.E. 107 (1915).

**A grant of land is void if not signed by the Secretary of State.** *Den on Demise of Hunter v. Williams*, 8 N.C. 221 (1820).

**Place of Secretary of State's Signature**

**Immaterial.** — It is not necessary that the Secretary of State countersign at any special place on the grant to make it valid. *Richards v. W.M. Ritter Lumber Co.*, 158 N.C. 54, 73 S.E. 485 (1911), modified on other grounds on rehearing, 159 N.C. 455, 74 S.E. 1016 (1912).

**Effect of Attempt to Sign by Deputy Secretary.** — It is necessary that the Secretary of State sign the grant, and if he signs such grant it is valid, no matter if there has been an attempt to sign by one of the deputies. *Fowler v. Union Dev. Co.*, 158 N.C. 48, 73 S.E. 488 (1911).

**When Secretary of State Must Issue Grant.** — Where the claimant has complied with the law, and it appears from the warrant and survey that the entry-taker and surveyor have discharged their duties, the Secretary must issue the grant and has no discretion in the matter. *Wool v. Saunders*, 108 N.C. 729, 13 S.E. 294 (1891).

#### § 146-47. Change of county line before grant issued or registered.

All grants issued on entries for lands which were entered in one county, and before the issuing of the grants therefor or the registration of the grants, by the change of former county lines or the establishment of new lines, the lands so entered were placed in a county or in counties different from that in which they were situated, and the grants were registered in the county where the entries were made, shall be good and valid, and the registration of the grant shall have

the same force and effect as if they had been registered in the county where the lands were situated. All persons claiming under and by such grants may have them, or a certified copy of the same, from the office of the Secretary of State, or from the office of the register of deeds when they had been erroneously registered, recorded in the office of the register of deeds of the county or counties where the lands lie, and such registration shall have the same force and effect as if the grants had been duly registered in such county or counties. (1897, c. 37; Rev., s. 1736; C.S., s. 7585; G.S., s. 146-55; 1959, c. 683, s. 1.)

#### CASE NOTES

**When the entry and survey are made in one county**, registration of the deed in that county gives good title, even though a new county may have been organized including the land granted before the grant was registered.

McMillan v. Gambill, 106 N.C. 359, 11 S.E. 273 (1890); Wyman v. Taylor, 124 N.C. 426, 32 S.E. 740 (1899), decided prior to 1959 revision of this Chapter.

### § 146-48. Entries in wrong county.

Whereas many citizens of the State, on making entries of lands near the lines of the county wherein they reside, either for want of proper knowledge of the land laws of the State or not knowing the county lines, have frequently made entries and extended their surveys on such entries into other counties than those wherein they were made, and obtained grants on the same; and whereas doubts have existed with respect to the validity of the titles to lands situated as aforesaid, so far as they extend into other counties than those where the entries were made; for remedy whereof it is hereby declared that all grants issued on entries made for lands situated as aforesaid shall be good and valid against any entries thereafter made or grants issued thereon. (1805, c. 675, P.R.; 1834, c. 17; R.C., c. 42, s. 27; Code, s. 2784; Rev., s. 1737; C.S., s. 7586; G.S., s. 146-56; 1959, c. 683, s. 1.)

#### CASE NOTES

**For application and discussion of earlier statute**, see Harris v. Norman, 96 N.C. 59, 2 S.E. 72 (1887). See also Avery v. Strother, 1

N.C. 496 (1802); Lunsford v. Boston, 16 N.C. 483 (1830).

### § 146-49. Errors in surveys of plots corrected.

Whenever there may be an error by the surveyor in plotting or making out the certificate for the Secretary's office, or whenever the Secretary shall make a mistake in making out the courses agreeable to such returns, or misname the claimant, or make other mistake, so that such claimant shall be injured thereby, the claimant may prefer a petition to the superior court of the county in which the land lies, setting forth the injury which he might sustain in consequence of such error or mistake, with all the matters and things relative thereto. The court may hear testimony respecting the truth of the allegations set forth in the petition; and if it shall appear by the testimony, from the return of the surveyor or the error of the Secretary, that the patentee is liable to be injured thereby, the court shall direct the clerk to certify the facts to the Secretary of State, who shall file the same in his office, and correct the error in the patent, and likewise in the records of his office. The costs of such suit shall be paid by the petitioner, except when any person may have made himself a party to prevent the prayer of the petitioner being granted, in which case the costs shall be paid as the court may decree. The benefits granted by this section to the patentees of land shall be extended in all cases to persons claiming by,

from, or under their grants, by descent, devise, or purchase. When any error is ordered to be rectified, and the same has been carried through from the grant into mesne conveyances, the court shall direct a copy of the order to be recorded in the register's book of the county: Provided no such petition shall be brought but within three years after the date of the patent; and if brought after that time, the court shall dismiss the same, and all proceedings had thereon shall be null and of no effect: Provided further, nothing herein shall affect the rights or interest of any person claiming under a patent issued between the period of the date of the grant alleged to be erroneous and the time of filing the petition, unless such person shall have had due notice of the filing of the petition, by service of a copy thereof, and an opportunity of defending his rights before the court according to the course of the common law. (1790, c. 326, P.R.; 1798, c. 504, P.R.; 1804, c. 655, P.R.; 1814, c. 876, P.R.; R.C., c. 42, s. 28; Code, s. 2785; Rev., s. 1738; C.S., s. 7587; G.S., s. 146-57; 1959, c. 683, s. 1.)

### § 146-50. Resurvey of lands to correct grants.

Persons who have entered vacant lands shall not be defeated in their just claims by mistakes or errors in the surveys and plots furnished by surveyors. In every case where the purchase money has been paid into the State treasury within the time prescribed by law after entry, and the survey or plot furnished shall be found to be defective or erroneous, the party having thus made entry and paid the purchase price may obtain another warrant of survey from the register of deeds of the county where the land lies, and have his entry surveyed as is directed by existing laws. On presenting a certificate of survey and two fair plots thereof to the Secretary of State within six months after the payment of the purchase money, the party making such entry and paying such purchase price shall be entitled to receive, and it shall be the duty of the Secretary of State to issue to him, the proper grant for the lands so entered. (1901, c. 734; Rev., s. 1739; C.S., s. 7588; G.S., s. 146-58; 1959, c. 683, s. 1.)

### § 146-51. Lost seal replaced.

In all cases where the seal annexed to a grant is lost or destroyed, the Governor may, on the certificate of the Secretary of State that the grant was fairly obtained, cause the seal of the State to be affixed thereto. (1807, c. 727, P.R.; R.C., c. 42, s. 24; Code, s. 2781; Rev., s. 1740; C.S., s. 7589; G.S., s. 146-59; 1959, c. 683, s. 1.)

### § 146-52. Errors in grants corrected.

If in issuing any grant the number of the grant or the name of the grantee or any material words or figures suggested by the context have been omitted or not correctly written or given, or the description in the body of the grant does not correspond with the plot and description in the surveyor's certificate attached to the grant, or if in recording the grant in his office the Secretary of State has heretofore made or may hereafter make any mistake or omission by which any part of any grant has not been correctly recorded, the Secretary of State shall, upon the application of any party interested and the payment to him of his lawful fees, correct the original grant by inserting in the proper place the words, figures, or names omitted or not correctly given or suggested by the context; or if the description in the grant does not correspond with the surveyor's plot or certificate, the Secretary of State shall make the former correspond with the latter as the true facts may require. In case the party interested shall prefer it, the Secretary of State shall issue a duplicate of the original grant, including therein the corrections made; and in those cases in

which grants have not been correctly recorded, he shall make the proper corrections upon his records, or by rerecording, as he may prefer; and any grant corrected as aforesaid may be recorded in any county of the State as other grants are recorded, and have relation to the time of the entry and date of the grant as in other cases. (1889, c. 460; Rev., s. 1741; C.S., s. 7590; G.S., s. 146-60; 1959, c. 683, s. 1.)

#### CASE NOTES

**Power to Correct Errors Ministerial and Not Judicial.** — The power conferred upon the Secretary of State to correct errors in grants of State's land, by supplying omissions or correcting the names of grantees, material words or

figures, etc., confers on him only a ministerial authority and not a judicial power. *Herbert v. Union Dev. Co.*, 179 N.C. 662, 103 S.E. 380 (1920), decided prior to 1959 revision of this Chapter.

### § 146-53. Irregular entries validated.

Wherever persons have, prior to January 1, 1883, irregularly entered lands and have paid the fees required by law to the Secretary of State, and have obtained grants for such lands duly executed, the title to the lands shall not be affected by reason of such irregular entries; and the grants are hereby declared to be as valid as if such entries had been properly made. (1868-9, c. 100, s. 4; c. 173, s. 6; 1874-5, c. 48; Code, s. 2761; Rev., s. 1743; C.S., s. 7591; G.S., s. 146-61; 1959, c. 683, s. 1.)

#### CASE NOTES

**As to curing of irregularities in receiving grants from the State** under former statute from which this section is derived, see

*Wyman v. Taylor*, 124 N.C. 426, 32 S.E. 740 (1899).

### § 146-54. Grant signed by deputy Secretary of State validated.

Where State grants have heretofore been issued and the name of the Secretary of State has been affixed thereto by his deputy or chief clerk, or by anyone purporting to act in such capacity, such grants are hereby declared valid; but nothing herein contained shall interfere with vested rights. (1905, c. 512; Rev., s. 1744; C.S., s. 7592; G.S., s. 146-62; 1959, c. 683, s. 1.)

#### CASE NOTES

**No Interference with Vested Rights.** — Statute from which this section is derived did not interfere with vested rights. *Richards v. W.M. Ritter Lumber Co.*, 158 N.C. 54, 73 S.E. 485 (1911), modified on other grounds on rehearing, 159 N.C. 455, 74 S.E. 1016 (1912).

**valid if it conflicts with a prior grant**, but is valid as between the State and the grantee if there was no prior grant. *Richards v. W.M. Ritter Lumber Co.*, 158 N.C. 54, 73 S.E. 485 (1911), modified on other grounds on rehearing, 159 N.C. 455, 74 S.E. 1016 (1912).

**A grant countersigned by a clerk is not**

### § 146-55. Registration of grants.

Every person obtaining a grant shall, within two years after such grant is perfected, cause the same to be registered in the county where the land lies; and any person may cause to be there registered any certified copy of a grant from the office of the Secretary of State, which shall have the same effect as if the original had been registered. (1783, c. 185, s. 14, P.R.; 1796, c. 455, P.R.;

1799, c. 525, s. 2, P.R.; R.S., c. 42, s. 24; R.C., c. 42, s. 22; Code, s. 2779; Rev., s. 1729; C.S., s. 7579; G.S., s. 146-48; 1959, c. 683, s. 1.)

CASE NOTES

*Editor's Note.* — Most of the cases below were decided under corresponding sections of this Chapter as it stood before its revision in 1959, or under earlier statutes from which they were derived.

**Certificate of Secretary of State as Sufficient Evidence for Registration.** — The certificate of the Secretary of State of North Carolina, attached to a grant of land and attested by the great seal of the State, is sufficient evidence of its official character to warrant its registration without further proof. *Ray v. Stewart*, 105 N.C. 472, 11 S.E. 182 (1890); *Barcello v. Hapgood*, 118 N.C. 712, 24 S.E. 124 (1896); *Wyman v. Taylor*, 124 N.C. 426, 32 S.E. 740 (1899).

**Extension of Time for Registration.** —

Prior to 1885 the statutes provided that all grants, deeds, etc., be registered in the county wherein the land was situated within two years from the date thereof. With one or two omissions, the legislature uniformly extended the time for registration for two years. The Supreme Court with equal uniformity held that such instruments, when registered within two years from their date or within the extended period, were good and valid for all purposes from their date by relation. *Janney v. Blackwell*, 138 N.C. 437, 50 S.E. 857 (1905).

**Registration is not required to pass title under a grant.** *VEPCO v. Tillett*, 80 N.C. App. 383, 343 S.E.2d 188, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

§ 146-56. Time for registering grants extended.

All grants from the State of North Carolina of lands and interests in land heretofore made, which were required or allowed to be registered within a time specified by law, or in the grants themselves, may be registered in the counties in which the lands lie respectively at any time within six years from January 1, 1918, notwithstanding the fact that such specified time has already expired, and all such grants heretofore registered after the expiration of such specified time shall be taken and treated as if they had been registered within such specified time: Provided that nothing herein contained shall be held or have the effect to divest any rights, titles, or equities in or to the land covered by such grants, or any of them, acquired by any person from the State of North Carolina by or through any entry or grant made or issued since such grants were respectively issued, or those claiming through or under such subsequent entry or grant. (1893, c. 40; 1901, c. 175; 1905, c. 6; Rev., s. 1747; 1907, c. 805; 1909, c. 167; 1911, c. 182; Ex. Sess. 1913, cc. 27, 45; 1915, c. 170; 1917, c. 84; C.S., s. 7593; Ex. Sess. 1920, c. 78; 1921, c. 153; G.S., s. 146-63; 1959, c. 683, s. 1.)

CASE NOTES

*Editor's Note.* — The cases below were decided under corresponding sections of this Chapter as it stood before its revision in 1959, or under earlier statutes from which they were derived.

**It is not necessary that a grant from the State be registered to make it valid.** The retroactive statutes making grants registered after the times prescribed valid give good title

against a junior grant duly recorded. *Dew v. Pyke*, 145 N.C. 300, 59 S.E. 76 (1907).

**Where neither party has possession, the senior grant is valid against a junior grant duly recorded,** no matter how long registration may have been delayed by the senior grantee. *Janney v. Blackwell*, 138 N.C. 437, 50 S.E. 857 (1905).

§ 146-57. Time for registering grants and other instruments extended.

The time is hereby extended until September 1, 1926, for the proving and

registering of all deeds of gift, grants from the State, or other instruments of writing heretofore executed and which are permitted or required by law to be registered, and which were or are required to be proved and registered within a limited time from the date of their execution; and all such instruments which have heretofore been or may be probated and registered before the expiration of the period herein limited shall be held and deemed, from and after the date of such registration, to have been probated and registered in due time, if proved in due form, and registration thereof be in other respects valid: Provided that nothing in this section shall be held or deemed to validate or attempt to validate or give effect to any informal instrument; and provided further that this section shall not affect pending litigation: Provided further that nothing herein contained shall be held deemed to place any limitation upon the time allowed for the registration of any instrument where no such limit is now fixed by law. (Ex. Sess. 1924, c. 20; G.S., s. 146-64; 1959, c. 683, s. 1.)

#### CASE NOTES

**Deed of Gift Void Under § 47-26 Not Revivable by Later Curative Statute.** — Where a mother made a deed of gift of her lands to her son, who failed to have it registered within the time required by § 47-26, and it was for that reason void, a later curative statute

extending the time for registration could not revive the void deed to the son. Booth v. Hairston, 193 N.C. 278, 136 S.E. 879, 57 A.L.R. 1186 (1927), petition for rehearing dismissed, 195 N.C. 8, 141 S.E. 480 (1928), decided prior to 1959 revision to this Chapter.

### § 146-58. Time for registering grants further extended.

The time for the registration of grants issued by the State of North Carolina is hereby extended for a period of two years from January 1, 1925: Provided that nothing herein contained shall be held or have the effect to divest any rights, titles, or equities in or to the land covered by such grants, or any of them, acquired by any person from the State of North Carolina by or through any entry or grant made or issued since such grants were respectively issued, or those claiming through or under such subsequent entry or grant. (1925, c. 97; G.S., s. 146-65; 1959, c. 683, s. 1.)

### § 146-59. Time for registering grants or copies extended.

The time for the registration of grants issued by the State of North Carolina, or copies of such grants duly certified by the Secretary of State under his official seal, be and the same hereby is extended for a period of two years from January 1, 1927, and such grants or copies thereof duly certified as above set forth may be registered within such time as fully as the original might have been registered at any time heretofore: Provided that nothing herein contained shall be held or have the effect to divest any rights, titles, or equities in or to the land covered by such grants or any of them, acquired by any person from the State of North Carolina by or through any entry or grant made or issued since such grants were respectively issued, or those claiming through or under such subsequent entry or grant. (1927, c. 140; G.S., s. 146-66; 1959, c. 683, s. 1.)

### § 146-60. Further extension of time for registering grants or copies for two years from January 1, 1947.

The time for the registration of grants issued by the State of North Carolina, or copies of such grants duly certified by the Secretary of State under his

official seal, be and the same hereby is extended for a period of two years from January 1, 1947, next ensuing, and such grants or copies thereof duly certified as above set forth may be registered within such time as fully as the original might have been registered at any time heretofore: Provided that nothing herein contained shall be held or have the effect to divest any rights, titles, or equities in or to the land covered by such grants or any of them acquired by any person from the State of North Carolina by or through any entry or grant made or issued since such grants were respectively issued, or those claiming through or under such subsequent entry or grant. (1947, c. 99; G.S., s. 146-66.1; 1959, c. 683, s. 1.)

#### CASE NOTES

**Registration is not required to pass title under a grant.** VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

### § 146-60.1. Further extension of time for registering grants or copies for four years from January 1, 1977.

The time for the registration of grants issued by the State of North Carolina, or copies of such grants duly certified by the Secretary of State under his official seal, be and the same hereby is extended for a period of four years from January 1, 1977, and such grants or copies thereof duly certified as above set forth may be registered within such time as fully as the original might have been registered at any time heretofore: Provided that nothing herein contained shall be held or have the effect to divest any rights, titles, or equities in or to the land covered by such grants or any of them acquired by any person from the State of North Carolina by or through any entry or grant made or issued since such grants were respectively issued, or those claiming through or under such subsequent entry or grant. (1977, c. 701.)

#### CASE NOTES

**Registration is not required to pass title under a grant.** VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

## ARTICLE 13.

### *Grants Vacated.*

### § 146-61. Civil action to vacate grant.

When any person claiming title to lands under a grant or patent from the King of Great Britain, any of the lords proprietors of North Carolina, or from the State of North Carolina, shall consider himself aggrieved by any grant or patent issued or made since July 4, 1776, to any other person, against law or obtained by false suggestions, surprise, or fraud, the person aggrieved may bring a civil action in the superior court for the county in which such land may be, together with an authenticated copy of such grant or patent, briefly stating the grounds whereon such patent should be repealed and vacated, whereupon the grantee, patentee, or the person, owner, or claimant under such grant or patent, shall be required to show cause why the same shall not be repealed and vacated. (R.C., c. 42, s. 29; Code, s. 2786; Rev., s. 1748; C.S., s. 7594; G.S., s. 146-67; 1959, c. 683, s. 1.)

**Legal Periodicals.** — For article, "Removing Local Elected Officials From Office in North

Carolina," see 16 Wake Forest L. Rev. 547 (1980).

#### CASE NOTES

**Editor's Note.** — *The cases below were decided under corresponding sections of this Chapter as it stood before its revision in 1959, or under earlier statutes from which they were derived.*

**Collateral Attack on Grant.** — If land is not subject to entry, the grant is void, and may be attacked collaterally. *Janney v. Blackwell*, 138 N.C. 437, 50 S.E. 857 (1905).

**For case holding that a grant could only be vacated by proceedings under former statute,** see *Crow v. Holland*, 15 N.C. 417 (1834); *McNamee v. Alexander*, 109 N.C. 242, 13 S.E. 777 (1891); *Kimsey v. Munday*, 112 N.C. 816, 17 S.E. 583 (1893).

**Plaintiff Must Have an Interest in Land Claimed.** — An action could not be had under the statute from which this section was derived unless it was made to appear that the plaintiff had an interest in the land claimed by the defendant. *State ex rel. Jones v. Riggs*, 154 N.C. 281, 70 S.E. 465 (1911); *Wadsworth v. Cozad*, 175 N.C. 15, 94 S.E. 670 (1917).

**Where the State has no interest in the**

**land, an action to vacate a grant must be brought by the party in interest** in his own name and at his own expense. *State ex rel. Attorney Gen. v. Bland*, 123 N.C. 739, 31 S.E. 475 (1898).

**Fraud Practiced on State Not Grounds to Set Aside Grant.** — A grant cannot be set aside at the suit of a junior grantee on the ground of fraud practiced on the State. *Henry v. McCoy*, 131 N.C. 586, 42 S.E. 955 (1902).

**Action Involving Land in Two Counties.** — When it appeared in an action for the cancellation of several grants, some of which were issued in a different county from that wherein the action was brought, that the allegation of fraud and false suggestion involved one and the same transaction, affecting each and all the grants, the subject of the litigation, it was unnecessary to bring a separate action in respect to the grants issued in the other county, since some of the lands which were the subject of the action were in the county wherein the action was brought. *Kanawha Hardwood Co. v. Waldo*, 161 N.C. 196, 76 S.E. 680 (1912).

### § 146-62. Judgment recorded in Secretary of State's office.

If, upon verdict or demurrer, the court believe that the patent or grant was made against law or obtained by fraud, surprise, or upon untrue suggestions, it may vacate the same; and a copy of such judgment, after being recorded at large, shall be filed by the petitioner in the Secretary of State's office, where it shall be recorded in a book kept for that purpose; and the Secretary shall note in the margin of the original record of the grant the entry of the judgment, with a reference to the record in his office. (R.C., c. 42, s. 30; Code, s. 2787; Rev., s. 1749; C.S., s. 7595; G.S., s. 146-68; 1959, c. 683, s. 1.)

### § 146-63. Action by State to vacate grants.

An action may be brought by the Attorney General in the name of the State for the purpose of vacating or annulling letters patent granted by the State, in the following cases:

- (1) When he has reason to believe that such letters patent were obtained by means of some fraudulent suggestion or concealment of a material fact, made by the person to whom the same were issued or made, or with his consent or knowledge; or
- (2) When he has reason to believe that such letters patent were issued through mistake, or in ignorance of a material fact; or
- (3) When he has reason to believe that the patentee, or those claiming under him, have done or omitted an act in violation of the terms and conditions on which the letters patent were granted, or have by any other means forfeited the interest acquired under the same. (C. C. P., s. 367; Code, s. 2788; Rev., s. 1750; C.S., s. 7596; G.S., s. 146-69; 1959, c. 683, s. 1.)

**Legal Periodicals.** — For note on defining public trust doctrine in North Carolina, see 49 navigable waters and the application of the N.C.L. Rev. 888 (1971).

CASE NOTES

*Editor's Note.* — *The cases below were decided under corresponding sections of this Chapter as it stood before its revision in 1959, or under earlier statutes from which they were derived.*

**State Must Be Interested Party.** — The State could only bring an action under the statute from which this section is derived to vacate a grant when title would vest in the State upon cancellation of the grant. State ex rel. Attorney Gen. v. Bland, 123 N.C. 739, 31 S.E. 475 (1898).

**Attorney General Must Bring Action.** — The right to bring an action to set aside a grant because of fraud practiced on the State must be brought by the Attorney General in the name of the State, and cannot be brought by any other person. Henry v. McCoy, 131 N.C. 586, 42 S.E. 955 (1902); Jones v. Riggs, 154 N.C. 281, 70 S.E. 465 (1911).

**Where a grant has been made in strict**

**compliance with the law, rights of property have been acquired** which cannot be taken away, even by the State, in the absence of an allegation of fraud or mistake, except after compensation and under the principle of eminent domain. State ex rel. Blount v. Spencer, 114 N.C. 770, 19 S.E. 93 (1894).

**A license to sell liquor** was not a letter patent to be vacated by quo warranto under the statute from which this section is derived. Hargett v. Bell, 134 N.C. 394, 46 S.E. 749 (1904).

**Proceeding by the Attorney General to vacate the charter of a corporation** could not be brought under the statute from which this section is derived, or because of any authority vested by such statute, but must be brought under Chapter 55. Attorney Gen. v. Holly Shelter R.R., 134 N.C. 481, 46 S.E. 959 (1904).

SUBCHAPTER IV. MISCELLANEOUS.

ARTICLE 14.

*General Provisions.*

§ 146-64. Definitions.

As used in this Chapter:

- (1) "Acquired lands" means all State lands, title to which has been acquired by the State or by any State agency by purchase, devise, gift, condemnation, or adverse possession.
- (2) "Escheated lands" means all State lands, title to which has been acquired by escheat.
- (3) "Land" means real property, buildings, space in buildings, timber rights, mineral rights, rights-of-way, easements, options, and all other rights, estates, and interests in real property.
- (4) "Navigable waters" means all waters which are navigable in fact.
- (5) "State agency" includes every agency, institution, board, commission, bureau, council, department, division, officer, and employee of the State, but does not include counties, municipal corporations, political subdivisions of the State, county or city boards of education, or other local public bodies. The term "State agency" does not include any private corporation created by act of the General Assembly. In case of doubt as to whether a particular agency, corporation, or institution is a State agency for the purposes of this Chapter, the Attorney General, upon request of the Governor and Council of State, shall make a determination of the issue. Upon a finding by the Attorney General that an agency, corporation, or institution is not a State agency for the purpose of this Chapter, the Governor and Council of State may execute a deed or other appropriate instrument releasing and quit-

- claiming all title and interest of the State in the lands of that agency, corporation, or institution.
- (6) "State lands" means all land and interests therein, title to which is vested in the State of North Carolina, or in any State agency, or in the State to the use of any agency, and specifically includes all vacant and unappropriated lands, swamplands, submerged lands, lands acquired by the State by virtue of being sold for taxes, escheated lands, and acquired lands.
  - (7) "Submerged lands" means State lands which lie beneath
    - a. Any navigable waters within the boundaries of this State, or
    - b. The Atlantic Ocean to a distance of three geographical miles seaward from the coastline of this State.
  - (8) "Swamplands" means lands too wet for cultivation except by drainage, and includes
    - a. All State lands which have been or are known as "swamp" or "marsh" lands, "pocosin bay," "briary bay" or "savanna," and which are a part of one swamp exceeding 2,000 acres in area, or which are a part of one swamp 2,000 acres or less in area which has been surveyed by the State; and
    - b. All State lands which are covered by the waters of any state-owned lake or pond.
  - (9) "Vacant and unappropriated lands" means all State lands title to which is vested in the State as sovereign, and land acquired by the State by virtue of being sold for taxes, except swamplands as hereinafter defined.
  - (10) For purposes of this Subchapter, "deep water" means the depth reasonably necessary to provide and allow reasonable access for all vessels traditionally used in the main watercourse area as of the time of the initial easement application. (1854-5, c. 21; R.C., c. 42, s. 1; Code, s. 2751; 1891, c. 302; Rev., ss. 1693, 1695; C.S., ss. 7540, 7542; G.S., ss. 146-1, 146-4; 1959, c. 683, s. 1; 1969, c. 1164; 1995, c. 529, s. 4.)

**Cross References.** — For requirement that all tax supervisors upon request furnish the State a report on all properties listed in the name of unknown owners in order to promote the discovery of State lands as defined by subdivision (6) of this section, see § 105-302.1.

**Editor's Note.** — Session Laws 1995, c. 529, s. 5, provides in part that nothing in this act shall require the adoption of rules to implement the provisions therein, and further provides that authorization established under this act applies only to the Department of Administration and shall not be used by any other agency

to administer or regulate activities affecting the public trust.

**Legal Periodicals.** — For note on defining navigable waters and the application of the public trust doctrine in North Carolina, see 49 N.C.L. Rev. 888 (1971).

For article, "Public Rights and Coastal Zone Management," see 51 N.C.L. Rev. 1 (1972).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

#### CASE NOTES

**Editor's Note.** — *Most of the cases below were decided under corresponding sections of this Chapter as it stood before its revision in 1959, or under earlier statutes from which they were derived.*

**Littoral rights do not include ownership of the foreshore.** The littoral owner may, however, in exercise of his right of access, construct a pier in order to provide passage

from the upland to the sea. But the passage under the pier must be free and substantially unobstructed over the entire width of the foreshore. This means that from low to high water mark it must be at such a height that the public will have no difficulty in walking under it when the tide is low or in going under it in boats when the tide is high. *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985).

**Ownership of Foreshore Remains in State.** — There is nothing in this section or § 146-3 to change the general rule that ownership of the foreshore remains in the State. On the contrary, it is noteworthy that a special class was created for the protection of the foreshore and the marginal seas. Therefore, littoral rights do not include ownership of the foreshore. *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 177 S.E.2d 513 (1970). See also *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985).

Littoral rights do not include ownership of the foreshore. The littoral owner may, however, in exercise of his right of access, construct a pier in order to provide passage from the upland to the sea. But the passage under the pier must be free and substantially unobstructed over the entire width of the foreshore. This means that from low to high water mark it must be at such a height that the public will have no difficulty in walking under it when the tide is low or in going under it in boats when the tide is high. *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985).

**All watercourses are regarded as navigable in law that are navigable in fact.** *Swan Island Club, Inc. v. White*, 114 F. Supp. 95 (E.D.N.C. 1953), aff'd, 209 F.2d 698 (4th Cir. 1954).

**Grant of Land Under Navigable Waters Void in Absence of Specific Authority.** — In the absence of specific authority from the legislature, the State at no time has the power to grant land under navigable waters, and all of such grants are void. *Swan Island Club, Inc. v. White*, 114 F. Supp. 95 (E.D.N.C. 1953), aff'd, 209 F.2d 698 (4th Cir. 1954).

**No Right to Make a Grant Impeding Navigation.** — In respect to navigable waters, the State has no right to grant or convey the land under such waters for any purpose which will destroy or materially impede the use of such waters for navigation. *Home Real Estate Loan & Ins. Co. v. Parmele*, 214 N.C. 63, 197 S.E. 714 (1938).

**Governor Held Unauthorized to Agree to Boundary Line over Land Under Navigable Waters.** — The Governor of North Carolina was without authority in 1927 to agree as to a private owner's boundary line over lands under navigable waters, as the statute at the time prohibited the grant of or entry upon such lands. *Swan Island Club, Inc. v. White*, 114 F. Supp. 95 (E.D.N.C. 1953), aff'd, 209 F.2d 698 (4th Cir. 1954).

**Decree in Torrens Proceeding Adjudg-**

**ing Ownership in Land Under Navigable Water Held Open to Attack.** — Insofar as a decree in a Torrens proceeding adjudged the plaintiff the owner in fee of shoal lands under navigable water, it transcended the power of the court under the law, and was therefore open to collateral attack. *Swan Island Club, Inc. v. White*, 114 F. Supp. 95 (E.D.N.C. 1953), aff'd, 209 F.2d 698 (4th Cir. 1954).

**An entry made to swampland when the body contained more than 2,000 acres was void**, as was a grant under such entry. *State Bd. of Educ. v. Roanoke R.R. & Lumber Co.*, 158 N.C. 313, 73 S.E. 994 (1912). See *Home Real Estate Loan & Ins. Co. v. Parmele*, 214 N.C. 63, 197 S.E. 714 (1938).

**Meaning of "Swamplands."** — Swamplands, within the meaning of this section, are those too wet for cultivation except by drainage. *Beer v. Whiteville Lumber Co.*, 170 N.C. 337, 86 S.E. 1024 (1915).

**Swamplands of two creeks may be separate and not subject to the same application of the statute**, even though it appears that sometimes during freshets and high water they are all covered with one sheet of water. *Beer v. Whiteville Lumber Co.*, 170 N.C. 337, 86 S.E. 1024 (1915).

**A tract of land within the area of "swamplands" coming within the meaning of the statute need not necessarily be free from knolls or higher and drier places.** *State Bd. of Educ. v. Roanoke R.R. & Lumber Co.*, 158 N.C. 313, 73 S.E. 994 (1912).

**For case holding that tract in question was not "swampland,"** see *Resort Dev. Co. v. Parmele*, 235 N.C. 689, 71 S.E.2d 474 (1952), overruled in part, *Gwathmey v. State ex rel. Dep't of Env't, Health & Natural Resources*, 342 N.C. 287, 464 S.E.2d 674 (1995).

**Tidelands Filled in and Reclaimed by Purchaser.** — The fact that tidelands conveyed by the State Board of Education were thereafter filled in and reclaimed by the purchaser did not divest the title of the purchaser, since the conveyance was of the fee and was not an easement in the lands. *Home Real Estate Loan & Ins. Co. v. Parmele*, 214 N.C. 63, 197 S.E. 714 (1938).

**Lands once granted by the State to individual citizens do not become "vacant lands" within the meaning of the statute where the State subsequently acquires title to them but abandons the actual use to which they were put.** *State v. Bevers*, 86 N.C. 588 (1882).

## § 146-65. Exemptions from Chapter.

None of the provisions of Chapter 146 shall apply to:

- (1) The acquisition of highway rights-of-way, borrow pits, or other inter-

ests or estates in land acquired for the same or similar purposes, or to the disposition thereof, by the Board of Transportation; or

- (2) The North Carolina State Ports Authority, the authority and powers thereof set forth or provided for by G.S. 143B-452 through G.S. 143B-467 or to the exercise of all or any of such authority and powers,

Nor shall the provisions of Chapter 146 abrogate or alter any otherwise valid contract or agreement heretofore made and entered into by the State of North Carolina or by any of its subdivisions or agencies during the term or period of such contract or agreement. (1957, c. 584, s. 6; G.S., s. 146-112; 1959, c. 683, s. 1; 1973, c. 507, s. 5; 1993, c. 553, s. 52.3.)

**§ 146-66. Voidability of transactions contrary to Chapter.**

Any sale, lease, rental, or other disposition of State lands or of any interest or right therein, made or entered into contrary to the provisions of this Chapter, shall be voidable in the discretion of the Governor and Council of State. (1957, c. 584, s. 6; G.S., s. 146-111; 1959, c. 683, s. 1.)

**CASE NOTES**

**An agreement to lease should be governed by the same statutory provisions as a lease itself.** To hold otherwise would defeat the legislative intent to protect the State and taxpayers from liability for the unauthorized

and invalid agreements of the State's numerous agents. *Stewart v. Graham*, 72 N.C. App. 676, 325 S.E.2d 53, cert. denied, 313 N.C. 611, 330 S.E.2d 616 (1985).

**§ 146-67. Governor to employ persons.**

The Governor may employ persons to perform such services as may be necessary to carry out the provisions of this Chapter, and he shall fix the compensation to be paid for such services. All expenditures for such services shall be paid from the State Land Fund on order of the Director of the Budget, or the officer designated by him to issue such orders. (1959, c. 683, s. 1.)

**§ 146-68. Statutes of limitation.**

The provisions of G.S. 1-35, 1-36, and 1-37 are made applicable to this Chapter. (1959, c. 683, s. 1.)

**Legal Periodicals.** — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims

to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

**§ 146-69. Service on State in land actions.**

In all actions and special proceedings brought by or against the State or any State agency with respect to State land or any interest therein, service of process upon the Secretary of Administration, with delivery to him of copies for the Attorney General and for the administrative head of each State agency known by the party in whose behalf service is made to have an interest in the land which is the subject of the action or proceeding, shall constitute service upon the State for all purposes. (1959, c. 683, s. 1; 1975, c. 879, s. 46.)

**§ 146-70. Institution of land actions by the State.**

Every action or special proceeding in behalf of the State or any State agency with respect to State lands or any interest therein, or with respect to land

being condemned by the State, shall be brought by the Attorney General in the name of the State, upon the complaint of the Secretary of Administration. (1959, c. 683, s. 1; 1975, c. 879, s. 46.)

#### CASE NOTES

**Quoted** in *State v. Brooks*, 279 N.C. 45, 181 S.E.2d 553 (1971).

### ARTICLE 15.

#### *State Land Fund.*

#### § 146-71. State Land Fund created.

The State Land Fund, which is hereby created, shall consist of the moneys required by this Chapter to be paid into that fund, together with such amounts as the General Assembly may appropriate thereto. (1959, c. 683, s. 1.)

#### § 146-72. Purpose.

The State Land Fund may, in accordance with rules and regulations adopted by the Governor and approved by the Council of State, be used for the following purposes:

- (1) To pay any expenses incurred in carrying out the duties and responsibilities created by the provisions of this Chapter.
- (2) For the acquisition of land, when appropriation is made for that purpose by the General Assembly. (1959, c. 683, s. 1.)

#### § 146-73. Administration.

The State Land Fund shall be administered by the Department of Administration, in accordance with rules and regulations adopted by the Governor and approved by the Council of State. All expenditures from the fund shall be made upon order of the Director of the Budget, or of the officer designated by him to issue such orders. (1959, c. 683, s. 1.)

### ARTICLE 16.

#### *Form of Conveyances.*

#### § 146-74. Approval of conveyances.

Every proposed conveyance in fee, including conveyances by gift, of State lands shall be submitted to the Governor and Council of State for their approval. If the proposed conveyance is of State lands with an appraised value of at least twenty-five thousand dollars (\$25,000), and it is for other than a transportation purpose, the Council of State shall consult with the Joint Legislative Commission on Governmental Operations before making a final decision on the proposed conveyance. Upon approval of the proposed conveyance in fee by the Governor and Council of State, a deed for the land being conveyed shall be executed in the manner prescribed in this Article. (1957, c.

584, s. 7; G.S., ss. 143-147; 1959, c. 683, s. 1; 1983 (Reg. Sess., 1984), c. 1116, s. 97; 1993, c. 561, s. 32(b).)

**Editor's Note.** — Session Laws 1993, c. 561, which amended this section, in s. 115 provides: "Notwithstanding the provisions of G.S. 146-74, the Division of Forest Resources, Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources], shall transfer in fee simple by gift the East Robeson Fire Tower and the approximately .91827 acres of land on which the tower is located approximately eight

miles east of Lumberton on Highway 41 in East Howellsville Township, Robeson County, this being the property described in the deed dated March 7, 1935, and recorded in Deed Book 8-N, page 219, Robeson County Registry to the East Howellsville Volunteer Fire Department, Inc. The transfer under this section shall be evidenced by a deed executed in accordance with G.S. 146-75 and registered in accordance with G.S. 146-77."

#### CASE NOTES

**Stated** in *Lewis v. White*, 287 N.C. 625, 216 S.E.2d 134 (1975).

### § 146-75. Execution; signature; attestation; seal.

Each such conveyance in fee shall be in the usual form of deeds of conveyance of real property and shall be executed in the name of the State of North Carolina, signed in the name of the State by the Governor, and attested by the Secretary of State; and the great seal of the State of North Carolina shall be affixed thereto. (1929, c. 143, s. 2; G.S., s. 143-148; 1959, c. 683, s. 1.)

### § 146-76. Exclusive method of conveying State lands.

The manner and method of conveying State lands herein set out shall be the exclusive and only method of conveying State lands in fee. Any conveyance thereof by any other person or executed in any other manner or by any other method shall not be effective to convey the interest or estate of the State in such land. (1929, c. 143, s. 4; G.S., s. 143-150; 1959, c. 683, s. 1.)

### § 146-77. Admission to registration in counties.

Each such conveyance shall be admitted to registration in the several counties of the State upon the probate required by law for deeds of corporations. (1929, c. 143, s. 3; G.S., s. 143-149; 1959, c. 683, s. 1.)

### § 146-78. Validation of conveyances of state-owned lands.

All conveyances heretofore made by the Governor, attested by the Secretary of State, and authorized by the Council of State, in the manner provided by G.S. 146-74 and 146-75 of any lands, the title to which was vested in the State for the use of any State institution, department, or agency, or vested in the State for any other purpose, are hereby ratified and validated. (1917, c. 129; C.S., s. 7524; 1951, c. 18; 1957, c. 584, s. 7; G.S., s. 143-146; 1959, c. 683, s. 1.)

#### CASE NOTES

**Quoted** in *Gwathmey v. State ex rel. Dep't of Env't, Health & Natural Resources*, 342 N.C. 287, 464 S.E.2d 674 (1995).

**Stated** in *Lewis v. White*, 287 N.C. 625, 216 S.E.2d 134 (1975).

## ARTICLE 17.

*Title in State.***§ 146-79. Title presumed in the State; tax titles.**

In all controversies and suits for any land to which the State or any State agency or its assigns shall be a party, the title to such lands shall be taken and deemed to be in the State or the State agency or its assigns until the other party shall show that he has a good and valid title to such lands in himself.

In all controversies touching the title or the right of possession of any lands claimed by the State or by any State agency under any sale for taxes at any time heretofore made or which hereafter may be made, the deed of conveyance made by the sheriff or other officer or person making such sale, or who may have been authorized to execute such deed, shall be presumptive evidence that the lands therein mentioned were, at the time the lien for such taxes attached and at the time of the sale, the property of the person therein designated as the delinquent owner; that such lands were subject to taxation; that the taxes were duly levied and assessed; that the lands were duly listed; that the taxes were due and unpaid; that the manner in which the listing, assessment, levy, and sale were conducted was in all respects as the law directed; that all the prerequisites of the law were duly complied with by all officers or persons who had or whose duty it was to have had any part or action in any transaction relating to or affecting the title conveyed or purported to be conveyed by the deed, from the listing and valuation of the property up to the execution of the deed, both inclusive; and that all things whatsoever required by law to make a good and valid sale and vest the title in the purchaser were done, and that all recitals in such deed contained are true as to each and every of the matters so recited.

In all controversies and suits involving the title to real property claimed and held under and by virtue of a deed made substantially as above, the person claiming title adverse to the title conveyed by such deed shall be required to prove, in order to defeat such title, either that the real property was not subject to taxation for the year or years named in the deed, that the taxes had been paid before the sale, that the property had been redeemed from the sale according to the provisions of law, and that such redemption was had or made for the use or benefit of persons having the right of redemption under the laws of this State, or that there had been an entire omission to list or assess the property or to levy the taxes or to sell the property; but no person shall be permitted to question the title acquired under such sale and deed without first showing that he or the person under whom he claims title had title to the property at the time of the sale, and that all taxes due upon the property have been paid by such person or the person under whom he claims title. (1842-3, c. 36, s. 3; R.C., c. 66, s. 24; Code, s. 2527; 1889, c. 243; Rev., s. 4047; C.S., s. 7617; G.S., s. 146-90; 1959, c. 683, s. 1.)

**Legal Periodicals.** — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For article, "The Pearl in the Oyster: The Public Trust Doctrine in North Carolina," see 12 Campbell L. Rev. 23 (1989).

## CASE NOTES

*Editor's Note.* — *Some of the cases below were decided under corresponding sections of this Chapter as it stood before its revision in 1959, or under earlier statutes from which they were derived.*

**This section is not affected by the Real Property Marketable Title Act, § 47B-1 et seq.** Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

**This section does not authorize a "taking" of property.** State v. Chadwick, 31 N.C. App. 398, 229 S.E.2d 255 (1976).

**This section applies where title to land is in dispute,** not where the State has conceded that defendant owns the land, but is attempting to establish the existence of an easement over it. Concerned Citizens of Brunswick County Taxpayer's Ass'n v. State ex rel. Rhodes, 95 N.C. App. 38, 381 S.E.2d 810, rev'd on other grounds, 329 N.C. 37, 404 S.E.2d 677 (1991).

**The operation of this section does not effect an uncompensated taking.** State v. Taylor, 63 N.C. App. 364, 304 S.E.2d 767 (1983), cert. denied and appeal dismissed, 310 N.C. 311, 312 S.E.2d 655 (1984).

**Presumption That Officials Have Done Their Duty Upheld.** — It is entirely proper and competent for the State to provide that the presumption that public officials have done their duty should apply, and throw upon any adverse claimant the burden of proving the contrary. State Bd. of Educ. v. Remick, 160 N.C. 562, 76 S.E. 627 (1912), distinguishing King v. Cooper, 128 N.C. 347, 38 S.E. 924 (1901), petition for rehearing dismissed, 130 N.C. 741, 41 S.E. 1038 (1902); Matthews v. Fry, 141 N.C. 582, 54 S.E. 379 (1906); Warren v. Williford, 148 N.C. 474, 62 S.E. 697 (1908); and Rexford v. Phillips, 159 N.C. 213, 74 S.E. 337 (1912).

**The statutory presumption created by this section is not unconstitutional.** State v. Taylor, 60 N.C. App. 673, 300 S.E.2d 42, cert. denied and appeal dismissed, 308 N.C. 547, 303 S.E.2d 823 (1983), appeal dismissed, 465 U.S. 1075, 104 S. Ct. 1432, 79 L. Ed. 2d 756 (1984).

The presumption created by this section is reasonable since title to all lands in North Carolina, except those previously granted by the Crown, originated from the State, and the State has ultimate title to the soil. In addition, the statute does not authorize a "taking" of property. The presumption of title in the State lasts only until the rival claimant establishes valid title in himself. State v. Taylor, 60 N.C. App. 673, 300 S.E.2d 42, cert. denied and appeal dismissed, 308 N.C. 547, 303 S.E.2d 823 (1983), appeal dismissed, 465 U.S. 1075, 104 S. Ct. 1432, 79 L. Ed. 2d 756 (1984).

The State has the ultimate title to the soil.

Since title to land is originally acquired from the State, it is reasonable to assume that, absent proof otherwise, title to any parcel within its boundaries reposes there. Therefore the presumption of title in the State created under this section passes constitutional muster. State v. Taylor, 63 N.C. App. 364, 304 S.E.2d 767 (1983), cert. denied and appeal dismissed, 310 N.C. 311, 312 S.E.2d 655 (1984).

**Purpose of Presumption.** — The presumption created by this section in favor of the State was enacted to avoid undesirable and chaotic consequences which would result if title to the subject land were in limbo. Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

**Title Is Taken to Be in State in Action Brought Thereby.** — In an action instituted by the State to remove a cloud on title to a tract of coastal marshland, title to the lands in controversy shall be taken to be in the State, unless and until the other party shows that he has a good and valid title to such lands in himself. State v. Brooks, 279 N.C. 45, 181 S.E.2d 553 (1971).

Under former § 146-90, when it was shown that land was swampland and within a swamp of more than 2,000 acres, the law presumed that the Board of Education was the owner thereof. State Bd. of Educ. v. Makely, 139 N.C. 31, 51 S.E. 784 (1905); State Bd. of Educ. v. Roanoke R.R. & Lumber Co., 158 N.C. 313, 73 S.E. 994 (1912).

**But the presumption of title in the State lasts only until the rival claimant establishes valid title** in himself. State v. Chadwick, 31 N.C. App. 398, 229 S.E.2d 255 (1976).

The presumption of title lasts only until good title is shown to be in another party. New Hanover Shingle Mills Co. v. John L. Roper Lumber Co., 178 N.C. 221, 100 S.E. 332 (1919).

**Defendants must carry the burden of proof** by showing a connected chain of title from the sovereign to them for the identical lands claimed by them. State v. Brooks, 279 N.C. 45, 181 S.E.2d 553 (1971).

In suits for land in which the State or a State agency is a party, the burden of proof is on the party seeking to prove title against the State. Taylor v. Johnston, 27 N.C. App. 186, 218 S.E.2d 500.

**Title Held Vested in State on Failure of Defendants to Meet Burden.** — Where defendants failed to show they had a good and valid title to the subject land in themselves, and the identity and location of the subject land was established by stipulation, as between the State of North Carolina and defendants, this section vested title in the State, and the court erred in submitting the issue to the jury, the

question for decision being a matter of law for the court. *State v. Brooks*, 279 N.C. 45, 181 S.E.2d 553 (1971).

**Description "to the high watermark" of nonnavigable arm of the sea**, a broad shallow sound, restricted or limited conveyance to correctly located line of mean high water as indicated on the ground, particularly where title to marshlands was at the time lots were

laid off held by the State, subject to disposition by State Board of Education, since under former § 146-90 title to swamplands was presumed to be in the Board or its assignees until a valid title to such land was shown otherwise. *Kelly v. King*, 225 N.C. 709, 36 S.E.2d 220 (1945).

**Applied** in *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 369 S.E.2d 825 (1988).

## § 146-80. Statute of limitations.

No statute of limitations shall affect the title or mar the action of the State, or of any State agency, or of its assigns, unless the same would protect the person holding and claiming adversely against the State. Neither the State nor any State agency, nor its assigns, shall commence any action for the recovery of damages for timber cut and removed from lands owned by the State or by any State agency or for any other act of trespass committed on such lands, more than 10 years after the occurrence of such cutting, removal, or other act of trespass. The provisions of this section shall not have the effect of reviving any cause of action which was, at the date of ratification of this Chapter, barred by any applicable statute of limitations. (1842, c. 36, s. 5; R.C., c. 66, s. 25; Code, s. 2528; Rev., s. 4048; 1917, c. 287; C.S., s. 7618; G.S., s. 146-91; 1959, c. 683, s. 1.)

### CASE NOTES

**Editor's Note.** — *The cases below were decided under corresponding sections of this Chapter as it stood before its revision in 1959, or under earlier statutes from which they were derived.*

**As to purpose of statute from which this section is derived**, see *Virginia-Carolina Tie & Wood Co. v. Dunbar*, 106 F.2d 383 (4th Cir. 1939).

**Board of Education Not Barred by Statute of Limitations.** — In an action for land brought by the State Board of Education, the plaintiff was not barred by the statute of limitations, which does not run in such cases, unless the State would have been barred by adverse possession. *State Bd. of Educ. v. Roanoke R.R. & Lumber Co.*, 158 N.C. 313, 73 S.E. 994 (1912).

**Protection of State Assignee Against Three-Year Statute in Action for Damage to Timber.** — Statute from which this section is derived, prior to its 1917 amendment, was

not intended to protect an assignee of the State against the three-year statute of limitations when the action was for damage to timber. *Tillery v. Whiteville Lumber Co.*, 172 N.C. 296, 90 S.E. 196 (1916).

**In action for damages for alleged trespass in the cutting of timber** on swampland, where defendants claimed adverse possession under color of title of land in dispute, and plaintiff claimed title under deeds executed by the State Board of Education to a third party, error, if any, in charging that the 7-year statute of limitations, rather than the 21-year statute, was applicable was harmless to plaintiff where, under defendants' evidence, jury could not have found that defendants and those under whom defendants claimed had been in possession for 7 years without finding that they had been in possession for more than 21 years. *Virginia-Carolina Tie & Wood Co. v. Dunbar*, 106 F.2d 383 (4th Cir. 1939).

## § 146-81. Title to lands sold for taxes.

The title to all land acquired by the State by virtue of being sold for taxes is hereby vested in the State of North Carolina. (1917, c. 209; C.S., s. 7615; G.S., s. 146-88; 1959, c. 683, s. 1.)

**§ 146-82. Protection of interest in lands sold for taxes.**

Whenever any lands in which the State of North Carolina or any State agency has an interest, by way of mortgage or otherwise, are advertised to be sold for any taxes or special assessment, or under any lien, the Department of Administration is authorized, if in its judgment it is necessary to protect the interest of the State, to appear at any sale of such lands and to buy the same as any other person would. For the purpose of paying therefor, the Director of the Budget is authorized to draw upon the State Land Fund. (1917, c. 246; C.S., s. 7616; G.S., s. 146-89; 1959, c. 683, s. 1.)

**ARTICLE 18.***Miscellaneous.***§ 146-83. Vested rights protected.**

No provision of this Chapter shall be applied or construed to the detriment of vested rights, interests, or estates of any private individual, firm, or corporation, acquired prior to June 2, 1959. (1959, c. 683, s. 1.)

**CASE NOTES**

**Cited** in *Gwathmey v. State ex rel. Dep't of Env't, Health & Natural Resources*, 342 N.C. 287, 464 S.E.2d 674 (1995).

# Chapter 147.

## State Officers.

### Article 1.

#### Classification and General Provisions.

- Sec.
- 147-1. Public State officials classified.
  - 147-2. Legislative officers.
  - 147-3. Executive officers.
  - 147-4. Executive officers — election; term; induction into office.
  - 147-5. Executive officers — report to Governor; reports transmitted to General Assembly.

### Article 2.

#### Expenses of State Officers and State Departments.

- 147-6. Expenses paid by warrants; statements filed.
- 147-7. Traveling expenses on State's business.
- 147-8. Mileage allowance to officers or employees using public or private automobiles.
- 147-9. Unlawful to pay more than allowance.
- 147-9.1. Municipalities and counties exempt.

### Article 2A.

#### Annuities and Deferred Compensation for Teachers and State Employees.

- 147-9.2. Definitions.
- 147-9.3. Annuity contracts; salary deductions.
- 147-9.4. Deferred Compensation Plan.

### Article 3.

#### The Governor.

- 147-10. Governor to reside in Raleigh; mansion and accessories.
- 147-11. Salary and expense allowance of Governor; allowance to person designated to represent Governor's office.
- 147-11.1. Succession to office of Governor; Acting Governor.
- 147-12. Powers and duties of Governor.
- 147-13. May convene Council of State; quorum; journal.
- 147-13.1. Governor's power to consolidate State agencies.
- 147-14. Appointment of private secretary; official correspondence preserved; books produced before General Assembly.
- 147-15. Salary of private secretary.
- 147-15.1. [Repealed.]
- 147-16. Records kept; certain original applica-

### Sec.

- tions preserved; notice of commutations.
- 147-16.1. Publication of executive orders.
- 147-16.2. Duration of boards and councils created by executive officials; extensions.
- 147-16.3. Timely nominations if legislative body must confirm.
- 147-17. May employ counsel in cases wherein State is interested.
- 147-18. To designate "Indian Day."
- 147-19. To appoint a day of thanksgiving.
- 147-20. [Repealed.]
- 147-21. Form and contents of applications for pardon.
- 147-22. [Repealed.]
- 147-23. Conditional pardons may be granted.
- 147-24. Governor's duties when conditions of pardon violated.
- 147-25. Duty of sheriff and clerk on pardon granted.
- 147-26. To procure great seal of State; its description.
- 147-27. Affixing great seal a second time to public papers.
- 147-28. To procure seals for departments and courts.
- 147-29. Seal of Department of State described.
- 147-30. To provide new seals when necessary.
- 147-31. [Repealed.]
- 147-31.1. Office space and expenses for Governor-elect and Lieutenant Governor-elect; and other Council of State members-elect.
- 147-32. Compensation for surviving spouses of Governors.
- 147-33. Compensation and expenses of Lieutenant Governor.

### Article 3A.

#### Emergency War Powers of Governor.

- 147-33.1. Short title.
- 147-33.2. Emergency war powers of the Governor.
- 147-33.3. Orders, rules and regulations.
- 147-33.4. Immunity.
- 147-33.5. Federal action controlling.
- 147-33.6. Construction of Article.
- 147-33.7 through 147-33.11. [Reserved.]

### Article 3B.

#### North Carolina Housing Commission.

- 147-33.12 through 147-33.21. [Repealed.]

**Article 3C.**

**Office of Juvenile Justice.**

Sec.

- 147-33.30 through 147-33.71. [Repealed].
- 147-33.72 through 147-33.74. [Reserved].

**Article 3D.**

**Office of Information Technology Services.**

Part 1. Transfer and Organization of Office.

- 147-33.75. Transfer to the Office of the Governor.
- 147-33.76. Head of the Office of Information Technology Services; qualification and appointment of State Chief Information Officer.
- 147-33.77. Office of Information Technology Services; organization and operation.
- 147-33.78. Information Resource Management Commission.
- 147-33.79. Information Resources Management Commission staff.

Part 2. General Powers and Duties.

- 147-33.80. Exempt agencies.
- 147-33.81. Definitions.
- 147-33.82. Powers and duties of the State Chief Information Officer and the Office of Information Technology Services.
- 147-33.83. Information resources centers and services.
- 147-33.84. Deviations authorized for Department of Revenue.
- 147-33.85. Information technology portfolio-based management.
- 147-33.86. Enterprise management of information technology assets.
- 147-33.87. Financial reporting and accountability for information technology investments and expenditures.
- 147-33.88. Information technology reports.
- 147-33.89, 147-33.90. [Reserved.]

Part 3. Telecommunications Services.

- 147-33.91. Telecommunications services; duties of State Chief Information Officer with respect to State agencies.
- 147-33.92. Telecommunications services for local governmental units and other entities.
- 147-33.93. Fees; dispute resolution panel.
- 147-33.94. [Reserved.]

Part 4. Procurement of Information Technology.

- 147-33.95. Procurement of information technology.

Sec.

- 147-33.96. Restriction on State agency contractual authority with regard to information technology; local governments.
- 147-33.97. Information technology procurement policy; reporting requirements.
- 147-33.98. Unauthorized use of public purchase or contract procedures for private benefit prohibited.
- 147-33.99. Financial interest of officers in sources of supply; acceptance of bribes.
- 147-33.100. Certification that information technology bid submitted without collusion.
- 147-33.101. Board of Awards review.
- 147-33.102. Penalty for violations; costs.
- 147-33.103. Attorney General contract assistance; rule-making authority.

**Article 4.**

**Secretary of State.**

- 147-34. Office and office hours.
- 147-35. Salary of Secretary of State.
- 147-36. Duties of Secretary of State.
- 147-36.1. Deputy Secretary of State.
- 147-37. Secretary of State; fees to be collected.
- 147-38. [Repealed.]
- 147-39. Custodian of statutes, records, deeds, etc.
- 147-40. [Repealed.]
- 147-41. To keep records of oyster grants.
- 147-42. Binding original statutes, resolutions, and documents.
- 147-43. Reports of State officers.
- 147-43.1 through 147-43.3. [Repealed.]
- 147-44. [Repealed.]
- 147-45. Distribution of copies of State publications.
- 147-46. [Repealed.]
- 147-46.1. Publications furnished State departments, bureaus, institutions and agencies.
- 147-47. [Repealed.]
- 147-48. Sale of Laws and Journals.
- 147-49. Disposition of damaged and unsaleable publications.
- 147-50. Publications of State officials and department heads furnished to certain institutions, agencies, etc.
- 147-50.1. [Repealed.]
- 147-51. Clerks of superior courts responsible for Appellate Division Reports; lending prohibited.
- 147-52. [Transferred.]
- 147-53. [Superseded.]
- 147-54. Printing, distribution and sale of the North Carolina Manual.
- 147-54.1. Division of Publications; duties.
- 147-54.2. [Repealed.]

## CH. 147. STATE OFFICERS

Sec.

- 147-54.3. Land records management program.
- 147-54.4. (For grandfather provision, see the Editor's Note) Certification of local government property mappers.
- 147-54.5. Investor Protection and Education Trust Fund; administration; limitations on use of the Fund.
- 147-54.6. International relations assistance.
- 147-54.7. [Reserved.]

### Article 4A.

#### Constitutional Amendments Publication Commission.

- 147-54.8. Constitutional Amendments Publication Commission.
- 147-54.9. Officers; meetings; quorum.
- 147-54.10. Powers.

### Article 4B.

#### Business License Information Office.

- 147-54.11. Purpose.
- 147-54.12. Definitions.
- 147-54.13. Business License Information Office established; appointment of director.
- 147-54.14. Clearinghouse functions.
- 147-54.15. License coordination and assistance to applicants.
- 147-54.16. Master application system.
- 147-54.17. License coordinator designated in all State agencies.
- 147-54.18. Use of Business License Information Office optional.
- 147-54.19. Report by State agencies.

### Article 5.

#### Auditor.

- 147-55 through 147-61. [Repealed.]
- 147-62 through 147-64. [Recodified.]

### Article 5A.

#### Auditor.

- 147-64.1. Salary of State Auditor.
- 147-64.2. Legislative policy and intent.
- 147-64.3. Legislative and management control system.
- 147-64.4. Definitions.
- 147-64.5. Cooperation with Joint Legislative Commission on Governmental Operations and other governmental bodies.
- 147-64.6. Duties and responsibilities.
- 147-64.6A. Audit of community colleges.
- 147-64.7. Authority.
- 147-64.7A. Obstruction of audit.
- 147-64.8. Independence.
- 147-64.9. Rules and regulations.

Sec.

- 147-64.10. Powers of appointment.
- 147-64.11. Review of office.
- 147-64.12. Conflict of interest.
- 147-64.13. Construction.
- 147-64.14. Severability.

### Article 6.

#### Treasurer.

- 147-65. Salary of State Treasurer.
- 147-66. Office and office hours.
- 147-67. [Repealed.]
- 147-68. To receive and disburse moneys; to make reports.
- 147-68.1. Banking operations.
- 147-69. Deposits of State funds in banks and savings and loan associations regulated.
- 147-69.1. Investments authorized for General Fund and Highway Funds assets.
- 147-69.2. Investments authorized for special funds held by State Treasurer.
- 147-69.3. Administration of State Treasurer's investment programs.
- 147-70. To make short-term notes in emergencies.
- 147-71. May demand and sue for money and property of State.
- 147-72. Ex officio treasurer of State institutions; duties as such.
- 147-73. Office of treasurer of each State institution abolished.
- 147-74. Office of State Treasurer declared office of deposit and disbursement.
- 147-75. Deputy to act for Treasurer.
- 147-76. Liability for false entries in his books.
- 147-77. Daily deposit of funds to credit of Treasurer.
- 147-78. Treasurer to select depositories.
- 147-78.1. Good faith deposits; use of master trust.
- 147-79. Deposits to be secured; reports of depositories.
- 147-80. Deposit in other banks unlawful; liability.
- 147-81. Number of depositories; contract.
- 147-82. Accounts of funds kept separate.
- 147-83. Receipts from federal government and gifts not affected.
- 147-84. Refund of excess payments.
- 147-85. Fiscal year.
- 147-86. Additional clerical assistance authorized; compensation and duties.
- 147-86.1. Pool account for local government unemployment compensation.
- 147-86.2 through 147-86.9. [Reserved.]

### Article 6A.

#### Cash Management.

- 147-86.10. Statement of policy.
- 147-86.11. Cash management for the State.

Sec.

- 147-86.12. Cash management for school administration units.
- 147-86.13. Cash management for community colleges.
- 147-86.14. Cash management for the General Court of Justice.
- 147-86.15. Cash management of the Highway Fund and the Highway Trust Fund.
- 147-86.16 through 147-86.19. [Reserved.]

**Article 6B.**

**Statewide Accounts Receivable Program.**

- 147-86.20. Definitions.
- 147-86.21. State agencies to collect accounts receivable in accordance with statewide policies.
- 147-86.22. Statewide accounts receivable program.
- 147-86.23. Interest and penalties.
- 147-86.24. Debtor information and skip tracing.
- 147-86.25. Setoff debt collection.
- 147-86.26. Reporting requirements.
- 147-86.27. Rules.
- 147-86.28, 147-86.29. [Reserved.]

**Article 6C.**

**Health and Wellness Trust Fund.**

Sec.

- 147-86.30. Health and Wellness Trust Fund established.
- 147-86.31. Health and Wellness Trust Fund; eligibility for grants; annual reports from non-State agencies.
- 147-86.32. Health and Wellness Trust Fund; Commission established; membership qualifications; vacancies.
- 147-86.33. Health and Wellness Trust Fund; powers and duties.
- 147-86.34. Advisory Council.
- 147-86.35. Health and Wellness Trust Fund; reporting requirements.
- 147-86.36. Health and Wellness Trust Fund; open meeting and public records requirements.

**Article 7.**

**Secretary of Revenue.**

- 147-87. Secretary of Revenue; appointment; salary.
- 147-88. [Repealed.]

**Article 8.**

**District Attorneys.**

- 147-89. To prosecute cases removed to federal courts.

**ARTICLE 1.**

*Classification and General Provisions.*

**§ 147-1. Public State officials classified.**

The public officers of the State are legislative, executive, and judicial. But this classification shall not be construed as defining the legal powers of either class. (1868-9, c. 270, ss. 1, 2; Code, s. 3317; Rev., s. 5323; C.S., s. 7624.)

**CASE NOTES**

**Cited** in Sansom v. Johnson, 39 N.C. App. 682, 251 S.E.2d 629 (1979).

**§ 147-2. Legislative officers.**

The legislative officers are:

- (1) Fifty Senators;
- (2) One hundred and twenty members of the House of Representatives;
- (3) A Speaker of the House of Representatives;
- (4) A clerk and assistants in each house;
- (5) A Sergeant-at-arms and assistants in each house;
- (6) As many subordinates in each house as may be deemed necessary. (1868-9, c. 270, s. 3; Code, s. 3318; Rev., s. 5324; C.S., s. 7625; 1995, c. 379, s. 13.)

**Cross References.** — As to assaults upon or threats against officers named in this section, see § 14-16.6 et seq. As to authority of the State

Bureau of Investigation to investigate assaults upon or threats against such officers, see § 114-15.

### § 147-3. Executive officers.

(a) Executive officers are either:

- (1) Civil;
- (2) Military.

(b) Civil executive officers are:

- (1) General, or for the whole State;
- (2) Special, or for special duties in different parts of the State;
- (3) Local, or for a particular part of the State.

(c) The general civil executive officers of this State are as follows:

- (1) A Governor;
- (2) A Lieutenant Governor;
- (3) Private secretary for the Governor;
- (4) A Secretary of State;
- (5) An Auditor;
- (6) A Treasurer;
- (7) An Attorney General;
- (8) A Superintendent of Public Instruction;
- (9) The members of the Governor's Council;
- (10) A Commissioner of Agriculture;
- (11) A Commissioner of Labor;
- (12) A Commissioner of Insurance. (1868-9, c. 270, ss. 24, 25, 26; Code, s. 3319; 1899, c. 54, ss. 3, 4; c. 373; 1901, c. 479, s. 4; Rev., s. 5325; C.S., s. 7626; 1931, c. 312, s. 5; 1943, c. 170.)

**Cross References.** — As to assaults upon or threats against officers named in this section, see § 14-16.6 et seq. As to authority of the State

Bureau of Investigation to investigate assaults upon or threats against such officers, see § 114-15.

#### CASE NOTES

**Cited** in *Sansom v. Johnson*, 39 N.C. App. 682, 251 S.E.2d 629 (1979).

### § 147-4. Executive officers — election; term; induction into office.

The executive department shall consist of a Governor, a Lieutenant Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, an Attorney General, a Commissioner of Agriculture, a Commissioner of Insurance, and a Commissioner of Labor, who shall be elected for a term of four years, by the qualified electors of the State, at the same time and places, and in the same manner, as members of the General Assembly are elected. Their term of office shall commence on the first day of January next after their election and continue until their successors are elected and qualified. The persons having the highest number of votes, respectively, shall be declared duly elected, but if two or more be equal and highest in votes for the same office, then one of them shall be chosen by joint ballot of both houses of the General Assembly. Contested elections shall be determined by a joint ballot of both houses of the General Assembly in such manner as shall be prescribed by law. (Const., art. 3, ss. 1, 3; 1897, c. 1, ss. 1, 2, 3; Rev., s. 5326; C.S., s. 7627; 1931, c. 312, s. 5; 1953, c. 2; 1981, c. 504, s. 7; 1985, c. 563, s. 12.)

**Cross References.** — As to election, term and induction of Superintendent of Public Instruction, see § 115C-18.

**Editor's Note.** — An amendment to this section in Session Laws 1981, c. 504, s. 7, was made effective upon certification of approval of

the constitutional amendments proposed by ss. 1 through 3 of the 1981 act. The constitutional amendments were submitted to the people at an election held June 29, 1982, and were defeated. Therefore, the 1981 amendment to this section never went into effect.

### § 147-5. Executive officers — report to Governor; reports transmitted to General Assembly.

It shall be the duty of the officers of the executive department to submit their respective reports to the Governor to be transmitted by him with his message to the General Assembly. (1813, c. 60, s. 2, P.R.; Rev., s. 5373; C.S., s. 7628.)

## ARTICLE 2.

### *Expenses of State Officers and State Departments.*

### § 147-6. Expenses paid by warrants; statements filed.

All salaries, purchases of equipment and expenses authorized by law to be paid out of the various funds heretofore mentioned shall be paid by warrant drawn on the State Treasurer. The officer of State or head of any department thereof shall file an itemized statement of the salaries, bills for purchase of equipment and other expenses of his department, and warrants shall be drawn on the State Treasurer for the payment of all salaries, purchases of equipment, and expenses as authorized by law, to be paid by the said officer of State or head of any department thereof, as evidenced by statements so approved and filed. The State Treasurer is hereby authorized and directed to pay said warrants. (1919, c. 117, s. 2; C.S., s. 7630; 1983, c. 913, s. 44.)

### § 147-7. Traveling expenses on State's business.

When, to efficiently and properly carry into effect and execute any of the duties imposed by his appointment or by the provision of any statute of this State, and provide for the expenses thereof, it is required that any officer of the State or any employee of any department thereof shall travel from place to place, such traveling and other expenses as shall be required shall be approved by said officer or head of the department whose employee incurs such expenses. (1919, c. 117, s. 3; C.S., s. 7631.)

### § 147-8. Mileage allowance to officers or employees using public or private automobiles.

Where it is provided by any law affecting the State of North Carolina, or any subdivision thereof, whereby any employee or officer of the same is allowed to charge mileage for the use of any motor vehicle when owned by the State or any subdivision thereof or by any such employee or officer of the State or any subdivision thereof, when in the discharge of any duties imposed upon him by reason of his employment or office, the same is hereby repealed to the extent that said charge shall be limited to the actual miles traveled by said motor vehicle and no mileage charge shall be allowed for but one occupant of any motor vehicle so used, and provided further that no such mileage charge shall exceed seven cents (7¢) per mile. (1931, c. 382, s. 1; 1953, c. 675, s. 20.)

**Local Modification.** — Guilford: 1961, c. 905; Lee: 1967, c. 58, s. 1; Mecklenburg: 1965, c. 240, s. 1; city of Greensboro: 1959, c. 1137, s. 15.

### § 147-9. Unlawful to pay more than allowance.

It shall be unlawful for any officer, auditor, bookkeeper, clerk or other employee of the State of North Carolina or any subdivision thereof to knowingly approve any claim or charge on the part of any person for mileage by reason of the use of any motor vehicle owned by the State or any subdivision thereof or by any person and used in the pursuit of his employment or office in excess of seven cents (7¢) per mile as set out in G.S. 147-8 and any officer, auditor, bookkeeper, clerk or other employee violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1931, c. 382, s. 2; 1953, c. 675, s. 21; 1993, c. 539, s. 1053; 1994, Ex. Sess., c. 24, s. 14(c).)

**Local Modification.** — Lee: 1967, c. 58, s. 2; Mecklenburg: 1965, c. 240, s. 2; city of Greensboro: 1959, c. 1137, s. 16.

### § 147-9.1. Municipalities and counties exempt.

Nothing in this Article shall be deemed to be applicable to counties or municipalities or to limit or restrict the amount of any automobile mileage allowance, or automobile expense allowance, or any other travel expense allowance or payment which may be paid by a county or municipality or by any board, commission, or other agency of any county or municipality. (1967, c. 941; 1969, c. 180, s. 2.)

## ARTICLE 2A.

### *Annuities and Deferred Compensation for Teachers and State Employees.*

### § 147-9.2. Definitions.

The following words when used in this Article shall have the meanings ascribed to them in this section except when the context clearly indicates a different meaning:

- (1) "Board" shall mean the Board of Trustees of the North Carolina Public Employee Deferred Compensation Plan established pursuant to Chapter 433 of the 1971 Session Laws and G.S. 143B-426.24.
- (1a) "Chief executive officer" shall mean the person or group of persons responsible for the administration of any employer, or an agent of such chief executive officer duly authorized to enter into the contracts with teachers or State employees referred to in G.S. 147-9.3 and 147-9.4.
- (2) "Employee" shall mean a permanent employee of the State of North Carolina, or of any of its departments or agencies, or of any of its wholly owned institutions and instrumentalities.
- (3) "Employer" shall mean (i) the State of North Carolina, its departments and agencies, and its wholly owned institutions and instrumentalities or (ii) a local board of education.
- (4) "Plan" shall mean the North Carolina Public Employee Deferred Compensation Plan.

- (5) "Teacher" shall have the meaning provided in G.S. 135-1(25). (1971, c. 433, s. 1; 1983, c. 559, s. 2; 1991, c. 389, s. 1.)

### § 147-9.3. Annuity contracts; salary deductions.

Notwithstanding the provisions of G.S. 143-3.3, and notwithstanding any provision of law relating to salaries or salary schedules of State employees, if the employee be one described in section 403(b) (1) (A) (i) or (ii) of the United States Internal Revenue Code, the chief executive officer of such employee, on behalf of the employer, may enter into an annual contract with the employee which provides for a reduction in salary below the total established compensation or salary schedule for a term of one year. The chief executive officer shall use the funds derived from the reduction in the salary of the employee to purchase a nonforfeitable annuity or retirement income contract for the benefit of said employee. An employee who has agreed to a salary reduction for this purpose shall not have the right to receive the amount of salary reduction in cash or in any other way except the annuity or retirement income contract. Funds used for the purchase of an annuity or retirement income contract shall not be in lieu of any amount earned by the employee before his election for a salary reduction has become effective. The agreement for salary reduction referred to herein shall be effective under the necessary regulations and procedures adopted by the chief executive officer and on forms prescribed by him. Notwithstanding any other provision of law, the amount by which the salary of an employee is reduced pursuant to this section shall not be excluded, but shall be included, in computing and making payroll deductions for social security and retirement system purposes, if any, and in computing and providing matching funds for retirement system purposes, if any. (1971, c. 433, s. 2; 1991, c. 389, s. 1.)

### § 147-9.4. Deferred Compensation Plan.

Notwithstanding the provisions of G.S. 143-3.3, and notwithstanding any provision of law relating to salaries or salary schedules of teachers or State employees, the chief executive officer of an employer, on behalf of the employer, may from time to time enter into a contract with a teacher or employee under which the teacher or employee irrevocably elects to defer receipt of a portion of his scheduled salary in the future, but only if, as a result of such contract, the income so deferred is deferred pursuant to the Plan provided for in G.S. 143B-426.24 or pursuant to some other plan established before January 1, 1983, and is not constructively received by the teacher or employee in the year in which it was earned, for State and federal income tax purposes. In addition, the income so deferred shall be invested in the manner provided in the applicable Plan; however, the teacher or employee may revoke his election to participate and may amend the amount of compensation to be deferred by signing and filing with the Board a written revocation or amendment on a form and in the manner approved by the Board. Any such revocation or amendment shall be effective prospectively only and shall cause no change in the allocation of amounts invested prior to the filing date of such revocation or amendment.

A teacher or employee who has agreed to the deferral of income pursuant to the Plan shall have the right to receive the income so deferred only in accordance with the provisions of the Plan. Funds so deferred shall not be in lieu of any amount earned by the teacher or employee before his election to defer compensation became effective. The agreement to defer income referred to herein shall be effective under such necessary regulations and procedures as are adopted by the Board, and on forms prepared or approved by it. A teacher or employee who agrees to defer income as provided in this section may

authorize payroll deductions for deferral of the income. An employer shall make payroll deduction available for a teacher or employee who authorizes payroll deduction. Notwithstanding any other provisions of law, the amount by which the salary of a teacher or employee is deferred pursuant to the Plan shall not be excluded, but shall be included, in computing and making payroll deductions for social security and retirement system purposes, if any, and in computing and providing matching funds for retirement system purposes, if any.

Except for the applications of the provisions of G.S. 110-136, and in connection with a court-ordered equitable distribution under G.S. 50-20, the right of a teacher or employee, who elects to defer income pursuant to the North Carolina Public Employee Deferred Compensation Plan under G.S. 143B-426.24, to benefits that have vested under the Plan, is nonforfeitable. These benefits are exempt from levy, sale, and garnishment, except as provided by this section. (1971, c. 433, s. 3; 1983, c. 559, s. 3; 1985, c. 660, s. 4; 1989, c. 792, s. 2.10; 1991, c. 389, s. 1.)

### ARTICLE 3.

#### *The Governor.*

#### **§ 147-10. Governor to reside in Raleigh; mansion and accessories.**

The Governor shall reside in the City of Raleigh during his continuance in office. A convenient and commodious furnished dwelling house, supplied with necessary lights, fuel, and water, shall be provided for his accommodation; and an automobile and driver shall be provided and maintained for the use of the executive mansion. (1868-69, c. 270, ss. 32, 33; Code, ss. 3325, 3326; 1885, c. 244; Rev., s. 5327; 1919, c. 307; C.S., s. 7635.)

#### **§ 147-11. Salary and expense allowance of Governor; allowance to person designated to represent Governor's office.**

(a) The salary of the Governor shall be one hundred eighteen thousand four hundred thirty dollars (\$118,430) annually, payable monthly.

(b) He shall be paid annually the sum of eleven thousand five hundred dollars (\$11,500) as an expense allowance in attending to the business for the State and for expenses out of the State and in the State in representing the interest of the State and people, incident to the duties of his office, the said allowance to be paid monthly.

(c) In addition to the foregoing allowance, the actual expenses of the Governor while traveling outside the State on business incident to his office shall be paid by a warrant drawn on the State Treasurer. Whenever a person who is not a State official or employee is designated by the Governor to represent the Governor's office, such person shall be paid actual travel expenses incurred in the performance of such duty; provided that the payment of such travel expense shall conform to the provisions of the biennial appropriation act in effect at the time the payment is made. (1879, c. 240; Code, s. 3720; 1901, c. 8; Rev., s. 2736; 1907, c. 1009; 1911, c. 89; 1917, cc. 11, 235; 1919, c. 320; C.S., s. 3858; 1929, c. 276, s. 1; 1947, c. 994; 1953, c. 1, s. 1; 1961, c. 1157; 1963, c. 1178, s. 1; 1965, c. 1091, s. 1; 1971, c. 1083, s. 1; 1973, c. 600; 1977, 2nd Sess., c. 1136, s. 39; c. 1249, s. 5; 1979, 2nd Sess., c. 1137, s. 31; 1981, c. 1127, s. 7; 1983, c. 761, ss. 194, 195; c. 913, s. 45; 1983 (Reg. Sess., 1984), c. 1034, s.

217; 1985, c. 479, s. 215; 1985 (Reg. Sess., 1986), c. 1014, s. 20; 1987, c. 738, s. 11; 1987 (Reg. Sess., 1988), c. 1086, ss. 6, 172; 1989, c. 752, ss. 23(a), (b), 167; 1991 (Reg. Sess., 1992), c. 900, ss. 32(a), (b), 182; 1993, c. 321, s. 48; 1993 (Reg. Sess., 1994), c. 769, s. 7.1; 1995, c. 507, s. 7.1(a); 1996, 2nd Ex. Sess., c. 18, s. 28(a); 1997-443, s. 33(a); 1998-153, s. 3(a); 1999-237, s. 28(a); 2000-67, s. 26(a).)

**Editor's Note.** — Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2001-424, s. 32.1(a), provides: "For the 2001-2002 and 2002-2003 fiscal years, the salary of the Governor shall remain the amount set by G.S. 147-11(a)."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 36.3, provides:

"Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-67, s. 26(a), effective July 1, 2000, substituted "one hundred eighteen thousand four hundred thirty dollars (\$118,430) annually" for "one hundred thirteen thousand six hundred fifty-six dollars (\$113,656) annually" in subsection (a).

## § 147-11.1. Succession to office of Governor; Acting Governor.

### (a) Lieutenant Governor. —

- (1) The Lieutenant Governor-elect shall become Governor upon the failure of the Governor-elect to qualify. The Lieutenant Governor shall become Governor upon the death, resignation, or removal from office of the Governor. The further order of succession to the office of Governor shall be prescribed by law. A successor shall serve for the remainder of the term of the Governor whom he succeeds and until a new Governor is elected and qualified.
- (2) During the absence of the Governor from the State, or during the physical or mental incapacity of the Governor to perform the duties of his office, the Lieutenant Governor shall be Acting Governor. The further order of succession as Acting Governor shall be prescribed by law.

### (b) President of Senate, Speaker of the House and Other Officers. —

- (1) If, by reason of failure to qualify, death, resignation, or removal from office, there is neither a Governor nor a Lieutenant Governor to discharge the powers and duties of the office of Governor, then the President of the Senate shall, upon his resignation as President of the Senate and as Senator, become Governor.
- (2) If, at the time when under subdivision (1) of this subsection the President of the Senate is to become Governor, there is no President of the Senate, or the President of the Senate fails to qualify as Governor, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative, become Governor.
- (3) If, at the time when under subdivision (2) of this subsection the Speaker of the House of Representatives is to become Governor, there is no Speaker of the House of Representatives, or the Speaker of the House of Representatives fails to qualify as Governor, then that officer of the State of North Carolina who is highest on the following list, and who is not under disability to serve as Governor, shall, upon his

resignation of the office which places him in the order of succession, become Governor: Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance.

(c) Acting Governor Generally. —

- (1) If, by reason of absence from the State or physical or mental incapacity, there is neither a Governor nor a Lieutenant Governor qualified to discharge the powers and duties of the office of Governor, then the President of the Senate shall become Acting Governor.
- (2) If, at the time when under subdivision (1) of this subsection the President of the Senate is to become Acting Governor, there is no President of the Senate, or the President of the Senate fails to qualify as Acting Governor, then the Speaker of the House of Representatives shall become Acting Governor.
- (3) If, at the time when under subdivision (2) of this subsection the Speaker of the House of Representatives is to become Acting Governor, there is no Speaker of the House of Representatives, or the Speaker of the House of Representatives fails to qualify as Acting Governor, then that officer of the State of North Carolina who is highest on the following list, and who is not under disability to serve as Acting Governor, shall become Acting Governor: Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance.

(d) Governor Serving under Subsection (c). — An individual serving as Acting Governor under subsection (c) of this section shall continue to act for the remainder of the term of the Governor whom he succeeds and until a new Governor is elected and qualified, except that:

- (1) If his tenure as Acting Governor is founded in whole or in part upon the absence of both the Governor and Lieutenant Governor from the State, then he shall act only until the Governor or Lieutenant Governor returns to the State; and
- (2) If his tenure as Acting Governor is founded in whole or in part upon the physical or mental incapacity of the Governor or Lieutenant Governor, then he shall act only until the removal of the incapacity of the Governor or Lieutenant Governor.

(e) Officers to Which Subsections (b), (c) and (d) Applicable. — Subsections (b), (c), and (d) of this section shall apply only to such officers as are eligible to the office of Governor under the Constitution of North Carolina, and only to officers who are not under impeachment by the House of Representatives at the time they are to become Governor or Acting Governor.

(f) Compensation of Acting Governor. — During the period that any individual serves as Acting Governor under subsection (c) of this section, his compensation shall be at the rate then provided by law in the case of the Governor. (1961, c. 992, s. 1.)

**Cross References.** — As to succession to the office of Governor, see also N.C. Const., Art. III, § 3.

## § 147-12. Powers and duties of Governor.

(a) In addition to the powers and duties prescribed by the Constitution, the Governor has the powers and duties prescribed in this and the following sections:

- (1) To supervise the official conduct of all executive and ministerial officers; and when the Governor deems it advisable to visit all State institutions for the purpose of inquiring into the management and needs of the same.
- (2) To see that all offices are filled, and the duties thereof performed, or in default thereof apply such remedy as the law allows, and if the remedy is imperfect, acquaint the General Assembly therewith.
- (3) To make the appointments and fill the vacancies not otherwise provided for in all departments.

In every case where the Governor is authorized by statute to make an appointment to fill a State office, the Governor may also appoint to fill any vacancy occurring in that office, and the person the Governor appoints shall serve for the unexpired term of the office and until the person's successor is appointed and qualified.

In every case where the Governor is authorized by statute to appoint to fill a vacancy in an office in the executive branch of State government, the Governor may appoint an acting officer to serve

- a. During the physical or mental incapacity of the regular holder of the office to discharge the duties of the office,
- b. During the continued absence of the regular holder of the office, or
- c. During a vacancy in an office and pending the selection and qualification, in the manner prescribed by statute, of a person to serve for the unexpired term.

An acting officer appointed in accordance with this subsection may perform any act and exercise any power which a regularly appointed holder of such office could lawfully perform and exercise. All powers granted to an acting officer under this subsection shall expire immediately

- a. Upon the termination of the incapacity of the officer in whose stead the person acts,
- b. Upon the return of the officer in whose stead the person acts, or
- c. Upon the selection and qualification, in the manner prescribed by statute, of a person to serve for the unexpired term.

The Governor may determine (after such inquiry as the Governor deems appropriate) that any of the officers referred to in this paragraph is physically or mentally incapable of performing the duties of the office. The Governor may also determine that such incapacity has terminated.

The compensation of an acting officer appointed pursuant to the provisions of this subdivision shall be fixed by the Governor. Prior to taking any action under this paragraph, the Governor may consult with the Advisory Budget Commission.

- (3a) To make appointments to fill vacancies in offices subject to appointment by the General Assembly as provided in G.S. 120-122.
- (3b) Whenever a statute calls for the Governor to appoint one person from each congressional district to a board or commission, and at the time of enactment of that statute, the gubernatorial appointments do not cover all of the congressional districts, then the Governor, in filling vacancies on that board or commission as they occur, shall make appointments to satisfy that requirement, but shall not be required to remove any person from office to satisfy the requirement.
- (3c) Notwithstanding any other provision of law, whenever a statute calls for the Governor to appoint a person to an office subject to confirmation by the General Assembly, the Governor shall notify the President of the Senate and the Speaker of the House of Representatives by May 15 of the year in which the appointment is to be made of the name of

the person the Governor is submitting to the General Assembly for confirmation.

- (3d) Notwithstanding any other provision of law, whenever a statute calls for the Governor to appoint a person to an office subject to confirmation by the Senate, the Governor shall notify the President of the Senate by May 15 of the year in which the appointment is to be made of the name of the person the Governor is submitting to the General Assembly for confirmation.
- (4) To be the sole official organ between the government of this State and other states, or the government of the United States.
- (5) To have the custody of the great seal of the State.
- (6) If the Governor is apprised by the affidavits of two responsible citizens of the State that there is imminent danger that the statute of this State forbidding prizefighting is about to be violated, the Governor shall use, as far as necessary, the civil and military power of the State to prevent it, and to have the offenders arrested and bound to keep the peace.
- (7) Repealed by Session Laws 1997-443, s. 32.30(j), effective July 1, 1999.
- (8) In carrying out ex officio duties, to designate the Governor's personal representative to attend meetings and to act in the Governor's behalf as the Governor directs.
- (9) To appoint such personal staff as the Governor deems necessary to carry out effectively the responsibilities of the Governor's office.
- (10) To contract in behalf of the State with the government of the United States to the extent allowed by the laws of North Carolina for the purpose of securing the benefits available to this State under the Federal Highway Safety Act of 1966. To that end, the Governor shall coordinate the activities of any and all departments and agencies of this State and its subdivisions relating thereto.
- (11) Upon being furnished information from law-enforcement officers that public roads or highways or other public vehicular areas, as defined in G.S. 20-4.01, are being blocked by privately owned and operated vehicles or by any other means, thereby impeding the free flow of goods and merchandise in North Carolina, if such information warrants, to declare that a state of emergency exists in the affected area, and to order that the Highway Patrol and/or national guard remove the offending vehicles or other causes of the blockade from the emergency area.
- (12) To name and locate State government buildings, monuments, memorials, and improvements, as provided by G.S. 143B-373(1).
- (13) To oversee and approve all memoranda of understanding and agreements between the State and foreign governments, as defined in G.S. 66-280(c), and international organizations. Any memoranda of understanding or agreements under this subsection to be signed on behalf of the State must first be approved by the Governor after review by the Attorney General, and after execution filed with the Secretary of State in accordance with G.S. 66-280.
- (14) To negotiate and enter into Class III Tribal-State gaming compacts, and amendments thereto, on behalf of the State consistent with State law and the Indian Gaming Regulatory Act, Public Law 100-497, as necessary to allow a federally recognized Indian tribe to operate gaming activities in this State as permitted under federal law.

(b) The Department of Transportation, the Department of Correction, the Department of Crime Control and Public Safety, the State Highway Patrol, the Wildlife Resources Commission, the Division of Parks and Recreation in the Department of Environment and Natural Resources, and the Division of

Marine Fisheries in the Department of Environment and Natural Resources shall deliver to the Governor by February 1 and August 1 of each year detailed information on the agency's litter enforcement, litter prevention, and litter removal efforts. The Administrative Office of the Courts shall deliver to the Governor by February 1 and August 1 of each year detailed information on the enforcement of the littering laws of the State, including the number of charges and convictions under the littering laws of the State. The Governor shall gather the information submitted by the respective agencies and deliver a consolidated semiannual report on or before March 1 and September 1 of each year to the Environmental Review Commission, the Joint Legislative Transportation Oversight Committee, and the House of Representatives and the Senate Appropriations Subcommittees on Natural and Economic Resources. (1868-9, c. 270, s. 27; 1870-1, c. 111; 1883, c. 71; Code, s. 3320; 1895, c. 28, s. 5; 1905, c. 446; Rev., s. 5328; C.S., s. 7636; 1955, c. 910, s. 3; 1959, c. 285; 1967, c. 1253; 1973, c. 1148; 1981 (Reg. Sess., 1982), c. 1191, ss. 3, 4, 68; 1983, c. 913, s. 46; 1985, c. 122, s. 5; c. 757, s. 181(a); 1985 (Reg. Sess., 1986), c. 955, ss. 106, 107; 1997-14, s. 3; 1997-443, s. 32.30(j); 1999-260, s. 4; 2001-487, s. 92; 2001-512, s. 9; 2001-513, s. 29(a).)

**Cross References.** — As to the Governor's power to appoint, see N.C. Const., Art. III, §§ 5 and 7, and N.C. Const., Art. IV, § 19. For provisions placing the Governor and Council of State in charge of the State's interest in railroads, canals and other works of internal improvements, see §§ 124-1 through 124-7. As to investment of surplus State funds, see § 147-69.1.

**Editor's Note.** — Sections 4.1 to 4.4 of Session Laws 1999-463, the Hurricane Floyd Recovery Act of 1999, authorize the Governor to establish new programs, to expand existing programs, and to modify existing programs to provide necessary and appropriate relief and assistance from the effects of Hurricane Floyd and to expend funds from the Hurricane Floyd Recovery Fund to implement these programs; authorize the Governor to transfer funds from the Hurricane Floyd Recovery Fund to federal agencies and to local governments; authorize the Governor to establish time-limited positions to implement the provisions of the act; and authorize the Governor to establish advisory councils to advise State agencies on Hurricane Floyd recovery efforts and to ensure input from representatives of affected communities and groups.

Session Laws 2001-512, s. 10, provides: "The first reports required to be delivered by the Department of Transportation, the Department of Correction, the Department of Crime Control and Public Safety, the State Highway Patrol, the Wildlife Resources Commission, the Division of Parks and Recreation in the Depart-

ment of Environment and Natural Resources, the Division of Marine Fisheries in the Department of Environment and Natural Resources, and the Administrative Office of the Courts to the Governor under G.S. 147-12(b), as enacted by Section 10 of this act [s. 9 of Session Laws 2001-512], shall be due February 1, 2002. The first report required to be delivered by the Governor to the Environmental Review Commission, the Joint Legislative Transportation Oversight Committee, and the House of Representatives and the Senate Appropriations Subcommittees on Natural and Economic Resources under G.S. 147-12(b), as enacted by Section 10 of this act [s. 9 of Session Laws 2001-512], shall be due March 1, 2002.

Session Laws 2001-512, s. 15, provides: "This act shall not be construed to obligate the General Assembly to appropriate any funds to implement the provisions of this act. Every agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to the agency."

**Effect of Amendments.** — Session Laws 2001-487, s. 92, effective December 16, 2001, in subdivision (a)(13), substituted "G.S. 66-280(c)" for "G.S. 66-275(c)" in the first sentence and substituted "G.S. 66-280" for "G.S. 66-275" at the end of the last sentence.

Session Laws 2001-512, s. 9, effective January 4, 2002, added subsection (b).

Session Laws 2001-513, s. 29(a), effective August 1, 1994, and applicable to compacts and amendments thereto executed on or after that date, added subdivision (a)(14).

## CASE NOTES

**The Governor has the duty to supervise the official conduct of all executive officers.** The constitutional independence of the

executive offices, and their differing functions and duties, create clear potential for conflict between their respective holders. In the event

of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor, could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers. The General Assembly, in the enactment of § 114-2(2), did not intend to create such potential. *Tice v. DOT*, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

**Mandamus to Compel Performance of State Auditor's Duties.** — Under subdivisions (1) and (2) of this section, the Governor has the right to bring mandamus proceedings

against the State Auditor to compel his performance of ministerial duties prescribed by statute which do not involve any official discretion. *Russell v. Ayer*, 120 N.C. 180, 27 S.E. 133 (1897).

**Right of the Governor to appoint officers is limited** to constitutional officers, and then only when the Constitution expressly provides for such appointment. *State ex rel. Salisbury v. Croom*, 167 N.C. 223, 83 S.E. 354 (1914).

**As to appointments under subdivision (3) of this section prior to 1959 amendment**, see *State ex rel. Salisbury v. Croom*, 167 N.C. 223, 83 S.E. 354 (1914).

**OPINIONS OF ATTORNEY GENERAL**

**Delegation of Power to Attend Meetings.** — Those members of the Council of State who have statutory authority to delegate duties may, in conformity with such statutes, attend and vote at meetings of Boards of which they are *ex officio* members through delegates or designated subordinates. The remaining members of the Council of State may make similar delegations or designations where, in the mem-

ber's judgment, other duties necessitate his absence and the statute creating his *ex officio* membership does not express or clearly imply an intent of the General Assembly that the powers of such membership be exercised personally. See opinion of Attorney General to the honorable James E. Long, Commissioner of Insurance, 55 N.C.A.G. 116 (1986).

**§ 147-13. May convene Council of State; quorum; journal.**

(a) The Governor may convene the Council for consultation whenever he may deem it proper. In all meetings of the Council of State, five members exclusive of the Governor shall constitute a quorum.

(b) The advice and proceedings of the Council of State shall be entered in a journal, to be kept for this purpose exclusively and signed by all members present. Any member of the Council may have entered in the journal his dissent to any part of the journal. The journal shall be maintained by the Governor and shall be placed before the General Assembly when called for by either house. (1868-9, c. 270, s. 40; Code, s. 3335; Rev., s. 5329; C.S., s. 7637; 1971, cc. 32, 151.)

**§ 147-13.1. Governor's power to consolidate State agencies.**

(a) The Governor is hereby authorized to direct the inauguration of studies to determine which agencies of the State conduct operations which are so nearly related to the operations of one or more other agencies that a consolidation would produce the same or a more efficient operational result at a reduction in cost, and to prepare recommendations to be presented to the 1971 General Assembly to effect such consolidations.

(b) For purposes of conducting the study, the Governor is authorized to utilize funds available to him from private sources, or from federal or other governmental grants, to be matched, as may be required, by funds available within the existing Department of Administration budget.

(c) The Governor shall direct that agencies which should be consolidated with or absorbed into other agencies having similar responsibilities and duties, as determined by the outcome of the study, shall be so consolidated or absorbed when, in his opinion, efficiency in State governmental operations will be

increased thereby, or when such consolidation will result in a reduction in the cost of administering State activities without a reduction in the effectiveness of such operations; provided, however, that the Governor shall not direct such consolidation or combination as would diminish the duty or authority of any State agency or institution created by act of the General Assembly. (1969, c. 1209, ss. 1-3.)

**§ 147-14. Appointment of private secretary; official correspondence preserved; books produced before General Assembly.**

The Governor shall appoint a private secretary, who shall enter in books kept for that purpose all such letters, written by and to the Governor, as are official and important, and such other letters as the Governor shall think necessary. Such books shall be deposited in the office of the executive by the private secretary, and there carefully preserved, and the Governor shall produce the same before the General Assembly whenever requested. (1868-9, c. 270, ss. 33, 34; Code, ss. 3326, 3327; Rev., s. 5330; C.S., s. 7638.)

**§ 147-15. Salary of private secretary.**

The salary of the private secretary to the Governor shall be fixed by the Governor. (R.C., c. 102, s. 12; 1856-7, p. 71, res.; 1881, c. 346; Code, ss. 1689, 3721; P.R. 1901, c. 405; 1903, c. 729; Rev., s. 2737; 1907, c. 830; 1911, c. 95; 1913, c. 1; 1915, c. 50; 1917, c. 214; C.S., s. 3859; 1921, c. 227; 1929, c. 322, ss. 1, 2; 1945, c. 45; 1953, c. 675, s. 22; 1955, c. 910, s. 4; c. 1313, s. 8; 1961, c. 738, s. 1; 1983, c. 717, s. 88.)

**§ 147-15.1:** Repealed by Session Laws 1995, c. 379, s. 11.

**§ 147-16. Records kept; certain original applications preserved; notice of commutations.**

- (a) The Governor shall cause to be kept the following records:
- (1) A register of all applications for pardon, or for commutation of any sentence, with a list of the official signatures and recommendations in favor of such application.
  - (2) An account of all his official expenses and disbursements, including the incidental expenses of his department, and the rewards offered by him for the apprehension of criminals.

These records and the originals of all applications, petitions, and recommendations and reports therein mentioned shall be preserved in the office of the Governor, but when applications for offices are refused he may, in his discretion, return the papers referring to the application.

(b) The Governor shall, unless otherwise requested by any person listed in subdivisions (1) through (4) of this subsection, provide notice of the commutation of any sentence within 20 days after the commutation by first-class mail to the following at the last known address:

- (1) The victim or victims of the crime for which the sentence was imposed;
- (2) The victims' spouse, children, and parents;
- (3) Any other members of the victims' family who request in writing to be notified; and
- (4) The Chairs of the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee. (1868-9, c. 270, ss. 29, 30; 1870-1, c. 111; Code, ss. 3322, 3323; Rev., s. 5331; C.S., s. 7639; 1983,

c. 913, s. 47; 1995, c. 507, s. 19.3(a); 1997-443, s. 21.4(b); 2001-138, s. 2.)

**Effect of Amendments.** — Session Laws 2001-138, s. 2, effective July 1, 2001, substituted “Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Com-

mittee” for “Joint Legislative Corrections and Crime Control Oversight Committee” in subdivision (b)(4).

### § 147-16.1. Publication of executive orders.

The Governor must submit Executive Orders to the Secretary of State, who must compile, index, and publish the Executive Orders. The Governor’s office shall also send a copy of each executive order to the President of the Senate, to the Speaker of the House of Representatives, to the Principal Clerk of the House of Representatives and to the Principal Clerk of the Senate. (1971, c. 1196; 1985, c. 479, ss. 150-152; c. 746, s. 8; 1991, c. 103, s. 1; 418, s. 14.)

### § 147-16.2. Duration of boards and councils created by executive officials; extensions.

(a) Any executive order of the Governor that creates a board, committee, council, or commission expires two years after the effective date of the executive order, unless the Governor specifies an expiration date in the order; provided, however, that any such executive order that was in effect on July 1, 1983, expires on June 30, 1985, unless the Governor specified a different expiration date in any such order. The Governor may extend any such executive order before it expires for additional periods of up to two years by doing so in writing; copies of the writing shall be filed by the Governor with the Secretary of State and the State Legislative Library.

(b) Any other State board, committee, council, or commission created by the Governor or by any other State elective officer specified in Article III of the North Carolina Constitution expires two years after it was created; provided, however, that any such board, committee, council, or commission existing as of July 1, 1984, expires on June 30, 1985, unless it was due to expire on an earlier date. The elective officer creating any such board, committee, council, or commission may extend the board, committee, council, or commission before it expires for additional periods of up to two years by doing so in writing; copies of the writing shall be filed by the elective officer with the Secretary of State and the State Legislative Library.

(c) Any State board, committee, council, or commission created by any official in the executive branch of State government, other than by those officials specified in subsections (a) and (b), expires two years after it was created; provided, however, that any board, committee, council, or commission existing as of July 1, 1984, expires on June 30, 1985, unless it was due to expire on an earlier date. The Governor may extend any such board, committee, council, or commission before it expires for additional periods of up to two years by executive order; copies of the executive order shall be filed by the Governor with the Secretary of State and the State Legislative Library.

The words, “official in the executive branch of State government,” as used in this section, do not include officials of counties, cities, towns, villages, other municipal corporations or political subdivisions of the State or any agencies of such subdivision, or local boards of education, other local public districts, units or bodies of any kind, or community colleges as defined in G.S. 115D-2(2), or private corporations created by act of the General Assembly.

(d) Any elective officer specified in subsection (b) and any other official in the executive branch of State government who creates a board, committee, council,

or commission shall do so in writing and shall file copies of the writing with the Secretary of State and the State Legislative Library. (1983, c. 733, s. 1; 1983 (Reg. Sess., 1984), c. 1053.)

### **§ 147-16.3. Timely nominations if legislative body must confirm.**

Notwithstanding any other provision of law, whenever:

- (1) A statute specifies that an office shall be filled by nomination by the Governor and confirmation by the General Assembly or by one house thereof, and
- (2) The statute specifies that the nominee shall take office without legislative action if the General Assembly adjourns without action being taken or fails to take action within a specified time, and
- (3) The Governor fails to nominate a person for the office by May 15 of a regular session of the General Assembly during an odd-numbered year or by June 7 of a regular session of the General Assembly during an even-numbered year, and
- (4) The appropriate legislative body does not act on the nomination before it next adjourns for more than 10 days or sine die,

the nominee shall serve only on an interim basis until 60 days after the convening of the next regular session of the General Assembly, subject to rejection or approval by the appropriate legislative body before that time. (1987, c. 867, s. 4.)

### **§ 147-17. May employ counsel in cases wherein State is interested.**

(a) No department, officer, agency, institution, commission, bureau or other organized activity of the State which receives support in whole or in part from the State shall employ any counsel, except with the approval of the Governor. The Governor shall give his approval only if the Attorney General has advised him, as provided in subsection (b) of this section, that it is impracticable for the Attorney General to render the legal services. In any case or proceeding, civil or criminal, in or before any court or agency of this State or any other state or the United States, or in any other matter in which the State of North Carolina is interested, the Governor may employ such special counsel as he may deem proper or necessary to represent the interest of the State, and may fix the compensation for their services.

(b) The Attorney General shall be counsel for all departments, officers, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State. Whenever the Attorney General shall advise the Governor that it is impracticable for him to render legal services to any State agency, officer, institution, commission, bureau or other organized activity, or to defend a State employee or former employee as authorized by Article 31A of Chapter 143 of the General Statutes, the Governor may authorize the employment of such counsel, as in his judgment, should be employed to render such services, and may fix the compensation for their services.

(c) The Governor may direct that the compensation fixed under this section for special counsel shall be paid out of appropriations or other funds credited to the appropriate department, agency, institution, commission, bureau, or other organized activity of the State or out of the Contingency and Emergency Fund. (1868-9, c. 270, s. 6; 1870-1, c. 111; 1873-4, c. 160, s. 2; 1883, c. 71; Code, ss. 3320, 3324; 1901, c. 744; Rev., s. 5332; C.S., s. 7640; 1925, c. 207, s. 3; 1961, c. 1007; 1963, c. 1009; 1967, c. 1092, s. 2; 1985, c. 479, s. 136.)

**Cross References.** — As to defense of State employees, see §§ 143-300.2 through 143-300.5.

**Legal Periodicals.** — For article, “Student Legal Services at the University of North Carolina at Chapel Hill,” see 7 N.C. Cent. L.J. 286 (1976).

For article, “The Common Law Powers of the Attorney General of North Carolina,” see 9 N.C. Cent. L.J. 1 (1977).

For survey of 1984 administrative law, “A Declining Role for the Attorney General,” see 63 N.C.L. Rev. 1051 (1985).

#### CASE NOTES

**Governor May Employ Special Counsel Without First Being Advised of Impracticability of Representation by Attorney General.** — The Governor, pursuant to subsection (a), may employ special counsel in a proceeding in which the State is interested without first being advised by the Attorney General that it is impracticable for the latter to represent the interest of the State. *Martin v. Thornburg*, 320 N.C. 533, 359 S.E.2d 472 (1987).

**District Attorneys.** — As state officers under Chapter 147, district attorneys are required to comply with the prohibition against hiring

counsel absent the Governor’s approval. *Whitfield v. Gilchrist*, 126 N.C. App. 241, 485 S.E.2d 61 (1997), rev’d on other grounds, 348 N.C. 39, 497 S.E.2d 412 (1998).

**Waiver of Sovereign Immunity.** — The State’s sovereign immunity will be waived by implication only once all of the requirements of this section are met and a valid contract has been entered. *Whitfield v. Gilchrist*, 348 N.C. 39, 497 S.E.2d 412 (1998).

**Applied** in *Nash County Bd. of Educ. v. Biltmore Co.*, 464 F. Supp. 1027 (E.D.N.C. 1978); *Tice v. DOT*, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

### § 147-18. To designate “Indian Day.”

The Governor of North Carolina is hereby empowered to set aside some day which shall be called “Indian Day” on which Indian lore shall receive emphasis in the public schools of the State and among the citizens of North Carolina. (Resolutions 54, 1937, p. 957.)

### § 147-19. To appoint a day of thanksgiving.

The Governor is directed to set apart a day in every year, and by proclamation give notice thereof, as a day of solemn and public thanksgiving to Almighty God for past blessings and of supplication for His continued kindness and care over us as a State and a nation. (1868-9, c. 270, s. 39; Code, s. 3334; Rev., s. 5333; C.S., s. 7641.)

§ 147-20: Repealed by Session Laws 1955, c. 867, s. 13.

### § 147-21. Form and contents of applications for pardon.

Every application for pardon must be made to the Governor in writing, signed by the party convicted, or by some person in his behalf. And every such application shall contain the grounds and reasons upon which the executive pardon is asked, and shall be in every case accompanied by a certified copy of the indictment, and the verdict and judgment of the court thereon. (1869-70, c. 171; 1870-1, c. 61; Code, s. 3336; Rev., s. 5334; C.S., s. 7642.)

**Cross References.** — As to the Governor’s power to pardon, see N.C. Const., Art. III, § 5.

#### CASE NOTES

**Quoted** in *Bacon v. Lee*, 353 N.C. 696, 549 S.E.2d 840 (2001).

§ 147-22: Repealed by Session Laws 1981, c. 309.

### § 147-23. Conditional pardons may be granted.

In any case in which the Governor is authorized by the Constitution to grant a pardon he may, upon the petition of the prisoner, grant it, subject to such conditions, restrictions, and limitations as he considers proper and necessary, and he may issue his warrant to all proper officers to carry such pardon into effect in such manner as he thinks proper. (1905, c. 356; Rev., s. 5335; C.S., s. 7643.)

### § 147-24. Governor's duties when conditions of pardon violated.

If a prisoner who has been pardoned upon conditions to be observed and performed by him violates such conditions, or any of them, the Governor, upon receiving information of such violation, shall forthwith cause him to be arrested and detained until the case can be examined by him. The Governor shall examine the case of such prisoner, and if it appears by his own admission or by such evidence as the Governor may require that he has violated the conditions of his pardon, the Governor shall order him remanded and confined for the unexpired term of his sentence; said confinement, if the prisoner is under any other sentence of imprisonment at the time of said order, to begin upon expiration of such sentence. In computing the period of his confinement the time between the conditional pardon and subsequent arrest shall not be taken to be a part of the time of his sentence. If it appears to the Governor that he has not broken the conditions of his conditional pardon he shall be released and his conditional pardon shall remain in force. (1905, c. 356, ss. 2, 3; Rev., s. 5336; C.S., s. 7644.)

**Cross References.** — As to the Governor's power to pardon, see N.C. Const., Art. III, § 5.

**Legal Periodicals.** — For review of this section, see 1 N.C.L. Rev. 47 (1923).

#### CASE NOTES

**Right to Grant Conditional Pardon.** — The Governor may grant a pardon upon a condition precedent that the prisoner pay the costs of trial, and upon condition subsequent, that he remain of good character and be sober and industrious. *Ex parte Williams*, 149 N.C. 436, 63 S.E. 108 (1908).

**Conditions Must Not Be Illegal, Immoral or Impossible.** — Power of the Governor to grant a conditional pardon is generally subject to the limitation that the conditions imposed must not be illegal, immoral or impossible of performance, which limitation does not apply to cases wherein the prisoner is only required not to violate the statute law and to remain of good conduct. *State v. Yates*, 183 N.C. 753, 111 S.E. 337 (1922).

**Conditional Pardon Irrevocable Unless Conditions Are Violated.** — A pardon with conditions precedent and subsequent is irrevocable after delivery and acceptance, upon compliance by the prisoner with the condition precedent, unless he violates the conditions

subsequent by his conduct after release. *Ex parte Williams*, 149 N.C. 436, 63 S.E. 108 (1908).

**Pardon Voided by Breach of Conditions.** — Where prisoner has accepted his freedom upon the terms of a conditional pardon from the Governor, his breach of such conditions voids the pardon and cancels his right to further immunity from punishment. *State v. Yates*, 183 N.C. 753, 111 S.E. 337 (1922).

**Rearrest for Violation of Conditions.** — Under the provisions of the State Constitution and statutes, a "parole" granted by the Governor to a prisoner imports a conditional pardon, and the Governor may cause his rearrest either upon his own admissions, or on such evidence as he may require, for violating the conditions which the prisoner has accepted under the terms of the parole. *State v. Yates*, 183 N.C. 753, 111 S.E. 337 (1922).

The essential part of a sentence for a violation of the criminal law is punishment for the offense committed, and not the time the sen-

tence shall begin and end; and where a prisoner has accepted a conditional pardon from the Governor and has obtained his freedom, the breaking of the condition after the term would have otherwise expired affords no legal excuse why he should not be recommitted to serve out the balance of his sentence. *State v. Yates*, 183 N.C. 753, 111 S.E. 337 (1922).

**A pardoned prior conviction may not be considered as an aggravating factor during sentencing** absent revocation of the pardon by the governor. *State v. Clifton*, 125 N.C. App. 471, 481 S.E.2d 393 (1997), cert. granted, 346 N.C. 182, 486 S.E.2d 200 (1997), discretionary review improvidently allowed, 347 N.C.

391, 493 S.E.2d 56 (1997).

The reasoning that an increased punishment for a current offense due to a prior pardoned conviction is not punishment for the prior pardoned offense is a legal fiction that conflicts with logic and the administrative duties of the governor; thus, trial court infringed upon the prerogatives of the governor by finding that defendant's prior conviction constituted an aggravating factor. *State v. Clifton*, 125 N.C. App. 471, 481 S.E.2d 393 (1997), cert. granted, 346 N.C. 182, 486 S.E.2d 200 (1997), discretionary review improvidently allowed, 347 N.C. 391, 493 S.E.2d 56 (1997).

### § 147-25. Duty of sheriff and clerk on pardon granted.

If a prisoner is pardoned conditionally or unconditionally, or his punishment is commuted, the officer to whom the warrant for such purpose is issued shall, as soon as may be after executing it, make return thereof, signed by him, with his doing thereon, to the Governor's office, and shall file in the office of the clerk of the court in which the offender was convicted an attested copy of the warrant and return, and the clerk shall file the same in his office and subjoin a brief abstract thereof to the record of the conviction and sentence, and at the next regular term of said court said warrant shall be entered upon the minutes of the court. (1905, c. 356, s. 4; Rev., s. 5337; C.S., s. 7645.)

#### CASE NOTES

**Sheriff, by returning a pardon after its delivery and acceptance** by the prisoner, cannot defeat or impair its legal results. *Ex parte Williams*, 149 N.C. 436, 63 S.E. 108 (1908).

**Recovery of Fine Paid Before Pardon.** — Where one convicted of a crime has paid the fine imposed by the court and has then obtained a pardon from the Governor, it is the

duty of the court to return the fine upon his application and presenting of the pardon, so long as the money remains in its possession and the rights of third persons have not intervened; but where the fine collected has reached its final destination, it is beyond the reach of executive clemency, and may not be recovered. *Byrum v. Turner*, 171 N.C. 86, 87 S.E. 975 (1916).

### § 147-26. To procure great seal of State; its description.

The Governor shall procure for the State a seal, which shall be called the great seal of the State of North Carolina, and shall be two and one-quarter inches in diameter, and its design shall be a representation of the figures of Liberty and Plenty, looking toward each other, but not more than half-fronting each other and otherwise disposed as follows: Liberty, the first figure, standing, her pole with cap on it in her left hand and a scroll with the word "Constitution" inscribed thereon in her right hand. Plenty, the second figure, sitting down, her right arm half extended towards Liberty, three heads of grain in her right hand, and in her left, the small end of her horn, the mouth of which is resting at her feet, and the contents of the horn rolling out.

The background on the seal shall contain a depiction of mountains running from left to right to the middle of the seal and an ocean running from right to left to the middle of the seal. A side view of a three-masted ship shall be located on the ocean and to the right of Plenty. The date "May 20, 1775" shall appear within the seal and across the top of the seal. The date "April 12, 1776" shall appear within the seal and across the bottom of the seal. The words "esse quam videri" shall appear at the bottom around the perimeter. The words "THE

GREAT SEAL of the STATE of NORTH CAROLINA” shall appear around the perimeter. No other words, figures or other embellishments shall appear on the seal.

It shall be the duty of the Governor to file in the office of Secretary of State an impression of the great seal, certified to under his hand and attested by the Secretary of State, which impression so certified the Secretary of State shall carefully preserve among the records of his office. (1868-9, c. 270, s. 35; 1883, c. 392; Code, ss. 3328, 3329; 1893, c. 145; Rev., s. 5339; C.S., s. 7646; 1971, c. 167, s. 1; 1983, c. 257, s. 1.)

#### OPINIONS OF ATTORNEY GENERAL

**As to the great seal of the State of North Carolina,** see opinion of Attorney General to Dr. H.G. Jones, Department of Archives and History, 41 N.C.A.G. 214 (1971).

### § 147-27. Affixing great seal a second time to public papers.

In all cases where any person may find it necessary to have the great seal of the State put again to any public paper, other than a grant for lands, he may prefer his petition to the Governor and Council, who shall, if they deem the same proper, direct the seal to be put thereto. (1868-9, c. 270, s. 38; Code, s. 3333; Rev., s. 5338; C.S., s. 7647.)

### § 147-28. To procure seals for departments and courts.

The Governor shall also procure a seal for each department of the State government to be used for attesting and authenticating grants, proclamations, commissions, and other public acts, in such manner as may be directed by law and the usage established in the public offices; also a seal for every court of record in the State, for the purpose of authenticating the papers and records of such court. All such seals shall be delivered to the proper officers, who shall give a receipt therefor and be accountable for their safekeeping. (1868-9, c. 270, ss. 35, 37; 1883, c. 71; Code, ss. 3328, 3332; Rev., s. 5340; C.S., s. 7648.)

### § 147-29. Seal of Department of State described.

The seal of the Department of State shall be two inches in diameter and shall be of the same design as the great seal of the State, with the words “State of North Carolina, Department of State,” surrounding the figures. (1883, c. 238; Code, s. 3330; Rev., s. 5341; C.S., s. 7649.)

### § 147-30. To provide new seals when necessary.

Whenever the great seal of the State shall be lost or so worn or defaced as to render it unfit for use, the Governor shall provide a new one and when such new one is provided the former one, if it can be found, shall be destroyed in the presence of the Governor. Whenever the seal of any department of the State shall be lost or so worn or defaced as to render it unfit for use, a new seal shall be provided by the head of the department and the former one, if it can be found, shall be destroyed in the presence of the head of the department. Whenever the seal of any court of record shall be lost or so worn or defaced as to render it unfit for use, the board of county commissioners of the county in which such court is situate shall provide a new one and the old one, if it can be found, shall be destroyed in the presence of the chairman of the board of county commissioners of such county. (1868-9, c. 270, s. 36; Code, s. 3331; Rev., s. 5342; C.S., s. 7650; 1943, c. 632.)

§ 147-31: Repealed by Session Laws 1983, c. 913, s. 48.

**§ 147-31.1. Office space and expenses for Governor-elect and Lieutenant Governor-elect; and other Council of State members-elect.**

(a) The Department of Administration, upon request of the Governor-elect and Lieutenant Governor-elect, made after the general election for these respective offices, is empowered and directed to provide suitable office space and office staff for each such official for the period between the general election and inauguration.

The Department of Administration shall provide, for the fiscal years in which general election and inauguration of the Governor and Lieutenant Governor shall occur, such sums, not in excess of eighty thousand dollars (\$80,000) for the Governor-elect, and not in excess of ten thousand dollars (\$10,000) for the Lieutenant Governor-elect, as may be necessary for the salary of the staffs and the payment of office expenses of each such official during such interim.

(b) The Department of Administration, upon request of any other member-elect of the Council of State who is not an incumbent in that office, shall provide for such persons suitable office space and office staff for each such official for the period between the general election and inauguration.

The Department of Administration shall provide, for the fiscal years in which general election and inauguration of such persons occurs, ten thousand dollars (\$10,000) for the salary of the staffs and the payment of office expenses of each such official during such interim. If there are more than two such persons, such services and payments shall be made from the Contingency and Emergency Fund upon approval of the Council of State. (1965, c. 407; 1987 (Reg. Sess., 1988), c. 1086, s. 48.)

**§ 147-32. Compensation for surviving spouses of Governors.**

All surviving spouses of Governors of the State of North Carolina, who make written request to the Director of the Budget, shall be paid the sum of twelve thousand dollars (\$12,000) a year in equal monthly installments, out of the State Treasury upon warrants duly drawn thereon. This compensation shall terminate upon the subsequent remarriage of the surviving spouse. (1937, c. 416; 1947, c. 897, ss. 1, 2; 1955, c. 1314; 1977, c. 554; 1981 (Reg. Sess., 1982), c. 1282, s. 63; 1987, c. 738, s. 40.)

**§ 147-33. Compensation and expenses of Lieutenant Governor.**

The salary of the Lieutenant Governor shall be set by the General Assembly in the Current Operations Appropriations Act. In addition to this salary, the Lieutenant Governor shall be paid an annual expense allowance in the sum of eleven thousand five hundred dollars (\$11,500). In addition to the salary set by the General Assembly in the Current Operations Appropriations Act, longevity pay shall be paid on the same basis as is provided to employees of the State who are subject to the State Personnel Act. (1911, c. 103; C.S., s. 3862; 1945, c. 1; 1953, c. 1, s. 1; 1963, c. 1050; 1967, c. 1170, s. 1; 1971, c. 913; 1977, c. 802, s. 42.6; 1977, 2nd Sess., c. 1136, s. 40; 1979, 2nd Sess., c. 1137, s. 32; 1983, c. 761, s. 211; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1987, c. 738, s. 32(b).)

## ARTICLE 3A.

*Emergency War Powers of Governor.***§ 147-33.1. Short title.**

This Article may be cited as the "North Carolina Emergency War Powers Act." (1943, c. 706, s. 1; 1959, c. 337, s. 6.)

**§ 147-33.2. Emergency war powers of the Governor.**

Upon his own initiative, or on the request or recommendation of the President of the United States, the army, navy or any other branch of the armed forces of the United States, the federal Director of Civilian Defense, or any other federal officer, department or agency having duties and responsibilities related to the prosecution of the war or the health, welfare, safety and protection of the civilian population, whenever in his judgment any such action is in the public interest and is necessary for the protection of the lives or property of the people of the State, or for the defense and security of the State or nation, or for the proper conduct of the war and the successful prosecution thereof, the Governor may, with the approval of the Council of State, at any time and from time to time during the existing state of war:

- (1) Formulate and execute plans for:
  - a. The inventory, mobilization, conservation, distribution or use of food, fuel, clothing and other necessities of life and health, and of land, labor, materials, industries, facilities and other resources of the State necessary or useful in the prosecution of the war;
  - b. Organization and coordination of civilian defense in the State in reasonable conformity with the program of civilian defense as promulgated from time to time by the Office of Civilian Defense of the federal government; and, further, to effectuate such plans for civilian defense in such manner as to promote and assure the security, protection and mobilization of the civilian population of the State for the duration of the war and in the interest of State and national defense.
- (2) Order and carry out blackouts, radio silences, evacuations and all other precautionary measures against air raids or other forms of enemy action, and suppress or otherwise control any activity which may aid or assist the enemy.
- (3) Mobilize, coordinate and direct the activities of the police, fire fighting, health, street and highway repair, public utility, medical and welfare forces and services of the State, of the political subdivisions of the State, and of private agencies and corporations, and formulate and execute plans for the interchange and use of such forces and services for the mutual aid of the people of the State in cases of air raid, sabotage or other enemy action, fire, flood, famine, violence, riot, insurrection, or other catastrophe or emergency.
- (4) Prohibit, restrict, or otherwise regulate and control the flow of vehicular and pedestrian traffic, and congregation of persons in public places or buildings, lights and noises of all kinds and the maintenance, extension and operation of public utility and transportation services and facilities.
- (5) Accept, or authorize any officer or department of the State to accept, from the federal government or any federal agency or instrumentality, or from any other source, grants of funds and grants or loans of equipment, materials, supplies or other property for war or defense

purposes, subject to the terms and conditions appertaining to such grants and loans.

- (6) Authorize any department or agency of the State to lease or lend to the army, navy or any other branch of the armed forces of the United States, any real or personal property of the State upon such terms and conditions as he may impose, or, on behalf of the State, to make a contract directly therefor.
- (7) Authorize the temporary transfer of personnel of the State for employment by the army, navy or any other branch of the armed forces of the United States and fix the terms and conditions of such transfers.
- (8) At any time when the General Assembly is not in session, suspend, or modify, in whole or in part, generally or in its application to certain classes of persons, firms, corporations or circumstances, any law, rule or regulation with reference to the subjects hereinafter enumerated, when he shall find and proclaim after such study, investigation or hearings as he may direct, make or conduct, that the operation, enforcement or application of such law, or any part thereof, materially hinders, impedes, delays or interferes with the proper conduct of the war; said subjects being as follows:
  - a. The use of the roads, streets, and highways of the State, with particular reference to speed limits, weights and sizes of motor vehicles, regulations of automobile lights and signals, transportation of munitions or explosives and parking or assembling of automobiles on highways or any other public place within the State; provided that any changes in the laws referred to in this subdivision shall be first approved by the Board of Transportation and the Commissioner of Motor Vehicles of the State;
  - b. Public health, insofar as suspension or modification of the laws in reference thereto may be stipulated by the United States Public Health Service or other authoritative agency of the United States government as being essential in the interest of national safety and in the successful prosecution of the war effort; provided that such suspension or modification of public health laws shall first be submitted to and approved by the Commission for Health Services;
  - c. Labor and industry; provided, however, that any suspension or modification of laws regulating labor and industry shall be only such as are certified by the Commissioner of Labor of the State as being necessary in the interest of national safety and in the furtherance of the war program; and provided further that any such changes as may result in an increase in the hours of employment over and above the limits of the existing statutory provisions shall carry provision for adequate additional compensation; and provided, further, that no changes in such laws or regulations shall be made as affecting existing contracts between labor and management in this State except with the approval of the contracting parties;
  - d. Whenever it should be certified by the Adjutant General of the State that emergency conditions require such procedure, the Governor, with the approval of the Council of State, shall have the power to call up and mobilize State militia; to provide transportation and facilities for mobilization and full utilization of the State militia, in such emergency; and to allocate from the Contingency and Emergency Fund such amounts as may be necessary for such purposes during the period of such emergency;
  - e. Manufacture, sale, transportation, possession and use of explosives or fireworks, or articles in simulation thereof, and the sale, use and handling of firearms;
- (9) Cooperate with agencies established by or pursuant to the laws of the

United States and the several states for civilian protection and the promotion of the war effort, and coordinate and direct the work of the offices and agencies of the State having duties and responsibilities directly connected with the war effort and the protection of the civilian population.

- (10) Aid in the administration and enforcement in this State of any rationing, freezing, price-fixing or similar order or regulation duly promulgated by any federal officer or agency under or pursuant to the authority of any act of Congress or of any order or proclamation of the President of the United States, by making temporarily available personnel and facilities of the State to assist in the administration thereof and/or by adopting and promulgating in this State an order or regulation substantially embodying the provisions of such federal order or regulation, filing the same in the office of the Secretary of State, prescribing the penalties for the violation thereof, and specifying the State and local officers and agencies to be charged with the enforcement thereof.
- (11) Formulate and execute plans and adopt rules for:
  - a. The organization, recruiting, training, maintenance and operation of aircraft warning services, observation and listening posts, information and control centers and such other services and facilities as may be necessary for the prompt and accurate reception and transmission of air-raid warnings and signals;
  - b. The organization, recruiting, training, equipment, identification, conduct, powers, duties, rights, privileges and immunities of air-raid wardens, auxiliary police, auxiliary firemen and of the members of all other auxiliary defense and civilian protection forces and agencies.
- (12) Adopt, promulgate, publicize and enforce such orders, rules and regulations as may be necessary for the proper and effective exercise of the powers granted by this Article, and amend or rescind the same.
- (13) Hold and conduct hearings, administer oaths and take testimony, issue subpoenas to compel the attendance of witnesses and the production of relevant books, papers, records or documents, in connection with any investigation made by him under the authority of this Article. (1943, c. 706, s. 2; 1959, c. 337, s. 6; 1973, c. 476, s. 128; c. 507, s. 5; 1999-456, s. 33(f).)

### § 147-33.3. Orders, rules and regulations.

All orders, rules and regulations promulgated by the Governor pursuant to this Article shall have the full force and effect of law from and after the date of the filing of a duly authenticated copy thereof in the office of the Secretary of State. All laws, ordinances, rules and regulations, insofar as they are inconsistent with the provisions of this Article or of any rule, order or regulation made pursuant to this Article, shall be suspended during the period of time and to the extent that such conflict exists. A violation of any such order, rule or regulation, unless otherwise provided therein, shall be deemed a Class 1 misdemeanor. (1943, c. 706, s. 3; 1959, c. 337, s. 6; 1993, c. 539, s. 1054; 1994, Ex. Sess., c. 24, s. 14(c).)

### § 147-33.4. Immunity.

Neither the State nor any political subdivision thereof, nor the agents or representatives of the State or any political subdivision thereof, under any circumstances, nor any individual, firm, partnership, corporation or other entity, or any agent thereof, in good faith complying with or attempting to

comply with any order, rule or regulation made pursuant to this Article, shall be liable for the death or any injury to persons or for any damage to property as the result of any air raid, invasion, act of sabotage, or other form of enemy action, or of any action taken under this Article or such order, rule or regulation. This section shall not be construed to impair or affect the right of any person to receive any benefits or compensation to which he may otherwise be entitled under Workers' Compensation Law, any pension law, or any other law, or any act of Congress, or any contract of insurance or indemnification. (1943, c. 706, s. 4; 1959, c. 337, s. 6; 1991, c. 636, s. 3.)

### § 147-33.5. Federal action controlling.

All action taken under this Article and all orders, rules and regulations made pursuant thereto in any field or with respect to any subject matter over which the army or navy or any other department or agency of the United States government has duly taken jurisdiction shall be taken or made with due consideration to the orders, rules, regulations, actions, recommendations and requests of such department or agency and shall be consistent therewith. Blackouts, radio silences and evacuations shall be carried out only in such areas, at such times, and for such periods as shall be designated by air-raid warnings or orders with respect thereto issued by the United States army, or its duly designated agency, and only under such conditions and in such manner as shall be consistent with such warning or order, and practice blackouts shall be held only when and as authorized by the United States army or its duly designated agency. (1943, c. 706, s. 5; 1959, c. 337, s. 6.)

### § 147-33.6. Construction of Article.

This Article shall be construed liberally to effectuate its purposes. (1943, c. 706, s. 6; 1959, c. 337, s. 6.)

§§ 147-33.7 through 147-33.11: Reserved for future codification purposes.

## ARTICLE 3B.

### *North Carolina Housing Commission.*

§§ 147-33.12 through 147-33.21: Repealed by Session Laws 1987, c. 841, s. 5.

**Cross References.** — For the North Carolina Housing Trust and Oil Overcharge Act, see section 122E-1 et seq.

## ARTICLE 3C.

### *Office of Juvenile Justice.*

§§ 147-33.30 through 147-33.71: Repealed by Session Laws 2000-137, s. 1(a), effective July 20, 2000.

**Cross References.** — For the Department of Juvenile Justice and Delinquency Prevention, see § 143B-511 et seq.

**Editor's Note.** — Repealed §§ 147-33.33, 147-33.34, 147-33.40, 147-33.48, 147-33.49, 147-33.52 to 147-33.54, 147-33.56 to 147-33.59,

147-33.68, and 147-33.69 had been reserved for future codification purposes.

**§§ 147-33.72 through 147-33.74:** Reserved for future codification purposes.

## ARTICLE 3D.

### *Office of Information Technology Services.*

#### Part 1. Transfer and Organization of Office.

#### **§ 147-33.75. Transfer to the Office of the Governor.**

(a) The Office of Information Technology Services (“Office”) of the Department of Commerce and the Information Resource Management Commission are hereby transferred to the Office of the Governor by a Type II transfer, as defined in G.S. 143A-6.

(b) The Governor has the authority, powers, and duties over the Office that are assigned to the Governor and the head of department pursuant to Article 1 of Chapter 143B of the General Statutes, G.S. 143A-6(b), and the Constitution and other laws of this State. (1999-434, s. 9; 2000-174, s. 2.)

**Editor’s Note.** — Session Laws 2000-174, s. 3, made this Article effective September 1, 2000.

Session Laws 2000-174, s. 1 repealed Part 16 of Article 10 of Chapter 143B, § 143B-472.40 et seq. Session Laws 2000-174, s. 1(b) enacted a new Article 3D of Chapter 147. Historical citations to the sections in the former Part 16 of Article 10 of Chapter 143B have been added to the corresponding sections in new Article 3D.

The sections in Article 3D have been numbered at the direction of the Revisor of Statutes, the section numbers in Session Laws 2000-174, s. 1(b) having been §§ 147-33.75 to 147-33.99.

Session Laws 2001-424, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2001.’”

Session Laws 2001-424, s. 15.4(c), provides: “The Office of State Personnel, in conjunction with the Office of Information Technology Services, shall devise a mechanism for identifying, by specific industry-relevant categories, State information technology positions across all relevant classifications in State government employment. The Office of State Personnel shall identify the results of market analyses compar-

ing State information technology workers with private sector information technology workers. By January 1, 2002, the Office of State Personnel shall report on the results of the market analyses and its identification of State information technology personnel to the Joint Select Committee on Information Technology and to the Chairs of the House of Representatives Appropriations Subcommittee on Information Technology and the Senate Appropriations Committee on Information Technology.”

Session Laws 2001-424, s. 15.4(d), provides: “The Office of Information Technology Services shall accurately identify and present State agencies with detailed information on the cost of the ITS services for telecommunications data and video services. The bill should clearly indicate the usage and the rate for the service.”

Session Laws 2001-424, s. 36.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium.”

Session Laws 2001-424, s. 36.5 is a severability clause.

#### **§ 147-33.76. Head of the Office of Information Technology Services; qualification and appointment of State Chief Information Officer.**

(a) The Office of Information Technology Services shall be managed and administered by the State Chief Information Officer. The State Chief Informa-

tion Officer shall be qualified by education and experience for the office and shall be appointed by the Governor after consultation with the Senate Committee on Information Technology and the House Committee on Technology meeting jointly (or by similar committees designated by the rules of each house).

(b) The Governor shall submit the name of the person to be appointed for review by the entities specified in subsection (a) of this section.

(c) The salary of the State Chief Information Officer shall be set by the General Assembly in the Current Operations Appropriations Act. The State Chief Information Officer shall receive longevity pay on the same basis as is provided to employees of the State who are subject to the State Personnel Act. (1999-434, s. 10; 2000-174, s. 2.)

### **§ 147-33.77. Office of Information Technology Services; organization and operation.**

(a) The State Chief Information Officer may appoint a Chief Deputy Information Officer. The salary of the Chief Deputy Information Officer shall be set by the State Chief Information Officer. The State Chief Information Officer may appoint all employees, including legal counsel, necessary to carry out the powers and duties of the office. These employees shall be subject to the State Personnel Act.

(b) All employees of the office shall be under the supervision, direction, and control of the State Chief Information Officer. Except as otherwise provided by this Article, the State Chief Information Officer may assign any function vested in the State Chief Information Officer or the Office of Information Technology Services to any subordinate officer or employee of the office.

(c) The State Chief Information Officer may, subject to the provisions of G.S. 147-64.7(b)(2), obtain the services of independent public accountants, qualified management consultants, and other professional persons or experts to carry out powers and duties of the office.

(d) The State Chief Information Officer shall have legal custody of all books, papers, documents, and other records of the office.

(e) The State Chief Information Officer shall be responsible for the preparation of and the presentation of the office budget request, including all funds requested and all receipts expected for all elements of the budget.

(f) The State Chief Information Officer may adopt regulations for the administration of the office, the conduct of employees of the office, the distribution and performance of business, the performance of the functions assigned to the State Chief Information Officer and the Office of Information Technology Services, and the custody, use, and preservation of the records, documents, and property pertaining to the business of the office. (1989, c. 239, s. 5; c. 770, s. 60; 1989 (Reg. Sess., 1990), c. 1024, s. 36; 1991 (Reg. Sess., 1992), c. 900, s. 14(g); c. 1030, s. 51.14; ; 1997-148, ss. 5, 6; 1999-347, s. 2; 1999-434, s. 27; 2000-174, s. 2.)

### **§ 147-33.78. Information Resource Management Commission.**

(a) Creation; Membership. — The Information Resource Management Commission is established and shall be located within the Office for organizational, budgetary, and administrative purposes. The Commission consists of the following members:

- (1) Four members of the Council of State, appointed by the Governor.
- (2) The Secretary of State.
- (3) The Secretary of Administration.

- (4) The State Budget Officer.
- (5) Two members of the Governor's cabinet, appointed by the Governor.
- (6) Two citizens of the State of North Carolina with a background in and familiarity with information systems or telecommunications, appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121.
- (7) Two citizens of the State of North Carolina with a background in and familiarity with information systems or telecommunications, appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121.
- (8) The Chair of the Information Technology Management Advisory Council.
- (9) The Chair of the Criminal Justice Information Network Governing Board.
- (10) The State Controller.
- (11) The Director of the Administrative Office of the Courts or the Director's designee.
- (12) The President of The University of North Carolina or the President's designee.
- (13) The President of the Community Colleges System Office or the President's designee.
- (14) The Executive Director of the North Carolina League of Municipalities or the Executive Director's designee, who shall be a nonvoting member.
- (15) The Executive Director of the North Carolina Association of County Commissioners or the Executive Director's designee, who shall be a nonvoting member.
- (16) The State Chief Information Officer, who shall be a nonvoting member.

Members of the Commission shall not be employed by or serve on the board of directors or other corporate governing body of any information systems, computer hardware, computer software, or telecommunications vendor of goods and services to the State of North Carolina.

The initial appointed members of the Commission shall be the members appointed to the Information Resource Management Commission who are serving unexpired terms as of July 1, 2000, who shall serve for a period equal to the remainder of their current terms on the Information Resource Management Commission. Upon the expiration of the current terms of the appointed members, their successors shall be appointed for four-year terms, commencing July 1. Members of the Governor's cabinet shall be disqualified from completing a term of service on the Commission if they are no longer cabinet members. Members of the Council of State shall be disqualified from completing a term of service on the Commission if they are no longer members of the Council of State.

Vacancies in the four legislative appointments shall be filled as provided in G.S. 120-122.

The Commission chair shall be elected in the first meeting of each calendar year from among the appointees of the Governor from the Council of State and shall serve a term of one year. The State Chief Information Officer shall be secretary to the Commission.

No member of the Information Resource Management Commission shall vote on an action affecting solely his or her own State agency.

(b) Powers and Duties. — The Commission has the following powers and duties:

- (1) To develop, approve, and publish a statewide information technology strategy covering the current and following biennium that shall be

- updated annually and shall be submitted to the General Assembly on the first day of each regular session.
- (2) To develop, approve, and sponsor statewide technology initiatives and to report on those initiatives in the annual update of the statewide information technology strategy.
  - (3) To review and approve biennially the information technology plans of the executive agencies and the Administrative Office of the Courts. This review shall include plans for the procurement and use of personal computers and workstations.
  - (4) To recommend to the Governor and the Office of State Budget and Management the relative priorities across executive agency and Administrative Office of the Courts information technology plans.
  - (5) To issue certification of any State agency information technology project that requires or is expected to require the expenditure of funds in excess of five hundred thousand dollars (\$500,000), whether the project is undertaken in a single phase or component or in multiple phases or components. The certification shall be issued when the Commission determines that the project complies with Commission policies, standards, and procedures. The Commission shall promptly report each certification to the Office of State Budget and Management, the Office of the State Controller, the Chairs of the Legislative Committees on Information Technology, and the Cochairs of the Joint Legislative Commission on Governmental Operations. No State agency, other than The University of North Carolina or any of its constituent institutions, shall allocate or expend funds in excess of five hundred thousand dollars (\$500,000) on any information technology project without prior certification as required by this subsection. If an agency cannot determine whether a project or series of projects will require certification, the agency shall seek an opinion from the Commission. Upon review, the Commission may determine that a project is exempt from certification and shall advise the agency of its determination.
  - (6) To establish a quality assurance policy for all agency information technology projects, information systems training programs, and information systems documentation. If at any time a certified agency information technology project is not in compliance with Commission policies, standards, or procedures, the Commission may suspend project certification and shall report the suspension to the Office of the State Controller, the Office of State Budget and Management, the Chairs of the Legislative Committees on Information Technology, and the Cochairs of the Joint Legislative Commission on Governmental Operations. Upon recommendation of the Commission, the Joint Legislative Commission on Governmental Operations may request the State Budget Office and the State Controller to take appropriate remedial action, up to and including the suspension of appropriations or the nonrelease of funds to the project.
  - (7) To establish and enforce a quality review and expenditure review procedure for major agency information technology projects.
  - (8) To review and approve expenditures from appropriations made to the Office of State Budget and Management for the purpose of creating a Computer Reserve Fund.
  - (9) To develop and promote technical requirements for the fair and competitive procurement of information technology in cooperation with the Office of Information Technology Services where different information technology hardware, software, and networks operate together easily and reliably, while considering the cost-effectiveness of managing these assets.

(c) Meetings. — The Information Resources Management Commission shall adopt bylaws containing rules governing its meeting procedures. The Information Resources Management Commission shall meet at least monthly. (1983, c. 267, s. 2; 1989, c. 239, s. 6; 1991 (Reg. Sess., 1992), c. 900, s. 14(a); c. 1030, s. 51.14; 1996, 2nd Ex. Sess., c. 18, s. 23.3(b); 1997-148, ss. 2, 6; 1997-443, ss. 18.17(a), 24(a); 1998-212, s. 16(a); 1999-347, ss. 3, 5; 1999-434, ss. 11, 18, 28; 1999-456, s. 62; 2000-140, s. 93.1(i); 2000-174, s. 2; 2001-166, s. 1; 2001-424, s. 12.2(b).)

**Cross References.** — For provision regarding “useful life guidelines, see § 115C-529.

**Editor’s Note.** — Session Laws 2001-424, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2001.’”

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-140, s. 93.1(i), effective July 1, 2000, substituted “Office of State Budget, Planning, and Management” for “Office of State Budget and Planning” in subdivisions (b)(4), (b)(5), (b)(6), and (b)(8).

Session Laws 2001-166, s. 1, effective June 7, 2001, substituted “Two citizens” for “One citizen” at the beginning of subdivisions (a)(6) and (a)(7); and substituted “four” for “two” preceding “legislative appointments” in the fourth paragraph of subsection (a).

Session Laws 2001-424, s. 12.2(b), effective July 1, 2001, substituted “Office of State Budget and Management” for “Office of State Budget, Planning, and Management” in subdivisions (b)(4), (5), (6) and (8).

## § 147-33.79. Information Resources Management Commission staff.

(a) There is established in the Office an independent staff for the Information Resources Management Commission. The staff shall consist of an executive director and such other professional, administrative, technical, and clerical personnel as authorized by the General Assembly as may be necessary to assist the Commission in carrying out its powers and duties.

(b) All independent staff shall be appointed, supervised, and directed by the Commission. The executive director shall be exempt from the provisions of Chapter 126 of the General Statutes, except for Articles 6 and 7 of Chapter 126 of the General Statutes. All other staff personnel shall be subject to the provisions of Chapter 126 of the General Statutes. The independent staff shall not be subject to the supervision, direction, or control of the Office.

(c) Except for the executive director, salaries and compensation of all staff personnel shall be fixed in the manner provided by law for fixing and regulating salaries and compensation by other State agencies.

(d) Expenses of the Commission and the salaries of the independent staff shall be paid out of funds from receipts available to the Office of Information Technology Services as requested by the Commission. (1999-434, s. 24; 2000-174, s. 2.)

## Part 2. General Powers and Duties.

### § 147-33.80. Exempt agencies.

Except as otherwise specifically provided by law, this Article shall not apply to the General Assembly, the Judicial Department, or The University of North Carolina and its constituent institutions. These agencies may elect to participate in the information technology programs, services, or contracts offered by the Office, including information technology procurement, in accordance with the statutes, policies, and rules of the Office. (1999-434, s. 10; 2000-174, s. 2.)

§ 147-33.81. Definitions.

As used in this Article:

- (1) "Distributed information technology assets" means hardware, software, and communications equipment not classified as traditional mainframe-based items, including personal computers, local area networks (LANs), servers, mobile computers, peripheral equipment, and other related hardware and software items.
- (2) "Information technology" means electronic data processing goods and services, telecommunications goods and services, security goods and services, microprocessors, software, information processing, office systems, any services related to the foregoing, and consulting or other services for design or redesign of information technology supporting business processes.
- (3) "Information technology enterprise management" means a method for managing distributed information technology assets from acquisition through retirement so that total ownership costs (purchase, operation, maintenance, disposal, etc.) are minimized while maximum benefits are realized.
- (4) "Information technology portfolio management" means a business-based approach for analyzing and ranking potential technology investments and selecting those investments that are the most cost-effective in supporting the strategic business and program objectives of the agency.
- (5) "Office" means the Office of Information Technology Services as established in this Article.
- (6) "State agency" means any department, institution, commission, committee, board, division, bureau, office, officer, or official of the State. The term does not include any State entity excluded from coverage under this Article by G.S. 147-33.80, unless otherwise expressly provided. (1999-434, s. 9; 2000-174, s. 2; 2001-424, s. 15.2(a).)

**Editor's Note.** — Session Laws 2001-424, ss. 15.4 (a) and (b), provide:

"(a) The Office of the State Controller, the Office of State Budget and Management, and the Office of Information Technology Services shall adopt a common definition for computer networking costs. The definition shall include a specific and detailed list of the separate components that comprise overall networking costs. These agencies shall define a process to capture all such costs without redundancy.

"(b) The Office of the State Controller, the Office of State Budget and Management, and the Office of Information Technology Services shall complete the definition by December 15, 2001. By January 1, 2002, the agencies shall provide an interim report to the Joint Select Committee on Information Technology and to

the Chairs of the House of Representatives Appropriations Subcommittee on Information Technology and the Senate Appropriations Committee on Information Technology on the process to capture networking costs, with a final report by May 1, 2002."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, s. 15.2(a), effective September 26, 2001, in subdivision (2), deleted "and" following "data processing goods and services" and inserted "security goods and services," and added subdivision (6).

§ 147-33.82. Powers and duties of the State Chief Information Officer and the Office of Information Technology Services.

(a) The Office of Information Technology Services shall:

- (1) Procure all information technology for State agencies, as provided in Part 4 of this Article.

- (2) Submit for approval of the Information Resources Management Commission all rates and fees for common, shared State government-wide technology services provided by the Office.
- (3) Submit for approval of the Information Resources Management Commission recommended State government-wide, enterprise-level policies for information technology.
- (4) Develop standards, procedures, and processes to implement policies approved by the Information Resources Management Commission.
- (5) Assure that State agencies implement and manage information technology portfolio-based management of State information technology resources, in accordance with the direction set by the State Chief Information Officer.
- (6) Assure that State agencies implement and manage information technology enterprise management efforts of State government, in accordance with the direction set by the State Chief Information Officer.
- (7) Provide recommendations to the Information Resources Management Commission for its biennial technology strategy and to develop State government-wide technology initiatives to be approved by the Information Resources Management Commission.
- (8) Develop a project management, quality assurance, and architectural review process that adheres to the Information Resources Management Commission's certification program and portfolio-based management initiative.
- (9) Establish and utilize the Information Technology Management Advisory Council to consist of representatives from other State agencies to advise the Office on information technology business management and technology matters.

(b) Notwithstanding any other provision of law, local governmental entities may use the information technology programs, services, or contracts offered by the Office, including information technology procurement, in accordance with the statutes, policies, and rules of the Office. For purposes of this subsection, "local governmental entities" includes local school administrative units, as defined in G.S. 115C-5, and community colleges. Local governmental entities are not required to comply with otherwise applicable competitive bidding requirements when using contracts established by the Office. Any other State entities may also use the information technology programs, services, or contracts offered by the Office, including information technology procurement, in accordance with the statutes, policies, and rules of the Office.

(c) The State Chief Information Officer shall establish an enterprise-wide set of standards for information technology security to maximize the functionality, security, and interoperability of the State's distributed information technology assets, including communications and encryption technologies. As part of this function, the State Chief Information Officer shall review periodically existing security standards and practices in place among the various State agencies to determine whether those standards and practices meet enterprise-wide security and encryption requirements. The State Chief Information Officer may assume the direct responsibility of providing for the information technology security of any State agency that fails to adhere to security standards adopted pursuant to this section. Any actions taken by the State Chief Information Officer under this subsection shall be reported to the Information Resources Management Commission at its next scheduled meeting.

(d) Notwithstanding G.S. 143-48.3 or any other provision of law, and except as otherwise provided by this subsection, all information technology security purchased using State funds, or for use by a State agency or in a State facility, shall be subject to approval by the State Chief Information Officer in accordance with security standards adopted under this section.

- (1) If the legislative branch, the judicial branch, The University of North Carolina and its constituent institutions, local school administrative units as defined by G.S. 115C-5, or the North Carolina Community Colleges System develop their own security standards, taking into consideration the mission and functions of that entity, that are comparable to or exceed those set by the State Chief Information Officer under this section, then these entities may elect to be governed by their own respective security standards, and approval of the State Chief Information Officer shall not be required before the purchase of information technology security. The State Chief Information Officer shall consult with the legislative branch, the judicial branch, The University of North Carolina and its constituent institutions, local school administrative units, and the North Carolina Community Colleges System in reviewing the security standards adopted by those entities.
- (2) If the State Chief Information Officer certifies that a State agency has developed security standards that meet or exceed those set under this section, then the agency may elect to be governed by its own security standards, and approval of the State Chief Information Officer shall not be required before the purchase of information technology security. This certification by the State Chief Information Officer is subject to annual renewal and may be revoked by the State Chief Information Officer at any time that a State agency's standards no longer exceed those set under this section.

(e) The State Chief Information Officer shall submit the enterprise-wide set of standards for the State's information technology security to the Information Resources Management Commission for approval. The Information Resources Management Commission shall report approval of the standards to the Joint Legislative Commission on Governmental Operations prior to implementation of the standards. The State Chief Information Officer shall review and revise the standards at least annually, and the revisions shall be subject to approval by the Information Resources Management Commission, with the Commission reporting to the Joint Legislative Commission on Governmental Operations on the revisions.

(f) The head of each State agency shall cooperate with the State Chief Information Officer in the discharge of his or her duties by:

- (1) Providing the full details of the agency's information technology and operational requirements.
- (2) Providing comprehensive information concerning the information technology security employed to protect the agency's information technology.
- (3) Forecasting the parameters of the agency's projected future information technology security needs and capabilities.
- (4) Designating an agency liaison in the information technology area to coordinate with the State Chief Information Officer.

The information provided by State agencies to the State Chief Information Officer under this subsection is protected from public disclosure pursuant to G.S. 132-6.1(c). (1999-434, s. 10; 2000-174, s. 2; 2001-424, s. 15.2(b).)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, s. 15.2(b), effective September 26, 2001, inserted "State Chief Information Officer and the" in the section catchline and added subsections (c) through (f).

**§ 147-33.83. Information resources centers and services.**

(a) With respect to all executive departments and agencies of State government, except the Department of Justice if they do not elect at their option to participate, the Office of Information Technology Services shall have all of the following powers and duties:

- (1) To establish and operate information resource centers and services to serve two or more departments on a cost-sharing basis, if the Information Resources Management Commission decides it is advisable from the standpoint of efficiency and economy to establish these centers and services.
- (2) With the approval of the Information Resources Management Commission, to charge each department for which services are performed its proportionate part of the cost of maintaining and operating the shared centers and services.
- (3) With the approval of the Information Resources Management Commission, to require any department served to transfer to the Office ownership, custody, or control of information processing equipment, supplies, and positions required by the shared centers and services.
- (4) With the approval of the Information Resources Management Commission, to adopt reasonable rules for the efficient and economical management and operation of the shared centers, services, and the integrated State telecommunications network.
- (5) With the approval of the Information Resources Management Commission, to adopt plans, policies, procedures, and rules for the acquisition, management, and use of information technology resources in the departments affected by this section to facilitate more efficient and economic use of information technology in these departments.
- (6) To develop and promote training programs to efficiently implement, use, and manage information technology resources.
- (7) To provide cities, counties, and other local governmental units with access to the Office of Information Technology Services, information resource centers and services as authorized in this section for State agencies. Access shall be provided on the same cost basis that applies to State agencies.

(b) No data of a confidential nature, as defined in the General Statutes or federal law, may be entered into or processed through any cost-sharing information resource center or network established under this section until safeguards for the data's security satisfactory to the department head and the State Chief Information Officer have been designed and installed and are fully operational. Nothing in this section may be construed to prescribe what programs to satisfy a department's objectives are to be undertaken, nor to remove from the control and administration of the departments the responsibility for program efforts, regardless whether these efforts are specifically required by statute or are administered under the general program authority and responsibility of the department. This section does not affect the provisions of G.S. 147-64.6, 147-64.7, or 147-33.91. Notwithstanding any other provision of law, the Office of Information Technology Services shall provide information technology services on a cost-sharing basis to the General Assembly and its agencies as requested by the Legislative Services Commission. (1989, c. 239, s. 5; c. 770, s. 60; 1989 (Reg. Sess., 1990), c. 1024, s. 36; 1991 (Reg. Sess., 1992), c. 900, s. 14(g); c. 1030, s. 51.14; 1997-148, ss. 5, 6; 1999-347, s. 2; 1999-434, s. 27; 2000-174, s. 2.)

**§ 147-33.84. Deviations authorized for Department of Revenue.**

(a) The Department of Revenue is authorized to deviate from any provision in G.S. 147-33.83(a) that requires departments or agencies to consolidate information processing functions on equipment owned, controlled, or under custody of the Office of Information Technology Services. All deviations pursuant to this section shall be reported in writing within 15 days by the Department of Revenue to the Information Resources Management Commission and shall be consistent with available funding.

(b) The Department of Revenue is authorized to adopt and shall adopt plans, policies, procedures, requirements, and rules for the acquisition, management, and use of information processing equipment, information processing programs, data communications capabilities, and information systems personnel in the Department of Revenue. If the plans, policies, procedures, requirements, rules, or standards adopted by the Department of Revenue deviate from the policies, procedures, or guidelines adopted by the Office of Information Technology Services or the Information Resources Management Commission, those deviations shall be allowed and shall be reported in writing within 15 days by the Department of Revenue to the Information Resources Management Commission. The Department of Revenue and the Office of Information Technology Services shall develop data communications capabilities between the two computer centers utilizing the North Carolina Integrated Network, subject to a security review by the Secretary of Revenue.

(c) The Department of Revenue shall prepare a plan to allow for substantial recovery and operation of major, critical computer applications. The plan shall include the names of the computer programs, databases, and data communications capabilities, identify the maximum amount of outage that can occur prior to the initiation of the plan and resumption of operation. The plan shall be consistent with commonly accepted practices for disaster recovery in the information processing industry. The plan shall be tested as soon as practical, but not later than six months, after the establishment of the Department of Revenue information processing capability. (1989, c. 239, s. 5; c. 770, s. 60; 1989 (Reg. Sess., 1990), c. 1024, s. 36; 1991 (Reg. Sess., 1992), c. 900, s. 14(g); c. 1030, s. 51.14; 1997-148, ss. 5, 6; 1999-347, s. 2; 1999-434, s. 27; 2000-174, s. 2.)

**§ 147-33.85. Information technology portfolio-based management.**

(a) The purposes of information technology portfolio-based management are to:

- (1) Ensure agencies link agency information technology investments with business plans.
- (2) Facilitate risk assessment of information technology projects and investments.
- (3) Ensure agencies justify information technology investments on the basis of sound business cases.
- (4) Ensure agencies facilitate development and review of information technology performance related to business operations.
- (5) Identify projects that can cross agency and program lines in order to leverage resources.
- (6) Assist in State government-wide planning for common, shared information technology infrastructure.

(b) The Office shall coordinate with the Office of State Budget and Management to integrate agency strategic and business planning, technology planning and budgeting, and project expenditure processes into the Office's information

technology portfolio-based management. The Office shall provide recommendations for agency annual budget requests for information technology investments, projects, and initiatives to the Office of State Budget and Management.

(c) In cooperation with State agencies, the Office shall conduct and maintain a continuous inventory of each State agency's current and planned investments in information technology, a compilation of information about these assets, and the total life cycle costs of these assets. In implementing the provisions of this subsection, the Office shall submit State government-wide policies for review and approval to the Information Resources Management Commission. The Office shall consult with the Office of the State Controller to establish and implement the State government-wide information technology inventory. The Office shall develop and implement State government-wide standards, processes, and procedures for the required inventory and for the management of the State government-wide information technology portfolio. State agencies shall participate in the information technology portfolio management and shall comply with the standards and processes established by the Office in accordance with this subsection. The provisions of this subsection shall not relieve any department, institution, or agency of the State government from accountability for equipment, materials, supplies, and tangible and intangible personal property under its control.

(d) No State agency information technology project shall proceed without the prior certification by the Information Resources Management Commission of the project. The Information Resources Management Commission may establish thresholds at an agency level based on project cost, potential project risk, or agency size and budget. (1999-434, s. 10; 2000-140, ss. 93.1(i), (k); 2000-174, s. 2; 2001-424, s. 12.2(c); 2001-487, s. 34.)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-140, ss. 93.1(i) and 93.1(k), effective July 1, 2000, substituted "Office of State Budget, Planning, and Management" for "Office of State Budget and Management" and for "Office of State Planning" in the first sentence of subsection (b).

Session Laws 2001-424, s. 12.2(c), effective July 1, 2001, substituted "Office of State Budget and Management" for "Office of State Budget, Planning, and Management" in two places in subsection (b).

Session Laws 2001-487, s. 34, effective December 16, 2001, deleted "and the Office of State Budget, Planning, and Management" preceding "to integrate" in the first sentence in subsection (b).

## § 147-33.86. Enterprise management of information technology assets.

(a) The purpose of enterprise management is to create a plan and implement a State government-wide approach for managing distributed information technology assets to minimize total life-cycle costs of assets, defined as total ownership costs from acquisition through retirement, while realizing maximum benefits for transacting the State's business and delivering services to its citizens.

(b) With input and recommendations from State agencies, the Office shall develop a plan for the State government-wide management of distributed information technology assets. The plan shall prescribe the State government-wide infrastructure and services for managing these assets. The plan shall be submitted to the Information Resources Management Commission for approval.

(c) Upon receiving approval by the Information Resources Management Commission, the Office shall ensure agency implementation of the plan, including the development of appropriate standards, processes, and procedures. The implementation effort shall follow Information Resources Management Commission project-reporting policies. State agencies must participate in the enterprise management of information technology assets and must comply with the standards and processes of the Office. (1999-434, s. 10; 2000-174, s. 2.)

**§ 147-33.87. Financial reporting and accountability for information technology investments and expenditures.**

The Office of Information Technology Services, the Office of State Budget and Management, and the Office of the State Controller shall jointly develop a system for budgeting and accounting of expenditures for information technology operations, services, projects, infrastructure, and assets. The system shall include hardware, software, personnel, training, contractual services, and other items relevant to information technology, and the sources of funding for each. This system must integrate seamlessly with the enterprise portfolio management system. Annual reports regarding information technology shall be coordinated by the Office with the Office of State Budget and Management and the Office of the State Controller, and submitted to the Governor, General Assembly, and the Information Resources Management Commission on or before October 1 of each year. (1999-434, s. 10; 2000-140, s. 93.1(i); 2000-174, s. 2; 2001-424, s. 12.2(b).)

**Editor’s Note.** — Session Laws 2001-424, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2001.’”

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-140, s. 93.1(i), effective July 1, 2000, sub-

stituted “Office of State Budget, Planning, and Management” for “Office of State Budget and Management.”

Session Laws 2001-424, s. 12.2(b), effective July 1, 2001, substituted “Office of State Budget and Management” for “Office of State Budget, Planning, and Management” in two places.

**§ 147-33.88. Information technology reports.**

(a) The Office shall develop an annual budget for review and approval by the Information Resources Management Commission prior to April 1 of each year. A copy of the approved budget shall be submitted to the Joint Select Committee on Information Technology and the Fiscal Research Division.

(b) The Office shall report to the Joint Select Committee on Information Technology and the Fiscal Research Division on the Office’s Internal Service Fund on a quarterly basis, no later than the first day of the second month following the end of the quarter. The report shall include current cash balances, line-item detail on expenditures from the previous quarter, and anticipated expenditures for the upcoming quarter, projected year-end balance, and the status report on personnel position changes including new positions created and existing positions eliminated. The Office spending reports shall comply with the State Accounting System object codes. (1999-434, s. 10; 2000-174, s. 2.)

**§§ 147-33.89, 147-33.90:** Reserved for future codification purposes.

### Part 3. Telecommunications Services.

#### § 147-33.91. Telecommunications services; duties of State Chief Information Officer with respect to State agencies.

With respect to State agencies, the State Chief Information Officer shall exercise general coordinating authority for all telecommunications matters relating to the internal management and operations of those agencies. In discharging that responsibility, the State Chief Information Officer may in cooperation with affected State agency heads, do such of the following things as the State Chief Information Officer deems necessary and advisable:

- (1) Provide for the establishment, management, and operation, through either State ownership or commercial leasing, of the following systems and services as they affect the internal management and operation of State agencies:
  - a. Central telephone systems and telephone networks;
  - b. Teleprocessing systems;
  - c. Teletype and facsimile services;
  - d. Satellite services;
  - e. Closed-circuit TV systems;
  - f. Two-way radio systems;
  - g. Microwave systems; and
  - h. Related systems based on telecommunication technologies.
- (2) With the approval of the Information Resources Management Commission, coordinate the development of cost-sharing systems for respective user agencies for their proportionate parts of the cost of maintenance and operation of the systems and services listed in subdivision (1) of this section.
- (3) Assist in the development of coordinated telecommunications services or systems within and among all State agencies and recommend, where appropriate, cooperative utilization of telecommunication facilities by aggregating users.
- (4) Perform traffic analysis and engineering for all telecommunications services and systems listed in subdivision (1) of this subsection.
- (5) Pursuant to G.S. 143-49, establish telecommunications specifications and designs so as to promote and support compatibility of the systems within State agencies.
- (6) Pursuant to G.S. 143-49 and G.S. 143-50, coordinate the review of requests by State agencies for the procurement of telecommunications systems or services.
- (7) Pursuant to G.S. 143-341 and Chapter 146 of the General Statutes, coordinate the review of requests by State agencies for State government property acquisition, disposition, or construction for telecommunications systems requirements.
- (8) Provide a periodic inventory of telecommunications costs, facilities, systems, and personnel within State agencies.
- (9) Promote, coordinate, and assist in the design and engineering of emergency telecommunications systems, including, but not limited to, the 911 emergency telephone number program, Emergency Medical Services, and other emergency telecommunications services.
- (10) Perform frequency coordination and management for State agencies and local governments, including all public safety radio service frequencies, in accordance with the rules and regulations of the

Federal Communications Commission or any successor federal agency.

- (11) Advise all State agencies on telecommunications management planning and related matters and provide through the State Personnel Training Center or the Office of Information Technology Services training to users within State agencies in telecommunications technology and systems.
- (12) Assist and coordinate the development of policies and long-range plans, consistent with the protection of citizens' rights to privacy and access to information, for the acquisition and use of telecommunications systems, and base such policies and plans on current information about State telecommunications activities in relation to the full range of emerging technologies.
- (13) Work cooperatively with the North Carolina Agency for Public Telecommunications in furthering the purpose of this section.

The provisions of this section shall not apply to the Criminal Information Division of the Department of Justice or to the Judicial Information System in the Judicial Department. (1985 (Reg. Sess., 1986), c. 1024, s. 1; 1987, c. 738, s. 59(a)(2); 1989, c. 239, s. 4; 1989 (Reg. Sess., 1990), c. 1024, s. 37; 1991, c. 542, s. 14; 1993, c. 512, s. 2; 1993 (Reg. Sess., 1994), c. 777, s. 1(a); 1997-148, ss. 3, 6; 1999-347, s. 4; 1999-434, s. 29; 2000-174, s. 2.)

**§ 147-33.92. Telecommunications services for local governmental units and other entities.**

(a) The State Chief Information Officer shall provide cities, counties, and other local governmental units with access to a central telecommunications system or service established under G.S. 147-33.91 for State agencies. Access shall be provided on the same cost basis that applies to State agencies.

(b) The State Chief Information Officer shall establish switched broadband telecommunications services and permit in addition to State agencies, cities, counties, and other local government units, the following organizations and entities to share on a not-for-profit basis:

- (1) Nonprofit educational institutions.
- (2) MCNC.
- (3) Research affiliates of MCNC for use only in connection with research activities sponsored or funded, in whole or in part, by MCNC, if such research activities relate to health care or education in North Carolina.
- (4) Agencies of the United States government operating in North Carolina for use only in connection with activities that relate to health care or education in North Carolina.
- (5) Hospitals, clinics, and other health care facilities for use only in connection with activities that relate to health care or education in North Carolina.

Provided, however, that sharing of the switched broadband telecommunications services by State agencies with entities or organizations in the categories set forth in this subsection shall not cause the State, the Office of Information Technology Services, or the MCNC to be classified as a public utility as that term is defined in G.S. 62-3(23)a.6. Nor shall the State, the Office of Information Technology Services, or the MCNC engage in any activities that may cause those entities to be classified as a common carrier as that term is defined in the Communications Act of 1934, 47 U.S.C. § 153(h). Provided further, authority to share the switched broadband telecommunications services with the non-

State agencies set forth in subdivisions (1) through (5) of this subsection shall terminate one year from the effective date of a tariff that makes the broadband services available to any customer. (1985 (Reg. Sess., 1986), c. 1024, s. 1; 1987, c. 738, s. 59(a)(2); 1989, c. 239, s. 4; 1989 (Reg. Sess., 1990), c. 1024, s. 37; 1991, c. 542, s. 14; 1993, c. 512, s. 2; 1993 (Reg. Sess., 1994), c. 777, s. 1(a); 1997-148, ss. 3, 6; 1999-347, s. 4; 1999-434, s. 29; 2000-174, s. 2.)

### § 147-33.93. Fees; dispute resolution panel.

In addition to the powers granted pursuant to Article 6B of this Chapter or by any other provision of law, the Office of Information Technology Services may go before a panel consisting of the State Auditor, the State Controller, and the State Budget Officer, or their designees, to resolve disputes concerning services, fees, and charges incurred by State government agencies receiving information technology services from the Office. The State Auditor shall adopt rules for the dispute resolution process pursuant to G.S. 147-64.9. The decisions of the panel shall be final in the settlement of all fee disputes that come before it. (2001-142, s. 1.)

**Editor's Note.** — Session Laws 2001-142, s. 3, made this section effective May 31, 2001.

§ 147-33.94: Reserved for future codification purposes.

## Part 4. Procurement of Information Technology.

### § 147-33.95. Procurement of information technology.

(a) Notwithstanding any other provision of law, the Office of Information Technology Services shall procure all information technology for State agencies. For purposes of this section, agency means any department, institution, commission, committee, board, division, bureau, office, officer, or official of the State, unless specifically exempted in this Article. The Office shall integrate technological review, cost analysis, and procurement for all information technology needs of those State agencies in order to make procurement and implementation of technology more responsive, efficient, and cost-effective. All contract information shall be made a matter of public record after the award of contract. Provided, that trade secrets, test data, similar proprietary information, and security information protected under G.S. 132-6.1(c) may remain confidential.

(b) The Office shall have the authority and responsibility, subject to the provisions of this Part, to:

- (1) Purchase or to contract for, by suitable means in conformity with G.S. 143-135.9, all information technology in the State government, or any of its departments, institutions, or agencies covered by this Part, or to authorize any department, institution, or agency covered by this Part to purchase or contract for such information technology.
- (2) Establish processes, specifications, and standards which shall apply to all information technology to be purchased, licensed, or leased in the State government or any of its departments, institutions, or agencies covered by this Part.
- (3) Comply with the State government-wide technical architecture, as required by the Information Resources Management Commission. (1999-434, s. 10; 2000-174, s. 2.)

**Cross References.** — As to purchase of information technology goods and services, see § 143-129.8.

**§ 147-33.96. Restriction on State agency contractual authority with regard to information technology; local governments.**

(a) All State agencies covered by this Part shall use contracts for information technology acquired by the Office for any information technology required by the State agency that is provided by these contracts. Notwithstanding any other statute, the authority of State agencies to procure or obtain information technology shall be subject to compliance with the provisions of this Part. The Office shall have the authority to exercise the authority of State agencies to procure or obtain information technology as otherwise provided by statute.

(b) Local governmental entities are not required to comply with otherwise applicable competitive bidding requirements when using contracts offered by the Office. (1999-434, s. 10; 2000-174, s. 210-241.)

**§ 147-33.97. Information technology procurement policy; reporting requirements.**

(a) Policy. — In order to further the policy of the State to encourage and promote the use of small, minority, physically handicapped, and women contractors in State purchasing of goods and services, all State agencies covered by this Part shall cooperate with the Office in efforts to encourage the use of small, minority, physically handicapped, and women contractors in achieving the purpose of this Part, which is to provide for the effective and economical acquisition, management, and disposition of information technology.

(b) Reporting. — Every State agency that makes a direct purchase of information technology using the services of the Office shall report directly to the Department of Administration all information required by G.S. 143-48(b).

(c) The Department of Administration shall collect and compile the data described in this section and report it annually to the Office. (1999-434, s. 10; 2000-174, s. 2.)

**§ 147-33.98. Unauthorized use of public purchase or contract procedures for private benefit prohibited.**

(a) It shall be unlawful for any person, by the use of the powers, policies, or procedures described in this Part or established hereunder, to purchase, attempt to purchase, procure, or attempt to procure any property or services for private use or benefit.

(b) This prohibition shall not apply if:

- (1) The department, institution, or agency through which the property or services are procured had theretofore established policies and procedures permitting such purchases or procurement by a class or classes of persons in order to provide for the mutual benefit of such persons and the department, institution, or agency involved, or the public benefit or convenience; and
- (2) Such policies and procedures, including any reimbursement policies, are complied with by the person permitted thereunder to use the purchasing or procurement procedures described in this Part or established thereunder.

(c) Any violation of this section is a Class 1 misdemeanor. (1999-434, s. 10; 2000-174, s. 2.)

### **§ 147-33.99. Financial interest of officers in sources of supply; acceptance of bribes.**

Neither the State Chief Information Officer nor the Chief Deputy State Information Officer shall be financially interested, or have any personal beneficial interest, either directly or indirectly, in the purchase of, or contract for, any information technology, nor in any firm, corporation, partnership, or association furnishing any information technology to the State government, or any of its departments, institutions, or agencies, nor shall either of these persons or any other Office employee accept or receive, directly or indirectly, from any person, firm, or corporation to whom any contract may be awarded, by rebate, gifts, or otherwise, any money or anything of value whatsoever, or any promise, obligation, or contract for future reward or compensation. Violation of this section is a Class F felony, and any person found guilty of a violation of this section shall, upon conviction, be removed from State office or employment. (1999-434, s. 10; 2000-174, s. 2.)

### **§ 147-33.100. Certification that information technology bid submitted without collusion.**

The Office shall require bidders to certify that each bid on information technology contracts overseen by the Office is submitted competitively and without collusion. False certification is a Class I felony. (1999-434, s. 10; 2000-174, s. 2.)

### **§ 147-33.101. Board of Awards review.**

(a) When the dollar value of a contract for the procurement of information technology equipment, materials, and supplies exceeds the benchmark established by the Chief State Information Officer, the contract shall be reviewed by the Board of Awards pursuant to G.S. 143-52.1 prior to the contract being awarded.

(b) Prior to submission of any contract for review by the Board of Awards pursuant to this section for any contract for information technology being acquired for the benefit of the Office and not on behalf of any other State agency, the Director of the Budget shall review and approve the procurement to ensure compliance with the established processes, specifications, and standards applicable to all information technology purchased, licensed, or leased in State government, including established procurement processes, and compliance with the State government-wide technical architecture as established by the Information Resources Management Commission. (1999-434, s. 10; 2000-174, s. 2)

### **§ 147-33.102. Penalty for violations; costs.**

Any employee or official of the State who violates this Part shall be liable to the State to repay any amount expended in violation of this Part, together with any court costs. (1999-434, s. 10; 2000-174, s. 2.)

### **§ 147-33.103. Attorney General contract assistance; rule-making authority.**

(a) At the request of the State Chief Information Officer, the Attorney General shall provide legal advice and services necessary to implement this Part.

(b) The State Chief Information Officer is authorized to adopt rules deemed necessary to implement the provisions of this Part. (1999-434, s. 10; 2000-174, s. 2.)

#### ARTICLE 4.

### *Secretary of State.*

#### **§ 147-34. Office and office hours.**

The Secretary of State shall attend at his office, in the City of Raleigh, between the hours of 10 o'clock A.M. and three o'clock P.M., on every day of the year, Sundays and legal holidays excepted. (1868-9, c. 270, s. 44; 1870-1, c. 111; Code, s. 3339; Rev., s. 5344; C.S., s. 7652.)

#### **§ 147-35. Salary of Secretary of State.**

The salary of the Secretary of State shall be set by the General Assembly in the Current Operations Appropriations Act. In addition to the salary set by the General Assembly in the Current Operations Appropriations Act, longevity pay shall be paid on the same basis as is provided to employees of the State who are subject to the State Personnel Act. (1879, c. 240, s. 6; 1881, p. 632, res.; Code, s. 3724; Rev., s. 2741; 1907, c. 994; 1919, c. 247, s. 2; C.S., s. 3863; Ex. Sess. 1920, c. 49, s. 4; 1921, c. 11, s. 1; 1931, c. 277; 1933, c. 46; 1935, c. 304; 1941, c. 1; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 1; 1967, c. 1130; c. 1237, s. 1; 1969, c. 1214, s. 1; 1971, c. 912, s. 1; 1973, c. 778, s. 1; 1975, 2nd Sess., c. 983, s. 14; 1977, c. 802, s. 42.7; 1983, c. 761, s. 212; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1987, c. 738, s. 32(b).)

#### **§ 147-36. Duties of Secretary of State.**

It is the duty of the Secretary of State:

- (1) To perform such duties as may then be devolved upon the Secretary by resolution of the two houses of the General Assembly or either of them;
- (2) To attend the Governor, whenever required by the Governor, for the purpose of receiving documents which have passed the great seal;
- (3) To receive and keep all conveyances and mortgages belonging to the State;
- (4) To distribute annually the statutes and the legislative journals;
- (5) To distribute the acts of Congress received at the Secretary's office in the manner prescribed for the statutes of the State;
- (6) To keep a receipt book, in which the Secretary shall take from every person to whom a grant shall be delivered, a receipt for the same; but may inclose grants by mail in a registered letter at the expense of the grantee, unless otherwise directed, first entering the same upon the receipt book;
- (7) To issue charters and all necessary certificates for the incorporation, domestication, suspension, reinstatement, cancellation and dissolution of corporations as may be required by the corporation laws of the State and maintain a record thereof;
- (8) To issue certificates of registration of trademarks, labels and designs as may be required by law and maintain a record thereof;
- (9) To maintain a Division of Publications to compile data on the State's several governmental agencies and for legislative reference;

- (10) To receive, enroll and safely preserve the Constitution of the State and all amendments thereto;
- (11) To serve as a member of such boards and commissions as the Constitution and laws of the State may designate;
- (12) To administer the Securities Law of the State, regulating the issuance and sale of securities, as is now or may be directed;
- (13) To receive and keep all oaths of public officials required by law to be filed in the Secretary's office, and as Secretary of State, is fully empowered to administer official oaths to any public official of whom an oath is required;
- (14) To receive and maintain a journal of all appointments made to any State board, agency, commission, council or authority which is filed in the office of the Secretary of State;
- (15) To regulate the solicitation of contributions pursuant to Chapter 131F of the General Statutes; and
- (16) To apply for and accept grants from the federal government and its agencies and from any foundation, corporation, association, or individual in order to effectuate the purposes of the Nonprofit Corporation Act, Chapter 55A of the General Statutes, and to further aid in the operation and development of nonprofit corporations. The Secretary shall comply with the terms, conditions, and limitations of grants applied for and accepted and shall expend grant funds pursuant to Article 1 of Chapter 143 of the General Statutes, The Executive Budget Act. (1868-9, c. 270, s. 45; 1881, c. 63; Code, s. 3340; Rev., s. 5345; C.S., s. 7654; 1941, c. 379, s. 6; 1943, cc. 480, 543; 1967, c. 691, s. 53; 1973, c. 1379, s. 1; 1995, c. 20, s. 9; 1998-212, s. 12.14(c); 1999-316, s. 1.)

**Editor's Note.** — Session Laws 1995, c. 20, s. 17, provided that sections 1 through 16 of that act would become effective only if the constitutional amendments proposed by Session Laws 1995, c. 5, ss. 1-2 were approved as provided by Session Laws 1995, c. 5, ss. 3-4, and if so approved, sections 1 through 16 would become effective with respect to bills and joint resolutions passed in either house of the General Assembly on or after January 1, 1997.

Those constitutional amendments were approved by the voters at the November 1996 election, and certification of the approval was provided to the Secretary of State on November 26, 1996.

Session Laws 2000-67, s. 24B.1, provides: "Of the funds appropriated in this act to the Department of the Secretary of State for the 2000-2001 fiscal year, the Department may use up to the sum of eight hundred sixty-eight thousand six hundred sixty-four dollars (\$868,664) in recurring funds and one million eight hundred ninety-one thousand four dollars (\$1,891,004) in nonrecurring funds for personnel, start-up expenses, and operating costs necessary for the implementation of Senate Bill 1305, 1999 General Assembly, if it becomes law. Prior to using any of these funds or establishing any of the 41 positions authorized by the General Assembly, the Department shall present its

plan for implementing Senate Bill 1305, 1999 General Assembly, to the Joint Legislative Commission on Governmental Operations, the Chairs of the Senate and House Appropriations Subcommittees on General Government, and the Joint Select Committee on Information Technology. The Department shall maintain monthly reports on UCC filings and, on a quarterly basis, submit the reports to the House and Senate Appropriations Subcommittees on General Government and the Fiscal Research Division. The reports shall include: the number of filings, the time required to process the filings, the filings per employee ratio, and the actual and projected revenue from filing fees." Senate Bill 1305, 1999 General Assembly, was enacted into law as Session Laws 2000-169.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

### § 147-36.1. Deputy Secretary of State.

The duly classified Deputy Secretary of State as reflected by the records of the State Department of Personnel, appointed by the Secretary of State to aid him in the discharge of his duties, shall have the authority to perform all acts and duties of the office in the absence of his chief, or in the case of his inability to act, or under his direction. In exercising such authority, certificates relating to documents and other filings, shall be issued in the name of the Secretary of State, printed, typed, stamped or facsimile signature, and signed by the Deputy Secretary of State.

Employees in the office of the Secretary of State designated as deputy or director of specific divisions in the Department, are empowered to issue certificates relating to documents and other filings within the scope of their division. In exercising such authority the certificates shall be issued in the name of the Secretary of State, printed, typed, stamped or facsimile signature, and signed by the deputy or director indicating his approved title. Provided, however, that if the volume of documents or certificates to be issued makes an embossed seal and the autograph signature of the deputy or director impractical, the documents may be certified and certificates issued under the facsimile signature and seal of the Secretary of State only. (1967, c. 1265; 1987, c. 349.)

#### OPINIONS OF ATTORNEY GENERAL

##### **Delegation of Power to Attend Meetings.**

— Those members of the Council of State who have statutory authority to delegate duties may, in conformity with such statutes, attend and vote at meetings of Boards of which they are *ex officio* members through delegates or designated subordinates. The remaining members of the Council of State may make similar delegations or designations where, in the mem-

ber's judgment, other duties necessitate his absence and the statute creating his *ex officio* membership does not express or clearly imply an intent of the General Assembly that the powers of such membership be exercised personally. See opinion of Attorney General to the honorable James E. Long, Commissioner of Insurance, 55 N.C.A.G. 116 (1986).

### § 147-37. Secretary of State; fees to be collected.

When no other charge is provided by law, the Secretary of State shall collect such fees for copying any document or record on file in his office which in his discretion bears a reasonable relation to the quantity of copies supplied and the cost of purchasing or leasing and maintaining copying equipment. These fees may be changed from time to time, but a schedule of fees shall be available on request at all times. In addition to copying charges, the Secretary of State shall collect a fee of ten dollars (\$10.00) for certifying any document or record on file in his office or for issuing any certificate as to the facts shown by the records on file in his office. (R.C., c. 102, s. 13; 1870-1, c. 81, s. 3; 1881, c. 79; Code, s. 3725; Rev., s. 2742; C.S., s. 3864; 1979, c. 85, s. 2; 1991, c. 429, s. 1; 1998-212, s. 29A.9(e).)

§ 147-38: Repealed by Session Laws 1979, c. 85, s. 3.

### § 147-39. Custodian of statutes, records, deeds, etc.

The Secretary of State is charged with the custody of all statutes and joint resolutions of the legislature, all documents which pass under the great seal, and of all the books, records, deeds, parchments, maps, and papers now deposited in his office or which may hereafter be there deposited pursuant to law, and he shall from time to time make all necessary provisions for their

arrangement and preservation. Every deed, conveyance, or other instrument whereby the State or any State agency or institution has acquired title to any real property and which is deposited with the Secretary of State shall be filed by him, and indexed according to the county or counties wherein the real property is situated and the name or names of the grantor or grantors and of the grantee; and the real property shall be briefly described in the index. (R.C., c. 104, s. 105; 1868-9, c. 270, s. 41; 1873-4, c. 129; Code, s. 3337; Rev., s. 5347; C.S., s. 7656; 1957, c. 584, s. 5.)

§ 147-40: Repealed by Session Laws 1969, c. 1184, s. 8.

### § 147-41. To keep records of oyster grants.

The Secretary of State shall keep books of records in which shall be recorded a full description of all grounds granted for oyster beds under the provisions of Chapter 119 of the Laws of 1887, and laws amendatory thereof, and shall keep a map or maps showing the position and limits of all public and private grounds. (1887, c. 119, s. 14; Rev., s. 2381; C.S., s. 7657.)

### § 147-42. Binding original statutes, resolutions, and documents.

The original statutes and joint resolutions passed at each session of the General Assembly the Secretary of State shall immediately thereafter cause to be bound in volumes of convenient size. Each such volume shall be lettered on the back with its title and the date of its session. (1866-7, c. 71; 1868-9, c. 270, s. 46; Code, s. 3343; Rev., s. 5348; C.S., s. 7658.)

### § 147-43. Reports of State officers.

The Secretary of State shall file and keep in his office one copy of each of the reports of State officers in the best binding in which any such report is issued, and the State Librarian shall likewise keep five similarly bound copies of each such report. (Rev., s. 5101; 1911, c. 211, s. 7; C.S., s. 7300.)

§§ 147-43.1 through 147-43.3: Repealed by Session Laws 1969, c. 1184, s. 8.

**Cross References.** — For present provisions as to printing of Session Laws, see § 120-34.

§ 147-44: Repealed by Session Laws 1943, c. 48, s. 2.

**Editor's Note.** — The repeal line above is set out to correct its omission from the main volume.

### § 147-45. Distribution of copies of State publications.

The Secretary of State shall, at the State's expense, as soon as possible after publication, provide such number of copies of the Session Laws and Senate and House Journals to federal, State, and local governmental officials, departments and agencies, and to educational institutions of instruction and exchange use, as is determined by the Legislative Services Commission in consultation with

the Principal Clerks of the House of Representatives and the Senate. These publications shall be made available in hardbound and electronic format. Each agency or institution entitled to more than one copy shall receive only one of the copies in hardbound format with the remainder in electronic format, unless that agency or institution requests additional hardbound copies from the Secretary of State by August 1 of the calendar year. The Legislative Services Commission, in consultation with the Principal Clerks of the House of Representatives and the Senate, shall determine each year the total number of bound volumes of each publication to be printed and the total number of the electronic copies of each publication to be produced.

Any State agency, department, institution, commission, committee, board, division, bureau, officer, or official that does not receive a copy of the Session Laws may, upon written request from their respective department head to the Secretary of State, and upon the discretion of the Secretary of State as to need, be issued copies of the Session Laws on a permanent loan basis with the understanding that should said copies be needed they will be recalled. (1941, c. 379, s. 1; 1943, c. 48, s. 4; 1945, c. 534; 1949, c. 1178; 1951, c. 287; 1953, cc. 245, 266; 1955, c. 505, s. 6; cc. 989, 990; 1957, c. 269, s. 1; cc. 1061, 1400; 1959, c. 215; c. 1028, s. 3; 1965, c. 503; 1967, c. 691, s. 54; cc. 695, 777, 1038, 1073, 1200; 1969, c. 355; c. 608, s. 1; c. 801, s. 2; c. 852, ss. 1, 2; c. 1190, s. 54; c. 1285; 1973, c. 476, ss. 48, 84, 128, 138, 143, 193; c. 507, s. 5; c. 731, s. 1; c. 762; c. 798, ss. 1, 2; c. 1262, ss. 10, 38; 1975, c. 19, s. 59; c. 879, s. 46; 1975, 2nd Sess., c. 983, s. 115; 1977, c. 379, s. 1; c. 679, s. 8; c. 771, s. 4; 1979, c. 358, s. 27; 1981, c. 412, ss. 4, 5; 1981 (Reg. Sess., 1982), c. 1348, s. 2; 1983, c. 842; 1987, c. 827, s. 59; 1989, c. 727, s. 223(b); c. 751, s. 9(b); 1991 (Reg. Sess., 1992), c. 959, s. 74; 1993, c. 522, s. 18; c. 553, s. 53; 1995, c. 166, s. 2; c. 509, s. 100; 1995 (Reg. Sess., 1996), c. 603, s. 5; c. 743, s. 22; 1997-443, ss. 11A.118(a), 11A.119(a); 1998-202, s. 4(bb); 2000-137, s. 4(ff); 2001-513, s. 16(a).)

**Editor's Note.** — Session Laws 1995 (Reg. Sess., 1996), c. 603, s. 8, provides: "This act shall be funded by funds currently available to the University of North Carolina at Pembroke. Nothing in this act obligates the General Assembly to appropriate any funds to implement it."

Session Laws 2001-513, s. 16(b), provides: "Each agency or institution entitled to receive more than one copy of a hardbound volume of the Session Laws and of the House of Representatives and Senate journal publications for the year 2001 desiring additional hardbound copies of those publications to which it is entitled shall so notify the Secretary of State not

later than 30 days after this act [Session Laws 2001-513, effective July 1, 2001] becomes law; and each State Senator and each State Representative is entitled to receive the 2001 journal of a house only if he or she so requests in writing to the principal clerk of that house no later than 30 days after this act becomes law."

**Effect of Amendments.** — Session Laws 2000-137, s. 4.(ff), effective July 20, 2000, substituted "Juvenile Justice and Delinquency Prevention, Department of" for "Juvenile Justice, Office of" in the table.

Session Laws 2001-513, s. 16(a), effective July 1, 2001, rewrote the section.

#### OPINIONS OF ATTORNEY GENERAL

**Publications Distributed Pursuant to This Statute Belong to the Office and Not to the Individual Who Holds the Office.** — See opinion of Attorney General to Honorable J. Russell Nipper, Clerk of Superior Court, Wake County, 41 N.C.A.G. 176 (1970).

**Advance Sheets of Appellate Division**

**Reports Are Required to Be Distributed to the University of North Carolina at Greensboro at No Cost.** — See opinion of Attorney General to Mr. Robert Grey Cole, Walter Clinton Jackson Library, University of North Carolina at Greensboro, 43 N.C.A.G. 93 (1973).

§ 147-46: Repealed by Session Laws 1955, c. 987.

**§ 147-46.1. Publications furnished State departments, bureaus, institutions and agencies.**

Upon request of any State department, bureau, institution or agency, and upon authorization by the Governor and Council of State, the Secretary of State shall supply to such department, bureau, institution or agency copies of any State publications then available to replace worn, damaged or lost copies and such additional sets or parts of sets as may be requested to meet the reasonable needs of such departments, bureaus, institutions or agencies, disclosed by the request.

This section shall not authorize the reprinting of any State publications which would not be ordered without reference to the provisions hereof. (1947, c. 639.)

§ 147-47: Repealed by Session Laws 1955, c. 748.

**§ 147-48. Sale of Laws and Journals.**

Such Laws and Journals as may be printed in excess of the number directed to be distributed, the Secretary of State may sell at such price as he deems reasonable, not exceeding cost plus ten percent (10%). All proceeds received from sales made pursuant to this section shall be paid into the State treasury. (1941, c. 379, s. 4; 1943, c. 48, s. 4; 1955, c. 978, s. 2; 1967, c. 691, s. 55; 1977, c. 802, s. 50.30.)

**§ 147-49. Disposition of damaged and unsaleable publications.**

The Secretary of State is hereby authorized and empowered to dispose of damaged and unsaleable House and Senate Journals and Session Laws of various years at a price to be determined by the Secretary of State. (1939, c. 345; 1967, c. 691, s. 56; 2001-487, s. 93.)

**Effect of Amendments.** — Session Laws 2001-487, s. 93, effective December 16, 2001, substituted "Session Laws" for "Public Laws."

**§ 147-50. Publications of State officials and department heads furnished to certain institutions, agencies, etc.**

Every State official and every head of a State department, institution or agency issuing any printed report, bulletin, map, or other publication shall, on request, furnish copies of such reports, bulletins, maps or other publications to the following institutions in the number set out below:

University of North Carolina at Chapel Hill .....	25 copies;
University of North Carolina at Charlotte .....	2 copies;
University of North Carolina at Greensboro .....	2 copies;
North Carolina State University at Raleigh .....	2 copies;
East Carolina University at Greenville .....	2 copies;
Duke University .....	25 copies;
Wake Forest College .....	2 copies;
Davidson College .....	2 copies;
North Carolina Supreme Court Library .....	2 copies;
North Carolina Central University .....	5 copies;
Western Carolina University .....	2 copies;

Appalachian State University ..... 2 copies;  
 University of North Carolina at Wilmington ..... 2 copies;  
 North Carolina Agricultural and Technical State University .... 2 copies;  
 Legislative Library ..... 2 copies;

and to governmental officials, agencies and departments and to other educational institutions, in the discretion of the issuing official and subject to the supply available, such number as may be requested: Provided that five sets of all such reports, bulletins and publications heretofore issued, insofar as the same are available and without necessitating reprinting, shall be furnished to the North Carolina Central University. The provisions in this section shall not be interpreted to include any of the appellate division reports or advance sheets distributed by the Administrative Office of the Courts. Except for reports, bulletins, and other publications issued for free distribution, this section shall not apply to the North Carolina State Museum of Natural Sciences. (1941, c. 379, s. 5; 1955, c. 505, s. 7; 1967, cc. 1038, 1065; 1969, c. 608, s. 1; c. 852, s. 3; 1973, c. 476, s. 84; c. 598; c. 731, s. 2; c. 776; 1977, c. 377; 1979, c. 591, s. 1; 1981, c. 435; 1993, c. 561, s. 116(j).)

**OPINIONS OF ATTORNEY GENERAL**

**Distribution of S.B.I. Investigative “Bulletin”.** — This section does not require the distribution of the S.B.I. Investigative “Bulletin,” because information contained in it is not of public record, but instead is information used by law-enforcement officers to collect and compile evidence for the trial of cases. See opinion of Attorney General to Mr. Charles Dunn, 45 N.C.A.G. 92 (1975).

**As to free distribution of certain statutory publications on request to certain institutions,** see opinion of Attorney General to Mr. James H. Thompson, Director, University of North Carolina at Greensboro, 42 N.C.A.G. 94 (1972).

§ 147-50.1: Repealed by Session Laws 1987, c. 771, s. 1.

**Cross References.** — As to the State Depository Library System, see § 125-11.5 et seq.

**§ 147-51. Clerks of superior courts responsible for Appellate Division Reports; lending prohibited.**

From and after March 9, 1927, the clerks of the superior courts of the State of North Carolina are held officially responsible for the volumes of the North Carolina Appellate Division Reports furnished and to be furnished them by the State.

The said clerks of the various courts shall not lend or permit to be taken from their custody the said Reports, nor shall any person with or without the permission of the said clerks take them from their possession. (1927, c. 259; 1969, c. 1190, s. 55.)

§ 147-52: Transferred to § 7A-14 by Session Laws 1975, c. 328.

§ 147-53: Superseded by Session Laws 1943, c. 716.

**§ 147-54. Printing, distribution and sale of the North Carolina Manual.**

The Secretary of State shall have printed biennially for distribution and sale, two thousand three hundred fifty (2,350) copies of the North Carolina

Manual, and shall make distribution to the State agencies, individuals, institutions and others as herein set forth.

**NORTH CAROLINA STATE GOVERNMENT:**

Members of the General Assembly .....	1 ea.
Officers of the General Assembly .....	1 ea.
Offices of the Clerk of each House of the General Assembly .....	1 ea.
Legislative Services Officer .....	1
Legislative Library .....	6
Members of the Council of State .....	2 ea.
Appointed Secretaries of Executive Departments .....	2 ea.
Personnel of the Department of the Secretary of State .....	1 ea.
State Board of Elections .....	2
Divisions of Archives and History, Director .....	1
Search Room .....	3
Publications Section .....	2
State Library .....	10
Libraries within State Agencies .....	1 ea.
Justices of the North Carolina Supreme Court .....	1 ea.
Judges of the North Carolina Court of Appeals .....	1 ea.
Judges of the North Carolina Superior Court .....	1 ea.
Supreme Court Library .....	12
Court of Appeals Library .....	2
Clerk of the Supreme Court .....	1
Clerk of the Court of Appeals .....	1
Reporter of the Supreme Court and Court of Appeals .....	1
Administrative Office of the Courts .....	5

**NORTH CAROLINA EDUCATIONAL INSTITUTIONS:**

<b>University of North Carolina System</b>	
General Administration Offices .....	12
Chancellors of the Constituent Institutions .....	1 ea.
University of North Carolina — Chapel Hill Library .....	15
North Carolina State University Library .....	5
East Carolina University Library .....	5
North Carolina Central University Library .....	5
Appalachian State University Library .....	4
University of North Carolina — Charlotte Library .....	4
University of North Carolina — Greensboro Library .....	4
Western Carolina University Library .....	4
Other Constituent Institutions Libraries .....	3 ea.
North Carolina School of the Arts .....	2
Institute of Government .....	2
Community Colleges and Technical Institutes .....	2 ea.
<b>Private Colleges and Universities</b>	
Duke University Library .....	6
Wake Forest University .....	6
Campbell University Library .....	5
Davidson College Library .....	4
All other Libraries of Senior and Junior Colleges .....	2 ea.
Public and Private Schools containing grades 8-12 .....	1 ea.

**COUNTY GOVERNMENT:**

Clerks of Court .....	1 ea.
Registers of Deeds .....	1 ea.
Public Libraries of North Carolina .....	1 ea.

**FEDERAL GOVERNMENT:**

President of the United States .....	1
North Carolina Members of the Presidential Cabinet .....	1 ea.

North Carolina Members of the United States Congress ..... 2 ea.  
 Library of Congress ..... 3  
 Resident Judges of the Federal Judiciary  
 and United States Attorneys in North Carolina ..... 1 ea.  
 Secretaries of State of the United States  
 and Territories ..... 1 ea.

After making the above distribution, the remainder shall be sold at the cost of publication plus tax and postage and the proceeds from such sales deposited with the State Treasurer for use by the Publications Division of the Secretary of State's Office to defray the expense of publishing the North Carolina Manual. Libraries and educational institutions not covered in the above distribution shall be entitled to a twenty percent (20%) discount on the cost of any purchase(s). (1933, c. 115, s. 2; 1977, c. 378; 1995, c. 509, s. 101; 2001-424, s. 14F.1.)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

.Session Laws 2001-424, s. 36.5 is a severability clause.

2001-424, s. 14F.1, effective July 1, 2001, substituted "two thousand three hundred fifty (2,350)" for "five thousand (5,000)" in the first paragraph and changed the number of North Carolina Manuals provided to the members of the General Assembly from 2 each to 1 each.

**Effect of Amendments.** — Session Laws

**§ 147-54.1. Division of Publications; duties.**

The Secretary of State is authorized to set up a division to be designated as the Division of Publications and to appoint a director thereof who shall be known as the Director of Publications. This Division shall publish the North Carolina Manual, Directory, Index of Local Legislation and such other publications as may be useful to the members and committees of the General Assembly and other officials of the State and of the various counties and cities. Unless otherwise required by law, the Secretary may publish electronically information permitted or required by this section. The Secretary may sell these publications at such prices as the Secretary deems reasonable; the proceeds of sale shall be paid into the State treasury.

The Division shall also perform all such other duties as may be assigned by the Secretary of State. (1915, c. 202, ss. 1, 2; C.S., ss. 6147, 6148; 1939, c. 316; 1971, c. 685, s. 3; 1977, c. 802, s. 50.31; 1999-260, s. 2.)

**§ 147-54.2:** Repealed by Session Laws 1979, c. 477, s. 2.

**§ 147-54.3. Land records management program.**

(a) The Secretary of State shall administer a land records management program for the purposes (i) of advising registers of deeds, local tax officials, and local planning officials about sound management practices, and (ii) of establishing greater uniformity in local land records systems. The management program shall consist of the activities provided for in subsections (b) through (e) of this section, and other related activities essential to the effective conduct of the management program.

(b) The Secretary of State, in cooperation with the Secretary of Cultural Resources and in accordance with G.S. 121-5(c) and G.S. 132-8.1, shall establish minimum standards and provide advice and technical assistance to local governments in implementing and maintaining minimum standards with regard to the following aspects of land records management:

- (1) Uniform indexing of land records;

(2) Uniform recording and indexing procedures for maps, plats and condominiums; and

(3) Security and reproduction of land records.

(b1) The Department of Secretary of State, in cooperation with the North Carolina Association of Registers of Deeds, Inc., and the Real Property Section of the North Carolina Bar Association, shall adopt, pursuant to Chapter 150B of the General Statutes, rules specifying the minimum indexing standards established pursuant to subsection (b) of this section and procedures for complying with those minimum standards in land records management. A copy of the standards adopted shall be posted in the office of the register of deeds in each county of the State.

(c) The Secretary of State shall conduct a program for the preparation of county base maps pursuant to standards prepared by the Secretary.

(c1) The Secretary of State, shall, in cooperation with the Secretary of Revenue, conduct a program for the preparation of county cadastral maps pursuant to standards prepared by the Secretary of State.

(d) Upon the joint request of any board of county commissioners and the register of deeds and subject to available resources of personnel and funds, the Secretary shall make a management study of the office of register of deeds, using assistance from the Office of State Personnel. At the conclusion of the study, the Secretary shall make nonbinding recommendations to the board, the register of deeds, and to the General Assembly.

(d1) The Secretary of State shall make comparative salary studies periodically of all registers of deeds offices and at the conclusion of each study the Secretary of State shall present his written findings and shall make recommendations to the board of county commissioners and register of deeds of each county.

(e) The Secretary of State, in cooperation with the Secretary of Cultural Resources and in accordance with G.S. 121-5(c) and G.S. 132-8.1, shall undertake research and provide advice and technical assistance to local governments on the following aspects of land records management:

- (1) Centralized recording systems;
- (2) Filming, filing, and recording techniques and equipment;
- (3) Computerized land records systems; and
- (4) Storage and retrieval of land records.

(f) An advisory committee on land records is created to assist the Secretary in administering the land records management program. The Secretary of State shall appoint 12 members to the committee; one member shall be appointed from each of the organizations listed below from persons nominated by the organization:

- (1) The North Carolina Association of Assessing Officers;
- (2) The North Carolina Section of the American Society of Photogrammetry;
- (3) The North Carolina Chapter of the American Institute of Planners;
- (4) The North Carolina Section of the American Society of Civil Engineers;
- (5) The North Carolina Property Mappers' Association;
- (6) The North Carolina Association of Registers of Deeds;
- (7) The North Carolina Bar Association;
- (8) The North Carolina Society of Land Surveyors; and
- (9) The North Carolina Association of County Commissioners.

In addition, three members from the public at large shall be appointed. The members of the committee shall be appointed for four-year terms, except that the initial terms for members listed in positions (1) through (4) above and for two of the members-at-large shall be two years; thereafter all appointments shall be for four years. The Secretary of State shall appoint the chairman, and

the committee shall meet at the call of the chairman. The Secretary of State in making the appointments shall try to achieve geographical and population balance on the advisory committee; one third of the appointments shall be persons from the most populous counties in the State containing approximately one third of the State's population, one third from the least populous counties containing approximately one third of the State's population, and one third shall be from the remaining moderately populous counties containing approximately one third of the State's population. Each organization shall nominate one nominee each from the more populous, moderately populous, and less populous counties of the State. The members of the committee shall receive per diem and subsistence and travel allowances as provided in G.S. 138-5. (1977, c. 771, s. 4; c. 932, s. 1; 1985, c. 479, s. 165(d), (e); 1987, c. 738, s. 158(a); 1989, c. 523, s. 8; c. 727, ss. 169, 218(116a); c. 751, s. 14; 1991, c. 689, ss. 181(b), 181(c); c. 697, s. 1; 1993, c. 258, s. 1.)

**Editor's Note.** — This section was formerly § 143-345.6. It was recodified as § 147-54.3 by Session Laws 1991, c. 689, s. 181(b).

**§ 147-54.4. (For grandfather provision, see the Editor's Note) Certification of local government property mappers.**

- (a) Definitions. — The following definitions apply in this section:
- (1) Department. — The Department of the Secretary of State.
  - (2) Large-scale. — A scale that uses an inch to represent no more than 400 feet.
  - (3) Local government. — A county as defined in G.S. 153A-10 and a city as defined in G.S. 160A-1.
  - (4) Property mapper. — A person who is employed by a local government and is responsible for creating and maintaining large-scale cadastral maps.
- (b) Certification. — The Department shall establish a certification program for property mappers. The purpose of the program is to protect and enhance the State's investment in local government large-scale cadastral maps. To be certified as a property mapper, an applicant must meet the following minimum requirements and the additional requirements set by the Department:
- (1) Be at least 18 years old.
  - (2) Hold a high school diploma or certificate of equivalency.
  - (3) Achieve a passing score in courses of instruction approved by the Department covering the following topics:
    - a. The principles and techniques of property mapping.
    - b. The laws of North Carolina governing the listing, appraisal, and assessment of real property for taxation.

The Department shall establish requirements for certification as a property mapper that are in addition to these minimum requirements. The additional requirements shall ensure that an applicant who is certified as a property mapper has the minimum skills necessary to create and maintain large-scale cadastral maps. In establishing these additional requirements, the Department may consult with the advisory committee on land records created by G.S. 147-54.3(f), the North Carolina Property Mappers' Association, and other relevant professional groups. The additional requirements may include mapping experience and a passing score on an examination administered by the Department.

(c) Renewal. — A certification as a property mapper must be renewed every two years. Attendance of 24 hours of continuing education approved by the

Department is a condition of renewal of a certification. The Department shall publish a list of courses acceptable for meeting this continuing education requirement.

(d) Application and Fees. — An applicant for certification as a property mapper or renewal of certification as a property mapper must file an application with the Department. The applicant must submit a fee of twenty dollars (\$20.00) with the application. Fees collected under this section shall be credited to the General Fund.

(e) Rules. — The Department may adopt rules to implement this section. Chapter 150B of the General Statutes governs the adoption of rules by the Department. (1993, c. 326, s. 1.)

**Editor's Note.** — Session Laws 1993, c. 326, which enacted this section, in s. 2 provides: "A person who has attained certification as a property mapper through the North Carolina Property Mappers' Association as of January 1, 1994, may apply to the Department of the Secretary of State at any time before July 1,

1994, for certification as a property mapper without meeting the requirements of G.S. 147-54.4, as enacted by this act. Upon application and payment of the fee required by G.S. 147-54.4, as enacted by this act, the person shall be certified by the Department as a property mapper".

### **§ 147-54.5. Investor Protection and Education Trust Fund; administration; limitations on use of the Fund.**

(a) The Investor Protection and Education Trust Fund created in the Department of the Secretary of State as an expendable trust account to be used by the Secretary of State only for the purposes set forth in this section.

(b) The proceeds of the Investor Protection and Education Trust Fund shall be used by the Secretary of State to provide investor protection and education to the general public and to potential securities investors in the State through:

- (1) The use of the media, including television and radio public service announcements and printed materials; and
- (2) The sponsorship of educational seminars, whether live, recorded, or through other electronic means.

(c) The proceeds of the Investor Protection and Education Trust Fund shall not be used for:

- (1) Travel expenses of the Secretary of State or staff of the Department of the Secretary of State, unless those expenses are directly related to specific investor protection and education activities performed in accordance with this section.
- (2) General operating expenses of the Department of the Secretary of State, or to supplement General Fund appropriations to the Department of the Secretary of State for other than investor education and protection activities.
- (3) Promoting the Secretary of State or the Department of the Secretary of State.

(d) Expenditures from the Investor Protection and Education Trust Fund shall be made in compliance with State purchasing and contracting requirements for competitive bidding in accordance with the provisions of Article 3 of Chapter 143 of the General Statutes.

(e) Revenues derived from consent orders resulting from negotiated settlements of securities investigations by the Secretary of State shall be credited to the Fund. The State Treasurer shall invest the assets of the Fund according to law. Any interest or other investment income earned by the Investor Protection and Education Trust Fund shall remain in the Fund. The balance of the Investor Protection and Education Trust Fund at the end of each fiscal year shall not revert to the General Fund.

(f) Beginning January 1, 1997, the Department of the Secretary of State shall report annually to the General Assembly's Fiscal Research Division and to the Joint Legislative Commission on Governmental Operations on the expenditures from the Investor Protection and Education Trust Fund and on the effectiveness of investor awareness education efforts of the Department of the Secretary of State. (1996, 2nd Ex. Sess., c. 18, s. 13.)

### § 147-54.6. International relations assistance.

(a) The Secretary of State may offer direct and indirect assistance in matters relating to international relations and protocol to other governmental agencies and units of the State of North Carolina. The assistance may be provided upon request of the intended recipient when resources are available for these purposes.

(b) The Secretary of State, on behalf of the State, may accept gifts, donations, bequests, or other forms of voluntary contributions, apply for grants from public and private sources, and may expend funds received under this subsection for the purpose of promoting international relations and hosting foreign dignitaries and leaders in North Carolina. All funds and gifts received pursuant to this subsection shall be subject to audit by the Office of the State Auditor and all funds shall be expended in conformity with the Executive Budget Act and shall become the property of the State. (1999-260, s. 3.)

**Editor's Note.** — This section was enacted as § 147-54.5 and was redesignated as § 147-54.6 at the direction of the Revisor of Statutes.

Session Laws 1999-260, s. 5, provides that within available appropriated funds, the Secretary of State shall provide information related

to the existence of memoranda of understanding and agreements between state agencies and foreign governments obtained pursuant to this act to the Joint Committee on Governmental Operations by March 31, 2000.

§ 147-54.7: Reserved for future codification purposes.

## ARTICLE 4A.

### *Constitutional Amendments Publication Commission.*

### § 147-54.8. Constitutional Amendments Publication Commission.

(a) There is established within the Department of the Secretary of State the Constitutional Amendments Publication Commission (hereinafter "Commission").

(b) The Commission shall consist of three members who shall serve ex officio as follows: The Secretary of State, the Attorney General, and the Legislative Services Officer. (1983, c. 844, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 844, s. 2, provided: "Nothing contained in this act shall affect the validity of the voting on any

proposed constitutional amendment, including the exercise of any powers by the Constitutional Amendments Publication Commission."

### § 147-54.9. Officers; meetings; quorum.

(a) The Secretary of State shall be the Chairman of the Commission.

(b) A quorum shall consist of all three members.

(c) The Commission shall meet on the call of the Chairman or any two members. (1983, c. 844, s. 1.)

### § 147-54.10. Powers.

At least 60 days before an election in which a proposed amendment to the Constitution, or a revised or new Constitution, is to be voted on, the Commission shall prepare an explanation of the amendment, revision, or new Constitution in simple and commonly used language.

The summary prepared by the Commission shall be printed by the Secretary of State, in a quantity determined by the Secretary of State. A copy shall be sent along with a news release to each county board of elections, and a copy shall be available to any registered voter or representative of the print or broadcast media making request to the Secretary of State. The Secretary of State may make copies available in such additional manner as he may determine. (1983, c. 844, s. 1.)

## ARTICLE 4B.

### *Business License Information Office.*

### § 147-54.11. Purpose.

It is the purpose of this Article to provide a convenient, accessible, and timely one-stop system for the business community to acquire and maintain the necessary State licenses to conduct business. Use of this one-stop system by an applicant is optional. An applicant may deal directly with the appropriate State licensing agency if he so prefers. To accomplish this goal, a business license information office is established to provide information to the business community on all State licensing and regulatory requirements and, to the extent feasible, to provide local and federal information on the same regulated activities. In addition to providing information on State licensing requirements, the business license information office shall develop an operating plan for an automated master application system, shall determine the software and hardware needs of the system, shall determine the staffing levels required for the system, and shall determine the space requirements for the office and automated system.

It is the intent of the General Assembly that the authority for determining whether a requested license shall be issued shall remain with the agency legally authorized to issue the license. (1987, c. 808, s. 1.)

### § 147-54.12. Definitions.

The following definitions apply in this Article:

- (1) "Director" means the director of the Business License Information Office.
- (2) "Environmental license" means any certificate, permit, or other approval by whatever name called, pertaining to a regulatory or management program related to the protection, conservation, or use of or interference with the resources of land, air, or water, which is required to be obtained from a State agency or instrumentality, including, but not limited to, any certificate, permit, or other approval by whatever name called, pertaining to a pollution control rule or standard established by the Commission for Health Services.
- (3) "License" means any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in any activity,

except occupational licenses and licenses issued under Chapter 20 of the General Statutes.

- (4) "Occupational license" means any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by any occupational licensing agency.
- (5) "Occupational licensing agency" means any board, commission, committee, or other agency of the State that is established for the primary purpose of regulating the admission or conduct of persons in a particular profession, occupation, or field of endeavor, and is authorized to issue and revoke licenses. The term does not include a State agency or department that issues permits or licenses as only a part of its regular function.
- (6) "Office" means the Business License Information Office.
- (7) "Regulatory" means all licensing and other governmental or statutory requirements pertaining to business or professional activities.
- (8) "Secretary" means the Secretary of State. (1987, c. 808, s. 1; 1993, c. 513, s. 10.)

### **§ 147-54.13. Business License Information Office established; appointment of director.**

(a) There is established within the Department of the Secretary of State the Business License Information Office. The Office shall be under the direction and supervision of a full-time salaried State employee who shall be designated as the Director. The Director shall be appointed by the Secretary of State and shall receive a salary commensurate with State government pay schedules for the duties of this office, or such salary to be set by the State Personnel Board pursuant to G.S. 126-4. Necessary travel allowance or reimbursement for expenses shall be authorized for the Director in accordance with G.S. 138-6. Sufficient staff shall be provided under the direction of the Secretary.

(b) The Office shall make recommendations to agencies and the General Assembly for eliminating, consolidating, simplifying, or expediting licenses, or otherwise improving licensing procedures affecting business undertakings.

(c) The Office shall promulgate and adopt rules and forms necessary to carry out the purposes of this Article. (1987, c. 808, s. 1.)

### **§ 147-54.14. Clearinghouse functions.**

The Office shall be a clearinghouse for State business license information and shall perform the following duties:

- (1) Establish a license information service detailing requirements for establishing and engaging in business in the State;
- (2) Provide the most recent forms and information sheets for all State business licenses; and
- (3) Prepare, publish, and distribute a complete directory of all State licenses required to do business in North Carolina. (1987, c. 808, s. 1.)

### **§ 147-54.15. License coordination and assistance to applicants.**

Upon request, the Office shall assist a person as provided below:

- (1) Identify the type and source of licenses that may be required and the potential difficulties in obtaining the licenses based on an informal review of a potential applicant's business at an early stage in its planning. Information provided by the Office is for guidance purposes

only and may not be asserted by an applicant as a waiver or release from any license requirement. However, an applicant who uses the services of the Office as provided in this subdivision, and who receives a written statement identifying required State business licenses relating to a specific business activity, may not be assessed a penalty for failure to obtain any State business license which was not identified, provided that the applicant submits an application for each such license within sixty (60) days after written notification by the Office or the agency responsible for issuing the license;

- (2) Arrange an informal conference between the person and the appropriate agency to clarify licensing requirements or standards, if necessary;
- (3) Assist in preparing the appropriate application and supplemental forms;
- (4) Monitor the license review process to determine the status of a particular license. If there is a delay in the review process, the Office may demand to know the reasons for the delay, the action required to end the delay, and shall provide this information to the applicant. The Office may assist the applicant in resolving a dispute with an agency during the application process. If a request for a license is refused, the Office may explain the recourse available to the person under the Administrative Procedure Act. (1987, c. 808, s. 1; 1989, c. 22.)

### **§ 147-54.16. Master application system.**

The Office shall implement and administer an automated master application system. The Office shall determine the licenses appropriate for inclusion in the master application system. The Office may not include environmental licenses in the master application system.

The appropriate agency shall continue to determine whether a requested license shall be issued and to issue the license if the application is approved by the agency. An applicant who receives written notification by the Office that a license requested through the Office is being issued by the appropriate agency may proceed with the licensed business activity without having physical possession of the issued license.

The Office shall collect from each applicant the total amount of the fees for the licenses applied for through the Office. The Office is the repository for an original signed application form submitted through the Office for a license that is included in the master application system. If, based on the information supplied by the applicant to the Office, the Office fails to make application for a required license, and the applicant did not know such a license was required, the applicant shall not be liable for any civil or criminal penalties or disciplinary action for failure to have the license. If the failure to obtain the license is reported to the applicant by either the Office or the agency issuing the license, the applicant must make application within 30 days or be subject to the penalties or disciplinary action. (1987, c. 808, s. 1; 1993, c. 561, s. 41(a).)

### **§ 147-54.17. License coordinator designated in all State agencies.**

(a) Each agency shall cooperate fully with the Office in providing information on the licenses and regulatory requirements of the agency, in coordinating conferences with applicants to clarify license and regulatory requirements, and in developing a plan for an automated master application system.

(b) Each agency shall designate a business license coordinator. The coordinator shall have the following responsibilities:

- (1) To provide to the Office the most recent application and supplemental forms required for each license issued by the agency, the most recent information available on existing and proposed agency rules, the most recent information on changes or proposed changes in license requirements or agency rules and how those changes will affect the business community, and agency publications that would be of aid or interest to the business community;
- (2) To work with the Office in scheduling conferences for applicants as provided under G.S. 147-54.15;
- (3) To determine, upon request of an applicant or the Office, the status of a license application or renewal, the reason for any delay in the license review process, and the action needed to end the delay; and to notify the applicant or Office, as appropriate, of those findings;
- (4) To work with the Office or applicant, upon request, to resolve any dispute that may arise between the agency and the applicant during the review process;
- (5) To review agency regulatory and license requirements and to provide a written report to the Office that identifies the regulatory and licensing requirements that affect the business community; indicates which, if any, requirements should be eliminated, modified, or consolidated with other requirements; and explains the need for continuing those requirements not recommended for elimination. (1987, c. 808, s. 1.)

### **§ 147-54.18. Use of Business License Information Office optional.**

The services offered to applicants by the Business License Information Office are optional. An applicant may deal directly with the licensing agency in obtaining information, assistance, or in applying for a license if the applicant so prefers. (1987, c. 808, s. 1.)

### **§ 147-54.19. Report by State agencies.**

Each State agency issuing licenses shall, on a quarterly basis, report to the Office the number of licenses issued during the previous quarter. The report shall be broken down by category, and shall be made on a form prescribed and furnished by the Secretary of State. (1993, c. 289, s. 1.)

## ARTICLE 5.

### *Auditor.*

**§ 147-55:** Repealed by Session Laws 1983, c. 913, s. 1.

**§ 147-56:** Repealed by Session Laws 1983, c. 913, s. 1.

**§ 147-57:** Repealed by Session Laws 1981, c. 884, s. 12.

**§ 147-58:** Repealed by Session Laws 1983, c. 913, s. 1.

**§§ 147-59 through 147-61:** Repealed by Session Laws 1981, c. 302.

§ **147-62:** Recodified as § 143-3.3 by Session Laws 1983, c. 913, s. 49.

§§ **147-63, 147-64:** Recodified as § 143-3.4 by Session Laws 1983, c. 913, ss. 50, 51.

**Cross References.** — As to transfer of power to issue warrants upon the State Treasurer from the State Auditor to the Director of the Budget, see §§ 143-3.1 and 143-3.2.

## ARTICLE 5A.

### *Auditor.*

#### § **147-64.1. Salary of State Auditor.**

(a) The salary of the State Auditor shall be set by the General Assembly in the Current Operations Appropriations Act.

(b) In addition to the salary set by the General Assembly in the Current Operations Appropriations Act, longevity pay shall be paid on the same basis as is provided to employees of the State who are subject to the State Personnel Act. (1983, c. 761, s. 214; c. 913, s. 2; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1987, c. 738, s. 32(b).)

#### § **147-64.2. Legislative policy and intent.**

The General Assembly is ultimately responsible for authorizing the expenditure of public moneys, designating the sources from which moneys may be collected, and shaping the administrative structure to perform the work of government throughout the State, and is held finally accountable for how the funds are spent and what is accomplished with them. The legislature should, therefore, provide the basic direction for audits of State agencies.

In the interest of reducing audit overlap and expense at all levels of government, the General Assembly and the Auditor should promote, to the extent possible, coordinated nonduplicating audits of public programs and activities of all governmental levels throughout the State.

It is the intent of this Article that all State agencies, and entities supported, partially or entirely, by public funds be subject to audit under the policy guidance of the Auditor. Such audits shall be made to assist in furnishing the General Assembly, the Governor, the executive departments and agencies of the State, the governing bodies and executive departments of the political subdivisions of the State, and the public in general with an independent evaluation of public program performance. (1983, c. 913, s. 2.)

#### § **147-64.3. Legislative and management control system.**

It is the intent of this Article that the State Auditor shall perform or coordinate all audit functions for State government. As appropriate, all State agencies are encouraged to establish, maintain, and use effective systems of management control. The adequacy of these control systems will be reviewed by the Auditor. The Auditor may, at his discretion, use such reviews to limit his audit activity or to suggest guidelines, make recommendations, and provide assistance where necessary within the resources available. (1983, c. 913, s. 2.)

#### § **147-64.4. Definitions.**

The words and phrases used in this Article have the following meanings:

- (1) "Audit". — An independent review or examination of government organizations, programs, activities, and functions. The purpose of an

audit is to help ensure full accountability and assist government officials and employees in carrying out their responsibilities. The elements of such an audit are:

- a. Financial and compliance: to determine whether financial operations are properly conducted, whether the financial reports of an audited entity are presented fairly, and whether the entity has complied with applicable laws and regulations; and,
  - b. Economy and efficiency: to determine whether the entity is managing or utilizing its resources (such as personnel and property) in an economical and efficient manner and the causes of any inefficiencies or uneconomical practices, including inadequacies in laws and regulations, management information systems, administrative policies and procedures, or organizational structures; and,
  - c. Program results: to determine whether the desired results or benefits are being achieved, whether the objectives established by the General Assembly or other authorizing body are being met, and whether the agency has considered alternatives which might yield desired results at lower costs.
  - d. An audit may include all three elements or only one or two. It is not intended or desirable that every audit include all three. Economy and efficiency and program result audits should be selected when their use will meet the needs of expected users of audit results.
- (2) "Accounting system". — The total structure of records and procedures which discover, record, classify, and report information on the financial position and operating results of a governmental unit or any of its funds, balanced account groups, and organizational components.
  - (3) "Federal agency". — Any department, agency, or instrumentality of the federal government and any federally owned or controlled corporation.
  - (4) "State agency". — Any department, institution, board, commission, committee, division, bureau, officer, official or any other entity for which the State has oversight responsibility, including but not limited to, any university, mental or specialty hospital, community college, or clerk of court. (1983, c. 913, s. 2; 1987, c. 564, s. 31.)

### **§ 147-64.5. Cooperation with Joint Legislative Commission on Governmental Operations and other governmental bodies.**

(a) Joint Legislative Commission on Governmental Operations. — The Auditor shall furnish copies of any and all audits only when requested by the Joint Legislative Commission on Governmental Operations. The copies shall be in written or electronic form, as requested. Accordingly, the Auditor shall, upon request by the chairmen, appear before the Commission to present findings and answer questions concerning the results of these audits. The Commission is hereby authorized to use these audit findings in its inquiries concerning the operations of State agencies and is empowered to require agency heads to advise the Commission of actions taken or to be taken on any recommendations made in the report or explain the reasons for not taking action.

(b) Requests for Auditor Assistance. — Committees of the General Assembly, the Governor, and other State officials may make written requests that the Auditor undertake, to the extent deemed practicable and within the resources provided, a specific audit or investigation; provide technical assistance and advice; and provide recommendations on management systems, finance, ac-

counting, auditing, and other areas of management interest. The Auditor may request the advice of the Joint Legislative Commission on Governmental Operations in prioritizing these requests and in determining whether the requests are practicable and can be undertaken within the resources provided.

(c) **Cooperation with Other Governmental Bodies.** — The Auditor shall cooperate, act, and function with other audit or evaluation organizations in the State, with appropriate councils or committees of other states, with governing bodies of the political subdivisions of the State, and with federal agencies in an effort to maximize the extent of intergovernmental audit coordination and thereby avoid unnecessary duplication and expense of audit effort. Nothing in this Article is intended nor shall it be construed as giving the Auditor control over the internal auditors of any agency. (1983, c. 913, s. 2; 1997-443, s. 25; 2001-424, s. 9.1(b).)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, s. 9.1(b), effective July 1, 2001, in subsection (a), inserted "only when" in the first sentence and added the second sentence.

## § 147-64.6. Duties and responsibilities.

(a) It is the policy of the General Assembly to provide for the auditing of State agencies by the impartial, independent State Auditor.

(b) The duties of the Auditor are independently to examine into and make findings of fact on whether State agencies:

- (1) Have established adequate operating and administrative procedures and practices; systems of accounting, reporting and auditing; and other necessary elements of legislative or management control.
- (2) Are providing financial and other reports which disclose fairly, consistently, fully, and promptly all information needed to show the nature and scope of programs and activities and have established bases for evaluating the results of such programs and operations.
- (3) Are promptly collecting, depositing, and properly accounting for all revenues and receipts arising from their activities.
- (4) Are conducting programs and activities and expending funds made available in a faithful, efficient, and economical manner in compliance with and in furtherance of applicable laws and regulations of the State, and, if applicable, federal law and regulation.
- (5) Are determining that the authorized activities or programs effectively serve the intent and purpose of the General Assembly and, if applicable, federal law and regulation.

(c) The Auditor shall be responsible for the following acts and activities:

- (1) Audits made or caused to be made by the Auditor shall be conducted in accordance with generally accepted auditing standards as prescribed by the American Institute of Certified Public Accountants, the United States General Accounting Office, or other professionally recognized accounting standards-setting bodies.
- (2) Financial and compliance audits may be made at the discretion of the Auditor without advance notice to the organization being audited. Audits of economy and efficiency and program results shall be discussed in advance with the prospective auditee unless an unannounced visit is essential to the audit.
- (3) The Auditor, on his own initiative and as often as he deems necessary, or as requested by the Governor or the General Assembly, shall, to the extent deemed practicable and consistent with his overall responsi-

bility as contained in this act, make or cause to be made audits of all or any part of the activities of the State agencies.

- (4) The Auditor, at his own discretion, may, in selecting audit areas and in evaluating current audit activity, consider and utilize, in whole or in part, the relevant audit coverage and applicable reports of the audit staffs of the various State agencies, independent contractors, and federal agencies. He shall coordinate, to the extent deemed practicable, the auditing conducted within the State to meet the needs of all governmental bodies.
- (5) The Auditor is authorized to contract with federal audit agencies, or any governmental agency, on a cost reimbursable basis, for the Auditor to perform audits of federal grants and programs administered by the State Departments and institutions in accordance with agreements negotiated between the Auditor and the contracting federal audit agencies or any governmental agency. In instances where the grantee State agency shall subgrant these federal funds to local governments, regional councils of government and other local groups or private or semiprivate institutions or agencies, the Auditor shall have the authority to examine the books and records of these subgrantees to the extent necessary to determine eligibility and proper use in accordance with State and federal laws and regulations.

The Auditor shall charge and collect from the contracting federal audit agencies, or any governmental agencies, the actual cost of all the audits of the grants and programs contracted by him to do. Amounts collected under these arrangements shall be deposited in the State Treasury and be budgeted in the Department of State Auditor and shall be available to hire sufficient personnel to perform these contracted audits and to pay for related travel, supplies and other necessary expenses.
- (6) The Auditor is authorized and directed in his reports of audits or reports of special investigations to make any comments, suggestions, or recommendations he deems appropriate concerning any aspect of such agency's activities and operations.
- (7) The Auditor shall charge and collect from each examining and licensing board the actual cost of each audit of such board. Costs collected under this subdivision shall be based on the actual expense incurred by the Auditor's office in making such audit and the affected agency shall be entitled to an itemized statement of such costs. Amounts collected under this subdivision shall be deposited into the general fund as nontax revenue.
- (8) The Auditor shall examine as often as may be deemed necessary the accounts kept by the Treasurer, and if he discovers any irregularity or deficiency therein, unless the same be rectified or explained to his satisfaction, report the same forthwith in writing to the General Assembly, with copy of such report to the Governor and Attorney General. In addition to regular audits, the Auditor shall check the treasury records at the time a Treasurer assumes office (not to succeed himself), and therein charge him with the balance in the treasury, and shall check the Treasurer's records at the time he leaves office to determine that the accounts are in order.
- (9) The Auditor may examine the accounts and records of any bank or financial institution relating to transactions with the State Treasurer, or with any State agency, or he may require banks doing business with the State to furnish him information relating to transactions with the State or State agencies.
- (10) The Auditor may, as often as he deems advisable, conduct a detailed review of the bookkeeping and accounting systems in use in the various State agencies which are supported partially or entirely from

State funds. Such examinations will be for the purpose of evaluating the adequacy of systems in use by these agencies and institutions. In instances where the Auditor determines that existing systems are outmoded, inefficient, or otherwise inadequate, he shall recommend changes to the State Controller. The State Controller shall prescribe and supervise the installation of such changes, as provided in G.S. 143B-426.39(2).

- (11) The Auditor shall, through appropriate tests, satisfy himself concerning the propriety of the data presented in the Comprehensive Annual Financial Report and shall express the appropriate auditor's opinion in accordance with generally accepted auditing standards.
- (12) The Auditor shall provide a report to the Governor and Attorney General, and other appropriate officials, of such facts as are in his possession which pertain to the apparent violation of penal statutes or apparent instances of malfeasance, misfeasance, or nonfeasance by an officer or employee.
- (13) At the conclusion of an audit, the Auditor or his designated representative shall discuss the audit with the official whose office is subject to audit and submit necessary underlying facts developed for all findings and recommendations which may be included in the audit report. On audits of economy and efficiency and program results, the auditee's written response shall be included in the final report if received within 30 days from receipt of the draft report.
- (14) The Auditor shall notify the General Assembly, the Governor, the Chief Executive Officer of each agency audited, and other persons as the Auditor deems appropriate that an audit report has been published, its subject and title, and the locations, including State libraries, at which the report is available. The Auditor shall then distribute copies of the report only to those who request a report. The copies shall be in written or electronic form, as requested. He shall also file a copy of the audit report in the Auditor's office, which will be a permanent public record; Provided, nothing in this subsection shall be construed as authorizing or permitting the publication of information whose disclosure is otherwise prohibited by law.
- (15) It is not the intent of the audit function, nor shall it be so construed, to infringe upon or deprive the General Assembly and the executive or judicial branches of State government of any rights, powers, or duties vested in or imposed upon them by statute or the Constitution.
- (16) The Auditor shall be responsible for receiving reports of allegations of the improper governmental activities set forth in G.S. 126-84. The Auditor shall provide a telephone hotline to receive such allegations and informant may choose whether to remain anonymous. The Auditor shall implement the necessary policies and procedures to investigate hotline allegations and recommend appropriate action. When the allegation involves issues of substantial and specific danger to the public health and safety, the Auditor shall notify the appropriate agency immediately. In addition, the Auditor shall publicize the hotline number periodically and shall report findings to the agencies involved.

All records maintained by the State Auditor which involve unsubstantiated allegations of improper governmental activities set forth in G.S. 126-84 shall be destroyed within four years from the date such allegation was received.
- (17) The Auditor or the Auditor's designee, in conjunction with the State Controller and the State Budget Officer or their designees, shall handle the resolution of fee disputes between the Office of Information Technology Services and the State agencies receiving information technology services from the Office.

(18) The Auditor shall, after consultation and in coordination with the State Chief Information Officer, assess, confirm, and report on the security practices of information technology systems. If an agency has adopted standards pursuant to G.S. 147-33.82(d)(1) or (2), the audit shall be in accordance with those standards. The Auditor's assessment of information security practices shall include an assessment of network vulnerability. The Auditor may conduct network penetration or any similar procedure as the Auditor may deem necessary. The Auditor may investigate reported information technology security breaches, cyber attacks, and cyber fraud in State government. The Auditor shall issue public reports on the general results of the reviews undertaken pursuant to this subdivision but may provide agencies with detailed reports of the security issues identified pursuant to this subdivision which shall not be disclosed as provided in G.S. 132-6.1(c). For the purposes of this subdivision only, the Auditor is exempt from the provisions of Article 3 of Chapter 143 of the General Statutes in retaining contractors.

(d) Reports and Work Papers. — The Auditor shall maintain for 10 years a complete file of all audit reports and reports of other examinations, investigations, surveys, and reviews issued under his authority. Audit work papers and other evidence and related supportive material directly pertaining to the work of his office shall be retained according to an agreement between the Auditor and State Archives. To promote intergovernmental cooperation and avoid unnecessary duplication of audit effort, and notwithstanding the provisions of G.S. 126-24, pertinent work papers and other supportive material related to issued audit reports may be, at the discretion of the Auditor and unless otherwise prohibited by law, made available for inspection by duly authorized representatives of the State and federal government who desire access to and inspection of such records in connection with some matter officially before them, including criminal investigations.

Except as provided above, or upon subpoena issued by a duly authorized court or court official, audit work papers shall be kept confidential. (1983, c. 913, s. 2; 1985 (Reg. Sess., 1986), c. 1024, ss. 24, 25; 1987, c. 738, s. 62; 1989, c. 236, s. 2; 1999-188, s. 2; 2001-142, s. 2; 2001-424, ss. 9.1(a), 15.2(c).)

**Editor's Note.** — The reference in subdivision (c)(3) of this section to "this act" refers to Session Laws 1983, c. 913, which enacted this Article and made other changes in the General Statutes.

Session Laws 1985 (Reg. Sess., 1986), c. 1024, s. 25 purported to rewrite "G.S. 147-64.6(11)." At the direction of the Revisor of Statutes, the amendment was effectuated in subdivision (c)(11).

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-142, s. 2, effective May 31, 2001, added subdivision (c)(17).

Session Laws 2001-424, s. 9.1(a), effective July 1, 2001, in subdivision (c)(12), substituted "a report" for "in a written statement" and inserted "of" preceding "such facts"; and in subdivision (c)(14), in the first sentence, substituted "notify" for "provide copies of each audit report to," added "that an audit report has been published, its subject and title, and the locations, including State libraries, at which the report is available" at the end of that sentence, and added the second and third sentences.

Session Laws 2001-424, s. 15.2(c), effective September 26, 2001, added subdivision (c)(18).

## § 147-64.6A. Audit of community colleges.

The State Auditor, within funds available to his Department, shall audit the Community Colleges and Technical Institutes so that all 58 institutions are audited no less than once every five years. (1987, c. 830, s. 71.)

**§ 147-64.7. Authority.**

- (a) Access to Persons and Records. —
- (1) The Auditor and his authorized representatives shall have ready access to persons and may examine and copy all books, records, reports, vouchers, correspondence, files, personnel files, investments, and any other documentation of any State agency. The review of State tax returns shall be limited to matters of official business and the Auditor's report shall not violate the confidentiality provisions of tax laws.
  - (2) The Auditor and his duly authorized representatives shall have such access to persons, records, papers, reports, vouchers, correspondence, books, and any other documentation which is in the possession of any individual, private corporation, institution, association, board, or other organization which pertain to:
    - a. Amounts received pursuant to a grant or contract from the federal government, the State, or its political subdivisions.
    - b. Amounts received, disbursed, or otherwise handled on behalf of the federal government or the State. In order to determine that payments to providers of social and medical services are legal and proper, the providers of such services will give the Auditor, or his authorized representatives, access to the records of recipients who receive such services.
  - (3) The Auditor shall, for the purpose of examination and audit authorized by this act, have the authority, and will be provided ready access, to examine and inspect all property, equipment, and facilities in the possession of any State agency or any individual, private corporation, institution, association, board, or other organization which were furnished or otherwise provided through grant, contract, or any other type of funding by the State of North Carolina, or the federal government.
  - (4) All contracts or grants entered into by State agencies or political subdivisions shall include, as a necessary part, a clause providing access as intended by this section.
  - (5) The Auditor and his authorized agents are authorized to examine all books and accounts of any individual, firm, or corporation only insofar as they relate to transactions with any agency of the State.
- (b) Experts; Contracted Audits. —
- (1) The Auditor may obtain the services of independent public accountants, qualified management consultants, or other professional persons and experts as he deems necessary or desirable to carry out the duties and functions assigned under the act.
  - (2) No State agency may enter into any contract for auditing services which may impact on the State's comprehensive annual financial report without consultation with, and the prior written approval of, the Auditor, except in instances where audits are called for by the Governor under G.S. 143-3 and he shall so notify the Auditor. The Auditor shall prescribe policy and establish guidelines containing appropriate criteria for selection and use of independent public accountants, qualified management consultants, or other professional persons by State agencies and governing bodies to perform all or part of the audit function.
- (c) Authority to Administer Oaths, Subpoena Witnesses and Records, and Take Depositions. —
- (1) For the purposes of this Article the Auditor or his authorized representative shall have the power to subpoena witnesses, to take testi-

mony under oath, to cause the deposition of witnesses (residing within or without the State) to be taken in a manner prescribed by law, and to assemble records and documents, by subpoena or otherwise. The subpoena power granted by this section may be exercised only at the specific written direction of the Auditor or his chief deputy.

- (2) In case any person shall refuse to obey a subpoena, the Auditor shall invoke the aid of any North Carolina court within the jurisdiction of which the investigation is carried on or where such person may be, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Auditor or officers designated by the Auditor, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. (1983, c. 913, s. 2; 1999-188, s. 1.)

**Editor's Note.** — The references in subdivisions (a)(3) and (b)(1) of this section to “act” and “the act” refer to Session Laws 1983, c. 913,

which enacted this Article and made other changes in the General Statutes.

#### OPINIONS OF ATTORNEY GENERAL

**Pursuant to § 147-64.13, the provisions of subdivision (a)(1) of this section supersede the provisions of § 126-24 to the extent they conflict.** Specifically, the Auditor's power to examine documents in the course of an authorized audit includes the power to examine

confidential employee personnel files relevant to that audit without the consent of the employee or his employer. See opinion of Attorney General to The Honorable Ralph Campbell, Jr., State Auditor, 1999 N.C.A.G. 8 (3/5/99).

### § 147-64.7A. Obstruction of audit.

Any person who shall willfully make or cause to be made to the State Auditor or his designated representatives any false, misleading, or unfounded report for the purpose of interfering with the performance of any audit, special review, or investigation, or to hinder or obstruct the State Auditor or the State Auditor's designated representatives in the performance of their duties, shall be guilty of a Class 2 misdemeanor. (1997-526, s. 1.)

### § 147-64.8. Independence.

The Auditor shall maintain independence in the performance of his authorized duties. Except as otherwise provided by law, neither the General Assembly nor the Governor nor any department or agency of the executive or judicial branches of State government shall have the authority to limit the scope, direction, or report of an audit undertaken by the Auditor. No State regulatory agency shall by any fiscal or administrative requirements attempt to limit the scope, direction, or report of an audit undertaken by the Auditor. (1983, c. 913, s. 2.)

### § 147-64.9. Rules and regulations.

The Auditor shall make and enforce such reasonable rules and regulations as are necessary for the operation of his office. The Auditor shall install an adequate accounting system for his office and shall keep or cause to be kept a complete, accurate, and adequate record of all fiscal transactions of his office. (1983, c. 913, s. 2.)

### § 147-64.10. Powers of appointment.

The Auditor may, subject to the provisions of the State Personnel Act, appoint all employees necessary to perform the duties and functions assigned to him by the provisions of this Article.

Except where otherwise provided in this Article, all powers and duties vested in the Auditor may be delegated by him to deputies, assistants, employees, or other auditors, consultants, professionals, and experts, whose services are obtained in accordance with the provisions of this act; but the Auditor shall retain responsibility for the powers and duties so delegated. (1983, c. 913, s. 2.)

#### OPINIONS OF ATTORNEY GENERAL

##### **Delegation of Power to Attend Meetings.**

— Those members of the Council of State who have statutory authority to delegate duties may, in conformity with such statutes, attend and vote at meetings of Boards of which they are *ex officio* members through delegates or designated subordinates. The remaining members of the Council of State may make similar delegations or designations where, in the mem-

ber's judgment, other duties necessitate his absence and the statute creating his *ex officio* membership does not express or clearly imply an intent of the General Assembly that the powers of such membership be exercised personally. See opinion of Attorney General to the honorable James E. Long, Commissioner of Insurance, 55 N.C.A.G. 116 (1986).

### § 147-64.11. Review of office.

The Auditor may, on his own initiative and as often as he deems necessary, or as requested by the General Assembly, cause to be made a quality review audit of the operations of his office. Such a "peer review" shall be conducted in accordance with standards prescribed by the accounting profession. Upon the recommendation of the Advisory Budget Commission, the Joint Legislative Commission on Governmental Operations may contract with an independent public accountant, qualified management consultant, or other professional person to conduct a financial and compliance, economy and efficiency, and program result audit of the State Auditor. (1983, c. 913, s. 2.)

### § 147-64.12. Conflict of interest.

(a) To preserve the independence and objectivity of the audit function, the Auditor and his employees may not, unless otherwise expressly authorized by statute, serve in any capacity on an administrative board, commission, or agency of government of a political subdivision of the State or any other organization that, under the provisions of this act, they have the responsibility or authority to audit. Nor shall they have a material, direct or indirect financial, or other economic interest in the transactions of any State agency.

(b) The Auditor shall not conduct an audit on a program or activity for which he had management responsibility or in which he has been employed during the preceding two years. The General Assembly shall otherwise provide for the necessary audit of programs and activities within the meaning of this subsection.

If the Auditor's hotline receives a report of allegations of improper governmental activities in a program or activity that the Auditor is prohibited by this subsection from auditing, the Hotline Manager shall transmit the report to the Legislative Services Officer or his designee. The report shall retain the same confidentiality after transmittal to the General Assembly that it had in the possession of the Auditor. (1983, c. 913, s. 2; 1993, c. 152, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 8(n).)

### § 147-64.13. Construction.

This Article shall be construed liberally in the aid of its declared purpose. It is the intent of this Article that the establishment of the Office of the Auditor and the duties, powers, qualifications, and purposes herein specified shall take precedence over any conflicting part or application of any other law. (1983, c. 913, s. 2.)

#### OPINIONS OF ATTORNEY GENERAL

**Pursuant to this section, the provisions of § 147-64.7(a)(1) supersede the provisions of § 126-24 to the extent they conflict.** Specifically, the Auditor's power to examine documents in the course of an authorized audit includes the power to examine confiden-

tial employee personnel files relevant to that audit without the consent of the employee or his employer. See opinion of Attorney General to The Honorable Ralph Campbell, Jr., State Auditor, 1999 N.C.A.G. 8 (3/5/99).

### § 147-64.14. Severability.

If any provision of this Article or the application thereof to any person, State agency, political subdivision, or circumstance is held invalid, such invalidation shall not affect other provisions or applications of this Article which can be given effect without the invalid provision of application, and to this end the provisions of this Article are declared severable. (1983, c. 913, s. 2.)

## ARTICLE 6.

### *Treasurer.*

### § 147-65. Salary of State Treasurer.

The salary of the State Treasurer shall be as established in the Current Operations Appropriations Act. In addition to the salary set by the General Assembly in the Current Operations Appropriations Act, longevity pay shall be paid on the same basis as is provided to employees of the State who are subject to the State Personnel Act. (Code, s. 3723; 1891, c. 505; Rev., s. 2739; 1907, c. 830, s. 3; c. 994, s. 2; 1917, c. 161; 1919, c. 233; c. 247, s. 3; C.S., s. 3868; Ex. Sess. 1920, c. 49, s. 2; 1921, c. 11, s. 1; 1935, c. 249; 1941, c. 1; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 1; 1967, c. 1130; c. 1237, s. 1; 1969, c. 1214, s. 1; 1971, c. 912, s. 1; 1973, c. 778, s. 1; 1975, 2nd Sess., c. 983, s. 16; 1977, c. 802, s. 42.9; 1983, c. 761, s. 215; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1987, c. 738, s. 32(b).)

**Cross References.** — As to settlement of affairs of inoperative boards and agencies, see §§ 143-267 through 143-272.

### § 147-66. Office and office hours.

The Treasurer shall keep his office at the City of Raleigh, and shall attend there between the hours of 10 o'clock A.M. and three o'clock P.M., Sundays and legal holidays excepted. He shall be allowed such office room as may be necessary. (1868-9, c. 270, ss. 80, 81; Code, s. 3362; Rev., s. 5369; C.S., s. 7679.)

§ 147-67: Repealed by Session Laws 1981, c. 884, s. 14.

**§ 147-68. To receive and disburse moneys; to make reports.**

(a) It is the duty of the Treasurer to receive all moneys which shall from time to time be paid into the treasury of this State; and to pay all warrants legally drawn on the Treasurer.

(b) No moneys shall be paid out of the treasury except on warrant unless there is a legislative appropriation or authority to pay the same.

(c) It shall be the responsibility of the Treasurer to determine that all warrants presented to him for payment are valid and legally drawn on the Treasurer.

(d) The Treasurer shall report to the Governor and Advisory Budget Commission annually and to the General Assembly at the beginning of each biennial session the exact balance in the treasury to the credit of the State, with a summary of the receipts and payments of the treasury during the preceding fiscal year, and so far as practicable an account of the same down to the termination of the current calendar year.

(d1) The Treasurer shall report to the Joint Legislative Commission on Governmental Operations, to the Chairman, Appropriations Base Budget Committee and the Chairman, Appropriations Expansion Budget Committee of the House of Representatives, and to the Chairman, Committee on Appropriations and the Chairman, Committee on Base Budget of the Senate, on a quarterly basis, concerning all investments and deposits made by and through his office. The report shall include a listing of all investments with or on behalf of the State or any of its agencies or institutions and shall include the particular agency or institution, fund, rate of return, duration of the investment, and the amount of deposit on all noninterest bearing accounts. The first report is due 90 days after July 1, 1982, and shall include all investments and deposits made during the 1981-82 fiscal year and all investments made during the first quarter of the 1982-83 fiscal year; thereafter, reports shall be made on a quarterly basis including all investments and deposits made during that reporting period.

(d2) After consulting with the Select Committee on Information Technology and the Joint Legislative Commission on Governmental Operations and after consultation with and approval of the Information Resources Management Commission, the Department of State Treasurer may spend departmental receipts for the 2000-2001 fiscal year to continue improvement of the Department's investment banking operations system, retirement payroll systems, and other information technology infrastructure needs. The Department of State Treasurer shall report by January 1, 2001, and annually thereafter to the following regarding the amount and use of the departmental receipts: the Joint Legislative Commission on Governmental Operations, the Chairs of the General Government Appropriations Subcommittees of both the House of Representatives and the Senate, and the Select Committee on Information Technology.

(e) The State Treasurer shall except as provided in G.S. 143-25 be independent of any fiscal control exercise by the Director of the Budget or the Department of Administration and shall be responsible to the Advisory Budget Commission, the General Assembly and the people of North Carolina for the efficient and faithful exercise of the responsibilities of his office. (1868-9, c. 270, s. 71; Code, s. 3356; Rev., s. 5370; C.S., s. 7682; 1955, c. 577; 1957, c. 269, s. 1; 1981 (Reg. Sess., 1982), c. 1282, s. 65; 1983, c. 913, s. 52; 2000-67, s. 24A.)

**Cross References.** — As to transfer of power to issue warrants upon the State Treasurer from the State Auditor to the Director of the Budget, see §§ 143-3.1 and 143-3.2. As to funds of inoperative boards and agencies, see §§ 143-267 through 143-272.

**Editor's Note.** — Session Laws 2000-67, s. 24A, effective July 1, 2000, was codified as subsection (d2) of this section at the direction of the Revisor of Statutes.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations

and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

#### CASE NOTES

**The Treasurer is not required to pay every warrant which the Auditor may sign,** but only those which are legally drawn, and the fact that the Auditor finds that a claim for which he issues a warrant on the Treasurer is authorized by law is not binding upon or a protection to the latter. *Commercial & Farmers' Bank v. Worth*, 117 N.C. 146, 23 S.E. 160 (1895).

**As He Has No Right to Pay Out Money Except on Proper Warrants.** — As it is the duty of the State Treasurer to keep his accounts, showing the transactions of each fiscal year ending December 31, he has no right to pay out money except upon proper warrants drawn upon the proper funds in the treasury. *Arendell v. Worth*, 125 N.C. 111, 34 S.E. 232 (1899).

**And the Treasurer is not liable to a mandamus for refusing to pay a warrant improperly drawn.** *Arendell v. Worth*, 125 N.C. 111, 34 S.E. 232 (1899).

Where the State Treasurer denies the correctness of a claim audited by the State Auditor and alleges fraud in the creation of the indebtedness or that the services for which a warrant was issued were not rendered, mandamus will not lie to compel him to pay it, the question raised by such claim being for the legislature, and not the courts, to determine. *Garner v. Worth*, 122 N.C. 250, 29 S.E. 364 (1898).

**Or for Refusing to Pay a Claim Where No Warrant Has Been Issued.** — Mandamus will not lie to compel the Treasurer to pay a claim where the Auditor has not issued a warrant therefor, as the Treasurer can only pay on such warrant. *Burton v. Furnam*, 115 N.C. 166, 20 S.E. 443 (1894).

**But the Treasurer is entitled to a man-**

**damus to enforce the drawing of proper warrants** upon the proper funds before paying them, as they are his vouchers. *Arendell v. Worth*, 125 N.C. 111, 34 S.E. 232 (1899).

**The courts cannot direct the State Treasurer to pay a claim** against the State, however just and unquestioned, when there is no legislative appropriation to pay the same; and when there is such an appropriation, the coercive power is applied not to compel payment of the State liability, but to compel a public servant to discharge his duty by obedience to a legislative enactment. *Garner v. Worth*, 122 N.C. 250, 29 S.E. 364 (1898).

**Refund of Taxes.** — The State Treasurer is responsible for the efficient and faithful exercise of the responsibilities of his office, including refunding taxes erroneously collected. *Bailey v. State*, 330 N.C. 227, 412 S.E.2d 295 (1991), cert. denied, 504 U.S. 911, 112 S. Ct. 1942, 118 L. Ed. 2d 547 (1992), overruled on other grounds, 348 N.C. 130, 500 S.E.2d 54 (1998).

Although the Secretary of Revenue is authorized by § 105-266.1 to refund excessive or incorrect taxes paid by a taxpayer who applies for such refund according to the statutory requisites of § 105-266.1, she is not authorized by that statute or by § 105-267 to order the refund of an invalid or illegal tax, since questions of constitutionality are for the courts. *Bailey v. State*, 330 N.C. 227, 412 S.E.2d 295 (1991), cert. denied, 504 U.S. 911, 112 S. Ct. 1942, 118 L. Ed. 2d 547 (1992), overruled on other grounds, 348 N.C. 130, 500 S.E.2d 54 (1998).

**Applied** in *Gardner v. Board of Trustees of N.C. Local Governmental Employees' Retirement Sys.*, 226 N.C. 465, 38 S.E.2d 314 (1946).

### § 147-68.1. Banking operations.

The cost of administration, management, and operations of the banking operations of the Department of State Treasurer shall be apportioned equitably among the funds and programs using these services, and the costs so apportioned shall be deposited with the State Treasurer as a general fund

nontax revenue. The cost of administration, management and operations of the banking operations of the Department of State Treasurer shall be covered by an appropriation to the State Treasurer for this purpose in the Current Operations Appropriations Act. (1983 (Reg. Sess., 1984), c. 1034, s. 118.)

### § 147-69. Deposits of State funds in banks and savings and loan associations regulated.

Banks and savings and loan associations having State deposits shall furnish to the Auditor of the State, upon his request, a statement of the moneys which have been received and paid by them on account of the treasury. The Treasurer shall keep in his office a full account of all moneys deposited in and drawn from all banks and savings and loan associations in which he may deposit or cause to be deposited any of the public funds, and such accounts shall be open to the inspection of the Auditor. The Treasurer shall sign all checks, and no depository bank or savings and loan association shall be authorized to pay checks not bearing his official signature. The Treasurer is authorized to use a facsimile signature machine or device in affixing his signature to warrants, checks or any other instrument he is required by law to sign. The Commissioner of Banks and the bank examiners, and the Commissioner of Banks and the savings and loan examiners, when so required by the State Treasurer, shall keep the State Treasurer fully informed at all times as to the condition of all such depository banks and savings and loan associations, so as to fully protect the State from loss. The State Treasurer shall, before making deposits in any bank or savings and loan association, require ample security from the bank or savings and loan association for such deposit. (1905, c. 520; Rev., s. 5371; 1915, c. 168; 1917, c. 159; C.S., s. 7684; 1931, c. 127, s. 1; c. 243, s. 5; 1933, c. 175, s. 1; 1945, c. 644; 1949, c. 1183; 1967, c. 398, s. 2; 1977, c. 401, s. 1; 1983, c. 158, s. 4; 1987, c. 751, s. 1; 1989, c. 76, s. 27; 2001-193, s. 16.)

**Editor's Note.** — Session Laws 2001-193, s. 16, effective July 1, 2001, deleted "Administrator of the Savings Institutions Division" following "bank examiner," in the fifth sentence of the section.

**Legal Periodicals.** — For comment on the 1949 amendment to this section, see 27 N.C.L. Rev. 425 (1949).

### § 147-69.1. Investments authorized for General Fund and Highway Funds assets.

(a) The Governor and Council of State, with the advice and assistance of the State Treasurer, shall adopt such rules and regulations as shall be necessary and appropriate to implement the provisions of this section.

(b) This section applies to funds held by the State Treasurer to the credit of:

- (1) The General Fund;
- (2) The Highway Fund and Highway Trust Fund.

(c) It shall be the duty of the State Treasurer to invest the cash of the funds enumerated in subsection (b) of this section in excess of the amount required to meet the current needs and demands on such funds, selecting from among the following:

- (1) Obligations of the United States or obligations fully guaranteed both as to principal and interest by the United States.
- (2) Obligations of the Federal Financing Bank, the Federal Farm Credit Bank, the Federal Home Loan Banks, the Federal Home Loan Mortgage Corporation, Fannie Mae, the Government National Mortgage Association, the Federal Housing Administration, the Farmers Home Administration, the United States Postal Service, the Export-Import Bank, the International Bank for Reconstruction and Devel-

- opment, the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, and the Student Loan Marketing Association.
- (3) Repurchase Agreements with respect to securities issued or guaranteed by the United States government or its agencies or other securities eligible for investment by this section executed by a bank or trust company or by primary or other reporting dealers to the Federal Reserve Bank of New York.
  - (4) Obligations of the State of North Carolina.
  - (5) Time deposits of financial institutions with a physical presence in North Carolina for the purpose of receiving commercial or retail deposits; provided that any principal amount of such deposit in excess of the amount insured by the federal government or any agency thereof, be fully secured by surety bonds, or be fully collateralized; provided further that the rate of return or investment yield may not be less than that available in the market on United States government or agency obligations of comparable maturity.
  - (6) Repealed by Session Laws 1989 (Regular Session, 1990), c. 813, s. 10.
  - (7) Prime quality commercial paper bearing the highest rating of at least one nationally recognized rating service and not bearing a rating below the highest by any nationally recognized rating service which rates the particular obligation.
  - (8) Bills of exchange or time drafts drawn on and accepted by a commercial bank and eligible for use as collateral by member banks in borrowing from a federal reserve bank, provided that the accepting bank or its holding company is either (i) incorporated in the State of North Carolina or (ii) has outstanding publicly held obligations bearing the highest rating of at least one nationally recognized rating service and not bearing a rating below the highest by any nationally recognized rating service which rates the particular obligations.
  - (9) Asset-backed securities (whether considered debt or equity) provided they bear the highest rating of at least one nationally recognized rating service and do not bear a rating below the highest rating by any nationally recognized rating service which rates the particular securities.
  - (10) Corporate bonds and notes provided they bear the highest rating of at least one nationally recognized rating service and do not bear a rating below the highest by any nationally recognized rating service which rates the particular obligation.

(d) Unless otherwise provided by law, the interest or income received and accruing from all deposits or investments of such cash balances shall be paid into the State's General Fund, except that all interest or income received and accruing on the monthly balance of the Highway Fund and Highway Trust Fund shall be paid into the State Highway Fund and Highway Trust Fund. The cash balances of the several funds may be combined for deposit or investment purposes; and when such combined deposits or investments are made, the interest or income received and accruing from all deposits or investments shall be prorated among the funds in conformity with applicable law and the rules and regulations adopted by the Governor and Council of State.

(e) The State Treasurer shall cause to be prepared quarterly statements on or before the tenth day of February, May, August, and November in each year, which shall show the amount of cash on hand, the amount of money on deposit, the name of each depository, and all investments for which he is in any way responsible. Each quarterly statement shall be delivered to the Governor, Council of State, President Pro Tempore of the Senate, and Speaker of the House of Representatives; and a copy shall be posted in the office of the State Treasurer for the information of the public.

(f) Repealed by Session Laws 1989 (Regular Session, 1990), c. 813, s. 10.

(g) Repealed by Session Laws 2001-444, s. 1, effective October 1, 2001. (1943, c. 2; 1949, c. 213; 1957, c. 1401; 1961, c. 833, s. 2.2; 1967, c. 398, s. 1969, c. 125; 1975, c. 482; 1979, c. 467, s. 1; c. 717, s. 1; 1981, c. 801, ss. 1, 2; 1985, c. 313, s. 3; 1987, c. 751, ss. 2-4; 1987 (Reg. Sess., 1988), c. 882, s. 5; 1989, c. 76, s. 28; c. 751, s. 7(43); 1989 (Reg. Sess., 1990), c. 813, s. 10; 1991 (Reg. Sess., 1992), c. 959, s. 75; 1993, c. 105, s. 2; 1999-251, s. 1; 2001-444, s. 1; 2001-487, s. 14(m).)

**Cross References.** — See § 124-5.1(a), directing the application of dividends of the North Carolina Railroad Company received by the State to reduce the obligations described in Session Laws 1997-443, s. 32.30(c), as amended by Session Laws 1999-237, s. 27.11(d). See also § 124-5.1(b), regarding the cessation of accrual of interest on the remaining balance of the obligations described in Session Laws 1997-443, s. 32.20(c), as amended by Session Laws 1999-237, s. 27.11(d), effective January 1, 2000.

**Editor's Note.** — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 32.30(c), as amended by Session Laws 1999-237, s. 27.11(d), provides: "Notwithstanding G.S. 147-69.1, if a majority of the outstanding shares held by shareholders other than the State and represented in person or by proxy at a North Carolina Railroad Company shareholder meeting where a plan for merger between the Beaufort and Morehead Railroad Company and the North Carolina Railroad Company is approved, then the State Treasurer shall invest on a one-time basis up to sixty-one million dollars (\$61,000,000) from the reserve account created in subsection (b) of this section in obligations of the Beaufort and Morehead Railroad Company or any successor company. This investment shall be an interest-bearing demand note and shall be in a form prescribed by the State Treasurer. The remaining balance of the loan is not subject to repayment of principal or interest prior to action of the 2000 Session of the General Assembly. The Director of the Budget shall recommend to the 2000 Session of the General Assembly, by February 1, 2000, a plan for the repayment of the loan."

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Subsection (c), as amended by Session Laws 1999-251, s. 1, has been set forth above con-

sistent with directions from the Revisor of statutes.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 2.2(b), provides: "Notwithstanding the provisions of Section 7.2.(a) of S.L. 2000-67, nineteen million dollars (\$19,000,000) of the North Carolina Railroad Company dividends received by the State during the 2000-2001 fiscal year and the 2001-2002 fiscal year shall: (i) be applied to increase the capital of the North Carolina Railroad Company, (ii) reduce the obligations described in subsection (c) of Section 32.30 of S.L. 1997-443, as amended by subsection (d) of Section 27.11 of S.L. 1999-237, and (iii) be deposited in the General Fund."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-444, s. 1, effective October 1, 2001, deleted "the Bank for Cooperatives, the Federal Intermediate Credit Bank, the Federal Land Banks," following "the Federal Farm Credit Bank," in subdivision (c)(2); in subsection (e), substituted "February, May, August, and November" for "January, April, July and October" in the first sentence, and in the last sentence, deleted "and" preceding "Council of State" and inserted "President Pro Tempore of the Senate, and Speaker of the House of Representatives" thereafter; and repealed subsection (g), regarding the proceeds for the sale of all or any part of stock owned by the State in the North Carolina Railroad Company or the Atlantic and North Carolina Railroad Company.

Session Laws 2001-487, s. 14(m), effective December 16, 2001, substituted "Fannie Mae" for "the Federal National Mortgage Association" in subdivision (c)(2).

## § 147-69.2. Investments authorized for special funds held by State Treasurer.

(a) This section applies to funds held by the State Treasurer to the credit of:

- (1) The Teachers' and State Employees' Retirement System,
- (2) The Consolidated Judicial Retirement System,
- (3) The Teachers' and State Employees' Hospital and Medical Insurance Plan,
- (4) The General Assembly Medical and Hospital Care Plan,
- (5) The Disability Salary Continuation Plan,
- (6) The Firemen's and Rescue Workers' Pension Fund,
- (7) The Local Governmental Employees' Retirement System,
- (8) The Legislative Retirement System,
- (9) The Escheat Fund,
- (10) The Legislative Retirement Fund,
- (11) The State Education Assistance Authority,
- (12) The State Property Fire Insurance Fund,
- (13) The Stock Workers' Compensation Fund,
- (14) The Mutual Workers' Compensation Fund,
- (15) The Public School Insurance Fund,
- (16) The Liability Insurance Trust Fund,
- (17) Trust funds of The University of North Carolina and its constituent institutions deposited with the State Treasurer pursuant to G.S. 116-36.1,
- (17a) North Carolina Veterans Home Trust Fund,
- (17b) North Carolina National Guard Pension Fund,
- (17c) Retiree Health Premium Reserve Account, and
- (18) Any other special fund created by or pursuant to law for purposes other than meeting appropriations made pursuant to the Executive Budget Act.

(b) It shall be the duty of the State Treasurer to invest the cash of the funds enumerated in subsection (a) of this section in excess of the amount required to meet the current needs and demands on such funds, selecting from among the following:

- (1) Any of the investments authorized by G.S. 147-69.1(c)(1)-(7).
- (2) General obligations of other states of the United States.
- (3) General obligations of cities, counties and special districts in North Carolina.
- (4) Obligations of any company, other organization or legal entity incorporated or otherwise created or located within or outside the United States if the obligations bear one of the four highest ratings of at least one nationally recognized rating service and do not bear a rating below the four highest by any nationally recognized rating service which rates the particular security.
- (5) Repealed by Session Laws 2001-444, s. 2, effective October 1, 2001.
- (6) Asset-backed securities (whether considered debt or equity) provided they bear ratings by nationally recognized rating services as provided in G.S. 147-69.2(b)(4) and that they do not bear a rating below the four highest by any nationally recognized rating service that rates the particular securities.
- (7) With respect to Retirement Systems' assets referred to in G.S. 147-69.2(b)(8), (i) insurance contracts that provide for participation in individual or pooled separate accounts of insurance companies, (ii) group trusts, (iii) individual, common, or collective trust funds of banks and trust companies, (iv) real estate investment trusts, and (v) limited partnerships, whether described as limited liability partner-

ships or limited liability companies; provided the investment manager has assets under management of at least one hundred million dollars (\$100,000,000); provided such investment assets are managed primarily for the purpose of investing in or owning real estate or related debt financing located within or outside the United States; and provided that the investment authorized by this subsection shall not exceed ten percent (10%) of the market value of all invested assets of the Retirement Systems.

- (8) With respect to assets of the Teachers' and State Employees' Retirement System, the Consolidated Judicial Retirement System, the Firemen's and Rescue Workers' Pension Fund, the Local Governmental Employees' Retirement System, the Legislative Retirement System, and the North Carolina National Guard Pension Fund (hereinafter referred to collectively as the Retirement Systems), they may be invested in preferred or common stocks issued by any company incorporated or otherwise created or located within or outside the United States provided the investments meet the conditions of this subdivision.

The investments authorized under this subdivision cannot exceed sixty-five percent (65%) of the market value of all invested assets of the Retirement Systems. Up to five percent (5%) of the amount that may be invested under this subdivision may be invested in the stocks or shares of a diversified investment company registered under the "Investment Company Act of 1940" that has total assets of at least fifty million dollars (\$50,000,000).

The assets authorized under this subdivision can be invested through individual, common, or collective trust funds of banks, trust companies, and group trust funds of investment advisory companies so long as the investment manager has assets under management of at least one hundred million dollars (\$100,000,000).

The assets authorized under this subdivision can also be invested directly, if all of the following conditions are met:

- a. The common stock or preferred stock of such corporation is registered on a national securities exchange as provided in the Federal Securities Exchange Act or quoted through the National Association of Securities Dealers' Automated Quotations (NASDAQ) system.
- b. The corporation has paid a cash dividend on its common stock in each year of the 5-year period next preceding the date of investment and the aggregate net earnings available for dividends on the common stock of the corporation for the whole of that period have been at least equal to the amount of the dividends paid.
- c. In applying the dividend and earnings test under this section to any issuing, assuming, or guaranteeing corporation, if the corporation acquired its property or any substantial part thereof within a five-year period immediately preceding the date of investment by consolidation, merger, or by the purchase of all or a substantial portion of the property of any other corporation or corporations, or acquired the assets of any unincorporated business enterprise by purchase or otherwise, the dividends and net earnings of the several predecessor or constituent corporations or enterprises shall be consolidated and adjusted so as to ascertain whether or not the applicable requirements of this subdivision have been complied with.

No more than one and one-half percent (1 1/2%) of the market value of the Retirement Systems' assets that may be invested under this

subdivision can be invested in the stock of a single corporation, and the total number of shares in that single corporation cannot exceed eight percent (8%) of the issued and outstanding stock of that corporation.

d. to f. Repealed by Session Laws 2001-444, s. 2, effective October 1, 2001.

g. That investments may be made in securities convertible into common stocks issued by any such company, if such securities bear one of the four highest ratings of at least one nationally recognized rating service and do not bear a rating below the four highest by any nationally recognized rating service which may then rate the particular security.

(9) With respect to Retirement Systems' assets, as defined in subdivision (b)(8) of this subsection, they may be invested in limited partnership interests in a partnership or in interests in a limited liability company if the primary purpose of the partnership or limited liability company is to invest in public or private debt, public or private equity, or corporate buyout transactions, within or outside the United States. The amount invested under this subdivision shall not exceed five percent (5%) of the market value of all invested assets of the Retirement Systems.

(10) Recodified as part of subdivision (b)(9) by Session Laws 2000-160, s. 2.

(11) With respect to assets of the Escheat Fund, obligations of the North Carolina Global TransPark Authority authorized by G.S. 63A-4(a)(22), not to exceed twenty-five million dollars (\$25,000,000), that have a final maturity not later than September 1, 2004. The obligations shall bear interest at the rate set by the State Treasurer. No commitment to purchase obligations may be made pursuant to this subdivision after September 1, 1993, and no obligations may be purchased after September 1, 1994. In the event of a loss to the Escheat Fund by reason of an investment made pursuant to this subdivision, it is the intention of the General Assembly to hold the Escheat Fund harmless from the loss by appropriating to the Escheat Fund funds equivalent to the loss.

(b1) With respect to investments authorized by subsections (b)(8) and (b)(9) of this section, the State Treasurer shall appoint an Investment Advisory Committee, which shall consist of five members: the State Treasurer, who shall be chairman ex officio; two members selected from among the members of the boards of trustees of the Retirement Systems; and two members selected from the general public. The two public members must have experience in one or more of the following areas: investment management, real estate investment trusts, real estate development, venture capital investment, or absolute return strategies. The State Treasurer shall also appoint a Secretary of the Investment Advisory Committee who need not be a member of the committee. Members of the committee shall receive for their services the same per diem and allowances granted to members of the State boards and commissions generally. The committee shall have advisory powers only and membership shall not be deemed a public office within the meaning of Article VI, Section 9 of the Constitution of North Carolina or G.S. 128-1.1.

(c) Repealed by Session Laws 1995, c. 501, s. 2. (1979, c. 467, s. 2; 1983, c. 702, ss. 1-9; 1987, c. 446, s. 1; c. 751, s. 5; 1987 (Reg. Sess., 1988), c. 1070; 1989, c. 770, s. 54; 1989 (Reg. Sess., 1990), c. 813, s. 11; c. 848, s. 5; 1991, c. 542, s. 16; c. 636, s. 3; c. 749, s. 8; 1993 (Reg. Sess., 1994), c. 777, s. 4(i); 1995, c. 346, s. 2; c. 501, s. 2; 1997-456, s. 27; 1999-237, s. 27.16; 1999-251, s. 2; 2000-160, s. 2; 2001-444, ss. 2, 3.)

**Cross References.** — As to investment by community colleges and technical institutes, see § 115D-58.6.

**Editor's Note.** — Subsection (a), as amended by Session Laws 1999-251, s. 2, has been set forth above with subdivision designation changes pursuant to direction from the Revisor of Statutes.

**Effect of Amendments.** — Session Laws 2000-160, s. 2, effective August 2, 2000, combined former subdivision (b)(10) with subdivision (b)(9); and in present (b)(9), inserted “of the North Carolina Economic Opportunities Fund”

and “or the North Carolina Economic Opportunities Fund,” added the last sentence, and made minor stylistic and wording changes.

Session Laws 2001-444, ss. 2 and 3, effective October 1, 2001, rewrote subsection (b); and in subsection (b1), deleted “Equity” preceding “Investment Advisory Committee” in two places, in the first sentence substituted “subsections (b)(8) and (b)(9) of this section” for “subsection (b)(8),” and added the present second sentence.

**Legal Periodicals.** — For note, “North Carolina’s South African Divestment Statute,” see 67 N.C.L. Rev. 949 (1989).

### § 147-69.3. Administration of State Treasurer’s investment programs.

(a) The State Treasurer shall establish, maintain, administer, manage, and operate within the Department of State Treasurer one or more investment programs for the deposit and investment of assets pursuant to the provisions of G.S. 147-69.1 and G.S. 147-69.2.

(b) Any official, board, commission, other public authority, local government, school administrative unit, local ABC board, or community college of the State having custody of any funds not required by law to be deposited with and invested by the State Treasurer may deposit all or any portion of those funds with the State Treasurer for investment in one of the investment programs established pursuant to this section, subject to any provisions of law with respect to eligible investments, provided that any occupational licensing board as defined in G.S. 93B-1 may participate in one of the investment programs established pursuant to this section regardless of whether or not the funds were required by law to be deposited with and invested by the State Treasurer. In the absence of specific statutory provisions to the contrary, any of those funds may be invested in accordance with the provisions of G.S. 147-69.2 and 147-69.3. Upon request from any depositor eligible under this subsection, the State Treasurer may authorize moneys invested pursuant to this subsection to be withdrawn by warrant on the State Treasurer.

(c) The State Treasurer’s investment programs shall be so managed that in the judgment of the State Treasurer funds may be readily converted into cash when needed.

(d) Except as provided by G.S. 147-69.1(d), the total return earned on investments shall accrue pro rata to the fund whose assets are invested according to the formula prescribed by the State Treasurer with the approval of the Governor and Council of State.

(e) The State Treasurer has full powers as a fiduciary to hold, purchase, sell, assign, transfer, lend and dispose of any of the securities or investments in which any of the programs created pursuant to this section have been invested, and may reinvest the proceeds from the sale of those securities or investments and any other investable assets of the program.

(f) The cost of administration, management, and operation of investment programs established pursuant to this section shall be apportioned equitably among the programs in such manner as may be prescribed by the State Treasurer, such costs to be paid from each program, and to the extent not otherwise chargeable directly to the income or assets of the specific investment program or pooled investment vehicle, shall be deposited with the State Treasurer as a General Fund nontax revenue. The cost of administration, management, and operation of investment programs established pursuant to this section and not directly paid from the income or assets of such program

shall be covered by an appropriation to the State Treasurer for this purpose in the Current Operations Appropriations Act.

(g) The State Treasurer is authorized to retain the services of independent appraisers, auditors, actuaries, attorneys, investment counseling firms, statisticians, custodians, or other persons or firms possessing specialized skills or knowledge necessary for the proper administration of investment programs created pursuant to this section.

(h) The State Treasurer shall prepare, as of the end of each fiscal year, a report on the financial condition of each investment program created pursuant to this section. A copy of each report shall be submitted within 30 days following the end of the fiscal year to the official, institution, board, commission or other agency whose funds are invested, the State Auditor, and the Advisory Budget Commission.

(i) The State Treasurer's annual report to the General Assembly shall include a full and complete statement of all moneys invested by virtue of the provisions of G.S. 147-69.1 and G.S. 147-69.2, the nature and character of investments therein, and the revenues derived therefrom.

(j) Subject to the provisions of G.S. 147-69.1(d), the State Treasurer shall adopt any rules necessary to carry out the provisions of this section. (1979, c. 467, s. 3; 1981, c. 445, ss. 4, 5; 1983, c. 515, s. 1; c. 702, s. 10; 1983 (Reg. Sess., 1984), c. 1034, ss. 116, 117; 1987, c. 751, ss. 6-8; 2001-444, s. 4.)

**Cross References.** — As to investment by community colleges and technical institutes, see § 115D-58.6.

**Effect of Amendments.** — Session Laws 2001-444, s. 4, effective October 1, 2001, in subsection (b) substituted "those funds" for "such funds" in the first sentence and substituted "of those funds" for "such funds" in the second sentence; in subsection (d) substituted "the total return" for "net income," substituted "accrue" for "be credited," and substituted "the formula" for "such formula as may be"; in subsection (e), substituted "has full powers" for "shall have full powers," and substituted "those

securities" for "such securities"; in subsection (g), deleted "such" preceding "independent appraisers" and deleted "as may be" preceding "necessary"; deleted the former last sentence of subsection (i), which read: "The State Treasurer shall also establish annual investment yield targets for all moneys invested by virtue of the provisions of G.S. 147-69.1 and G.S. 147-69.2, and shall include in his annual report a statement of the extent that these targets have been reached"; and in subsection (j), substituted "G.S. 147-69.1(d)" for "G.S. 147-69.1(e)," and substituted "any rules necessary" for "such rules and regulations as may be necessary."

### § 147-70. To make short-term notes in emergencies.

Subject to the approval of the Governor and Council of State, the State Treasurer is authorized to make short-term notes for temporary emergencies, but such notes must only be made to provide for appropriations already made by the General Assembly. (1915, c. 168, s. 3; C.S., s. 7685.)

### § 147-71. May demand and sue for money and property of State.

The Treasurer is authorized to demand, sue for, collect and receive all money and property of the State not held by some person under authority of law. (1866, c. 46; Code, s. 3359; Rev., s. 5375; C.S., s. 7688.)

### § 147-72. Ex officio treasurer of State institutions; duties as such.

The Treasurer shall be ex officio the treasurer of the Department of Agriculture and Consumer Services, of the North Carolina State College of Agriculture and Engineering, of the North Carolina School for the Deaf and

Dumb at Morganton, of the North Carolina Institution for the Deaf and Dumb and the Blind at Raleigh, for the State hospitals (for the insane) at Raleigh, Morganton and Goldsboro and for the State's prison. He may appoint deputies to act for him at Morganton and Goldsboro, and may pay such deputies reasonable compensation. He shall keep all accounts of the institutions, and shall pay out all moneys, upon the warrant of the respective chief officers or superintendents, countersigned by two members of the board of directors, managers, or trustees. He shall report to the respective boards at such times as they may call on him, showing the amount received on account of the institution, amount paid out, and amount on hand. He shall perform his duties as treasurer of these several institutions under such regulation as shall be prescribed in each case by their respective boards of managers, trustees or directors, with the approval of the Governor; and shall be responsible on his official bond for the faithful discharge of his duties as treasurer of each of the several institutions. As treasurer of such institutions he shall, annually, after the examination, verification, and cancellation of his vouchers, deposit the same with the respective institutions, and the superintendents thereof shall be responsible for their safekeeping. (1879, c. 240, s. 2; 1881, c. 128; c. 211, s. 9; 1883, c. 156, s. 12; c. 405; Code, ss. 2235, 2251, 3723; 1895, c. 434; 1899, c. 1, s. 11; Rev., s. 5376; 1919, c. 314, s. 6; C.S., s. 7689; 1947, c. 781; 1997-261, s. 109.)

**Cross References.** — As to State schools for hearing impaired children, see § 143B-216.40 et seq. As to the state school for sight-impaired children, see § 143B-164.10 et seq.

**Editor's Note.** — The North Carolina State

College of Agriculture and Engineering is now the North Carolina State University at Raleigh. See Session Laws 1963, c. 448, s. 6; 1965, c. 213. And see § 116-4.

### **§ 147-73. Office of treasurer of each State institution abolished.**

The office of treasurer of each of the several State institutions of which the State Treasurer is ex officio treasurer is hereby abolished. (1929, c. 337, s. 3.)

### **§ 147-74. Office of State Treasurer declared office of deposit and disbursement.**

The office of the State Treasurer is declared to be an office of deposit and disbursement and only such records and accounts as may be necessary to disclose the accountability of the State Treasurer shall be kept. The purpose of this section is to prevent duplication in account and record keeping and such accounts as may be necessary shall be prescribed by the Director of the Budget under the terms of the Executive Budget Act. (1929, c. 337, s. 2.)

### **§ 147-75. Deputy to act for Treasurer.**

The Treasurer may authorize a deputy to perform any duties pertaining to the office. The Treasurer may authorize a deputy to affix the Treasurer's signature to any check, warrant or any other instrument the Treasurer is required to sign by use of the facsimile signature machine or device during the Treasurer's absence or disability. The Treasurer shall be responsible for the conduct of his deputies. (1868-9, c. 270, s. 76; Code, s. 3358; Rev., s. 5377; C.S., s. 7690; 1977, c. 401, s. 2.)

## OPINIONS OF ATTORNEY GENERAL

**Delegation of Power to Attend Meetings.**

— Those members of the Council of State who have statutory authority to delegate duties may, in conformity with such statutes, attend and vote at meetings of Boards of which they are *ex officio* members through delegates or designated subordinates. The remaining members of the Council of State may make similar delegations or designations where, in the mem-

ber's judgment, other duties necessitate his absence and the statute creating his *ex officio* membership does not express or clearly imply an intent of the General Assembly that the powers of such membership be exercised personally. See opinion of Attorney General to the honorable James E. Long, Commissioner of Insurance, 55 N.C.A.G. 116 (1986).

**§ 147-76. Liability for false entries in his books.**

If the Treasurer of the State shall wittingly or falsely make, or cause to be made, any false entry or charge in any book by him as Treasurer, or shall wittingly or falsely form, or procure to be formed, any statement of the treasury, to be by him laid before the Governor, the General Assembly, or any committee thereof, or to be by him used in any settlement which he is required to make with intent, in any of said instances, to defraud the State or any person, such Treasurer shall be guilty of a Class 1 misdemeanor. (R.C., c. 34, s. 68; Code, s. 1119; Rev., s. 3606; C.S., s. 7691; 1983, c. 913, s. 53; 1993, c. 539, s. 1055; 1994, Ex. Sess., c. 24, s. 14(c).)

**§ 147-77. Daily deposit of funds to credit of Treasurer.**

All funds belonging to the State of North Carolina, in the hands of any head of any department of the State which collects revenue for the State in any form whatsoever, and every institution, agency, officer, employee, or representative of the State or any agency, department, division or commission thereof, except officers and the clerks of the Supreme Court and Court of Appeals, collecting or receiving any funds or money belonging to the State of North Carolina, shall daily deposit the same in some bank, or trust company, selected or designated by the State Treasurer, in the name of the State Treasurer, at noon, or as near thereto as may be, and shall report the same daily to said Treasurer: Provided that the State Treasurer may authorize exemptions from the provisions of this section so long as funds are deposited and reported pursuant to the provisions of this section at least once a week and, in addition, so long as funds are deposited and reported pursuant to the provisions of this section whenever as much as two hundred fifty dollars (\$250.00) has been collected and received: Provided, that the Treasurer may refund the amount of any bad checks which have been returned to the department by the Treasurer when the same have not been collected after 30 days' trial. (1925, c. 128, s. 1; 1945, c. 159; 1969, c. 44, s. 77; 1985, c. 708.)

**Cross References.** — As to daily deposits by community colleges and technical institutes, see § 115D-58.9.

## OPINIONS OF ATTORNEY GENERAL

**“Enterprise funds”** maintained by the Division of Vocational Rehabilitation Services and “student activity funds” maintained by the Schools for the Deaf are required to be deposited with the State Treasurer pursuant to § 147-77. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department

of Human Resources, 56 N.C.A.G. 10 (1986).

**Funds donated to Lenox Baker Children's Hospital** are required to be deposited with the State Treasurer unless the conditions or terms of the gift provide to the contrary, or unless otherwise provided by law. See opinion of Attorney General to Mr. Richard J. Vinegar,

Chairman Board of Directors of Lenox Baker Children's Hospital, 56 N.C.A.G. 31 (1986).

**Any gift in trust where the terms contraindicate investment or deposit** with the State Treasurer (for example where the terms of the gift provide for a private trustee)

would be exempt from the operation of the cash management policy. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 56 N.C.A.G. 10 (1986).

## § 147-78. Treasurer to select depositories.

The State Treasurer is hereby authorized and empowered to select and designate, wherever necessary, in this State some bank or banks, savings and loan association or associations, or trust company as an official depository of the State. (1925, c. 128, s. 2; 1979, c. 637, s. 4; 1983, c. 158, s. 5.)

### § 147-78.1. Good faith deposits; use of master trust.

Notwithstanding any other provision of law, the State Treasurer is authorized to select a bank or trust company as master trustee to hold cash or securities to be pledged to the State when deposited with him pursuant to statute or at the request of another State agency. Securities may be held by the master trustee in any form that, in fact, perfects the security interest of the State in the securities. The State Treasurer shall by rule or regulation establish the manner in which the master trust shall operate. The master trustee may charge reasonable fees for services rendered to each person who deposits the cash or securities with the State. (1985, c. 496, s. 1.)

## § 147-79. Deposits to be secured; reports of depositories.

(a) The amount of funds deposited by the State Treasurer in an official depository shall be adequately secured by deposit insurance, surety bonds, or investment securities of such nature, in such amounts, and in such manner, as may be prescribed by rule or regulation of the State Treasurer with the approval of the Governor and Council of State. No security is required for the protection of funds remitted to and received by a bank or trust company designated by the State Treasurer under G.S. 142-1 and acting as paying agent for the payment of the principal of or interest on bonds or notes of the State.

(b) Each official depository having deposits required to be secured by subsection (a) of this section may be required to report to the State Treasurer on January 1 and July 1 of each year (or such other dates as he may prescribe) a list of all surety bonds or investment securities securing such deposits. If the State Treasurer finds at any time that any funds of the State are not properly secured, he shall so notify the depository. Upon such notification, the depository shall comply with the applicable law or regulations forthwith.

(c) Violation of the provisions of this section shall be a Class 1 misdemeanor. (1933, c. 461, ss. 1, 11/2; 1979, c. 637, s. 3; 1993, c. 539, s. 1056; 1994, Ex. Sess., c. 24, s. 14(c).)

**Legal Periodicals.** — For review of this section, see 11 N.C.L. Rev. 201 (1933).

## § 147-80. Deposit in other banks unlawful; liability.

It shall be unlawful for any funds of the State to be deposited by any person, institution, or department or agency in any place or bank or trust company, other than those so selected and designated as official depositories of the State of North Carolina by the State Treasurer, and any person so offending or aiding and abetting in such offense shall be guilty of a Class 1 misdemeanor and any

person so offending or aiding and abetting in such offense shall also immediately become civilly liable to the State of North Carolina in the amount of the money or funds unlawfully deposited, and, at the instance of the State Treasurer, or at the instance of the Governor, the Attorney General shall forthwith institute the civil action in the name of the State of North Carolina against such person or persons, either in the courts of Wake County, according to their respective jurisdiction, or in the county in which said unlawful deposit has been made, according to the selection made by the officer requesting the institution of such action, for the purpose of recovering the amount of the money so unlawfully deposited, with interest thereon at six percent (6%) per annum, and for the cost of said action, and the court in which said action is tried may also tax, as a part of the cost in said action, to the use of the State of North Carolina, a sum sufficient to reimburse the State of North Carolina for all expense incidental to or connected with the preparation and prosecution of such action. (1925, c. 128, s. 3; 1993, c. 539, s. 1057; 1994, Ex. Sess., c. 24, s. 14(c).)

### **§ 147-81. Number of depositories; contract.**

The State Treasurer is authorized and empowered to select as many depositories in one place and in the State as may appear to him to be necessary and convenient for the various officers, representatives and employees of the State, to comply with the purposes of G.S. 147-77, 147-78, 147-80, 147-81, 147-82, 147-83 and 147-84, and may make such contracts with said depositories for the payment of interest on average daily or monthly balances as may appear advantageous to the State in the opinion of such Treasurer and the Governor. (1925, c. 128, s. 4.)

### **§ 147-82. Accounts of funds kept separate.**

In order to preserve and keep them separate, all funds that are now required by law to be kept separate or to be separately administered, both by State departments, institutions, commissions, and other agencies or divisions of the State which collect or receive funds belonging to the State, or funds handled or maintained as trust funds in any form by such department, division or institution shall be evidenced in daily reports by distribution sheets, which shall reflect and show an exact copy of the accounts, showing the distribution of said money kept by such collecting departments, institutions and agencies, and the same shall be entered in the records of the office of the State Treasurer, so as to keep and maintain in the office where the same is first collected or received the same account thereof, and of the distribution thereof, the same records and accounts as are kept in the office of the State Treasurer relating thereto. (1925, c. 128, s. 5.)

### **§ 147-83. Receipts from federal government and gifts not affected.**

General Statutes 147-77, 147-78, 147-80, 147-81, 147-82, 147-83 and 147-84 shall not be held or construed to affect or interfere with the receipts and disbursements of any funds received by any institution or department of this State from the federal government or any gift or donation to any institution or department of the State or commission or agency thereof when either in the act of Congress, relating to such funds received from the federal government, or in the instrument evidencing the said private donation or gift, a contrary disposition or handling is prescribed or required, and the said sections shall not apply to any moneys paid to any department, institution or agency, or

undertaking of the State of North Carolina, as a part of any legislative appropriation, or allotment from any contingent fund, as provided by law, after the same has been paid out of the State treasury. (1925, c. 128, s. 6.)

#### OPINIONS OF ATTORNEY GENERAL

**When Federally Confiscated Drug Related Property Is Returned to Local Authorities.** — If federal authorities confiscate drug related property and thereafter return a part of it to local authorities for law enforcement purposes, the N.C. Constitution and laws do not require these funds to go to the local school board as forfeited property and they may be used by local law enforcement. See opinion of the Attorney General to Mr. Aubrey S. Tomlinson, Jr., Attorney for Franklin County, 58 N.C.A.G. 51 (1988).

**Funds donated to Lenox Baker Children's Hospital** are required to be deposited with the State Treasurer unless the conditions

or terms of the gift provide to the contrary, or unless otherwise provided by law. See opinion of Attorney General to Mr. Richard J. Vinegar, Chairman Board of Directors of Lenox Baker Children's Hospital, 56 N.C.A.G. 31 (1986).

**Any gift in trust where the terms contraindicate investment or deposit** with the State Treasurer (for example where the terms of the gift provide for a private trustee) would be exempt from the operation of the cash management policy. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 56 N.C.A.G. 10 (1986).

### § 147-84. Refund of excess payments.

Whenever taxes or other receipts of any kind are or have been by clerical error, misinterpretation of the law, or otherwise, collected and paid into the State treasury in excess of the amount found legally due the State, said excess amount shall be refunded to the person entitled thereto. (1925, c. 128, s. 7; 1983, c. 913, s. 54.)

### § 147-85. Fiscal year.

The fiscal year of the State government shall annually close on the thirtieth day of June. (1868-9, c. 270, s. 77; 1883, c. 60; Code, s. 3360; 1885, c. 334; 1905, c. 430; Rev., s. 5378; C.S., s. 7692; 1921, c. 229; Ex. Sess. 1921, c. 7; 1925, c. 89, s. 21; 1983, c. 913, s. 55.)

#### CASE NOTES

**Applied** in *Martin v. Swain County*, 201 N.C. 68, 158 S.E. 843 (1931).

### § 147-86. Additional clerical assistance authorized; compensation and duties.

The State Treasurer, by and with the consent and advice of the Governor and Council of State, is authorized to employ an additional clerk in the Treasury Department, whose compensation and duties shall be fixed by the State Treasurer, by and with the consent and advice of the Governor and Council of State. The compensation of such additional clerk as may be employed pursuant to this section shall be paid as other officers and clerks are paid. (1923, c. 172; C.S., s. 7693 (a).)

### § 147-86.1. Pool account for local government unemployment compensation.

(a) The State Treasurer is authorized to establish a pool account, in

accordance with rules and regulations of the Employment Security Commission, in cooperation with any one or more units of local government, for the purpose of reimbursing the Employment Security Commission for unemployment benefits paid by the Commission and chargeable to each local unit of government participating in the pool account. In the pool account established pursuant to this section, the funds contributed by a unit of local government shall remain the funds of the particular unit, and interest or other investment income earned by the pool account shall be prorated and credited to the various contributing local units on the basis of the amounts thereof contributed, figured according to an average periodic balance or some other sound accounting principle.

(b) The State Treasurer shall pay to the Employment Security Commission, within 25 days from receipt of a list thereof, all unemployment benefits charged by the Commission to each unit of local government participating in the pool account from the funds in the pool account belonging to each such unit, to the extent that said funds are sufficient to do so.

(c) Notwithstanding the participation by a unit of local government in the pool account authorized by this section, such unit shall remain liable to the Employment Security Commission for any benefits duly charged by the Commission to the unit which are not paid by the State Treasurer from funds in the pool account belonging to the unit. Notwithstanding its participation in the pool account, each unit of local government shall continue to maintain an individual account with the Employment Security Commission.

(d) The Director of the Budget shall be authorized to transfer from the interest earned on the pool account, to the State Treasurer's departmental budget, such funds as may be necessary to defray the Treasurer's cost of administering the pool account. (1977, c. 1124; 1983, c. 717, s. 89.)

**§§ 147-86.2 through 147-86.9:** Reserved for future codification purposes.

## ARTICLE 6A.

### *Cash Management.*

#### **§ 147-86.10. Statement of policy.**

It is the policy of the State of North Carolina that all agencies, institutions, departments, bureaus, boards, commissions, and officers of the State, whether or not subject to the Executive Budget Act, Chapter 143, Article 1 of the General Statutes, shall devise techniques and procedures for the receipt, deposit, and disbursement of moneys coming into their control and custody which are designed to maximize interest-bearing investment of cash, and to minimize idle and nonproductive cash balances. This policy shall apply to the General Court of Justice as defined in Article IV of the North Carolina Constitution, the public school administrative units, and the community colleges with respect to the receipt, deposit, and disbursement of moneys required by law to be deposited with the State Treasurer and with respect to moneys made available to them for expenditure by warrants drawn on the State Treasurer. This policy shall include the acceptance of electronic payments in accordance with G.S. 147-86.22 to the maximum extent possible consistent with sound business practices. (1985, c. 709, s. 1; 1999-434, s. 2.)

**Editor's Note.** — Session Laws 1999-434, s. 1 shall implement policies and procedures to ensure "Best Value" Procurement, Solution-Based Procurement, and Procurement Reform. Session Laws 1999-434, s. 2 provides that the Secretary of Commerce shall ensure "Best Value" Procurement, Solution-Based Procurement, and Procurement Reform.

Procurement, and Government-Vendor Partnership.

Session Laws 1999-434, s. 20, requires the Secretary of Commerce to develop and implement policies, procedures, and/or programs to ensure that personnel receive high quality training in the principles of "Best Value" Procurement, Solution-Based Procurement, Government-Vendor Partnership, contract administration, and project management.

Session Laws 1999-434, s. 21, provides that the Secretary of Commerce shall report to the Joint Select Committee on Information Tech-

nology on the implementation of this act on or before April 1, 2000.

Session Laws 1999-434, s. 22, provides that the Joint Select Committee on Information Technology shall study the governance of State government-wide information technology management by the creation of a centralized agency responsible for all technology-related issues. An interim report may be made by the Committee to the 2000 Session of the General Assembly and a final report prior to the convening of the 2001 General Assembly.

## § 147-86.11. Cash management for the State.

(a) Uniform Plan. — The State Controller, with the advice and assistance of the State Treasurer, the State Budget Officer, and the State Auditor, shall develop, implement and amend as necessary a uniform statewide plan to carry out the cash management policy for all State agencies. The State Auditor shall report annually to the Advisory Budget Commission and the General Assembly on the implementation of the plan as shown in the audits completed during the prior fiscal year. The State Treasurer shall recommend periodically to the General Assembly any implementing legislation necessary or desirable in the furtherance of the State policy. When used in this section, "State agency" means any agency, institution, bureau, board, commission or officer of the State; however, except as provided in G.S. 147-86.12, 147-86.13, 147-86.14, and 147-86.22, this Article does not apply to the agencies, institutions, bureaus, boards, commissions and officers of the General Court of Justice as defined in Article IV of the North Carolina Constitution or to the local school administrative units and community colleges and their officers and employees.

(b) Duties of Auditor. — The State Auditor pursuant to authority under G.S. 147-64.6 shall monitor agency compliance with this Article, and make any comments, suggestions, and recommendations the Auditor deems advisable to the agencies.

(c) Treasurer's Report. — The State Treasurer shall publish a quarterly report on all funds in the control or custody of the State Treasurer showing cash balances on hand, investments of cash balances and a comparative analysis of earnings and investment performances.

(d) Earnings on Trust Funds. — The statewide cash management plan shall provide that any net earnings on invested funds, whose beneficial owner is not the State or a local governmental unit, shall be paid to the beneficial owners of the funds. "Net earnings" are the amounts remaining after allowance for the cost of administration, management, and operation of the invested funds.

(e) Elements of Plan. — For moneys received or to be received, the statewide cash management plan shall provide at a minimum that:

- (1) Except as otherwise provided by law, moneys received by employees of State agencies in the normal course of their employment shall be deposited as follows:
  - a. Moneys received in trust for specific beneficiaries for which the employee-custodian has a duty to invest shall be deposited with the State Treasurer under the provisions of G.S. 147-69.3.
  - b. All other moneys received shall be deposited with the State Treasurer pursuant to G.S. 147-77 and G.S. 147-69.1.
- (2) Moneys received shall be deposited daily in the form and amounts received, except as otherwise provided by statute.
- (3) Moneys due to a State agency by another governmental agency or by private persons shall be promptly billed, collected and deposited.

- (4) Unpaid billings due to a State agency shall be turned over to the Attorney General for collection no more than 90 days after the due date of the billing, except that a State agency need not turn over to the Attorney General unpaid billings of less than five hundred dollars (\$500.00), or (for institutions where applicable) amounts owed by all patients which are less than the federally established deductible applicable to Part A of the Medicare program, and instead may handle these unpaid bills pursuant to agency debt collection procedures.
  - (5) Moneys received in the form of warrants drawn on the State Treasurer shall be deposited by the State agency directly with the State Treasurer and not through the banking system, unless otherwise approved by the State Treasurer.
  - (6) State agencies shall accept payment by electronic payment in accordance with G.S. 147-86.22 to the maximum extent possible consistent with sound business practices.
- (f) Disbursement Requirements. — For the disbursement of money, the statewide cash management plan shall provide at a minimum that:
- (1) Moneys deposited with the State Treasurer remain on deposit with the State Treasurer until final disbursement to the ultimate payee.
  - (2) The order in which appropriations and other available resources are expended shall be subject to the provisions of G.S. 143-27 regardless of whether the State agency disbursing or expending the moneys is subject to the Executive Budget Act.
  - (3) Federal and other reimbursements of expenditures paid from State funds shall be paid immediately to the source of the State funds.
  - (4) Billings to the State for goods received or services rendered shall be paid neither early nor late but on the discount date or the due date to the extent practicable.
  - (5) Disbursement cycles for each agency shall be established to the extent practicable so that the overall efficiency of the warrant disbursement system is maximized while maintaining prompt payment of bills due.
- (g) Interest Maximized. — The interest earnings of the General Fund and Highway Fund shall be maximized to the extent practicable. To this end:
- (1) Interest earnings shall not be allocated to an account by the State Treasurer unless all of the moneys in the account are expressly eligible by law for receiving interest allocations.
  - (2) State officers and employees who received moneys in trust or for investment shall be solely responsible for properly segregating such funds for investment in the manner prescribed by law. The officer or employee charged with the responsibility for these moneys shall be under a duty to segregate the funds in a timely manner. No investment income shall be allocated by the State Treasurer to trust or other investment accounts until properly segregated into investment accounts as provided by law and the rules of the State Treasurer.
- (h) New Technologies. — The statewide cash management plan shall consider new technologies and procedures whenever the technologies and procedures are economically beneficial to the State as a whole. Where the new technologies and procedures may be implemented without additional legislation, the technologies and procedures shall be implemented in the plan.
- (i) Penalty. — A willful or continued failure of an employee paid from State funds or employed by a State agency to follow the statewide cash management plan is sufficient cause for immediate dismissal of the employee. (1985, c. 709, s. 1; 1985 (Reg. Sess., 1986), c. 1024, s. 26; 1987, c. 564, s. 32; c. 738, s. 59(a)(1); 1991, c. 95, s. 1; c. 542, s. 15; 1999-434, s. 4.)

**Editor's Note.** — Session Laws 1999-434, s. 19, provides that the Secretary of Commerce shall implement policies and procedures to ensure “Best Value” Procurement, Solution-Based Procurement, and Government-Vendor Partnership.

Session Laws 1999-434, s. 20, requires the Secretary of Commerce to develop and implement policies, procedures, and/or programs to ensure that personnel receive high quality training in the principles of “Best Value” Procurement, Solution-Based Procurement, Government-Vendor Partnership, contract administration, and project management.

Session Laws 1999-434, s. 21, provides that

the Secretary of Commerce shall report to the Joint Select Committee on Information Technology on the implementation of this act on or before April 1, 2000.

Session Laws 1999-434, s. 22, provides that the Joint Select Committee on Information Technology shall study the governance of State government-wide information technology management by the creation of a centralized agency responsible for all technology-related issues. An interim report may be made by the Committee to the 2000 Session of the General Assembly and a final report prior to the convening of the 2001 General Assembly.

#### OPINIONS OF ATTORNEY GENERAL

“**Enterprise funds**” maintained by the Division of Vocational Rehabilitation Services and “student activity funds” maintained by the Schools for the Deaf are required to be deposited with the State Treasurer pursuant to § 147-77. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 56 N.C.A.G. 10 (1986).

**Individual patient funds which are held in trust** by a state institution operated under the Division of Mental Health are not required to be deposited with the State Treasurer. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 56 N.C.A.G. 10 (1986).

Any gift in trust where the terms contraindicate investment or deposit with the State Treasurer (for example where the terms of the gift provide for a private trustee) would be exempt from the operation of the cash management policy. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 56 N.C.A.G. 10 (1986).

Individual patient funds held in trust by a state institution may not be invested with the State Treasurer without consent; however, such funds may be placed in an insured interest-bearing savings account without the consent of the patient, grantor of the trust, or legally

responsible person. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 56 N.C.A.G. 10 (1986).

In the case of individual patient funds held in trust by a state custodian, the patient who is the beneficial owner of the funds is entitled to any interest or income generated by deposit in an interest-bearing savings account. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 56 N.C.A.G. 10 (1986).

In the case of individual patient funds deposited in a common interest-bearing savings account, the state cannot charge an administrative handling fee to cover the costs of computing interest which has accrued on individual funds deposited in the common account. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 56 N.C.A.G. 10 (1986).

**Funds donated to Lenox Baker Children's Hospital** are required to be deposited with the State Treasurer unless the conditions or terms of the gift provide to the contrary, or unless otherwise provided by law. See opinion of Attorney General to Mr. Richard J. Vinegar, Chairman Board of Directors of Lenox Baker Children's Hospital, 56 N.C.A.G. 31 (1986).

#### § 147-86.12. Cash management for school administration units.

All school administrative units and their officers and employees are subject to the provision of G.S. 147-86.11 with respect to moneys required by law to be deposited with the State Treasurer and with respect to moneys made available to the school administrative unit for expenditure by warrants drawn on the State Treasurer. (1985, c. 709, s. 1.)

#### § 147-86.13. Cash management for community colleges.

All community colleges and their officers and employees are subject to the

provisions of G.S. 147-86.11 with respect to moneys required by law to be deposited with the State Treasurer and with respect to moneys made available to them for expenditure by warrants drawn on the State Treasurer. (1985, c. 709, s. 1; 1987, c. 564, s. 9.)

### § 147-86.14. Cash management for the General Court of Justice.

All agencies, institutions, bureaus, boards, commissions, and officers of the General Court of Justice as defined in Article IV of the Constitution are subject to the provisions of G.S. 147-86.11 with respect to moneys required by law to be deposited with the State Treasurer and with respect to moneys made available to them for expenditure by warrants drawn on the State Treasurer; provided, that the provisions of G.S. 147-86.11 shall not apply to any funds deposited with a clerk of superior court unless the beneficial owner of the funds is either the State or a local governmental unit of the State. (1985, c. 709, s. 1.)

### § 147-86.15. Cash management of the Highway Fund and the Highway Trust Fund.

The State Treasurer may combine the balances of the Highway Fund and the Highway Trust Fund for cash management purposes. The State Treasurer may make short-term loans between the Funds to accomplish the purposes of this section. (2001-424, s. 27.23(b).)

**Editor's Note.** — Session Laws 2001-424, s. 36.6, made this section effective July 1, 2001.

Session Laws 2001-424, s. 27.23(a), provides: "The Department of Transportation is directed to reorganize its cash management procedures consistent with the March 2001 Joint Legislative Transportation Oversight Committee Cash Management Study final report.

"The Department is directed to:

"(1) Utilize cash flow financing to the maximum extent possible to fund highway construction projects with the goal of reducing the combined average daily cash balance of the Highway Trust Fund and the Highway Fund to an amount equal to twelve percent (12%) of combined estimate of the yearly receipts of the Funds, exclusive of municipal aid funds.

"(2) Establish necessary management controls to facilitate use of cash flow financing, such as establishment of a financial planning committee, development of a monthly financial report, establishment of appropriate fund cash level targets, review of revenue forecasting procedures, and reduction of accrued unbilled costs.

"(3) Strengthen the project delivery process by reorganization of preconstruction functions in order to expedite project delivery and maximize use of cash flow financing of projects. The Department shall designate one person responsible for project delivery, developing project delivery reports, and continually assessing which projects can be accelerated using cash flow financing.

"(4) Report quarterly for a period of two years, beginning in September 2001, to the Joint Legislative Transportation Oversight Committee on its efforts to reorganize the cash management and project delivery process and the results of those efforts."

Session Laws 2001-424, s. 27.23(c), provides: "The Department of Transportation and the State Treasurer are directed to jointly:

"(1) Evaluate the recommendations of the March 2001 Joint Legislative Transportation Oversight Committee Cash Management Study final report concerning authorization for the State Treasurer to borrow funds on a short-term basis in order to allow the Department of Transportation to maintain lower target cash balances and expedite highway construction projects;

"(2) Develop recommendations concerning short-term borrowing for cash management purposes, including any needed legislation; and

"(3) Submit findings and recommendations to the Joint Legislative Transportation Oversight Committee by February 1, 2002."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium,

the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium.”

**§§ 147-86.16 through 147-86.19:** Reserved for future codification purposes.

## ARTICLE 6B.

### *Statewide Accounts Receivable Program.*

#### **§ 147-86.20. Definitions.**

The following definitions apply in this Article:

- (1) Account Receivable. — An asset of the State reflecting a debt that is owed to the State and has not been received by the State agency servicing the debt. The term includes claims, damages, fees, fines, forfeitures, loans, overpayments, and tuition as well as penalties, interest, and other costs authorized by law. The term does not include court costs or fees assessed in actions before the General Court of Justice or counsel fees and other expenses of representing indigents under Article 36 of Chapter 7A of the General Statutes.
- (2) Debtor. — A person who owes an account receivable.
- (2a) Electronic payment. — Payment by charge card, credit card, debit card, or by electronic funds transfer as defined in this subsection.
- (3) Past Due. — An account receivable is past due if the State has not received payment of it by the payment due date.
- (4) Person. — An individual, a fiduciary, a firm, a partnership, an association, a corporation, a unit of government, or another group acting as a unit.
- (5) State Agency. — Defined in G.S. 147-64.4(4). The term does not include, however, a community college, a local school administrative unit, an area mental health, developmental disabilities, and substance abuse authority, or the General Court of Justice.
- (6) Write-off. — To remove an account receivable from a State agency's accounts receivable records. (1993, c. 512, s. 1; 1999-434, s. 1.)

**Editor's Note.** — Article 36 of Chapter 7A, referred to in this section, is codified as § 7A-450 et seq.

Session Laws 1999-434, s. 19, provides that the Secretary of Commerce shall implement policies and procedures to ensure “Best Value” Procurement, Solution-Based Procurement, and Government-Vendor Partnership.

Session Laws 1999-434, s. 20, requires the Secretary of Commerce to develop and implement policies, procedures, and/or programs to ensure that personnel receive high quality training in the principles of “Best Value” Procurement, Solution-Based Procurement, Government-Vendor Partnership, contract administration, and project management.

Session Laws 1999-434, s. 21, provides that the Secretary of Commerce shall report to the Joint Select Committee on Information Technology on the implementation of this act on or before April 1, 2000.

Session Laws 1999-434, s. 22, provides that the Joint Select Committee on Information Technology shall study the governance of State government-wide information technology management by the creation of a centralized agency responsible for all technology-related issues. An interim report may be made by the Committee to the 2000 Session of the General Assembly and a final report prior to the convening of the 2001 General Assembly.

Session Laws 2000-67, s. 22.1(a)-(d), establishes a one-year Bad Debt Collection Clearinghouse Pilot, extending the limited 90-day Bad Debt Clearinghouse Proof of Concept Prototype for collection of previously determined “uncollectible” accounts, to determine the feasibility of implementing a centralized Bad Debt Collection Clearinghouse Program. The Office of State Controller is to establish a procedure by which State agencies and institutions with a material amount of accounts receivable is to

report on collection of bad debts. The Pilot is to address the use of one or more private collection agencies and make provision to allow local government units to participate. The Office is to report the result of the Pilot to the General Assembly no later than May 15, 2001, along with recommendations on changes in law or procedure to better collect bad debts.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

### **§ 147-86.21. State agencies to collect accounts receivable in accordance with statewide policies.**

A State agency to which an account receivable is owed is responsible for collecting the account receivable. In fulfilling this responsibility, a State agency shall establish internal policies and procedures for the management and collection of accounts receivable and shall submit its internal policies and procedures to the State Controller for review.

The State Controller shall examine the policies and procedures submitted by a State agency to determine whether they are consistent with statewide policies and procedures adopted by the State Controller. The statewide policies and procedures shall ensure that a State agency takes all cost-effective and appropriate actions to collect accounts receivable owed to it. If the State Controller determines that a State agency's policies and procedures are not consistent with the statewide policies and procedures, the State Controller shall discuss the inconsistencies with the State agency to determine whether special circumstances, such as a requirement of federal law, justify the inconsistencies. If the State Controller, after consulting with the Office of the Attorney General, finds that no special circumstances justify the inconsistencies, the State Controller shall notify the State agency and the State agency shall conform its policies and procedures to the statewide policies and procedures. If the State Controller finds that special circumstances justify the inconsistencies, the State agency's internal policies and procedures shall reflect the special circumstances. (1993, c. 512, s. 1.)

### **§ 147-86.22. Statewide accounts receivable program.**

(a) Program. — The State Controller shall implement a statewide accounts receivable program. As part of this program, the State Controller shall do all of the following:

- (1) Monitor the State's accounts receivable collection efforts.
- (2) Coordinate information, systems, and procedures between State agencies to maximize the collection of past-due accounts receivable.
- (3) Adopt policies and procedures for the management and collection of accounts receivable by State agencies.
- (4) Establish procedures for writing off accounts receivable and for determining when to end efforts to collect accounts receivable after they have been written off.

(b) Electronic Payment. — Notwithstanding the provisions of G.S. 147-86.20 and G.S. 147-86.21, this subsection applies to debts owed a community college, a local school administrative unit, an area mental health, developmental disabilities, and substance abuse authority, and the Administrative Office of the Courts, and to debts payable to or through the office of a clerk of superior court or a magistrate, as well as to debts owed to other State agencies as defined in G.S. 147-86.20.

The State Controller shall establish policies that allow accounts receivable to be payable under certain conditions by electronic payment. These policies shall be established with the concurrence of the State Treasurer. In addition, any policies that apply to debts payable to or through the office of a clerk of superior court or a magistrate shall be established with the concurrence of the Administrative Officer of the Courts. The Administrative Officer of the Courts may also establish policies otherwise authorized by law that apply to these debts as long as those policies are not inconsistent with the Controller's policies.

A condition of payment by electronic payment is receipt by the appropriate State agency of the full amount of the account receivable owed to the State agency. A debtor who pays by electronic payment may be required to pay any fee or charge associated with the use of electronic payment. Fees associated with processing electronic payments may be paid out of the General Fund and Highway Fund if the payment of the fee by the State is economically beneficial to the State and the payment of the fee by the State has been approved by the State Controller and State Treasurer.

The State Controller and State Treasurer shall consult with the Joint Legislative Commission on Governmental Operations before establishing policies that allow accounts receivable to be payable by electronic payment and before authorizing fees associated with electronic payment to be paid out of the General Fund and Highway Fund. A State agency must also consult with the Joint Legislative Commission on Governmental Operations before implementing any program to accept payment under the policies established pursuant to this subsection.

A payment of an account receivable that is made by electronic payment and is not honored by the issuer of the card or the financial institution offering electronic funds transfer does not relieve the debtor of the obligation to pay the account receivable.

(c) Collection Techniques. — The State Controller, in conjunction with the Office of the Attorney General, shall establish policies and procedures to govern techniques for collection of accounts receivable. These techniques may include use of credit reporting bureaus, judicial remedies authorized by law, and administrative setoff by a reduction of an individual's tax refund pursuant to the Setoff Debt Collection Act, Chapter 105A of the General Statutes, or a reduction of another payment, other than payroll, due from the State to a person to reduce or eliminate an account receivable that the person owes the State.

No later than January 1, 1999, the State Controller shall negotiate a contract with a third party to perform an audit and collection process of inadvertent overpayments by State agencies to vendors as a result of pricing errors, neglected rebates and discounts, miscalculated freight charges, unclaimed refunds, erroneously paid excise taxes, and related errors. The third party shall be compensated only from funds recovered as a result of the audit. Savings realized in excess of costs shall be transferred from the agency to the Office of State Budget and Management and placed in a special reserve account for future direction by the General Assembly. Any disputed savings shall be settled by the State Controller. This paragraph does not apply to the purchase of medical services by State agencies or payments used to reimburse or otherwise pay for health care services. (1993, c. 512, s. 1; 1998-212, s. 26.1; 1999-434, s. 3; 2000-140, s. 93.1(a); 2001-424, s. 12.2(b).)

**Editor's Note.** — Session Laws 1999-434, s. 19, provides that the Secretary of Commerce shall implement policies and procedures to ensure "Best Value" Procurement, Solution-Based

Procurement, and Government-Vendor Partnership.

Session Laws 1999-434, s. 20, requires the Secretary of Commerce to develop and imple-

ment policies, procedures, and/or programs to ensure that personnel receive high quality training in the principles of “Best Value” Procurement, Solution-Based Procurement, Government-Vendor Partnership, contract administration, and project management.

Session Laws 1999-434, s. 21, provides that the Secretary of Commerce shall report to the Joint Select Committee on Information Technology on the implementation of this act on or before April 1, 2000.

Session Laws 1999-434, s. 22, provides that the Joint Select Committee on Information Technology shall study the governance of State government-wide information technology management by the creation of a centralized agency responsible for all technology-related issues. An interim report may be made by the Committee to the 2000 Session of the General Assembly and a final report prior to the convening of the 2001 General Assembly.

Session Laws 2000-67, s. 22(a)-(e), directs that during the 2000-2001 fiscal year, receipts generated by the collection of inadvertent overpayments by State agencies to vendors as a result of pricing errors, neglected rebates and discounts, miscalculated freight charges, unclaimed refunds, erroneously paid excise taxes, and related errors, as required by G.S. 147-86.22(c), are to be deposited in the Special Reserve Account 24172. For the 2000-2001 fiscal year, \$550,000 of the funds transferred from the Account are to be used by the Office of the State Controller for data processing, debt collection, or e-commerce costs, and any unobligated funds realized above this allowance are subject to appropriation by the Gen-

eral Assembly in the 2001 Session. All funds available in the Account on July 1, 2000, are transferred to the General Fund. The State Controller is to report monthly to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division on the revenue deposited into the Special Reserve Account and the disbursement of that revenue.

Session Laws 2000-67, s. 1.1, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2000’.”

Session Laws 2000-67, s. 28.2, provides: “Except for statutory changes, or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year.”

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2001-424, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2001’.”

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-140, s. 93.1(a), effective July 21, 2000, substituted “Office of State Budget, Planning, and Management” for “Office of State Budget and Management” in subsection (c).

Session Laws 2001-424, s. 12.2(b), effective July 1, 2001, substituted “Office of State Budget and Management” for “Office of State Budget, Planning, and Management” in the last paragraph in subsection (c).

## § 147-86.23. Interest and penalties.

A State agency shall charge interest at the rate established pursuant to G.S. 105-241.1(i) on a past-due account receivable from the date the account receivable was due until it is paid. A State agency shall add to a past-due account receivable a late payment penalty of no more than ten percent (10%) of the account receivable. A State agency may waive a late-payment penalty for good cause shown. If another statute requires the payment of interest or a penalty on a past-due account receivable, this section does not apply to that past-due account receivable. (1993, c. 512, s. 1.)

## § 147-86.24. Debtor information and skip tracing.

A State agency shall collect from clients and debtors minimum identifying information as prescribed by the State Controller. A State agency shall use all available debtor information to skip trace debtors as prescribed by the State Controller.

The State Controller shall establish procedures to give the State Controller access to information that is in the custody of a State agency and could assist another State agency in the collection of accounts receivable owed to that State agency. A State agency that has this information shall cooperate with the State Controller in giving the State Controller access to the information. If the

information is contained in an electronic database, the State agency shall provide the State Controller on-line electronic access upon request. A State agency is not required to give the State Controller access to information when a State or federal law prohibits the disclosure of the information. (1993, c. 512, s. 1.)

### **§ 147-86.25. Setoff debt collection.**

The State Controller shall implement a statewide setoff debt collection program to provide for collection of accounts receivable that have been written off. The statewide program shall supplement the Setoff Debt Collection Act, Chapter 105A of the General Statutes, and shall provide for written-off accounts receivable to be set off against payments the State owes to debtors, other than payments of individual income tax refunds and payroll.

A program shall provide that, before final setoff can occur, the State agency servicing the debt must notify the debtor of the proposed setoff and of the debtor's right to contest the setoff through an administrative hearing and judicial review. A proposed setoff by a State agency that is a "claimant agency" under Chapter 105A of the General Statutes shall be conducted in accordance with the procedures the State agency must follow under that Chapter. A proposed setoff by a State agency that is not a "claimant agency" under Chapter 105A of the General Statutes shall be conducted under Articles 3 and 4 of Chapter 150B of the General Statutes. (1993, c. 512, s. 1.)

### **§ 147-86.26. Reporting requirements.**

A State agency shall provide the State Controller a complete report of the agency's accounts receivable at least quarterly or more frequently as required by the State Controller. The State Controller shall use the information provided by a State agency and any additional information available to compile a summary report of the agency. The State Controller shall provide copies of these summary reports annually to the Governor, the Joint Legislative Commission on Governmental Operations, and each State agency. Each summary report shall include the following:

- (1) The type of accounts receivable owed to the State agency.
  - (2) An aging of the accounts receivable.
  - (3) Any attempted collection activity and any costs incurred in the collection process.
  - (4) Any accounts receivable that have been written off.
  - (5) Information required by subdivisions (1) through (4) for the previous three years.
  - (6) Identification of a State agency that is not complying with this Article or Chapter 105A of the General Statutes.
  - (7) Any additional information the State Controller considers useful.
- (1993, c. 512, s. 1.)

### **§ 147-86.27. Rules.**

A State agency may adopt rules to implement this Article. (1993, c. 512, s. 1.)

**§§ 147-86.28, 147-86.29:** Reserved for future codification purposes.

## ARTICLE 6C.

*Health and Wellness Trust Fund.***§ 147-86.30. Health and Wellness Trust Fund established.**

(a) Fund Established. — There is established the Health and Wellness Trust Fund in the Office of the State Treasurer that shall be used to develop a comprehensive plan to finance programs and initiatives to improve the health and wellness of the people of North Carolina. As used in this Article, the term “Fund” means the Health and Wellness Trust Fund. It is the intent of the General Assembly that the funds provided pursuant to this Article to address the health needs of North Carolinians be used to supplement, not supplant, existing funding of health and wellness programs.

(b) Fund Earnings, Assets, and Balances. — The State Treasurer shall hold the Fund separate and apart from all other moneys, funds, and accounts. The State Treasurer shall be the custodian of the Fund and shall invest its assets in accordance with G.S. 147-69.2 and G.S. 147-69.3. Investment earnings credited to the assets of the Fund shall become part of the Fund. Any balance remaining in the Fund at the end of any fiscal year shall be carried forward in the Fund for the next succeeding fiscal year. Payments from the Fund shall be made on the warrant of the chair of the Commission, pursuant to directives of the Commission. The Commission may expend moneys in the Fund only as provided in subsections (c) and (d) of this section.

(c) Creation of Fund Reserve. — The Commission shall reserve, and shall not expend, fifty percent (50%) of each annual payment allocated to the Health and Wellness Trust Fund pursuant to G.S. 143-16.4 during years 2001 through 2025 to create and build the Fund Reserve. During years 2001 through 2025, the Commission may expend any investment earnings on the reserved funds. Beginning in year 2026, and thereafter, the Commission shall not expend the reserved funds but may continue to expend any investment earnings on the reserved funds.

(d) Use of Nonreserved Funds. — The Commission may expend all of the annual payments for years 1998, 1999, and 2000 and may expend the remaining fifty percent (50%) portion of each annual payment thereafter through the year 2025 that is not reserved pursuant to subsection (c) of this section. Any unexpended or unencumbered portion of the nonreserved portion of each annual payment for years 2001 through 2025 that has not been expended or encumbered by the third June 30th following the date of the receipt of the payment shall be reserved pursuant to subsection (c) of this section. The Commission may expend any investment earnings on the nonreserved funds in the year in which the investment earnings are received by the Fund.

(e) Fund Purposes. — Moneys from the Fund may be used for any of the following purposes:

- (1) To address the health needs of vulnerable and underserved populations in North Carolina.
- (2) To fund programs and initiatives that include research, education, prevention, and treatment of health problems in North Carolina and to increase the capacity of communities to respond to the public's health needs.
- (3) To develop a comprehensive, community-based plan with goals and objectives to improve the health and wellness of the people of North

Carolina with a priority on preventing, reducing, and remedying the health effects of tobacco use and with an emphasis on reducing youth tobacco use. The plan shall include measurable health and wellness objectives and a proposed timetable for achieving these objectives. In developing the plan, the Commission shall consider all facets of health, including prevention, education, treatment, research, and related areas.

(f) **Limit on Operating and Administrative Expenses.** — No more than two and one-half percent (2 1/2%) of the annual receipts of the Fund for the fiscal year beginning July 1 or a total sum of one million dollars (\$1,000,000), whichever is less, may be used each fiscal year for administrative and operating expenses of the Commission and its staff. All administrative expenses of the Commission shall be paid from the Fund. (2000-147, s. 2.)

**Cross References.** — As to the Tobacco Trust Fund, see § 143-715 et seq.

**Editor's Note.** — Session Laws 2000-147, s. 9, made this Article effective August 2, 2000.

Session Laws 2000-147, s. 8(a)-(c), provides:

“(a) Interpretation of Act. — The foregoing sections of this act provide an additional and alternative method for the doing of the things authorized by the act, are supplemental and additional to powers conferred by other laws, and do not derogate any powers now existing.

“(b) References in this act to specific sections or Chapters of the General Statutes are intended to be references to those sections or Chapters as amended and as they may be amended from time to time by the General Assembly.

“(c) This act, being necessary for the health and welfare of the people of the State, shall be liberally construed to effect its purposes.”

Session Laws 2000-147, s. 8(d), contains a severability clause.

Session Laws 2001-424, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2001.’”

Session Laws 2001-424, s. 21.100, provides: “The Health and Wellness Trust Fund Commission shall, as it develops criteria for awarding grants under Article 6C of Chapter 147 of the General Statutes, include criteria that will enable programs and initiatives addressing the need to expand access to prescription drugs to North Carolina senior and disabled citizens to receive grants from the Fund. In making the grants, the Commission shall consider, and coordinate with, the availability of any federal

funds allocated to North Carolina pursuant to any federal initiative to provide financial assistance to senior and disabled citizens for the cost of prescription drugs.

“In making its annual report to the Joint Legislative Commission on Governmental Operations and to the chairs of the Joint Legislative Health Care Oversight Committee regarding the implementation of that Article, the chair of the Health and Wellness Trust Fund Commission shall report on the programs and initiatives to expand access to prescription drugs to senior and disabled citizens that were funded by the Trust Fund. The report shall include the amount of funds disbursed for programs and initiatives to expand access to prescription drugs to senior and disabled citizens and the success of those programs and initiatives towards helping senior and disabled citizens obtain prescription drugs.”

Session Laws 2001-424, s. 36.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium.”

Session Laws 2001-424, s. 36.5 is a severability clause.

Session Laws 2001-487, s. 124, provides: “Notwithstanding G.S. 150B-21.1(a) (2), the Health and Wellness Trust Fund Commission and the Tobacco Trust Fund Commission shall have the authority to adopt temporary rules as a recent act of the General Assembly through June 30, 2002, in order to adopt rules as authorized in S.L. 2000-147.”

## § 147-86.31. Health and Wellness Trust Fund; eligibility for grants; annual reports from non-State agencies.

(a) **Eligible Grant Applicants.** — Any of the following are eligible to apply for a grant from the Fund:

(1) A State agency.

(2) A local government or other political subdivision of the State or a combination of such entities.

(3) A nonprofit corporation which has as a significant purpose promoting the public's health, limiting youth access to tobacco products, or reducing the health consequences of tobacco use.

(b) Annual Report From Non-State Agencies. — Grant or financial assistance recipients that are non-State agencies shall submit an annual report to the Commission. The report shall include information concerning how the funds are used, the intended goals and objectives of the recipient's grant proposal or program initiative, and the results of an evaluation of the extent to which the outcomes of the initiatives or proposal achieved those goals and objectives. (2000-147, s. 2.)

### **§ 147-86.32. Health and Wellness Trust Fund; Commission established; membership qualifications; vacancies.**

(a) Commission Established. — There is established the Health and Wellness Trust Fund Commission. As used in this Article, the term "Commission" means the Health and Wellness Trust Fund Commission. The Commission shall exercise its powers independently, but for administrative purposes, the Commission shall be located within the Office of the State Treasurer.

(b) Membership. — The Commission shall consist of 18 members. The members shall not be employed by or be agents of tobacco product manufacturing companies. The Commission shall be appointed as follows: six members by the Governor, six members by the President Pro Tempore of the Senate, and six members by the Speaker of the House of Representatives. These members shall be appointed as follows:

(1) The Governor shall make the following appointments:

a. A person involved in public health.

b. A person involved in the operation of health care delivery systems.

c. A health care practitioner.

d. An at-large appointee.

e. An at-large appointee.

f. An at-large appointee.

(2) The President Pro Tempore of the Senate shall make the following appointments:

a. A person involved in health research.

b. A person involved in tobacco-related health care issues.

c. A person involved in health promotion and disease prevention.

d. An at-large appointee.

e. An at-large appointee.

f. An at-large appointee.

(3) The Speaker of the House of Representatives shall make the following appointments:

a. A person involved in health policy trends.

b. A person involved with health care for underserved populations.

c. A person involved with child health care.

d. An at-large appointee.

e. An at-large appointee.

f. An at-large appointee.

It is the intent of the General Assembly that the appointing authorities, in appointing members, shall appoint members who represent the geographic, political, gender, and racial diversity of the State.

(c) Initial Appointments; Term Limits; Officers. — To provide for a staggered membership, the members initially appointed pursuant to sub-subdivisions

(b)(1)a., (1)b., (2)d., and (3)d. of this section shall serve one-year terms ending on June 30, 2001. The members initially appointed pursuant to sub-subdivisions (b)(2)c., (2)e., (3)a., and (3)e. shall serve two-year terms ending on June 30, 2002. The members initially appointed pursuant to sub-subdivisions (b)(1)c., (1)d., (1)e., (2)b., and (3)c. shall serve three-year terms ending June 30, 2003. The remaining members initially appointed pursuant to subsection (b) of this section shall serve four-year terms ending June 30, 2004.

Except as provided for the initial members under this subsection, members shall serve four-year terms beginning July 1. No member may serve more than two full consecutive terms. Members may continue to serve beyond their terms until their successors are duly appointed, but any holdover shall not affect the expiration date of the succeeding term. A member may be removed from the Commission for cause by the authority that appointed the member.

The Commission shall elect from its membership a chair, vice-chair, and other officers as necessary for two-year terms beginning July 1 at the first meeting of the Commission held on or after July 1 of every even-numbered year. The vice-chair may act for the chair in the absence of the chair as authorized by the Commission.

(d) Vacancies. — Vacancies shall be filled by the designated appointing authority for the remainder of the unexpired term.

(e) Frequency of Meetings. — The Commission shall meet at least twice each year and may hold special meetings at the call of the chair or a majority of the voting members. The Governor shall call the initial meeting of the Commission.

(f) Quorum; Majority. — Ten members shall constitute a quorum of the Commission. The Commission may act upon a majority vote of all the members of the Commission on matters involving the disbursement of funds and personnel matters properly before the Commission. On all other matters, the Commission may act by majority vote of the members of the Commission at a meeting at which a quorum is present.

(g) Meeting Facilities. — The Office of the State Treasurer shall provide meeting facilities for the Commission and its staff as requested by the chair of the Commission.

(h) Per Diem and Expenses. — The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5. Per diem, subsistence, and travel expenses of the members shall be paid from the Fund.

(i) Conflict of Interest. — The members of the Commission shall comply with the provisions of G.S. 14-234 prohibiting conflicts of interest. In addition to the restrictions imposed under G.S. 14-234, a member shall not vote on, participate in the deliberations of, or otherwise attempt through his or her official capacity to influence the vote on a grant or other financial assistance award by the Commission to a nonprofit entity of which the member is an officer, director, or employee or to a governmental entity of which the member is an employee or a member of the governing board. A violation of this subsection is a Class 1 misdemeanor. (2000-147, s. 2.)

### **§ 147-86.33. Health and Wellness Trust Fund; powers and duties.**

(a) The Commission shall do the following:

- (1) Allocate moneys from the Fund as grants. A grant may be awarded only for a program or initiative that satisfies the criteria and furthers the purposes of this Article, but the provisions of this Article shall be liberally construed. The Commission shall strive to avoid imposing any unnecessary barriers in the grant application process.

- (2) Develop criteria for awarding grants under this Article. The criteria shall include types of programs and initiatives to be funded, including programs which address the short-and long-term health and wellness of the citizens of North Carolina.
- (3) Develop criteria by which to measure the outcomes of funded programs to evaluate the extent to which those programs achieved the goals for which funds were awarded.
- (4) Develop a mechanism with which to evaluate individual applications.
- (5) Ensure that good faith efforts are made to achieve federal mandates targeting the reduction of youth access to tobacco products.
- (6) Administer the provisions of this Article.
- (7) Adopt rules to implement this Article.

(b) The Commission is authorized to hire staff or contract for other expertise for the administration of the Fund.

(c) Gifts and Grants. — The Commission is authorized to accept gifts or grants from other sources. (2000-147, s. 2.)

### **§ 147-86.34. Advisory Council.**

The Commission shall create an Advisory Council to advise it with regard to issues as requested by the Commission. The Advisory Council shall include the Secretary of the Department of Health and Human Services, the State Health Director, the Dean of the School of Public Health of the University of North Carolina, and others the Commission considers necessary. (2000-147, s. 2.)

### **§ 147-86.35. Health and Wellness Trust Fund; reporting requirements.**

(a) The chair of the Commission shall report each year by November 1 to the Joint Legislative Commission on Governmental Operations and to the chairs of the Joint Legislative Health Care Oversight Committee regarding implementation of this Article, including a report on funds disbursed during the fiscal year by amount, purpose, and category of recipient, and other information as requested by the Joint Legislative Commission on Governmental Operations. The annual report shall also include a summary of each recipient's annual report submitted to the Health and Wellness Trust Fund Commission pursuant to G.S. 147-86.31(b) and an analysis of progress toward the goals and objectives of any comprehensive, community-based plan established pursuant to G.S. 147-86.30(e)(3). A written copy of the annual report shall also be sent to the Legislative Library by November 1 each year. Written reports shall also be sent on a quarterly basis to the Joint Legislative Commission on Governmental Operations.

(b) Any non-State corporation, organization, or institution that receives, uses, or expends any funds from the Commission is subject to the applicable reporting requirements of G.S. 143-6.1. (2000-147, s. 2.)

### **§ 147-86.36. Health and Wellness Trust Fund; open meeting and public records requirements.**

The Open Meetings Law (Article 33 of Chapter 143 of the General Statutes) and the Public Records Act (Chapter 132 of the General Statutes) shall apply to the Fund and the Commission, and the Fund and the Commission shall be subject to audit by the State Auditor as provided by law. The Commission shall reimburse the State Auditor for the actual cost of the audit. (2000-147, s. 2.)

## ARTICLE 7.

*Secretary of Revenue.***§ 147-87. Secretary of Revenue; appointment; salary.**

A Secretary of Revenue shall be appointed by the Governor on January 1, 1933, and quadrennially thereafter. The term of office of the Secretary shall be four years and until his successor is appointed and qualified. His salary shall be fixed by the General Assembly in the Current Operations Appropriations Act. (1921, c. 40, ss. 2, 6; 1929, c. 232; 1973, c. 476, s. 193; 1983, c. 717, s. 90; 1983 (Reg. Sess., 1984), c. 1034, s. 164.)

**Cross References.** — As to the Department of Revenue, see § 143B-217 et seq.

## CASE NOTES

**Cited** in *Boylan-Pearce, Inc. v. Johnson*, 257 N.C. 582, 126 S.E.2d 492 (1962).

**§ 147-88:** Repealed by Session Laws 1991, c. 10, s. 3.

**Cross References.** — As to preparation of reports concerning taxes by the Secretary of Revenue, see now § 105-256.

## ARTICLE 8.

*District Attorneys.***§ 147-89. To prosecute cases removed to federal courts.**

It shall be the duty of the district attorneys of this State, in whose jurisdiction the circuit and district courts of the United States are held, having first obtained the permission of the judges of said courts, to prosecute, or assist in the prosecution of, all criminal cases in said courts where the defendants are charged with violations of the laws of this State, and have moved their cases from the State to the federal courts under the provisions of the various acts of Congress on such subjects. (1874-5, c. 164, s. 1; Code, s. 1239; Rev., s. 5381; C.S., s. 7696; 1973, c. 47, s. 2.)

## CASE NOTES

**Public Nuisances.** — The State Constitution and §§ 7A-61, 147-89 and 19-2.1 do not prohibit a district attorney from employing private counsel to assist in public nuisance

actions. *Whitfield v. Gilchrist*, 126 N.C. App. 241, 485 S.E.2d 61 (1997), rev'd on other grounds, 348 N.C. 39, 497 S.E.2d 412 (1998).

# Chapter 148.

## State Prison System.

### Article 1.

#### Organization and Management.

- Sec.
- 148-1. [Repealed.]
  - 148-2. Prison moneys and earnings.
  - 148-3. Prison property.
  - 148-4. Control and custody of prisoners; authorizing prisoner to leave place of confinement.
    - 148-4.1. Release of inmates.
  - 148-5. Secretary to manage prison property.
    - 148-5.1. Confining inmates away from victims.
  - 148-6. Custody, employment and hiring out of convicts.
  - 148-7. [Repealed.]
  - 148-8, 148-8.1. [Transferred.]
  - 148-9. [Repealed.]
  - 148-10. Department of Environment and Natural Resources to supervise sanitary and health conditions of prisoners.
    - 148-10.1. Employment of clinical chaplains for inmates.
    - 148-10.2. Policy: Certain inmates not to contact family members of victims.

### Article 2.

#### Prison Regulations.

- 148-11. Authority to adopt rules; authority to designate uniforms.
- 148-12. Diagnostic and classification programs.
- 148-13. Regulations as to custody grades, privileges, gain time credit, etc.
- 148-14 through 148-17. [Repealed.]
- 148-18. Wages, allowances and loans.
  - 148-18.1. Confiscation of unauthorized articles.
- 148-19. Health services.
  - 148-19.1. Exemption from licensure and certificate of need.
- 148-20. Corporal punishment of prisoners prohibited.
- 148-21. [Repealed.]
- 148-22. Treatment programs.
  - 148-22.1. Educational facilities and programs for selected inmates.
  - 148-22.2. Procedure when surgical operations on inmates are necessary.
- 148-23. Prison employees not to use intoxicants, narcotic drugs or profanity.
- 148-24. Religious services.
- 148-25. Secretary to investigate death of convicts.

### Article 3.

#### Labor of Prisoners.

- Sec.
- 148-26. State policy on employment of prisoners.
    - 148-26.1. Definitions.
    - 148-26.2 through 148-26.4. [Repealed.]
    - 148-26.5. Pay and time allowances for work.
    - 148-27. Women prisoners; limitations on labor of prisoners.
    - 148-28. Sentencing prisoners to Central Prison; youthful offenders.
    - 148-29. Transportation of convicts to prison; reimbursement to counties; sheriff's expense affidavit.
    - 148-30. [Repealed.]
    - 148-31. Maintenance of Central Prison; warden; powers and duties.
    - 148-32. [Repealed.]
      - 148-32.1. Local confinement, costs, alternate facilities, parole, work release.
    - 148-33. Prison labor furnished other State agencies.
      - 148-33.1. Sentencing, quartering, and control of prisoners with work-release privileges.
      - 148-33.2. Restitution by prisoners with work-release privileges.
    - 148-34, 148-35. [Repealed.]
    - 148-36. Secretary of Correction to control classification and operation of prison facilities.
    - 148-37. Additional facilities authorized; contractual arrangements.
      - 148-37.1. Prohibition on private prisons housing out-of-state inmates.
      - 148-37.2. Lease-purchase of three facilities.
    - 148-38, 148-39. [Repealed.]
    - 148-40. Recapture of escaped prisoners.
    - 148-41. Recapture of escaping prisoners; reward.
    - 148-42, 148-43. [Repealed.]
    - 148-44. Separation as to sex.
    - 148-45. Escaping or attempting escape from State prison system; failure of conditionally and temporarily released prisoners and certain youthful offenders to return to custody of Department of Correction.
    - 148-46. Degree of protection against violence allowed.
      - 148-46.1. Inflicting or assisting in infliction of self injury to prisoner resulting in incapacity to perform assigned duties.

## CH. 148. STATE PRISON SYSTEM

Sec.

148-46.2. Procedure when consent is refused by prisoner.

148-47. Disposition of child born of female prisoner.

148-48. Parole powers of Parole Commission unaffected.

148-49. Prison indebtedness not assumed by Board of Transportation.

### Article 3A.

#### Facilities and Programs for Youthful Offenders.

148-49.1 through 148-49.9. [Repealed.]

### Article 3B.

#### Facilities and Programs for Youthful Offenders.

148-49.10 through 148-49.16. [Repealed.]

### Article 4.

#### Paroles.

148-50 through 148-52. [Repealed.]

148-52.1. Prohibited political activities of member of Post-Release Supervision and Parole Commission.

148-53. Investigators and investigations of cases of prisoners.

148-54. Parole and post-release supervision supervisors provided for; duties.

148-54.1, 148-55. [Repealed.]

148-56. Assistance in supervision of parolees or post-release supervisees and preparation of case histories.

148-57. Rules and regulations for parole consideration.

148-57.1. Restitution as a condition of parole or post-release supervision.

148-58, 148-58.1. [Repealed.]

148-59. Duties of clerks of superior courts as to commitments; statements filed with Department of Correction.

148-60. [Repealed.]

148-60.1. Allowances for paroled prisoner and prisoner on post-release supervision.

148-60.2 through 148-62. [Repealed.]

148-62.1. Entitlement of indigent parolee and post-release supervisee to counsel, in discretion of Post-Release Supervision and Parole Commission.

148-63. Arrest powers of police officers.

148-64. Cooperation of prison and parole officials and employees.

148-65. [Repealed.]

### Article 4A.

#### Out-of-State Parolee Supervision.

148-65.1. Governor to execute compact; form of compact.

Sec.

148-65.1A. Interstate parole and probation hearing procedures.

148-65.2. Title of Article.

148-65.3. North Carolina sentence to be served in another jurisdiction.

### Article 5.

#### Farming Out Convicts.

148-66. Cities and towns and Department of Agriculture and Consumer Services may contract for prison labor.

148-67. Hiring to cities and towns and State Department of Agriculture and Consumer Services.

148-68. Payment of contract price; interest; enforcement of contracts.

148-69. Agents; levy of taxes; payment of costs and expenses.

148-70. Management and care of inmates; prison industries; disposition of products of inmate labor.

### Article 5A.

#### Prison Labor for Farm Work.

148-70.1 through 148-70.7. [Repealed.]

### Article 6.

#### Reformatory.

148-71 through 148-73. [Repealed.]

### Article 7.

#### Records, Statistics, Research and Planning.

148-74. Records Section.

148-75. [Repealed.]

148-76. Duties of Records Section.

148-77. Statistics, research, and planning.

148-78. Reports.

148-79. [Repealed.]

148-80. Seal of Records Section; certification of records.

148-81. [Repealed.]

### Article 8.

#### Compensation to Persons Erroneously Convicted of Felonies.

148-82. Provision for compensation.

148-83. Form, requisites and contents of petition; nature of hearing.

148-84. Evidence; action by Industrial Commission; payment and amount of compensation.

### Article 9.

#### Prison Advisory Council.

148-85 through 148-88. [Repealed.]

**Article 10.**

**Interstate Agreement on Detainers.**

Sec.

148-89 through 148-95. [Transferred.]  
 148-96 through 148-100. [Reserved.]

**Article 11.**

**Inmate Grievance Commission.**

148-101 through 148-118. [Repealed.]

**Article 11A.**

**Corrections Administrative Remedy Procedure.**

148-118.1. Authority.  
 148-118.2. Effect.  
 148-118.3. Publication of procedure.

Sec.

148-118.4. Definitions.  
 148-118.5. Records confidentiality.  
 148-118.6. Grievance Resolution Board.  
 148-118.7. Removal of members.  
 148-118.8. Appointment, salary, and authority of Executive Director and inmate grievance examiners.  
 148-118.9. Investigatory power of the Grievance Resolution Board.

**Article 12.**

**Interstate Corrections Compact.**

148-119. Short title.  
 148-120. Governor to execute; form of compact.  
 148-121. Proceedings to be open; all documents public records; exception.

**ARTICLE 1.**

*Organization and Management.*

**Editor's Note.** — For note regarding Session Laws 1989 (Reg. Sess., 1990), c. 933, also known as the Prison Facilities Legislative Bond

Act of 1990, see the Editor's note under § 148-4.1.

**§ 148-1:** Repealed by Session Laws 1973, c. 1262, s. 10.

**Cross References.** — For present provisions as to the Department of Correction, see § 143B-260 et seq.

**§ 148-2. Prison moneys and earnings.**

(a) Persons authorized to collect or receive the moneys and earnings of the State prison system shall enter into bonds payable to the State of North Carolina in penal sums and with security approved by the Department of Correction, conditioned upon the faithful performance by these persons of their duties in collecting, receiving, and paying over prison moneys and earnings to the State Treasurer. Only corporate security with sureties licensed to do business in North Carolina shall be accepted.

(b) All revenues from the sale of articles and commodities manufactured or produced by prison enterprises shall be deposited with the State Treasurer to be kept and maintained as a special revolving working-capital fund designated "Prison Enterprises Fund." Revenue in the Prison Enterprises Fund shall be applied first to capital and operating expenditures, including salaries and wages of supervisory personnel, necessary to develop and operate prison industrial and forestry enterprises to provide diversified employment for prisoners, and incentive wages for non-Prison Enterprises Inmates. Of the remaining revenue in the Fund, five percent (5%) of the net profits, before expansion costs, shall be credited to the Crime Victims Compensation Fund established in G.S. 15B-23 as soon as practicable after profits have been determined for the previous year, and at the direction of the Governor, the

remainder shall be used for other purposes within the State prison system or shall be transferred to the General Fund. The provisions of this section shall not apply to revenues generated from private prison enterprises conducted pursuant to G.S. 148-70 except for lease and rental income.

(c) Notwithstanding G.S. 147-77, Article 6A of Chapter 147 of the General Statutes, or any other provision of law, the Department of Correction may deposit revenue from prison canteens in local banks. The profits from prison canteens shall be deposited with the State Treasurer on a monthly basis in a fund denominated as the Correction Inmate Welfare Fund. Once the operating budget for the Correction Inmate Welfare Fund has been met, an amount equal to the funds allocated to each prison unit on a per inmate per year basis shall be credited to the Crime Victims Compensation Fund established in G.S. 15B-23 as soon as practicable after the total amount paid to each unit per inmate per year has been determined. (1901, c. 472, s. 7; Rev., s. 5389; C.S., s. 7704; 1923, c. 156; 1925, c. 163; 1933, c. 172, s. 18; 1957, c. 349, s. 2; 1967, c. 996, s. 14; 1973, c. 1262, s. 10; 1985 (Reg. Sess., 1986), c. 1014, s. 203; 1991 (Reg. Sess., 1992), c. 902, s. 4; 1993 (Reg. Sess., 1994), c. 769, s. 21.5(a).)

**Editor's Note.** — Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 17.11 provides: "Notwithstanding the provisions of G.S. 148-2, the Department of Correction may use up to the sum of eight hundred seventy-five thousand dollars (\$875,000) from funds available to the Department to provide the State match needed in order to receive federal grant funds. Prior to using funds for this purpose, the Department shall report to the Chairs of the Appropriations Subcommittees on Justice and Public Safety and the Joint Legislative Commission on Governmental Operations on the grants to be matched using these funds."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Session Laws 1999-237, s. 18.15, provides that the provisions of G.S. 148-2 notwithstanding, the Department of Correction may use up to the sum of six hundred fifty thousand dollars (\$650,000) from funds available to the Department to provide the State match needed in order to receive federal grant funds.

Session Laws 1999-237, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvement Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.4 contains a severability clause.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 25.7, provides: "Notwithstanding the provisions of G.S. 148-2, the Department of Correction may use up to the sum of nine hundred thousand dollars (\$900,000) from funds available to the Department to provide the State match needed in order to receive federal grant funds. Prior to using funds for this purpose, the Department shall report to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety and the Joint Legislative Commission on Governmental Operations on the grants to be matched using these funds."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

### § 148-3. Prison property.

(a) The State Department of Correction shall subject to the provisions of G.S. 143-341, have control and custody of all unexpended surplus highway funds previously allocated for prison purposes and all property of every kind and description now used by or considered a part of units of the State prison system, except vehicles used on a rental basis. The property coming within the

provisions of this section shall be identified and agreed upon by the executive heads of the highway and prison systems, or by their duly authorized representatives. The Governor shall have final authority to decide whether or not particular property shall be transferred to the Department of Correction in event the executive heads of the two systems are unable to agree.

(b) Property, both real and personal, deemed by the Department of Correction to be necessary or convenient in the operation of the State prison system may, subject to the provisions of G.S. 143-341, be acquired by gift, devise, purchase, or lease. The Department of Correction may, subject to the provisions of G.S. 143-341, dispose of any prison property, either real or personal, or any interest or estate therein. (1901, c. 472, ss. 2, 6; Rev., s. 5392; C.S., s. 7705; 1925, c. 163; 1933, c. 172, s. 18; 1943, c. 409; 1957, c. 349, s. 3; 1967, c. 996, s. 13.)

#### CASE NOTES

**Discretion as to Operation of Prison.** — Whether the maintenance and operation of a prison on a particular site shall be conducted either as at present, or as enlarged by the construction of additional buildings and facilities, or as a "minimum security prison" is a matter for determination by the State Prison Commission (now the Department of Correction) in the exercise of its discretion, and the court has no power to substitute its discretion

for that of the Commission; and, in the absence of fraud, manifest abuse of discretion or conduct in excess of lawful authority, the court has no power to intervene. *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E.2d 18 (1960).

**Construction of a prison on a site selected by public officials pursuant to statutory authority will not be enjoined.** *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E.2d 18 (1960).

### § 148-4. Control and custody of prisoners; authorizing prisoner to leave place of confinement.

The Secretary of Correction shall have control and custody of all prisoners serving sentence in the State prison system, and such prisoners shall be subject to all the rules and regulations legally adopted for the government thereof. Any sentence to imprisonment in any unit of the State prison system, or to jail to be assigned to work under the State Department of Correction, shall be construed as a commitment, for such terms of imprisonment as the court may direct, to the custody of the Secretary of Correction or his authorized representative, who shall designate the places of confinement within the State prison system where the sentences of all such persons shall be served. The authorized agents of the Secretary shall have all the authority of peace officers for the purpose of transferring prisoners from place to place in the State as their duties might require and for apprehending, arresting, and returning to prison escaped prisoners, and may be commissioned by the Governor, either generally or specially, as special officers for returning escaped prisoners or other fugitives from justice from outside the State, when such persons have been extradited or voluntarily surrendered. Employees of departments, institutions, agencies, and political subdivisions of the State hiring prisoners to perform work outside prison confines may be designated as the authorized agents of the Secretary of Correction for the purpose of maintaining control and custody of prisoners who may be placed under the supervision and control of such employees, including guarding and transferring such prisoners from place to place in the State as their duties might require, and apprehending and arresting escaped prisoners and returning them to prison. The governing authorities of the State prison system are authorized to determine by rules and regulations the manner of designating these agents and placing prisoners under their supervision and control, which rules and regulations shall be

established in the same manner as other rules and regulations for the government of the State prison system.

The Secretary of Correction may extend the limits of the place of confinement of a prisoner, as to whom there is reasonable cause to believe he will honor his trust, by authorizing him, under prescribed conditions, to leave the confines of that place unaccompanied by a custodial agent for a prescribed period of time to

- (1) Contact prospective employers; or
- (2) Secure a suitable residence for use when released on parole or upon discharge; or
- (3) Obtain medical services not otherwise available; or
- (4) Participate in a training program in the community; or
- (5) Visit or attend the funeral of a spouse, child (including stepchild, adopted child or child as to whom the prisoner, though not a natural parent, has acted in the place of a parent), parent (including a person though not a natural parent, has acted in the place of a parent), brother, or sister; or
- (6) Participate in community-based programs of rehabilitation, including, but not limited to the existing community volunteer and home-leave programs, pre-release and after-care programs as may be provided for and administered by the Secretary of Correction and other programs determined by the Secretary of Correction to be consistent with the prisoner's rehabilitation and return to society; or
- (7) Be on maternity leave, for a period of time not to exceed 60 days. The county departments of social services are expected to cooperate with officials at the North Carolina Correctional Center for Women to coordinate prenatal care, financial services, and placement of the child; or
- (8) Receive palliative care, only in the case of a terminally ill inmate or a permanently and totally disabled inmate that the Secretary finds no longer poses a threat to society, and only after consultation with any victims of the inmate or the victims' families. For purposes of this subdivision, the term "terminally ill" describes an inmate who, as determined by a licensed physician, has an incurable condition caused by illness or disease that will likely produce death within 12 months. For purposes of this subdivision, the term "permanently and totally disabled" describes an inmate who, as determined by a licensed physician, suffers from permanent and irreversible physical incapacitation as a result of an existing physical or medical condition.

The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to the place of confinement designated by the Secretary of Correction, shall be deemed an escape from the custody of the Secretary of Correction punishable as provided in G.S. 148-45. (1901, c. 472, s. 4; Rev., s. 5390; C.S., s. 7706; 1925, c. 163; 1933, c. 172, ss. 5, 18; 1935, c. 257, s. 2; 1943, c. 409; 1955, c. 238, s. 2; 1957, c. 349, s. 10; 1959, c. 109; 1965, c. 1042; 1967, c. 996, ss. 13, 15; 1973, c. 902; c. 1262, s. 10; 1977, c. 704, s. 5; 1985, c. 483; 2001-424, s. 25.9(a).)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, s. 25.9(a), effective September 26, 2001, and applicable to inmates serving sentences on or after that date, substituted "; or" for a period at the end of subdivision (7), and added subdivision (8).

## CASE NOTES

**Power to Designate Places of Confinement.** — This section gives the Director of Prisons (now the Secretary of Correction) or his duly authorized agents or representatives the authority to designate the places of confinement within the State prison system where the sentences of prisoners shall be served. *State v. Whitley*, 264 N.C. 742, 142 S.E.2d 600 (1965).

**Recommendation as to Confinement Held Not to Constitute Cruel and Unusual Punishment.** — An attachment to commitment papers recommending “that the defendant not be placed upon work release or permitted to leave his place of confinement under this section or any other statute but be kept at all times in close security until the sentence is completed” was a mere recommendation and had no legal effect upon the type or place of incarceration of the petitioner, and it did not constitute cruel and unusual punishment. *Harris v. North Carolina*, 320 F. Supp. 770 (M.D.N.C. 1970), *aff’d*, 435 F.2d 1305 (4th Cir. 1971).

**Instruction on Willfulness Under This Section Unnecessary in Prosecution Under § 148-45.** — In a prosecution for felonious escape under § 148-45, trial court was not required to instruct the jury pursuant to this section that one of the essential elements of felonious escape is that the failure to remain in or return to confinement must be willful, since defendant was not charged with escape while outside the place of his confinement pursuant to authorization by the Secretary of Correction under this section, but was charged under § 148-45, which establishes the general escape offense, and that section does not contain the word “willful.” *State v. Rose*, 53 N.C. App. 608, 281 S.E.2d 404 (1981).

**Evidence Held Sufficient to Support**

**Finding of Escape.** — Testimony of a sergeant with the North Carolina Department of Correction assigned to the prison camp in which defendant was confined that on the day in question defendant was given permission to leave the unit on a Community Volunteer Leave was sufficient to support the jury’s finding, and it was not necessary that the State present evidence to show that the Secretary of Correction, after making a determination that there was reasonable cause to believe that defendant would honor his trust, had personally authorized defendant’s release to participate in the community volunteer program and had personally prescribed the precise period of time during which the defendant was permitted to be absent from the prison unit. *State v. Harris*, 27 N.C. App. 15, 217 S.E.2d 729, cert. denied, 288 N.C. 512, 219 S.E.2d 347 (1975).

**A State prisoner has no legal right to the mitigation of his punishment.** *Wetzel v. Edwards*, 635 F.2d 283 (4th Cir. 1980).

**Question as to whether a particular inmate is entitled to honor grade status or parole involves policy decisions** which should be made by the department and the Parole Board, not the courts. *Wetzel v. Edwards*, 635 F.2d 283 (4th Cir. 1980).

**Applied** in *Goble v. Bounds*, 281 N.C. 307, 188 S.E.2d 347 (1972); *State v. Eppley*, 30 N.C. App. 217, 226 S.E.2d 675 (1976).

**Stated** in *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E.2d 18 (1960).

**Cited** in *State v. Davis*, 253 N.C. 86, 116 S.E.2d 365 (1960); *State v. Cooper*, 275 N.C. 283, 167 S.E.2d 266 (1969); *State v. Stewart*, 19 N.C. App. 112, 198 S.E.2d 30 (1973); *Slakan v. Porter*, 737 F.2d 368 (4th Cir. 1984); *Kandler v. Department of Cor.*, 80 N.C. App. 444, 342 S.E.2d 910 (1986).

## OPINIONS OF ATTORNEY GENERAL

**As to the status of a convicted person awaiting appeal**, see opinion of the Attorney General to Mr. Martin R. Peterson, Director of

Legal Services, N.C. Department of Correction, 40 N.C.A.G. 163 (1969).

## § 148-4.1. Release of inmates.

(a) Whenever the Secretary of Correction determines from data compiled by the Department of Correction that it is necessary to reduce the prison population to a more manageable level or to meet the State’s obligations under law, he shall direct the Post-Release Supervision and Parole Commission to release on parole over a reasonable period of time a number of prisoners sufficient to that purpose. From the time the Secretary directs the Post-Release Supervision and Parole Commission until the prison population has been reduced to a more manageable level, the Secretary may not accept any inmates ordered transferred from local confinement facilities to the State

prison system under G.S. 148-32.1(b). Further, the Secretary may return any inmate housed in the State prison system under an order entered pursuant to G.S. 148-32.1(b) to the local confinement facility from which the inmate was transferred. In order to meet the requirements of this section, the Parole Commission shall not parole any person convicted under Article 7A of Chapter 14 of a sex offense, under G.S. 14-39, 14-41, or 14-43.3, under G.S. 90-95(h) of a drug trafficking offense, or under G.S. 14-17, or any other violent felon as defined in subsection (a1) of this section. The Parole Commission may continue to consider the suitability for release of such persons in accordance with the criteria set forth in Articles 85 and 85A of Chapter 15A.

(a1) Notwithstanding any other provision of this section, the Department of Correction shall at all times secure the necessary prison space to house any violent felon or habitual felon for the full active sentence imposed by the court. For purposes of this subsection, the term "violent felon" means any person convicted of the following felony offenses: first or second degree murder, voluntary manslaughter, first or second degree rape, first or second degree sexual offense, any sexual offense involving a minor, robbery, kidnapping, or assault, or attempting, soliciting, or conspiring to commit any of those offenses.

(b) Except as provided in subsection (c), only inmates who are otherwise eligible for parole pursuant to Article 85 of Chapter 15A or pursuant to Article 3B of this Chapter may be released under this section.

(c) Persons eligible for parole under Article 85A of Chapter 15A shall be eligible for early parole under this section nine months prior to the discharge date otherwise applicable, and six months prior to the date of automatic 90-day parole authorized by G.S. 15A-1380.2.

(c1) through (g). Repealed by 1995 Session Laws, c. 324, s. 19.9(e).

(g1) Expired July 1, 1996.

(h) A person sentenced under Article 81B of Chapter 15A of the General Statutes shall not be released pursuant to this section. (1983, c. 557, s. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 197(a); 1987, c. 7, ss. 1, 3, 4; c. 879, s. 1.2; 1989, c. 1, s. 1; 1990, Ex. Sess., c. 1, ss. 1-3.3; 1989 (Reg. Sess., 1990), c. 933, ss. 10-13; 1991, c. 187, s. 2; c. 217, ss. 6, 7; c. 437, ss. 1-9; 1991 (Reg. Sess., 1992), c. 1036, ss. 5-7; 1993, c. 91, ss. 1-9; c. 538, s. 31; 1994, Ex. Sess., c. 14, s. 64; c. 15, ss. 1-4; c. 24, s. 14(b), (e); 1995, c. 324, s. 19.9(a)-(e).)

**Editor's Note.** — Effective March 15, 1994, Session Laws 1993 (Reg. Sess., 1994), c. 15, s. 2 repealed Session Laws 1993, c. 91, ss. 7-9, which would have been effective April 1, 1994, and would have increased the figure "21,400" in subsections (d), (e), and (f) to 21,500, pursuant to ss. 7-9 of Session Laws 1993, c. 91.

This section was amended by Session Laws 1994, Extra Session, c. 15, s. 1, in the coded bill drafting format provided by § 120-20.1. In this amendment, the section was set out in full and added a new (c1) but did not include (h). It has been set out in the form above at the direction of the Revisor of Statutes.

#### OPINIONS OF ATTORNEY GENERAL

**The Parole Commission has the authority to select fair-sentence inmates to be paroled** pursuant to subsection (c) of this section. See opinion of Attorney General to Mr.

Ben G. Irons, II, Senior Administrative Assistant, North Carolina Department of Correction, 53 N.C.A.G. 106 (1984).

### § 148-5. Secretary to manage prison property.

The Secretary of Correction shall manage and have charge of all the property and effects of the State prison system, and conduct all its affairs subject to the provisions of this Chapter and the rules and regulations legally adopted for the government thereof. (1933, c. 172, s. 4; 1955, c. 238, s. 3; 1967, c. 996, s. 15; 1973, c. 1262, s. 10.)

**Editor's Note.** — Session Laws 1995 (Reg. Sess., 1996), c. 18, s. 20.1 provides that in conjunction with the closing of small expensive prison units recommended for consolidation by the Government Performance Audit Committee, the Department of Correction shall consult with the county or municipality in which the unit is located or any private for-profit or non-profit firm about the possibility of converting that unit to other use. The Department may provide for the lease of any of these units to

counties, municipalities, or private firms wishing to convert them to other use and the Department may also consider converting some of the units from medium security to minimum security, where that conversion would be cost-effective.

Furthermore, the Department of Correction shall report quarterly to the Joint Legislative Corrections Oversight Committee on the conversion of these units to other use.

#### CASE NOTES

**Cited** in Pharr v. Garibaldi, 252 N.C. 803, 115 S.E.2d 18 (1960); North Carolina Council of Churches v. State, 120 N.C. App. 84, 461 S.E.2d 354 (1995).

### § 148-5.1. Confining inmates away from victims.

If a victim or immediate family member of a victim requests that, for the safety of the victim or family member, an inmate be confined outside the county where the victim or family member resides or is employed, the Department shall make a reasonable effort to house the inmate in a facility in another county. If the inmate is not so housed in another county, the Department shall notify the victim or family member in writing. (2001-433, s. 10; 2001-487, s. 120.)

**Editor's Note.** — Session Laws 2001-433, s. 120, makes this section effective December 1, 2001, as amended by Session Laws 2001-487, s. 2001.

### § 148-6. Custody, employment and hiring out of convicts.

The State Department of Correction shall provide for receiving, and keeping in custody until discharged by law, all such convicts as may be now confined in the prison and such as may be hereafter sentenced to imprisonment therein by the several courts of this State. The Department shall have full power and authority to provide for employment of such convicts, either in the prison or on farms leased or owned by the State of North Carolina, or elsewhere, or otherwise; and may contract for the hire or employment of any able-bodied convicts upon such terms as may be just and fair, but such convicts so hired, or employed, shall remain under the actual management, control and care of the Department: Provided, however, that no female convict shall be worked on public roads or streets in any manner. (1895, c. 194, s. 5; 1897, c. 270; 1901, c. 472, ss. 5, 6; Rev., s. 5391; C.S., s. 7707; 1925, c. 163; 1933, c. 172, s. 18; 1957, c. 349, s. 10; 1967, c. 996, s. 13.)

**Legal Periodicals.** — For survey of 1996 developments in the law regarding prisoner rights, see 75 N.C.L. Rev. 2428 (1997).

#### CASE NOTES

**Basis of Section.** — This section and §§ 148-26 and 148-33.1, as well as provisions with reference to paroles contained in Article 4 of this Chapter, are predicated upon the idea that the ability as well as the disposition of released

prisoners to engage in honest employment and become law-abiding members of society is calculated to serve the best interests of the State and of its citizens. Pharr v. Garibaldi, 252 N.C. 803, 115 S.E.2d 18 (1960).

**Employers of work release inmates are not required to supervise and control inmate employees** outside the scope of their work release employment. *O'Connor v. Corbett Lumber Corp.*, 84 N.C. App. 178, 352 S.E.2d 267 (1987).

**Treatment of Prisoner Whose Conviction Was Overturned.** — Where the Court of Appeals reversed defendant's conviction, and where after receiving a copy of the Court of Appeals' certified judgment the Department of Correction released defendant to the custody of the county jail, and where, on the same day, the county jailer obtained a safekeeping order transferring defendant back to the custody of the Department of Correction, the Secretary of the Department of Correction was not respon-

sible for failing to implement a policy directing Department of Correction employees as to the proper manner with which to deal with prisoners whose convictions had been overturned on appeal; the department personnel were not on notice of the circumstances leading to the issuance of the safekeeping order and had no reason to question its sufficiency, and given the lack of discretion allowed to the Department and state law, there was no reasonable way that the Secretary could have detailed a policy that would have avoided defendant's misfortunes. *Allen v. Lowder*, 875 F.2d 82 (4th Cir. 1989).

**Stated** in *State v. Whitley*, 264 N.C. 742, 142 S.E.2d 600 (1965).

#### OPINIONS OF ATTORNEY GENERAL

**Department of Correction Has No Authority on Its Own to Correct an Invalid Sentence.** — See opinion of Attorney General

to Mr. Martin Peterson, Department of Correction, 41 N.C.A.G. 291 (1971).

§ 148-7: Repealed by Session Laws 1995, c. 233, s. 1.

§ 148-8: Transferred to § 66-58(b)(15) by Session Laws 1975, c. 730, s. 2.

§ 148-8.1: Transferred to § 66-58(b)(16) by Session Laws 1975, c. 730, s. 3.

§ 148-9: Repealed by Session Laws 1973, c. 476, s. 138.

### § 148-10. Department of Environment and Natural Resources to supervise sanitary and health conditions of prisoners.

The Department of Environment and Natural Resources shall have general supervision over the sanitary and health conditions of the central prison, over the prison camps, or other places of confinement of prisoners under the jurisdiction of the State Department of Correction, and shall make periodic examinations of the same and report to the State Department of Correction the conditions found there with respect to the sanitary and hygienic care of such prisoners. (1917, c. 286, s. 8; 1919, c. 80, s. 4; C.S., s. 7714; 1925, c. 163; 1933, c. 172, s. 22; 1943, c. 409; 1957, c. 349, s. 10; 1967, c. 996, s. 13; 1973, c. 476, s. 128; 1989, c. 727, s. 219(37); 1997-443, s. 11A.111.)

#### § 148-10.1. Employment of clinical chaplains for inmates.

The Department of Correction is authorized and directed to employ clinical chaplains to provide moral, spiritual and social counselling and ministerial services to inmates in the custody of the Secretary of the Department of Correction. The Department of Correction shall seek to employ a diversity of qualified persons having differing faiths which are to the extent practicable reflective of the professed religious composition of the inmate population. (1977, c. 950, s. 1.)

## § 148-10.2. Policy: Certain inmates not to contact family members of victims.

(a) It shall be the policy of the Department of Correction to prohibit death row inmates from contacting the surviving family members of the victims without the written consent of the family members being contacted. For purposes of this subsection, the term "contact" includes arranging for a third party to forward communications from the inmate to the surviving family members of the victim.

(b) At the request of the victim or a family member of the victim, the Department of Correction shall prohibit an inmate convicted of an offense listed in G.S. 15A-830(a)(7) from contacting the requesting party. For purposes of this subsection, the term "contact" includes arranging for a third party to forward communications from the inmate to the victim or family member.

(c) The Department of Correction shall develop and impose sanctions against any inmate who violates the provisions of this section. (1999-358, s. 1; 2001-433, s. 9; 2001-487, s. 120.)

**Editor's Note.** — Session Laws 1999-358, s. 1 was codified as this section at the direction of the Revisor of Statutes.

**Effect of Amendments.** — Session Laws 2001-433, s. 9, as amended by Session Laws 2001-487, s. 120, effective December 1, 2001,

substituted "Certain inmates" for "Death row inmates" in the catchline; inserted the subsection (a) designation and substituted "this subsection" for "this section" in subsection (a); and added subsections (b) and (c).

## ARTICLE 2.

### *Prison Regulations.*

## § 148-11. Authority to adopt rules; authority to designate uniforms.

(a) The Secretary shall adopt rules for the government of the State prison system. The Secretary shall have the rules that pertain to enforcing discipline read to every prisoner when received in the State prison system and a printed copy of these rules made available to the prisoners.

(b) The Secretary of Correction has sole authority to designate the uniforms worn by inmates confined in the Division of Prisons. (1873-4, c. 158, s. 15; Code, s. 3444; Rev., s. 5401; C.S., s. 7721; 1925, c. 163; 1933, c. 172, s. 18; 1955, c. 238, s. 4; 1957, c. 349, s. 4; 1967, c. 996, ss. 14, 15; 1973, c. 1262, s. 10; 1983, c. 147, s. 1; 1987, c. 827, s. 1; 1991, c. 418, s. 15; c. 477, ss. 6, 8; 1995, c. 507, s. 27.8(u); 1999-109, s. 2.)

**Cross References.** — As to the authority of agencies to adopt rules, see Article 2A of Chapter 150B.

**Editor's Note.** — Session Laws 1999-109, s. 2, was codified as subsection (b) of this section at the direction of the Revisor of Statutes.

## CASE NOTES

**This section is constitutional.** State v. Revis, 193 N.C. 192, 136 S.E. 346, 50 A.L.R. 98 (1927); State v. Carpenter, 231 N.C. 229, 56 S.E.2d 713 (1949).

**The prison rules authorized by this section are administrative** and not judicial.

State v. Shoemaker, 273 N.C. 475, 160 S.E.2d 281 (1968).

**And Their Application Cannot Affect Sentences.** — The administrative application of the rules authorized by this section by prison authorities cannot affect sentences imposed by

the courts. *State v. Shoemaker*, 273 N.C. 475, 160 S.E.2d 281 (1968).

**Courts are not authorized to deal with the giving or withholding of privileges or rewards under the rules authorized by this section.** *State v. Shoemaker*, 273 N.C. 475, 160 S.E.2d 281 (1968).

**Fact that disciplinary punishment inflicted on a prisoner by a prison official was administered in accordance with the rules and regulations of the former State Highway and Public Works Commission did not render the prison official immune to prosecution for assault unless the particular regulation relied on was within the statutory authority of the Commission.** *State v. Carpenter*, 231 N.C. 229, 56 S.E.2d 713 (1949).

**Public Official Immunity for Enforcement of Rules.** — Prison officials acted within the scope of their authority and were therefore protected by public official immunity from prisoner's action claiming that officials violated this section and prison regulations by depriving him of pens and other materials. *Price v. Davis*, 132 N.C. App. 556, 512 S.E.2d 783 (1999).

**Fair Sentencing Act.** — Although the principal provisions of the Fair Sentencing Act are

codified in Chapter 15A, Article 81A of the General Statutes, the act resulted in revisions to other portions of the General Statutes. See, e.g., Chapter 14, Articles 1, 2, 2A, 33; Chapter 15A, Articles 58, 81A, 82, 83, 85, 85A, 89, 91; Chapter 148, Article 2, and Chapter 162, Article 4. *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983).

For discussion of the historical background, policies, purposes, and implementation of the new Fair Sentencing Act, see *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983).

**Obtaining Medical Care Outside of Prison.** — North Carolina law bars all but minimum-security prisoners from exercising an option to go outside the prison and obtain medical care of their choice at their own expense or funded by family resources or private health insurance. *West v. Atkins*, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988).

**Applied** in *State v. McCall*, 273 N.C. 135, 159 S.E.2d 316 (1968).

**Cited** in *State v. Garris*, 265 N.C. 711, 144 S.E.2d 901 (1965); *Goble v. Bounds*, 281 N.C. 307, 188 S.E.2d 347 (1972); *Slakan v. Porter*, 737 F.2d 368 (4th Cir. 1984).

## § 148-12. Diagnostic and classification programs.

(a) The Department of Correction shall, as soon as practicable, establish diagnostic centers to make social, medical, and psychological studies of persons committed to the Department. Full diagnostic studies shall be made before initial classification in cases where such studies have not been made.

(b) Repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

(c) Any prisoner confined in the State prison system while under a sentence of imprisonment imposed upon conviction of a felony shall be classified and treated as a convicted felon even if, before beginning service of the felony sentence, such prisoner has time remaining to be served in the State prison system on a sentence or sentences imposed upon conviction of a misdemeanor or misdemeanors. (1917, c. 278, s. 2; 1919, c. 191, s. 2; C.S., s. 7750; 1925, c. 163; 1933, c. 172, s. 18; 1955, c. 238, s. 5; 1959, c. 50; 1967, c. 996, s. 2; 1973, c. 1446, s. 27; 1977, c. 711, s. 33; 1977, 2nd Sess., c. 1147, s. 32.)

**Editor's Note.** — Session Laws 1977, c. 711, s. 34, provided: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons

sentenced before July 1, 1978."

Session Laws 1977, c. 732, s. 6, provided that all commitments to the Department of Correction under former G.S. 148-49.3 should be treated as commitments under subsection (b) of this section. However, subsection (b) was repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

Session Laws 1973, c. 803, s. 44, purported to repeal "the third unnumbered paragraph" of this section. The 1973 act apparently intended to amend § 158-12.

**Legal Periodicals.** — For article discussing the presence diagnostic program in North Carolina, see 9 N.C. Cent. L.J. 133 (1978).

## CASE NOTES

**Power of Judge Other Than Trial Judge to Impose Sentence.** — Where sentencing was delayed for the purpose of a diagnostic evaluation of the defendant under this section, it was not error for a judge other than the trial judge to impose sentence upon the defendant. *State v. Sampson*, 34 N.C. App. 305, 237 S.E.2d 883 (1977), cert. denied, 294 N.C. 185, 241 S.E.2d 520 (1978).

**Applied** in *State v. Powell*, 11 N.C. App. 194, 180 S.E.2d 490 (1971); *State v. Streeter*, 17 N.C. App. 48, 193 S.E.2d 347 (1972), aff'd, 283 N.C. 203, 195 S.E.2d 502 (1973).

**Cited** in *State v. Davis*, 8 N.C. App. 99, 173 S.E.2d 490 (1970).

### § 148-13. Regulations as to custody grades, privileges, gain time credit, etc.

(a) The Secretary of Correction may issue regulations regarding the grades of custody in which State prisoners are kept, the privileges and restrictions applicable to each custody grade, and the amount of cash, clothing, etc., to be awarded to State prisoners after their discharge or parole. The amount of cash awarded to a prisoner upon discharge or parole after being incarcerated for two years or longer shall be at least forty-five dollars (\$45.00).

(a1) The Secretary of Correction shall adopt rules to specify the rates at, and circumstances under, which earned time authorized by G.S. 15A-1340.13(d) and G.S. 15A-1340.20(d) may be earned or forfeited by persons serving activated sentences of imprisonment for felony or misdemeanor convictions.

(b) With respect to prisoners who are serving prison or jail terms for impaired driving offenses under G.S. 20-138.1, the Secretary of Correction may, in his discretion, issue regulations regarding deductions of time from the terms of such prisoners for good behavior, meritorious conduct, work or study, participation in rehabilitation programs, and the like.

(c), (d) Repealed by Session Laws 1993, c. 538, s. 32, effective January 1, 1995.

(e) The Secretary's regulations concerning earned time credits authorized by this section shall be distributed to and followed by local jail administrators with regard to sentenced jail prisoners.

(f) The provisions of this section do not apply to persons sentenced to a term of special probation under G.S. 15A-1344(e) or G.S. 15A-1351(a). (1933, c. 172, s. 23; 1935, c. 414, s. 15; 1937, c. 88, s. 1; 1943, c. 409; 1955, c. 238, s. 6; 1979, c. 760, s. 4; 1979, 2nd Sess., c. 1316, ss. 43-47; 1981, c. 63, s. 1; c. 179, s. 14; c. 662, ss. 8, 9; 1983, c. 560, s. 3; 1985, c. 310, ss. 1-4; 1987 (Reg. Sess., 1988), c. 1086, s. 120(a); 1991, c. 187, s. 3; 1993, c. 538, s. 32; 1994, Ex. Sess., c. 24, s. 14(b).)

## CASE NOTES

**Editor's Note.** — Most of the cases cited below were decided under this section as it read prior to the 1979 amendment thereto.

**Rules as to "Good Time" Rewards Are Strictly Administrative.** — Prison rules and regulations respecting rewards and privileges for good conduct ("good time") are strictly administrative and not judicial. *State v. Garris*, 265 N.C. 711, 144 S.E.2d 901 (1965); *State v. McCall*, 273 N.C. 135, 159 S.E.2d 316 (1968); *Goble v. Bounds*, 13 N.C. App. 579, 186 S.E.2d 638, aff'd, 281 N.C. 307, 188 S.E.2d 347 (1972).

**As Are Grades Established for "Gain**

**Time."** — The grades established for "gain time" based on differences in work assignment are matters of prison administration, to be disturbed only if clearly arbitrary or capricious. *Ham v. North Carolina*, 471 F.2d 406 (4th Cir. 1973).

**And Allowance of Gained Time.** — Allowance of gained time is a discretionary act of the State prison administrative body, and decisions as to its allowance will not be upset by the federal courts unless clearly arbitrary or capricious. *Kelly v. North Carolina*, 276 F. Supp. 200 (E.D.N.C. 1967).

**Courts Are Not Authorized to Deal with Giving or Withholding Such Rewards.** —

Giving or withholding of the rewards and privileges under these rules is not a matter with which the courts are authorized to deal. *State v. Garris*, 265 N.C. 711, 144 S.E.2d 901 (1965); *Goble v. Bounds*, 13 N.C. App. 579, 186 S.E.2d 638, aff'd, 281 N.C. 307, 188 S.E.2d 347 (1972).

The giving or withholding of the rewards and privileges under rules and regulations authorized by § 148-11 is not a matter with which the courts are authorized to deal. *State v. McCall*, 273 N.C. 135, 159 S.E.2d 316 (1968).

**Discretion of Secretary to Determine Allowance and Forfeiture of Gained Time.** —

State law vests authority to determine allowance and forfeiture of gained time in the Director of Prisons (now Secretary of Correction) to be exercised in his sound discretion. *Patton v. Ross*, 267 F. Supp. 387 (E.D.N.C. 1967).

**Service on a vacated sentence must be considered in determining defendant's gained time**, if any, on account of good behavior. *Patton v. Ross*, 267 F. Supp. 387 (E.D.N.C. 1967).

**Benefits Depend on Conduct.** — Whether a prisoner shall benefit by the rules and regulations authorized by § 148-11 depends on his own conduct. *State v. McCall*, 273 N.C. 135, 159 S.E.2d 316 (1968).

**Honor-Grade Status, Work-Release Privilege and Parole Are Discretionary Acts of Clemency.** —

Honor-grade status, work-release privilege, and parole are discretionary acts of grace or clemency extended by the State as a reward for good behavior, conferring no vested rights upon the convicted person. An accused person must be given full constitutional protection before and during his trial, but procedures of constitutional dimension are not appropriate in subsequent determinations of rewards for good behavior while serving a validly imposed sentence of confinement. *Goble v. Bounds*, 13 N.C. App. 579, 186 S.E.2d 638, aff'd, 281 N.C. 307, 188 S.E.2d 347 (1972).

**In Mitigation of Terms of Judgment.** —

The grant of honor-grade status, work release, and parole is by way of mitigating the terms of the judgment which the court has entered. The legality and propriety of the trial and sentence have already been determined after the prisoner has been heard and his constitutional rights have been accorded him. The merits of the trial and the validity of the judgment may not again be raised before the Department of Correction and the Board of Paroles (now Parole Commission). *Goble v. Bounds*, 281 N.C. 307, 188 S.E.2d 347 (1972).

**Involving Policy Decisions.** — Whether a prisoner is entitled to honor-grade status, work release, or parole involves policy decisions which should be decided by the Department of Correction and the Board of Paroles (Parole Commission). These agencies are charged with the duty of making such decisions and are properly given means of discharging it not available to the courts. *Goble v. Bounds*, 281 N.C. 307, 188 S.E.2d 347 (1972).

**And Not the Right of the Prisoner.** —

While a prisoner takes with him into the prison certain rights which may not be denied him, the legal right to the mitigation of his punishment is not one of them. It is contemplated as a part of his rehabilitation that he earn his right to honor-grade status, work release, or parole. The decision is not in the nature of an adversary proceeding under rules of evidence. *Goble v. Bounds*, 281 N.C. 307, 188 S.E.2d 347 (1972).

**And Inmate Being Considered for Honor-Grade Status or Work Release Is Not Entitled to Procedural Due Process.** —

An inmate being considered for honor-grade status or work release is not entitled, either under the State or federal Constitutions, to procedural due process rights. *Goble v. Bounds*, 13 N.C. App. 579, 186 S.E.2d 638, aff'd, 281 N.C. 307, 188 S.E.2d 347 (1972).

**Judges still have discretion to increase or reduce sentences from the presumptive term** upon findings of aggravating or mitigating factors, the weighing of which is a matter within their sound discretion. The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. *State v. Stone*, 71 N.C. App. 417, 322 S.E.2d 413 (1984).

**Trial judge's remarks concerning the effect of "good time" and "gain time"**, which were not an expression of dissatisfaction with the length of time convicted criminals must serve in prison, but were made in an effort to respond to defense counsel's impassioned argument concerning the fact that the defendant would be required to serve other sentences totalling four years at the expiration of the sentence at issue, could not be said to indicate that the trial court was using the sentencing process to thwart the Fair Sentencing Act. *State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1985).

**Cited in** *In re Swink*, 243 N.C. 86, 89 S.E.2d 792 (1955); *State v. Weaver*, 264 N.C. 681, 142 S.E.2d 633 (1965); *Robbins v. Freeman*, 127 N.C. App. 162, 487 S.E.2d 771 (1997), cert. granted, 347 N.C. 270, 493 S.E.2d 746 (1997), aff'd, 347 N.C. 664, 496 S.E.2d 375 (1998).

**§§ 148-14 through 148-17:** Repealed by Session Laws 1943, c. 409.

## § 148-18. Wages, allowances and loans.

(a) Prisoners employed in prison enterprises shall be compensated at hourly rates fixed by the Department of Correction's rules and regulations, or on the basis of production quotas established by prison enterprises, for work performed; provided, that no prisoner working for prison enterprises shall be paid more than three dollars (\$3.00) per day from funds made available by the Prison Enterprises Fund.

Prisoners employed other than by prison enterprises and those involved in the maintenance and housekeeping of the prison system, shall be compensated at rates fixed by the Department of Correction's rules and regulations; provided, that no prisoner so paid shall receive more than one dollar (\$1.00) per day. The source of wages and allowances provided inmates who are not employed by prison enterprises shall be funds provided by the Department of Transportation to the Department of Correction for this purpose. The provisions of this subsection shall not apply to wages paid by private prison enterprises conducted pursuant to G.S. 148-70.

(b) A prisoner shall be required to contribute to the support of any of his dependents residing in North Carolina who may be receiving public assistance during the period of commitment if funds available to the prisoner are adequate for such purpose. The dependency status and need shall be determined by the department of social services in the county of North Carolina in which such dependents reside.

(c) Repealed by Session Laws 1995, c. 233, s. 2. (1935, c. 414, s. 19; 1967, c. 996, s. 3; 1969, c. 982; 1973, c. 1262, s. 10; 1975, c. 506, s. 3; c. 716, s. 7; 1991 (Reg. Sess., 1992), c. 902, s. 5; 1993, c. 321, s. 175; 1995, c. 233, s. 2.)

**Editor's Note.** — Session Laws 1975, c. 682, which amended § 148-26 and added §§ 148-26.1 through 148-26.5, provided in s. 4: "Nothing in this act shall be construed as altering or amending G.S. 148-26(b) or G.S. 148-18(a) as set out in Chapter 506 of the 1975 Session Laws."

Session Laws 1993, c. 321, s. 322 is a severability clause.

**Legal Periodicals.** — For survey of 1996 developments in the law regarding prisoner rights, see 75 N.C.L. Rev. 2428 (1997).

### § 148-18.1. Confiscation of unauthorized articles.

Any item of personal property which a prisoner in any correctional facility is prohibited from possessing by State law or which is not authorized by rules adopted by the Secretary of Correction shall, when found in the possession of a prisoner, be confiscated and destroyed or otherwise disposed of as the Secretary may direct. Any unauthorized funds confiscated under this section or funds from the sale of confiscated property shall be deposited to Inmate Welfare Fund maintained by the Department of Correction. (1983, c. 289, s. 1.)

#### CASE NOTES

**Constitutionality.** — This section and the regulations of the North Carolina Department of Correction which implement the statute do not violate petitioner's rights under U.S. Const., Amend. XIV or the law of the land clause of N.C. Const., Art. I, § 19. In re Smith, 82 N.C. App. 107, 345 S.E.2d 423 (1986).

This section and the Department of Correc-

tion regulations implementing the statute provide necessary due process procedural safeguards and meet substantive due process requirements. In re Smith, 82 N.C. App. 107, 345 S.E.2d 423 (1986).

**Quoted** in Price v. Davis, 132 N.C. App. 556, 512 S.E.2d 783 (1999).

## § 148-19. Health services.

(a) The general policies, rules and regulations of the Department of Correction shall prescribe standards for health services to prisoners, which shall include preventive, diagnostic, and therapeutic measures on both an outpatient and a hospital basis, for all types of patients. A prisoner may be taken, when necessary, to a medical facility outside the State prison system. The Department of Correction shall seek the cooperation of public and private agencies, institutions, officials and individuals in the development of adequate health services to prisoners.

(b) Upon request of the Secretary of Correction, the Secretary of Health and Human Services may detail personnel employed by the Department of Health and Human Services to the Department of Correction for the purpose of supervising and furnishing medical, psychiatric, psychological, dental, and other technical and scientific services to the Department of Correction. The compensation, allowances, and expenses of the personnel detailed under this section may be paid from applicable appropriations to the Department of Health and Human Services, and reimbursed from applicable appropriations to the Department of Correction. The Secretary of Correction may make similar arrangements with any other agency of State government able and willing to aid the Department of Correction to meet the needs of prisoners for health services.

(c) Each prisoner committed to the State Department of Correction shall receive a physical and mental examination by a health care professional authorized by the North Carolina Medical Board to perform such examinations as soon as practicable after admission and before being assigned to work. The prisoner's work and other assignments shall be made with due regard for the prisoner's physical and mental condition.

(d) The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall adopt standards for the delivery of mental health and mental retardation services to inmates in the custody of the Department of Correction. The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall give the Secretary of Correction an opportunity to review and comment on proposed standards prior to promulgation of such standards; however, final authority to determine such standards remains with the Commission. The Secretary of the Department of Health and Human Services shall designate an agency or agencies within the Department of Health and Human Services to monitor the implementation by the Department of Correction of these standards and of substance abuse standards adopted by the Department of Correction upon the advice of the Substance Abuse Advisory Council established pursuant to G.S. 143B-270. The Secretary of Health and Human Services shall send a written report on the progress which the Department of Correction has made on the implementation of such standards to the Governor, the Lieutenant Governor, and the Speaker of the House. Such reports shall be made on an annual basis beginning January 1, 1978. (1917, c. 286, s. 22; C.S., s. 7727; 1925, c. 163; 1933, c. 172, s. 18; 1957, c. 349, s. 10; 1967, c. 996, s. 4; 1973, c. 476, s. 133; c. 1262, s. 10; 1977, c. 332; c. 679, s. 7; 1981, c. 51, s. 6; c. 707, ss. 1, 2; 1985, c. 589, s. 55.1; 1991, c. 405, s. 1; 1995, c. 94, s. 36; 1997-443, s. 11A.118(a).)

### CASE NOTES

**Basic Health Services for Prisoners.** — In compliance with this section, 5 N.C. Admin. Code § 02E.0201 (1987) charges the director, division of prisons, with the responsibility of providing each prisoner the services necessary

to maintain basic health. *West v. Atkins*, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988).

**The Department of Correction has a duty to provide adequate medical care to**

**inmates** in its custody, and the duty is of such great importance that the state cannot avoid liability by contracting with someone else to perform it. *Medley v. North Carolina Dep't of Cor.*, 330 N.C. 837, 412 S.E.2d 654 (1992).

**Additional Examinations.** — Whenever there is a change of physical or mental condition, it would seem to logically follow that a

further examination is required under this section; however, the frequency of such examinations must, as a practical matter, be left to the sound discretion of prison authorities. *Threatt v. North Carolina*, 221 F. Supp. 858 (W.D.N.C. 1963).

**Cited** in *Price v. Dixon*, 961 F. Supp. 894 (E.D.N.C. 1997).

**OPINIONS OF ATTORNEY GENERAL**

**Legislative Intent.** — Although Substance Abuse Advisory Council was not given any rule making authority of its own, the clear intent of the General Assembly was to give Council an active role in the formulation of policy governing the substance abuse program. Thus, Council was directed to give advice to Secretary of Correction as to any rules and regulations and on any other matters pertaining to program; however, 1987 legislation did not impose a duty upon the Commission for Mental Health, Mental Retardation and Substance Abuse Services

to consult directly with Council; the Commission's responsibility as set out in subsection (d) of this section was left untouched and is fulfilled by giving Secretary of Correction opportunity to review and comment on proposed standards for delivery of substance abuse services to inmates. Secretary of Correction should then consult with the Council under §§ 143B-270 and 143B-271 in order to effectuate the legislatively intended role of the Council. See opinion of Attorney General to Substance Abuse Council, 60 N.C.A.G. 27 (1990).

**§ 148-19.1. Exemption from licensure and certificate of need.**

(a) Inpatient chemical dependency or substance abuse facilities that provide services exclusively to inmates of the Department of Correction shall be exempt from licensure by the Department of Health and Human Services under Chapter 122C of the General Statutes. If an inpatient chemical dependency or substance abuse facility provides services both to inmates of the Department of Correction and to members of the general public, the portion of the facility that serves inmates shall be exempt from licensure.

(b) Any person who contracts to provide inpatient chemical dependency or substance abuse services to inmates of the Department of Correction may construct and operate a new chemical dependency or substance abuse facility for that purpose without first obtaining a certificate of need from the Department of Health and Human Services pursuant to Article 9 of Chapter 131E of the General Statutes. However, a new facility or addition developed for that purpose without a certificate of need shall not be licensed pursuant to Chapter 122C of the General Statutes and shall not admit anyone other than inmates unless the owner or operator first obtains a certificate of need. (2001-424, s. 25.19(a).)

**Editor's Note.** — Session Laws 2001-424, s. 36.6, made this section effective July 1, 2001.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Oper-

ations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

**§ 148-20. Corporal punishment of prisoners prohibited.**

It is unlawful for the Secretary of Correction or any other person having the care, custody, or control of any prisoner in this State to make or enforce any rule or regulation providing for the whipping, flogging, or administration of any similar corporal punishment of any prisoner, or to give any specific order for or cause to be administered or personally to administer or inflict any such corporal punishment. (1917, c. 286, s. 7; C.S., s. 7728; 1925, c. 163; 1933, c. 172,

s. 18; 1955, c. 238, s. 9; 1963, c. 1174, s. 1; 1967, c. 996, s. 15; 1973, c. 1262, s. 10.)

#### CASE NOTES

**Striking Prisoner with Key Ring and Kicking Him into Cell Not Countenanced.**

— Nothing contained in this section can be said to countenance striking the prisoner with a key ring or kicking him into his cell. *Threatt v. North Carolina*, 221 F. Supp. 858 (W.D.N.C. 1963).

**For construction of section prior to 1963**

**as permitting whipping**, see *State v. Nipper*, 166 N.C. 272, 81 S.E. 164 (1914); *State v. Mincher*, 172 N.C. 895, 90 S.E. 429 (1916); *State v. Revis*, 193 N.C. 192, 136 S.E. 346 (1927).

**Cited in** *Slakan v. Porter*, 737 F.2d 368 (4th Cir. 1984); *Price v. Dixon*, 961 F. Supp. 894 (E.D.N.C. 1997).

§ 148-21: Repealed by Session Laws 1963, c. 1174, s. 5.

#### § 148-22. Treatment programs.

(a) The general policies, rules and regulations of the Department of Correction shall provide for humane treatment of prisoners and for programs to effect their correction and return to the community as promptly as practicable. Visits and correspondence between prisoners and approved friends shall be authorized under reasonable conditions, and family members shall be permitted and encouraged to maintain close contact with the prisoners unless such contacts prove to be hurtful. Casework, counseling, and psychotherapy services provided to prisoners may be extended to include members of the prisoner's family if practicable and necessary to achieve the purposes of such programs. Education, library, recreation, and vocational training programs shall be developed so as to coordinate with corresponding services and opportunities which will be available to the prisoner when he is released. Programs may be established for the treatment and training of mentally retarded prisoners and other special groups. These programs may be operated in segregated sections of facilities housing other prisoners or in separate facilities.

(b) The Department of Correction may cooperate with and seek the cooperation of public and private agencies, institutions, officials, and individuals in the development and conduct of programs designed to give persons committed to the Department opportunities for physical, mental and moral improvement. The Department may enter into agreements with other agencies of federal, State or local government and with private agencies to promote the most effective use of available resources.

Specifically the Secretary of Correction may enter into contracts or agreements with appropriate public or private agencies offering needed services including health, mental health, mental retardation, substance abuse, rehabilitative or training services for such inmates of the Department of Correction as the Secretary may deem eligible. These agencies shall be reimbursed from applicable appropriations to the Department of Correction for services rendered at a rate not to exceed that which such agencies normally receive for serving their regular clients.

The Secretary may contract for the housing of work-release inmates at county jails and local confinement facilities. Inmates may be placed in the care of such agencies but shall remain the responsibility of the Department and shall be subject to the complete supervision of the Department. The Department may reimburse such agencies for the support of such inmates at a rate not in excess of the average daily cost of inmate care in the corrections unit to which the inmate would otherwise be assigned. (1917, c. 286, s. 15; C.S., s. 7732; 1925, c. 163; 1933, c. 172, s. 18; 1955, c. 238, s. 9; 1967, c. 996, s. 5; 1975, c. 679, ss. 1, 2; 1977, c. 297; 1983, c. 376; 1985, c. 589, s. 55.)

## CASE NOTES

**Stated** in *Wetzel v. Edwards*, 635 F.2d 283 (4th Cir. 1980).

### § 148-22.1. Educational facilities and programs for selected inmates.

(a) The State Department of Correction is authorized to take advantage of aid available from any source in establishing facilities and developing programs to provide inmates of the State prison system with such academic and vocational and technical education as seems most likely to facilitate the rehabilitation of these inmates and their return to free society with attitudes, knowledge, and skills that will improve their prospects of becoming law-abiding and self-supporting citizens. The State Department of Public Instruction is authorized to cooperate with the State Department of Correction in planning academic and vocational and technical education of prison system inmates, but the State Department of Public Instruction is not authorized to expend any funds in this connection.

(b) In expending funds that may be made available for facilities and programs to provide inmates of the State prison system with academic and vocational and technical education, the State Department of Correction shall give priority to meeting the needs of inmates who are less than 21 years of age when received in the prison system with a sentence or sentences under which they will be held for not less than six months nor more than five years before becoming eligible to be considered for a parole or unconditional release. These inmates shall be given appropriate tests to determine their educational needs and aptitudes. When the necessary arrangements can be made, they shall receive such instruction as may be deemed practical and advisable for them. (1959, c. 431; 1967, c. 996, s. 13; 1985, c. 226, s. 1; 1993, c. 180, s. 8.)

**Editor's Note.** — Session Laws 1995, c. 269, s. 1, provides that a pilot correction education program that would allow prison inmates to participate in community college capital con-

struction projects is established. The State Board of Community Colleges shall report to the General Assembly prior to January 1, 1997, on the progress of the program.

### § 148-22.2. Procedure when surgical operations on inmates are necessary.

The medical staff of any penal institution of the State of North Carolina is hereby authorized to perform or cause to be performed by competent and skillful surgeons surgical operations upon any inmate when such operation is necessary for the improvement of the physical condition of the inmate. The decision to perform such operation shall be made by the chief medical officer of the institution, with the approval of the superintendent of the institution, and with the advice of the medical staff of said institution. No such operation shall be performed without the consent of the inmate; or, if the inmate be a minor, without the consent of a responsible member of his family, a guardian, or one having legal custody of such minor; or, if the inmate be non compos mentis, then the consent of a responsible member of his family or of a guardian must be obtained. Any surgical operations on inmates of State penal institutions shall also be subject to the provisions of Article 1A of Chapter 90 of the General Statutes and G.S. 90-21.13 and G.S. 90-21.14.

If the operation on the inmate is determined by the chief medical officer to be an emergency situation in which immediate action is necessary to preserve the life or health of the inmate, and the inmate, if *sui juris*, is unconscious or

otherwise incapacitated so as to be incapable of giving consent or in the case of a minor or inmate non compos mentis, the consent of a responsible member of his family, guardian, or one having legal custody of such inmate cannot be obtained within the time necessitated by the nature of the emergency situation, then the decision to proceed with the operation shall be made by the chief medical officer and the superintendent of the institution with the advice of the medical staff of the institution.

In all cases falling under this Article [section], the chief medical officer of the institution and the medical staff of the institution shall keep a careful and complete record of the measures taken to obtain the permission for such operation and a complete medical record signed by the medical superintendent or director, the surgeon performing the operation and all surgical consultants of the operation performed.

This Article [section] is not to be considered as affecting the provisions of Article 7 of Chapter 35 of the General Statutes dealing with eugenical sterilization. (1919, c. 281, ss. 1, 2; C.S., ss. 7221, 7222; 1947, c. 537, s. 24; 1951, c. 775; 1957, c. 1357, s. 1; 1981, c. 307, ss. 2, 3.)

**Editor's Note.** — This section was formerly § 130-191. It was amended and transferred to Chapter 148 by Session Laws 1981, c. 307, s. 8, which originally designated the transferred section as § 148-22.1; since that number had already been assigned, the section was renumbered as § 148-22.2.

The reference in this section to § 90-21.14 should probably now be to § 90-21.16. Session Laws 2001-230, s. 1(b), recodified former subsection (a1) of § 90-21.14 as present § 90-21.16.

### **§ 148-23. Prison employees not to use intoxicants, narcotic drugs or profanity.**

No one addicted to the use of alcoholic beverages, or narcotic drugs, shall be employed as superintendent, warden, guard, or in any other position connected with the State Department of Correction, where such position requires the incumbent to have any charge or direction of the prisoners; and anyone holding such position, or anyone who may be employed in any other capacity in the State prison system, who shall come under the influence of alcoholic beverages during hours of employment, or reports for duty under the effect of intoxicants, or narcotic drugs, or who shall become intoxicated, or uses narcotic drugs, under circumstances that bring discredit on the State Department of Correction, shall be subject to immediate dismissal from employment by any of the institutions and shall not be eligible for reinstatement to such position or be employed in any other position in any of the institutions. Any superintendent, warden, guard, supervisor, or other person holding any position in the State Department of Correction who curses a prisoner under his charge shall be subject to immediate dismissal from employment and shall not be eligible for reinstatement. (1917, c. 286, s. 16; 1919, c. 80, s. 8; C.S., s. 7733; 1925, c. 163; 1933, c. 172, s. 18; 1957, c. 349, s. 10; 1967, c. 996, s. 13; 1969, c. 382; 1981, c. 412, s. 4(4); c. 747, s. 66.)

### **§ 148-24. Religious services.**

The general policies, rules and regulations of the Department of Correction shall provide for religious services to be held in all units of the State prison system on Sunday and at such other times as may be deemed appropriate. Attendance of prisoners at religious services shall be voluntary. The Secretary of Correction shall if possible secure the visits of some minister at the prison hospitals to administer to the spiritual wants of the sick. (1873-4, c. 158, s. 18; 1883, c. 349; Code, s. 3446; Rev., s. 5405; 1915, c. 125, ss. 1, 2; 1917, c. 286, s.

15; C.S., s. 7735; 1925, c. 163; c. 275, s. 6; 1933, c. 172, s. 18; 1955, c. 238, s. 9; 1967, c. 996, s. 6; 1973, c. 1262, s. 10.)

### § 148-25. Secretary to investigate death of convicts.

The Secretary of Correction, upon information of the death of a convict other than by natural causes, shall investigate the cause thereof and report the result of such investigation to the Governor, and for this purpose the Secretary may administer oaths and send for persons and papers. (1885, c. 379, s. 2; Rev., s. 5409; C.S., s. 7746; 1925, c. 163; 1933, c. 172, s. 18; 1955, c. 238, s. 9; 1967, c. 996, s. 15; 1973, c. 1262, s. 10.)

## ARTICLE 3.

### *Labor of Prisoners.*

### § 148-26. State policy on employment of prisoners.

(a) It is declared to be the public policy of the State of North Carolina that all able-bodied prison inmates shall be required to perform diligently all work assignments provided for them. The failure of any inmate to perform such a work assignment may result in disciplinary action. Work assignments and employment shall be for the public benefit to reduce the cost of maintaining the inmate population while enabling inmates to acquire or retain skills and work habits needed to secure honest employment after their release.

In exercising his power to enter into contracts to supply inmate labor as provided by this section, the Secretary of Correction shall not assign any inmate to work under any such contract who is eligible for work release as provided in this Article, study release as provided by G.S. 148-4(4), or who is eligible for a program of vocational rehabilitation services through the State Vocational Rehabilitation Agency, unless suitable work release employment or educational opportunity cannot be found for the inmate, and the inmate is not eligible for a program of vocational rehabilitation services through the State Vocational Rehabilitation Agency, and shall not agree to supply inmate labor for any project or service unless it meets all of the following criteria:

- (1) The project or service involves a type of work by which inmates can develop a skill to better equip themselves to return to society;
- (2) The project or service is of benefit to the citizens of North Carolina or units of State or local government thereof, regardless of whether the project or service is performed on public or private property;
- (3) Repealed by Session Laws 1977, c. 824, s. 2.
- (4) Wages shall be paid in an amount not exceeding one dollar (\$1.00) per day per inmate by the local or State contracting agency.

(b) As many minimum custody prisoners as are available and fit for road work, who cannot appropriately be placed on work release, study release, or other full-time programs, and as many medium custody prisoners as are available, fit for road work and can be adequately guarded during such work without reducing security levels at prison units, shall be employed in the maintenance and construction of public roads of the State. The number and location of prisoners to be kept available for work on the public roads shall be agreed upon by the governing authorities of the Department of Transportation and the State Department of Correction far enough in advance of each budget to permit proper provisions to be made in the request for appropriations submitted by the Department of Transportation. Any dispute between the Departments will be resolved by the Governor. Prisoners so employed shall be compensated, at rates fixed by the Department of Correction's rules and

regulations for work performed; provided, that no prisoner working on the public roads under the provisions of this section shall be paid more than one dollar (\$1.00) per day from funds provided by the Department of Transportation to the Department of Correction for this purpose. The Department of Correction and the Department of Transportation shall develop a program to be implemented no later than July 1, 1982, to the extent money is herein appropriated, which shall include:

(1) The use of portable toilets for inmate road crews.

(c) As many of the male prisoners available and fit for forestry work shall be employed in the development and improvement of state-owned forests as can be used for this purpose by the agencies controlling these forests.

(d) The remainder of the able-bodied inmates of the State prison system shall be employed so far as practicable in prison industries and agriculture, giving preference to the production of food supplies and other articles needed by state-supported institutions or activities.

(e) The State Department of Correction may make such contracts with departments, institutions, agencies, and political subdivisions of the State for the hire of prisoners to perform other appropriate work as will help to make the prisons as nearly self-supporting as is consistent with the purposes of their creation. The Department of Correction may contract with any person or any group of persons for the hire of prisoners for forestry work, soil erosion control, water conservation, hurricane damage prevention, or any similar work certified by the Secretary of Environment and Natural Resources as beneficial in the conservation of the natural resources of this State. All contracts for the employment of prisoners shall provide that they shall be fed, clothed, quartered, guarded, and otherwise cared for by the Department of Correction. Such work may include but is not limited to work with State or local government agencies in cleaning, construction, landscaping and maintenance of roads, parks, nature trails, bikeways, cemeteries, landfills or other government-owned or operated facilities.

(f) Adult inmates of the State prison system shall be prohibited from working at or being on the premises of any schools or institutions operated or administered by the Youth Development Division of the Department of Juvenile Justice and Delinquency Prevention. (1933, c. 172, ss. 1, 14; 1957, c. 349, s. 5; 1967, c. 996, s. 13; 1971, c. 193; 1973, c. 1262, s. 86; 1975, c. 278; c. 506, ss. 1, 2; c. 682, s. 2; c. 716, s. 7; 1977, c. 771, s. 4; c. 802, s. 25.36; c. 824, ss. 1-3; 1981, c. 516; 1981 (Reg. Sess., 1982), c. 1400; 1989, c. 727, s. 218(156); 1997-443, s. 11A.123; 1999-237, s. 18.21; 2001-95, s. 8.)

**Editor's Note.** — Session Laws 1975, c. 682, s. 4, provided: "Nothing in this act shall be construed as altering or amending G.S. 148-26(b) or G.S. 148-18(a) as set out in Chapter 506 of the 1975 Session Laws."

**Effect of Amendments.** — Session Laws 2001-95, s. 8, effective May 18, 2001, substituted "Youth Development Division of the Department of Juvenile Justice and Delinquency

Prevention" for "State Division of Youth Development" in subsection (f).

**Legal Periodicals.** — For review of this section and those following, see 11 N.C.L. Rev. 252 (1933).

For a survey of 1996 developments in the law regarding prisoner rights, see 75 N.C.L. Rev. 2428 (1997).

## CASE NOTES

**Basis of Section.** — This section and §§ 148-6 and 148-33.1, as well as provisions with reference to paroles contained in Article 4 of this Chapter, are predicated upon the idea that the ability as well as the disposition of released prisoners to engage in honest employ-

ment and become law-abiding members of society is calculated to serve the best interests of the State and of its citizens. *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E.2d 18 (1960).

**Applied** in *State v. Cooper*, 238 N.C. 241, 77 S.E.2d 695 (1953); *State v. Frazier*, 142 N.C.

App. 207, 541 S.E.2d 800 (2001).

**Quoted** in *State v. Whitley*, 264 N.C. 742, 142 S.E.2d 600 (1965).

**OPINIONS OF ATTORNEY GENERAL**

**Employment of Prisoners Is Not Prohibited by Constitution Rewrite.** — See opinion of Attorney General to Senator Julian Allsbrook, 41 N.C.A.G. 440 (1971).

**§ 148-26.1. Definitions.**

The following definitions apply:

- (1) through (3) Repealed by Session Laws 1983, c. 709, s. 1.
- (4) through (7) Repealed by Session Laws 1985, c. 226.
- (8) "State public work project" or "State public work": A useful service other than the construction of buildings performed on any land, or any structure thereon, belonging to any principal department of State government as defined in subdivision (6) above, including, but not limited to, State parks, campuses, playgrounds, highways, roads, lakes, forests and waterways.
- (9) Repealed by Session Laws 1985, c. 226, s. 2. (1975, c. 682, s. 3; 1983, c. 709, s. 1; 1985, c. 226, s. 2.)

**Editor's Note.** — Session Laws 1975, c. 682, s. 4, provided: "Nothing in this act shall be construed as altering or amending G.S. 148-26(b) or G.S. 148-18(a) as set out in Chapter 506 of the 1975 Session Laws."

**§§ 148-26.2 through 148-26.4:** Repealed by Session Laws 1983, c. 709, s. 1.

**§ 148-26.5. Pay and time allowances for work.**

The provisions of G.S. 148-18 and 148-13 shall be applicable to inmate work on local or State public work projects contracted for by the Secretary of Correction as provided by G.S. 148-26 through 148-26.4. Travel, cost of inmate wages and custodial supervision expenses incurred by the Department of Correction and arising out of a local or State public work project shall be reimbursed on a cost basis to the Department of Correction by the local or State contracting agency. (1975, c. 682, s. 3.)

**Editor's Note.** — Session Laws 1975, c. 682, s. 4, provided: "Nothing in this act shall be construed as altering or amending G.S. 148-26(b) or G.S. 148-18(a) as set out in Chapter 506 of the 1975 Session Laws." Sections 148-26.2 to 148-26.4, referred to in this section, were repealed by Session Laws 1983, c. 709, s. 1.

**§ 148-27. Women prisoners; limitations on labor of prisoners.**

The State Department of Correction may provide suitable quarters for women prisoners and arrange for work suitable to their capacity; and the several courts of the State may assign women convicted of offenses, whether felonies or misdemeanors, to these quarters. No woman prisoner shall be assigned to work under the supervision of the State Department of Correction whose term of imprisonment is less than six months, or who is under 16 years of age. (1931, c. 145, s. 32; 1933, c. 39; c. 172, s. 18; 1935, c. 257, s. 3; 1943, c. 409; 1953, c. 1230; 1957, c. 349, s. 10; 1967, c. 996, s. 13.)

## CASE NOTES

**In sentencing a woman defendant convicted of a misdemeanor, the court may designate the place of imprisonment** as the quarters provided by the State Highway and Public Works Commission (now State Department of Correction) for women prisoners, and upon a finding that such quarters are main-

tained in the central prison at Raleigh, order defendant's imprisonment in such quarters at that place. *State v. Cagle*, 241 N.C. 134, 84 S.E.2d 649 (1954).

**Cited** in *State v. Brown*, 252 N.C. 366, 113 S.E.2d 584 (1960).

## § 148-28. Sentencing prisoners to Central Prison; youthful offenders.

When a sentenced offender is to be taken to the Central Prison at Raleigh, a sheriff or other appropriate officer of the county shall cause such prisoner to be delivered with the proper commitment papers to the warden of the Central Prison. A person under 16 years of age convicted of a felony shall not be imprisoned in the Central Prison at Raleigh unless:

- (1) The person was convicted of a capital felony; or
- (2) He has previously been imprisoned in a county jail or under the authority of the Department of Correction upon conviction of a felony.

This provision shall not limit the authority of the Secretary of Correction from transferring a person under 16 years of age to Central Prison when in the Secretary's determination this person would not benefit from confinement in separate facilities for youthful offenders or when it has been determined that his presence would be detrimental to the implementation of programs designed for the benefit of other youthful offenders. Nor shall this provision limit the authority of the judges of the superior courts of this State or the Secretary of Correction from committing or transferring a person under 16 years of age to Central Prison for medical or psychiatric treatment. (1933, c. 172, s. 7; 1971, c. 691; 1973, c. 1262, s. 10; 1977, c. 711, s. 27; 1977, 2nd Sess., c. 1147, s. 32.)

**Editor's Note.** — Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by

its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

## CASE NOTES

**Transfer by Court Pursuant to § 162-39.** — Under § 162-39, the trial court, upon making an appropriate finding that it is necessary for the safety of the defendant, may order a defendant transferred to "a unit of the State Prison System designated by the Commissioner of Correction [now Secretary of Correction] or his authorized representative," but the court should not order defendant transferred directly to Central Prison absent a finding that the Central Prison has been properly designated

for that purpose by the Commissioner of Correction [now Secretary of Correction] or his authorized representative. *State v. Sherron*, 4 N.C. App. 386, 166 S.E.2d 836 (1969).

**As to who could be sentenced to Central Prison prior to 1977 amendment**, see *State v. Cagle*, 241 N.C. 134, 84 S.E.2d 649 (1954); *State v. Floyd*, 246 N.C. 434, 98 S.E.2d 478 (1957); *State v. Sherron*, 4 N.C. App. 386, 166 S.E.2d 836 (1969).

## § 148-29. Transportation of convicts to prison; reimbursement to counties; sheriff's expense affidavit.

(a) The sheriff having in charge any prisoner to be taken to the State prison system shall send the prisoner to the custody of the Department of Correction

after sentencing and the disposal of all pending charges against the prisoner, if no appeal has been taken. Beginning on the day after the Division of Prisons has been notified by the sheriff that a prisoner is ready for transfer and the Division has informed the sheriff that bedspace is not available for that prisoner, and continuing through the day the prisoner is received by the Division of Prisons, the Department of Correction shall pay the county:

- (1) A standard sum set by the General Assembly in its appropriations acts for the cost of providing food, clothing, personal items, supervision, and necessary ordinary medical services to the prisoner awaiting transfer to the State prison system; and
- (2) Extraordinary medical costs, as defined in G.S. 148-32.1(a), incurred by prisoners awaiting transfer to the State prison system.

If the Division of Prisons determines that bedspace is not available for a prisoner after the sheriff has notified the Division that the prisoner is ready for transfer, reimbursement under this subsection shall be made beginning on the day after the sheriff gave the notification.

(b) The sheriff having in charge any parolee or post-release supervisee to be taken to the State prison system shall send the prisoner to the custody of the Department of Correction after preliminary hearing held under G.S. 15A-1368.6(b) or G.S. 15A-1376(b). Beginning on the day after the Division of Prisons has been notified by the sheriff that a prisoner is ready for transfer and the Division has informed the sheriff that bedspace is not available for that prisoner, and continuing through the day the prisoner is received by the Division of Prisons, the Department of Correction shall pay the county:

- (1) A standard sum set by the General Assembly in its appropriations acts for the cost of providing food, clothing, personal items, supervision, and necessary ordinary medical services to the parolee or post-release supervisee awaiting transfer to the State prison system; and
- (2) Extraordinary medical costs, as defined in G.S. 148-32.1(a), incurred by parolees or post-release supervisees awaiting transfer to the State prison system.

If the Division of Prisons determines that bedspace is not available for a prisoner after the sheriff has notified the Division that the prisoner is ready for transfer, reimbursement under this subsection shall be made beginning on the day after the sheriff gave the notification.

(c) The sheriff shall file with the board of commissioners of his county a copy of his affidavit as to necessary guard, together with a copy of his itemized account of expenses, both certified to by him as true copies of those on file in his office. (1869-70, c. 180, s. 3; 1870-1, c. 124, s. 3; 1874-5, c. 107, s. 3; Code, ss. 3432, 3437, 3438; Rev., ss. 5398, 5399, 5400; C. S., ss. 7718, 7719, 7720; 1925, c. 163; 1933, c. 172, s. 18; 1957, c. 349, s. 10; 1967, c. 996, s. 13; 1977, c. 711, s. 28; 1977, 2nd Sess., c. 1147, s. 32; 1993, c. 257, s. 18; 1996, 2nd Ex. Sess., c. 18, s. 20.2(a); 1997-443, s. 19(a); 1999-237, s. 18.10(b).)

**Editor's Note.** — Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1995, c. 507, s. 28.9, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1995-97 fiscal biennium, the

textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1995-97 biennium."

Session Laws 1999-237, s. 18.10(a), as amended by Session Laws 2000-67, s. 16.2, provides that the Department of Correction may use funds appropriated to the Department for the 1999-2000 and 2000-2001 fiscal years to pay the sum of forty dollars (\$40.00) per day as reimbursement to counties for the cost of housing convicted inmates and parolees and post-release supervisees awaiting transfer to the State prison system, as provided in G.S. 148-29. The Department shall report quarterly on the

expenditure of funds to reimburse counties for prisoners awaiting transfer and on its progress in reducing the jail backlog. For prior similar provisions, see Session Laws 1995, c. 507, s. 19.4, Session Laws 1996, Second Extra Session, c. 18, ss. 20.2(b) and (c), Session Laws 1997-443, s. 19(b), and Session Laws 1998-212, s. 17.2.

Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvement Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 30.4 contains a severability clause.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2001-424, s. 25.4, provides: "The Department of Correction may use funds appropriated to the Department for the 2001-2002 fiscal year to pay the sum of forty dollars (\$40.00) per day as reimbursement to counties for the cost of housing convicted inmates, parolees, and post-release supervisees awaiting transfer to the State prison system, as provided in G.S. 148-29. The Department shall report by December 1 and May 1 of each year to the Joint Legislative Commission on Governmental Operations, the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee, the Chairs of the Senate and House of Representatives Appropriations Committees, and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the expenditure of funds to reimburse counties for prisoners awaiting transfer and on its progress in reducing the jail backlog."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

#### CASE NOTES

**Expense of Conveying Convicts.** — The last sentence of this section only applies to the expense of maintenance and does not apply to the expense of conveying convicts to the penitentiary. By the acts of 1869-70 it was espe-

cially provided that the expense of conveying should be paid by the State and this section did not repeal that act. *Taylor v. Adams*, 66 N.C. 338 (1872).

#### § 148-30: Repealed by Session Laws 1977, c. 711, s. 33.

**Editor's Note.** — Session Laws 1977, c. 711, s. 34, provided: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provided: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

### § 148-31. Maintenance of Central Prison; warden; powers and duties.

The Central Prison shall be maintained in such a manner as to conform to all the requirements of Article XI of the State Constitution, relating to a State's prison. A suitable person shall be appointed warden of the Central Prison, and he shall succeed to and be vested with all the rights, duties, and powers heretofore vested by law in the superintendent of the State's prison or the warden thereof with respect to capital punishment, or any matter of discipline of the inmates of the prison not otherwise provided for in this Article. (1933, c. 172, s. 14.)

§ 148-32: Repealed by Session Laws 1977, c. 450, s. 2.

**Editor's Note.** — This section was also repealed by Session Laws 1977, c. 711, s. 33.

### § 148-32.1. Local confinement, costs, alternate facilities, parole, work release.

(a) The Department of Correction shall pay each local confinement facility a standard sum set by the General Assembly in its appropriation acts at a per day, per inmate rate, for the cost of providing food, clothing, personal items, supervision and necessary ordinary medical services to those inmates committed to the custody of the local confinement facility to serve sentences of 30 days or more. This reimbursement shall not include any period of detention prior to actual commitment by the sentencing court. The Department shall also pay to the local confinement facility extraordinary medical expenses incurred for the inmates, defined as follows:

- (1) Medical expenses incurred as a result of providing health care to an inmate as an inpatient (hospitalized);
- (2) Other medical expenses when the total cost exceeds thirty-five dollars (\$35.00) per occurrence or illness as a result of providing health care to an inmate as an outpatient (nonhospitalized); and
- (3) Cost of replacement of eyeglasses and dental prosthetic devices if those eyeglasses or devices are broken while the inmate is incarcerated, provided the inmate was using the eyeglasses or devices at the time of his commitment and then only if prior written consent of the Department is obtained by the local facility.

(b) In the event that the custodian of the local confinement facility certifies in writing to the clerk of the superior court in the county in which said local confinement facility is located that the local confinement facility is filled to capacity, or that the facility cannot reasonably accommodate any more prisoners due to segregation requirements for particular prisoners, or that the custodian anticipates, in light of local experiences, an influx of temporary prisoners at that time, or if the local confinement facility does not meet the minimum standards published pursuant to G.S. 153A-221, any judge of the district court in the district court district as defined in G.S. 7A-133 where the facility is located, or any superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in a district or set of districts as defined in G.S. 7A-41.1 where the facility is located may order that the prisoner be transferred to any other qualified local confinement facility within that district or within another such district where space is available, including a satellite jail unit operated pursuant to G.S. 153A-230.3 if the prisoner is a non-violent misdemeanor, which local facility shall accept the transferred prisoner, if the prison population has exceeded a manageable level as provided for in G.S.

148-4.1(a). If no such local confinement facility is available, then any such judge may order the prisoner transferred to such camp or facility as the proper authorities of the Department of Correction shall designate, notwithstanding that the term of imprisonment of the prisoner is 90 days or less. In no event, however, shall a prisoner whose term of imprisonment is less than 30 days be assigned or ordered transferred to any such camp or facility.

(c) When a prisoner sentenced for a conviction of impaired driving under G.S. 20-138.1 is assigned to a local confinement facility pursuant to this section, the clerk of the superior court in the county in which the sentence was imposed shall immediately forward a copy of the commitment order to the Post-Release Supervision and Parole Commission so that the prisoner will be eligible for parole pursuant to G.S. 15A-1371.

(d) When a prisoner serving a sentence of 30 days or more in a local confinement facility is placed on work release pursuant to a recommendation of the sentencing court, the custodian of the facility shall forward the prisoner's work-release earnings to the Department of Correction, which shall disburse the earnings as determined under G.S. 148-33.1(f). When a prisoner serving a sentence of 30 days or more in a local confinement facility is placed on work release pursuant to an order of the sentencing court, the custodian of the facility shall forward the prisoner's work-release earnings to the clerk of the court that sentenced the prisoner or to the Department of Correction, as provided in the prisoner's commitment order. The clerk or the Department, as appropriate, shall disburse the earnings as provided in the prisoner's commitment order. Upon agreement between the Department of Correction and the custodian of the local confinement facility, however, the clerk may disburse to the local confinement facility the amount of the earnings to be paid for the cost of the prisoner's keep, and that amount shall be set off against the reimbursement to be paid by the Department to the local confinement facility pursuant to G.S. 148-32.1(a).

(e) Upon entry of a prisoner serving a sentence of imprisonment for impaired driving under G.S. 20-138.1 into a local confinement facility pursuant to this section, the custodian of the local confinement facility shall forward to the Post-Release Supervision and Parole Commission information pertaining to the prisoner so as to make him eligible for parole consideration pursuant to G.S. 15A-1371. Such information shall include date of incarceration, jail credit, and such other information as may be required by the Post-Release Supervision and Parole Commission. The Post-Release Supervision and Parole Commission shall approve a form upon which the custodian shall furnish this information, which form will be provided to the custodian by the Department of Correction. (1977, c. 450, s. 3; c. 925, s. 2; 1981, c. 859, s. 25; 1985, c. 226, s. 3(1), (2); 1985 (Reg. Sess., 1986), c. 1014, ss. 199, 201(e); 1987, c. 7, ss. 2, 6; 1987 (Reg. Sess., 1988), c. 1037, s. 120; c. 1100, s. 17.4(a); 1989, c. 1, s. 2; c. 761, s. 3; 1991, c. 217, s. 6; 1993, c. 538, s. 33; 1994, Ex. Sess., c. 14, s. 65; c. 24, s. 14(b); 1995, c. 324, s. 19.9(f); 1997-456, s. 23.)

**Editor's Note.** — Session Laws 1987, c. 7, s. 6 as amended by Session Laws 1989, c. 1, s. 2, had provided that the amendment to subsection (b) of this section by s. 2 of the act would

expire July 1, 1991, unless reenacted by the General Assembly. However, the expiration provision was deleted by Session Laws 1991, c. 217, s. 6.

#### OPINIONS OF ATTORNEY GENERAL

**Misdemeanants with sentences of 180 days or less** are not to be sent to the Department of Correction, but must be jailed in a "local confinement facility" (subject to the lim-

ited exception found at § 148-32.1). See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

**§ 148-33. Prison labor furnished other State agencies.**

The State Department of Correction may furnish to any of the other State departments, State institutions, or agencies, upon such conditions as may be agreed upon from time to time between the Department and the governing authorities of such Department, institution or agency, prison labor for carrying on any work where it is practical and desirable to use prison labor in the furtherance of the purposes of any State department, institution or agency, and such other employment as is now provided by law for inmates of the State's prison under the provisions of G.S. 148-6: Provided that such prisoners shall at all times be under the custody of and controlled by the duly authorized agent of such Department. Provided, further, that notwithstanding any provisions of law contained in this Article or in this Chapter, no male prisoner or group of male prisoners may be assigned to work in any building utilized by any State department, agency, or institution where women are housed or employed unless a duly designated custodial agent of the Secretary of Correction is assigned to the building to maintain supervision and control of the prisoner or prisoners working there. (1933, c. 172, s. 30; 1957, c. 349, s. 10; 1961, c. 966; 1967, c. 996, ss. 13, 15; 1973, c. 1262, s. 10.)

**CASE NOTES**

**Cited** in *State v. Kimball*, 261 N.C. 582, 135 S.E.2d 568 (1964).

**§ 148-33.1. Sentencing, quartering, and control of prisoners with work-release privileges.**

(a) Whenever a person is sentenced to imprisonment for a term to be served in the State prison system or a local confinement facility, the Secretary of the Department of Correction may authorize the Director of Prisons or the custodian of the local confinement facility to grant work-release privileges to any inmate who is eligible for work release and who has not been granted work-release privileges by order of the sentencing court. The Secretary of Correction shall authorize immediate work-release privileges for any person serving a sentence not exceeding five years in the State prison system and for whom the presiding judge shall have recommended work-release privileges when (i) it is verified that appropriate employment for the person is available in an area where, in the judgment of the Secretary, the Department of Correction has facilities to which the person may suitably be assigned, and (ii) custodial and correctional considerations would not be adverse to releasing the person without supervision into the free community.

(b) Repealed by Session Laws 1981, c. 541, s. 2.

(c) The State Department of Correction shall from time to time, as the need becomes evident, designate and adapt facilities in the State prison system for quartering prisoners with work-release privileges. No State or county prisoner shall be granted work-release privileges by the Director of Prisons or the custodian of a local confinement facility until suitable facilities for quartering him have been provided in the area where the prisoner has employment or the offer of employment.

(d) The Secretary of Corrections is authorized and directed to establish a work-release plan under which an eligible prisoner may be released from actual custody during the time necessary to proceed to the place of his employment, perform his work, and return to quarters designated by the prison authorities. If the prisoner shall violate any of the conditions prescribed by prison rules and regulations for the administration of the work-release

plan, then such prisoner may be withdrawn from work-release privileges, and the prisoner may be transferred to the general prison population to serve out the remainder of his sentence. Rules and regulations for the administration of the work-release plan shall be established in the same manner as other rules and regulations for the government of the State prison system.

(e) The State Department of Labor shall exercise the same supervision over conditions of employment for persons working in the free community while serving sentences imposed under this section as the Department does over conditions of employment for free persons.

(f) A prisoner who is convicted of a felony and who is granted work-release privileges shall give his work-release earnings, less standard payroll deductions required by law, to the Department of Correction. A prisoner who is convicted of a misdemeanor, is committed to a local confinement facility, and is granted work-release privileges by order of the sentencing court shall give his work-release earnings, less standard payroll deductions required by law, to the custodian of the local confinement facility. Other misdemeanants granted work-release privileges shall give their work-release earnings, less standard payroll deductions required by law, to the Department of Correction. The Department of Correction or the sentencing court, as appropriate, shall determine the amount to be deducted from a prisoner's work-release earnings to pay for the cost of the prisoner's keep and to accumulate a reasonable sum to be paid the prisoner when he is paroled or discharged from prison. The Department or sentencing court shall also determine the amount to be disbursed by the Department or clerk of court, as appropriate, for each of the following:

- (1) To pay travel and other expenses of the prisoner made necessary by his employment;
- (2) To provide a reasonable allowance to the prisoner for his incidental personal expenses;
- (3) To make payments for the support of the prisoner's dependents in accordance with an order of a court of competent jurisdiction, or in the absence of a court order, in accordance with a determination of dependency status and need made by the local department of social services in the county of North Carolina in which such dependents reside;
- (3a) To make restitution or reparation as provided in G.S. 148-33.2.
- (4) To comply with an order from any court of competent jurisdiction regarding the payment of an obligation of the prisoner in connection with any judgment rendered by the court.
- (5) To comply with a written request by the prisoner to withhold an amount, when the request has been granted by the Department or the sentencing court, as appropriate.

Any balance of his earnings remaining at the time the prisoner is released from prison shall be paid to him. The Social Services Commission is authorized to promulgate uniform rules and regulations governing the duties of county social services departments under this section.

(g) No prisoner employed in the free community under the provisions of this section shall be deemed to be an agent, employee, or involuntary servant of the State prison system while working in the free community or going to or from such employment.

(h) Any prisoner employed under the provisions of this section shall not be entitled to any benefits under Chapter 96 of the General Statutes entitled "Employment Security" during the term of the sentence.

(i) No recommendation for work release shall be made at the time of sentencing in any case in which the presiding judge shall suspend the imposition of sentence and place a convicted person on probation; however, if

probation be subsequently revoked and the active sentence of imprisonment executed, the court may at that time recommend work release. Neither a recommendation for work release by the court or the decision of the Secretary of Correction to place a person on work release shall give rise to any vested statutory right to an individual to be placed on or continued on work release.

(j) The provisions of subsections (f), (g), and (h) of this section shall also apply to prisoners employed in private prison enterprises conducted pursuant to G.S. 148-70. (1957, c. 540; 1959, c. 126; 1961, c. 420; 1963, c. 469, ss. 1, 2; 1967, c. 684; c. 996, s. 13; 1969, c. 982; 1973, c. 476, s. 138; c. 1262, s. 10; 1975, c. 22, ss. 1-3; c. 679, s. 3; 1977, c. 450, ss. 4, 5; c. 614, s. 6; c. 623, ss. 1, 2; c. 711, s. 29; 1977, 2nd Sess., c. 1147, s. 32; 1981, c. 541, ss. 1-3; 1985, c. 474, s. 3; 1985 (Reg. Sess., 1986), c. 1014, s. 201(f)-(i); 1991 (Reg. Sess., 1992), c. 902, s. 6.)

**Editor's Note.** — Session Laws 1977, c. 711, which amended subsection (b), provided in s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions

of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

**Legal Periodicals.** — For note on prisoners' rights and an inmate's liberty interest in work release programs, see 17 Wake Forest L. Rev. 273 (1981).

For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

#### CASE NOTES

**As to constitutionality of this section,** see Advisory Opinion in *In re Work-Release Statute*, 268 N.C. 727, 152 S.E.2d 225 (1966).

**Basis of Section.** — This section and §§ 146-6 and 146-26, as well as provisions with reference to paroles contained in Article 4 of this Chapter, are predicated upon the idea that the ability as well as the disposition of released prisoners to engage in honest employment and become law-abiding members of society is calculated to serve the best interests of the State and of its citizens. *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E.2d 18 (1960).

**Honor-Grade Status, Work-Release Privilege and Parole Are Discretionary Acts of Clemency.** — Honor-grade status, work-release privilege, and parole are discretionary acts of grace or clemency extended by the State as a reward for good behavior, conferring no vested rights upon the convicted person. An accused person must be given full constitu-

tional protection before and during his trial, but procedures of constitutional dimension are not appropriate in subsequent determinations of rewards for good behavior while serving a validly imposed sentence of confinement. *Goble v. Bounds*, 13 N.C. App. 579, 186 S.E.2d 638, aff'd, 281 N.C. 307, 188 S.E.2d 347 (1972).

**In Mitigation of Terms of Judgment.** — The granting of honor-grade status, work release, and parole is by way of mitigating the terms of the judgment which the court has entered. The legality and propriety of the trial and sentence have already been determined after the prisoner has been heard and his constitutional rights have been accorded him. The merits of the trial and the validity of the judgment may not again be raised before the Department of Correction and the Board of Paroles (now Parole Commission). *Goble v. Bounds*, 281 N.C. 307, 188 S.E.2d 347 (1972).

### § 148-33.2. Restitution by prisoners with work-release privileges.

(a) Repealed by Session Laws 1985, c. 474, s. 4.

(b) As a rehabilitative measure, the Secretary of the Department of Correction is authorized to require any prisoner granted work-release privileges to make restitution or reparation to an aggrieved party from any earnings gained by the defendant while on work release when the sentencing court recommends that restitution or reparation be paid by the defendant out of any earnings gained by the defendant if he is granted work-release privileges and out of other resources of the defendant, including all real and personal property owned by the defendant and the income derived from such property.

The Secretary shall not be bound by such recommendation, but if they elect not to implement the recommendation, they shall state in writing the reasons therefor, and shall forward the same to the sentencing court.

(c) When an active sentence is imposed, the court shall consider whether, as a rehabilitative measure, it should recommend to the Secretary of Correction that restitution or reparation be made by the defendant out of any earnings gained by the defendant if he is granted work-release privileges and out of other resources of the defendant, including all real and personal property owned by the defendant, and income derived from such property. If the court determines that restitution or reparation should not be recommended, it shall so indicate on the commitment. If, however, the court determines that restitution or reparation should be recommended, the court shall make its recommendation a part of the order committing the defendant to custody. The recommendation shall be in accordance with the applicable provisions of G.S. 15A-1343(d) and Article 81C of Chapter 15A of the General Statutes. If the offense is one in which there is evidence of physical, mental or sexual abuse of a minor, the court may order the defendant to pay from work release earnings the cost of rehabilitative treatment for the minor. The Administrative Office of the Courts shall prepare and distribute forms which provide ample space to make restitution or reparation recommendations incident to commitments, which forms shall be conveniently structured to enable the sentencing court to make its recommendation.

(d) The Secretary of the Department of Correction shall establish rules and regulations to implement this section, which shall include adequate notice to the prisoner that the payment of restitution or reparation from any earnings gained by the prisoner while on work release is being considered as a condition of any work-release privileges granted the prisoner, and opportunity for the prisoner to be heard. Such rules and regulations shall also provide additional methods whereby facts may be obtained to supplement the recommendation of the sentencing court. (1977, c. 614, s. 7; 1977, 2nd Sess., c. 1147, s. 33; 1981, c. 541, ss. 4-9; 1985, c. 474, s. 4; 1987, c. 397, ss. 2, 3; c. 598, s. 5; 1998-212, s. 19.4(g).)

#### CASE NOTES

**Constitutionality.** — Since the decision to impose restitution or reparation is discretionary with the trial court and the Secretary, and since indigency could be considered in making that decision, subsection (c) of this section and § 148-57.1(c) are not unconstitutional as a denial of equal protection discriminating against indigent defendants. *State v. Lambert*, 40 N.C. App. 418, 252 S.E.2d 855 (1979).

The requirement that a defendant pay restitution under subsection (c) of this section or § 148-57.1(c) as a condition of obtaining work-release or parole is not inherently unconstitutional. Whether the restitution requirement is unconstitutional as applied to a particular defendant may only be determined by considering the defendant's financial status and other relevant circumstances at the time when the restitution must be paid, that is, after a defendant becomes eligible for work-release privileges or parole. *State v. Parton*, 303 N.C. 55, 277 S.E.2d 410 (1981).

**Restitution is intended to be compensatory, not punitive.** *State v. Easter*, 101 N.C.

App. 36, 398 S.E.2d 619 (1990).

**The purpose of this section and § 15A-1343(b)(6) is rehabilitation and not additional penalty** or punishment, and the sum ordered or recommended must be reasonably related to the damages incurred. If the trial evidence does not support the amount ordered or recommended, then supporting evidence should be required in the sentencing hearing. *State v. Killian*, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

**And Court's Order or Recommendation for Restitution or Restoration Must Be Supported by Evidence.** — Together subsection (c) of this section and § 15A-1343(b)(6) require that any order or recommendation of the sentencing court for restitution or restoration to the aggrieved party as a condition of attaining work-release privileges must be supported by the evidence. *State v. Killian*, 37 N.C. App. 234, 245 S.E.2d 812 (1978); *State v. Wilson*, 340 N.C. 720, 459 S.E.2d 192 (1995).

An order of restitution as a condition of work-release must be supported by evidence

adduced at trial or at sentencing. *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557, aff'd, 318 N.C. 502, 349 S.E.2d 576 (1986).

**Amount of Restitution Must Be Supported by Evidence.** — Regardless of whether restitution is ordered or recommended by the trial court, the amount must be supported by the evidence. *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557, aff'd, 318 N.C. 502, 349 S.E.2d 576 (1986).

**There must be something more than a guess or conjecture as to an appropriate amount of restitution, as restitution is not intended to punish defendants, but to compensate victims.** *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557, aff'd, 318 N.C. 502, 349 S.E.2d 576 (1986).

**Court Not Required to Consider Ability to Pay.** — Trial court did not err in failing to consider defendant's ability to pay restitution, as the potentially binding determination at a later date requiring defendant to pay restitution as a condition of work release or parole by either the Department of Correction or the Parole Commission would by necessity require sufficient evidence of defendant's ability to pay at that time. *State v. Wilson*, 340 N.C. 720, 459 S.E.2d 192 (1995).

**Duty of Sentencing Court to Consider Restitution or Restoration as Prerequisite to Work-Release.** — The sentencing court is not only authorized but is required by subsection (c) of this section, when an active sentence is imposed, to consider whether, as a further rehabilitative measure, restitution or restoration should be ordered or recommended to the Secretary of Correction to be imposed as a condition of attaining work-release privileges. *State v. Killian*, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

**But the decision to recommend restitution or reparation is discretionary, and the trial court is not required to impose such a condition.** *State v. Lambert*, 40 N.C. App. 418, 252 S.E.2d 855 (1979).

**A recommendation of restitution as a condition of work-release is not binding on the Parole Commission or Department of Corrections.** *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557, aff'd, 318 N.C. 502, 349 S.E.2d 576 (1986).

**Restitution or reparation may only be**

**recommended** as a condition of work-release, and the trial court is without authority to "order" restitution as a condition of work release. *State v. Easter*, 101 N.C. App. 36, 398 S.E.2d 619 (1990).

**Restitution Cannot Be Imposed with Active Prison Sentence.** — When a court imposes an active sentence, it may recommend restitution as a condition of work-release, as a condition of post-release supervision and parole, or as a condition of probation, but it may not require the defendant to make restitution while serving an active sentence. *State v. Hughes*, 136 N.C. App. 92, 524 S.E.2d 63 (1999).

**Imposition of Fine Is Not Restitution.** — When an active sentence is imposed, the judge should consider whether, as a further rehabilitative measure, restitution or reparation should be ordered or recommended to the Secretary of Correction to be imposed as a condition of attaining work-release privileges; however, the imposition of a fine is not restitution or reparation within the meaning of this section and should not be included in a judgment under this section. *State v. Alexander*, 47 N.C. App. 502, 267 S.E.2d 396 (1980).

**State as "Aggrieved Party."** — Although the North Carolina Supreme Court has never definitively decided the issue, there is persuasive authority in North Carolina law supporting the State's right to claim the status of an "aggrieved party" for the expenses associated with providing court-appointed counsel. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

**Order of Restitution Vacated.** — Order requiring defendant to pay one-third of his income to the clerk was vacated where the record revealed only that the victim was separated from his wife, and that they had two children who lived with their mother at the time the victim died. *State v. Easter*, 101 N.C. App. 36, 398 S.E.2d 619 (1990).

**Applied** in *State v. Simpson*, 61 N.C. App. 151, 300 S.E.2d 412 (1983); *State v. Stallings*, 316 N.C. 535, 342 S.E.2d 519 (1986).

**Cited** in *State v. Bunn*, 66 N.C. App. 187, 310 S.E.2d 792 (1984); *State v. Buchanan*, 108 N.C. App. 338, 423 S.E.2d 819 (1992); *State v. Ray*, 125 N.C. App. 721, 482 S.E.2d 755 (1997).

§§ 148-34, 148-35: Repealed by Session Laws 1957, c. 349, s. 11.

### § 148-36. Secretary of Correction to control classification and operation of prison facilities.

All facilities established or acquired by the State Department of Correction shall be under the administrative control and direction of the Secretary of Correction, and operated under rules and regulations proposed by the Secre-

tary and adopted by the Department of Correction as provided in G.S. 148-11. Subject to such rules and regulations, the Secretary shall classify the facilities of the State prison system and develop a variety of programs so as to permit proper segregation and treatment of prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and correctional treatment of persons committed to the Department. The Secretary of Correction, or his authorized representative, shall designate the places of confinement where sentences to imprisonment in the State's prison system shall be served. The Secretary or his representative may designate any available facility appropriate for the individual in view of custodial and correctional considerations. (1931, c. 145, s. 28; c. 277, s. 8; 1933, c. 46, ss. 3, 4; c. 172, ss. 4, 17; 1943, c. 409; 1955, c. 238, s. 7; 1957, c. 349, s. 10; 1967, c. 996, s. 7; 1973, c. 1262, s. 10.)

#### CASE NOTES

**A State prisoner has no legal right to the mitigation of his punishment.** *Wetzel v. Edwards*, 635 F.2d 283 (4th Cir. 1980).

**The question as to whether a particular inmate is entitled to honor grade status or parole involves policy decisions which**

should be made by the department and the Parole Board, not the courts. *Wetzel v. Edwards*, 635 F.2d 283 (4th Cir. 1980).

**Cited** in *Slakan v. Porter*, 737 F.2d 368 (4th Cir. 1984).

### § 148-37. Additional facilities authorized; contractual arrangements.

(a) Subject to the provisions of G.S. 143-341, the State Department of Correction may establish additional facilities for use by the Department, such facilities to be either of a permanent type of construction or of a temporary or movable type as the Department may find most advantageous to the particular needs, to the end that the prisoners under its supervision may be so distributed throughout the State as to facilitate individualization of treatment designed to prepare them for lawful living in the community where they are most likely to reside after their release from prison. For this purpose, the Department may purchase or lease sites and suitable lands adjacent thereto and erect necessary buildings thereon, or purchase or lease existing facilities, all within the limits of allotments as approved by the Department of Administration.

(b) The Secretary of Correction may contract with the proper official of the United States or of any county or city of this State for the confinement of federal prisoners after they have been sentenced, county, or city prisoners in facilities of the State prison system or for the confinement of State prisoners in any county or any city facility located in North Carolina, or any facility of the United States Bureau of Prisons, when to do so would most economically and effectively promote the purposes served by the Department of Correction. Except as otherwise provided, any contract made under the authority of this subsection shall be for a period of not more than two years, and shall be renewable from time to time for a period not to exceed two years. Contracts made under the authority of this subsection for the confinement of State prisoners in local or district confinement facilities may be for a period of not more than 10 years and renewable from time to time for a period not to exceed 10 years, and shall be subject to the approval of the Council of State and the Department of Administration after consultation with the Joint Legislative Commission on Governmental Operations. Contracts for receiving federal, county and city prisoners shall provide for reimbursing the State in full for all costs involved. The financial provisions shall have the approval of the Depart-

ment of Administration before the contract is executed. Payments received under such contracts shall be deposited in the State treasury for the use of the State Department of Correction. Such payments are hereby appropriated to the State Department of Correction as a supplementary fund to compensate for the additional care and maintenance of such prisoners as are received under such contracts.

(b1) Recodified as G.S. 148-37.2 by Session Laws 2001-84, s. 1, effective May 17, 2001.

(c) In addition to the authority contained in subsections (a) and (b) of this section, and in addition to the contracts ratified by subsection (f) of this section, the Secretary of Correction may enter into contracts with any public entity or any private nonprofit or for-profit firms for the confinement and care of State prisoners in any out-of-state correctional facility when to do so would most economically and effectively promote the purposes served by the Department of Correction. Contracts entered into under the authority of this subsection shall be for a period not to exceed two years and shall be renewable from time to time for a period not to exceed two years. Prisoners may be sent to out-of-state correctional facilities only when there are no available facilities in this State within the State prison system to appropriately house those prisoners. Any contract made under the authority of this subsection shall be approved by the Department of Administration before the contract is executed. Before expending more than the amount specifically appropriated by the General Assembly for the out-of-state housing of inmates, the Department shall obtain the approval of the Joint Legislative Commission on Governmental Operations and shall report such expenditures to the Chairs of the Senate and House Appropriations Committees, the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety, and the Chairs of the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee.

(d) Prisoners confined in out-of-state correctional facilities pursuant to subsection (c) of this section shall remain subject to the rules adopted for the conduct of persons committed to the State prison system. The rules regarding good time and gain time, discipline, classification, extension of the limits of confinement, transfers, housing arrangements, and eligibility for parole shall apply to inmates housed in those out-of-state correctional facilities. The operators of those out-of-state correctional facilities may promulgate any other rules as may be necessary for the operation of those facilities with the written approval of the Secretary of Correction. Custodial officials employed by an out-of-state correctional facility are agents of the Secretary of Correction and may use those procedures for use of force authorized by the Secretary of Correction not inconsistent with the laws of the State of situs of the facility to defend themselves, to enforce the observance of discipline in compliance with correctional facility rules, to secure the person of a prisoner, and to prevent escape. Prisoners confined to out-of-state correctional facilities may be required to perform reasonable work assignments within those facilities. Private firms under subsection (c) of this section shall employ inmate disciplinary and grievance policies of the North Carolina Department of Correction.

(e) Repealed by Session Laws 1995, c. 324, s. 19.10.

(f) Any contracts entered into by the Department of Correction with public contractors prior to March 25, 1994, for the out-of-state housing of inmates are ratified.

(g) The Secretary of Correction may contract with private for-profit or nonprofit firms for the provision and operation of four or more confinement facilities totaling up to 2,000 beds in the State to house State prisoners when to do so would most economically and effectively promote the purposes served by the Department of Correction. This 2,000-bed limitation shall not apply to

the 500 beds in private substance abuse treatment centers authorized by the General Assembly prior to July 1, 1995. Whenever the Department of Correction determines that new prison facilities are required in addition to existing and planned facilities, the Department may contract for any remaining beds authorized by this section before constructing State-operated facilities.

Contracts entered under the authority of this subsection shall be for a period not to exceed 10 years, shall be renewable from time to time for a period not to exceed 10 years. The Secretary of Correction shall enter contracts under this subsection only if funds are appropriated for this purpose by the General Assembly. Contracts entered under the authority of this subsection may be subject to any requirements for the location of the confinement facilities set forth by the General Assembly in appropriating those funds.

Once the Department has made a determination to contract for additional private prison beds, it shall issue a request for proposals within 30 days of the decision. The request for proposals shall require bids to be submitted within two months, and the Department shall award contracts at the earliest practicable date after the submission of bids. The Secretary of Correction, in consultation with the Chairs of the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee and the Chairs of the House and Senate Appropriations Subcommittees on Justice and Public Safety, shall make recommendations to the State Purchasing Officer on the final award decision. The State Purchasing Officer shall make the final award decision, and the contract shall then be subject to the approval of the Council of State after consultation with the Joint Legislative Commission on Governmental Operations.

Contracts made under the authority of this subsection may provide the State with an option to purchase the confinement facility or may provide for the purchase of the confinement facility by the State. Contracts made under the authority of this subsection shall state that plans and specifications for private confinement facilities shall be furnished to and reviewed by the Office of State Construction. The Office of State Construction shall inspect and review each project during construction to ensure that the project is suitable for habitation and to determine whether the project would be suitable for future acquisition by the State. All contracts for the housing of State prisoners in private confinement facilities shall require a minimum of ten million dollars (\$10,000,000) of occurrence-based liability insurance and shall hold the State harmless and provide reimbursement for all liability arising out of actions caused by operations and employees of the private confinement facility.

Prisoners housed in private confinement facilities pursuant to this subsection shall remain subject to the rules adopted for the conduct of persons committed to the State prison system. The Secretary of Correction may review and approve the design and construction of private confinement facilities before housing State prisoners in these facilities. The rules regarding good time, gain time, and earned credits, discipline, classification, extension of the limits of confinement, transfers, housing arrangements, and eligibility for parole shall apply to inmates housed in private confinement facilities pursuant to this subsection. The operators of private confinement facilities may adopt any other rules as may be necessary for the operation of those facilities with the written approval of the Secretary of Correction. Custodial officials employed by a private confinement facility are agents of the Secretary of Correction and may use those procedures for use of force authorized by the Secretary of Correction to defend themselves, to enforce the observance of discipline in compliance with confinement facility rules, to secure the person of a prisoner, and to prevent escape. Private firms under this subsection shall employ inmate disciplinary and grievance policies of the North Carolina Department of Correction.

(h) Private confinement facilities under this section shall be designed, built, and operated in accordance with applicable State laws, court orders, fire safety codes, and local regulations.

(i) The Department of Correction shall make a written report no later than March 1 of every odd-numbered year, beginning in 1997, on the substance of all outstanding contracts for the housing of State prisoners entered into under the authority of this section. The report shall be submitted to the Council of State, the Department of Administration, the Joint Legislative Commission on Governmental Operations, and the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee. In addition to the report, the Department of Correction shall provide information on contracts for the housing of State prisoners as requested by these groups. (1933, c. 172, s. 19; 1957, c. 349, s. 10; 1967, c. 996, s. 8; 1973, c. 1262, s. 10; 1975, c. 879, s. 46; 1977, 2nd Sess., c. 1147, s. 34; 1994, Ex. Sess., c. 24, s. 16(a), (b); 1995, c. 324, s. 19.10(a), (b); c. 507, s. 19; 1996, 2nd Ex. Sess., c. 18, s. 20.18; 1997-443, ss. 21.4(c)-(e); 1999-237, s. 18.20(a); 2001-84, s. 1; 2001-138, s. 2.)

**Cross References.** — For prohibition on private prisons housing out-of-state inmates, see § 148-37.1.

**Editor's Note.** — Session Laws 1997-443, s. 19.17, as amended by Session Laws 1998-212, s. 17.23, Session Laws 1999-237, s. 18.19, and Session Laws 2000-67, s. 16.3(b), provides that the Department of Correction, in consultation with the United States Corrections Corporation, shall determine the feasibility of expanding private confinement facilities and shall report its findings to the Joint Legislative Commission on Governmental Operations and the Joint Legislative Corrections and Crime Control Oversight Committee by December 1, 1997; and that the Department shall establish proposed standards for private correctional facilities used to confine inmates from a jurisdiction other than North Carolina, or a political subdivision thereof, or the federal government and shall provide a final report on those proposed standards by March 15, 2000, with a progress report to the Joint Legislative Corrections and Crime Control Oversight Committee by November 1, 1999. The Department shall also consult with the Department of Justice on the penalty provided for in G.S. 14-256.1 and on the implications of convicting inmates already serving sentences imposed by other jurisdictions in private prisons in North Carolina.

Session Laws 1997-443, s. 21.4(f), provides that all reports directed by that act to be made to the Joint Legislative Corrections Oversight

Committee shall be made to the Joint Legislative Corrections and Crime Control Oversight Committee.

Session Laws 2000-67, s. 16.3(b) repealed Session Laws 1997-443, s. 19.17(c), as amended, which had provided that no municipality, county, or private entity could construct or operate a facility for confinement of inmates from any jurisdiction other than North Carolina, a political subdivision thereof, or the federal government until the General Assembly had acted upon the proposed standards, and that no private confinement facility that received payment from the State for the housing of State prisoners could contain inmates from any jurisdiction other than North Carolina or a political subdivision thereof without the written consent of the Secretary of Correction.

Session Laws 2001-84, s. 2, provided: "This act, being necessary for the health and welfare of the people of the State, shall be liberally construed to effect its purposes."

**Effect of Amendments.** — Session Laws 2001-84, s. 1, effective May 17, 2001, recodified subsection (b1) of this section as § 148-37.2, and amended the text thereof.

Session Laws 2001-138, s. 2, effective July 1, 2001, substituted "Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee" for "Joint Legislative Corrections and Crime Control Oversight Committee" throughout the section.

## § 148-37.1. Prohibition on private prisons housing out-of-state inmates.

(a) Except as otherwise provided in this section or authorized by North Carolina law, no municipality, county, or private entity may authorize, construct, own, or operate any type of correctional facility for the confinement of inmates serving sentences for violation of the laws of a jurisdiction other than North Carolina.

(b) The provisions of this section shall not apply to facilities owned or operated by the federal government and used exclusively for the confinement of inmates serving sentences for violation of federal law, but only to the extent that such facilities are not subject to restriction by the states under the provisions of the United States Constitution. (2000-67, s. 16.3(a).)

**Editor’s Note.** — Session Laws 2000-67, s. 16.3(c), made this section effective June 30, 2000.

Session Laws 2000-67, s. 1.1, provides: “This act shall be known as “The Current Operations

and Capital Improvements Appropriations Act of 2000’.”

Session Laws 2000-67, s. 28.4, contains a severability clause.

**§ 148-37.2. Lease-purchase of three facilities.**

(a) Authorization. — The Secretary of Correction may, as provided in this section, enter contracts with private for-profit or nonprofit firms for the construction of three close security correctional facilities totaling up to 3,000 cells to be operated by the Department pursuant to a lease that contains a schedule for purchase of the facilities over a period of up to 20 years.

The State, with the prior approval of the Council of State and the State Treasurer as provided in this section, is authorized to execute and deliver one or more lease-purchase agreements with a special nonprofit corporation providing for the lease-purchase by the State of the Projects from the special nonprofit corporation in connection with and under an arrangement whereby certificates of participation are sold and delivered by the special nonprofit corporation in order to provide funds to pay the purchase price of the Projects. The Projects will be constructed by selected contractors designated to the special nonprofit corporation by the State Property Office of the Department of Administration in consultation with the Department of Correction. The selected contractors will be responsible for arranging for and obtaining their own construction financing, which will consist solely of private funds. The Projects will be sold to the special nonprofit corporation, with the purchase price paid by the special nonprofit corporation from the proceeds of the certificates of participation. The State may lease the real property upon which the Projects will be located, if owned by the State, to the selected contractors constructing the Projects and to the special nonprofit corporation for nominal consideration.

(b) Definitions. — The following definitions apply in this section:

- (1) Certificates of participation. — Certificates or other instruments delivered by a special nonprofit corporation as provided in this section evidencing the assignment of proportionate and undivided interests in the rights to receive lease payments to be made by the State pursuant to a lease-purchase agreement.
- (2) Construction contract agreement. — A contract between the Department of Correction and the selected contractors for construction of the Projects, under which the selected contractors will be responsible for arranging for and obtaining their own construction financing, which will consist solely of private funds.
- (3) Lease-purchase agreement. — A lease-purchase agreement entered into pursuant to this section, under which the State will lease the Projects from the special nonprofit corporation, with option to purchase.
- (4) Projects. — Three close security correctional facilities providing up to 3,000 cells to be constructed by selected contractors, sold to the special nonprofit corporation, and leased to the State pursuant to this section.
- (5) Purchase agreement. — A contract under which the special nonprofit corporation will purchase the Projects from the selected contractors.

- (6) Selected contractors. — One or more private firms selected to construct the Projects.
- (7) Special nonprofit corporation. — A nonprofit corporation created under Chapter 55A of the General Statutes and designated by the State Treasurer for entering into the transactions contemplated by this section.

(c) Request for Proposals. — The Secretary of Correction may issue a request for proposals to private firms for the private firms to construct the Projects in accordance with plans and specifications developed by the Department of Correction and reviewed by the Office of State Construction. The request for proposals shall provide for the option of proposing on one or more of the facilities, and shall require each proposer to provide a separate proposal on a single facility of up to 1,000 cells. It is the intent of the General Assembly that the State may decide to accept proposals for only one, for two, or for all three facilities.

The Secretary of Correction shall make recommendations to the State Property Office of the Department of Administration on the final award decision. The Department of Correction and the State Property Office of the Department of Administration shall consult with the Joint Legislative Commission on Governmental Operations before making the final award decision. The Department of Administration shall make the final award decision, which shall then be subject to the approval of the Council of State.

The Department of Correction will enter into a construction contract agreement with the selected contractors for the construction of the Projects. The special nonprofit corporation will enter into a purchase agreement with the selected contractors for the sale of the constructed Projects to the special nonprofit corporation. The Department of Correction shall furnish plans and specifications for review by the State Construction Office. Construction contract agreements entered into under this section shall provide that the Department of Correction and the Office of State Construction shall inspect and review each facility during construction to ensure and determine jointly that the facility is suitable for use as a correctional facility and for future acquisition by the State. The Department of Correction may contract with a design consortium for construction administration services.

(d) Approval of Lease-Purchase Agreement. — A lease-purchase agreement may not be entered into pursuant to this section unless the following conditions are met before the lease-purchase agreement is entered into: (i) the Council of State, by resolution, approves the execution and delivery of the lease-purchase agreement, and (ii) the State Treasurer approves the lease-purchase agreement and all other documentation related to it, including any leasehold deed of trust or trust agreement in connection with it. The resolution of the Council of State may include any matters the Council of State determines. In determining whether to approve the lease-purchase agreement, the State Treasurer may consider any factors as the State Treasurer considers relevant in order to find and determine that all of the following conditions are met:

- (1) The principal amount to be financed under the lease-purchase agreement is adequate and not excessive for the purpose of paying the cost of the Projects.
- (2) The increase, if any, in State revenues necessary to pay the sums to become due under the lease-purchase agreement is not excessive.
- (3) The lease-purchase agreement can be entered into on terms desirable to the State.
- (4) The sale of certificates of participation will not have an adverse effect on any scheduled or proposed sale of obligations of the State or any State agency or of any unit of local government in the State.

(e) Terms and Conditions. — The following provisions apply to a lease-purchase agreement entered into under this section:

- (1) In order to secure the performance by the State of its obligations under the lease-purchase agreement, the lease-purchase agreement may require the eviction of the State from the occupancy of one or more of the Projects in the event that the State breaches its obligations and agreements under the lease-purchase agreement.
- (2) No deficiency judgment may be rendered against the State or any agency, department, or commission of the State in any action for breach of any obligation contained in the lease-purchase agreement or any other related documentation, and the taxing power of the State or any agency, department, or commission of the State is not and may not be pledged to secure any moneys due under the lease-purchase agreement.
- (3) The lease-purchase agreement shall not contain a nonsubstitution clause that restricts the right of the State to replace or provide a substitute for the Projects.
- (4) The lease-purchase agreement may include provisions requesting the Governor to submit in the Governor's budget proposal, or any amendments or supplements to it, appropriations necessary to make the payments required under the lease-purchase agreement.
- (5) The lease-purchase agreement may contain any provisions for protecting and enforcing the rights and remedies of the special nonprofit corporation that are reasonable and proper and not in violation of law, including covenants setting forth the duties of the State with respect to the Projects, which may include provisions relating to insuring, operating, and maintaining the Projects and the custody, safeguarding, investment, and application of moneys.
- (6) The lease-purchase agreement may designate the lease payments to be paid by the State under it to be "principal components" and "interest components." Any interest component of the lease payments may be calculated based upon a fixed or variable interest rate or rates as determined by the State Treasurer.
- (7) The lease-purchase agreement may be entered into by the State, and certificates of participation may be delivered by the special nonprofit corporation, at any time, including at times prior to the delivery of the Projects to the special nonprofit corporation for purchase, and the related delivery of occupancy of the Projects to the State by the special nonprofit corporation. The costs incurred in connection with the preparation of the lease-purchase agreement and related documents and the delivery of the certificates of participation may be paid from the proceeds of the certificates of participation.
- (8) The State is authorized to agree in the lease-purchase agreement to indemnify the special corporation and its directors and agents for any liabilities that arise to the special corporation or directors or agents on account of their participation in the activities contemplated by this act.

(f) Faith and Credit Not Pledged. — The payment of amounts payable by the State under the lease-purchase agreement and other related documentation during any fiscal biennium or fiscal year is limited to funds appropriated for that purpose by the General Assembly in its discretion. No provision of this section and no lease-purchase agreement creates any pledge of the faith and credit of the State or any agency, department, or commission of the State within the meaning of any constitutional debt limitation.

(g) Certificates of Participation. — The State may cooperate as necessary to effectuate the delivery by the special nonprofit corporation of tax-exempt

certificates of participation, including participating in the preparation of offering documents, the filing of required tax forms and agreeing to comply with restrictions on the use of the Projects as required in order for the interest component of the lease payments to be tax-exempt. Disclosures and compliance with other federal law requirements by the special nonprofit corporation shall be under the direction of the State Treasurer. Certificates of participation may be sold at the direction of the State Treasurer in the manner, either at public or private sale, and for any price or prices that the State Treasurer determines to be in the best interest of the State and to effect the purposes of this section. Interest payable with respect to certificates of participation shall accrue at the rate or rates determined by the State Treasurer with the approval of the special nonprofit corporation.

Certificates of participation may be delivered pursuant to a trust agreement with a corporate trustee approved by the State Treasurer. The corporate trustee may be any trust company or bank having the powers of a trust company within or without the State. A trust agreement may (i) provide for security and pledges and assignments with respect to the security as may be permitted under this section and further provide for the enforcement of any lien or security interest created pursuant to this section, and (ii) contain any provisions for protecting and enforcing the rights and remedies of the owners of any certificates of participation that are reasonable and proper and not in violation of law as determined by the State Treasurer. The State Treasurer shall designate the professionals providing legal or financial services relating to the lease-purchase agreement and the delivery of certificates of participation, including the provider of any credit facility and the underwriter or placement agent for any certificates of participation.

(h) **Tax Exemption.** — The lease purchase agreement and any certificates of participation relating to it shall at all times be free from taxation by the State or any political subdivision or any of their agencies, excepting estate, inheritance, or gift taxes, income taxes on the gain from the transfer of the lease-purchase agreement and certificates of participation, and franchise taxes. The interest component of the lease payments made by the State under the lease-purchase agreement, including the interest payable with respect to any certificates of participation, is not subject to taxation as income.

(i) The private for-profit or nonprofit firms authorized to respond to requests for proposal authorized by this section, or entitled to be a Selected Contractor pursuant to any response to such proposal, need not be a licensed general contractor within the meaning of G.S. 87-1 so that providing a response to such request for proposal or entering a Construction Contract Agreement or Purchase Agreement shall not be deemed general contracting within the meaning of G.S. 87-1; provided that this subsection shall not be deemed to remove the actual construction of any prison facility from the provisions of G.S. 87-1. (1999-237, s. 18.20(a); 2001-84, s. 1; 2001-202, s. 1.)

**Editor's Note.** — This section was formerly codified as subsection (b1) of G.S. 148-37. It was recodified as § 148-37.2 by Session Laws 2001-84, § 1.

Session Laws 1999-237, s. 18.20(b), provides that the Department of Correction shall provide a status report on the development of requests for proposals and the award-making process to the Joint Legislative Commission on Governmental Operations, by May 1, 2000, and that after the contract has been awarded, the Department shall report by May 1 of each year on the progress of the project.

Session Laws 1999-237, s. 30.2 provides: "Ex-

cept for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvement Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.4 contains a severability clause.

Session Laws 2001-84, s. 2, provided: "This act, being necessary for the health and welfare

of the people of the State, shall be liberally construed to effect its purposes.”

**Effect of Amendments.** — Session Law 2001-84, s. 1, effective May 17, 2001, recodified former subsection (b1) of § 148-37 as this sec-

tion, and rewrote the text thereof.

Session Laws 2001-202, s. 1, effective May 17, 2001, amends this section as rewritten by Session Laws 2001-84, s. 1, by adding subsection (i).

**§§ 148-38, 148-39:** Repealed by Session Laws 1957, c. 349, s. 11.

### § 148-40. Recapture of escaped prisoners.

The rules and regulations for the government of the State prison system may provide for the recapture of convicts that may escape, or any convicts that may have escaped from the State's prison or prison camps, or county road camps of this State, and the State Department of Correction may pay to any person recapturing an escaped convict such reward or expense of recapture as the regulations may provide. Any citizen of North Carolina shall have authority to apprehend any convict who may escape before the expiration of his term of imprisonment whether he be guilty of a felony or misdemeanor, and retain him in custody and deliver him to the State Department of Correction. (1933, c. 172, s. 21; 1955, c. 238, s. 8; 1957, c. 349, s. 10; 1967, c. 996, s. 13.)

#### CASE NOTES

**Quoted** in *State v. Davis*, 253 N.C. 86, 116 S.E.2d 365 (1960).

**Cited** in *State v. Payne*, 213 N.C. 719, 197 S.E. 573 (1938).

### § 148-41. Recapture of escaping prisoners; reward.

The Secretary of Correction shall use every means possible to recapture, regardless of expense, any prisoners escaping from or leaving without permission any of the State prisons, camps, or farms. When any person who has been confined or placed to work escapes from the State prison system, the Secretary shall immediately notify the Governor, and accompany the notice with a full description of the escaped prisoner, together with such information as will aid in the recapture. The Governor may offer such rewards as he may deem desirable and necessary for the recapture and return to the State prison system of any person who may escape or who heretofore has escaped therefrom. Such reward earned shall be paid by warrant of the State Department of Correction and accounted for as a part of the expense of maintaining the State's prisons. (1873-4, c. 158, s. 13; Code, s. 3442; Rev., s. 5407; 1917, c. 236; c. 286, s. 13; C. S., ss. 7742, 7743; 1925, c. 163; 1933, c. 172, s. 18; 1935, c. 414, s. 16; 1943, c. 409; 1955, c. 238, s. 9; c. 279, s. 3; 1957, c. 349, s. 10; 1967, c. 996, ss. 13, 15; 1973, c. 1262, s. 10.)

**§ 148-42:** Repealed by Session Laws 1977, c. 711, s. 33.

**Editor's Note.** — Session Laws 1977, c. 711, s. 34, provided: “All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose.”

Session Laws 1977, c. 711, s. 35, provided: “None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law.”

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provided: “This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978.”

§ 148-43: Repealed by Session Laws 1963, c. 1174, s. 5.

### § 148-44. Separation as to sex.

The Department shall provide quarters for female prisoners separate from those for male prisoners. (1933, c. 172, s. 25; 1947, c. 262, s. 2; 1957, c. 349, s. 10; 1963, c. 1174, s. 2; 1985, c. 226, s. 3(3).)

#### CASE NOTES

Quoted in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 318 F. Supp. 786 (W.D.N.C. 1970).

### § 148-45. Escaping or attempting escape from State prison system; failure of conditionally and temporarily released prisoners and certain youthful offenders to return to custody of Department of Correction.

(a) Any person in the custody of the Department of Correction in any of the classifications hereinafter set forth who shall escape from the State prison system, shall for the first such offense, except as provided in subsection (g) of this section, be guilty of a Class 1 misdemeanor:

- (1) A prisoner serving a sentence imposed upon conviction of a misdemeanor;
- (2) A person who has been charged with a misdemeanor and who has been committed to the custody of the Department of Correction under the provisions of G.S. 162-39;
- (3) Repealed by Session Laws 1985, c. 226, s. 4.
- (4) A person who shall have been convicted of a misdemeanor and who shall have been committed to the Department of Correction for presentence diagnostic study under the provisions of G.S. 15A-1332(c).

(b) Any person in the custody of the Department of Correction, in any of the classifications hereinafter set forth, who shall escape from the State prison system, shall, except as provided in subsection (g) of this section, be punished as a Class H felon.

- (1) A prisoner serving a sentence imposed upon conviction of a felony;
- (2) A person who has been charged with a felony and who has been committed to the custody of the Department of Correction under the provisions of G.S. 162-39;
- (3) Repealed by Session Laws 1985, c. 226, s. 5.
- (4) A person who shall have been convicted of a felony and who shall have been committed to the Department of Correction for presentence diagnostic study under the provisions of G.S. 15A-1332(c); or
- (5) Any person previously convicted of escaping or attempting to escape from the State prison system.

(c) Repealed by Session Laws 1979, c. 760, s. 5.

(d) Any person who aids or assists other persons to escape or attempt to escape from the State prison system shall be guilty of a Class 1 misdemeanor.

(e) Repealed by Session Laws 1983, c. 465, s. 5.

(f) Any person convicted of an escape or attempt to escape classified as a felony by this section shall be immediately classified and treated as a convicted felon even if such person has time remaining to be served in the State prison system on a sentence or sentences imposed upon conviction of a misdemeanor or misdemeanors.

- (g)(1) Any person convicted and in the custody of the North Carolina Department of Correction and ordered or otherwise assigned to work under the work-release program, G.S. 148-33.1, or any convicted person in the custody of the North Carolina Department of Correction and temporarily allowed to leave a place of confinement by the Secretary of Correction or his designee or other authority of law, who shall fail to return to the custody of the North Carolina Department of Correction, shall be guilty of the crime of escape and subject to the applicable provisions of this section and shall be deemed an escapee. For the purpose of this subsection, escape is defined to include, but is not restricted to, willful failure to return to an appointed place and at an appointed time as ordered.
- (2) If a person, who would otherwise be guilty of a first violation of G.S. 148-45(g)(1), voluntarily returns to his place of confinement within 24 hours of the time at which he was ordered to return, such person shall not be charged with an escape as provided in this section but shall be subject to such administrative action as may be deemed appropriate for an escapee by the Department of Correction; said escapee shall not be allowed to be placed on work release for a four-month period or for the balance of his term if less than four months; provided, however, that if such person commits a subsequent violation of this section then such person shall be charged with that offense and, if convicted, punished under the provisions of this section. (1933, c. 172, s. 26; 1955, c. 279, s. 2; 1963, c. 681; 1965, c. 283; 1967, c. 996, s. 13; 1973, c. 1120; c. 1262, s. 10; 1975, cc. 170, 241, 705; c. 770, ss. 1, 2; 1977, c. 732, ss. 3, 4; c. 745; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1983, c. 465, ss. 1-5; 1985, c. 226, ss. 3(4)-6; 1993, c. 539, ss. 1058, 1321, 1322; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 19.25(t).)

**Editor's Note.** — Session Laws 1955, c. 279, which rewrote what is now subsection (a) of this section, provided, in s. 4: "The provisions of this act shall be construed to be mandatory rather than directive."

**Legal Periodicals.** — For note on availability of the defense of duress in prison escapes, see 12 Wake Forest L. Rev. 1102 (1976).

## CASE NOTES

- I. General Consideration.
- II. Effect of Invalidity of Original Conviction.
- III. Practice and Procedure.

### I. GENERAL CONSIDERATION.

**There are two classes of escape from the state prison system.** One is a felonious escape and the other is a misdemeanor. *State v. Ledford*, 9 N.C. App. 245, 175 S.E.2d 605 (1970).

**Escape from Custody Authorized by Law Is a Crime Against Public Justice.** — *State v. Goff*, 264 N.C. 563, 142 S.E.2d 142 (1965).

**As Citizens Should Yield Obedience to Law.** — The statute declaring escape from custody to be an offense proceeds from the theory that a citizen should yield obedience to the law. *State v. Goff*, 264 N.C. 563, 142 S.E.2d 142 (1965).

**And Persons Confined by Law Must Submit to Such Confinement.** — When one has been, by authority or command of the law, confined in prison, it is his duty to submit to such confinement until delivered by due course of law, no matter whether he has been committed for a future trial or for punishment after conviction. *State v. Goff*, 264 N.C. 563, 142 S.E.2d 142 (1965).

**Escape of Prisoners Working for Board of Transportation.** — Prisoners hired by the State Highway Commission (now the Board of Transportation) to work on the highways of the State are within the prison system when the agents of the Highway Commission (now the Board of Transportation) have been designated

to receive and work such prisoners. *State v. Whitley*, 264 N.C. 742, 142 S.E.2d 600 (1965).

An escape by a prisoner assigned by an official of the Department of Correction to work under an employee of the State Highway Commission (now Board of Transportation) constitutes an escape from the State prison system. *State v. Coleman*, 24 N.C. App. 530, 211 S.E.2d 542 (1975).

**Murder Committed in the Perpetration or Attempt to Perpetrate a Felonious Escape Is Murder in the First Degree.** — *State v. Lee*, 277 N.C. 205, 176 S.E.2d 765 (1970).

**For cases holding that a second escape is a felony, decided prior to repeal of subsection (c)** of this section, see *State v. Worley*, 268 N.C. 687, 151 S.E.2d 618 (1966); *State v. Walters*, 17 N.C. App. 94, 193 S.E.2d 316 (1972); *State v. Stone*, 22 N.C. App. 352, 206 S.E.2d 389 (1974).

**As to time when sentence began prior to 1965 amendment to this section**, see *State v. Doggett*, 267 N.C. 648, 148 S.E.2d 622 (1966).

**Predicate Offense Under Armed Career Criminal Act.** — Felony conviction for escape while serving a sentence imposed upon a conviction of a felony (felony escape from custody), under subdivision (b)(1), qualifies as a predicate conviction under the Federal Armed Career Criminal Act, 18 U.S.C. § 924. *United States v. Hairston*, 71 F.3d 115 (4th Cir. 1995), cert. denied, 517 U.S. 1200, 116 S. Ct. 1699, 134 L. Ed. 2d 798 (1996).

**Serious Potential Risk of Physical Injury to Another.** — Subdivision (b)(1), “involves conduct that presents a serious potential risk of physical injury to another”, as required by the Federal Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), because an overt escape, especially an overt escape from a maximum security prison, inherently presents such a risk of physical injury. *United States v. Hairston*, 71 F.3d 115 (4th Cir. 1995), cert. denied, 517 U.S. 1200, 116 S. Ct. 1699, 134 L. Ed. 2d 798 (1996).

**Applied** in *State v. Gibson*, 265 N.C. 487, 144 S.E.2d 402 (1965); *State v. Elliott*, 269 N.C. 683, 153 S.E.2d 330 (1967); *State v. Morgan*, 272 N.C. 97, 157 S.E.2d 606 (1967); *State v. Faison*, 272 N.C. 146, 157 S.E.2d 664 (1967); *State v. McCall*, 273 N.C. 135, 159 S.E.2d 316 (1968); *State v. Shoemaker*, 273 N.C. 475, 160 S.E.2d 281 (1968); *State v. Collins*, 273 N.C. 479, 160 S.E.2d 291 (1968); *State v. Allison*, 1 N.C. App. 623, 162 S.E.2d 63 (1968); *State v. Jones*, 3 N.C. App. 69, 163 S.E.2d 910 (1968); *State v. Ruffin*, 3 N.C. App. 307, 164 S.E.2d 503 (1968); *State v. Rogers*, 7 N.C. App. 572, 172 S.E.2d 883 (1970); *State v. Foster*, 8 N.C. App. 67, 173 S.E.2d 577 (1970); *State v. Ware*, 10 N.C. App. 179, 177 S.E.2d 764 (1970); *State v. Ford*, 13 N.C. App. 34, 185 S.E.2d 328 (1971);

*State v. Ford*, 281 N.C. 62, 187 S.E.2d 741 (1972); *State v. Rufty*, 16 N.C. App. 192, 191 S.E.2d 242 (1972); *State v. White*, 16 N.C. App. 652, 192 S.E.2d 663 (1972); *State v. Edwards*, 282 N.C. 578, 193 S.E.2d 736 (1973); *State v. Haith*, 17 N.C. App. 597, 194 S.E.2d 868 (1973); *State v. Carroll*, 17 N.C. App. 691, 195 S.E.2d 306 (1973); *State v. Stewart*, 19 N.C. App. 112, 198 S.E.2d 30 (1973); *State v. Sadler*, 19 N.C. App. 641, 199 S.E.2d 702 (1973); *State v. Lowe*, 21 N.C. App. 98, 203 S.E.2d 96 (1974); *State v. Eppley*, 30 N.C. App. 217, 226 S.E.2d 675 (1976).

**Quoted** in *In re Swink*, 243 N.C. 86, 89 S.E.2d 792 (1955); *State v. Hunt*, 265 N.C. 714, 144 S.E.2d 890 (1965).

**Stated** in *Gainey v. Turner*, 266 F. Supp. 95 (E.D.N.C. 1967); *State v. Best*, 292 N.C. 294, 233 S.E.2d 544 (1977).

**Cited** in *State v. Sutton*, 268 N.C. 165, 150 S.E.2d 50 (1966); *State v. Alphin*, 7 N.C. App. 75, 171 S.E.2d 53 (1969); *State v. Jones*, 9 N.C. App. 726, 177 S.E.2d 311 (1970); *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971); *State v. McDowell*, 24 N.C. App. 590, 211 S.E.2d 475 (1975); *State v. Watson*, 51 N.C. App. 369, 276 S.E.2d 732 (1981); *State v. Parnell*, 53 N.C. App. 793, 281 S.E.2d 732 (1981); *State v. Washington*, 54 N.C. App. 683, 284 S.E.2d 330 (1981).

## II. EFFECT OF INVALIDITY OF ORIGINAL CONVICTION.

**Belief in Innocence or Legal Errors in Convictions.** — It would bring the law into disrepute and completely render prison order and discipline unenforceable if prisoners convicted of crime could exercise the right of self-judgment and self-help and be allowed to escape from imprisonment, either because they believed themselves to be innocent or believed that their convictions were obtained through legal error. *State v. Goff*, 264 N.C. 563, 142 S.E.2d 142 (1965).

**Innocence or Guilt of Original Offense Is Immaterial to Crime of Escape.** — It is generally held by the more modern authorities that it is immaterial whether a prisoner is innocent or guilty of the original offense insofar as his liability for escaping is concerned. *State v. Goff*, 264 N.C. 563, 142 S.E.2d 142 (1965).

When a prisoner is held in legal custody and commits an escape, the crime itself does not depend upon whether he would have been adjudged guilty or innocent of the original offense had the proper procedure for appeal been followed. *State v. Goff*, 264 N.C. 563, 142 S.E.2d 142 (1965).

**As Is Later Determination That Original Conviction Was Void.** — The crime of escape does not depend upon whether it may or may not be determined in a future habeas corpus

proceeding that his original conviction was void for defects in the judgment of conviction by a court of competent jurisdiction. *State v. Goff*, 264 N.C. 563, 142 S.E.2d 142 (1965).

**Or Voidable.** — Deprivation of procedural rights before or during imprisonment does not constitute grounds or justification for, an escape by a prisoner serving a sentence imposed by authority of law. This is so even though the sentence the prisoner was serving at the time was later held to be irregular or voidable. A prisoner in such case may not put himself in defiance of the duly constituted authorities by escaping from custody but must seek redress in compliance with due process. *State v. Warren*, 4 N.C. App. 441, 166 S.E.2d 858 (1969).

North Carolina has held that a prisoner escaping while serving a sentence is not immune to punishment for the escape even though the sentence he was serving at the time of the escape was irregular or voidable and is set aside and a new trial ordered after the escape but prior to imposition of sentence for the escape, since a prisoner serving a sentence imposed by authority of law may not defy that authority but must seek redress in compliance with due process. *Kelly v. North Carolina*, 276 F. Supp. 200 (E.D.N.C. 1967).

**And defendant can be tried and sentenced on charge of escape irrespective of outcome of a new trial.** *State v. Warren*, 4 N.C. App. 441, 166 S.E.2d 858 (1969).

**There is no deprivation of federal constitutional rights in trial for escape from an invalid sentence.** *Kelly v. North Carolina*, 276 F. Supp. 200 (E.D.N.C. 1967).

### III. PRACTICE AND PROCEDURE.

**The elements of felonious escape are** (1) lawful custody, (2) while serving a sentence imposed upon a plea of guilty, a plea of *nolo contendere*, or a conviction for a felony, and (3) escape from such custody. *State v. Malone*, 73 N.C. App. 323, 326 S.E.2d 302 (1985).

**Exact time is not an essential element of the offense of escape as set out in subdivision (g)(1) of this section and the 24-hour exception provided in subdivision (g)(2) of this section is a defense which a defendant may raise should the evidence warrant such a defense.** Therefore, the trial court did not err in denying defendant's motion to dismiss at the close of the State's evidence on the grounds that the warrant did not set out the exact date and time of the alleged escape and further failed to state that the period of time was in excess of the 24-hour time limitation found in subdivision (g)(2) of this section. *State v. Womble*, 44 N.C. App. 503, 261 S.E.2d 263, appeal dismissed, 299 N.C. 740, 267 S.E.2d 669 (1980).

**For construction of former provisions similar to subsection (g)(1) of this section,**

see *State v. Kimball*, 261 N.C. 582, 135 S.E.2d 568 (1964); *State v. Cooper*, 275 N.C. 283, 167 S.E.2d 266 (1969); *State v. Ledford*, 9 N.C. App. 245, 175 S.E.2d 605 (1970).

**Indictment to Allege Conviction of a Misdemeanor or Felony.** — It is necessary to allege that the escape or attempted escape occurred when defendant was serving a sentence imposed upon conviction of a misdemeanor or of a felony, irrespective of whether the presently alleged escape or attempted escape was alleged to be a first or a second offense. *State v. Jordan*, 247 N.C. 253, 100 S.E.2d 497 (1957); *State v. Whitley*, 264 N.C. 742, 142 S.E.2d 600 (1965); *State v. Stallings*, 267 N.C. 405, 148 S.E.2d 252 (1966).

**But Need Not State the Specific Felony.** — An indictment charging that a defendant escaped while serving a sentence for a felony imposed in the superior court in a named county is sufficient without naming the felony. *State v. Jackson*, 14 N.C. App. 75, 187 S.E.2d 470 (1972).

An indictment charging that defendant escaped from lawful custody while serving a sentence for a felony imposed in the superior court of a named county was sufficient, without naming the felony for which defendant was imprisoned, and reference in the indictment to the felony was surplusage. *State v. Stallings*, 267 N.C. 405, 148 S.E.2d 252 (1966).

**Or Other Detailed Information.** — Where defendant contended that warrant was defective in that it did not allege: (1) the year of defendant's conviction in Craven County; (2) the length of the sentence imposed; (3) the number of the defendant's commitment from Craven County; and (4) the trial docket number of the case in which the commitment was issued, it was held that such detailed information was not required to charge an offense under this section. *State v. Harper*, 264 N.C. 354, 141 S.E.2d 475 (1965).

**Indictment Held Insufficient to Charge Felony Escape.** — A bill of indictment was insufficient to charge the felony of escape while serving a felony sentence, notwithstanding the indictment used the word "felony" to describe one of the offenses for which defendant was serving sentence when he escaped, where it also alleged that sentences for both offenses were imposed in district courts, since district courts are without jurisdiction to impose sentence in felony cases; however, the indictment was sufficient to charge misdemeanor escape. *State v. Jackson*, 14 N.C. App. 75, 187 S.E.2d 470 (1972).

**Variance Held Not Fatal.** — Where bill of indictment charged that defendant escaped while lawfully confined in the North Carolina State prison system in the lawful custody of the North Carolina Department of Correction, and the evidence showed he escaped while assigned

by an official of the Department of Correction to work under an employee of the State Highway Commission (now Board of Transportation), the variance was not fatal. *State v. Coleman*, 24 N.C. App. 530, 211 S.E.2d 542 (1975).

**Further Prosecution Not Barred by Arrest of Judgment for Defective Indictment.** — Arrest of judgment on the ground that the bill of indictment is fatally defective does not bar further prosecution for a violation of this section if the solicitor deems it advisable to proceed on a new bill. *State v. Whitley*, 264 N.C. 742, 142 S.E.2d 600 (1965).

**Nor by Mistrial on Such Ground.** — Where indictment on its face negated any possibility of a showing that at the time of the alleged escape the defendant was serving a sentence in prison, such indictment was fatally defective, and the action of the court in ordering a mistrial was tantamount to quashing the bill of indictment, which the trial court had the right to do *ex mero motu*; hence, the defendant's conviction on a second bill of indictment was valid and a plea of former jeopardy was properly overruled. *State v. Whitley*, 264 N.C. 742, 142 S.E.2d 600 (1965).

**As to indictments for second or subsequent offenses, prior to repeal of subsection (c) of this section,** see *State v. Lawrence*, 264 N.C. 220, 141 S.E.2d 264 (1965); *State v. Revis*, 267 N.C. 255, 147 S.E.2d 892 (1966); *State v. Bennett*, 271 N.C. 423, 156 S.E.2d 725 (1967); *State v. Jackson*, 14 N.C. App. 75, 187 S.E.2d 470 (1972); *State v. Chapman*, 20 N.C. App. 456, 201 S.E.2d 579 (1974).

**Proof of Lawfulness of Custody and Type of Offense for Which Defendant Committed Prerequisite to Conviction.** — In order to sustain a conviction for the offense of escape under this section, the State must prove, among other things, from the evidence and beyond a reasonable doubt, that at the time of the escape defendant was in the lawful custody of the State Department of Correction and was serving a sentence imposed upon a plea of guilty, a plea of *nolo contendere*, or a conviction for a felony. *State v. Ledford*, 9 N.C. App. 245, 175 S.E.2d 605 (1970).

When a defendant is charged with escape from the State prison system under this section the State is entitled to introduce evidence of any and all convictions for which defendant was in custody at the time of escape. *State v. Hammond*, 307 N.C. 662, 300 S.E.2d 361 (1983).

Before a defendant can be convicted of felonious escape, the State must prove beyond a reasonable doubt that at the time of his escape defendant was serving a sentence of incarceration imposed for the conviction of a felony. *State v. Hammond*, 307 N.C. 662, 300 S.E.2d 361 (1983).

When a defendant is charged with escape under this statute, the State has the burden of proving that defendant was in the legal custody of the Department of Correction at the time of the escape. Testimony concerning the kind of crimes for which defendant was sentenced to prison is relevant and competent evidence which the State may introduce in order to meet its burden of proof on this issue. *State v. Hammond*, 307 N.C. 662, 300 S.E.2d 361 (1983).

When a defendant is charged with felonious escape from the state prison system under this section, the State has the burden of proving that defendant was in the legal custody of the Department of Correction at the time of the escape, serving a sentence imposed upon conviction of a felony. Accordingly, the State is entitled to introduce evidence of any and all convictions for which defendant was in custody at the time of escape. *State v. Parrish*, 73 N.C. App. 662, 327 S.E.2d 613 (1985).

To sustain a conviction for escape the state must prove that the defendant was in lawful custody and was serving a sentence imposed upon a plea of guilty, a plea of *nolo contendere*, or a conviction for a felony. *State v. Malone*, 73 N.C. App. 323, 326 S.E.2d 302 (1985).

The legislature, in setting the presumptive sentence for escape, presumably took into account that evidence of an underlying plea or conviction would be necessary to prove the offense. *State v. Malone*, 73 N.C. App. 323, 326 S.E.2d 302 (1985).

**Failure to Prove Defendant Serving Sentence.** — Defendant was improperly convicted of felonious escape where the State failed to present any evidence that defendant was serving a sentence for the commission of a felony on the date defendant escaped from a county jail. *State v. Miller*, — N.C. App. —, 553 S.E.2d 410, 2001 N.C. App. LEXIS 975 (2001).

**What Evidence Competent to Show Lawfulness of Custody and Type of Offense.** — A properly certified copy of the commitment is competent, when introduced into evidence, to show the lawfulness of the custody and the type of offense for which defendant was committed. *State v. Ledford*, 9 N.C. App. 245, 175 S.E.2d 605 (1970).

Certified copies of the record of the superior court showing defendant's conviction and sentence, or a commitment issued under the hand and official seal of the clerk of the superior court, are admissible for the purpose of showing that defendant was in lawful custody at the time of the alleged escape. *State v. Stallings*, 267 N.C. 405, 148 S.E.2d 252 (1966).

**The defense of duress or escaping against his will** will not be available to a

prisoner charged with escape except where such defendant meets all of the following five requirements: (1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future; (2) there is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory; (3) there is no time or opportunity to resort to courts; (4) there is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and (5) the prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat. *State v. Watts*, 60 N.C. App. 191, 298 S.E.2d 436 (1982).

**Nature of Offense for Which Defendant Committed as Question for Jury.** — A defendant who has committed an escape is entitled to have his case submitted to the jury on the question of whether he was imprisoned while serving a sentence imposed for a felony or for a misdemeanor. *State v. Ledford*, 9 N.C. App. 245, 175 S.E.2d 605 (1970).

**Prejudicial Error Not to Charge Jury That It Must Find Defendant Was Serving Sentence for Felony Conviction at Time of Escape.** — Since defendant's plea of not guilty put in issue every essential element of the crime charged, and defendant was charged with escaping from the lawful custody of the State Department of Correction while then and there serving time for a felony, trial judge's failure to instruct the jury that before they could convict defendant of the felony of escape charged, they must find beyond a reasonable doubt that at the time of the escape he was serving a sentence imposed upon conviction of a felony, was prejudicial error which entitled defendant to a new trial. *State v. McCloud*, 11

N.C. App. 425, 181 S.E.2d 204 (1971).

The court erred where it did not require the jury to find beyond a reasonable doubt that defendant was serving a felony sentence in a prosecution under this section. *State v. Johnson*, 21 N.C. App. 85, 203 S.E.2d 424 (1974).

**Instruction on Willfulness Unnecessary.**

— In a prosecution for felonious escape under this section, the trial court was not required to instruct the jury pursuant to § 148-4 that one of the essential elements of felonious escape is that the failure to remain in or return to confinement must be willful, since defendant was not charged with escape while outside the place of his confinement pursuant to authorization by the Secretary of Correction under § 148-4, but was charged under this section, which establishes the general escape offense and does not contain the word willful. *State v. Rose*, 53 N.C. App. 608, 281 S.E.2d 404 (1981).

**Erroneous Reference to Another Section in Judgment and Commitment Order Held Not Prejudicial.** — The fact that the judgment and commitment order in an escape prosecution erroneously referred to § 148-48 instead of this section was not prejudicial to the defendant. *State v. Cobb*, 9 N.C. App. 51, 175 S.E.2d 381 (1970).

**Sentence of 12 Months Not Cruel and Unusual Punishment.** — A sentence of imprisonment for 12 months for felonious escape under this section does not constitute cruel and unusual punishment, in violation of N.C. Const., Art. I, § 14 and U.S. Const., Amend. VIII. *State v. Dixon*, 5 N.C. App. 514, 168 S.E.2d 418 (1969).

**A sentence of one year is not excessive** under this section. *State v. Garris*, 265 N.C. 711, 144 S.E.2d 901 (1965).

## § 148-46. Degree of protection against violence allowed.

(a) When any prisoner, or several combined shall offer violence to any officer, overseer, or guard, or to any fellow prisoner, or attempt to do any injury to the prison building, or to any workshop, or other equipment, or shall attempt to escape, or shall resist, or disobey any lawful command, the officer, overseer, or guard shall use any means necessary to defend himself, or to enforce the observance of discipline, or to secure the person of the offender, and to prevent an escape.

(b) A misdemeanor prisoner classified and treated as a convicted felon as the result of a consecutive felony sentence or sentences, or a convicted felon placed in the custody of the Secretary of Correction pending the outcome of an appeal, or a defendant charged with a felony or felonies and placed in the custody of the Secretary of Correction pending trial, shall be considered as a convicted felon in the custody of the Secretary of Correction against whom any means reasonably necessary, including deadly force, may be used to prevent an escape. (1933, c. 172, s. 27; 1975, c. 230.)

**Legal Periodicals.** — For note on use of deadly force in preventing escape of fleeing minor felon, see 34 N.C.L. Rev. 122 (1955).

#### CASE NOTES

**Constitutional Liability.** — While simple reasonableness governs official forcible encounters with “free citizens,” a vastly different standard governs use of force against convicted prisoners. The prohibition in U.S. Const., Amend. VIII against cruel and unusual punishment requires liability for the unnecessary and wanton infliction of pain. *Morrison v. Martin*, 755 F. Supp. 683 (E.D.N.C. 1990), *aff’d*, 917 F.2d 1302 (4th Cir. 1990).

**This section specifically permits the use of force to enforce lawful orders by prison officials.** The deference due to prison administrators in the establishment of policies reasonably related to legitimate governmental objectives is well established. *Morrison v. Martin*, 755 F. Supp. 683 (E.D.N.C. 1990), *aff’d*, 917 F.2d 1302 (4th Cir. 1990).

**The use of force against prisoners may be appropriate, depending upon the existence of certain factors:** (1) The need for force; (2) the amount of force needed in relation to the

amount used; (3) the extent of injury inflicted; and (4) whether the force arose out of good faith efforts to maintain discipline as opposed to the malicious infliction of harm. *Stokes v. Galyan*, 618 F. Supp. 1483 (W.D.N.C. 1985).

**Correctional officers can be held answerable at law only for obduracy and wantonness,** not merely because lesser measures might have sufficed or where ordinary errors of judgment occurred. *Morrison v. Martin*, 755 F. Supp. 683 (E.D.N.C. 1990), *aff’d*, 917 F.2d 1302 (4th Cir. 1990).

**Administrator Dictates Policy.** — As long as prison authorities are rationally pursuing a legitimate penological objective, the administrator has the last word as to relevant prison policy. *Morrison v. Martin*, 755 F. Supp. 683 (E.D.N.C. 1990), *aff’d*, 917 F.2d 1302 (4th Cir. 1990).

**Stated** in *Bailey v. Turner*, 736 F.2d 963 (4th Cir. 1984).

### § 148-46.1. Inflicting or assisting in infliction of self injury to prisoner resulting in incapacity to perform assigned duties.

Any person serving a sentence or sentences within the State prison system who, during the term of such imprisonment, willfully and intentionally inflicts upon himself any injury resulting in a permanent or temporary incapacity to perform work or duties assigned to him by the State Department of Correction, or any prisoner who aids or abets any other prisoner in the commission of such offense, shall be punished as a Class H felon. (1959, c. 1197; 1967, c. 996, s. 13; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1323; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 19.25(v).)

**Cross References.** — As to procedure for treatment of self-inflicted injuries upon prisoners where consent is refused, see § 148-46.2.

#### CASE NOTES

**Cited** in *State v. Faircloth*, 297 N.C. 100, 253 S.E.2d 890 (1979).

### § 148-46.2. Procedure when consent is refused by prisoner.

When the Secretary of Correction finds as a fact that the injury to any prisoner was willfully and intentionally self-inflicted and that an operation or treatment is necessary for the preservation or restoration of the health of the prisoner and that the prisoner is competent to act for himself or herself; and

that attempts have been made to obtain consent for the proposed operation or treatment but such consent was refused, and the findings have been reduced to writing and entered into the prisoner's records as a permanent part thereof, then the chief medical officer of the prison hospital or prison institution shall be authorized to give or withhold, on behalf of the prisoner, consent to the operation or treatment.

In all cases coming under the provisions of this Article [section], the medical staff of the hospital or institution shall keep a careful and complete medical record of the treatment and surgical procedures undertaken. The record shall be signed by the chief medical officer of the hospital or institution and the surgeon performing any surgery. Any treatment of self-inflicted injuries shall also be subject to the provisions of G.S. 90-21.13 and 90-21.14. (1959, c. 1196; 1967, c. 996, s. 15; 1969, c. 982; 1973, c. 1262, s. 10; 1981, c. 307, ss. 4-7, 9.)

**Editor's Note.** — This section was formerly § 130-191.1. It was amended and transferred to its present position by Session Laws 1981, c. 307, s. 9.

The reference in this section to § 90-21.14

should probably now be to § 90-21.16. Session Laws 2001-230, s. 1(b), recodified former subsection (a1) of § 90-21.14 as present § 90-21.16.

### § 148-47. Disposition of child born of female prisoner.

Any child born of a female prisoner while she is in custody shall as soon as practicable be surrendered to the director of social services of the county wherein the child was born upon a proper order of the domestic relations court or juvenile court of said county affecting the custody of said child. When it appears to be for the best interest of the child, the court may place custody beyond the geographical bounds of Wake County: Provided, however, that all subsequent proceedings and orders affecting custody of said child shall be within the jurisdiction of the proper court of the county where the infant is residing at the time such proceeding is commenced or such order is sought: Provided, further, that nothing in this section shall affect the right of the mother to consent to the adoption of her child nor shall the right of the mother to place her child with the legal father or other suitable relative be affected by the provisions of this section. (1933, c. 172, s. 28; 1955, c. 1027; 1961, c. 186; 1969, c. 982.)

### § 148-48. Parole powers of Parole Commission unaffected.

Nothing in this Chapter shall be construed to limit or restrict the power of the Parole Commission to parole prisoners under such conditions as it may impose or prevent the reimprisonment of such prisoners upon violation of the conditions of such parole, as now provided by law. (1933, c. 172, s. 29; 1955, c. 867, s. 8; 1973, c. 1262, s. 10.)

#### CASE NOTES

**Erroneous Reference to Statute Under Which Defendant Committed Held Not Prejudicial.** — It was not prejudicial to the defendant where, in the judgment and commitment as it appeared in the record, the statute

under which the defendant was convicted was erroneously referred to as "G.S. 148.48" instead of § 148-45. *State v. Cobb*, 9 N.C. App. 51, 175 S.E.2d 381 (1970).

### § 148-49. Prison indebtedness not assumed by Board of Transportation.

The Board of Transportation shall not assume or pay off any part of the deficit of the State prison existing on March 22, 1933. (1933, c. 172, s. 33; 1973, c. 507, s. 5.)

#### ARTICLE 3A.

##### *Facilities and Programs for Youthful Offenders.*

§§ 148-49.1 through 148-49.9: Repealed by Session Laws 1977, c. 732, s. 1.

**Cross References.** — For present provisions relating to facilities and programs for youthful offenders, see § 148-49.10 et seq.

**Editor's Note.** — Session Laws 1977, c. 732, s. 6, provided: "All commitments to the Department of Correction under G.S. 148-49.3 shall be

treated as commitments under G.S. 148-12(b)." Section 148-12(b) was repealed by Session Laws 1977, c. 711, s. 33.

Section 148-49.3 was also repealed by Session Laws 1977, c. 711, s. 33, effective July 1, 1978.

#### ARTICLE 3B.

##### *Facilities and Programs for Youthful Offenders.*

§§ 148-49.10 through 148-49.16: Repealed by Session Laws 1993, c. 538, s. 34.

**Editor's Note.** — This Article was Article 3A of this Chapter as rewritten by Session Laws 1977, c. 732, s. 2, and recodified.

#### ARTICLE 4.

##### *Paroles.*

§§ 148-50 through 148-51: Repealed by Session Laws 1955, c. 867, s. 13.

§ 148-51.1: Repealed by Session Laws 1985, c. 226, s. 9.

§ 148-52: Repealed by Session Laws 1973, c. 1262, s. 10.

**Cross References.** — As to transfer of the functions of the Board of Paroles to the Department of Correction, see § 143B-262.

### § 148-52.1. Prohibited political activities of member of Post-Release Supervision and Parole Commission.

No member of the Post-Release Supervision and Parole Commission shall be permitted to use his position to influence elections or the political action of any person, serve as a member of the campaign committee of any political party, interfere with or participate in the preparation for any election or the conduct thereof at the polling place, or be in any manner concerned in the demanding, soliciting or receiving of any assessments, subscriptions or contributions, whether voluntary or involuntary, to any political party. Any Post-Release Supervision and Parole Commission member who shall violate any of the provisions of this section shall be subject to dismissal from office. (1953, c. 17, s. 4; 1973, c. 1262, s. 10; 1981, c. 260; 1993, c. 538, s. 44; 1994, Ex. Sess., c. 24, s. 14(b).)

**State Government Reorganization.** — The Board of Paroles was transferred to the Department of Social Rehabilitation and Control by former § 143A-168, enacted by Session Laws 1971, c. 864, and repealed by Session

Laws 1973, c. 1262, s. 10. The functions of the Department of Social Rehabilitation and Control have been transferred to the Department of Correction. See § 143B-262.

#### CASE NOTES

**Basis of Article.** — Sections 148-6, 148-26 and 148-33.1, as well as provisions with reference to paroles contained in this Article, are predicated upon the idea that the ability as well as the disposition of released prisoners to engage in honest employment and become law-

abiding members of society is calculated to serve the best interests of the State and of its citizens. *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E.2d 18 (1960).

**Cited in** *Goble v. Bounds*, 281 N.C. 307, 188 S.E.2d 347 (1972).

#### OPINIONS OF ATTORNEY GENERAL

**Campaigning for Office of Sheriff.** — A person employed by the State as a probation and parole officer may file notice of candidacy and campaign for election to the office of sheriff assuming that no federal funds are involved with respect to the probation and parole offic-

er's employment and, thus, that proscriptions contained in the federal Hatch Act do not apply. See opinion of Attorney General to Sheriff Ralph L. Thomas, Carteret County, 55 N.C.A.G. 35 (1985).

### § 148-53. Investigators and investigations of cases of prisoners.

For the purpose of investigating the cases of prisoners, the Department of Correction is hereby authorized and empowered to appoint an adequate staff of competent investigators, particularly qualified for such work, with such reasonable clerical assistance as may be required, who shall, under the rules and regulations duly adopted by the Post-Release Supervision and Parole Commission, investigate all cases designated by it, investigate cases of prisoners eligible for post-release supervision, and otherwise aid the Commission in passing upon the question of the parole and post-release supervision of prisoners, to the end that every prisoner in the custodial care of the State may receive full, fair, and just consideration. (1935, c. 414, s. 3; 1955, c. 867, s. 2; 1973, c. 1262, s. 10; 1977, c. 704, s. 3; c. 711, s. 30; 1977, 2nd Sess., c. 1147, s. 32; 1993, c. 538, s. 45; 1994, Ex. Sess., c. 24, s. 14(b).)

**Editor's Note.** — Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by

its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

### **§ 148-54. Parole and post-release supervision supervisors provided for; duties.**

The Department of Correction is hereby authorized to appoint a sufficient number of competent parole and post-release supervision supervisors, who shall be particularly qualified for and adapted for the work required of them, and who shall under the direction of the Department of Correction, and under regulations prescribed by the Department of Correction after consultation with the Commission, exercise supervision and authority over paroled prisoners and persons on post-release supervision, assist paroled prisoners and persons on post-release supervision, and those who are to be paroled or released for post-release supervision in finding and retaining self-supporting employment, and to promote rehabilitation work with paroled and post-release supervised prisoners, to the end that they may become law-abiding citizens. The supervisors shall also, under the direction of the Department of Correction, maintain frequent contact with paroled and post-release supervised prisoners and find out whether or not they are observing the conditions of their paroles or post-release supervision, and assist them in every possible way toward compliance with the conditions, and they shall perform such other duties in connection with paroled prisoners as the Department of Correction may require. The number of supervisors may be increased by the Department of Correction as and when the number of paroled and post-release supervised prisoners to be supervised requires or justifies such increase. (1935, c. 414, s. 4; 1955, c. 867, s. 11; 1973, c. 1262, s. 10; 1977, c. 704, s. 4; 1993, c. 538, s. 46; 1994, Ex. Sess., c. 24, s. 14(b).)

**§ 148-54.1:** Repealed by Session Laws 1955, c. 867, s. 13.

**§ 148-55:** Repealed by Session Laws 1973, c. 1262, s. 10.

### **§ 148-56. Assistance in supervision of parolees or post-release supervisees and preparation of case histories.**

Upon request by the Post-Release Supervision and Parole Commission, the county directors of social services shall assist in the supervision of parolees and shall prepare and submit to the Post-Release Supervision and Parole Commission case histories or other information in connection with any case under consideration for parole or some form of executive clemency. (1935, c. 414, s. 6; 1955, c. 867, s. 9; 1961, c. 186; 1969, c. 982; 1973, c. 1262, s. 10; 1993, c. 538, s. 47; 1994, Ex. Sess., c. 24, s. 14(b).)

### **§ 148-57. Rules and regulations for parole consideration.**

The Post-Release Supervision and Parole Commission is hereby authorized and empowered to set up and establish rules and regulations in accordance with which prisoners eligible for parole consideration may have their cases reviewed and by which such proceedings may be initiated and considered. That the rules and regulations shall include but not be limited to, a plan whereby

the Post-Release Supervision and Parole Commission may determine parole eligibility, and, when eligibility is so approved, provide for parole of a prisoner to a plan approved by the Secretary of the Department of Correction. (1935, c. 414, s. 7; 1955, c. 867, s. 4; 1973, c. 1262, s. 10; 1977, c. 704, s. 2; 1993, c. 538, s. 48; 1994, Ex. Sess., c. 24, s. 14(b).)

**Editor's Note.** — This section was amended by Session Laws 1993, c. 538, s. 48, in the coded bill drafting format provided by § 120-20.1. It

has been set out in the form above at the direction of the Revisor of Statutes.

#### CASE NOTES

**Honor-Grade Status, Work-Release Privilege and Parole as Discretionary Acts of Clemency.** — Honor-grade status, work-release privilege, and parole are discretionary acts of grace or clemency extended by the State as a reward for good behavior, conferring no vested rights upon the convicted person. An accused person must be given full constitutional protection before and during his trial,

but procedures of constitutional dimension are not appropriate in subsequent determinations of rewards for good behavior while serving a validly imposed sentence of confinement. *Goble v. Bounds*, 13 N.C. App. 579, 186 S.E.2d 638, aff'd, 281 N.C. 307, 188 S.E.2d 347 (1972).

**Quoted** in *Glenn v. Johnson*, 761 F.2d 192 (4th Cir. 1985).

### § 148-57.1. Restitution as a condition of parole or post-release supervision.

(a) Repealed by Session Laws 1985, c. 474, s. 5.

(b) As a rehabilitative measure, the Post-Release Supervision and Parole Commission is authorized to require a prisoner to whom parole or post-release supervision is granted to make restitution or reparation to an aggrieved party as a condition of parole or post-release supervision when the sentencing court recommends that restitution or reparation to an aggrieved party be made a condition of any parole or post-release supervision granted the defendant. When imposing restitution as a condition and setting up a payment schedule for the restitution, the Post-Release Supervision and Parole Commission shall take into consideration the resources of the defendant, including all real and personal property owned by the defendant and the income derived from such property, his ability to earn, and his obligation to support dependents. The Post-Release Supervision and Parole Commission shall not be bound by such recommendation, but if it elects not to implement the recommendation, it shall state in writing the reasons therefor, and shall forward the same to the sentencing court.

(c) When an active sentence is imposed, the court shall consider whether, as a rehabilitative measure, it should recommend to the Post-Release Supervision and Parole Commission that restitution or reparation by the defendant be made a condition of any parole or post-release supervision granted the defendant. If the court determines that restitution or reparation should not be recommended, it shall so indicate on the commitment. If, however, the court determines that restitution or reparation should be recommended, the court shall make its recommendation a part of the order committing the defendant to custody. The recommendation shall be in accordance with the applicable provisions of Article 81C of Chapter 15A of the General Statutes. The Administrative Office of the Courts shall prepare and distribute forms which provide ample space to make restitution or reparation recommendations incident to commitments, which forms shall be conveniently structured to enable the sentencing court to make its recommendation.

If the offense is one in which there is evidence of physical, mental or sexual abuse of a minor, the court may order, as a condition of parole or post-release

supervision, that the defendant pay the cost of any rehabilitative treatment for the minor.

(d) The Post-Release Supervision and Parole Commission shall establish rules and regulations to implement this section, which shall include adequate notice to the prisoner that the payment of restitution or reparation by the prisoner is being considered as a condition of any parole or post-release supervision granted the prisoner, and opportunity for the prisoner to be heard. Such rules and regulations shall also provide additional methods whereby facts may be obtained to supplement the recommendation of the sentencing court. (1977, c. 614, s. 8; 1977, 2nd Sess., c. 1147, s. 36; 1985, c. 474, s. 5; 1987, c. 397, s. 4; c. 598, s. 4; 1993, c. 538, s. 49; 1994, Ex. Sess., c. 24, s. 14(b); 1998-212, s. 19.4(h).)

**Legal Periodicals.** — For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

#### CASE NOTES

**Constitutionality.** — Since the decision to impose restitution or reparation is discretionary with the trial court, the Secretary and the Parole Commission, and since indigency could be considered in making that decision, § 148-33.2(c) and subsection (c) of this section are not unconstitutional as a denial of equal protection discriminating against indigent defendants. *State v. Lambert*, 40 N.C. App. 418, 252 S.E.2d 855 (1979).

The requirement that a defendant pay restitution under § 148-33.2(c) or subsection (c) of this section as a condition of obtaining work-release or parole is not inherently unconstitutional. Whether the restitution requirement is unconstitutional as applied to a particular defendant may only be determined by considering the defendant's financial status and other relevant circumstances at the time when the restitution must be paid, that is, at the time he becomes eligible for parole or work-release privileges. *State v. Parton*, 303 N.C. 55, 277 S.E.2d 410 (1981), overruled on other grounds, *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985).

A requirement that a defendant pay restitution as a condition of parole or work release is not inherently unconstitutional. *State v. Arnette*, 67 N.C. App. 194, 312 S.E.2d 547 (1984).

**The constitutionality of a reparation requirement may only be considered** if and when restitution is ordered. *State v. Arnette*, 67 N.C. App. 194, 312 S.E.2d 547 (1984); *State v. Wilson*, 340 N.C. 720, 459 S.E.2d 192 (1995).

The constitutionality of a reparation requirement may only be determined by considering defendant's financial status at the time when restitution may be paid. *State v. Arnette*, 67 N.C. App. 194, 312 S.E.2d 547 (1984).

There is no statutory requirement for a sen-

tencing judge to inquire into a defendant's ability to pay restitution when the judge merely recommends restitution as a condition of parole or work release. *State v. Arnette*, 67 N.C. App. 194, 312 S.E.2d 547 (1984).

**Constitutionality of Requiring Repayment of Attorneys' Fees.** — The interlocking statutes and court decisions that regulate North Carolina's ability to recover the costs of court-appointed counsel meet constitutional requirements. The indigent defendant's fundamental right to counsel is preserved under the system; he is given ample opportunity to challenge the decision to require repayment at all critical stages; and he is protected against heightened civil or criminal penalties based solely on his inability to pay. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

Though far from a paragon of clarity and detail as a complete program, the North Carolina statutes relating to the repayment of attorneys' fees by restitution embody all the required features of a constitutionally acceptable approach. The indigent defendant's fundamental right to counsel is preserved under the North Carolina statute and no preconditions are placed on the exercise of that right beyond a reasonable and minimally intrusive procedure designed to establish the fact of indigency. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

Like its civil recoupment statute, North Carolina's procedures for imposing the reimbursement of court-appointed counsel fees as a condition of parole are narrowly drawn to avoid unfairness and discriminatory effects. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

**Claim of parolee under 42 U.S.C. § 1983 that North Carolina had placed an unconstitutional restraint** on her freedom by con-

ditioning her parole upon repayment of attorneys' fees would be dismissed for failure to exhaust state remedies. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

**Amount of Restitution Must Be Supported by Evidence.** — The amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing. *State v. Wilson*, 340 N.C. 720, 459 S.E.2d 192 (1995).

**The decision to recommend restitution or reparation is discretionary,** and the trial court is not required to impose such a condition. *State v. Lambert*, 40 N.C. App. 418, 252 S.E.2d 855 (1979).

**Parole Commission, etc., Not Bound by Recommendation of Restitution.** — Neither the Parole Commission nor the Department of Correction is bound by the judge's recommendation of restitution as a condition of parole or work release. *State v. Arnette*, 67 N.C. App. 194, 312 S.E.2d 547 (1984).

**Restitution Cannot Be Imposed with Active Prison Sentence.** — When a court imposes an active sentence, it may recommend restitution as a condition of work-release, as a condition of post-release supervision and pa-

role, or as a condition of probation, but it may not require the defendant to make restitution while serving an active sentence. *State v. Hughes*, 136 N.C. App. 92, 524 S.E.2d 63 (1999).

**Law Enforcement Agencies Not Victims for Restitution Purposes.** — While North Carolina statutes authorize the imposition of a condition, upon parole eligibility, of restitution to victims of crime who have suffered economic loss as a result of that crime, law enforcement agencies are not within the class of such victims. *Evans v. Garrison*, 657 F.2d 64 (4th Cir. 1981).

**State as "Aggrieved Party".** — Although the North Carolina Supreme Court has never definitively decided the issue, there is persuasive authority in North Carolina law supporting the State's right to claim the status of an "aggrieved party" for the expenses associated with providing court-appointed counsel. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

**Quoted** in *State v. McNeill*, 54 N.C. App. 454, 283 S.E.2d 565 (1981).

**Cited** in *State v. Ray*, 125 N.C. App. 721, 482 S.E.2d 755 (1997).

## §§ 148-58, 148-58.1: Repealed by Session Laws 1977, c. 711, s. 33.

**Editor's Note.** — Session Laws 1977, c. 711, s. 34, provided: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provided: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

## § 148-59. Duties of clerks of superior courts as to commitments; statements filed with Department of Correction.

The several clerks of the superior courts shall attach to the commitment of each prisoner sentenced in such courts a statement furnishing such information as the Post-Release Supervision and Parole Commission shall by regulations prescribe, which information shall contain, among other things, the following:

- (1) The court in which the prisoner was tried;
- (2) The name of the prisoner and of all codefendants;
- (3) The date or session when the prisoner was tried;
- (4) The offense with which the prisoner was charged and the offense for which convicted;
- (5) The judgment of the court and the date of the beginning of the sentence;
- (6) The name and address of the presiding judge;

- (7) The name and address of the prosecuting solicitor;
- (8) The name and address of private prosecuting attorney, if any;
- (9) The name and address of the arresting officer;
- (10) All available information of the previous criminal record of the prisoner; and
- (11) For all Class G or more serious felonies, the names and addresses of the following persons, where the presiding judge makes a finding of such facts:
  - a. Any victims of the offense for which the prisoner was convicted;
  - b. The parent or legal guardian of any minor victims of the offense for which the prisoner was convicted; and
  - c. The next of kin of any homicide victims of the offense for which the prisoner was convicted.

The prison authorities receiving the prisoner for the beginning of the service of sentence shall detach from the commitment the statement furnishing such information and forward it to the Department of Correction, together with any additional information in the possession of such prison authorities relating to the previous criminal record of such prisoner, and the information thus furnished shall constitute the foundation and file of the prisoner's case. Forms for furnishing the information required by this section shall, upon request, be furnished to the said clerks by the State Department of Correction without charge. (1935, c. 414, s. 9; 1953, c. 17, s. 2; 1955, c. 867, s. 12; 1957, c. 349, s. 10; 1967, c. 996, s. 13; 1973, c. 108, s. 90; c. 1262, s. 10; 1993, c. 538, s. 50; 1994, Ex. Sess., c. 12, s. 2; c. 24, s. 14(b).)

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 12, ss. 1, 2 made identical amendments to this section in the coded bill drafting format provided by § 120-20.1, by

amending the version of this section appearing in the 1993 supplement and the version appearing in the 1987 replacement chapter.

CASE NOTES

**File to Contain Names and Addresses of Sworn Officials.** — The file must contain the name and address of the judge, the investigating officer, and the State's prosecutor. These sworn officials know more of the background of the case than the record discloses. Hence, these

officers may be consulted on matters in addition to that which the record discloses. *Goble v. Bounds*, 281 N.C. 307, 188 S.E.2d 347 (1972).

**Applied** in *State v. Cooper*, 275 N.C. 283, 167 S.E.2d 266 (1969).

§ 148-60: Repealed by Session Laws 1977, c. 711, s. 33.

**Editor's Note.** — Session Laws 1977, c. 711, s. 34, provided: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provided: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provided: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

### § 148-60.1. Allowances for paroled prisoner and prisoner on post-release supervision.

Upon the release of any prisoner upon parole or post-release supervision, the superintendent or warden of the institution shall provide the prisoner with suitable clothing and, if needed, an amount of money sufficient to purchase transportation to the place within the State where the prisoner is to reside. The Post-Release Supervision and Parole Commission may, in its discretion, provide that the prisoner shall upon his release on parole or post-release supervision receive a sum of money of at least forty-five dollars (\$45.00). (1953, c. 17, s. 8; 1973, c. 1262, s. 10; 1987 (Reg. Sess., 1988), c. 1086, s. 120(b); 1993, c. 538, s. 51; 1994, Ex. Sess., c. 24, s. 14(b).)

### §§ 148-60.2 through 148-62: Repealed by Session Laws 1977, c. 711, s. 33.

**Editor's Note.** — Session Laws 1977, c. 711, s. 34, provided: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

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### § 148-62.1. Entitlement of indigent parolee and post-release supervisee to counsel, in discretion of Post-Release Supervision and Parole Commission.

Any parolee or post-release supervisee who is an indigent under the terms of G.S. 7A-450(a) may be determined entitled, in the discretion of the Post-Release Supervision and Parole Commission, to the services of counsel at State expense at a parole revocation hearing at which either:

- (1) The parolee or post-release supervisee claims not to have committed the alleged violation of the parole or post-release supervision conditions; or
- (2) The parolee or post-release supervisee claims there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, even if the violation is a matter of public record or is uncontested, and that the reasons are complex or otherwise difficult to develop or present; or
- (3) The parolee or post-release supervisee is incapable of speaking effectively for himself;

and where the Commission feels, on a case by case basis, that such appointment in accordance with either (1), (2) or (3) above is necessary for fundamental fairness.

If the parolee or post-release supervisee is determined to be indigent and entitled to services of counsel, counsel shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services. (1973, c. 1116, s. 2; 1993, c. 538, s. 52; 1994, Ex. Sess., c. 24, s. 14(b); 2000-144, s. 45.)

**Cross References.** — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B, § 7A-498 et seq.

**Effect of Amendments.** — Session Laws 2000-144, s. 45, effective July 1, 2001, added the last paragraph.

**Legal Periodicals.** — For article on probation and parole revocation procedures and related issues, see 13 Wake Forest L. Rev. 5 (1977).

### § 148-63. Arrest powers of police officers.

Any officer who is authorized to make arrests of fugitives from justice shall have full authority and power to arrest any parolee whose parole has been revoked or any post-release supervisee who has been revoked. (1935, c. 414, s. 13; 1993, c. 538, s. 53; 1994, Ex. Sess., c. 24, s. 14(b).)

### § 148-64. Cooperation of prison and parole officials and employees.

The officials and employees of the Department of Correction and the Post-Release Supervision and Parole Commission shall at all times cooperate with and furnish each other such information and assistance as will promote the purposes of this Chapter and the purposes for which these agencies were established. The Commission shall have free access to all prisoners. (1935, c. 414, s. 14; 1955, c. 867, s. 7; 1967, c. 996, ss. 11, 15; 1973, c. 1262, s. 10; 1993, c. 538, s. 54; 1994, Ex. Sess., c. 24, s. 14(b).)

#### CASE NOTES

**Quoted** in *Goble v. Bounds*, 281 N.C. 307, 188 S.E.2d 347 (1972).

§ 148-65: Repealed by Session Laws 1955, c. 867, s. 13.

#### ARTICLE 4A.

#### *Out-of-State Parolee Supervision.*

### § 148-65.1. Governor to execute compact; form of compact.

(a) The Governor of this State is hereby authorized and directed to execute a compact on behalf of the State of North Carolina with any of the United States legally joining therein in the form substantially as follows:

A compact entered into by and among the contracting states, signatories hereto, with the consent of the Congress of the United States of America, granted by an act entitled "An Act granting the consent of Congress to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes."

The contracting states solemnly agree:

- (1) That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this compact (herein called "sending state"), to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact (herein called "receiving state"), while on probation or parole, if
  - a. Such person is in fact a resident or has his family residing within the receiving state and can obtain employment there;

- b. Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than six continuous months immediately preceding the commission of the offense for which he has been convicted.

- (2) That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.
- (3) That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state; provided, however, that if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.
- (4) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact, without interference.
- (5) That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.
- (6) That this compact shall become operative immediately upon its execution by any state as between it and any other state or states so executing. When executed it shall have the full force and effect of law within such state, the form of execution to be in accordance with the laws of the executing state.
- (7) That this compact shall continue in force and remain binding upon each executing state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending state. Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other state party hereto.

(b) Persons supervised in this State pursuant to this compact shall pay the supervision fee specified in G.S. 15A-1374(c). The fee shall be paid to the clerk of court in the county in which the person initially receives supervision services in this State. (1951, c. 1137, s. 1; 1985 (Reg. Sess., 1986), c. 859, s. 4.)

**State Government Reorganization.** — The administration of parolee supervision compacts was transferred to the Department of Social Rehabilitation and Control by former § 143A-170, enacted by Session Laws 1971, c. 864, and repealed by Session Laws 1973, c. 1262, s. 10. The functions of the Department of

Social Rehabilitation and Control have been transferred to the Department of Correction. See § 143B-262.

**Legal Periodicals.** — For article on probation and parole revocation procedures and related issues, see 13 Wake Forest L. Rev. 5 (1977).

#### CASE NOTES

**Phrase “at all times” in subdivision (a)(3) of this section** clearly implies a right of the sending state to retake the probationer prior to a revocation hearing in the receiving

state, and to hold the hearing in the sending state. *State v. Coleman*, 64 N.C. App. 384, 307 S.E.2d 207 (1983).

### § 148-65.1A. Interstate parole and probation hearing procedures.

(a) Where supervision of a parolee or probationer is being administered pursuant to the Interstate Compact for the Supervision of Parolees and Probationers, the appropriate judicial or administrative authorities in this State shall notify the Compact Administrator of the sending state whenever, in their view, consideration should be given to retaking or reincarceration for a parole or probation violation. Prior to the giving of any such notification, a hearing shall be held in accordance with this section within a reasonable time, unless such hearing is waived by the parolee or probationer. The appropriate officer or officers of this State shall as soon as practicable, following termination of any such hearing, report to the sending state, furnish a copy of the hearing record, and make recommendations regarding the disposition to be made of the parolee or probationer by the sending state. Pending any proceeding pursuant to this section, the appropriate officers of this State may take custody of and detain the parolee or probationer involved for a period not to exceed 15 days prior to the hearing and, if it appears to the hearing officer or officers that retaking or reincarceration is likely to follow, for such reasonable period after the hearing or waiver as may be necessary to arrange for the retaking or reincarceration.

(b) Any hearing pursuant to this section may be before the Administrator of the Interstate Compact for the Supervision of Parolees and Probationers, a deputy of such Administrator, or any other person appointed by the Administrator, or any person authorized pursuant to the laws of this State to hear cases of alleged parole or probation violation, except that no hearing officer shall be the person making the allegation of violation.

(c) With respect to any hearing pursuant to this section, the parolee or probationer:

- (1) Shall have reasonable notice in writing of the nature and content of the allegations to be made, including notice that its purpose is to determine whether there is probable cause to believe that he has committed a violation that may lead to a revocation of parole or probation.
- (2) Shall be permitted to advise with any persons whose assistance he reasonably desires, prior to the hearing.
- (3) Shall have the right to confront and examine any persons who have made allegations against him, unless the hearing officer determines that such confrontation would present a substantial present or subsequent danger of harm to such person or persons.
- (4) May admit, deny or explain the violation alleged and may present proof, including affidavits and other evidence, in support of his contentions. A record of the proceedings shall be made and preserved.

(d) In any case of alleged parole or probation violation by a person being supervised in another state pursuant to the Interstate Compact for the Supervision of Parolees and Probationers, any appropriate judicial or administrative officer or agency in another state is authorized to hold a hearing on the alleged violation. Upon receipt of the record of a parole or probation violation hearing held in another state pursuant to a statute substantially similar to this section, such record shall have the same standing and effect as though the proceeding of which it is a record was had before the appropriate officer or officers in this State, and any recommendations contained in or accompanying the record shall be fully considered by the appropriate officer or officers of this State in making disposition of the matter. (1973, c. 1352.)

**Legal Periodicals.** — For article on probation and parole revocation procedures and related issues, see 13 Wake Forest L. Rev. 5 (1977).

#### CASE NOTES

**Applied** in *State v. Coleman*, 64 N.C. App. 384, 307 S.E.2d 207 (1983).

### § 148-65.2. Title of Article.

This Article may be cited as the "Uniform Act for Out-of-State Parolee Supervision." (1951, c. 1137, s. 2.)

### § 148-65.3. North Carolina sentence to be served in another jurisdiction.

The Post-Release Supervision and Parole Commission, with the concurrence of the Secretary of Correction, may direct that the balance of any sentence imposed by the courts of this State shall be served concurrently with a sentence or sentences in another state or federal institution, and may effect a transfer of custody of such individual to the other jurisdiction for such purpose. In the event the individual's sentence liability in the other jurisdiction terminates prior to the expiration of his North Carolina sentence, the individual shall be either paroled (if eligible) or returned to the prison department of this State, in the discretion of the Post-Release Supervision and Parole Commission. (1975, c. 450, s. 2; 1993, c. 538, s. 55; 1994, Ex. Sess., c. 24, s. 14(b).)

#### ARTICLE 5.

#### *Farming Out Convicts.*

### § 148-66. Cities and towns and Department of Agriculture and Consumer Services may contract for prison labor.

The corporate authorities of any city or town may contract in writing with the State Department of Correction for the employment of convicts upon the highways or streets of such city or town, and such contracts when so exercised shall be valid and enforceable against such city or town, and the Attorney General may prosecute an action in the Superior Court of Wake County in the name of the State for their enforcement.

The Department of Agriculture and Consumer Services is hereby authorized and empowered to contract, in writing, with the State Department of Correc-

tion for the employment and use of convicts under its supervision to be worked on the State test farms and/or State experimental stations. (1881, c. 127, s. 1; Code, s. 3449; Rev., s. 5410; C.S., s. 7758; 1925, c. 163; 1931, c. 145, s. 35; 1933, c. 172, s. 18; 1943, c. 605, s. 1; 1957, c. 349, s. 10; 1967, c. 996, s. 13; 1985, c. 226, s. 10(1); 1997-261, s. 106.)

**Legal Periodicals.** — For comment on the 1943 amendment, see 21 N.C.L. Rev. 333 (1943).

#### CASE NOTES

**Cited** in *Watson v. City of Durham*, 207 N.C. 624, 178 S.E. 218 (1935).

### § 148-67. Hiring to cities and towns and State Department of Agriculture and Consumer Services.

The State Department of Correction shall in their discretion, upon application to them, hire to the corporate authorities of any city or town for the purposes specified in G.S. 148-66, such convicts as are mentally and physically capable of performing the work or labor contemplated and are not at the time of such application hired or otherwise engaged in labor under the direction of the Department; but the convicts so hired for services shall be fed, clothed and quartered while so employed by the Department.

Upon application to it, it shall be the duty of the State Department of Correction, in its discretion, to hire to the Department of Agriculture and Consumer Services for the purposes of working on the State test farms and/or State experimental stations, such convicts as may be mentally and physically capable of performing the work or labor contemplated; but the convicts so hired for services under this paragraph shall be fed, clothed and quartered while so employed by the State Department of Correction. (1881, c. 127, s. 2; Code, s. 3450; Rev., s. 5411; C.S., s. 7759; 1925, c. 163; 1931, c. 145, s. 35; 1933, c. 172, s. 18; 1943, c. 605, s. 2; 1957, c. 349, s. 10; 1967, c. 996, s. 13; 1985, c. 226, s. 10(2); 1997-261, s. 107.)

### § 148-68. Payment of contract price; interest; enforcement of contracts.

The corporate authorities of any city or town so hiring convicts shall pay into the treasury of the State for the labor of any convict so hired such sum or sums of money at such time or times as may be agreed upon in the contract of hire; and if any such city or town fails to pay the State money due for such hiring, the same shall bear interest from the time it is due until paid at the rate of six percent (6%) per annum; and an action to recover the same may be instituted by the Attorney General in the name of the State in the courts of Wake County. (1881, c. 127, s. 3; Code, s. 3451; Rev., s. 5412; C.S., s. 7760; 1925, c. 163; 1931, c. 145, s. 35.)

### § 148-69. Agents; levy of taxes; payment of costs and expenses.

The corporate authorities of any city or town so hiring convicts may appoint and remove at will all such necessary agents to superintend the construction or improvement of such highways and streets as they may deem proper, or to

pay the costs and expenses incident to such hiring may levy taxes and raise money as in other respects. (1881, c. 127, s. 4; Code, s. 3452; Rev., s. 5413; C. S., s. 7761; 1925, c. 163; 1931, c. 145, s. 35.)

### **§ 148-70. Management and care of inmates; prison industries; disposition of products of inmate labor.**

The State Department of Correction in all contracts for labor shall provide for feeding and clothing the inmates and shall maintain, control and guard the quarters in which the inmates live during the time of the contracts; and the Department shall provide for the guarding and working of such inmates under its sole supervision and control. The Department may make such contracts for the hire of the inmates confined in the State prison as may in its discretion be proper. In accordance with the provisions of Article 11 of Chapter 66 of the General Statutes, the Department may use the labor of inmates confined in the State prison in work on farms and manufacturing, either within or without the State prison. The Department may dispose of the products of the labor of the inmates, either in farming or in manufacturing or in other industry at the State Prison System to any public institution owned, managed, or controlled by the State, or to any county, city or town in this State, or to any federal, state, or local public institution in any other state of the union. Provided however, no manufacturing or other industry shall be established, supervised or controlled by the Department unless specifically approved by the Governor pursuant to G.S. 66-58(f).

All departments, institutions and agencies of this State which are supported in whole or in part by the State shall give preference to Department of Correction products in purchasing articles, products, and commodities which these departments, institutions, and agencies require and which are manufactured or produced within the State prison system and offered for sale to them by the Department of Correction, and no article or commodity available from the Department of Correction shall be purchased by any such State department, institution, or agency from any other source unless the prison product does not meet the standard specifications and the reasonable requirements of the department, institution, or agency as determined by the Secretary of Administration, or the requisition cannot be complied with because of an insufficient supply of the articles or commodities required. The provisions of Article 3 of Chapter 143 of the General Statutes respecting contracting for the purchase of all supplies, materials and equipment required by the State government or any of its departments, institutions or agencies under competitive bidding shall not apply to articles or commodities available from the Department of Correction, but the Department of Correction shall be required to keep the price of such articles or commodities substantially in accord with that paid by governmental agencies for similar articles and commodities of equivalent quality as determined by the Secretary by reference to competitive bidding as required by law.

In addition, the Secretary of Correction may lease one or more buildings or portions of buildings on the grounds of any State correctional institution or location under Department of Correction control, together with the real estate needed for reasonable access to such buildings, for a term not to exceed 20 years, to a private corporation for the purpose of establishing and operating a factory for the manufacture and processing of products or any other commercial enterprise deemed by the Secretary to provide employment opportunities for inmates in meaningful jobs for wages. A lease entered into pursuant to this section may include provisions for the remodeling or construction of buildings. Each lease shall be approved by the Governor and Council of State and may be entered into only after consultation with the Joint Legislative Commission on

Governmental Operations. Each lease negotiated and concluded pursuant to this section shall include and shall be valid only so long as the lessee adheres to the following provisions:

- (1) All persons employed in the factory or other commercial enterprise operated in or on the leased property, except the lessee's supervisory employee and necessary training personnel, shall be inmates who are approved for such employment by the Secretary or his designee.
- (2) The factory or other commercial enterprise operated in or on the leased property shall observe at all times such practices and procedures regarding security as the lease may specify or as the Secretary may stipulate.
- (3) The factory or other commercial enterprise operated on the leased property shall be deemed a private enterprise and subject to all the laws and lawfully adopted rules of this State governing the operation of similar business enterprises elsewhere, except that the provisions of G.S. 66-58 shall not apply to the industries or products of such private enterprise.

The Secretary shall adopt rules for the administration and management of personnel policies for prisoner workers including wages, working hours, and conditions of employment.

Except as prohibited by applicable provisions of the United States Code, inmates of correctional institutions of this State may be employed in the manufacture and processing of products and services for introduction into interstate commerce, so long as they are paid no less than the prevailing minimum wage. (1917, c. 286, s. 2; 1919, c. 80, s. 1; C.S., s. 7762; 1925, c. 163; 1931, c. 145, s. 35; 1933, c. 172, s. 18; 1957, c. 349, s. 10; 1959, c. 170, s. 2; 1967, c. 996, s. 13; 1975, c. 730, s. 1; 1983, c. 717, s. 14; 1985, c. 118; c. 226, s. 11; 1991 (Reg. Sess., 1992), c. 902, s. 2.)

## ARTICLE 5A.

### *Prison Labor for Farm Work.*

§§ 148-70.1 through 148-70.7: Repealed by Session Laws 1957, c. 349, s. 11.

## ARTICLE 6.

### *Reformatory.*

§§ 148-71 through 148-73: Repealed by Session Laws 1947, c. 262, s. 3.

## ARTICLE 7.

### *Records, Statistics, Research and Planning.*

## § 148-74. Records Section.

Case records and related materials compiled for the use of the Secretary of Correction and the Parole Commission shall be maintained in a single central file system designed to minimize duplication and maximize effective use of such records and materials. When an individual is committed to the State prison system after a period on probation, the probation files on that individual shall be made a part of the combined files used by the Department of

Correction and the Parole Commission. The administration of the Records Section shall be under the control and direction of the Secretary of Correction. (1925, c. 228, s. 1; 1953, c. 55, ss. 2, 4; 1967, c. 996, s. 12; 1973, c. 1262, s. 10; 1985, c. 226, s. 12.)

#### CASE NOTES

**Access to Prison Records Limited to Named Parties.** — Prison records are confidential and only named parties have access to them. *Goble v. Bounds*, 13 N.C. App. 579, 186 S.E.2d 638, aff'd, 281 N.C. 307, 188 S.E.2d 347 (1972); *Paine v. Baker*, 595 F.2d 197 (4th Cir. 1979), cert. denied, 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181 (1979).

**Prison Records Not Subject to Inspection by Public or Inmates.** — Prison records are confidential and are not subject to inspection by the public or by the inmate involved. *Goble v. Bounds*, 13 N.C. App. 579, 186 S.E.2d 638, aff'd, 281 N.C. 307, 188 S.E.2d 347 (1972); *Paine v. Baker*, 595 F.2d 197 (4th Cir. 1979), cert. denied, 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181 (1979).

**A State prisoner does not have a consti-**

**tutional right of access to his prison file.** *Paine v. Baker*, 595 F.2d 197 (4th Cir. 1979), cert. denied, 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181 (1979).

**However, in certain limited circumstances a claim of constitutional magnitude is raised** where a prisoner alleges (1) that information is in his file, (2) that the information is false, and (3) that it is relied on to a constitutionally significant degree. But see *Shabazz v. Keating*, 1999 OK 26, 977 P.2d 1089 (1999), questioning the present day viability of this opinion in light of later 4th circuit jurisprudence. *Paine v. Baker*, 595 F.2d 197 (4th Cir. 1979), cert. denied, 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181 (1979).

**Cited in** *Chapman v. State*, 4 N.C. App. 438, 166 S.E.2d 873 (1969).

§ 148-75: Repealed by Session Laws 1963, c. 1174, s. 5.

#### § 148-76. Duties of Records Section.

The Records Section shall maintain the combined case records and receive and collect fingerprints, photographs, and other information to assist in locating, identifying, and keeping records of criminals. The information collected shall be classified, compared, and made available to law-enforcement agencies, courts, correctional agencies, or other officials requiring criminal identification, crime statistics, and other information respecting crimes and criminals. (1925, c. 228, s. 3; 1953, c. 55, s. 4; 1967, c. 996, s. 12.)

#### CASE NOTES

**Access to Prison Records Limited to Named Parties.** — Prison records are confidential and only named parties have access to them. *Goble v. Bounds*, 13 N.C. App. 579, 186 S.E.2d 638, aff'd, 281 N.C. 307, 188 S.E.2d 347 (1972); *Paine v. Baker*, 595 F.2d 197 (4th Cir. 1979), cert. denied, 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181 (1979).

**Prison Records Not Subject to Inspection by Public or Inmates.** — Prison records are confidential and are not subject to inspection by the public or by the inmate involved. *Goble v. Bounds*, 13 N.C. App. 579, 186 S.E.2d 638, aff'd, 281 N.C. 307, 188 S.E.2d 347 (1972); *Paine v. Baker*, 595 F.2d 197 (4th Cir. 1979), cert. denied, 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181 (1979).

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**Illustrative Cases.** — Defendant was not prejudiced by the State's subpoenaing and obtaining, pursuant to this section, all of his confidential prison records and disclosing those records during cross-examination of witnesses. *State v. Cummings*, 352 N.C. 600, 536 S.E.2d 36 (2000), cert. denied, — U.S. —, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

**§ 148-77. Statistics, research, and planning.**

In order to facilitate regular improvement in the structure, administration, and programs of the Department of Correction, there shall be established within the Department organizational units responsible for statistics, research, and planning. The Department of Correction may cooperate with and seek the cooperation of public and private agencies, institutions, officials, and individuals in the development and conduct of programs to compile and analyze statistics and to conduct research in criminology and correction. (1925, c. 228, s. 4; 1967, c. 996, s. 12.)

**§ 148-78. Reports.**

The Secretary of Correction may prepare and release reports on the work of the Department of Correction, including statistics and other data, accounts of research, and recommendations for legislation. (1925, c. 228, s. 5; 1953, c. 55, s. 4; 1967, c. 996, s. 12; 1973, c. 1262, s. 10.)

**§ 148-79:** Repealed by Session Laws 1965, c. 1049, s. 2.

**Cross References.** — For present provisions relating to the duty of the State Bureau of Investigation to provide criminal information, see § 114-19.

**§ 148-80. Seal of Records Section; certification of records.**

A seal shall be provided to be affixed to any paper, record, copy or form or true copy of any of the same in the files or records of the Records Section, and when so certified under seal by the duly appointed custodian, such record or copy shall be admitted as evidence in any court of the State. (1925, c. 228, s. 7; 1953, c. 55, s. 4; 1967, c. 996, s. 12.)

**§ 148-81:** Repealed by Session Laws 1965, c. 1049, s. 2.

ARTICLE 8.

*Compensation to Persons Erroneously Convicted of Felonies.*

**§ 148-82. Provision for compensation.**

Any person who, having been convicted of a felony and having been imprisoned therefor in a State prison of this State, and who was thereafter or who shall hereafter be granted a pardon of innocence by the Governor upon the grounds that the crime with which the person was charged either was not committed at all or was not committed by that person, may as hereinafter provided present by petition a claim against the State for the pecuniary loss sustained by the person through his or her erroneous conviction and imprisonment, provided the petition is presented within five years of the granting of the pardon. (1947, c. 465, s. 1; 1997-388, s. 1.)

**Editor's Note.** — Session Laws 1997-443, s. 7.2(b), rewrites Session Laws 1997-388, s. 5 to provide in part that notwithstanding the five year limitation set forth in G.S. 148-82, as rewritten by s. 1, the petition of a person who has received a pardon of innocence prior to July

1, 1995, may be presented at any time prior to July 1, 1998, and this act shall apply to that petition, regardless of any prior claims for compensation filed and settled or otherwise resolved. If the petitioner has received compensation pursuant to a prior claim, the Industrial Commission shall consider the amount of the award received by the petitioner and may deduct that amount, plus interest, from the date the award was made, from an award granted pursuant to this act.

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

**Legal Periodicals.** — For brief comment on this Article, see 25 N.C.L. Rev. 403 (1947).

### § 148-83. Form, requisites and contents of petition; nature of hearing.

Such petition shall be addressed to the Industrial Commission, and must include a full statement of the facts upon which the claim is based, verified in the manner provided for verifying complaints in civil actions, and it may be supported by affidavits substantiating such claim. Upon its presentation the Industrial Commission shall fix a time and a place for a hearing, and shall mail notice to the claimant, and shall notify the Attorney General, at least 15 days before the time fixed therefor. (1947, c. 465, s. 2; 1963, c. 1174, s. 4; 1973, c. 1262, s. 10; 1997-388, s. 2.)

**Editor's Note.** — Session Laws 1997-443, s. 7.2(b), rewrites Session Laws 1997-388, s. 5 to provide in part that notwithstanding the five year limitation set forth in G.S. 148-82, as rewritten by s. 1, the petition of a person who has received a pardon of innocence prior to July 1, 1995, may be presented at any time prior to July 1, 1998, and this act shall apply to that petition, regardless of any prior claims for compensation filed and settled or otherwise resolved. If the petitioner has received compensation pursuant to a prior claim, the Industrial

Commission shall consider the amount of the award received by the petitioner and may deduct that amount, plus interest, from the date the award was made, from an award granted pursuant to this act.

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

### § 148-84. Evidence; action by Industrial Commission; payment and amount of compensation.

At the hearing the claimant may introduce evidence in the form of affidavits or testimony to support the claim, and the Attorney General may introduce counter affidavits or testimony in refutation. If the Industrial Commission finds from the evidence that the claimant received a pardon of innocence for the reason that the crime was not committed at all, or was not committed by the claimant, and that the claimant was imprisoned and has been vindicated in connection with the alleged offense for which he or she was imprisoned, the Industrial Commission shall award to the claimant an amount equal to twenty thousand dollars (\$20,000) for each year or the pro rata amount for the portion of each year of the imprisonment actually served, including any time spent awaiting trial, but in no event shall the compensation exceed a total amount of five hundred thousand dollars (\$500,000). The Director of the Budget shall pay the amount of the award to the claimant out of the Contingency and Emergency Fund, or out of any other available State funds. The Industrial Commission shall give written notice of its decision to all parties concerned. The determination of the Industrial Commission shall be subject to judicial review upon appeal of the claimant or the State according to the provisions and

procedures set forth in Article 31 of Chapter 143 of the General Statutes. (1947, c. 465, s. 3; 1963, c. 1174, s. 4; 1973, c. 1262, s. 10; 1997-388, s. 3; 2001-424, s. 25.12(a).)

**Editor's Note.** — Session Laws 1997-443, s. 7.2(b), rewrites Session Laws 1997-388, s. 5 to provide in part that notwithstanding the five year limitation set forth in G.S. 148-82, as rewritten by s. 1, the petition of a person who has received a pardon of innocence prior to July 1, 1995, may be presented at any time prior to July 1, 1998, and this act shall apply to that petition, regardless of any prior claims for compensation filed and settled or otherwise resolved. If the petitioner has received compensation pursuant to a prior claim, the Industrial Commission shall consider the amount of the award received by the petitioner and may deduct that amount, plus interest, from the date the award was made, from an award granted pursuant to this act.

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, s. 25.12(a), effective September 26, 2001, and applicable to persons granted a pardon of innocence on or after January 1, 2001, combined the second and former fourth sentences into the present second sentence, deleting "determine the amount the claimant is entitled to be paid for the claimant's pecuniary loss and shall enter an award for that amount. The Director of the Budget shall pay the amount of the award to the claimant out of the Contingency and Emergency Fund, or out of any other available State funds. The Industrial Commission shall" following "the Industrial Commission shall" near the middle of the present second sentence, and in that sentence substituted "twenty thousand dollars (\$20,000)" for "ten thousand dollars (\$10,000)," inserted "including any time spent awaiting trial," and substituted "five hundred thousand dollars (\$500,000)" for "one hundred fifty thousand dollars (\$150,000)"; and added the present third sentence.

## ARTICLE 9.

### *Prison Advisory Council.*

§§ 148-85 through 148-88: Repealed by Session Laws 1957, c. 349, s. 11.

## ARTICLE 10.

### *Interstate Agreement on Detainers.*

§§ 148-89 through 148-95: Transferred to §§ 15A-761 to 15A-767 by Session Laws 1973, c. 1286, s. 22, as amended by Session Laws 1975, c. 573.

§§ 148-96 through 148-100: Reserved for future codification purposes.

## ARTICLE 11.

### *Inmate Grievance Commission.*

§§ 148-101 through 148-118: Repealed by Session Laws 1987, c. 746, s. 1.

**Cross References.** — As to corrections administrative remedy procedure, see now § 148-118.1 et seq.

## ARTICLE 11A.

### *Corrections Administrative Remedy Procedure.*

#### **§ 148-118.1. Authority.**

The Department of Correction shall adopt an Administrative Remedy Procedure in compliance with 42 U.S.C. 1997, the “Civil Rights of Institutionalized Persons Act”. The Administrative Remedy Procedure and any amendments or changes thereto shall be adopted only after prior consultation with the Grievance Resolution Board. (1987, c. 746, s. 2.)

#### **§ 148-118.2. Effect.**

(a) Upon approval of the Administrative Remedy Procedure by a federal court as authorized and required by 42 U.S.C. 1997(e)(a), and the implementation of the procedure, this procedure shall constitute the administrative remedies available to a prisoner for the purpose of preserving any cause of action under the purview of the Administrative Remedy Procedure, which a prisoner may claim to have against the State of North Carolina, the Department of Correction, or its employees.

(b) No State court shall entertain a prisoner’s grievance or complaint which falls under the purview of the Administrative Remedy Procedure unless and until the prisoner shall have exhausted the remedies as provided in said procedure. If the prisoner has failed to pursue administrative remedies through this procedure, any petition or complaint he files shall be stayed for 90 days to allow the prisoner to file a grievance and for completion of the procedure. If at the end of 90 days the prisoner has failed to timely file his grievance, then the petition or complaint shall be dismissed. Provided, however, that the court can waive the exhaustion requirement if it finds such waiver to be in the interest of justice. (1987, c. 746, s. 2.)

#### **§ 148-118.3. Publication of procedure.**

The Administrative Remedy Procedure shall be published in the North Carolina Register. (1987, c. 746, s. 2.)

#### **§ 148-118.4. Definitions.**

For purposes of this Article, “prisoner” shall refer to all prisoners in the physical custody of the Department of Correction. (1987, c. 746, s. 2.)

#### **§ 148-118.5. Records confidentiality.**

All reports, investigations, and like supporting documents prepared by the Department for purposes of responding to the prisoner’s request for an administrative remedy shall be deemed to be confidential. All formal written responses to the prisoner’s request shall be furnished to the prisoner as a matter of course as required by the procedure. The Grievance Resolution Board shall have access to all relevant records developed by the Department of Correction. (1987, c. 746, s. 2.)

### § 148-118.6. Grievance Resolution Board.

The Grievance Resolution Board is established as a separate agency within the Department of Correction. It shall consist of five members appointed by the Governor to serve four-year terms. Of the members so appointed, three shall be attorneys selected from a list of 10 persons recommended by the Council of the North Carolina State Bar. The remaining two members shall be persons of knowledge and experience in one or more fields under the jurisdiction of the Secretary of Correction. In the event a vacancy occurs on the Board prior to the expiration of a member's term, the Governor shall appoint a new Board member to serve the unexpired term. If the vacancy occurs in one of the positions designated for an attorney, the Governor shall select another attorney from a list of five persons recommended by the Council of the North Carolina State Bar. The Board shall perform those functions assigned to it by the Governor and shall review the grievance procedure. The Grievance Resolution Board shall meet not less than quarterly to review summaries of grievances. All members of the Inmate Grievance Commission, appointed by the Governor pursuant to G.S. 148-101, may complete their terms as members of the Board. Each member of the Board shall receive per diem and travel expenses as authorized for members of State commissions and boards under G.S. 138-5. (1987, c. 746, s. 2.)

**Editor's Note.** — Section 148-101, referred to in the next to the last sentence, was repealed by Session Laws 1987, c. 746, s. 1.

### § 148-118.7. Removal of members.

The Governor may remove any member of the Grievance Resolution Board for one or more of the following reasons:

- (1) Conviction of a crime involving moral turpitude or of any criminal offense the effect of which is to prevent or interfere with the performance of Board duties.
- (2) Failure to regularly attend meetings of the Board.
- (3) Failure to carry out duties assigned by the Board or its chairman.
- (4) Acceptance of another office or the conduct of other business conflicting with or tending to conflict with the performance of Board duties.
- (5) Any other ground that, under law, necessitates or justifies the removal of a State employee. (1987, c. 746, s. 2.)

### § 148-118.8. Appointment, salary, and authority of Executive Director and inmate grievance examiners.

(a) The Grievance Resolution Board shall appoint an Executive Director and grievance examiners after consultation with the Secretary of Correction. The Executive Director shall manage the staff and perform such other functions as are assigned to him by the Grievance Resolution Board. The Executive Director and the grievance examiners shall serve at the pleasure of the Grievance Resolution Board. However, if a grievance examiner is removed from his position for other than just cause, he shall have priority for any position that becomes available for which he is qualified according to rules regulating and defining priority as promulgated by the State Personnel Commission. The grievance examiners shall be subject to Article 2 of Chapter 126 of the North Carolina General Statutes for purposes of salary and leave. Support staff, equipment, and facilities for the Board shall be provided by the Department of Correction.

(b) The inmate grievance examiners shall investigate inmate grievances pursuant to the procedures established by the Administrative Remedy Procedure. Examiners shall attempt to resolve grievances through mediation with all parties. Otherwise, the inmate grievance examiners shall either (i) order such relief as is appropriate; or (ii) deny the grievance. The decision of the grievance examiner shall be binding, unless the Secretary of Correction (i) finds that such relief is not appropriate, (ii) gives a written explanation for this finding, and (iii) makes an alternative order of relief or denies the grievance. (1987, c. 746, s. 2.)

### **§ 148-118.9. Investigatory power of the Grievance Resolution Board.**

The Secretary of Correction may request that the Grievance Resolution Board investigate matters involving broad policy concerns. The Grievance Resolution Board may convene a fact-finding hearing to consider the issues presented for investigation. A record of testimony presented at such hearing shall be maintained by the Board. The Board shall report the findings of its investigation to the Secretary within a reasonable time. In no event shall such a request on the part of the Secretary result in a delay of the resolution of an inmate's grievance beyond the 90 day period. (1987, c. 746, s. 2.)

## ARTICLE 12.

### *Interstate Corrections Compact.*

#### **§ 148-119. Short title.**

This Article shall be known and may be cited as the Interstate Corrections Compact. (1979, c. 623.)

#### **§ 148-120. Governor to execute; form of compact.**

The Governor of North Carolina is hereby authorized and requested to execute, on behalf of the State of North Carolina, with any other state or states legally joining therein a compact which shall be in form substantially as follows:

The contracting states solemnly agree that:

- (1) The party states, desiring by common action to fully utilize and improve their institutional facilities and provide adequate programs for the confinement, treatment and rehabilitation of various types of offenders, declare that it is the policy of each of the party states to provide such facilities and programs on a basis of cooperation with one another, and with the federal government, thereby serving the best interest of such offenders and of society and effecting economies in capital expenditures and operational costs. The purpose of this compact is to provide for the mutual development and execution of such programs of cooperation for the confinement, treatment and rehabilitation of offenders with the most economical use of human and material resources.
- (2) As used in this compact, unless the context clearly requires otherwise:
  - a. "State" means a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.
  - b. "Sending state" means a state party to this compact in which conviction or court commitment was had.

- c. "Receiving state" means a state party to this compact to which an inmate is sent for confinement other than a state in which conviction or court commitment was had.
  - d. "Inmate" means a male or female offender who is committed, under sentence to or confined in a penal or correctional institution.
  - e. "Institution" means any penal or correctional facility, including but not limited to a facility for the mentally ill or mentally defective, in which inmates as defined in (2)d. above may lawfully be confined.
- (3)a. Each party state may make one or more contracts with any one or more of the other party states, or with the federal government, for the confinement of inmates on behalf of a sending state in institutions situated within receiving states. Any such contract shall provide for:
- 1. Its duration;
  - 2. Payments to be made to the receiving state or to the federal government, by the sending state for inmate maintenance, extraordinary medical and dental expenses, and any participation in or receipt by inmates of rehabilitative or correctional services, facilities, programs or treatment not reasonably included as part of normal maintenance;
  - 3. Participation in programs of inmate employment, if any; the disposition or crediting of any payments received by inmates on account thereof; and the crediting of proceeds from or disposal of any products resulting therefrom;
  - 4. Delivery and retaking of inmates;
  - 5. Such other matters as may be necessary and appropriate to fix the obligations, responsibilities and rights of the sending and receiving states.
- b. The terms and provisions of this compact shall be a part of any contract entered into by the authority of or pursuant thereto and nothing in any such contract shall be inconsistent therewith.
- (4)a. Whenever the duly constituted authorities in a state party to this compact, and which has entered into a contract pursuant to Article III, Subsection (1) [paragraph a. of subdivision (3)] shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary or desirable in order to provide adequate quarters and care or an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.
- b. The appropriate officials of any state party to this compact shall have access, at all reasonable times, to any institution in which it has a contractual right to confine inmates for the purpose of inspecting the facilities thereof and visiting such of its inmates as may be confined in the institution.
- c. Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state, for transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending state, provided that the sending state shall continue to be obligated to such payments as

- may be required pursuant to the terms of any contract entered into under the terms of Article III, Subsection (1) [paragraph a. of subdivision (3)].
- d. Each receiving state shall provide regular reports to each sending state on the inmates of that sending state in institutions pursuant to this compact including a conduct record of each inmate and certify said record to the official designated by the sending state, in order that each inmate may have official review of his or her record in determining and altering the disposition of said inmate in accordance with the law which may obtain in the sending state and in order that the same may be a source of information for the sending state.
  - e. All inmates who may be confined in an institution pursuant to the provisions of this compact shall be treated in a reasonable and humane manner and shall be treated equally with such similar inmates of the receiving state as may be confined in the same institution. The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.
  - f. Any hearing or hearings to which an inmate confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state, or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. In the event such hearing or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. Said record, together with any recommendations of the hearing officials, shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In any and all proceedings had pursuant to the provisions of this subdivision, the officials of the receiving state shall act solely as agents of the sending state and no final determination shall be made in any matter except by the appropriate officials of the sending state.
  - g. Any inmate confined pursuant to this compact shall be released within the territory of the sending state unless the inmate, and the sending and receiving states, shall agree upon release in some other place. The sending state shall bear the cost of such return to its territory.
  - h. Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state.
  - i. The parents, guardian, trustee, or other person or persons entitled under the laws of the sending state to act for, advise or otherwise function with respect to any inmate shall not be deprived of or restricted in his exercise of any power in respect of any inmate confined pursuant to the terms of this compact.
- (5)a. Any decision of the sending state in respect to any matter over which it retains jurisdiction pursuant to this compact shall be conclu-

- sive upon and not reviewable within the receiving state, but if at the time the sending state seeks to remove an inmate from an institution in the receiving state there is pending against the inmate within such state any criminal charge or if the inmate is formally accused of having committed within such state a criminal offense, the inmate shall not be returned without the consent of the receiving state until discharge from prosecution or other form of proceeding, imprisonment or detention for such offense. The duly accredited officers of the sending state shall be permitted to transport inmates pursuant to this compact through any and all states party to this compact without interference.
- b. An inmate who escapes from an institution in which he is confined pursuant to this compact shall be deemed a fugitive from the sending state and from the state in which the institution is situated. In the case of an escape to a jurisdiction other than the sending or receiving state, the responsibility for institution of extradition or rendition proceedings shall be that of the sending state, but nothing contained herein shall be construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.
- (6) Any state party to this compact may accept federal aid for use in connection with any institution or program, the use of which is or may be affected by this compact or any contract pursuant hereto; and any inmate in a receiving state pursuant to this compact may participate in any such federally-aided program or activity for which the sending and receiving states have made contractual provision, provided that if such program or activity is not part of the customary correctional regimen, the express consent of the appropriate official of the sending state shall be required therefor.
- (7) This compact shall enter into force and become effective and binding upon the states so acting when it has been enacted into law by any two states. Thereafter, this compact shall enter into force and become effective and binding as to any other of said states upon similar action by such state.
- (8) This compact shall continue in force and remain binding upon a party state until it shall have enacted a statute repealing the same and providing for the sending of formal written notice of withdrawal from the compact to the appropriate official of all other party states. An actual withdrawal shall not take effect until one year after the notice provided in said statute has been sent. Such withdrawal shall not relieve the withdrawing state from its obligations assumed hereunder prior to the effective date of withdrawal. Before effective date of withdrawal, a withdrawing state shall remove to its territory, at its own expense, such inmates as it may have confined pursuant to the provisions of this compact.
- (9) Nothing contained in this compact shall be construed to abrogate or impair any agreement or other arrangement which a party state may have with a nonparty state for the confinement, rehabilitation or treatment of inmates nor to repeal any other laws of a party state authorizing the making of cooperative institutional arrangements.
- (10) The provisions of this compact shall be liberally construed and shall be severable. If any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof

to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. (1979, c. 623.)

**§ 148-121. Proceedings to be open; all documents public records; exception.**

(a) Except as provided in subsection (c) of this section, at least 30 days before a transfer of a North Carolina inmate to another state system pursuant to this Article is approved, the Secretary of Correction shall give notice that the transfer is being considered. The Secretary shall give notice of the proposed transfer by:

- (1) Notifying the district attorney of the district where the prisoner was convicted, the judge who presided at the prisoner's trial, the law-enforcement agency that arrested the prisoner, and the victim of the prisoner's crime;
- (2) Posting notice at the courthouse in the county in which the prisoner was convicted; and
- (3) Notifying any other person who has made a written request to receive notice of a transfer of the prisoner.

(b) Except as provided in subsection (c) of this section, all written comments regarding a transfer are public records under General Statutes Chapter 132.

(c) If, in the discretion of the Secretary, such notice or disclosure requirements provided for in this section would jeopardize the safety of persons or property, the provisions of this section do not apply. (1983, c. 874, s. 1.)

## Chapter 149.

### State Song and Toast.

Sec.

149-1. "The Old North State."

149-2. "A Toast" to North Carolina.

#### § 149-1. "The Old North State."

The song known as "The Old North State," as hereinafter written, is adopted and declared to be the official song of the State of North Carolina, said song being in words as follows:

"Carolina! Carolina! Heaven's blessings attend her!  
While we live we will cherish, protect and defend her;  
Though the scorner may sneer at and witlings defame her,  
Our hearts swell with gladness whenever we name her.  
Hurrah! Hurrah! The Old North State forever!  
Hurrah! Hurrah! The good Old North State!  
Though she envies not others their merited glory,  
Say, whose name stands the foremost in Liberty's story!  
Though too true to herself e'er to crouch to oppression,  
Who can yield to just rule more loyal submission?  
Plain and artless her sons, but whose doors open faster  
At the knock of a stranger, or the tale of disaster?  
How like to the rudeness of their dear native mountains,  
With rich ore in their bosoms and life in their fountains.  
And her daughters, the Queen of the Forest resembling—  
So graceful, so constant, yet to gentlest breath trembling;  
And true lightwood at heart, let the match be applied them,  
How they kindle and flame! Oh! none know but who've tried them.  
Then let all who love us, love the land that we live in  
(As happy a region on this side of Heaven),  
Where Plenty and Freedom, Love and Peace smile before us,  
Raise aloud, raise together, the heart-thrilling chorus!"

(1927, c. 26, s. 1.)

#### § 149-2. "A Toast" to North Carolina.

The song referred to as "A Toast" to North Carolina is hereby adopted and declared to be the official toast to the State of North Carolina, said toast being in words as follows:

"Here's to the land of the long leaf pine,  
The summer land where the sun doth shine,  
Where the weak grow strong and the strong grow great,  
Here's to 'Down Home,' the Old North State!  
"Here's to the land of the cotton bloom white,  
Where the scuppernong perfumes the breeze at night,  
Where the soft southern moss and jessamine mate,  
'Neath the murmuring pines of the Old North State!  
"Here's to the land where the galax grows,  
Where the rhododendron's rosette glows,  
Where soars Mount Mitchell's summit great,  
In the 'Land of the Sky,' in the Old North State!  
"Here's to the land where maidens are fair,  
Where friends are true and cold hearts rare,

The near land, the dear land whatever fate,  
The blest land, the best land, the Old North State!"  
(1957, c. 777.)

**Chapter 150.**  
**Uniform Revocation of Licenses.**

**§§ 150-1 through 150-34:** Repealed by Session Laws 1973, c. 1331, as amended by Session Laws 1975, c. 69, s. 4.

**Cross References.** — For provisions as to administrative hearings, see §§ 150B-22 through 150B-42. As to judicial review of administrative decisions, see §§ 150B-43 through 150B-52.



## Chapter 150A.

### Administrative Procedure Act.

**§§ 150A-1 through 150A-64:** Recodified as §§ 150B-1 to 150B-64, effective January 1, 1986.

**Editor's Note.** — This Chapter was rewritten by Session Laws 1985, c. 746, s. 1, effective January 1, 1986, and has been recodified as Chapter 150B.

Session Laws 1985, c. 746, s. 19 had provided that the act would expire January 1, 1992, and would not be effective on or after that date, but the expiration date was deleted by Session Laws 1991, c. 103, ss. 1 and 2 and Session Laws 1991, c. 689, s. 182.

Session Laws 1983, c. 923, s. 52 had provided for the repeal of Chapter 150A, with the exception of §§ 150A-9 and 150A-11 through 150A-17, effective July 1, 1985. Session Laws 1985, c. 504, s. 1 extended the date of the repeal to July 11, 1985, and Session Laws 1985, c. 684, s. 1 further extended the date of the repeal to July 14, 1985. Subsequently, Session Laws 1985, c. 746, s. 10, effective July 12, 1985, repealed the repealing language of Session Laws 1983, c. 923, s. 52. Thus, the repeal by Session Laws

1983, c. 923, s. 52 never went into effect.

Session Laws 1983, c. 883, s. 1, had provided for repeal, effective July 1, 1985, of all rules adopted under the provisions of Article 2 of Chapter 150A which were in effect on January 1, 1985, unless they were approved by the 1985 Session of the General Assembly. Session Laws 1985, c. 504, s. 2 extended the repeal date provided for in Session Laws 1983, c. 883 to July 11, 1985, and Session Laws 1985, c. 684, s. 2, further extended this date to July 14, 1985. Subsequently, Session Laws 1985, c. 746, s. 11, effective July 12, 1985, repealed Session Laws 1983, c. 883, s. 1. Thus, the repeal of rules by Session Laws 1983, c. 883, s. 1 never went into effect.

Former § 150A-10 was repealed by Session Laws 1983, c. 641, s. 2, effective January 1, 1984. Former § 150A-46.1, relating to review de novo, was enacted by Session Laws 1983, c. 919, s. 1.



## Chapter 150B.

### Administrative Procedure Act.

#### Article 1.

##### General Provisions.

Sec.

- 150B-1. Policy and scope.
- 150B-2. Definitions.
- 150B-3. Special provisions on licensing.
- 150B-4. Declaratory rulings.
- 150B-5 through 150B-8. [Reserved.]

#### Article 2.

##### Rule Making.

- 150B-9 through 150B-16. [Repealed.]
- 150B-17. [Recodified.]

#### Article 2A.

##### Rules.

###### Part 1. General Provisions.

- 150B-18. Scope and effect.
- 150B-19. Restrictions on what can be adopted as a rule.
- 150B-20. Petitioning an agency to adopt a rule.
- 150B-21. Agency must designate rule-making coordinator; duties of coordinator.

###### Part 2. Adoption of Rules.

- 150B-21.1. Procedure for adopting a temporary rule.
- 150B-21.2. Procedure for adopting a permanent rule.
- 150B-21.3. Effective date of rules.
- 150B-21.4. Fiscal notes on rules.
- 150B-21.5. Circumstances when notice and rule-making hearing not required.
- 150B-21.6. Incorporating material in a rule by reference.
- 150B-21.7. Effect of transfer of duties or termination of agency on rules.

###### Part 3. Review by Commission.

- 150B-21.8. Review of rule by Commission.
- 150B-21.9. Standards and timetable for review by Commission.
- 150B-21.10. Commission action on permanent rule.
- 150B-21.11. Procedure when Commission approves permanent rule.
- 150B-21.12. Procedure when Commission objects to a permanent rule.
- 150B-21.13. Procedure when Commission extends period for review of permanent rule.
- 150B-21.14. Public hearing on a rule.
- 150B-21.15. [Repealed.]
- 150B-21.16. Report to Joint Legislative Ad-

Sec.

ministrative Procedure Oversight Committee.

###### Part 4. Publication of Code and Register.

- 150B-21.17. North Carolina Register.
- 150B-21.18. North Carolina Administrative Code.
- 150B-21.19. Requirements for including rule in Code.
- 150B-21.20. Codifier's authority to revise form of rules.
- 150B-21.21. Publication of rules of North Carolina State Bar, Building Code Council, and exempt agencies.
- 150B-21.22. Effect of inclusion in Code.
- 150B-21.23. Rule publication manual.
- 150B-21.24. Free copies of Register and Code.
- 150B-21.25. Paid copies of Register and Code.

###### Part 5. Rules Affecting Local Governments.

- 150B-21.26. Governor to conduct preliminary review of certain administrative rules.
- 150B-21.27. Minimizing the effects of rules on local budgets.
- 150B-21.28. Role of the Office of State Budget and Management.

#### Article 3.

##### Administrative Hearings.

- 150B-22. Settlement; contested case.
- 150B-23. Commencement; assignment of administrative law judge; hearing required; notice; intervention.
- 150B-23.1. Mediated settlement conferences.
- 150B-24. Venue of hearing.
- 150B-25. Conduct of hearing; answer.
- 150B-26. Consolidation.
- 150B-27. Subpoena.
- 150B-28. Depositions and discovery.
- 150B-29. Rules of evidence.
- 150B-30. Official notice.
- 150B-31. Stipulations.
- 150B-32. Designation of administrative law judge.
- 150B-33. Powers of administrative law judge.
- 150B-34. Decision of administrative law judge.
- 150B-35. No ex parte communication; exceptions.
- 150B-36. Final decision.
- 150B-37. Official record.

#### Article 3A.

##### Other Administrative Hearings.

- 150B-38. Scope; hearing required; notice; venue.

Sec.

- 150B-39. Depositions; discovery; subpoenas.
- 150B-40. Conduct of hearing; presiding officer; ex parte communication.
- 150B-41. Evidence; stipulations; official notice.
- 150B-42. Final agency decision; official record.

**Article 4.**

**Judicial Review.**

- 150B-43. Right to judicial review.
- 150B-44. Right to judicial intervention when decision unreasonably delayed.
- 150B-45. Procedure for seeking review; waiver.
- 150B-46. Contents of petition; copies served on all parties; intervention.

Sec.

- 150B-47. Records filed with clerk of superior court; contents of records; costs.
- 150B-48. Stay of decision.
- 150B-49. New evidence.
- 150B-50. Review by superior court without jury.
- 150B-51. Scope and standard of review.
- 150B-52. Appeal; stay of court's decision.
- 150B-53 through 150B-57. [Reserved.]

**Article 5.**

**Publication of Administrative Rules.**

- 150B-58 through 150B-64. [Repealed.]

ARTICLE 1.

*General Provisions.*

**§ 150B-1. Policy and scope.**

(a) Purpose. — This Chapter establishes a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process.

(b) Rights. — This Chapter confers procedural rights.

(c) Full Exemptions. — This Chapter applies to every agency except:

- (1) The North Carolina National Guard in exercising its court-martial jurisdiction.
- (2) The Department of Health and Human Services in exercising its authority over the Camp Butner reservation granted in Article 6 of Chapter 122C of the General Statutes.
- (3) The Utilities Commission.
- (4) The Industrial Commission.
- (5) The Employment Security Commission.

(d) Exemptions from Rule Making. — Article 2A of this Chapter does not apply to the following:

- (1) The Commission.
- (2) Repealed by Session Laws 2000-189, s. 14, effective July 1, 2000.
- (3) Repealed by Session Laws 2001-474, s. 34, effective November 29, 2001.
- (4) The Department of Revenue, with respect to the notice and hearing requirements contained in Part 2 of Article 2A.
- (5) The North Carolina Global TransPark Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.
- (6) The Department of Correction, with respect to matters relating solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees.
- (7) The North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in administering the provisions of Parts 2 and 3 of Article 3 of Chapter 135 of the General Statutes.
- (8) The North Carolina Federal Tax Reform Allocation Committee, with respect to the adoption of the annual qualified allocation plan required by 26 U.S.C. § 42(m), and any agency designated by the

Committee to the extent necessary to administer the annual qualified allocation plan.

- (9) The Department of Health and Human Services in adopting new or amending existing medical coverage policies under the State Medicaid Program.

(e) Exemptions From Contested Case Provisions. — The contested case provisions of this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter. The contested case provisions of this Chapter do not apply to the following:

- (1) The Department of Health and Human Services and the Department of Environment and Natural Resources in complying with the procedural safeguards mandated by Section 680 of Part H of Public Law 99-457 as amended (Education of the Handicapped Act Amendments of 1986).
  - (2) Repealed by Session Laws 1993, c. 501, s. 29.
  - (3), (4) Repealed by Session Laws 2001-474, s. 35, effective November 29, 2001.
  - (5) Hearings required pursuant to the Rehabilitation Act of 1973, (Public Law 93-122), as amended and federal regulations promulgated thereunder. G.S. 150B-51(a) is considered a contested case hearing provision that does not apply to these hearings.
  - (6) The Department of Revenue.
  - (7) The Department of Correction.
  - (8) The Department of Transportation, except as provided in G.S. 136-29.
  - (9) The Occupational Safety and Health Review Board.
  - (10) The North Carolina Global TransPark Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.
  - (11) Hearings that are provided by the Department of Health and Human Services regarding the eligibility and provision of services for eligible assaultive and violent children, as defined in G.S. 122C-3(13a), shall be conducted pursuant to the provisions outlined in G.S. 122C, Article 4, Part 7.
  - (12) The North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan with respect to disputes involving the performance, terms, or conditions of a contract between the Plan and an entity under contract with the Plan.
  - (13) The Teachers' and State Employees' Comprehensive Major Medical Plan with respect to determinations by the Executive Administrator and Board of Trustees, the Plan's designated utilization review organization, or a self-funded health maintenance organization under contract with the Plan that an admission, availability of care, continued stay, or other health care service has been reviewed and, based upon the information provided, does not meet the Plan's requirements for medical necessity, appropriateness, health care setting, or level of care or effectiveness, and the requested service is therefore denied, reduced, or terminated.
- (f) **(Effective until December 31, 2006)** Exemption for the University of North Carolina. — Except as provided in G.S. 143-135.3, no Article in this Chapter except Article 4 applies to The University of North Carolina.
- (f) **(Effective December 31, 2006)** Exemption from All But Judicial Review. — No Article in this Chapter except Article 4 applies to The University of North Carolina. (1973, c. 1331, s. 1; 1975, c. 390; c. 716, s. 5; c. 721, s. 1; c. 742, s. 4; 1981, c. 614, s. 22; 1983, c. 147, s. 2; c. 927, s. 13; 1985, c. 746, ss. 1, 19; 1987, c. 112, s. 2; c. 335, s. 2; c. 536, s. 1; c. 847, s. 2; c. 850, s. 20; 1987 (Reg. Sess., 1988), c. 1082, s. 14; c. 1111, s. 9; 1989, c. 76, s. 29; c. 168, s. 33; c. 373,

## § 150B-1(f) is set out twice. See notes.

s. 2; c. 538, s. 1; c. 751, s. 7(44); 1989 (Reg. Sess., 1990), c. 1004, s. 36; 1991, c. 103, s. 1; c. 418, s. 2; c. 477, s. 1; c. 749, ss. 9, 10; 1991 (Reg. Sess., 1992), c. 1030, s. 46; 1993, c. 501, s. 29; 1993 (Reg. Sess., 1994), c. 777, ss. 4(j), 4(k); 1995, c. 249, s. 4; c. 507, s. 27.8(m); 1997-35, s. 2; 1997-278, s. 1; 1997-412, s. 8; 1997-443, ss. 11A.110, 11A.119(a); 2000-189, s. 14; 2001-192, s. 1; 2001-299, s. 1; 2001-395, s. 6(c); 2001-424, ss. 6.20(b), 21.20(c); 2001-446, s. 5(d); 2001-474, ss. 34, 35; 2001-496, s. 8(c).)

**Subsection (f) Set Out Twice.** — The first version of subsection (f) set out above is effective until December 31, 2006. The second version of subsection (f) set out above is effective December 31, 2006.

**Editor's Note.** — This Chapter is former Chapter 150A, as rewritten by Session Laws 1985, c. 746, s. 1, effective January 1, 1986, and recodified. Where appropriate, the historical citations to the sections in the former Chapter have been added to the corresponding sections in the Chapter as rewritten and recodified.

In addition, Session Laws 1985, c. 746, s. 19, had provided that the act would expire January 1, 1992, and would not be effective on or after that date, but the expiration date was deleted by Session Laws 1991, c. 103, ss. 1 and 2 and Session Laws 1991, c. 689, s. 182.

Section 1 of Session Laws 1987, c. 827, provided: "The General Statutes are amended by deleting the reference '150A' and substituting the reference '150B' each time it appears."

Session Laws 1987, c. 536, s. 6 provided that a county ordinance that applies to the Camp Butner reservation on the effective date of the act (July 2, 1987) shall continue to apply until the Secretary of the Department of Human Resources withdraws his approval of the ordinance or the county amends or repeals the ordinance so that it no longer applies to the Camp Butner reservation.

Session Laws 1997-412, s. 14, provided that ss. 6, 7, 8, 10 and 11 of the act, which amended §§ 143-341(3), 143-135.3, 150B-1(f), 143-135.1, 133-1.1(d), and § 116-31.11, as enacted by s. 1 thereof, would expire on July 1, 2001. Subsequently, Session Laws 2001-496, s. 8(c), effective July 1, 2001, reenacted ss. 5, 7, 8 and 10 of Session Laws 1997-412. Session Laws 2001-496, s. 14(a) provided that ss. 8(a) to 8(e) of that act would expire December 31, 2006.

Session Laws 1999-294, s. 13 provides that the Codifier of Rules may amend the text of the administrative rules in Title 11 of the North Carolina Administrative Code to reflect the recodification of Chapter 58 of the General Statutes. An amendment pursuant to this section is exempt from Chapter 150B of the General Statutes and review by the Rules Review Commission to the extent that it does not change the substance of the rule.

Session Laws 2001-424, s. 21.10, provides: "The Codifier of Rules may continue the process of reorganizing Titles 10 and 15A of the North Carolina Administrative Code to reflect the recent reorganization of the Department of Health and Human Services and the Department of Environment and Natural Resources. The reorganization of the Code may include replacing Title 10 with a new Title 10A if desirable for clarity. The Codifier of Rules may make changes in the text of the affected rules to reflect changes in organizational structure of the Department of Health and Human Services and the Department of Environment and Natural Resources. So long as the changes in text do not change the substance of the rules, the reorganization by the Codifier is exempt from the requirements of Chapter 150B of the General Statutes and does not require the review or approval of the Rules Review Commission."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Acts of 2001'."

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 1997-412, s. 8, effective January 1, 1998, and effective until July 1, 2001, substituted "for The University of North Carolina" for "from All But Judicial Review", and inserted "Except as provided in G.S. 143-135.3." Session Laws 1997-412, s. 14, provided that this amendment would expire July 1, 2001. Subsequently, Session Laws 2001-496, s. 8(c), effective July 1, 2001, and expiring December 31, 2006, reenacted Session Laws 1997-412, s. 8.

Session Laws 2000-189, s. 14, effective July 1, 2000, repealed subdivision (d)(2), which had exempted the North Carolina Low-Level Radioactive Waste Management Authority from the rule making provisions of Article 2A of the Chapter when administering §§ 104G-10 and 104G-11.

Session Laws 2001-192, s. 1, effective June 12, 2001, and applicable to cases pending on that date, added subdivision (e)(12).

Session Laws 2001-299, s. 1, effective July 21, 2001, added subsection (d)(8).

Session Laws 2001-395, s. 6(c), effective August 29, 2001, added a subdivision (d)(9) that was identical to the subdivision subsequently added by Session Laws 2001-424, s. 21.20(c); Session Laws 2001-424, s. 6.20(b) repealed s. 6 of Session Laws 2001-395 effective July 1, 2001.

Session Laws 2001-424, s. 21.20(c), effective July 1, 2001, in subsection (d) as amended by Session Laws 2001-299, added subdivision (d)(10), which was redesignated (d)(9) at the direction of the Revisor of Statutes.

Session Laws 2001-446, s. 5(d), effective March 1, 2002, and applicable to health benefit plans that are in effect, delivered, issued for delivery, or renewed on or after that date, added subdivision (e)(12), which was redesignated (e)(13) at the direction of the Revisor of Statutes.

Session Laws 2001-474, ss. 34 and 35, effective November 29, 2001, deleted subdivision (d)(3), which read: "The North Carolina Hazardous Waste Management Commission in administering the provisions of G.S. 130B-13 and G.S. 130B-14"; deleted subdivision (e)(3), which read: "The North Carolina Low-Level Radioactive Waste Management Authority in administering the provisions of G.S. 104G-9, 104G-10, and 104G-11"; and deleted subdivision (e)(4), which read: "The North Carolina Hazardous

Waste Management Commission in administering the provisions of G.S. 130B-11, 130B-13, and 130B-14."

**Legal Periodicals.** — For comment on former Chapter 150, see 31 N.C.L. Rev. 378 (1953).

For note as to constitutionality of statutes licensing occupations, see 35 N.C.L. Rev. 473 (1957).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

For interpretative analysis of former Chapter 150A, see 53 N.C.L. Rev. 833 (1975).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1026 (1981).

For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

For article, "The New Administrative Procedures Act: A Practical Guide to Understanding and Using It," see 9 Campbell L. Rev. 293 (1987).

For note, "The Forty-Two Hundred Dollar Question: 'May State Agencies Have Discretion in Setting Civil Penalties Under the North Carolina Constitution?'," see 68 N.C.L. Rev. 1035 (1990).

For survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

#### CASE NOTES

**Editor's Note.** — *Most of the cases below were decided under corresponding provisions of former Chapter 150A, or prior to the 1991 amendments to this Chapter.*

**History of Chapter.** — The original Administrative Procedure Act (APA), codified as Chapter 150A, was effective until Dec. 31, 1985; the APA was rewritten in 1985 and recodified as Chapter 150B, with the new version becoming effective Jan. 1, 1986. *Vass v. Board of Trustees*, 108 N.C. App. 251, 423 S.E.2d 796 (1992).

**The 1991 Amendment to this section** merely confirms that when a person is aggrieved by agency action, the Administrative Procedure Act only "describes the procedures" for Office of Administrative Hearings review in the event the North Carolina General Assembly vests a party with the right to administrative review, such as a contested case hearing. *Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources*, 112 N.C. App. 566, 436 S.E.2d 594 (1993), rev'd on other grounds, 337 N.C. 569, 447 S.E.2d 768, reh'g denied, 338 N.C. 314, 451 S.E.2d 634 (1994).

**The primary purpose of this Act** is to

confer procedural rights, including the right to an administrative hearing, upon any person aggrieved by an agency decision, and statutes should be liberally construed together to preserve and effectuate that right. *Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources*, 337 N.C. 569, 447 S.E.2d 768, rehearing denied, 338 N.C. 314, 451 S.E.2d 634 (1994).

**The administrative hearing provisions of this act** apply to all agencies and all proceedings except those expressly exempted, and it expressly named the particular agencies exempted therefrom, specifying the extent of each such exemption. *Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources*, 337 N.C. 569, 447 S.E.2d 768, rehearing denied, 338 N.C. 314, 451 S.E.2d 634 (1994).

**The University of Chapel Hill is expressly exempted from the administrative hearings provisions** of the Administrative Procedure Act. *Beauchesne v. University of N.C.*, 125 N.C. App. 457, 481 S.E.2d 685 (1997).

**Application of Chapter.** — Where the com-

plaints and notices of hearing were filed prior to Jan. 1, 1986, the action was commenced prior to Jan. 1, 1986, and Chapter 150B had no application; thus, § 150A-45 (rewritten and recodified as § 150B-45), requiring a person seeking review to file a petition in the Superior Court of Wake County, and not § 150B-45, permitting such filing in either Wake County or the county where the person resides, governed. *Pinewood Manor Mobile Homes, Inc. v. North Carolina Manufactured Hous. Bd.*, 84 N.C. App. 564, 353 S.E.2d 231, cert. denied, 319 N.C. 674, 356 S.E.2d 780 (1987).

**Individuals aggrieved pursuant to the Rehabilitation Act** are not required to seek administrative review in a contested case hearing before the Office of Administrative Hearings via the contested case hearing provisions of this act; rather, they are entitled to a hearing governed by procedures established by the Rehabilitation Act of 1973, P.L.102-569, 42 U.S.C. § 701, et seq. as amended. *Hedgepeth v. North Carolina Div. of Servs. for the Blind*, 142 N.C. App. 338, 543 S.E.2d 169 (2001).

**Direct Challenge to Constitutionality of North Carolina Supreme Court Order.** — A direct challenge of the constitutionality of an order of the North Carolina Supreme Court cannot be adjudicated under this Chapter. The issue must be litigated as an original action in the General Court of Justice. *Beard v. North Carolina State Bar*, 320 N.C. 126, 357 S.E.2d 694 (1987).

**Judicial Notice of Regulations.** — Where promulgating agency is not subject to the North Carolina Administrative Procedure Act, the court is only required to take judicial notice of its regulations if they are submitted in accordance with certain procedures designed to insure their accuracy. *Southern Ry. v. O'Boyle Tank Lines*, 70 N.C. App. 1, 318 S.E.2d 872 (1984).

**Irreconcilable Dispute.** — When a dispute between a state agency and another person arise and cannot be settled informally, the procedures for resolving the dispute are governed by this act. *North Buncombe Ass'n of Concerned Citizens v. Rhodes*, 100 N.C. App. 24, 394 S.E.2d 462 (1990), appeal dismissed, 327 N.C. 484, 397 S.E.2d 215 (1990).

**State Personnel Commission.** — As to the applicability of former Chapter 150A to the State Personnel Commission, see *Stevenson v. North Carolina Dep't of Ins.*, 31 N.C. App. 299, 229 S.E.2d 209, cert. denied, 291 N.C. 450, 230 S.E.2d 767 (1976).

**Department of Insurance.** — Insurance Commissioner's promulgation of 11 N.C.A.C. 12.0319, prohibiting subrogation provisions in life or accident and health insurance contracts, supported by §§ 58-2-40 (right to limit practices injurious to the public) and 58-50-15(a) (prohibiting provisions less favorable to the

insured), did not exceed his statutory authority, even though it may change state substantive law, and did not amount to an unconstitutional delegation of legislative powers, because statutory provisions (§§ 58-2-40, 58-51-15, and 58-50-15) and judicial review (available under this chapter) offer adequate procedural safeguards and support the delegation of power to the Commissioner. In re Ruling by N. C. Comm'r of Ins., 134 N.C. App. 22, 517 S.E.2d 134 (1999), cert. denied, appeal dismissed, 351 N.C. 105, 540 S.E.2d 356 (1999).

**Department of Transportation.** — Language which provides that Articles 2 and 3 of former Chapter 150A shall not apply to the Department of Transportation in rule-making or administrative hearings only applies to actions taken by the department pursuant to Chapter 20, which refers to regulation of motor vehicles. In contrast, Chapters 136 and 143B provide the Department of Transportation and the Board of Transportation with powers and duties to engage in the planning and construction of the state highway system, and had the General Assembly wanted to exclude actions of the Department and Board of Transportation under Chapter 136 from the requirements of Articles 2 and 3 of former Chapter 150A, it would have done so with the same specificity that it used in excluding actions taken pursuant to Chapter 20. *Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina Dep't of Transp.*, 46 N.C. App. 350, 265 S.E.2d 890 (1980).

**University of North Carolina's State Residency Committee (SRC)** is exempt from this Chapter; therefore, although provisions in the act requiring judicial review of final administrative review were applicable, the SRC was not governed by § 150B-36, which requires agencies to state reasons for their decisions. *Wilson v. State Residence Comm.*, 92 N.C. App. 355, 374 S.E.2d 415 (1988), cert. denied, 324 N.C. 252, 377 S.E.2d 764 (1989).

**Board of Trustees.** — Language in § 135-39.7 that board of trustees "may make a binding decision" concerning a dispute between an aggrieved individual and a claims administrator of a medical plan is not an express and unequivocal exemption of the board from the requirements of this Chapter; instead, the use of the term "binding" in the statute was intended to mean only that the board's decision would be binding upon the parties absent further review according to law. *Vass v. Board of Trustees*, 324 N.C. 402, 379 S.E.2d 26 (1989).

**The Department of Environment, Health, and Natural Resources (now the Department of Environment and Natural Resources),** is not among those agencies which the Administrative Procedures Act specifically exempts from its provisions. *North Buncombe Ass'n of Concerned Citizens v. Rhodes*, 100 N.C. App. 24, 394 S.E.2d 462

(1990), appeal dismissed, 327 N.C. 484, 397 S.E.2d 215 (1990).

**Entitlement to Administrative Hearing on Mining Permit.** — Petitioners were entitled to a contested case hearing by the Office of Administrative Hearings on their claim that mining permit should not have been issued. *North Buncombe Ass'n of Concerned Citizens, Inc. v. North Carolina Dep't of Env't, Health, & Natural Resources*, 338 N.C. 302, 449 S.E.2d 451 (1994).

**The Social Services Commission** was not excluded from coverage under subsection (d). *Whittington v. North Carolina Dep't of Human Resources*, 100 N.C. App. 603, 398 S.E.2d 40 (1990).

**Board of Dental Examiners.** — The Board of Dental Examiners is an agency governed by the provisions of the North Carolina Administrative Procedure Act and is not exempt from the contested case provisions of the Act. *Homoly v. North Carolina State Bd. of Dental Examrs.*, 121 N.C. App. 695, 468 S.E.2d 481 (1996).

**Where taxpayer only argued in his brief that decision by board was unsupported by substantial evidence** in view of the "whole record" test, the Court of Appeals would decline to review the board's decision under the other standards of this section. *Walls & Marshall Fuel Co. v. North Carolina Dep't of Revenue*, 95 N.C. App. 151, 381 S.E.2d 815 (1989).

**For discussion of respective powers and duties of Commissioner of Insurance and his designated hearing officer** in the review of filed rates and entry of a final agency decision in a contested insurance rate case, see *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 61 N.C. App. 506, 300 S.E.2d 845 (1983).

**Appeal Allowed.** — Third party was entitled under this Act and the Air Pollution Control Act, §§ 143-215.105 et seq., to appeal to the Office of Administrative Hearings from the decision of the Department of Environmental Management, to grant an air pollution control permit to Duke Power Company. *Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources*, 337 N.C. 569, 447 S.E.2d 768, rehearing denied, 338 N.C. 314, 451 S.E.2d 634 (1994).

**Challenges to Constitutionality of Regulation or Statute.** — Under North Carolina law, plaintiffs may be able to bypass adminis-

trative review and seek direct relief from the court. For example, when an aggrieved party challenges the constitutionality of a regulation or statute, administrative remedies are deemed to be inadequate and exhaustion thereof is not required. *Prentiss v. Allstate Ins. Co.*, 87 F. Supp. 2d 514 (W.D.N.C. 1999).

**Applied** in *Florence Concrete Prods., Inc. v. North Carolina Licensing Bd.*, 113 N.C. App. 270, 437 S.E.2d 877 (1994); *Simonel v. North Carolina Sch. of Arts*, 119 N.C. App. 772, 460 S.E.2d 194 (1995); *Johnston Health Care Ctr., L.L.C. v. North Carolina Dep't of Human Res.*, 136 N.C. App. 307, 524 S.E.2d 352 (2000); *Charlotte-Mecklenburg Hosp. Auth. v. Bruton*, 145 N.C. App. 190, 550 S.E.2d 524 (2001).

**Quoted** in *Nailing v. UNC-CH*, 117 N.C. App. 318, 451 S.E.2d 351 (1994), cert. denied, 339 N.C. 614, 454 S.E.2d 255 (1995); *Prentiss v. Allstate Ins. Co.*, 87 F. Supp. 2d 514 (W.D.N.C. 1999).

**Stated** in *Huang v. North Carolina State Univ.*, 107 N.C. App. 710, 421 S.E.2d 812 (1992); *Dialysis Care of N.C., LLC v. Department of Health & Human Servs.*, 137 N.C. App. 638, 529 S.E.2d 257 (2000), aff'd, 353 N.C. 258, 538 S.E.2d 566 (2000).

**Cited** in *O.S. Steel Erectors v. Brooks*, 84 N.C. App. 630, 353 S.E.2d 869 (1987); *North Carolina Dep't of Justice v. Baker*, 90 N.C. App. 30, 367 S.E.2d 392 (1988); *Vass v. Board of Trustees*, 324 N.C. 402, 379 S.E.2d 26 (1989); *Walls & Marshall Fuel Co. v. North Carolina Dep't of Revenue*, 95 N.C. App. 151, 381 S.E.2d 815 (1989); *C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co.*, 326 N.C. 133, 388 S.E.2d 557 (1990); *In re Greene*, 328 N.C. 639, 403 S.E.2d 257 (1991); *Brooks v. BCF Piping, Inc.*, 109 N.C. App. 26, 426 S.E.2d 282 (1993); *In re McCrary*, 112 N.C. App. 161, 435 S.E.2d 359 (1993); *Eury v. North Carolina Emp. Sec. Comm'n*, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994); *Byers v. North Carolina Sav. Institutions Div.*, 123 N.C. App. 689, 474 S.E.2d 404 (1996); *Ware v. Fort*, 124 N.C. App. 613, 478 S.E.2d 218 (1996); *Bryant v. Hogarth*, 127 N.C. App. 79, 488 S.E.2d 269 (1997), cert. denied, 347 N.C. 396, 494 S.E.2d 406 (1997); *Holland Group, Inc. v. North Carolina Dep't of Admin.*, 130 N.C. App. 721, 504 S.E.2d 300 (1998); *Living Centers-Southeast, Inc. v. North Carolina Health & Human Servs.*, 138 N.C. App. 572, 532 S.E.2d 192 (2000).

## OPINIONS OF ATTORNEY GENERAL

**Editor's Note.** — *The opinions below were issued prior to the 1991 amendments to this Chapter.*

**Applicability of § 150B-23(a).** — Section 150B-23(a), as amended by Session Laws 1987,

Chapter 878, is not applicable to agencies governed by Article 3A of this Chapter. See opinion of Attorney General to Mr. Phillip T. Fisher, Executive Director, N.C. Real Estate Commission, 57 N.C.A.G. 85 (1987).

**Appeals by applicants and recipients of public assistance or social services from adverse decisions of county agencies or boards are governed by the substantive provisions and procedural requirements of § 108A-79, including the procedural provisions of the Administrative Procedure Act consistent with the statute, to the extent that substance and procedure are not in conflict with applicable federal law and regulations. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 55 N.C.A.G. 91 (1986).**

**Procedural, Not Substantive, Provisions of Act Applicable to Appeals of County Agency Decisions.** — Given the detailed substantive provisions of § 108A-79, designed specifically to apply to appeals of county agency decisions, and the fact that the Administrative Procedure Act (APA), by its terms, does not apply to such appeals, the Legislature, by reference to the APA, did not intend to substitute the Act's substantive requirements for those of § 108A-79. The citation to the APA simply indicates a legislative intent to incorporate the powers of hearing officers and the hearing procedures detailed in the Act into § 108A-79(i) by reference. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 55 N.C.A.G. 91 (1986).

**When a contested case hearing is conducted by an agency governed by Article**

**3A of this Chapter, a petition or other notice need not be filed with the Office of Administrative Hearings. See opinion of Attorney General to Mr. Phillip T. Fisher, Executive Director, N.C. Real Estate Commission, 57 N.C.A.G. 85 (1987).**

**Chapter 78A Does Not Take Precedence over This Act.** — The provisions of Chapter 78A are not stated with the specificity and particularity sufficient to take precedence over any similar provisions of this Chapter which might conceivably apply to the actions and proceedings addressed by the Securities Act. See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

**This Chapter applies to the Secretary of State in the execution of the duties delegated in Chapter 78A.** To be entirely exempt from this Chapter under subsection (c) of this section, the agency must either be listed in subsection (d) or have a specific statement of exemption from this Chapter in its enabling legislation; however, neither basis for exemption exists for Chapter 78A. Subsection (c) does have the additional effect of causing any applicable provisions of this Chapter which cannot be reconciled with provisions of Chapter 78A to fail in favor of Chapter 78A. See opinion of Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

## § 150B-2. Definitions.

As used in this Chapter,

- (1) "Administrative law judge" means a person appointed under G.S. 7A-752, 7A-753, or 7A-757.
- (1a) "Agency" means an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.
- (1b) "Adopt" means to take final action to create, amend, or repeal a rule.
- (1c) "Codifier of Rules" means the Chief Administrative Law Judge of the Office of Administrative Hearings or a designated representative of the Chief Administrative Law Judge.
- (1d) "Commission" means the Rules Review Commission.
- (2) "Contested case" means an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. "Contested case" does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.
- (2a) Repealed by Session Laws 1991, c. 418, s. 3.
- (2b) "Hearing officer" means a person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.
- (3) "License" means any certificate, permit or other evidence, by whatever name called, of a right or privilege to engage in any activity, except

licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes and occupational licenses.

- (4) "Licensing" means any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. "Licensing" does not include controversies over whether an examination was fair or whether the applicant passed the examination.
- (4a) "Occupational license" means any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.
- (4b) "Occupational licensing agency" means any board, commission, committee or other agency of the State of North Carolina which is established for the primary purpose of regulating the entry of persons into, and/or the conduct of persons within a particular profession, occupation or field of endeavor, and which is authorized to issue and revoke licenses. "Occupational licensing agency" does not include State agencies or departments which may as only a part of their regular function issue permits or licenses.
- (5) "Party" means any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate. This subdivision does not permit an agency that makes a final decision, or an officer or employee of the agency, to petition for initial judicial review of that decision.
- (6) "Person aggrieved" means any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.
- (7) "Person" means any natural person, partnership, corporation, body politic and any unincorporated association, organization, or society which may sue or be sued under a common name.
- (8) "Residence" means domicile or principal place of business.
- (8a) "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
  - a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
  - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, by an occupational licensing board, as defined by G.S. 93B-1, or by the State Board of Elections.
  - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
  - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
  - e. Statements of agency policy made in the context of another proceeding, including:
    1. Declaratory rulings under G.S. 150B-4.
    2. Orders establishing or fixing rates or tariffs.

- f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
  - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
  - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.
  - i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Personnel Commission.
  - j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.1 and the variable component of the excise tax on motor fuel under G.S. 105-449.80.
- (8b) "Substantial evidence" means relevant evidence a reasonable mind might accept as adequate to support a conclusion.
- (9) Repealed by Session Laws 1991, c. 418, s. 3. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, ss. 61, 62; 1977, c. 915, s. 5; 1983, c. 641, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(2)-1(5); 1987, c. 878, ss. 1, 2, 21; 1987 (Reg. Sess., 1988), c. 1111, s. 17; 1991, c. 418, s. 3; c. 477, ss. 3.1, 3.2, 9; 1995, c. 390, s. 29; 1996, 2nd Ex. Sess., c. 18, s. 7.10(g); 1997-456, s. 27.)

**Cross References.** — For section regarding rulemaking to implement ABC plan, see G.S. 115C-17.

**Editor's Note.** — Subdivisions (01), (1), (1a), (1b), and (1c) of this section were renumbered as subdivisions (1), (1a), (1b), (1c) and (1d), respectively, pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

For note, "Contested Case Hearings Under the North Carolina Administrative Procedure Act: 1985 Rewrite Contains Dual System of Administrative Adjudication," see 64 N.C.L. Rev. 852 (1986).

For survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

## CASE NOTES

**Editor's Note.** — *Most of the cases below were decided under corresponding provisions of former Chapter 150A or prior to the 1991 amendments to this Chapter.*

**"Agency".** — The Department of Insurance is an "agency" subject to the provisions of subdivision (1) of this section. *North Carolina Reinsurance Facility v. Long*, 98 N.C. App. 41, 390 S.E.2d 176 (1990).

The Department of Revenue is an administrative agency of the State. *Bailey v. State*, 330 N.C. 227, 412 S.E.2d 295 (1991), cert. denied, 504 U.S. 911, 112 S. Ct. 1942, 118 L. Ed. 2d 547 (1992), overruled on other grounds, 348 N.C. 130, 500 S.E.2d 54 (1998).

Although the North Carolina Administrative

Procedure Act (the Act) provides review only for agency decisions, § 150B-50 (1991), and local units of government are not within the definition of agencies in subdivision (1), the principles embodied in the Act "are highly pertinent" to appellate review of local government actions. *Vulcan Materials Co. v. Guilford County Bd. of County Comm'rs*, 115 N.C. App. 319, 444 S.E.2d 639, cert. denied, 337 N.C. 807, 449 S.E.2d 758 (1994).

**"Contested Case".** — Case challenging a consent special order entered into by Environmental Management Commission and a corporation, which order was alleged to intrude upon the National Pollutant Discharge Elimination System (NPDES) permit process (which pro-

cess requires a hearing), was "contested" for the purposes of former § 150A-43. State ex rel. Tenn. Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

Where the rights of the petitioner were determined by an in-person interview and by an investigation conducted by a hearing officer of the North Carolina DMV, a state agency, they constituted "an agency proceeding." Therefore, the case was "contested" for purposes of § 150B-43. Charlotte Truck Driver Training School, Inc. v. North Carolina DMV, 95 N.C. App. 209, 381 S.E.2d 861 (1989).

Petitioner's allegation that he had been "demoted in rank without sufficient cause" stated grounds for his department's action to be deemed "disciplinary" within the meaning and intent of § 126-35 and for his case to be considered "contested" within the meaning and intent of § 126-37(a). Because he had properly pursued all informal procedures mandated by the State Personnel Act and by the North Carolina Administrative Code for the resolution of his grievance, petitioner's appeal also fit the procedural profile of a "contested case" for purposes of its review by the Office of Administrative Hearings under this Chapter. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

Wildlife Resources Commission's rejection of sewer district's study and of its request for lower streamflow requirements constituted agency action giving rise to a dispute which ultimately became a "contested case" over which the Office of Administrative Hearings has jurisdiction. Metropolitan Sewerage Dist. v. North Carolina Wildlife Resources Comm'n, 100 N.C. App. 171, 394 S.E.2d 668 (1990).

**A contested case hearing is distinguishable from a contested case.** The phrase "contested case" extends beyond an adjudicatory hearing to include any agency proceeding, by whatever name called, wherein the legal rights, duties and privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing. Community Psychiatric Ctrs. v. North Carolina Dep't of Human Resources, 103 N.C. App. 514, 405 S.E.2d 769 (1991).

**Elements of "Contested Case".** — There are two elements of a "contested case": (1) An agency proceeding; (2) that determined the rights of a party or parties. Lloyd v. Babb, 296 N.C. 416, 251 S.E.2d 843 (1979).

**Clear and Convincing Evidentiary Rule Invalid.** — An administrative rule requiring that clear and convincing evidence be presented to show that a transfer of assets was made exclusively for a purpose other than to

establish Medicaid eligibility was invalid. Dillingham v. North Carolina Dep't of Human Resources, 132 N.C. App. 704, 513 S.E.2d 823 (1999).

**Error of Law.** — The reviewing court may substitute its judgment for that of the Review Board if the Board's decision was affected by an error of law. Associated Mechanical Contractors v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996).

**The result of a petitioner's ineffective attempts to file a petition** for a contested case hearing was only a contested case. Community Psychiatric Ctrs. v. North Carolina Dep't of Human Resources, 103 N.C. App. 514, 405 S.E.2d 769 (1991).

**Without the jurisdictional prerequisite of a contested case hearing,** a petitioner cannot utilize § 131E-188(b) to appeal to the Court of Appeals. Community Psychiatric Ctrs. v. North Carolina Dep't of Human Resources, 103 N.C. App. 514, 405 S.E.2d 769 (1991).

**"Person Aggrieved".** — "Procedural injury," whereby petitioner State of Tennessee's right to be heard on certain aspects of a National Pollutant Discharge Elimination System (NPDES) permit was substantially impaired, was sufficient under former § 150A-43 to qualify petitioner as an "aggrieved person" for purposes of appeal of issuance of Environmental Management Commission's consent special order with corporation. In addition, where the consent special order contained provisions substantially identical to provisions which petitioner opposed in the proposed NPDES permit, which affected the property rights of the petitioner in the Pigeon River, these allegations also established petitioner's "aggrieved person" status. State ex rel. Tenn. Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

Where none of petitioner's personal rights or interests, nor any rights or interests properly attributable to him in a cognizable representative capacity, were either directly or indirectly at issue in requested rule making proceeding, he was not substantially affected by Department of Human Resources' denial of his petition for rule making. Therefore, he was not a "person aggrieved" as a result of the agency decision and had no standing to seek judicial review thereof. In re Wheeler, 85 N.C. App. 150, 354 S.E.2d 374 (1987).

"Person aggrieved" means one who is adversely affected in respect to legal rights, or who is suffering from an infringement or denial of legal rights. In re Wheeler, 85 N.C. App. 150, 354 S.E.2d 374 (1987).

A power company satisfied the definition of a "person aggrieved" because its interest in having the Department of Environment, Health and Natural Resources (now the Department of Environment and Natural Resources) prepare an Environmental Impact Statement before is-

suing a permit and its interest in the air resources of the state were adversely affected by DEHNR's granting of a permit issued to another power company to construct and operate combustion turbine electric generating units. *Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources*, 112 N.C. App. 566, 436 S.E.2d 594 (1993), rev'd on other grounds, 337 N.C. 569, 447 S.E.2d 768, reh'g denied, 338 N.C. 314, 451 S.E.2d 634 (1994).

A landowner qualified as a "person aggrieved" as he owned and lived on property adjacent to the proposed site. *Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources*, 112 N.C. App. 566, 436 S.E.2d 594 (1993), rev'd on other grounds, 337 N.C. 569, 447 S.E.2d 768, reh'g denied, 338 N.C. 314, 451 S.E.2d 634 (1994).

A pet owner was not a "person aggrieved" under § 150B-2(6) as to the decision of the North Carolina Veterinary Medical Board disciplining a veterinarian against whom she filed a complaint, and therefore the pet owner was not entitled to an administrative hearing on the issue and had no standing to seek judicial review. In re Complaint No. 97025-1-1, — N.C. App. —, 552 S.E.2d 230, 2001 N.C. App. LEXIS 855 (2001).

**Standing Is Question of Subject Matter Jurisdiction.** — Whether one has standing to obtain judicial review of an administrative decision is a question of subject matter jurisdiction. *Carter v. North Carolina State Bd. of Registration*, 86 N.C. App. 308, 357 S.E.2d 705 (1987).

**County had standing to challenge establishment of toxic waste site** within its borders because of the effect on its tax base and planning jurisdiction, because of the final agency determination upon issuance of an environmental impact statement, and because the Environmental Policy Act (Art. 1 of Chap. 113A) includes the right to judicial review of an issue which involves a contested case. *Warren County v. North Carolina*, 528 F. Supp. 276 (E.D.N.C. 1981).

**The intervention statute is permissive only.** In re Brunswick County, 81 N.C. App. 391, 344 S.E.2d 584 (1986).

**Decisions of Municipalities Exempt from Chapter.** — The North Carolina Administrative Procedure Act provides judicial review only for agency decisions, from which the decisions of local municipalities are expressly exempt. *Coastal Ready-Mix Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 265 S.E.2d 379, rehearing denied, 300 N.C. 562, 270 S.E.2d 106 (1980).

**Standard on Review of City's Special Zoning Request Decisions.** — Although the North Carolina Administrative Procedure Act provides judicial review only for agency deci-

sions and exempts cities and other local municipalities, a similar standard of review is appropriate to review city council special zoning request decisions. *Jennewein v. City Council*, 62 N.C. App. 89, 302 S.E.2d 7, cert. denied, 309 N.C. 461, 307 S.E.2d 365 (1983).

**The Department of Insurance** is an "agency" subject to the provisions of the North Carolina Administrative Procedure Act. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

**Tax Review Board** was an "administrative agency" under former statute. In re Halifax Paper Co., 259 N.C. 589, 131 S.E.2d 441 (1963).

**"Rule."** — Specific findings by the State Banking Commission were not rules as defined under subsection (8a); thus, the Commission did not apply unpromulgated rules in denying application to sell non-credit disability insurance. *Beneficial N.C., Inc. v. State ex rel. N.C. State Banking Comm'n*, 126 N.C. App. 117, 484 S.E.2d 808 (1997).

**Memorandum Was Not a "Rule" Under Subdivision (8a).** — Where a memorandum constituted guidelines to be followed when investigating and prosecuting violations of state law and a statement that possession or operation of certain video machines on ABC-licensed premises transgressed that law, the memorandum fell squarely within the meaning of subdivisions (8a)(c) and (8a)(g), and therefore did not constitute a "rule." *Ford v. State, Dep't of Crime Control & Pub. Safety*, 115 N.C. App. 556, 445 S.E.2d 425 (1994).

**Interpretation of Medicaid Law as Rule.** — A provision of an agency manual requiring written evidence that a transfer of assets was made exclusively for a purpose other than to establish Medicaid eligibility was an administrative rule under this section, where the requirement created a binding standard interpreting eligibility provisions of Medicaid law. *Dillingham v. North Carolina Dep't of Human Resources*, 132 N.C. App. 704, 513 S.E.2d 823 (1999).

**Rehabilitation Act.** — The Superior Court had jurisdiction over a petition for review of denial of services under the Rehabilitation Act of 1973, P.L. 102-569, 42 U.S.C. § 701, et seq. as amended, where, although the petitioner's claims were not heard by an Administrative Law Judge, they were heard by an agency hearing officer, at a proceeding in which petitioner and respondent were allowed to submit and cross-examine evidence and where respondent's director reviewed and affirmed the hearing officer's decision, in accordance with its own regulations. *Hedgepeth v. North Carolina Div. of Servs. for the Blind*, 142 N.C. App. 338, 543 S.E.2d 169 (2001).

**While subdivision (1) expressly excepts local boards of education** from the coverage

of the Administrative Procedure Act, nonetheless the standards for judicial review set forth in § 150B-51 apply to appeals from school boards. *Evers v. Pender County Bd. of Educ.*, 104 N.C. App. 1, 407 S.E.2d 879 (1991), aff'd, 331 N.C. 380, 416 S.E.2d 3 (1992).

**Board of trustees of medical plan** was an "agency" of the executive branch of State government under this section. *Vass v. Board of Trustees*, 324 N.C. 402, 379 S.E.2d 26 (1989).

**Trustees of university** were not an agency governed by the former statute. In re *Carter*, 262 N.C. 360, 137 S.E.2d 150 (1964).

**State Employee's Attempt to Recover for Surgery Costs.** — State employee's dispute with the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan, an administrative agency, seeking to recover costs of surgery should have been brought under this Chapter. *Vass v. Board of Trustees*, 89 N.C. App. 333, 366 S.E.2d 1 (1988), modified and aff'd, 324 N.C. 402, 379 S.E.2d 26 (1989).

**Petitioner whose driving privilege was mandatorily suspended** under § 20-17(2) and § 20-19(e) did not have the right to appeal under § 20-25 or under this Chapter. However, the superior court could review the actions of the Commissioner by issuing a writ of certiorari. *Davis v. Hiatt*, 326 N.C. 462, 390 S.E.2d 338 (1990).

**Intervenor Not Approved.** — For purposes of meeting appeal requirements of § 131E-188(b), appellant, proposed intervenor below, was not and could not be a party to contested hearing at issue below until its motion to intervene was approved. Since this motion was not approved, appellant was not a party to contested case, and therefore, did not meet jurisdictional requirements of § 131E-188(b). *HCA Crossroads Residential Centers, Inc. v. North*

*Carolina Dep't of Human Resources*, 99 N.C. App. 193, 392 S.E.2d 398 (1990).

**As to applicability of former statute**, see In re *North Carolina Auto. Rate Admin. Office*, 278 N.C. 302, 180 S.E.2d 155 (1971); *Carter v. Town of Chapel Hill*, 14 N.C. App. 93, 187 S.E.2d 588, cert. denied, 281 N.C. 314, 188 S.E.2d 897 (1972).

**Applied** in *Beneficial N.C., Inc. v. State ex rel. N.C. State Banking Comm'n*, 126 N.C. App. 117, 484 S.E.2d 808 (1997); *Duke Univ. Medical Ctr. v. Bruton*, 134 N.C. App. 39, 516 S.E.2d 633 (1999).

**Quoted** in *State ex rel. Envtl. Mgt. Comm'n v. House of Raeford Farms, Inc.*, 101 N.C. App. 433, 400 S.E.2d 107 (1991); *Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources*, 337 N.C. 569, 447 S.E.2d 768, rehearing denied, 338 N.C. 314, 451 S.E.2d 634 (1994); *Meads v. North Carolina Dep't of Agric.*, 349 N.C. 656, 509 S.E.2d 165 (1998).

**Stated** in *Gummels v. North Carolina Dep't of Human Resources*, 97 N.C. App. 245, 388 S.E.2d 223 (1990); *Act-Up Triangle v. Commission for Health Servs.*, 345 N.C. 699, 483 S.E.2d 388 (1997).

**Cited** in *Penuel v. Hiatt*, 97 N.C. App. 616, 389 S.E.2d 289 (1990); *North Buncombe Ass'n of Concerned Citizens v. Rhodes*, 100 N.C. App. 24, 394 S.E.2d 462 (1990), appeal dismissed, 327 N.C. 484, 397 S.E.2d 215 (1990); *Bryant v. North Carolina State Bd. of Exmrs. of Elec. Contractors*, 111 N.C. App. 875, 433 S.E.2d 814 (1993); *Farnsworth v. Jones*, 114 N.C. App. 182, 441 S.E.2d 597 (1994); *Bryant v. North Carolina State Bd. of Exmrs. of Elec. Contractors*, 338 N.C. 288, 449 S.E.2d 188 (1994); *Jackson v. North Carolina Dep't of Human Res.*, 131 N.C. App. 179, 505 S.E.2d 899 (1998), cert. denied, 350 N.C. 594, 537 S.E.2d 213 (1999).

## OPINIONS OF ATTORNEY GENERAL

**Editor's Note.** — *Many of the opinions below were issued prior to the 1991 amendments to this Chapter.*

**Procedures Substantially Affecting Nonagency Persons Must Be Adopted as Rules.** — When § 150B-2(8a) and § 150B-11(1) are read together, it is apparent that any procedures, whether formal or informal, that directly or substantially affect the rights or procedures of nonagency persons must be adopted as rules. See *Opinion of Attorney General to Elizabeth H. Drury*, Director, Office of Legislative and Legal Affairs, Department of Human Resources, 56 N.C.A.G. 25 (1986) decided prior to the 1991 amendment.

**Employee Insurance Committees have rule-making and limited quasi-judicial powers** pursuant to former § 58-194.3(b) (see

now § 58-31-60) and are "agencies" within the meaning of § 150B-2(1). See *Opinion of Attorney General to Elizabeth H. Drury*, Director, Office of Legislative and Legal Affairs, Department of Human Resources, 56 N.C.A.G. 25 (1986) decided prior to the 1991 amendment.

**The signing of a proposed memorandum of understanding with federal land managers of National Parks and Wilderness Areas in and around North Carolina would not constitute rulemaking** under the N.C. Administrative Procedures Act and, therefore, did not require rulemaking by the Environmental Management Commission. See *Opinion of Attorney General to Mr. William R. Gilkeson*, Staff Attorney, N.C. General Assembly, 1998 N.C.A.G. 54 (12/4/98).

**Contested Cases.** — Determinations made

by the securities administrator pursuant to his statutory authority are considered "contested cases" within the meaning of subdivision (2) of this section. Such determinations control or restrict the activities of dealers, salesmen, or issuers of securities, but these determinations only become "contested cases" if the administrator's action is "disputed" by the subject of such determination. See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

**The registration of securities dealers and salesmen** by the Securities Division pursuant to § 78A-37 constitutes the granting of an "occupational license" within the meaning of subdivision (4a) of this section. See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

**Scope of Article 3A of This Chapter.** — Even though the Securities Division is determined to be an "occupational licensing agency" within the meaning of subdivision (4b) of this section, the provisions of Article 3A of this chapter (procedure for conduct of administrative hearings by occupational licensing agencies) in no way restrict or modify provisions of §§ 78A-39(a), (c),(e) and (f); 78A-45 or 78A-46(b). See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

**The Securities Division is an "occupational licensing agency"** within the meaning of subdivision (4b) of this section. See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

### § 150B-3. Special provisions on licensing.

(a) When an applicant or a licensee makes a timely and sufficient application for issuance or renewal of a license or occupational license, including the payment of any required license fee, the existing license or occupational license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license or occupational license are limited, until the last day for applying for judicial review of the agency order. This subsection does not affect agency action summarily suspending a license or occupational license under subsections (b) and (c) of this section.

(b) Before the commencement of proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of any license other than an occupational license, the agency shall give notice to the licensee, pursuant to the provisions of G.S. 150B-23. Before the commencement of such proceedings involving an occupational license, the agency shall give notice pursuant to the provisions of G.S. 150B-38. In either case, the licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license or occupational license.

(c) If the agency finds that the public health, safety, or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license or occupational license may be ordered effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.

Nothing in this subsection shall be construed as amending or repealing any special statutes, in effect prior to February 1, 1976, which provide for the summary suspension of a license.

(d) This section does not apply to the following:

- (1) Revocations of occupational licenses based solely on a court order of child support delinquency or a Department of Health and Human Services determination of child support delinquency issued pursuant to G.S. 110-142, 110-142.1, or 110-142.2.
- (2) Refusal to renew an occupational license pursuant to G.S. 87-10.1, 87-22.2, 87-44.2, or 89C-18.1, based solely on a Department of Revenue determination that the licensee owes a delinquent income tax debt. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1995, c. 538, s. 2(i); 1997-443, s. 11A.118(a); 1998-162, s. 8.)

**Legal Periodicals.** — For comment, “The Problem of Procedural Delay in Contested Case Hearings ...” under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

#### CASE NOTES

**Stated** in *Miller v. North Carolina State Bd. of Registration for Professional Eng'rs & Land Surveyors*, 322 N.C. 465, 368 S.E.2d 605 (1988).

#### OPINIONS OF ATTORNEY GENERAL

**The requirements in subsection (c) of this section** that an agency make a finding that the “public health, safety, or welfare requires emergency action” prior to a summary suspension of a license or an occupational license, and that the agency incorporate such finding in its order of suspension, are not in any way in conflict with the findings required to be made by the securities administrator by § 78A-

39(a) prior to denying, suspending, or revoking the registration of a securities dealer or salesman and by § 78A-29(a) prior to denying, suspending, or revoking the effectiveness of a securities registration statement. See opinion of the Attorney General to Mr. Stephen M. Wallis, Deputy Securities Administrator (acting), 58 N.C.A.G. 76 (1988).

### § 150B-4. Declaratory rulings.

(a) On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency, except when the agency for good cause finds issuance of a ruling undesirable. The agency shall prescribe in its rules the circumstances in which rulings shall or shall not be issued. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court. An agency may not retroactively change a declaratory ruling, but nothing in this section prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an order in a contested case. Failure of the agency to issue a declaratory ruling on the merits within 60 days of the request for such ruling shall constitute a denial of the request as well as a denial of the merits of the request and shall be subject to judicial review.

(b) Repealed by Session Laws 1997-34, s. 1, effective April 23, 1997. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 4; c. 477, s. 2.1; 1997-34, s. 1.)

**Editor's Note.** — This section is former § 150B-17, as recodified by Session Laws 1991, c. 418, s. 4.

Rulings by Administrative Agencies: Their Benefits and Dangers,” see 2 Campbell L. Rev. 1 (1980).

**Legal Periodicals.** — For article, “Advisory

#### CASE NOTES

**Editor's Note.** — *Most of the cases below were decided under corresponding provisions of former § 150B-17 or Chapter 150A.*

**Former § 150A-17 clearly did not contemplate an evidentiary proceeding.** If evidence were required to establish the facts, then the proper procedure would have been to hold a contested case hearing. In re Ford, 52 N.C. App. 569, 279 S.E.2d 122 (1981).

**Good Cause for Denial.** — Good cause exists for denial of a request for a declaratory

ruling where the denial is based on the existence of a prior agency ruling which necessarily required an interpretation on the same statute which is the subject of the request for declaratory ruling. *Catawba Mem. Hosp. v. North Carolina Dep't of Human Resources*, 112 N.C. App. 557, 436 S.E.2d 390 (1993), cert. granted, 336 N.C. 72, 445 S.E.2d 31 (1994).

**A declaratory ruling by an administrative agency is subject to judicial review** as though it were an agency final decision or order

in a contested case. *High Rock Lake Ass'n v. North Carolina Env'tl. Mgt. Comm'n*, 51 N.C. App. 275, 276 S.E.2d 472 (1981).

**Plaintiff Failing to Exhaust Administrative Remedies Not Entitled to Judicial Relief.** — Plaintiff collection agency was not entitled to seek a declaratory judgment in the superior court as to the validity and applicability of a regulation of the Department of Insurance prohibiting collection agencies from instituting judicial proceedings on behalf of other persons, where plaintiff failed to exhaust available administrative remedies by petitioning the Department of Insurance for amendment or repeal of the regulation under former § 150A-16 or seeking a declaratory ruling from the Department of Insurance as to the validity and applicability of the regulation under former § 150A-17, and then by seeking judicial review of an adverse Department of Insurance decision under former § 150A-43 et seq. *Porter v. North Carolina Dep't of Ins.*, 40 N.C. App. 376, 253 S.E.2d 44, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979).

**Trial Court Lacked Jurisdiction Where Declaratory Relief Not Pursued in Agency**

**Proceeding.** — Original jurisdiction for a declaratory ruling as to the rights and interest of parties in a pier and boat ramp extending over a state-owned lake rested in the Department of Natural Resources and Community Development (now the Department of Environment and Natural Resources). As the parties did not pursue such declaratory relief and failed to exhaust their administrative remedies prior to instituting their civil action, the trial court lacked subject matter jurisdiction. *Woodlief v. Johnson*, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

**Stated** in *Gummels v. North Carolina Dep't of Human Resources*, 97 N.C. App. 245, 388 S.E.2d 223 (1990).

**Cited** in *Total Care, Inc. v. Department of Human Resources*, 99 N.C. App. 517, 393 S.E.2d 338 (1990); *Florence Concrete Prods., Inc. v. North Carolina Licensing Bd.*, 113 N.C. App. 270, 437 S.E.2d 877 (1994); *County of Durham v. North Carolina Dep't of Env't & Natural Resources*, 131 N.C. App. 395, 507 S.E.2d 310 (1998); *D.G. Matthews & Son v. State ex rel. McDevitt*, 131 N.C. App. 520, 508 S.E.2d 331 (1998).

§§ 150B-5 through 150B-8: Reserved for future codification purposes.

## ARTICLE 2.

### *Rule Making.*

§§ 150B-9 through 150B-16: Repealed by Session Laws 1991, c. 418, s. 5.

**Cross References.** — As to rulemaking, see now § 150B-18 et seq.

§ 150B-17: Recodified as § 150B-4 by Session Laws 1991, c. 418, s. 4, effective October 1, 1991.

## ARTICLE 2A.

### *Rules.*

#### Part 1. General Provisions.

### § 150B-18. Scope and effect.

This Article applies to an agency's exercise of its authority to adopt a rule. A rule is not valid unless it is adopted in substantial compliance with this Article. (1991, c. 418, s. 1.)

**Editor's Note.** — Session Laws 1991, ch. 418 repealed former Articles 2 and 5 and enacted in their place a new Article 2A. Where appropriate, the historical citations to sections in the repealed Articles have been added to corresponding sections in new Article 2A.

**Legal Periodicals.** — For article, "Advisory Rulings by Administrative Agencies: Their Benefits and Dangers," see 2 Campbell L. Rev. 1 (1980).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1017 (1981).

For article discussing limitations on ad hoc adjudicatory rulemaking by an administrative agency, see 61 N.C.L. Rev. 67 (1982).

For note, "The Forty-Two Hundred Dollar Question: 'May State Agencies Have Discretion in Setting Civil Penalties Under the North Carolina Constitution?'" see 68 N.C. L. Rev. 1035 (1990).

### CASE NOTES

**Editor's Note.** — *The cases below were decided under corresponding provisions of former Article 2 or earlier statutes.*

**Notice and Opportunity to Be Heard Required.** — Substantial compliance under former § 150A-9, among other things, required notice and the opportunity to be heard, as provided by former § 150A-12, before the adoption of a rule. *American Guar. & Liab. Ins. Co. v. Ingram*, 32 N.C. App. 552, 233 S.E.2d 398, cert. denied, 292 N.C. 729, 235 S.E.2d 782 (1977).

**Limitation on Authority of Social Services Commission to Make Rules.** — The Social Services Commission has and continues to have general rule making authority under its grant in § 143B-153 and by the provision of § 108A-71 which authorizes the Department of Human Resources to accept all "State appropriations" for programs of social services. That grant became limited, however, by this Chapter upon its enactment, thereby requiring the Commission to comply with certain procedural requirements in adopting rules if specifically authorized by legislative enactment to adopt rules. *Whittington v. North Carolina Dep't of Human Resources*, 100 N.C. App. 603, 398 S.E.2d 40 (1990).

**Rule denying Medicaid payments** to those who are eligible for Medicare, but have failed to enroll, would be struck down as unsupported by statutory or regulatory authority and as denying a substantial right. *Duke Univ. Medical Ctr. v. Bruton*, 134 N.C. App. 39, 516 S.E.2d 633 (1999).

**Compliance with This Chapter in Administering State Abortion Fund.** — Since the State Abortion Fund prior to the enactment of Session Laws 1985, c. 479, s. 93 was merely a "state appropriation," the Department of Human Resources, through its Social Services Commission, could and did enact rules and regulations pertaining to the program. However, by the passage of s. 93, which specifically limits, by legislative enactment, how the Fund is to be administered, the Department of Human Resources and the Commission's rule making authority must comply with the requirements of this Chapter. *Whittington v.*

*North Carolina Dep't of Human Resources*, 100 N.C. App. 603, 398 S.E.2d 40 (1990).

**Construction with Coastal Area Management Act.** — The mandatory provisions of the Administrative Procedure Act must be read as complementing the procedural safeguards in the Coastal Area Management Act of 1974. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Administrative agency rules may be grouped into three categories:** (1) Procedural rules which describe how the agency will discharge its assigned functions and the requirements others must follow in dealing with the agency; (2) Legislative rules which are established by an agency as a result of a delegation of legislative power to the agency; and (3) Interpretative rules which interpret and apply the provisions of the statute under which the agency operates. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

**The Supreme Court is not limited to the label placed on a rule by an agency,** but must look instead to the substance of the rule in question. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

**Amendments to State Guidelines as Administrative Rule-Making.** — Amendments to the State guidelines by the Coastal Resources Commission are considered administrative rule-making under this section and thus subject to the comprehensive additional safeguards contained in the Administrative Procedure Act. *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Requirement by the Commissioner of Insurance that audited data be submitted in a ratemaking case was a legislative rule** and therefore subject to the rule-making provisions of the North Carolina Administrative Procedure Act. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

**Construction of Former § 150A-10(4).** — The exclusion of policy statements or interpretations “made in the decision of a contested case” included in subdivision (4) of former § 150A-10 clearly was not intended to embrace substantive rules with anticipated future applicability. This is so because of the difference between interpretative and legislative rules and because subdivision (6) of former § 150A-10, which excludes “interpretative rules and general statements of policy of the agency”

would be unnecessary if subdivision (4) of former § 150A-10 were intended to apply to matters beyond the contested case in question. *State ex rel. Comm’r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

**Cited in** *Jackson v. North Carolina Dep’t of Human Res.*, 131 N.C. App. 179, 505 S.E.2d 899 (1998), cert. denied, 350 N.C. 594, 537 S.E.2d 213 (1999).

## § 150B-19. Restrictions on what can be adopted as a rule.

An agency may not adopt a rule that does one or more of the following:

- (1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so.
- (2) Enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.
- (3) Imposes criminal liability or a civil penalty for an act or omission, including the violation of a rule, unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty.
- (4) Repeats the content of a law, a rule, or a federal regulation. A brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the “reasonably necessary” standard of review set in G.S. 150B-21.9(a)(3).
- (5) Establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following:
  - a. A service to a State, federal, or local governmental unit.
  - b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both.
  - c. A transcript of a public hearing.
  - d. A conference, workshop, or course.
  - e. Data processing services.
- (6) Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 7.10(a).)

## § 150B-20. Petitioning an agency to adopt a rule.

(a) **Petition.** — A person may petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption. A person may submit written comments with a rule-making petition. If a rule-making petition requests the agency to create or amend a rule, the person must submit the proposed text of the requested rule change and a statement of the effect of the requested rule change. Each agency must establish by rule the procedure for submitting a rule-making petition to it and the procedure the agency follows in considering a rule-making petition.

(b) **Time.** — An agency must grant or deny a rule-making petition submitted to it within 30 days after the date the rule-making petition is submitted, unless the agency is a board or commission. If the agency is a board or commission, it must grant or deny a rule-making petition within 120 days after the date the rule-making petition is submitted.

(c) Action. — If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition, the notice of rule-making proceedings it publishes in the North Carolina Register may state that the agency is initiating rule-making proceedings as the result of a rule-making petition and state the name of the person who submitted the rule-making petition. If the rule-making petition requested the creation or amendment of a rule, the notice of text the agency publishes after the notice of rule-making proceedings may set out the text of the requested rule change submitted with the rule-making petition and state whether the agency endorses the proposed text.

(d) Review. — Denial of a rule-making petition is a final agency decision and is subject to judicial review under Article 4 of this Chapter. Failure of an agency to grant or deny a rule-making petition within the time limits set in subsection (b) is a denial of the rule-making petition.

(e) Repealed by Session Laws 1996, Second Extra Session, c. 18, s. 7.10(b). (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 1; c. 477, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 7.10(b); 1997-34, s. 2.)

**Editor's Note.** — Session Laws 1999-237, s. 11 provides that the Codifier of Rules may reorganize Titles 10 and 15A of the North Carolina Administrative Code to reflect the recent reorganization of the Department of Health and Human Services and the Depart-

ment of Environment and Natural Resources.

**Legal Periodicals.** — For article, "Advisory Rulings by Administrative Agencies: Their Benefits and Dangers," see 2 Campbell L. Rev. 1 (1980).

## CASE NOTES

**Editor's Note.** — *The cases below were decided under corresponding provisions of former Article 2 or earlier statutes.*

**Judicial Review of Denial.** — An agency's denial of a petition for rule making under former § 150A-16 is subject to judicial review pursuant to the provisions of former § 150A-43. In re Wheeler, 85 N.C. App. 150, 354 S.E.2d 374 (1987).

Where the Commission denied plaintiffs' rule-making petition, judicial review of the decision to deny the petition was available pursuant to subsection (d). Act-Up Triangle v. Commission for Health Servs., 345 N.C. 699, 483 S.E.2d 388 (1997).

**Use of "Whole Record" Test.** — The superior court properly employed the "whole record test" in its judicial review of the Commission's decision to deny plaintiffs' rule-making petition. Act-Up Triangle v. Commission for Health Servs., 345 N.C. 699, 483 S.E.2d 388 (1997).

**Plaintiff Failing to Exhaust Administrative Remedies Not Entitled to Judicial Relief.** — Plaintiff collection agency was not entitled to seek a declaratory judgment in the superior court as to the validity and applicability of a regulation of the Department of Insurance prohibiting collection agencies from instituting judicial proceedings on behalf of other

persons, where plaintiff failed to exhaust available administrative remedies by petitioning the Department of Insurance for amendment or repeal of the regulation under former § 150A-16 or seeking a declaratory ruling from the Department of Insurance as to the validity and applicability of the regulation under former § 150A-17, and then by seeking judicial review of an adverse Department of Insurance decision under former § 150A-43 et seq. Porter v. North Carolina Dep't of Ins., 40 N.C. App. 376, 253 S.E.2d 44, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979).

**Federal Court Jurisdiction.** — Where plaintiff filed a petition for rule-making requesting that North Carolina Department of Human Resources remove rule from the North Carolina Food Stamp Manual, cease all further application of rule, and adopt proposed rule, and the Secretary of the United States Department of Agriculture moved to intervene, then removed the case to federal district court, pursuant to 28 U.S.C. §§ 1441(b) and 1442(a)(1), the case was remanded to the State Supreme Court because the federal court lacked subject matter jurisdiction. Thomas v. North Carolina Dep't of Human Resources, 898 F. Supp. 315 (M.D.N.C. 1995).

**Applied** in North Carolina Chiropractic

Ass'n v. North Carolina State Bd. of Educ., 122 N.C. App. 122, 468 S.E.2d 539 (1996); Beneficial N.C., Inc. v. State ex rel. N.C. State Bank-

ing Comm'n, 126 N.C. App. 117, 484 S.E.2d 808 (1997).

## § 150B-21. Agency must designate rule-making coordinator; duties of coordinator.

(a) Each agency must designate one or more rule-making coordinators to oversee the agency's rule-making functions. The coordinator shall serve as the liaison between the agency, other agencies, units of local government, and the public in the rule-making process. The coordinator shall report directly to the agency head.

(b) The rule-making coordinator shall be responsible for the following:

- (1) Preparing notices of public hearings.
- (2) Coordinating access to the agency's rules.
- (3) Screening all proposed rule actions prior to publication in the North Carolina Register to assure that an accurate fiscal note has been completed as required by G.S. 150B-21.4(b).
- (4) Consulting with the North Carolina Association of County Commissioners and the North Carolina League of Municipalities to determine which local governments would be affected by any proposed rule action.
- (5) Providing the North Carolina Association of County Commissioners and the North Carolina League of Municipalities with copies of all fiscal notes required by G.S. 150B-21.4(b), prior to publication in the North Carolina Register of the proposed text of a permanent rule change.
- (6) Coordinating the submission of proposed rules to the Governor as provided by G.S. 150B-21.26.

(c) At the earliest point in the rule-making process and in consultation with the North Carolina Association of County Commissioners, the North Carolina League of Municipalities, and with samples of county managers or city managers, as appropriate, the rule-making coordinator shall lead the agency's efforts in the development and drafting of any rules or rule changes that could:

- (1) Require any unit of local government, including a county, city, school administrative unit, or other local entity funded by or through a unit of local government to carry out additional or modified responsibilities;
- (2) Increase the cost of providing or delivering a public service funded in whole or in part by any unit of local government; or
- (3) Otherwise affect the expenditures or revenues of a unit of local government.

(d) The rule-making coordinator shall send to the Office of State Budget and Management for compilation a copy of each final fiscal note prepared pursuant to G.S. 150B-21.4(b).

(e) The rule-making coordinator shall compile a schedule of the administrative rules and amendments expected to be proposed during the next fiscal year. The coordinator shall provide a copy of the schedule to the Office of State Budget and Management in a manner proposed by that Office.

(f) Whenever an agency proposes a rule that is purported to implement a federal law, or required by or necessary for compliance with federal law, or on which the receipt of federal funds is conditioned, the rule-making coordinator shall:

- (1) Attach to the proposed rule a certificate prepared by the rule-making coordinator identifying the federal law requiring adoption of the proposed rule. The certification shall contain a statement setting forth

the reasons for why the proposed rule is required by law. If all or part of the proposed rule is not required by federal law or exceeds the requirements of federal law, then the certification shall state the reasons for that opinion. No comment or opinion shall be included in the certification with regard to the merits of the proposed rule; and

- (2) The rule-making coordinator shall maintain a copy of the federal law and shall provide to the Office of State Budget and Management for compilation the citation to the federal law requiring or pertaining to the proposed rule. (1991, c. 418, s. 1; 1995, c. 415, s. 1; c. 507, s. 27.8(v); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b).)

**Editor's Note.** — Session Laws 2001-113, ss. 1 to 4, provides: "For a well serving a single-family dwelling where lot size or other fixed conditions preclude the separation distances specified in subparagraph (a) (2) of 15A NCAC 2C.0107 (Standards of Construction: Water-Supply Wells), as adopted by the Environmental Management Commission on October 12, 2000, and approved by the Rules Review Commission on November 16, 2000, the required separation distances shall be the maximum possible, but shall in no case be less than the following:

- |   |          |
|---|----------|
| "(1) Septic tank and drainfield   | 50 feet  |
| "(2) Water-tight sewage or liquid-waste collection or transfer facility | 25 feet  |
| "(3) Animal barns   | 50 feet  |
| "(4) Cesspool or privies  | 50 feet. |

"This act [Session Laws 2001-113] constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1(a). The Environmental Management Commission may adopt a temporary rule that incorporates the provisions of Section 1 of this act [Section 1 of Session Laws 2001-113]. Notwithstanding G.S. 150B-21.1(d), a temporary rule adopted in accordance with this section shall remain in effect until a permanent rule adopted to replace the temporary rule becomes effective.

"Except as provided by Section 1 of this act

[Section 1 of Session Laws 2001-113], this act does not limit the authority of the Environmental Management Commission to adopt rules governing the location, construction, repair, and abandonment of wells pursuant to G.S. 87-87 and Article 2A of Chapter 150B of the General Statutes.

"This act is effective retroactively to the date on which it is ratified. If the Environmental Management Commission adopts a temporary rule as provided in Section 2 of this act, Section 1 of this act [Sections 1 and 2 of Session Laws 2001-113] expires when the temporary rule becomes effective."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-140, s. 93.1(a), effective July 21, 2000, substituted "Office of State Budget, Planning, and Management" for "Office of State Budget and Management" throughout the section.

Session Laws 2001-424, s. 12.2(b), effective July 1, 2001, substituted "Office of State Budget and Management" for "Office of State Budget, Planning, and Management" in subsections (d) and (e) and in subdivision (f)(2).

## Part 2. Adoption of Rules.

### § 150B-21.1. Procedure for adopting a temporary rule.

(a) Adoption. — An agency may adopt a temporary rule without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical when it finds that adherence to the notice and hearing requirements of this Part would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.
- (2) The effective date of a recent act of the General Assembly or the United States Congress.
- (3) A recent change in federal or State budgetary policy.
- (4) A federal regulation.
- (5) A court order.

- (6) The need for the rule to become effective the same date as the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan.

An agency must prepare a written statement of its findings of need for a temporary rule. The statement must be signed by the head of the agency adopting the rule.

(a1) Notwithstanding the provisions of subsection (a) of this section, the Wildlife Resources Commission may adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical to protect the public health, safety, or welfare, conserve wildlife resources, or provide for the orderly and efficient operation of game lands by establishing any of the following:

- (1) No wake zones;
- (2) Hunting or fishing seasons;
- (3) Hunting or fishing bag limits;
- (4) Management of public game lands as defined in G.S. 113-129(8a).

When the Wildlife Resources Commission adopts a temporary rule pursuant to this subsection, it must submit the reference to this subsection as its statement of need to the Codifier of Rules.

(a2) Notwithstanding the provisions of subsection (a) of this section, the Secretary of State may adopt temporary rules to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes and to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association for the purpose of promoting uniformity of state securities regulation. After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall:

- (1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule;
- (2) Accept oral and written comments on the proposed temporary rule; and
- (3) Hold at least one public hearing on the proposed temporary rule.

When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary must submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.

Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.

(a3) Notwithstanding the provisions of subsection (a) of this section, the Commissioner of Insurance may adopt a temporary rule to implement the provisions of G.S. 58-2-205 after prior notice or hearing or upon any abbreviated notice or hearing. When the Commissioner adopts a temporary rule pursuant to this subsection, the Commissioner must submit the reference to this subsection as the Commissioner's statement of need to the Codifier of Rules.

(a4) Notwithstanding the provisions of subsection (a) of this section, the State Chief Information Officer may adopt temporary rules to implement the information technology procurement provisions of Article 3D of Chapter 147 of the General Statutes. After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Officer shall:

- (1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule;

(2) Accept oral and written comments on the proposed temporary rule; and

(3) Hold at least one public hearing on the proposed temporary rule.

When the Officer adopts a temporary rule pursuant to this subsection, the Officer must submit a reference to this subsection as the Officer's statement of need to the Codifier of Rules.

Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Officer in accordance with this subsection.

(a5) Notwithstanding the provisions of subsection (a) of this section, the State Board of Elections may adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:

(1) In accordance with the provisions of G.S. 163-22.2.

(2) To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.

(3) The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.

When the State Board of Elections adopts a temporary rule pursuant to this subsection, it must submit the reference to this subsection as its statement of need to the Codifier of Rules.

(a6) (**Expires June 30, 2002**) Notwithstanding the provisions of subsection (a) of this section, the Manufactured Housing Board may adopt temporary rules regarding continuing education course approval under G.S. 143-143.11B(c). After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Board shall:

(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule;

(2) Accept oral and written comments on the proposed temporary rule; and

(3) Hold at least one public hearing on the proposed temporary rule.

When the Board adopts a temporary rule pursuant to this subsection, the Board must submit a reference to this subsection as the Board's statement of need to the Codifier of Rules.

Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Board in accordance with this subsection.

(a7) Notwithstanding the provisions of subdivision (a)(2) of this section, an agency may adopt a temporary rule to implement the provisions of any of the following acts until all rules necessary to implement the provisions of the act have become effective as either temporary or permanent rules:

(1) (**Repealed effective July 1, 2002**) The North Carolina Rural Redevelopment Authority Act, Part 2D of Article 10 of Chapter 143B of the General Statutes.

(2) (**Repealed effective July 1, 2003**) Article 34B of Chapter 115C of the General Statutes, relating to qualified zone academy bonds.

(a8) (**Expires on June 30, 2003**) Notwithstanding the provisions of subsection (a) of this section, the Secretary of Transportation may adopt temporary rules concerning the permitted height of mobile and modular homes. After having the proposed temporary rule published in the North Carolina Register and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall:

(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule.

(2) Accept oral and written comments on the proposed temporary rule.

(3) Hold at least one public hearing on the proposed temporary rule.

When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary must submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.

Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.

(a9) **(Expires June 30, 2003)** Notwithstanding the provisions of subsection (a) of this section, the Secretary of Transportation may adopt temporary rules pursuant to G.S. 113A-11(b) to establish a class of minimum criteria projects.

After having the proposed temporary rule published in the North Carolina Register, and at least 30 days prior to adopting a temporary rule pursuant to this subsection, the Secretary shall do all of the following:

(1) Notify persons on its mailing list, maintained pursuant to G.S. 150B-21.2(d), and any other interested parties, of his intent to adopt a temporary rule.

(2) Accept oral and written comments on the proposed temporary rule.

(3) Hold at least one public hearing on the proposed temporary rule.

When the Secretary adopts a temporary rule pursuant to this subsection, the Secretary shall submit a reference to this subsection as the Secretary's statement of need to the Codifier of Rules.

Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a proposed temporary rule received from the Secretary in accordance with this subsection.

(b) Review. — When an agency adopts a temporary rule it must submit the rule and the agency's written statement of its findings of the need for the rule to the Codifier of Rules. Within one business day after an agency submits a temporary rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria listed in subsection (a) or (a1) of this section. In reviewing the statement, the Codifier of Rules may consider any information submitted by the agency or another person. If the Codifier of Rules finds that the statement meets the criteria, the Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code.

If the Codifier of Rules finds that the statement does not meet the criteria, the Codifier of Rules must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the Codifier of Rules must review the additional findings or new statement within one business day after the agency submits the additional findings or new statement. If the Codifier of Rules again finds that the statement does not meet the criteria listed in subsection (a) or (a1) of this section, the Codifier of Rules must immediately notify the head of the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the Codifier of Rules that the agency's findings of need for a rule do not meet the required criteria, the agency must notify the Codifier of Rules of its decision. The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision.

(c) Standing. — A person aggrieved by a temporary rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) or (a1) of this section and whether the rule meets the standards in G.S. 150B-21.9 that

apply to review of a permanent rule. The court shall not grant an ex parte temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) **Effective Date and Expiration.** — A temporary rule becomes effective on the date specified in G.S. 150B-21.3. A temporary rule expires on the earliest of the following dates:

- (1) The date specified in the rule.
- (2) The effective date of the permanent rule adopted to replace the temporary rule, if the Commission approves the permanent rule.
- (3) The date the Commission returns to an agency a permanent rule the agency adopted to replace the temporary rule.
- (4) The effective date of an act of the General Assembly that specifically disapproves a permanent rule adopted to replace the temporary rule.
- (5) 270 days from the date the temporary rule was published in the North Carolina Register, unless the permanent rule adopted to replace the temporary rule has been submitted to the Commission.

(e) **Publication.** — When the Codifier of Rules enters a temporary rule in the North Carolina Administrative Code, the Codifier must publish the rule in the North Carolina Register. Publication of a temporary rule in the North Carolina Register serves as a notice of rule-making proceedings for a permanent rule if the permanent rule is substantially the same as the published temporary rule, unless the agency published a notice of rule-making proceedings at least 60 days before it adopted the temporary rule. (1973, c. 1331, s. 1; 1981, c. 688, s. 12; 1981 (Reg. Sess., 1982), c. 1232, s. 1; 1983, c. 857, c. 927, ss. 4, 8; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), 1(8); 1987, c. 285, ss. 10-12; 1991, c. 418, s. 1; 1991 (Reg. Sess., 1992), c. 900, s. 149; 1993, c. 553, s. 54; 1995, c. 507, s. 27.8(c); 1996, 2nd Ex. Sess., c. 18, ss. 7.10(c), (d); 1997-403, ss. 1-3; 1998-127, s. 2; 1998-212, s. 26B(h); 1999-434, s. 16; 1999-453, s. 5(a); 2000-69, ss. 3, 5; 2000-148, ss. 4, 5; 2001-126, s. 12; 2001-421, s. 2.3; 2001-424, ss. 27.17(b), 27.22(a); 2001-487, s. 21(g).)

**Cross References.** — As to Commission's ability to adopt temporary rules, notwithstanding this section, to establish maximum mass loads or concentration limits relating to nitrogen and phosphorous discharge limits pursuant to § 143-215.1B, see § 143-215.1B(c).

**Editor's Note.** — This section was amended by Session Laws 1993, c. 553, s. 54, in the coded bill drafting format provided by § 120-20.1. It has been set out in the form above at the direction of the Revisor of Statutes.

The section above was amended by Session Laws 1999-434, s. 16, and Session Laws 1999-453, s. 5(a). Subdivision (a4) as added by Session Laws 1999-453, s. 5(a), has been redesignated as subdivision (a5) at the direction of the Revisor of Statutes.

Session Laws 1999-453, s. 1, provides that the act shall be known as "The Campaign Reform Act of 1999."

Session Laws 1999-453, s. 11, contains a severability clause.

Session Laws 2000-69, s. 4, in part, provides: "Interpretation of Act.

"(a) **Additional Method.** This act provides an additional and alternative method for the doing of the things it authorizes and is as supplemental and additional to powers conferred by other laws. Except as otherwise expressly provided, it does not derogate any powers now existing.

"(b) **Statutory References.** References in this act to specific sections or Chapters of the General Statutes are intended to be references to those sections or Chapters as they may be amended from time to time by the General Assembly.

"(c) **Liberal Construction.** This act, being necessary for the health and welfare of the people of the State, shall be liberally construed to effect its purposes."

Session Laws 2000-69, s. 4(d) contains a severability clause.

Session Laws 2000-69, s. 5, provides that subdivision (a7)(2), as enacted by s. 3 of the act, is repealed effective July 1, 2003.

Session Laws 2000-148, s. 5, provides that subdivision (a7)(1), as enacted by s. 4 of the act, is repealed effective July 1, 2002.

Session Laws 2001-421, s. 5.3 provides that s. 2.3, which added subsection (a6) of this section, expires June 30, 2002.

Session Laws 2001-421, s. 5.2 is a severability clause.

Session Laws 2001-424, s. 27.17(c), provides that subsection (b), which added subsection (a8) of this section, expires on June 30, 2003.

Session Laws 2001-424, s. 27.22(b), provides that subsection (a), which added subsection (a9) of this section, expires on June 30, 2003.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001.'"

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

**Neuse River Basin.** — Session Laws 1998-221, s. 1.2 provided: "Permanent rule disapproved; temporary rule continued in effect. — Pursuant to G.S. 150B-21.3(b), 15A NCAC 2B.0233 (Neuse River Basin: Nutrient Sensitive Waters Management Strategy: Protection and Maintenance of Riparian Areas with Existing Forest Vegetation), as amended by the Commission and approved by the Rules Review Commission on 19 February 1998, is disapproved as a permanent rule. Notwithstanding G.S. 150B-21.1(d), 15A NCAC 2B.0233 (Neuse River Basin: Nutrient Sensitive Waters Management Strategy: Protection and Maintenance of Riparian Areas with Existing Forest Vegetation), as amended by the Commission effective 22 April 1998, shall remain in effect as a temporary rule until the revised temporary rule required by Section 1.8 of this act becomes effective. The Commission and the Department shall implement temporary rule 15A NCAC 2B.0233 as provided in Section 1.3 of this act."

Session Laws 1998-221, s. 1.12 provided: "Temporary rules authorized. — (a) Notwithstanding G.S. 150B-21.1(a)(2) and 26 NCAC 2C.0102(11), the Commission may adopt temporary rules to implement this Part and to correct other rules related to the Neuse River Nutrient Sensitive Waters (NSW) Management Strategy until 1 October 1999. It is the intention of the General Assembly that the Commission first address the revisions to temporary rule 15A NCAC 2B.0233 required by subdivision (1) of subsection (a) of Section 1.8 of this act and that the Commission adopt all temporary rules required by or necessary to implement this Part no later than 1 April 1999.

"(b) Notwithstanding G.S. 150B-21.1(a)(2) and 26 NCAC 2C.0102(11), the Sedimentation Control Commission may adopt temporary rules to implement Section 1.11 of this act until

1 October 1999. It is the intention of the General Assembly that the Sedimentation Control Commission adopt any temporary rules that may be necessary to implement Section 1.11 of this act no later than 1 April 1999. If the Sedimentation Control Commission determines that adoption of a temporary rule is necessary to implement Section 1.11 of this act, the Sedimentation Control Commission shall proceed, in accordance with Article 2A of Chapter 150B of the General Statutes, with the adoption of a permanent rule to replace the temporary rule. The Sedimentation Control Commission shall require local erosion control programs approved under G.S. 113A-60 to implement the requirements of G.S. 113A-61(b1), as amended by Section 1.11 of this act."

**Coastal Energy Facilities.** — Session Laws 1998-221, s. 2.1 provided: "Notwithstanding G.S. 150B-21.1(a) and 26 NCAC 2C.0102(11), the Coastal Resources Commission may adopt temporary rules governing coastal energy facilities until 1 July 2005."

**Conservation Reserve Enhancement Program.** — Session Laws 1998-165, s. 2 provides that the Soil and Water Conservation Commission may adopt temporary rules to implement the Conservation Reserve Enhancement Program. This section shall constitute a recent act of the General Assembly for purposes of G.S. 150B-21.1(a)(2).

**Area Mental Health Programs.** — Session Laws 1998-212, s. 12.35C(b) provides: "Notwithstanding G.S. 150B-21.1, the Secretary may adopt temporary rules to implement subsection (a) of this section [which amended § 122C-112(a)], provided that the temporary rules shall not become effective until 60 days after the Secretary has provided notice and opportunity for written comment to the general public of the Secretary's intent to adopt temporary rules, the purpose and subject matter of the rules, and the effective date of the rules. Notice and comment shall be through publication in the North Carolina Register, in the print media, and through mailings to area mental health authorities and other appropriate mental health institutions and providers that will be subject to the temporary rules."

**Immunization Program.** — Session Laws 1998-212, s. 12.52(c), provides in part that the Commission for Health Services may adopt temporary rules to impose upon immunization program providers reasonable reporting requirements with respect to improving immunization program accountability as required by the section.

Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998.'"

Session Laws 1998-212, s. 30.2 provides: "Except for statutory changes or other provisions

that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1998-99 fiscal year."

Session Laws 1998-212, s. 30.5 contains a severability clause.

**Medicaid.** — Session Laws 1999-237, s. 11.12(t) provides that the Department of Health and Human Services may adopt temporary rules according to the procedures established in G.S. 150B-21.1 when it finds that these rules are necessary to maximize receipt of federal funds, to reduce Medicaid expenditures, and to reduce fraud and abuse.

Session Laws 1999-237, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvement Appropriations Act of 1999.'"

Session Laws 1999-237, s. 30.4 contains a severability clause.

**"Best Value."** — Session Laws 1999-434, s. 19, provides that the Secretary of Commerce shall implement policies and procedures to ensure "Best Value" Procurement, Solution-Based Procurement, and Government-Vendor Partnership.

Session Laws 1999-434, s. 20, requires the Secretary of Commerce to develop and implement policies, procedures, and/or programs to ensure that personnel receive high quality training in the principles of "Best Value" Procurement, Solution-Based Procurement, Government-Vendor Partnership, contract administration, and project management.

Session Laws 1999-434, s. 21, provides that the Secretary of Commerce shall report to the Joint Select Committee on Information Technology on the implementation of this act on or before April 1, 2000.

Session Laws 1999-434, s. 22, provides that the Joint Select Committee on Information Technology shall study the governance of State government-wide information technology management by the creation of a centralized agency responsible for all technology-related issues. An interim report may be made by the Committee to the 2000 Session of the General Assembly and a final report prior to the convening of the 2001 General Assembly.

**Hurricane Floyd Recovery Act.** — Session Laws 1999-463, s. 4 authorizes every State agency to adopt temporary rules necessary to implement the provisions of the act, the Hurricane Floyd Recovery Act of 1999, and provides that notwithstanding § 150B-21.1 (a)(2) and 26

NCAC 2C.0102(11), the authority to adopt temporary rules to implement the provisions of the act shall continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules. Notwithstanding § 150B-21.1 (d), a temporary rule adopted to implement the provisions of the act shall specify the date on which the rule will expire and shall continue in effect until that date. Any agency that adopts a temporary rule to implement the provisions of the act shall report the text of the rule and the agency's written statement of its findings of the need for the rule to the Joint Legislative Administrative Procedure Oversight Committee within 30 days of the adoption of the temporary rule. Section 4 applies to the adoption of temporary rules by the Department of Administration under § 113A-11 (a) and to the adoption of temporary rules that establish minimum criteria by any State agency, as defined in § 113A-9, under § 113A-11 (b).

**Adult Care Homes—Short-Term Admission.** — Session Laws 2000-50, s. 2, provides: "Notwithstanding G.S. 150B-21.1(a), the Medical Care Commission shall adopt temporary rules for the purpose of defining the circumstances under which adult care homes may admit residents on a short-term basis for the purpose of caregiver respite and the rules that shall apply during the course of their stay. The Commission's authority to adopt temporary rules under this section expires on the date that permanent rules pertaining to the same subject matter adopted by the Commission as authorized under G.S. 143B-165(10) become effective."

**Mental Health Facilities.** — Session Laws 2000-55, s. 6, provides: "Notwithstanding G.S. 150B-21.1(a), the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall adopt temporary rules to implement G.S. 122C-26(5)."

**Abuser Treatment Programs.** — Session Laws 2000-67, s. 21.5, provides that, notwithstanding the provisions of G.S. 150B-21.1(a), the Department of Administration may adopt temporary rules to approve abuser treatment programs that apply to the North Carolina Council for Women.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000.'"

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

**Air Quality.** — Session Laws 2000-134, s. 21, provides that Session Laws 2000-134, relating to air quality emission inspections, and fund expenditures, constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, and that, notwithstanding G.S. 150B-21.1(a)(2) and 26 NCAC 2C.0102(11), the Environmental Management Commission and the Division of Motor Vehicles of the Department of Transportation may adopt temporary rules to implement the provisions of the act. Section 21 is to continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

**Tar-Pamlico River Basin.** — Session Laws 2001-355, s. 5(b) provides that the Environmental Management Commission may adopt a temporary rule that incorporates the provisions of Sections 2 and 3 of the act (providing for implementation of the Tar-Pamlico River Basin-Nutrient Sensitive Waters Management Strategy; Agricultural Nutrient Control Strategy, as adopted by the Environmental Management Commission on 12 October 2000 and approved by the Rules Review Commission on 20 November 2000, to become effective on 1 September 2001). Notwithstanding G.S. 150B-21.1(d), a temporary rule adopted in accordance with s. 5(b) shall remain in effect until a temporary or permanent rule adopted to replace the temporary rule becomes effective.

**Neonatal Care Beds.** — Session Laws 2001-410, s. 2, effective September 14, 2001, and expiring 180 days from that date, provides: “Notwithstanding G.S. 150B-21.1(a), the Medical Care Commission shall adopt temporary rules setting forth conditions for licensing all levels of neonatal care beds. After having the proposed temporary rules published in the North Carolina Register and at least 30 days prior to adopting any temporary rules pursuant to this section, the Commission shall:

“(1) Notify persons on its mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt the temporary rules.

“(2) Accept oral and written comments on the proposed temporary rules.

“(3) Hold at least one public hearing on the proposed temporary rules. When the Commission adopts temporary rules pursuant to this section, the Commission shall submit a reference to this section as the Commission’s statement of need to the Codifier of Rules. The Codifier of Rules shall review the Commission’s proposed temporary rules in accordance with G.S. 150B-21.1(b).

“When the Commission adopts temporary rules pursuant to this section, the Commission shall submit a reference to this section as the Commission’s statement of need to the Codifier of Rules. The Codifier of Rules shall review the

Commission’s proposed temporary rules in accordance with G.S. 150B-21.1(b).”

**Medicaid — Temporary Rules.** — Session Laws 2001-424, s. 21.19(t) provides: “The Department of Health and Human Services may adopt temporary rules according to the procedures established in G.S. 150B-21.1 when it finds that these rules are necessary to maximize receipt of federal funds within existing State appropriations, to reduce Medicaid expenditures, and to reduce fraud and abuse. Prior to the filing of these temporary rules with the Office of Administrative Hearings, the Department shall consult with the Office of State Budget and Management on the possible fiscal impact of the temporary rule and its effect on State appropriations and local governments.

**Medical Coverage Policy Under State Medicaid Program.** — Session Laws 2001-424, s. 21.20(a) provides: “(a) In order to promote consistency among providers and to ensure that medical coverage criteria are uniformly applied to Medicaid recipients throughout the State, the Department of Health and Human Services shall adopt medical coverage policies for the State Medicaid Program that are consistent with national standards or Department-defined standards. If the Department determines that application of a national standard would likely cause significant deterioration in the quality of or access to appropriate medical care, then the Department shall substitute for that national standard an evidence-based, best-practice standard that will not compromise quality of or access to appropriate medical care. The adoption of new or amended medical coverage policies under the State Medicaid Program are exempt from the rule-making requirements of Chapter 150B of the General Statutes.”

Session Laws 2001-424, s. 21.20(b) sets out criteria for the development, amendment and adoption of medical coverage policy.

**Reorganization of Human Resources Development Program.** — Session Laws 2001-424, ss. 30.3(a) to (e), provide:

“(a) The State Board of Community Colleges shall establish a committee to develop and recommend to the Board a core series of employability skills training classes that should be coded in the Continuing Education Master Course List as Human Resources Development.

“(b) The State Board of Community Colleges may waive tuition and fees for enrollment in classes coded in the Continuing Education Master Course List as Human Resources Development if the individual enrolling:

“(1) Is unemployed;

“(2) Has received notification of a pending layoff;

“(3) Is working and is eligible for the Federal Earned Income Tax Credit (FEITC); or

“(4) Is working and earning wages at or below

two hundred percent (200%) of the federal poverty guidelines.

"Individuals for whom tuition and fees are waived must sign a form adopted by the State Board of Community Colleges verifying that they meet one of these criteria.

"(c) The State Board of Community Colleges shall study the feasibility of integrating the delivery of human resources development services into the frame work of the JobLink Career Centers. The Board shall report its recommendations to the Joint Legislative Education Oversight Committee by May 1, 2002.

"(d) The State Board of Community Colleges shall report to the Joint Legislative Education Oversight Committee on its reorganization of the Human Resources Development Program by January 1, 2003.

"(e) The State Board of Community Colleges may adopt temporary rules to implement reorganization of the Human Resources Development Program."

**Open-End Design Agreements for Wetland, Stream, and Buffer Projects.** — Session Laws 2001-442, ss. 6(a) to (c), provide: "(a) This act [Session Laws 2001-442] constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1.

"(b) Notwithstanding G.S.150B-21.1(a)(2) and 26 NCAC 2C.0102(11), the Environmental Management Commission may adopt temporary rules to implement this act [Session Laws 2001-422] until 1 July 2002. Prior to the adoption of a temporary rule under this section [s. 6 of Session Laws 2001-442], the Commission shall publish a notice of intent to adopt a temporary rule in the North Carolina Register. The notice shall set out the text of the proposed temporary rule and include the name of the person to whom questions and written comment on the proposed temporary rule may be submitted. The Commission shall accept written comment on the proposed temporary rule for at least 30 days after the notice of intent to adopt a temporary rule is published in the North Carolina Register.

"(c) Notwithstanding G.S.150B-21.1(a)(2) and 26 NCAC 2C.0102(11), the State Building Commission may adopt temporary rules to authorize open-end design agreements for design and construction of wetland, stream, and buffer creation, mitigation, and restoration projects. Prior to the adoption of a temporary rule under this section [s. 6 of Session Laws 2001-442], the Commission shall publish a notice of intent to adopt a temporary rule in the North Carolina Register. The notice shall set out the text of the proposed temporary rule and include the name of the person to whom questions and written comment on the proposed temporary rule may be submitted. The Commission shall accept written comment on the proposed temporary rule for at least 30 days after the notice of

intent to adopt a temporary rule is published in the North Carolina Register. The State Building Commission is authorized to adopt temporary rules under this section [s. 6 of Session Laws 2001-442] until 1 July 2002."

**Trust Funds.** — Session Laws 2001-487, s. 124, provides: "Notwithstanding G.S. 150B-21.1(a)(2), the Health and Wellness Trust Fund Commission and the Tobacco Trust Fund Commission shall have the authority to adopt temporary rules as a recent act of the General Assembly through June 30, 2002, in order to adopt rules as authorized in S.L. 2000-147."

**Buffer Requirement.** — Session Laws 2001-494, s. 3, provides: "The Coastal Resources Commission may adopt a temporary rule to amend 15A NCAC 7H.0209 that incorporates the provision of Section 1 of this act [s. 1 of Session Laws 2001-494, relating to the 30 foot buffer requirement along public trust and estuarine waters]. Notwithstanding G.S. 150B-21.1(d), a temporary rule adopted in accordance with this section [s. 1 of Session Laws 2001-494] shall remain in effect until the permanent rule that incorporates the temporary rule becomes effective. Notwithstanding G.S. 150B-21.1(a)(2), this act [Session Laws 2001-494] shall not be construed to authorize the adoption of temporary rules except as specifically provided in this section [s. 1 of Session Laws 2001-494]."

**Motor Vehicle Emissions.** — Session Laws 2001-504, s. 19, provides: "This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Notwithstanding G.S. 150B-21.1(a) (2) and 26 NCAC 2C.0102(11), the Environmental Management Commission and the Division of Motor Vehicles of the Department of Transportation may adopt temporary rules to implement the provisions of this act. This section [s. 19 of Session Laws 2001-504] shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

**Effect of Amendments.** — Session Laws 1999-434, s. 16, effective January 1, 2000, added subsection (a4).

Session Laws 1999-453, s. 5(a), effective August 12, 1999, and applicable to rules adopted by the State Board of Elections on or after that date, added subsection (a5).

Session Laws 2000-69, s. 3, effective June 30, 2000, added subsection (a7). See editor's note for repeal of subdivision (a7)(2).

Session Laws 2000-148, s. 4, effective July 1, 2000, added present subdivision (a7)(1), and in subdivision (a7)(2), added "relating to qualified zone academy bonds." See editors's note for repeal of subdivision (a7)(1).

Session Laws 2001-126, s. 12, effective May 25, 2001, in subsection (a2), added the language beginning "and to adopt Uniform State-

ments of Policy” at the end of first sentence of the introductory language and substituted “Codifier” for “Codifer” in the last paragraph of that subsection.

Session Laws 2001-421, s. 2.3, effective September 22, 2001, added subsection (a6). For expiration provision, see the editor’s note.

Session Laws 2001-424, ss. 27.17(b) and 27.22(a), effective July 1, 2001, added subsections (a8) and (a9). For expiration date, see editor’s notes.

Session Laws 2001-487, s. 21(g), effective December 16, 2001, substituted “the Officer” for “the Secretary” throughout subsection (a4); in the introductory language of subsection (a4), substituted “the State Chief Information Officer” for “the Secretary of Commerce” and “Article 3D of Chapter 147” for “Part 16 of Article 10 of Chapter 143B”; and substituted “the Officer’s statement” for “the Secretary’s statement” in subdivision (a4)(4).

#### CASE NOTES

**Editor’s Note.** — *The cases below were decided under corresponding provisions of former Article 2.*

**Rules Not Exempt from Notice and Comment Requirements of Chapter 113A.** — Temporary rule issued under this section failed to comply with Coastal Area Management Act’s (CAMA’s) (§ 113A-101 et seq.) notice and comment provisions; the mandatory provisions of this chapter complement the procedural safeguards in the CAMA; the temporary rule provisions of this section exempt agencies only from the notice and comment requirements of this chapter; clearly, the General Assembly did not intend that the Commission use temporary rules promulgated under this chapter to circumvent public review and comment on major projects that could affect the State’s coastal resources. *Conservation Council v. Haste*, 102

N.C. App. 411, 402 S.E.2d 447 (1991).

**Failure to Address Merits of Claim.** — Where petitioners argued that the North Carolina Coastal Resources Commission (CRC) failed to comply with the procedures for adopting a temporary rule under this section, vice-chairman’s order was arbitrary and capricious because it required petitioners to specifically allege that the CRC either acted arbitrarily and capriciously or abused its discretion; this finding did not address the merits of petitioners’ claim and imposed on petitioners an additional burden that § 113A-121.1(b) did not require. *Conservation Council v. Haste*, 102 N.C. App. 411, 402 S.E.2d 447 (1991).

**Applied** in *North Carolina Chiropractic Ass’n v. North Carolina State Bd. of Educ.*, 122 N.C. App. 122, 468 S.E.2d 539 (1996).

### § 150B-21.2. Procedure for adopting a permanent rule.

(a) Steps. — Before an agency adopts a permanent rule, it must take the following actions:

- (1) Publish a notice of rule-making proceedings in the North Carolina Register, unless the proposed rule is substantially the same as a temporary rule published in the North Carolina Register.
- (2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.
- (3) Publish the text of the proposed rule in the North Carolina Register.
- (4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.
- (5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

(b) Notice of Rule-Making Proceedings. — A notice of rule-making proceedings published in the North Carolina Register must include all of the following:

- (1) A statement of the subject matter of the proposed rule making.
- (2) A short explanation of the reason for the proposed action.
- (3) A citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making.
- (4) The person to whom questions or written comments may be submitted on the subject matter of the proposed rule making.

Publication in the North Carolina Register of an agency’s rule-making agenda satisfies the requirements of this subsection if the agenda includes the information required by this subsection.

(c) Text After Notice of Rule-Making Proceedings. — A notice of the proposed text of a rule must include all of the following:

- (1) The text of the proposed rule.
- (2) A short explanation of the reason for the proposed rule.
- (3) A citation to the law that gives the agency the authority to adopt the rule.
- (4) The proposed effective date of the rule.
- (5) The date, time, and place of any public hearing scheduled on the rule.
- (6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
- (7) The period of time during which and the person to whom written comments may be submitted on the proposed rule.
- (8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.

An agency shall not publish the proposed text of a rule until at least 60 days after the date the notice of rule-making proceedings for the proposed rule was published in the North Carolina Register.

(d) Mailing List. — An agency must maintain a mailing list of persons who have requested notice of rule making. When an agency publishes in the North Carolina Register a notice of rule-making proceedings or the text of a proposed rule, it must mail a copy of the notice or text to each person on the mailing list who has requested notice of rule-making proceedings on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. — An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and all the following apply:

- (1) The notice of text does not schedule a public hearing on the proposed rule.
- (2) The agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published.
- (3) The proposed text is not a changed version of proposed text the agency previously published in the course of rule-making proceedings but did not adopt.

An agency may hold a public hearing on a proposed rule in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published.

(f) Comments. — An agency must accept comments on a notice of proposed rule-making proceedings published in the North Carolina Register until the text of the proposed rule that results from the notice is published. An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and that requires a fiscal note under G.S. 150B-21.4(b1) for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must accept comments on the text of any other proposed rule published in the North Carolina Register for at least 30 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must consider fully all written and oral comments received.

(g) Adoption. — An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons who, based on either the notice of rule-making proceedings or the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part.

(h) Explanation. — An agency must issue a concise written statement explaining why the agency adopted a rule if, within 30 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule.

(i) Record. — An agency must keep a record of a rule-making proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, and any written explanation made by the agency for adopting the rule. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 63; 1977, c. 915, s. 2; 1983, c. 927, ss. 3, 7; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), (7); 1987, c. 285, ss. 7-9; 1989, c. 5, s. 1; 1991, c. 418, s. 1; 1995, c. 507, s. 27.8(d); 1996, 2nd Ex. Sess., c. 18, s. 7.10(e).)

**Editor’s Note.** — Session Laws 1986, Extra Session, c. 2, effective February 18, 1986, s. 1 provided: “Prior to the first publication of the North Carolina Register the notice of publication requirements of G.S. 150B-12(c) [now repealed] are met if an agency publishes in one or more newspapers of general circulation notice which includes:

(1) A reference to the statutory authority under which the action is proposed.

(2) The time and place of the public hearing and a statement of the manner in which data, views, and arguments may be submitted to the agency either at the hearing or at other times by any person.

(3) A statement of the terms or substance of the proposed rule or a description of the subjects and issues involved, and the proposed effective date of the rule.”

**CASE NOTES**

**Editor’s Note.** — *The case below was decided under corresponding provisions of former Chapter 150A.*

**Notice and Opportunity to Be Heard Required.** — Substantial compliance under former § 150A-9, among other things, requires notice and the opportunity to be heard, as provided by former § 150A-12, before the adoption of a rule. *American Guar. & Liab. Ins. Co. v. Ingram*, 32 N.C. App. 552, 233 S.E.2d 398,

cert. denied, 292 N.C. 729, 235 S.E.2d 782 (1977).

**Applied** in *North Carolina Chiropractic Ass’n v. North Carolina State Bd. of Educ.*, 122 N.C. App. 122, 468 S.E.2d 539 (1996).

**Cited** in *Jackson v. North Carolina Dep’t of Human Res.*, 131 N.C. App. 179, 505 S.E.2d 899 (1998), cert. denied, 350 N.C. 594, 537 S.E.2d 213 (1999).

**OPINIONS OF ATTORNEY GENERAL**

**Notice Provisions of Other Statutes Controlled over Former § 150A-12.** — See opinion of Attorney General to Mr. Gary K. Berman, Administrative Procedures Office, De-

partment of Human Resources, 45 N.C.A.G. 217 (1976), issued under corresponding provisions of former Chapter 150A.

**§ 150B-21.3. Effective date of rules.**

(a) Temporary Rule. — A temporary rule becomes effective on the date the Codifier of Rules enters the rule in the North Carolina Administrative Code.

(b) Permanent Rule. — A permanent rule approved by the Commission becomes effective on the earlier of the thirty-first legislative day or the day of adjournment of the next regular session of the General Assembly that begins at least 25 days after the date the Commission approved the rule, unless a different effective date applies under this section. If a bill that specifically disapproves the rule is introduced in either house of the General Assembly before the thirty-first legislative day of that session, the rule becomes effective on the earlier of either the day an unfavorable final action is taken on the bill or the day that session of the General Assembly adjourns without ratifying a bill that specifically disapproves the rule. If the agency adopting the rule specifies a later effective date than the date that would otherwise apply under this subsection, the later date applies. A permanent rule that is not approved by the Commission or that is specifically disapproved by a bill enacted into law before it becomes effective does not become effective.

A bill specifically disapproves a rule if it contains a provision that refers to the rule by appropriate North Carolina Administrative Code citation and states that the rule is disapproved. Notwithstanding any rule of either house of the General Assembly, any member of the General Assembly may introduce a bill during the first 30 legislative days of any regular session to disapprove a rule that has been approved by the Commission and that either has not become effective or has become effective by executive order under subsection (c) of this section.

(c) Executive Order Exception. — The Governor may, by executive order, make effective a permanent rule that has been approved by the Commission and has not become effective under subsection (b) of this section upon finding that it is necessary that the rule become effective in order to protect public health, safety, or welfare. A rule made effective by executive order becomes effective on the date the order is issued or at a later date specified in the order. When the Codifier of Rules enters in the North Carolina Administrative Code a rule made effective by executive order, the entry must reflect this action.

A rule that is made effective by executive order remains in effect unless it is specifically disapproved by the General Assembly in a bill enacted into law on or before the day of adjournment of the regular session of the General Assembly that begins at least 25 days after the date the executive order is issued. A rule that is made effective by executive order and that is specifically disapproved by a bill enacted into law is repealed as of the date specified in the bill. If a rule that is made effective by executive order is not specifically disapproved by a bill enacted into law within the time set by this subsection, the Codifier of Rules must note this in the North Carolina Administrative Code.

(d) Legislative Day and Day of Adjournment. — As used in this section:

- (1) A "legislative day" is a day on which either house of the General Assembly convenes in regular session.
- (2) The "day of adjournment" of a regular session held in an odd-numbered year is the day the General Assembly adjourns by joint resolution for more than 10 days.

(3) The “day of adjournment” of a regular session held in an even-numbered year is the day the General Assembly adjourns sine die.

(e) OSHA Standard. — A permanent rule concerning an occupational safety and health standard that is adopted by the Occupational Safety and Health Division of the Department of Labor and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor becomes effective on the date the Division delivers the rule to the Codifier of Rules, unless the Division specifies a later effective date. If the Division specifies a later effective date, the rule becomes effective on that date.

(f) Technical Change. — A permanent rule for which no notice or hearing is required under G.S. 150B-21.5(a)(1) through (a)(5) or G.S. 150B-21.5(b) becomes effective on the first day of the month following the month the rule is approved by the Rules Review Commission. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(e); 1995 (Reg. Sess., 1996), c. 742, s. 43; 1996, 2nd Ex. Sess., c. 18, s. 7.10(f); 1997-34, s. 3; 2001-487, s. 80(b).)

**Cross References.** — For section regarding rulemaking to implement ABC plan, see G.S. 115C-17.

**Editor’s Note.** — Session Laws 1996, Second Extra Session, c. 18, s. 27.36, provides: “G.S. 150B-21.3(c) does not apply to a rule that extends the data set in 15A NCAC 13B.1627(c)(10)(A) for closure of a municipal solid waste landfill facility beyond January 1, 2000.”

Session Laws 1999-237, s. 11.30 provides that, notwithstanding G.S. 150B-21.3(b), Administrative Rules 10 NCAC 41S and 41T, adopted by the Social Services Commission on January 13, 1999, and approved by the Rules Review Commission on February 18, 1999, and Administrative Rules 10 NCAC 41E, 41G, and 41R, repealed by the Social Services Commission on January 13, 1999, and approved by the Rules Review Commission on February 18, 1999, become effective July 1, 1999.

Session Laws 2000-172, s. 2.2, as amended by Session Laws 2000-140, s. 92.1(b), provides that notwithstanding G.S. 150B-21.3(a) and 25 NCAC 2C.0102(11), the Coastal Resources Commission shall adopt a temporary rule to establish use standards for waterfront development in urban areas to replace G.S. 113A-120.2 when it expires. The temporary rule shall become effective April 1, 2000, and shall remain in effect until a permanent rule that replaces the temporary rule becomes effective.

Session Laws 2000-142, s. 3, provides that, notwithstanding G.S. 150B-21.3(a) and 26 NCAC 2C.0102(11), the Coastal Resources Commission may adopt a temporary rule to establish criteria for exceptions to the regulatory requirement, effective August 1, 2000, of a 30-foot development setback along public trust and estuarine waters to allow construction of residences on previously platted undeveloped

lots of 5,000 square feet or less that are located in intensively developed areas and that would otherwise be prohibited under rules adopted by the Commission pursuant to Article 7 of Chapter 113A of the General Statutes. The temporary rule shall become effective upon its adoption by the Commission and shall remain in effect until a permanent rule that replaces the temporary rule becomes effective.

Session Laws 2001-361, s.1, provides: “Notwithstanding G.S. 150-21.3(b), 15 NCAC 2B.0315 (Neuse River Basin), as amended by the Environmental Management Commission on 12 October 2000 and approved by the Rules Review Commission on 16 November 2000, becomes effective 1 July 2004 unless the 2004 Regular Session of the 2003 General Assembly specifically disapproves 15A NCAC 2B.0315 (Neuse River Basin), as amended by the Environmental Commission of 12 October 2000 and approved by the Rules Review Commission on 16 November 2000, by enactment of a bill as provided in G.S. 150B-21.3(b).”

Session Laws 2001-418, ss. 1 to 3, authorize the Coastal Resources Commission to adopt temporary rules to establish additional exceptions to the 30-foot buffer requirement along public trust and estuarine waters in certain circumstances and to allow structural modifications to piers to prevent or minimize storm damage.

**Effect of Amendments.** — Session Laws 2001-487, s. 80(b), effective December 16, 2001, substituted “enacted into law” for “ratified by the General Assembly” in the last sentence of the first paragraph of subsection (b); and in subsection (c), substituted “enacted into law” for “ratified” in the first sentence and substituted “enacted into law” for “ratified by the General Assembly” twice in the last sentence of the second paragraph.

## CASE NOTES

Cited in Frye Regional Medical Ctr., Inc. v. Hunt, 350 N.C. 39, 510 S.E.2d 159 (1999).

**§ 150B-21.4. Fiscal notes on rules.**

(a) State Funds. — Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would require the expenditure or distribution of funds subject to the Executive Budget Act, Article 1 of Chapter 143, it must submit the text of the proposed rule change and a fiscal note on the proposed rule change to the Director of the Budget and obtain certification from the Director that the funds that would be required by the proposed rule change are available. The fiscal note must state the amount of funds that would be expended or distributed as a result of the proposed rule change and explain how the amount was computed. The Director of the Budget must certify a proposed rule change if funds are available to cover the expenditure or distribution required by the proposed rule change.

(b) Local Funds. — Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would affect the expenditures or revenues of a unit of local government, it must submit the text of the proposed rule change and a fiscal note on the proposed rule change to the Office of the Governor as provided by G.S. 150B-21.26, the Fiscal Research Division of the General Assembly, the Office of State Budget and Management, the North Carolina Association of County Commissioners, and the North Carolina League of Municipalities. The fiscal note must state the amount by which the proposed rule change would increase or decrease expenditures or revenues of a unit of local government and must explain how the amount was computed.

(b1) Substantial Economic Impact. — Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would have a substantial economic impact and that is not identical to a federal regulation that the agency is required to adopt, the agency must obtain a fiscal note for the proposed rule change from the Office of State Budget and Management or prepare a fiscal note for the proposed rule change and have the note approved by that Office. If an agency requests the Office of State Budget and Management to prepare a fiscal note for a proposed rule change, that Office must prepare the note within 90 days after receiving a written request for the note. If the Office of State Budget and Management fails to prepare a fiscal note within this time period, the agency proposing the rule change may prepare a fiscal note. A fiscal note prepared in this circumstance does not require approval of the Office of State Budget and Management.

If an agency prepares the required fiscal note, the agency must submit the note to the Office of State Budget and Management for review. The Office of State Budget and Management must review the fiscal note within 14 days after it is submitted and either approve the note or inform the agency in writing of the reasons why it does not approve the fiscal note. After addressing these reasons, the agency may submit the revised fiscal note to that Office for its review. If an agency is not sure whether a proposed rule change would have a substantial economic impact, the agency may ask the Office of State Budget and Management to determine whether the proposed rule change has a substantial economic impact.

As used in this subsection, the term “substantial economic impact” means an aggregate financial impact on all persons affected of at least five million dollars (\$5,000,000) in a 12-month period.

(b2) Content. — A fiscal note required by subsection (b1) of this section must contain the following:

- (1) A description of the persons who would be affected by the proposed rule change.
- (2) A description of the types of expenditures that persons affected by the proposed rule change would have to make to comply with the rule and an estimate of these expenditures.
- (3) A description of the purpose and benefits of the proposed rule change.
- (4) An explanation of how the estimate of expenditures was computed.

(c) **Errors.** — An erroneous fiscal note prepared in good faith does not affect the validity of a rule. (1973, c. 1331, s. 1; 1979, 2nd Sess., c. 1137, s. 41.1; 1983, c. 761, s. 185; 1985, c. 746, s. 1; 1987, c. 827, s. 54; 1991, c. 418, s. 1; 1995, c. 415, s. 2; c. 507, s. 27.8(b); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b).)

**Cross References.** — For section regarding rulemaking to implement ABC plan, see G.S. 115C-17.

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws

2000-140, s. 93.1(a), effective July 21, 2000, substituted "Office of State Budget, Planning, and Management" for "Office of State Budget and Management" throughout the section.

Session Laws 2001-424, s. 12.2(b), effective July 1, 2001, substituted "Office of State Budget and Management" for "Office of State Budget, Planning, and Management" in subsection (b) and throughout subsection (b1).

## § 150B-21.5. Circumstances when notice and rule-making hearing not required.

(a) **Amendment.** — An agency is not required to publish a notice of rule-making proceedings or a notice of text in the North Carolina Register or hold a public hearing when it proposes to amend a rule to do one of the following:

- (1) Reletter or renumber the rule or subparts of the rule.
- (2) Substitute one name for another when an organization or position is renamed.
- (3) Correct a citation in the rule to another rule or law when the citation has become inaccurate since the rule was adopted because of the repeal or renumbering of the cited rule or law.
- (4) Change information that is readily available to the public, such as an address or a telephone number.
- (5) Correct a typographical error in the North Carolina Administrative Code.
- (6) Change a rule in response to a request or an objection by the Commission.

(b) **Repeal.** — An agency is not required to publish a notice of rule-making proceedings or a notice of text in the North Carolina Register or hold a public hearing when it proposes to repeal a rule as a result of any of the following:

- (1) The law under which the rule was adopted is repealed.
- (2) The law under which the rule was adopted or the rule itself is declared unconstitutional.
- (3) The rule is declared to be in excess of the agency's statutory authority.

(c) **OSHA Standard.** — The Occupational Safety and Health Division of the Department of Labor is not required to publish a notice of rule-making proceedings or a notice of text in the North Carolina Register or hold a public hearing when it proposes to adopt a rule that concerns an occupational safety and health standard and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor. The Occupational Safety and Health Division is not required to submit to the Commission for review a rule for which notice and hearing is not required under this subsection.

(d) State Building Code. — The Building Code Council is not required to publish a notice of text in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The Building Code Council is required to publish a notice of rule-making proceeding in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The Building Code Council is required to submit to the Commission for review a rule for which notice and hearing is not required under this subsection. In adopting a rule, the Council shall comply with the procedural requirements of G.S. 150B-21.3. (1991, c. 418, s. 1; 1995, c. 504, s. 12; 1997-34, s. 4; 2001-141, s. 5; 2001-421, s. 1.3.)

**Editor's Note.** — Session Laws 2001-421, s. 5.2 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-141, s. 5, effective May 31, 2001, and applicable to revisions made to the North Carolina State Building Code on or after January 1, 2002, added subsection (d).

Session Laws 2001-421, s. 1.3, effective September 22, 2001, and applicable to revisions made to the North Carolina State Building Code on or after January 1, 2002, amended subsection (d) as enacted by 2001-141, s. 5, by inserting the second sentence.

### § 150B-21.6. Incorporating material in a rule by reference.

An agency may incorporate the following material by reference in a rule without repeating the text of the referenced material:

- (1) Another rule or part of a rule adopted by the agency.
- (2) All or part of a code, standard, or regulation adopted by another agency, the federal government, or a generally recognized organization or association.
- (3) Repealed by Session Laws 1997-34, s. 5.

In incorporating material by reference, the agency must designate in the rule whether or not the incorporation includes subsequent amendments and editions of the referenced material. The agency can change this designation only by a subsequent rule-making proceeding. The agency must have copies of the incorporated material available for inspection and must specify in the rule both where copies of the material can be obtained and the cost on the date the rule is adopted of a copy of the material.

A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(b) is a statement that the rule does not include subsequent amendments and editions of the referenced material. A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(c) is a statement that the rule includes subsequent amendments and editions of the referenced material. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 64; 1981 (Reg. Sess., 1982), c. 1359, s. 5; 1983, c. 641, s. 3; c. 768, s. 19; 1985, c. 746, s. 1; 1987, c. 285, s. 13; 1991, c. 418, s. 1; 1997-34, s. 5.)

### § 150B-21.7. Effect of transfer of duties or termination of agency on rules.

When a law that authorizes an agency to adopt a rule is repealed and another law gives the same or another agency substantially the same authority to adopt a rule, the rule remains in effect until the agency amends or repeals the rule. When a law that authorizes an agency to adopt a rule is repealed and another law does not give the same or another agency substantially the same authority to adopt a rule, a rule adopted under the repealed law is repealed as of the date the law is repealed.

When an executive order abolishes part or all of an agency and transfers a function of that agency to another agency, a rule concerning the transferred

function remains in effect until the agency to which the function is transferred amends or repeals the rule. When an executive order abolishes part or all of an agency and does not transfer a function of that agency to another agency, a rule concerning a function abolished by the executive order is repealed as of the effective date of the executive order.

The Director of Fiscal Research of the General Assembly must notify the Codifier of Rules when a rule is repealed under this section. When notified of a rule repealed under this section, the Codifier of Rules must enter the repeal of the rule in the North Carolina Administrative Code. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 1.)

### Part 3. Review by Commission.

#### § 150B-21.8. Review of rule by Commission.

(a) Temporary Rule. — The Commission does not review a temporary rule.

(b) Permanent Rule. — An agency must submit a permanent rule adopted by it to the Commission before the rule can be included in the North Carolina Administrative Code. The Commission reviews a permanent rule in accordance with the standards in G.S. 150B-21.9 and follows the procedure in this Part in its review of a permanent rule.

(c) Scope. — When the Commission reviews an amendment to a rule, it may review the entire rule that is being amended. The procedure in G.S. 150B-21.12 applies when the Commission objects to a part of a rule that is within its scope of review but is not changed by a rule amendment. (1991, c. 418, s. 1.)

#### § 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. — The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to fulfill a duty delegated to the agency by the General Assembly, when considered in light of the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed and the legislative intent of the General Assembly in delegating the duty.

The Commission may determine if a rule submitted to it was adopted in accordance with Part 2 of this Article. The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

The Commission must notify the agency that adopted the rule if it determines that a rule was not adopted in accordance with Part 2 of this Article and must return the rule to the agency. Entry of a rule in the North Carolina Administrative Code after review by the Commission is conclusive evidence that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. — The Commission must review a rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month

by the last day of the second subsequent month. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b).)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-140, s. 93.1(a), effective July 21, 2000, substituted "Office of State Budget, Planning,

and Management" for "Office of State Budget and Management" in subsection (a).

Session Laws 2001-424, s. 12.2(b), effective July 1, 2001, substituted "Office of State Budget and Management" for "Office of State Budget, Planning, and Management" in two places in the first undesignated paragraph of subsection (a).

### § 150B-21.10. Commission action on permanent rule.

At the first meeting at which a permanent rule is before the Commission for review, the Commission must take one of the following actions:

- (1) Approve the rule, if the Commission determines that the rule meets the standards for review.
- (2) Object to the rule, if the Commission determines that the rule does not meet the standards for review.
- (3) Extend the period for reviewing the rule, if the Commission determines it needs additional information on the rule to be able to decide whether the rule meets the standards for review.

In reviewing a new rule or an amendment to an existing rule, the Commission may request an agency to make technical changes to the rule and may condition its approval of the rule on the agency's making the requested technical changes. (1991, c. 418, s. 1.)

### § 150B-21.11. Procedure when Commission approves permanent rule.

When the Commission approves a permanent rule, it must notify the agency that adopted the rule of the Commission's approval, deliver the approved rule to the Codifier of Rules, and include the text of the approved rule and a summary of the rule in its next report to the Joint Legislative Administrative Procedure Oversight Committee.

If the approved rule will increase or decrease expenditures or revenues of a unit of local government, the Commission must also notify the Governor of the Commission's approval of the rule and deliver a copy of the approved rule to the Governor by the end of the month in which the Commission approved the rule. (1991, c. 418, s. 1; 1995, c. 415, s. 4; c. 507, s. 27.8(g).)

### § 150B-21.12. Procedure when Commission objects to a permanent rule.

(a) **Action.** — When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

(b) **Time Limit.** — An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after

receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

(c) Changes. — When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection.

(d) Return of Rule. — A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its action and must send a copy of the record of the Commission's review of the rule to the Joint Legislative Administrative Procedure Oversight Committee in its next report to that Committee. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule. (1991, c. 418, s. 1; 1995, c. 415, s. 5; c. 507, s. 27.8(h), (y).)

### **§ 150B-21.13. Procedure when Commission extends period for review of permanent rule.**

When the Commission extends the period for review of a permanent rule, it must notify the agency that adopted the rule of the extension and the reason for the extension. After the Commission extends the period for review of a rule, it may call a public hearing on the rule. Within 70 days after extending the period for review of a rule, the Commission must decide whether to approve the rule, object to the rule, or call a public hearing on the rule. (1991, c. 418, s. 1.)

### **§ 150B-21.14. Public hearing on a rule.**

The Commission may call a public hearing on a rule when it extends the period for review of the rule. At the request of an agency, the Commission may call a public hearing on a rule that is not before it for review. Calling a public hearing on a rule not already before the Commission for review places the rule before the Commission for review. When the Commission decides to call a public hearing on a rule, it must publish notice of the public hearing in the North Carolina Register.

After a public hearing on a rule, the Commission must approve the rule or object to the rule in accordance with the standards and procedures in this Part. The Commission must make its decision of whether to approve or object to the rule within 70 days after the public hearing. (1991, c. 418, s. 1.)

**§ 150B-21.15:** Repealed by Session Laws 1995, c. 507, s. 27.8(i), effective December 1, 1995.

### **§ 150B-21.16. Report to Joint Legislative Administrative Procedure Oversight Committee.**

The Commission must make monthly reports to the Joint Legislative Administrative Procedure Oversight Committee. The reports are due by the

last day of the month. A report must include the rules approved by the Commission at its meeting held in the month in which the report is due and the rules the Commission returned to agencies during that month after the Commission objected to the rule. A report must include any other information requested by the Joint Legislative Administrative Procedure Oversight Committee. When the Commission sends a report to the Joint Legislative Administrative Procedure Oversight Committee, the Commission must send a copy of the report to the Codifier of Rules. (1995, c. 507, s. 27.8(j).)

#### Part 4. Publication of Code and Register.

### § 150B-21.17. North Carolina Register.

(a) Content. — The Codifier of Rules must publish the North Carolina Register. The North Carolina Register must be published at least two times a month and must contain the following:

- (1) Temporary rules entered in the North Carolina Administrative Code.
  - (1a) Notices of rule-making proceedings, the text of proposed rules, and the text of permanent rules approved by the Commission. Except with regard to notices of rule-making proceedings, this subdivision does not apply to the North Carolina State Building Code.
- (2) Notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165.
- (3) Executive orders of the Governor.
- (4) Final decision letters from the United States Attorney General concerning changes in laws that affect voting in a jurisdiction subject to section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H.
- (5) Orders of the Tax Review Board issued under G.S. 105-241.2.
- (6) Other information the Codifier determines to be helpful to the public.

(b) Form. — When an agency publishes notice in the North Carolina Register of the proposed text of a new rule, the Codifier of Rules must publish the complete text of the proposed new rule. In publishing the text of a proposed new rule, the Codifier must indicate the rule is new by underlining the proposed text of the rule.

When an agency publishes notice in the North Carolina Register of the proposed text of an amendment to an existing rule, the Codifier must publish the complete text of the rule that is being amended unless the Codifier determines that publication of the complete text of the rule being amended is not necessary to enable the reader to understand the proposed amendment. In publishing the text of a proposed amendment to a rule, the Codifier must indicate deleted text with overstrikes and added text with underlines.

When an agency publishes notice in the North Carolina Register of the proposed repeal of an existing rule, the Codifier must publish the complete text of the rule the agency proposes to repeal unless the Codifier determines that publication of the complete text is impractical. In publishing the text of a rule the agency proposes to repeal, the Codifier must indicate the rule is to be repealed. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(k); 2001-141, s. 6; 2001-421, s. 1.4.)

**Editor's Note.** — Session Laws 1985, c. 746, s. 4, effective January 1, 1986, provided: "All personnel and equipment presently assigned to the Department of Justice for the purpose of carrying out the provisions of Article 5, Chapter 150A [recodified as this Article] of the General

Statutes, are transferred to the Office of Administrative Hearings by a Type I transfer as defined by G.S. 143A-6(a)."

Session Laws 2001-421, s. 5.2 is a severability clause.

**Effect of Amendments.** — Session Laws

2001-141, s. 6, effective May 31, 2001, and applicable to revisions made to the North Carolina State Building Code on or after January 1, 2002, added the second sentence of subdivision (a)(1a).

Session Laws 2001-421, s. 1.4, effective October 1, 2001, and applicable to revisions made to

the North Carolina State Building Code on or after January 1, 2002, in subsection (a) of this section, as rewritten by Session Laws 2001-141, s. 6, inserted "Except with regard to notices of rule-making proceedings" in subdivision (a)(1a).

### § 150B-21.18. North Carolina Administrative Code.

The Codifier of Rules must compile all rules into a Code known as the North Carolina Administrative Code. The format and indexing of the Code must conform as nearly as practical to the format and indexing of the North Carolina General Statutes. The Codifier must publish printed copies of the Code and may publish the Code in other forms. The Codifier must keep the Code current by publishing the Code in a loose-leaf format and periodically providing new pages to be substituted for outdated pages, by publishing the Code in volumes and periodically publishing cumulative supplements, or by another means. The Codifier may authorize and license the private indexing, marketing, sales, reproduction, and distribution of the Code. The Codifier must keep superseded rules. (1973, c. 1331, s. 1; 1979, c. 69, ss. 3, 7; c. 541, s. 2; c. 688, s. 1; 1979, 2nd Sess., c. 1266, ss. 1-3; 1981 (Reg. Sess., 1982), c. 1359, s. 6; 1983, c. 641, s. 6; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1003, s. 2; c. 1022, s. 1(1), (19); c. 1032, s. 12; 1987, c. 774, ss. 2-4; 1987 (Reg. Sess., 1988), c. 1111, s. 3; 1989, c. 500, s. 43(a); 1991, c. 418, s. 1; 1993 (Reg. Sess., 1994), c. 777, s. 2.)

### § 150B-21.19. Requirements for including rule in Code.

To be acceptable for inclusion in the North Carolina Administrative Code, a rule must:

- (1) Cite the law under which the rule is adopted.
- (2) Be signed by the head of the agency or the rule-making coordinator for the agency that adopted the rule.
- (3) Be in the physical form specified by the Codifier of Rules.
- (4) Have been approved by the Commission, if the rule is a permanent rule. (1973, c. 1331, s. 1; 1979, c. 571, s. 1; 1981, c. 688, s. 14; 1983, c. 927, ss. 6, 9; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1); c. 1028, s. 35; 1987, c. 285, s. 16; 1991, c. 418, s. 1; 1995, c. 507, s. 27.8(l).)

### § 150B-21.20. Codifier's authority to revise form of rules.

(a) Authority. — After consulting with the agency that adopted the rule, the Codifier of Rules may revise the form of a rule submitted for inclusion in the North Carolina Administrative Code within 10 business days after the rule is submitted to do one or more of the following:

- (1) Rearrange the order of the rule in the Code or the order of the subsections, subdivisions, or other subparts of the rule.
- (2) Provide a catch line or heading for the rule or revise the catch line or heading of the rule.
- (3) Reletter or renumber the rule or the subparts of the rule in accordance with a uniform system.
- (4) Rearrange definitions and lists.
- (5) Make other changes in arrangement or in form that do not change the substance of the rule and are necessary or desirable for a clear and orderly arrangement of the rule.
- (6) Omit from the published rule a map, a diagram, an illustration, a chart, or other graphic material, if the Codifier of Rules determines

that the Office of Administrative Hearings does not have the capability to publish the material or that publication of the material is not practicable. When the Codifier of Rules omits graphic material from the published rule, the Codifier must insert a reference to the omitted material and information on how to obtain a copy of the omitted material.

(b) Effect. — Revision of a rule by the Codifier of Rules under this section does not affect the effective date of the rule or require the agency to readopt or resubmit the rule. When the Codifier of Rules revises the form of a rule, the Codifier of Rules must send the agency that adopted the rule a copy of the revised rule. The revised rule is the official rule, unless the rule was revised under subdivision (a)(6) of this section to omit graphic material. When a rule is revised under that subdivision, the official rule is the published text of the rule plus the graphic material that was not published. (1973, c. 1331, s. 1; 1979, c. 571, s. 1; 1981, c. 688, s. 14; 1983, c. 927, ss. 6, 9; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1); c. 1028, s. 35; 1987, c. 285, s. 16; 1987 (Reg. Sess., 1988), c. 1111, s. 23; 1991, c. 418, s. 1; 1997-34, s. 6.)

### § 150B-21.21. Publication of rules of North Carolina State Bar, Building Code Council, and exempt agencies.

(a) State Bar. — The North Carolina State Bar must submit a rule adopted or approved by it and entered in the minutes of the North Carolina Supreme Court to the Codifier of Rules for inclusion in the North Carolina Administrative Code. The State Bar must submit a rule within 30 days after it is entered in the minutes of the Supreme Court. The Codifier of Rules must compile, make available for public inspection, and publish a rule included in the North Carolina Administrative Code under this subsection in the same manner as other rules in the Code.

(a1) Building Code Council. — The Building Code Council shall publish the North Carolina State Building Code as provided in G.S. 143-138(g). The Codifier of Rules is not required to publish the North Carolina State Building Code in the North Carolina Administrative Code.

(b) Exempt Agencies. — Notwithstanding G.S. 150B-1, the North Carolina Utilities Commission must submit to the Codifier of Rules those rules of the Utilities Commission that are published from time to time in the publication titled “North Carolina Utilities Laws and Regulations.” The Utilities Commission must submit a rule required to be included in the Code within 30 days after it is adopted.

Notwithstanding G.S. 150B-1, an agency other than the Utilities Commission that is exempted from this Article by that statute must submit a temporary or permanent rule adopted by it to the Codifier of Rules for inclusion in the North Carolina Administrative Code. These exempt agencies must submit a rule to the Codifier of Rules within 30 days after adopting the rule.

(c) Publication. — A rule submitted to the Codifier of Rules under this section must be in the physical form specified by the Codifier of Rules. The Codifier of Rules must compile, make available for public inspection, and publish a rule submitted under this section in the same manner as other rules in the North Carolina Administrative Code. (1991, c. 418, s. 1; 1997-34, s. 7; 2001-141, s. 7.)

**Effect of Amendments.** — Session Laws 2001-141, s. 7, effective May 31, 2001, and applicable to revisions made to the North Caro-

lina State Building Code on or after January 1, 2002, inserted “Building Code Council” in the section catchline and added subsection (a1).

## § 150B-21.22. Effect of inclusion in Code.

Official or judicial notice can be taken of a rule in the North Carolina Administrative Code and shall be taken when appropriate. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 1; 1997-34, s. 8.)

### CASE NOTES

*Editor's Note.* — *The case below was decided under corresponding provisions of former Chapter 150A.*

**Judicial Notice of Regulations.** — Where promulgating agency is not subject to the Administrative Procedure Act, the court is only

required to take judicial notice of its regulations if submitted in accordance with certain procedures designed to insure their accuracy. *Southern Ry. v. O'Boyle Tank Lines*, 70 N.C. App. 1, 318 S.E.2d 872 (1984).

## § 150B-21.23. Rule publication manual.

The Codifier of Rules must publish a manual that sets out the form and method for publishing a notice of rule-making proceedings and a notice of text in the North Carolina Register and for filing a rule in the North Carolina Administrative Code. (1973, c. 1331, s. 1; 1979, c. 571, s. 1; 1981, c. 688, s. 14; 1983, c. 927, ss. 6, 9; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1); c. 1028, s. 35; 1987, c. 285, s. 16; 1991, c. 418, s. 1; 1997-34, s. 9.)

## § 150B-21.24. Free copies of Register and Code.

(a) Register. — The Codifier of Rules must distribute copies of the North Carolina Register as soon after publication as practical, without charge, to the following:

- (1) A person who receives a free copy of the North Carolina Administrative Code.
- (2) Upon request, one copy to each member of the General Assembly.

(b) Code. — The Codifier of Rules must distribute copies of the North Carolina Administrative Code as soon after publication as practical, without charge, to the following:

- (1) One copy to the board of commissioners of each county, to be placed at the county clerk of court's office or at another place selected by the board of commissioners.
- (2) One copy to the Commission.
- (3) One copy to the Clerk of the Supreme Court and to the Clerk of the Court of Appeals of North Carolina.
- (4) One copy to the Supreme Court Library and one copy to the library of the Court of Appeals.
- (5) One copy to the Administrative Office of the Courts.
- (6) One copy to the Governor.
- (7) Five copies to the Legislative Services Commission for the use of the General Assembly.
- (8) Upon request, one copy to each State official or department to whom or to which copies of the appellate division reports are furnished under G.S. 7A-343.1.
- (9) Five copies to the Division of State Library of the Department of Cultural Resources pursuant to G.S. 125-11.7. (1973, c. 1331, s. 1; c. 69, ss. 3, 7; c. 688, s. 1; 1979, c. 541, s. 2; 1979, 2nd Sess., c. 1266, ss. 1-3; 1981 (Reg. Sess., 1982), c. 1359, s. 6; 1983, c. 641, s. 6; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1003, s. 2; c. 1022, s. 1(1), (19); c. 1032, s. 12; 1987, c. 774, ss. 2-4; 1987 (Reg. Sess., 1988), c. 1111, s. 3; 1989, c. 500, s. 43(a); 1991, c. 418, s. 1.)

**Legal Periodicals.** — For article, “A Powerless Judiciary? The North Carolina Courts’ Per-

ceptions of Review of Administrative Action,” see 12 N.C. Cent. L.J. 21 (1980).

**CASE NOTES**

*Editor’s Note.* — The case below was decided under corresponding provisions of former Chapter 150A.

**Administrative remedies prescribed by environmental regulations were inade-**

**quate where they were not published** as required by Article 5 of former Chapter 150A. Orange County Sensible Hwys. & Protected Env’ts, Inc. v. North Carolina Dep’t of Transp., 46 N.C. App. 350, 265 S.E.2d 890 (1980).

**§ 150B-21.25. Paid copies of Register and Code.**

A person who is not entitled to a free copy of the North Carolina Administrative Code or North Carolina Register may obtain a copy by paying a fee set by the Codifier of Rules. The Codifier must set separate fees for the North Carolina Register and the North Carolina Administrative Code in amounts that cover publication, copying, and mailing costs. All monies received under this section must be credited to the General Fund. (1991, c. 418, s. 1.)

**Part 5. Rules Affecting Local Governments.**

**§ 150B-21.26. Governor to conduct preliminary review of certain administrative rules.**

(a) Preliminary Review. — At least 30 days before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would affect the expenditures or revenues of a unit of local government, the agency must submit all of the following to the Governor for preliminary review:

- (1) The text of the proposed rule change.
- (2) A short explanation of the reason for the proposed change.
- (3) A fiscal note stating the amount by which the proposed rule change would increase or decrease expenditures or revenues of a unit of local government and explaining how the amount was computed.

(b) Scope. — The Governor’s preliminary review of a proposed permanent rule change that would affect the expenditures or revenues of a unit of local government shall include consideration of the following:

- (1) The agency’s explanation of the reason for the proposed change.
- (2) Any unanticipated effects of the proposed change on local government budgets.
- (3) The potential costs of the proposed change weighed against the potential risks to the public of not taking the proposed change. (1995, c. 415, s. 3; c. 507, s. 27.8(w).)

**Editor’s Note.** — This Part was enacted by Session Laws 1995, c. 415, s. 3, as Part 4 of

Article 2A. It has been renumbered as Part 5 at the direction of the Revisor of Statutes.

**§ 150B-21.27. Minimizing the effects of rules on local budgets.**

In adopting permanent rules that would increase or decrease the expenditures or revenues of a unit of local government, the agency shall consider the timing for implementation of the proposed rule as part of the preparation of the fiscal note required by G.S. 150B-21.4(b). If the computation of costs in a fiscal note indicates that the proposed rule change will disrupt the budget process as set out in the Local Government Budget and Fiscal Control Act, Article 3 of

Chapter 159 of the General Statutes, the agency shall specify the effective date of the change as July 1 following the date the change would otherwise become effective under G.S. 150B-21.3. (1995, c. 415, s. 3; c. 507, s. 27.8(x).)

### § 150B-21.28. Role of the Office of State Budget and Management.

The Office of State Budget and Management shall:

- (1) Compile an annual summary of the projected fiscal impact on units of local government of State administrative rules adopted during the preceding fiscal year.
- (2) Compile from information provided by each agency schedules of anticipated rule actions for the upcoming fiscal year.
- (3) Provide the Governor, the General Assembly, the North Carolina Association of County Commissioners, and the North Carolina League of Municipalities with a copy of the annual summary and schedules by no later than March 1 of each year. (1995, c. 415, s. 3; 2000-140, s. 93.1(a); 2001-424, s. 12.2(b).)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-140, s. 93.1(a), effective July 21, 2000, substituted "Office of State Budget, Planning,

and Management" for "Office of State Budget and Management" in the catchline and in the introductory language.

Session Laws 2001-424, s. 12.2(b), effective July 1, 2001, substituted "Office of State Budget and Management" for "Office of State Budget, Planning, and Management" in section catchline and in the introductory paragraph.

## ARTICLE 3.

### *Administrative Hearings.*

### § 150B-22. Settlement; contested case.

It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case." (1985 (Reg. Sess., 1986), c. 1022, s. 1(11); 1991, c. 418, s. 16.)

**Legal Periodicals.** — For note on the Brownfields Property Reuse Act of 1997, see 78 N.C.L. Rev. 1015 (1998).

## CASE NOTES

**Timely Petition.** — Failure to timely petition for a hearing before the Office of Administrative Hearings constituted waiver of any

right to that administrative remedy. *Citizens for Responsible Road-Ways v. North Carolina DOT*, — N.C. App. —, 550 S.E.2d 253, 2001

N.C. App. LEXIS 655 (2001).

**Editor's Note.** — *The cases below were decided prior to the 1991 amendments to this Chapter.*

**Petitioner's allegation that he had been "demoted in rank without sufficient cause"** stated grounds for his department's action to be deemed "disciplinary" within the meaning and intent of § 126-35 and for his case to be considered "contested" within the meaning and intent of § 126-37(a). Because he had properly pursued all informal procedures mandated by the State Personnel Act and by the North Carolina Administrative Code for the resolution of his grievance, petitioner's appeal also fit the procedural profile of a "contested case" for purposes of its review by the Office of Administrative Hearings under this chapter. *Batten v. North Carolina Dep't of Cor.*, 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, *Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources*, 337 N.C. 569, 447 S.E.2d 168 (1994).

**Dispute as "Contested Case."** — Wildlife Resources Commission's rejection of sewer district's study and of its request for lower streamflow requirements constituted agency action giving rise to a dispute which ultimately became a "contested case" over which the Office of Administrative Hearings has jurisdiction. *Metropolitan Sewerage Dist. v. North Carolina Wildlife Resources Comm'n*, 100 N.C. App. 171, 394 S.E.2d 668 (1990).

**State Employee's Attempt to Recover for**

**Surgery Costs.** — State employee's dispute with the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan, an administrative agency, seeking to recover costs of surgery should have been brought under this Chapter. *Vass v. Board of Trustees*, 89 N.C. App. 333, 366 S.E.2d 1 (1988), modified and aff'd, 324 N.C. 402, 379 S.E.2d 26 (1989).

**Applied** in *North Buncombe Ass'n of Concerned Citizens v. Rhodes*, 100 N.C. App. 24, 394 S.E.2d 462 (1990), appeal dismissed, 327 N.C. 484, 397 S.E.2d 215 (1990); *Homoly v. North Carolina State Bd. of Dental Exmrs.*, 125 N.C. App. 127, 479 S.E.2d 215 (1997).

**Quoted** in *Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources*, 337 N.C. 569, 447 S.E.2d 768, rehearing denied, 338 N.C. 314, 451 S.E.2d 634 (1994); *Prentiss v. Allstate Ins. Co.*, 87 F. Supp. 2d 514 (W.D.N.C. 1999).

**Cited** in *Vass v. Board of Trustees*, 324 N.C. 402, 379 S.E.2d 26 (1989); *Ocean Hill Joint Venture v. North Carolina Dep't of Environment, Health & Natural Resources*, 333 N.C. 318, 426 S.E.2d 274 (1993); *Walker v. North Carolina Dep't of Env't, Health & Natural Resources*, 111 N.C. App. 851, 433 S.E.2d 767 (1993); *Jackson v. North Carolina Dep't of Human Res.*, 131 N.C. App. 179, 505 S.E.2d 899 (1998), cert. denied, 350 N.C. 594, 537 S.E.2d 213 (1999); *Howell v. Morton*, 131 N.C. App. 626, 508 S.E.2d 804 (1998).

## § 150B-23. Commencement; assignment of administrative law judge; hearing required; notice; intervention.

(a) A contested case shall be commenced by filing a petition with the Office of Administrative Hearings and, except as provided in Article 3A of this Chapter, shall be conducted by that Office. The party who files the petition shall serve a copy of the petition on all other parties and, if the dispute concerns a license, the person who holds the license. A party who files a petition shall file a certificate of service together with the petition. A petition shall be signed by a party or a representative of the party and, if filed by a party other than an agency, shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

The parties in a contested case shall be given an opportunity for a hearing without undue delay. Any person aggrieved may commence a contested case hereunder.

A local government employee, applicant for employment, or former employee to whom Chapter 126 of the General Statutes applies may commence a

contested case under this Article in the same manner as any other petitioner. The case shall be conducted in the same manner as other contested cases under this Article, except that the State Personnel Commission shall enter final decisions only in cases in which it is found that the employee, applicant, or former employee has been subjected to discrimination prohibited by Article 6 of Chapter 126 of the General Statutes or in any case where a binding decision is required by applicable federal standards. In these cases, the State Personnel Commission's decision shall be binding on the local appointing authority. In all other cases, the final decision shall be made by the applicable appointing authority.

(a1) Repealed by Session Laws 1985 (Regular Session, 1986), c. 1022, s. 1(9).

(a2) An administrative law judge assigned to a contested case may require a party to the case to file a prehearing statement. A party's prehearing statement must be served on all other parties to the contested case.

(b) The parties to a contested case shall be given a notice of hearing not less than 15 days before the hearing by the Office of Administrative Hearings. If prehearing statements have been filed in the case, the notice shall state the date, hour, and place of the hearing. If prehearing statements have not been filed in the case, the notice shall state the date, hour, place, and nature of the hearing, shall list the particular sections of the statutes and rules involved, and shall give a short and plain statement of the factual allegations.

(c) Notice shall be given personally or by certified mail. If given by certified mail, it shall be deemed to have been given on the delivery date appearing on the return receipt. If giving of notice cannot be accomplished either personally or by certified mail, notice shall then be given in the manner provided in G.S. 1A-1, Rule 4(j1).

(d) Any person may petition to become a party by filing a motion to intervene in the manner provided in G.S. 1A-1, Rule 24. In addition, any person interested in a contested case may intervene and participate in that proceeding to the extent deemed appropriate by the administrative law judge.

(e) All hearings under this Chapter shall be open to the public. Hearings shall be conducted in an impartial manner. Hearings shall be conducted according to the procedures set out in this Article, except to the extent and in the particulars that specific hearing procedures and time standards are governed by another statute.

(f) Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency by personal delivery or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. When no informal settlement request has been received by the agency prior to issuance of the notice, any subsequent informal settlement request shall not suspend the time limitation for the filing of a petition for a contested case hearing. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 65; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, ss. 1(9), (10), 6(2), (3); 1987, c. 878, ss. 3-5; c. 879, s. 6.1; 1987 (Reg. Sess., 1988), c. 1111, s. 5; 1991, c. 35, s. 1; 1993 (Reg. Sess., 1994), c. 572, s. 2.)

**Legal Periodicals.** — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

For comment, “The Problem of Procedural Delay in Contested Case Hearings ...” under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

For article, “Advisory Rulings by Administrative Agencies: Their Benefits and Dangers,” see 2 Campbell L. Rev. 1 (1980).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1017 (1981).

For survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

### CASE NOTES

**Editor’s Note.** — *Some of the cases below were decided under corresponding provisions of former Chapter 150A, or under this Chapter prior to the 1991 amendments thereto.*

**Filing of Petition for “Contested Case” Hearing.** — The language of § 131E-188(a) leaves no room for judicial construction. The statute clearly contemplates that a petition for a contested case hearing must be filed — not mailed or served — with the Office of Administrative Hearings within the 30-day deadline. *Gummels v. North Carolina Dep’t of Human Resources*, 98 N.C. App. 675, 392 S.E.2d 113 (1990).

Under the 1986 version of § 131E-188(a) in effect at time of petitioner’s request for a contested case hearing, request was timely “filed” with the Division of Facility Services where it was received within 30 days of the contested decision; the version of the subdivision in effect at that time read in pertinent part: “... any affected person shall be entitled to a contested case hearing under Article 3 of Chapter 150A [now Chapter 150B] of the General Statutes, if the department receives a request therefor within 30 days after its decision.” Under the current statutes, a request must be filed within 30 days, not just received. *Huntington Manor v. North Carolina Dep’t of Human Resources*, 99 N.C. App. 52, 393 S.E.2d 104 (1990).

**Construction with Other Laws.** — It was within the ALJ’s discretion to dismiss the petition as untimely under the North Carolina Administrative Procedures Act (APA), because although the Individuals with Disabilities Education Act (IDEA) instructs states to make a free appropriate public education (FAPE) available, it has left to the states the procedural mechanisms for putting the same in place, and application of the APA’s 60-day limitation was not inconsistent with the underlying policies of the IDEA. *M.E. v. Board of Educ.*, 88 F. Supp. 2d 493 (W.D.N.C. 1999).

The court held that the 60-day limitations period in this section is the period associated with § 115C-116 and rejected the idea that North Carolina’s catch-all three-year statute of limitations for statutory actions for which no limitations period is otherwise provided, pursu-

ant to § 1-52(2), constituted a better borrowing choice and one more consistent with federal policies. *CM v. Board of Educ.*, 241 F.3d 374 (4th Cir. 2001), cert. denied, — U.S. —, 122 S. Ct. 48, 151 L. Ed. 2d 18 (2001).

**The Administrative Procedure Act does not apply to a case involving the Outdoor Advertising Control Act, §§ 136-126 through 136-140,** because there is no statute or administrative rule which requires the Department of Transportation to make an agency decision after providing an opportunity for an adjudicatory hearing, and the subject controversy is therefore not a “contested case” within the meaning of former § 150A-23. *National Adv. Co. v. Bradshaw*, 48 N.C. App. 10, 268 S.E.2d 816, cert. denied and appeal dismissed, 301 N.C. 400, 273 S.E.2d 446 (1980).

**Delay Due to Rehearing Not “Undue.”** — The delay caused when the full State Personnel Commission ordered a rehearing of the dismissal case of a Department of Transportation employee after declining to accept the recommendation of the hearing officer that a default be entered against the department for its failure to appear was not an “undue delay” within the meaning of subsection (a) of former § 150A-23, nor such a delay as would allow the Court of Appeals to treat the order for rehearing as a final agency decision under former § 150A-43. *Davis v. North Carolina Dep’t of Transp.*, 39 N.C. App. 190, 250 S.E.2d 64 (1978), cert. denied, 296 N.C. 735, 254 S.E.2d 177 (1979).

**Erroneous Assertion of Jurisdiction Tolls Time Limit.** — In appropriate circumstances, the 60-day time limitation of subsection (f) may be tolled. Specifically, such tolling is appropriate where a court’s erroneous assertion of jurisdiction brings a dispute over an administrative agency’s ruling into the court which would normally review decisions of that agency, and — in reliance on this assertion of jurisdiction — a party fails to seek administrative review within the statutory time limit. *House of Raeford Farms, Inc. v. State ex rel. Env’tl Mgt. Comm’n*, 338 N.C. 262, 449 S.E.2d 453 (1994).

The time limitation of subsection (f) of this section was tolled by the superior court’s erro-

neous assertion of subject matter jurisdiction over respondents' penalty assessment and remained tolled until the court's assertion of jurisdiction was vacated by the Court of Appeals' mandate. The Office of Administrative Hearings (OAH) had subject matter jurisdiction over petitioners' contested case petition, since this petition was timely filed in the OAH following the issuance of the Court of Appeals' mandate. *House of Raeford Farms, Inc. v. State ex rel. Env'tl Mgt. Comm'n*, 338 N.C. 262, 449 S.E.2d 453 (1994).

**Failure to Comply with Time Limitation.** — Plaintiffs who did not file a petition for a contested case, under § 115C-116 within the time limit prescribed by this section, abandoned the process and sought relief in the courts without exhausting the available administrative remedies, were therefore barred from seeking relief in federal district court. *Glen ex rel. Glen v. Charlotte-Mecklenburg Sch. Bd. of Educ.*, 903 F. Supp. 918 (W.D.N.C. 1995).

**The notice requirements in former § 150A-23 were strictly construed.** *Parrish v. North Carolina Real Estate Licensing Bd.*, 41 N.C. App. 102, 254 S.E.2d 268 (1979).

**Factual Allegations to Be Specific.** — The same rationale applicable in criminal proceedings, that an indictment must charge the offense with sufficient certainty to apprise the defendant of the specific accusation against him so as to enable him to prepare his defense, is applicable to factual allegations in proceedings pursuant to former § 150A-23. *Parrish v. North Carolina Real Estate Licensing Bd.*, 41 N.C. App. 102, 254 S.E.2d 268 (1979).

**Notice Held Sufficient to Comply with Due Process.** — Notice published in a newspaper and provided to each member of the county board of elections and each candidate whose name appeared on the ballot for a county office, to the effect that a public hearing would be held at a specified time and place to inquire into the processes relative to a general election conducted in the county, particularly the processes involving absentee ballots, was sufficient to comply with due process, it not being necessary for the State Board of Elections to particularize any charges in the notice of public hearing. *In re Judicial Review by Republican Candidates*, 45 N.C. App. 556, 264 S.E.2d 338, cert. denied, 299 N.C. 736, 267 S.E.2d 672 (1980).

Any variance between notice and proof was insignificant in notice served defendant real estate broker that Commission would present evidence that defendant doctored tapes he used in his defense, since defendant was not surprised nor deprived of an opportunity to present his defense when he attempted to use tapes to defend himself. *Watson v. North Carolina Real Estate Comm'n*, 87 N.C. App. 637, 362

S.E.2d 294 (1987), cert. denied, 321 N.C. 746, 365 S.E.2d 296 (1988).

**Notice Held Insufficient to Comply with Due Process.** — A notice which failed to inform petitioner of her right to contest the designation of her position as "exempt policymaking," the procedure for contesting the designation, or the time limits for filing her objection to the designation was not sufficient to start the limitation period running. *Jordan v. DOT*, 140 N.C. App. 771, 538 S.E.2d 623 (2000), cert. denied, 353 N.C. 376, 547 S.E.2d 412 (2001).

**Notice Held Insufficient to Comply with Due Process.** — Defendants-school systems failed to adequately notify the parents of disabled children, as required by this section, that school authorities had reached a final decision regarding reimbursement of their special educational costs that could be challenged only in a due process hearing, which had to be requested within sixty days; the letters which the schools relied on were written during negotiations with the parents and were not express enough to trigger the limitations period, and distribution of the Handbook of Parents' Rights could not remedy the letters' inadequacies. *CM v. Board of Educ.*, 241 F.3d 374 (4th Cir. 2001), cert. denied, — U.S. —, 122 S. Ct. 48, 151 L. Ed. 2d 18 (2001).

**Notice Held Insufficient to Support Suspension of License.** — Notice to professional engineer that charges against him involved gross negligence, incompetence or misconduct resulting from his noncompliance with certain statutes and administrative regulations in the preparation and sealing of certain plans was insufficient to support suspension of his license for misconduct in placing his seal on engineering work not prepared under his direction and for gross negligence in sealing the work of another in order to procure planning board approval when he knew that the plans did not conform to the State Building Code. *In re Trulove*, 54 N.C. App. 218, 282 S.E.2d 544 (1981), cert. denied, 304 N.C. 727, 288 S.E.2d 808 (1982).

**Evidentiary Hearing in Contested Case.** — The exercise of the right to an evidentiary hearing under the contested case provision of § 131E-188(a) does not commence a de novo proceeding by the administrative law judge (ALJ) intended to lead to a formulation of the final decision pursuant to subsection (a), the ALJ, in a contested case hearing under the certificate of need law and this Act, determines whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule, based on a hearing limited to the

evidence that is presented or available to the agency during the review period. *Britthaven, Inc. v. North Carolina Dep't of Human Resources*, 118 N.C. App. 379, 455 S.E.2d 455 (1995).

**The administrative hearing provisions of this article do not establish the right of a person "aggrieved" by agency action to Office of Administrative Hearings review of that action, but only describe the procedures for such review.** *Batten v. North Carolina Dep't of Cor.*, 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, *Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources*, 337 N.C. 569, 447 S.E.2d 168 (1994).

**Compliance with Procedures Required for Jurisdiction.** — Because Chapter 126 makes compliance with the procedures of this article mandatory, jurisdiction over a contested case hearing arising under Chapter 126 is not conferred upon the Office of Administrative Hearings unless petitioner follows such procedures. *Nailing v. UNC-CH*, 117 N.C. App. 318, 451 S.E.2d 351 (1994), cert. denied, 339 N.C. 614, 454 S.E.2d 255 (1995).

**No statutory authority exists for the State Personnel Commission to review an administrative law judge's recommended decision in a case involving an exempt employee.** *Johnson v. Natural Resources & Community Dev.*, 98 N.C. App. 334, 391 S.E.2d 48 (1990).

**Discretionary Intervention Under Former § 150A-23(d).** — While § 1A-1, Rule 24 contains specific requirements which control and limit intervention, subsection (d) of former § 150A-23 clearly provides for discretionary intervention by the Commissioner of Insurance by providing that the agency may permit any interested person to intervene "and participate in [the] proceeding to the extent deemed appropriate." This discretionary intervention is without limitation, and the statutory language has been construed to provide intervention broader than the permissive intervention under § 1A-1, Rule 24. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 460, 269 S.E.2d 538 (1980).

**Commissioner of Insurance acted within his discretion in permitting a consumer group to intervene in an automobile insurance rate case and in allowing hearings to be held throughout the State.** *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 460, 269 S.E.2d 538 (1980).

**Intervention Not Approved.** — For purposes of meeting appeal requirements of § 131E-188(b), appellant, proposed intervenor below, was not and could not be a party to the contested hearing at issue below until its motion to intervene was approved. Since this motion was not approved, appellant was not a

party to contested case and, therefore, did not meet jurisdictional requirements of § 131E-188(b). *HCA Crossroads Residential Centers, Inc. v. North Carolina Dep't of Human Resources*, 99 N.C. App. 193, 392 S.E.2d 398 (1990).

**Application of Time Limitation to Appeal of Personnel Decisions.** — The time limitation contained in subsection (f) applies to appeal of personnel decisions under Chapter 126 that are not covered by § 126-38. *Clay v. Employment Sec. Comm'n*, 340 N.C. 83, 455 S.E.2d 619 (1995).

Petitioner, an intermittent state employee who alleged discrimination on consideration of his application for state employment, under subsection (f) had sixty days to file his petition for a contested case hearing and this period did not begin to run until petitioner received letter from agency chairman which indicated that no evidence of discrimination existed in the agency's selection. *Clay v. Employment Sec. Comm'n*, 340 N.C. 83, 455 S.E.2d 619 (1995).

**The 60-day time limitation of subsection (f) was tolled by the superior court's assertion of subject matter jurisdiction over assessment and remained tolled until the court's assertion of jurisdiction was vacated by the Court of Appeals, accordingly, the Office of Administrative Hearings (OAH) had subject matter jurisdiction over petition since it was filed in the OAH within 60 days of the Court of Appeals' decision.** *House of Raeford Farms, Inc. v. State ex rel. Env'tl Mgt. Comm'n*, 338 N.C. 262, 449 S.E.2d 453 (1994).

**Applied in North Buncombe Ass'n of Concerned Citizens v. Rhodes**, 100 N.C. App. 24, 394 S.E.2d 462 (1990), appeal dismissed, 327 N.C. 484, 397 S.E.2d 215 (1990); *Gaskill v. State ex rel. Cobey*, 109 N.C. App. 656, 428 S.E.2d 474 (1993); *Deep River Citizens Coalition v. North Carolina Dep't of Env't, Health & Natural Resources*, 119 N.C. App. 232, 457 S.E.2d 772 (1995).

**Quoted in Lenoir Mem. Hosp. v. North Carolina Dep't of Human Resources**, 98 N.C. App. 178, 390 S.E.2d 448 (1990); *Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources*, 337 N.C. 569, 447 S.E.2d 768, rehearing denied, 338 N.C. 314, 451 S.E.2d 634 (1994); *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 286, 517 S.E.2d 401 (1999).

**Stated in Clay v. Employment Sec. Comm'n**, 111 N.C. App. 599, 432 S.E.2d 873 (1993); *Cunningham v. Catawba County*, 128 N.C. App. 70, 493 S.E.2d 82 (1997).

**Cited in North Carolina Dep't of Cor. v. Hodge**, 99 N.C. App. 602, 394 S.E.2d 285 (1990); *State ex rel. Env'tl. Mgt. Comm'n v. House of Raeford Farms, Inc.*, 101 N.C. App. 433, 400 S.E.2d 107 (1991); *North Carolina DOT v. Davenport*, 102 N.C. App. 476, 402

S.E.2d 477 (1991); North Carolina DOT v. Davenport, 108 N.C. App. 178, 423 S.E.2d 327 (1992); Ocean Hill Joint Venture v. North Carolina Dep't of Environment, Health & Natural Resources, 333 N.C. 318, 426 S.E.2d 274 (1993); Professional Food Servs. Mgt., Inc. v. North Carolina Dep't of Admin., 109 N.C. App. 265, 426 S.E.2d 447 (1993); Citizens for Clean Indus., Inc. v. Lofton, 109 N.C. App. 229, 427 S.E.2d 120 (1993); North Carolina DOT v. Davenport, 334 N.C. 428, 432 S.E.2d 303 (1993); In re Sullivan, 112 N.C. App. 795, 436 S.E.2d 862 (1993); Davis v. North Carolina Dep't of Cors.,

48 F.3d 134 (4th Cir. 1995); Williams v. North Carolina Dep't of Economic & Community Dev., 119 N.C. App. 535, 458 S.E.2d 750 (1995); Gainey v. North Carolina Dep't of Justice, 121 N.C. App. 253, 465 S.E.2d 36 (1996); Bryant v. Hogarth, 127 N.C. App. 79, 488 S.E.2d 269 (1997), cert. denied, 347 N.C. 396, 494 S.E.2d 406 (1997); Dialysis Care of N.C., LLC v. Department of Health & Human Servs., 137 N.C. App. 638, 529 S.E.2d 257 (2000), aff'd, 353 N.C. 258, 538 S.E.2d 566 (2000); Blalock v. State Dep't of Health & Human Servs., 143 N.C. App. 470, 546 S.E.2d 177 (2001).

### OPINIONS OF ATTORNEY GENERAL

**Editor's Note.** — *The opinions below were issued prior to the 1991 amendments to this Chapter.*

**Applicability of Subsection (a).** — Subsection (a) of this section, as amended by Session Laws 1987, Chapter 878, is not applicable to agencies governed by Article 3A of this Chapter. See opinion of Attorney General to Mr. Phillip T. Fisher, Executive Director, N.C. Real Estate Commission, 57 N.C.A.G. 85 (1987).

**Appeals by applicants and recipients of public assistance or social services** from adverse decisions of county agencies or boards are governed by the substantive provisions and procedural requirements of § 108A-79, including the procedural provisions of the Administrative Procedure Act (§ 150B-1 et seq.) consistent with the statute, to the extent that substance and procedure are not in conflict with applicable federal law and regulations. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 55 N.C.A.G. 91 (1986).

**Procedural, Not Substantive Provisions**

**of Act Applicable to Appeals of County Agency Decisions.** — Given the detailed substantive provisions of § 108A-79, designed specifically to apply to appeals of county agency decisions, and the fact that the Administrative Procedure Act (APA), by its terms, does not apply to such appeals, the Legislature, by reference to the APA, did not intend to substitute the Act's substantive requirements for those of § 108A-79. The citation to the APA simply indicates a legislative intent to incorporate the powers of hearing officers and the hearing procedures detailed in the Act into § 108A-79(i) by reference. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 55 N.C.A.G. 91 (1986).

**When a contested case hearing is conducted by an agency governed by Article 3A** of this Chapter, a petition or other notice need not be filed with the Office of Administrative Hearings. See opinion of Attorney General to Mr. Phillip T. Fisher, Executive Director, N.C. Real Estate Commission, 57 N.C.A.G. 85 (1987).

## § 150B-23.1. Mediated settlement conferences.

(a) Purpose. — This section authorizes a mediation program in the Office of Administrative Hearings in which the chief administrative law judge may require the parties in a contested case to attend a prehearing settlement conference conducted by a mediator. The purpose of the program is to determine whether a system of mediated settlement conferences may make the operation of the Office of Administrative Hearings more efficient, less costly, and more satisfying to the parties.

(b) Definitions. — The following definitions apply in this section:

- (1) Mediated settlement conference. — A conference ordered by the chief administrative law judge involving the parties to a contested case and conducted by a mediator prior to a contested case hearing.
- (2) Mediator. — A neutral person who acts to encourage and facilitate a resolution of a contested case but who does not make a decision on the merits of the contested case.

(c) Conference. — The chief administrative law judge may order a mediated settlement conference for all or any part of a contested case to which an administrative law judge is assigned to preside. All aspects of the mediated

settlement conference shall be conducted insofar as possible in accordance with the rules adopted by the Supreme Court for the court-ordered mediation pilot program under G.S. 7A-38.

(d) Attendance. — The parties to a contested case in which a mediated settlement conference is ordered, their attorneys, and other persons having authority to settle the parties' claims shall attend the settlement conference unless excused by the presiding administrative law judge.

(e) Mediator. — The parties shall have the right to stipulate to a mediator. Upon the failure of the parties to agree within a time limit established by the presiding administrative law judge, a mediator shall be appointed by the presiding administrative law judge.

(f) Sanctions. — Upon failure of a party or a party's attorney to attend a mediated settlement conference ordered under this section, the presiding administrative law judge may impose any sanction authorized by G.S. 150B-33(b)(8) or (10).

(g) Standards. — Mediators authorized to conduct mediated settlement conferences under this section shall comply with the standards adopted by the Supreme Court for the court-ordered mediation pilot program under G.S. 7A-38.

(h) Immunity. — A mediator acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice.

(i) Costs. — Costs of a mediated settlement conference shall be paid one share by the petitioner, one share by the respondent, and an equal share by any intervenor, unless otherwise apportioned by the administrative law judge.

(j) Inadmissibility of Negotiations. — All conduct or communications made during a mediated settlement conference are presumed to be made in compromise negotiations and shall be governed by Rule 408 of the North Carolina Rules of Evidence.

(k) Right to Hearing. — Nothing in this section restricts the right to a contested case hearing. (1993, c. 321, s. 25(b); c. 363, ss. 1, 3; 1995, c. 145, s. 1.)

**Editor's Note.** — Section 7A-38, referred to in this section, was repealed by Session Laws, 1995, c. 500, s. 3.

Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina's Pre-Trial Process," 18 Campbell L. Rev. 281 (1996).

**Legal Periodicals.** — For comment, "Good

## § 150B-24. Venue of hearing.

(a) The hearing of a contested case shall be conducted:

- (1) In the county in this State in which any person whose property or rights are the subject matter of the hearing maintains his residence;
- (2) In the county where the agency maintains its principal office if the property or rights that are the subject matter of the hearing do not affect any person or if the subject matter of the hearing is the property or rights of residents of more than one county; or
- (3) In any county determined by the administrative law judge in his discretion to promote the ends of justice or better serve the convenience of witnesses.

(b) Any person whose property or rights are the subject matter of the hearing waives his objection to venue by proceeding in the hearing. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1987, c. 878, s. 6.)

**Legal Periodicals.** — For comment, "The Problem of Procedural Delay in Contested Case

Hearings ..." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

## § 150B-25. Conduct of hearing; answer.

(a) If a party fails to appear in a contested case after proper service of notice, and if no adjournment or continuance is granted, the administrative law judge may proceed with the hearing in the absence of the party.

(b) Repealed by Session Laws 1991, c. 35, s. 2.

(c) The parties shall be given an opportunity to present arguments on issues of law and policy and an opportunity to present evidence on issues of fact.

(d) A party may cross-examine any witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. Any party may submit rebuttal evidence. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(13); 1987, c. 878, s. 6; 1991, c. 35, s. 2.)

**Legal Periodicals.** — For comment, “The Problem of Procedural Delay in Contested Case Hearings ...” under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

For article, “Advisory Rulings by Administrative Agencies: Their Benefits and Dangers,” see 2 Campbell L. Rev. 1 (1980).

### CASE NOTES

**Editor’s Note.** — *The cases below were decided under corresponding provisions of former Chapter 150A, or under this Chapter prior to the 1991 amendments thereto.*

**Former § 150A-25 was permissive, not mandatory.** *Frieson v. North Carolina Real Estate Licensing Bd.*, 72 N.C. App. 665, 325 S.E.2d 293 (1985).

**Subsection (a) of Former § 150A-25 Was Permissive and Not Mandatory.** — The language of subsection (a) of former § 150A-25, providing that if a party fails to appear after proper service of notice the agency may proceed and render its decision in the absence of that party, is permissive and not mandatory. *Davis v. North Carolina Dep’t of Transp.*, 39 N.C. App. 190, 250 S.E.2d 64 (1978), cert. denied, 296 N.C. 735, 254 S.E.2d 177 (1979).

**Contested Case Hearing Appropriate.** — Where parties forecast evidence to support rec-

ommendation by the administrative law judge and final agency decision which were contrary, a genuine issue of material fact existed regarding hospital’s application for a certificate of need so that a contested case hearing would be required. *Presbyterian-Orthopaedic Hosp. v. North Carolina Dep’t of Human Resources*, 122 N.C. App. 529, 470 S.E.2d 831 (1996), discretionary review improvidently allowed, 346 N.C. 267, 485 S.E.2d 294 (1997).

**Applied** in *Deep River Citizens Coalition v. North Carolina Dep’t of Env’t, Health & Natural Resources*, 119 N.C. App. 232, 457 S.E.2d 772 (1995).

**Cited** in *Britthaven, Inc. v. North Carolina Dep’t of Human Resources*, 118 N.C. App. 379, 455 S.E.2d 455 (1995); *Blalock v. State Dep’t of Health & Human Servs.*, 143 N.C. App. 470, 546 S.E.2d 177 (2001).

## § 150B-26. Consolidation.

When contested cases involving a common question of law or fact or multiple proceedings involving the same or related parties are pending, the Director of the Office of Administrative Hearings may order a joint hearing of any matters at issue in the cases, order the cases consolidated, or make other orders to reduce costs or delay in the proceedings. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1985, (Reg. Sess., 1986), c. 1022, s. 1(1), 1(14).)

**Legal Periodicals.** — For comment, “The Problem of Procedural Delay in Contested Case

Hearings ...” under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

## § 150B-27. Subpoena.

After the commencement of a contested case, subpoenas may be issued and served in accordance with G.S. 1A-1, Rule 45. In addition to the methods of

service in G.S. 1A-1, Rule 45, a State law enforcement officer may serve a subpoena on behalf of an agency that is a party to the contested case by any method by which a sheriff may serve a subpoena under that Rule. Upon a motion, the administrative law judge may quash a subpoena if, upon a hearing, the administrative law judge finds that the evidence the production of which is required does not relate to a matter in issue, the subpoena does not describe with sufficient particularity the evidence the production of which is required, or for any other reason sufficient in law the subpoena may be quashed.

Witness fees shall be paid by the party requesting the subpoena to subpoenaed witnesses in accordance with G.S. 7A-314. However, State officials or employees who are subpoenaed shall not be entitled to witness fees, but they shall receive their normal salary and they shall not be required to take any annual leave for the witness days. Travel expenses of State officials or employees who are subpoenaed shall be reimbursed as provided in G.S. 138-6. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 66; 1985, c. 746, s. 1; 1987, c. 878, s. 6; 1991, c. 35, s. 3.)

**Legal Periodicals.** — For comment, “The Problem of Procedural Delay in Contested Case

Hearings ...” under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

CASE NOTES

**Editor’s Note.** — *The case below was decided under corresponding provisions of former Chapter 150A.*

**One of the purposes of a subpoena duces tecum** is to insure that documents are described with sufficient particularity and with

such definiteness that they can be identified without prolonged or extensive search. *Myers v. Holshouser*, 25 N.C. App. 683, 214 S.E.2d 630, cert. denied, 287 N.C. 664, 216 S.E.2d 907 (1975).

§ 150B-28. Depositions and discovery.

(a) A deposition may be used in lieu of other evidence when taken in compliance with the Rules of Civil Procedure, G.S. 1A-1. Parties in contested cases may engage in discovery pursuant to the provisions of the Rules of Civil Procedure, G.S. 1A-1.

(b) On a request for identifiable agency records, with respect to material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall promptly make the records available to a party. (1973, c. 1331, s. 1; 1985, c. 746, s. 1.)

CASE NOTES

**Cited** in *Davenport v. North Carolina DOT*, 3 F.3d 89 (4th Cir. 1993); *Eury v. North Carolina Emp. Sec. Comm’n*, 115 N.C. App. 590, 446

S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994).

§ 150B-29. Rules of evidence.

(a) In all contested cases, irrelevant, immaterial and unduly repetitious evidence shall be excluded. Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under the rules to show relevant facts, then the most reliable and substantial evidence available shall be admitted. On the judge’s own motion, an administrative law judge may exclude evidence that is inadmissible under this section. The party with the burden of proof in a contested case must establish the facts required by G.S.

150B-23(a) by a preponderance of the evidence. It shall not be necessary for a party or his attorney to object at the hearing to evidence in order to preserve the right to object to its consideration by the administrative law judge in making a decision, by the agency in making a final decision, or by the court on judicial review.

(b) Evidence in a contested case, including records and documents, shall be offered and made a part of the record. Factual information or evidence not made a part of the record shall not be considered in the determination of the case, except as permitted under G.S. 150B-30. Documentary evidence may be received in the form of a copy or excerpt or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original if available. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1987, c. 878, s. 7; 1991, c. 35, s. 4; 2000-190, s. 4.)

**Effect of Amendments.** — Session Laws 2000-190, s. 4, effective January 1, 2001, and applicable to contested cases commenced on or after that date, in subsection (a), inserted the next-to-last sentence and deleted “recommended” following “in making a” in the last sentence.

**Legal Periodicals.** — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

For comment, “The Problem of Procedural Delay in Contested Case Hearings . . .” under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

For article, “A Powerless Judiciary? The North Carolina Courts’ Perceptions of Review of Administrative Action,” see 12 N.C. Cent. L.J. 21 (1980).

## CASE NOTES

**Editor’s Note.** — *The cases below were decided under corresponding provisions of former Chapter 150A, or under this Chapter prior to the 1991 amendments thereto.*

**The standard of review, known as the “whole record test,”** presents to the trial judge a task which must be distinguished from both de novo review and the any competent evidence standard of review. *Goodwin v. Goldsboro City Bd. of Educ.*, 67 N.C. App. 243, 312 S.E.2d 892, cert. denied, 311 N.C. 304, 317 S.E.2d 680 (1984).

The whole record test is not a tool of judicial intrusion; instead it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence. Thus, the task before the trial court is to consider all the evidence, both that which supports the decision of the board and that which detracts from it. *Goodwin v. Goldsboro City Bd. of Educ.*, 67 N.C. App. 243, 312 S.E.2d 892, cert. denied, 311 N.C. 304, 317 S.E.2d 680 (1984).

The whole record test does not allow the reviewing court to replace the board’s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo. On the other hand, the whole record rule requires the court, in determining the substantiality of evidence supporting the board’s decision, to take into account whatever in the record fairly detracts from the weight of

the board’s evidence. *Goodwin v. Goldsboro City Bd. of Educ.*, 67 N.C. App. 243, 312 S.E.2d 892, cert. denied, 311 N.C. 304, 317 S.E.2d 680 (1984).

Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the board’s result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. *Goodwin v. Goldsboro City Bd. of Educ.*, 67 N.C. App. 243, 312 S.E.2d 892, cert. denied, 311 N.C. 304, 317 S.E.2d 680 (1984).

**Standard of Proof.** — The standard of proof in administrative matters is by the greater weight of the evidence, and it is error to require a showing by clear, cogent, and convincing evidence. *Dillingham v. North Carolina Dep’t of Human Resources*, 132 N.C. App. 704, 513 S.E.2d 823 (1999).

**Board of Adjustment Not Required to Sound-Record Hearings.** — Municipal corporations were specifically excluded from requirements under former § 150A-29 and former § 150A-37 that trial rules of evidence and production of evidence be followed in proceedings before State agencies. Thus, a Board of Adjustment was not required to sound-record its hearings. *Washington Park Neighborhood Ass’n v. Winston-Salem Zoning Bd. of Adjustment*, 35 N.C. App. 449, 241 S.E.2d 872, cert. denied and appeal dismissed, 295 N.C. 91, 244 S.E.2d 263 (1978).

**As to admissibility of evidence in pro-**

**ceeding before Property Tax Commission**, see *In re McLean Trucking Co.*, 281 N.C. 375, 189 S.E.2d 194, rehearing denied, 282 N.C. 156 (1972), cert. denied and appeal dismissed, 409 U.S. 1099, 93 S. Ct. 909, 34 L. Ed. 2d 681 (1973).

**Reports of physicians are acceptable as evidence**, since an agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it. *Lackey v. North Carolina Dep't of Human Resources*, 306 N.C. 231, 293 S.E.2d 171 (1982).

**Burden of Proof on Unemployment Claimant.** — Where a claimant for unemployment previously quit her job to retire and was presently claiming to have reentered the labor market, the degree of proof required of the claimant was by the greater weight of the evidence. *In re Thomas*, 281 N.C. 598, 189 S.E.2d 245 (1972).

## § 150B-30. Official notice.

Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. The noticed fact and its source shall be stated and made known to affected parties at the earliest practicable time, and any party shall on timely request be afforded an opportunity to dispute the noticed fact through submission of evidence and argument. (1973, c. 1331, s. 1; 1985, c. 746, s. 1.)

**Legal Periodicals.** — For comment, "The Problem of Procedural Delay in Contested Case Hearings ..." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

**School Board's Dismissal of At-Will Employee Upheld.** — It was not arbitrary or capricious, nor an abuse of discretion, for school board to terminate an at-will employee for making a racial comment in a school setting. *Cooper v. Board of Educ.*, 135 N.C. App. 200, 519 S.E.2d 536 (1999).

**Stated in** *In re Freeman*, 109 N.C. App. 100, 426 S.E.2d 100 (1993).

**Cited in** *Davenport v. North Carolina DOT*, 3 F.3d 89 (4th Cir. 1993); *Eury v. North Carolina Emp. Sec. Comm'n*, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994); *Dialysis Care of N.C., LLC v. Department of Health & Human Servs.*, 137 N.C. App. 638, 529 S.E.2d 257 (2000), aff'd, 353 N.C. 258, 538 S.E.2d 566 (2000); *Living Centers-Southeast, Inc. v. North Carolina Health & Human Servs.*, 138 N.C. App. 572, 532 S.E.2d 192 (2000).

For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

### CASE NOTES

**Editor's Note.** — *The cases below were decided under corresponding provisions of former Chapter 150A and earlier statutes.*

**One of the purposes behind the creation of administrative agencies was the necessity for the supervision and experience of specialists** in difficult and complicated fields. *Lackey v. North Carolina Dep't of Human Resources*, 306 N.C. 231, 293 S.E.2d 171 (1982).

**Reports of physicians are acceptable as evidence**, since an agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it. *Lackey v. North Carolina Dep't of Human Resources*, 306 N.C. 231, 293 S.E.2d 171 (1982).

**Reliance on Paper Presented in Hearing on Prior Rate Filing.** — While it is the better practice to produce a witness in a rate-making hearing rather than to rely on exhibits furnished by the witness in earlier hearings, the Commissioner of Insurance did not commit prejudicial error in a homeowners' insurance

rate hearing in taking official notice of a paper presented by a witness in a hearing on a prior rate filing and made a part of the order disapproving the prior filing, where the commissioner gave the rate bureau adequate notice in the notice of public hearing that he would rely on the paper in the present hearing. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 474, 269 S.E.2d 595 (1980).

**State Board of Assessment (now Department of Revenue) is neither required nor permitted to shut its eyes to an established fact** of common knowledge. *In re Valuation of Property Located at 411-417 W. Fourth St.*, 282 N.C. 71, 191 S.E.2d 692 (1972).

**For discussion of respective powers and duties of Commissioner of Insurance and his designated hearing officer** in the review of filed rates and entry of a final agency decision in a contested insurance rate case, see *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 61 N.C. App. 506, 300 S.E.2d 845 (1983).

**§ 150B-31. Stipulations.**

(a) The parties in a contested case may, by a stipulation in writing filed with the administrative law judge, agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties should agree upon facts when practicable.

(b) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default, or other method agreed upon by the parties. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1987, c. 878, s. 6.)

**§ 150B-32. Designation of administrative law judge.**

(a) The Director of the Office of Administrative Hearings shall assign himself or another administrative law judge to preside over a contested case.

(a1) Repealed by Sessions Laws 1985 (Regular Session, 1986), c. 1022, s. 1(15).

(b) On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of an administrative law judge, the administrative law judge shall determine the matter as a part of the record in the case, and this determination shall be subject to judicial review at the conclusion of the proceeding.

(c) When an administrative law judge is disqualified or it is impracticable for him to continue the hearing, the Director shall assign another administrative law judge to continue with the case unless it is shown that substantial prejudice to any party will result, in which event a new hearing shall be held or the case dismissed without prejudice. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), 1(12), 1(15); c. 1028, s. 40; 1987, c. 878, s. 8.)

**Legal Periodicals.** — For comment, “The Problem of Procedural Delay in Contested Case Hearings ...” under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

**CASE NOTES**

**Cited** in Williams v. North Carolina Dep’t of Economic & Community Dev., 119 N.C. App. 535, 458 S.E.2d 750 (1995); Gaaney v. North Carolina Dep’t of Justice, 121 N.C. App. 253, 465 S.E.2d 36 (1996).

**§ 150B-33. Powers of administrative law judge.**

(a) An administrative law judge shall stay any contested case under this Article on motion of an agency which is a party to the contested case, if the agency shows by supporting affidavits that it is engaged in other litigation or administrative proceedings, by whatever name called, with or before a federal agency, and this other litigation or administrative proceedings will determine the position, in whole or in part, of the agency in the contested case. At the conclusion of the other litigation or administrative proceedings, the contested case shall proceed and be determined as expeditiously as possible.

(b) An administrative law judge may:

- (1) Administer oaths and affirmations;
- (2) Sign, issue, and rule on subpoenas in accordance with G.S. 150B-27 and G.S. 1A-1, Rule 45;
- (3) Provide for the taking of testimony by deposition and rule on all objections to discovery in accordance with G.S. 1A-1, the Rules of Civil Procedure;

- (3a) Rule on all prehearing motions that are authorized by G.S. 1A-1, the Rules of Civil Procedure;
- (4) Regulate the course of the hearings, including discovery, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;
- (5) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties;
- (6) Stay the contested action by the agency pending the outcome of the case, upon such terms as he deems proper, and subject to the provisions of G.S. 1A-1, Rule 65;
- (7) Determine whether the hearing shall be recorded by a stenographer or by an electronic device; and
- (8) Enter an order returnable in the General Court of Justice, Superior Court Division, to show cause why the person should not be held in contempt. The Court shall have the power to impose punishment as for contempt for any act which would constitute direct or indirect contempt if the act occurred in an action pending in Superior Court.
- (9) Determine that a rule as applied in a particular case is void because (1) it is not within the statutory authority of the agency, (2) is not clear and unambiguous to persons it is intended to direct, guide, or assist, or (3) is not reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly.
- (10) Impose the sanctions provided for in G.S. 1A-1 or Chapter 3 of Title 26 of the North Carolina Administrative Code for noncompliance with applicable procedural rules.
- (11) Order the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved in contested cases decided under Chapter 126 where the administrative law judge finds discrimination, harassment, or orders reinstatement or back pay. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1987, c. 878, ss. 5, 9, 10, 26; 1987 (Reg. Sess., 1988), c. 1111, ss. 18, 19; 1991, c. 35, s. 5; 2000-190, s. 5.)

**Effect of Amendments.** — Session Laws 2000-190, s. 5, effective January 1, 2001, and applicable to contested cases commenced on or after that date, added subdivision (b)(11).

**Legal Periodicals.** — For comment, "The Problem of Procedural Delay in Contested Case Hearings ..." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

#### CASE NOTES

**Editor's Note.** — *The cases below were decided under corresponding provisions of former Chapter 150A and earlier statutes, or under this Chapter prior to the 1991 amendments thereto.*

**Powers Generally.** — When an agency of State government determines to use the services of a hearing officer (now administrative law judge), it is former § 150A-33 that prescribes his powers. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 61 N.C. App. 262, 300 S.E.2d 586, cert. denied, 308 N.C. 548, 304 S.E.2d 242 (1983).

**Proposal for Decision Required of Hearing Officer (Now Administrative Law Judge).** — Under the Administrative Procedure Act, when the services of a hearing officer (now administrative law judge) are used, there must be a "proposal for decision" by the hearing officer. *State ex rel. Comm'r of Ins. v. North*

*Carolina Rate Bureau*, 61 N.C. App. 262, 300 S.E.2d 586, cert. denied, 308 N.C. 548, 304 S.E.2d 242 (1983).

**Administrative Law Judge's Decision Reviewed by Personnel Commission.** — The administrative law judge must render a decision on the motion which is presented, but the administrative law judge's ruling is subject to review by the ultimate factfinder, the Personnel Commission. *Eury v. North Carolina Emp. Sec. Comm'n*, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994).

**For discussion of respective powers and duties of Commissioner of Insurance and his designated hearing officer** in the review of filed rates and entry of a final agency decision in a contested insurance rate case, see *State ex rel. Comm'r of Ins. v. North Carolina*

Rate Bureau, 61 N.C. App. 506, 300 S.E.2d 845 (1983).

**Commissioner of Insurance Has No Statutory Power to Issue Restraining Orders or Injunctions.** — The statutes creating the Department of Insurance and prescribing the powers and duties of the Commissioner do not purport to grant him the power of issuing restraining orders and injunctions. *Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier*, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

**But He May Apply to the Courts Therefor.** — In administering the laws relative to the insurance industry, the Commissioner, if he deems it necessary, may apply to the courts for restraining orders and injunctions. *Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier*, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

**Attempted grant to the Commissioner of Insurance of judicial power** to impose a penalty upon an insurance agent for a violation

of the insurance laws, varying in the Commissioner's discretion from a nominal sum to \$25,000, violated N.C. Const., Art. IV, there being no reasonable necessity for conferring such judicial power upon the Commissioner. *State ex rel. Lanier v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1968).

**Authority to Determine Validity of Rules.** — This section provides that an Administrative Law Judge (ALJ) may determine that a rule as applied in a particular case is void; however, it does not authorize an ALJ to make a final decision with respect to the validity of agency rules. *Fearrington v. University of N.C.*, 126 N.C. App. 774, 487 S.E.2d 169 (1997).

**Quoted** in *Lenoir Mem. Hosp. v. North Carolina Dep't of Human Resources*, 98 N.C. App. 178, 390 S.E.2d 448 (1990); *Alexander v. Wilkerson*, 99 N.C. App. 340, 392 S.E.2d 765 (1990).

## § 150B-34. Decision of administrative law judge.

(a) Except as provided in G.S. 150B-36(c), and subsection (c) of this section, in each contested case the administrative law judge shall make a decision that contains findings of fact and conclusions of law and return the decision to the agency for a final decision in accordance with G.S. 150B-36. The administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency. All references in this Chapter to the administrative law judge's decision shall include orders entered pursuant to G.S. 150B-36(c).

(b) Repealed by Session Laws 1991, c. 35, s. 6.

(c) Notwithstanding subsection (a) of this section, in cases arising under Article 9 of Chapter 131E of the General Statutes, the administrative law judge shall make a recommended decision or order that contains findings of fact and conclusions of law. A final decision shall be made by the agency in writing after review of the official record as defined in G.S. 150B-37(a) and shall include findings of fact and conclusions of law. The final agency decision shall recite and address all of the facts set forth in the recommended decision. For each finding of fact in the recommended decision not adopted by the agency, the agency shall state the specific reason, based on the evidence, for not adopting the findings of fact and the agency's findings shall be supported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31. The provisions of G.S. 150B-36(b), (b1), (b2), (b3), and (d), and G.S. 150B-51 do not apply to cases decided under this subsection.

(d) Except for the exemptions contained in G.S. 150B-1(c) and (e), and subsection (c) of this section, the provisions of this section regarding the decision of the administrative law judge shall apply only to agencies subject to Article 3 of this Chapter, notwithstanding any other provisions to the contrary relating to recommended decisions by administrative law judges. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1987, c. 878, ss. 5, 23; 1987 (Reg. Sess., 1988), c. 1111, s. 21; 1991, c. 35, s. 6; 2000-190, s. 6.)

**Effect of Amendments.** — Session Laws 2000-190, s. 6, effective January 1, 2001, and applicable to contested cases commenced on or after that date, substituted "Decision" for "Rec-

ommended decision or order" in the catchline; in subsection (a), inserted "and subsection (c) of this section," substituted "decision that contains" for "recommended decision or order that

contains," added "and return the decision to the agency for a final decision in accordance with G.S. 150B-36" and added the last two sentences; and added subsections (c) and (d).

**Legal Periodicals.** — For comment, "The Problem of Procedural Delay in Contested Case

Hearings ..." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

For article, "Advisory Rulings by Administrative Agencies: Their Benefits and Dangers," see 2 Campbell L. Rev. 1 (1980).

### CASE NOTES

**Editor's Note.** — *The cases below were decided prior to the 1991 amendments to this Chapter.*

**Powers of Hearing Officer (Now Administrative Law Judge) Generally.** — When an agency of State government determined to use the services of a hearing officer (now administrative law judge), it was former § 150A-33 that prescribed his powers. State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 61 N.C. App. 262, 300 S.E.2d 586, cert. denied, 308 N.C. 548, 304 S.E.2d 242 (1983), decided under corresponding provisions of Chapter 150A.

**Proposal for Decision Required.** — Under the Administrative Procedure Act, when the services of a hearing officer (now administrative law judge) are used, there must be a "proposal for decision" by the hearing officer. State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 61 N.C. App. 262, 300 S.E.2d 586, cert. denied, 308 N.C. 548, 304 S.E.2d 242 (1983), decided under corresponding provisions of Chapter 150A.

**Administrative Law Judge's Decision Reviewed by Personnel Commission.** — The administrative law judge must render a decision on the motion which is presented, but the administrative law judge's ruling is subject

to review by the ultimate factfinder, the Personnel Commission. Eury v. North Carolina Emp. Sec. Comm'n, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994).

**No statutory authority exists for the State Personnel Commission to review an administrative law judge's recommended decision** in a case involving an exempt employee. Johnson v. Natural Resources & Community Dev., 98 N.C. App. 334, 391 S.E.2d 48, cert. denied, 327 N.C. 140, 394 S.E.2d 176 (1990), rev'd on other grounds, 328 N.C. 689, 394 S.E.2d 469 (1991).

**Applied** in Deep River Citizens Coalition v. North Carolina Dep't of Env't, Health & Natural Resources, 119 N.C. App. 232, 457 S.E.2d 772 (1995).

**Cited** in HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990); Ford v. North Carolina Dep't of Env't, Health, & Natural Resources, 107 N.C. App. 192, 419 S.E.2d 204 (1992); Britthaven, Inc. v. North Carolina Dep't of Human Resources, 118 N.C. App. 379, 455 S.E.2d 455 (1995); Williams v. North Carolina Dep't of Economic & Community Dev., 119 N.C. App. 535, 458 S.E.2d 750 (1995).

## § 150B-35. No ex parte communication; exceptions.

Unless required for disposition of an ex parte matter authorized by law, neither the administrative law judge assigned to a contested case nor a member or employee of the agency making a final decision in the case may communicate, directly or indirectly, in connection with any issue of fact, or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1987, c. 878, s. 11.)

## § 150B-36. Final decision.

(a) Before the agency makes a final decision, it shall give each party an opportunity to file exceptions to the decision made by the administrative law judge, and to present written arguments to those in the agency who will make the final decision or order. If a party files in good faith a timely and sufficient affidavit of personal bias or other reason for disqualification of a member of the agency making the final decision, the agency shall determine the matter as a part of the record in the case, and the determination is subject to judicial review at the conclusion of the case.

(b) Except as provided in G.S. 150B-34(c) or subsection (d) of this section, a final decision in a contested case shall be made by the agency in writing after review of the official record as defined in G.S. 150B-37(a) and shall include findings of fact and conclusions of law. The agency shall adopt each finding of fact contained in the administrative law judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses. For each finding of fact not adopted by the agency and each finding of fact made by the agency that is not contained in the administrative law judge's decision, the agency shall follow the procedures set forth in subsections (b1) and (b2) of this section.

(b1) For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the following:

- (1) The reasons for not adopting the findings of fact.
- (2) The evidence in the record relied upon by the agency in not adopting the finding of fact contained in the administrative law judge's decision.

Any finding of fact not specifically rejected as required by this subsection shall be deemed accepted for purposes of judicial review of the final decision pursuant to Article 4 of this Chapter.

(b2) For each finding of fact made by the agency that is not contained in the administrative law judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact. Any new finding of fact made by the agency shall be supported by a preponderance of the admissible evidence in the record. The agency shall not make any new finding of fact that is inconsistent with a finding of fact contained in the administrative law judge's decision unless the finding of fact in the administrative law judge's decision is not adopted as required by subsection (b1) of this section.

(b3) Except as provided in G.S. 150B-34(c), the agency shall adopt the decision of the administrative law judge unless the agency demonstrates that the decision of the administrative law judge is clearly contrary to the preponderance of the admissible evidence in the record. If the agency does not adopt the administrative law judge's decision as its final decision, the agency shall set forth its reasoning for the final decision in light of the findings of fact and conclusions of law in the final decision, including any exercise of discretion by the agency. The agency may consider only the official record prepared pursuant to G.S. 150B-37 in making a final decision. A copy of the decision shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency, and a copy shall be furnished to his attorney of record and the Office of Administrative Hearings.

(c) The following decisions made by administrative law judges in contested cases are final decisions appealable directly to superior court under Article 4 of this Chapter:

- (1) A determination that the Office of Administrative Hearings lacks jurisdiction.
- (2) An order entered pursuant to the authority in G.S. 7A-759(e).
- (3) An order entered pursuant to a written prehearing motion that either dismisses the contested case for failure of the petitioner to prosecute or grants the relief requested when a party does not comply with procedural requirements.
- (4) An order entered pursuant to a prehearing motion to dismiss the contested case in accordance with G.S. 1A-1, Rule 12(b) when the order disposes of all issues in the contested case.

(d) An administrative law judge may grant judgment on the pleadings, pursuant to a motion made in accordance with G.S. 1A-1, Rule 12(c), or

summary judgment, pursuant to a motion made in accordance with G.S. 1A-1, Rule 56, that disposes of all issues in the contested case. Notwithstanding subsection (b) of this section, a decision granting a motion for judgment on the pleadings or summary judgment need not include findings of fact or conclusions of law, except as determined by the administrative law judge to be required or allowed by G.S. 1A-1, Rule 12(c) or Rule 56. For any decision by the administrative law judge granting judgment on the pleadings or summary judgment that disposes of all issues in the contested case, the agency shall make a final decision. If the agency does not adopt the administrative law judge's decision, it shall set forth the basis for failing to adopt the decision and shall remand the case to the administrative law judge for hearing. The party aggrieved by the agency's decision shall be entitled to immediate judicial review of the decision under Article 4 of this Chapter. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 67; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(16); 1987, c. 878, ss. 12, 24; 1987 (Reg. Sess., 1988), c. 1111, s. 20; 1991, c. 35, s. 7; 2000-190, s. 7.)

**Effect of Amendments.** — Session Laws 2000-190, s. 7, effective January 1, 2001, and applicable to contested cases commenced on or after that date, substituted "decision made" for "decision recommended" in subsection (a); divided the text of former subsection (b) into present subsections (b) and (b3); in subsection (b), substituted "Except as provided in G.S. 150B-34(c) or subsection (d) of this section, a final decision" for "A final decision" and added

the last two sentences; added subsections (b1) and (b2); inserted the subsection (b3) designation, and rewrote subsection (b3); added "appealable directly to superior court under Article 4 of this Chapter" in subsection (c); and added subsection (d).

**Legal Periodicals.** — For article, "Advisory Rulings by Administrative Agencies: Their Benefits and Dangers," see 2 Campbell L. Rev. 1 (1980).

## CASE NOTES

**Editor's Note.** — *Many of the cases below were decided under corresponding provisions of former Chapter 150A, or under this Chapter prior to the 1991 amendments thereto.*

**Remand Required Where Findings Are Found Insufficient.** — Where, on review of an order of a state commission permitting petitioner savings and loan association to open a branch office, the trial court determined that the commission's findings were insufficient in that they lacked the specificity required by this section, the trial court should never have reached the question of whether reversal under former § 150A-51(5) was appropriate, as remand for further findings was essential upon concluding that the findings of record presented an inadequate basis for review. Under no applicable theory of law would it be appropriate for the trial court to reverse the commission and substitute its judgment for the commission's. *Community Sav. & Loan Ass'n v. North Carolina Sav. & Loan Comm'n*, 43 N.C. App. 493, 259 S.E.2d 373 (1979).

**Administrative agencies should be encouraged to continue cases under active deliberation until rendition of a final decision,** to assure that that decision is the product of adequate, sound deliberation. In re *Alamance Sav. & Loan Ass'n*, 53 N.C. App. 326, 280 S.E.2d 748, cert. denied, 304 N.C. 588, 291 S.E.2d 148 (1981).

**Final agency decision in writing envisioned by former § 150A-36 was not merely a memorialization** of the decision, but was the decision itself, without which agency action did not become final. In re *Alamance Sav. & Loan Ass'n*, 53 N.C. App. 326, 280 S.E.2d 748, cert. denied, 304 N.C. 588, 291 S.E.2d 148 (1981).

**Under subsection (b) of this section, a final agency decision in a contested case hearing must be based on the official record** prepared pursuant to § 150B-37l; the agency is not permitted to hear new evidence, and if it does so, the trial court on review is required to reverse or remand the agency decision. *Everhart & Assocs. v. Department of Env't, Health & Natural Resources*, 127 N.C. App. 693, 493 S.E.2d 66 (1997), cert. denied, 347 N.C. 575, 502 S.E.2d 590 (1998).

**Local Appointing Authority.** — A "local appointing authority," within the meaning of § 126-37, is required to render its decision in accordance with subsection (b) of this section. *Cunningham v. Catawba County*, 128 N.C. App. 70, 493 S.E.2d 82 (1997).

DSS was required, in rejecting the recommended decision of the Commission, to state the specific reasons why it did not adopt the recommended decision and serve a copy of its final decision on the petitioner; however, be-

cause the legislature did not specifically require that the "local appointing authority" comply with subsection (b), there was no obligation to enter findings of fact and conclusions of law, as required by subsection (b). *Cunningham v. Catawba County*, 128 N.C. App. 70, 493 S.E.2d 82 (1997).

**Duty of Agency to Allow Adequate Opportunity to File Exceptions.** — This section places an affirmative duty on the agency to allow parties an adequate opportunity to file exceptions to the recommended decision, but in no way obligates parties to file specific exceptions to the recommended decision before issuance of the final agency decision. *Owen v. UNC-G Physical Plant*, 121 N.C. App. 682, 468 S.E.2d 813 (1996), discretionary review improvidently allowed, 344 N.C. 73, 477 S.E.2d 33 (1996).

**Subsection (a) simply provides the parties with an opportunity to file written exceptions and/or written arguments;** it does not create an additional exhaustion hurdle. *Jackson v. Department of Admin.*, 127 N.C. App. 434, 490 S.E.2d 248 (1997).

**No Obligation to File Specific Exceptions.** — Although this section places an affirmative duty on the agency to provide the opportunity to file exceptions to the parties, the plain language in no way obligates petitioners to file specific exceptions to the recommended decision before issuance of the final agency decision. *Jackson v. Department of Admin.*, 127 N.C. App. 434, 490 S.E.2d 248 (1997).

**Decision Not Made on Unlawful Procedure.** — A decision of the State Board of Elections ordering a new election for certain county officers was not made on "unlawful procedure" without findings of fact where the chairman orally announced the board's decision on December 6, 1978, to order a new election because of irregularities in assistance rendered to persons who voted by absentee ballots and in the collection and return of voted absentee ballots; a written decision was filed on the same day incorporating the oral decision; and order was entered December 14, 1978, setting a date for the new election and setting out the rules and procedures for its conduct; and on February 13, 1979, the state board filed a written order containing its findings of fact and conclusions of law. In re *Judicial Review by Republican Candidates*, 45 N.C. App. 556, 264 S.E.2d 338, cert. denied, 299 N.C. 736, 267 S.E.2d 672 (1980).

**University of North Carolina's State Residence Committee (SRC)** is exempt from the entire Administrative Procedure Act; therefore, although provisions in the act requiring judicial review of final administrative review were applicable, the SRC was not governed by this section, which requires agencies to state reasons for their decisions. *Wilson v. State*

*Residence Comm.*, 92 N.C. App. 355, 374 S.E.2d 415 (1988), cert. denied, 324 N.C. 252, 377 S.E.2d 764 (1989).

**Recusal From Decision Review.** — Failure of the Director of the Division of Facility Services of DHHS to recuse herself from reviewing her own decision did not amount to a violation of the applicant's competitor's due process rights. *Bio-Medical Applications of N.C., Inc. v. North Carolina Dep't of Human Resources*, 136 N.C. App. 103, 523 S.E.2d 677 (1999).

**Administrative Law Judge's Decision Reviewed by Personnel Commission.** — The administrative law judge must render a decision on the motion which is presented, but the administrative law judge's ruling is subject to review by the ultimate factfinder, the Personnel Commission. *Eury v. North Carolina Emp. Sec. Comm'n.*, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994).

**No statutory authority exists for the State Personnel Commission to review an administrative law judge's recommended decision** in a case involving an exempt employee. *Johnson v. Natural Resources & Community Dev.*, 98 N.C. App. 334, 391 S.E.2d 48 (1990).

**Applied** in *Ford v. North Carolina Dep't of Env't, Health, & Natural Resources*, 107 N.C. App. 192, 419 S.E.2d 204 (1992); *Deep River Citizens Coalition v. North Carolina Dep't of Env't, Health & Natural Resources*, 119 N.C. App. 232, 457 S.E.2d 772 (1995); *Citizens for Responsible Road-Ways v. North Carolina DOT*, — N.C. App. —, 550 S.E.2d 253, 2001 N.C. App. LEXIS 655 (2001).

**Quoted** in *Jarrett v. North Carolina Dep't of Cultural Resources*, 101 N.C. App. 475, 400 S.E.2d 66 (1991); *Hearne v. Sherman*, 350 N.C. 612, 516 S.E.2d 864 (1999).

**Cited** in *North Carolina Dep't of Cor. v. Hodge*, 99 N.C. App. 602, 394 S.E.2d 285 (1990); *State ex rel. Env'tl. Mgt. Comm'n v. House of Raeford Farms, Inc.*, 101 N.C. App. 433, 400 S.E.2d 107 (1991); *Webb v. North Carolina Dep't of Env't, Health & Natural Resources, Coastal Resources Comm'n*, 102 N.C. App. 767, 404 S.E.2d 29 (1991); *Williams v. New Hanover County Bd. of Educ.*, 104 N.C. App. 425, 409 S.E.2d 753 (1991); *Professional Food Servs. Mgt., Inc. v. North Carolina Dep't of Admin.*, 109 N.C. App. 265, 426 S.E.2d 447 (1993); *Britthaven, Inc. v. North Carolina Dep't of Human Resources*, 118 N.C. App. 379, 455 S.E.2d 455 (1995); *Ritter v. Department of Human Resources*, 118 N.C. App. 564, 455 S.E.2d 901 (1995); *North Carolina Dep't of Cors. v. Harding*, 120 N.C. App. 451, 462 S.E.2d 671 (1995); *McHugh v. North Carolina Dep't of Env'tl., Health & Natural Resources*, 126 N.C. App. 469, 485 S.E.2d 861 (1997); *Bryant v.*

Hogarth, 127 N.C. App. 79, 488 S.E.2d 269 (1997), cert. denied, 347 N.C. 396, 494 S.E.2d 406 (1997); Howell v. Morton, 131 N.C. App.

626, 508 S.E.2d 804 (1998); Blalock v. State Dep't of Health & Human Servs., 143 N.C. App. 470, 546 S.E.2d 177 (2001).

§ 150B-37. Official record.

(a) In a contested case, the Office of Administrative Hearings shall prepare an official record of the case that includes:

- (1) Notices, pleadings, motions, and intermediate rulings;
- (2) Questions and offers of proof, objections, and rulings thereon;
- (3) Evidence presented;
- (4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose; and
- (5) Repealed by Session Laws 1987, c. 878, s. 25.
- (6) The administrative law judge's decision, or order.

(b) Proceedings at which oral evidence is presented shall be recorded, but need not be transcribed unless requested by a party. Each party shall bear the cost of the transcript or part thereof or copy of said transcript or part thereof which said party requests, and said transcript or part thereof shall be added to the official record as an exhibit.

(c) The Office of Administrative Hearings shall forward a copy of the official record to the agency making the final decision and shall forward a copy of the administrative law judge's decision to each party. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1987, c. 878, ss. 13, 25; 2000-190, s. 8.)

**Effect of Amendments.** — Session Laws 2000-190, s. 8, effective January 1, 2001, and applicable to contested cases commenced on or after that date, deleted "recommended" follow-

ing "law judge's" in subdivision (a)(6); and substituted "administrative law judge's" for "recommended" in subsection (c).

CASE NOTES

**Editor's Note.** — *The cases below were decided prior to the 1991 amendments to this Chapter.*

**Board of Adjustment Not Required to Sound-Record Hearings.** — Municipal corporations are specifically excluded from requirements under former § 150A-37 and former § 150A-29 that trial rules of evidence and production of evidence be followed in proceedings before State agencies. Thus a Board of Adjustment is not required to sound-record its hearings. *Washington Park Neighborhood Ass'n v. Winston-Salem Zoning Bd. of Adjustment*, 35 N.C. App. 449, 241 S.E.2d 872, cert. denied and appeal dismissed, 295 N.C. 91, 244 S.E.2d 263 (1978), decided under corresponding provisions of former Chapter 150A.

**No statutory authority exists for the State Personnel Commission to review an administrative law judge's recommended decision** in a case involving an exempt employee. *Johnson v. Natural Resources & Community Dev.*, 98 N.C. App. 334, 391 S.E.2d 48 (1990).

**Official Record Required.** — Under § 150B-36(b), a final agency decision in a con-

tested case hearing must be based on the official record prepared pursuant to this section; the agency is not permitted to hear new evidence, and if it does so, the trial court on review is required to reverse or remand the agency decision. *Everhart & Assocs. v. Department of Env't, Health & Natural Resources*, 127 N.C. App. 693, 493 S.E.2d 66 (1997), cert. denied, 347 N.C. 575, 502 S.E.2d 590 (1998).

**Offers of Proof Part of Official Record.** — Commission properly considered offers of proof included in the record since offers of proof are part of the official record under subdivision (a)(2) of this section and not "new evidence" violative of § 150B-51(a). *Everhart & Assocs. v. Department of Env't, Health & Natural Resources*, 127 N.C. App. 693, 493 S.E.2d 66 (1997), cert. denied, 347 N.C. 575, 502 S.E.2d 590 (1998).

**Applied** in *Deep River Citizens Coalition v. North Carolina Dep't of Env't, Health & Natural Resources*, 119 N.C. App. 232, 457 S.E.2d 772 (1995).

**Quoted** in *Living Centers-Southeast, Inc. v. North Carolina Health & Human Servs.*, 138 N.C. App. 572, 532 S.E.2d 192 (2000).

## OPINIONS OF ATTORNEY GENERAL

*Editor's Note.* — The opinions below were issued prior to the 1991 amendments to this Chapter.

**Tapes Must Be Included in Official Record.** — The tapes of a contested case which have not been transcribed must be included in the official record prepared by the Office of

Administrative Hearings pursuant to subdivision (a)(3) and forwarded to the final agency decision maker pursuant to subsection (c). See opinion of Attorney General to Mr. John B. DeLuca, Assistant Director, Office of Legal Affairs, Dept. of Human Resources, 58 N.C.A.G. 85 (1988).

## ARTICLE 3A.

*Other Administrative Hearings.***§ 150B-38. Scope; hearing required; notice; venue.**

(a) The provisions of this Article shall apply to:

- (1) Occupational licensing agencies.
- (2) The State Banking Commission, the Commissioner of Banks, and the Credit Union Division of the Department of Commerce.
- (3) The Department of Insurance and the Commissioner of Insurance.
- (4) The State Chief Information Officer in the administration of the provisions of Article 3D of Chapter 147 of the General Statutes.
- (5) The North Carolina State Building Code Council.

(b) Prior to any agency action in a contested case, the agency shall give the parties in the case an opportunity for a hearing without undue delay and notice not less than 15 days before the hearing. Notice to the parties shall include:

- (1) A statement of the date, hour, place, and nature of the hearing;
- (2) A reference to the particular sections of the statutes and rules involved; and
- (3) A short and plain statement of the facts alleged.

(c) Notice shall be given personally or by certified mail. If given by certified mail, notice shall be deemed to have been given on the delivery date appearing on the return receipt. If notice cannot be given personally or by certified mail, then notice shall be given in the manner provided in G.S. 1A-1, Rule 4(j1).

(d) A party who has been served with a notice of hearing may file a written response with the agency. If a written response is filed, a copy of the response must be mailed to all other parties not less than 10 days before the date set for the hearing.

(e) All hearings conducted under this Article shall be open to the public. A hearing conducted by the agency shall be held in the county where the agency maintains its principal office. A hearing conducted for the agency by an administrative law judge requested under G.S. 150B-40 shall be held in a county in this State where any person whose property or rights are the subject matter of the hearing resides. If a different venue would promote the ends of justice or better serve the convenience of witnesses, the agency or the administrative law judge may designate another county. A person whose property or rights are the subject matter of the hearing waives his objection to venue if he proceeds in the hearing.

(f) Any person may petition to become a party by filing with the agency or hearing officer a motion to intervene in the manner provided by G.S. 1A-1, Rule 24. In addition, any person interested in a contested case under this Article may intervene and participate to the extent deemed appropriate by the agency hearing officer.

(g) When contested cases involving a common question of law or fact or multiple proceedings involving the same or related parties are pending before

an agency, the agency may order a joint hearing of any matters at issue in the cases, order the cases consolidated, or make other orders to reduce costs or delay in the proceedings.

(h) Every agency shall adopt rules governing the conduct of hearings that are consistent with the provisions of this Article. (1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 6(3); 1989, c. 76, s. 30; c. 751, s. 7(45); 1991 (Reg. Sess., 1992), c. 959, s. 76; 1999-434, s. 17; 2001-141, s. 8; 2001-193, s. 12; 2001-487, s. 21(h).)

**Editor's Note.** — Session Laws 1999-434, s. 19, provides that the Secretary of Commerce shall implement policies and procedures to ensure "Best Value" Procurement, Solution-Based Procurement, and Government-Vendor Partnership.

Session Laws 1999-434, s. 20, requires the Secretary of Commerce to develop and implement policies, procedures, and/or programs to ensure that personnel receive high quality training in the principles of "Best Value" Procurement, Solution-Based Procurement, Government-Vendor Partnership, contract administration, and project management.

Session Laws 1999-434, s. 21, provides that the Secretary of Commerce shall report to the Joint Select Committee on Information Technology on the implementation of this act on or before April 1, 2000.

Session Laws 1999-434, s. 22, provides that the Joint Select Committee on Information Technology shall study the governance of State government-wide information technology management by the creation of a centralized agency responsible for all technology-related issues. An interim report may be made by the Committee to the 2000 Session of the General Assembly and a final report prior to the convening of the 2001 General Assembly.

**Effect of Amendments.** — Session Laws 1999-434, s. 17, effective January 1, 2000, added subdivision (a)(4).

Session Laws 2001-141, s. 8, effective May 31, 2001, and applicable to revisions made to the North Carolina State Building Code on or after January 1, 2002, added subdivision (a)(5) and made minor punctuation changes.

Session Laws 2001-193, s. 12, effective July 1, 2001, in subdivision (a)(2), deleted "the Savings Institutions Division of the Department of Commerce" following "Commissioner of Banks," and made minor stylistic changes.

Session Laws 2001-487, s. 21(h), effective December 16, 2001, in subsection (a) of this section, as rewritten by Session Laws 2001-141, s. 8, and by Session Laws 2001-193, s. 12, deleted "the following agencies" at the end of the introductory language, and in subdivision (a)(4), substituted "State Chief Information Officer" for "Department of Commerce" and substituted "Article 3D of Chapter 147" for "Part 16 of Article 10 of Chapter 143B."

**Legal Periodicals.** — For note, "Contested Case Hearings Under the North Carolina Administrative Procedure Act: 1985 Rewrite Contains Dual System of Administrative Adjudication," see 64 N.C.L. Rev. 852 (1986).

## CASE NOTES

**Applicability of Article.** — Article 3 of the North Carolina Administrative Procedure Act applies to administrative hearings conducted by the Office of Administrative Hearings before an administrative law judge, while Article 3A applies to "other administrative hearings" which are conducted by state agencies enumerated in this section. *Homoly v. North Carolina State Bd. of Dental Examrs.*, 121 N.C. App. 695, 468 S.E.2d 481 (1996).

**Action Sufficient to Trigger Contested Case Provisions.** — Petitioner's letter, requesting expungement of a record, and requesting an opportunity to meet with the administrative board, was sufficient to trigger the contested case provisions of this section, and respondent's subsequent denial of the request constituted agency action on a contested case which affected the substantive rights of peti-

tioner. In re *Sullivan*, 112 N.C. App. 795, 436 S.E.2d 862 (1993).

**Revocation of Law Enforcement Officer's License.** — Petitioner was entitled to both notice and an opportunity to be heard prior to the revocation of his license as a law enforcement officer by the Criminal Justice Education and Training Standards Commission, where such adjudicatory action constituted agency action on a contested case affecting substantive rights. *Scroggs v. North Carolina Criminal Justice Educ. & Training Stds. Comm'n*, 101 N.C. App. 699, 400 S.E.2d 742 (1991) (decided prior to the 1991 amendments to this Chapter).

**Charges Against Licensees of a Board.** — The General Assembly intended that any person who prefers charges against, inter alia, a licensee of the Board is entitled to a hearing and decision on those charges. *Bryant v. North Carolina State Bd. of Examrs. of Elec. Contrac-*

tors, 338 N.C. 288, 449 S.E.2d 188 (1994).

**Board of Examiners of Electrical Contractors Required to Hold Hearing.** —

Though the language is not explicit in requiring that the Board of Examiners of Electrical Contractors hold a hearing on charges, such a requirement is implicit both in the language referring to “hearings of charges” and in the stated purpose of the statute governing the jurisdiction of the Board to hear such charges. *Bryant v. North Carolina State Bd. of Exmrs. of Elec. Contractors*, 338 N.C. 288, 449 S.E.2d 188 (1994).

**Intent of Statute Mandated Hearing.** — It would be contrary to the intent expressed in § 87-47(a1), that of protecting the public, to determine that plaintiff was not entitled to a

hearing and decision on charges brought to effectuate that very purpose. *Bryant v. North Carolina State Bd. of Exmrs. of Elec. Contractors*, 338 N.C. 288, 449 S.E.2d 188 (1994).

**Applied** in *Cameron v. North Carolina State Bd. of Dental Exmrs.*, 95 N.C. App. 332, 382 S.E.2d 864 (1989); *McCullough v. North Carolina State Bd. of Dental Exmrs.*, 111 N.C. App. 186, 431 S.E.2d 816 (1993); *Act-Up Triangle v. Commission for Health Servs.*, 345 N.C. 699, 483 S.E.2d 388 (1997).

**Cited** in *Huang v. North Carolina State Univ.*, 107 N.C. App. 710, 421 S.E.2d 812 (1992); *Adams v. North Carolina State Bd. of Registration*, 129 N.C. App. 292, 501 S.E.2d 660 (1998); *Brooks v. Southern Nat'l Corp.*, 131 N.C. App. 80, 505 S.E.2d 306 (1998).

### OPINIONS OF ATTORNEY GENERAL

*Editor's Note.* — *The opinions below were issued prior to the 1991 amendments to this Chapter.*

**Applicability of § 150B-23(a).** — Subsection (a) of § 150B-23, as amended by Session Laws 1987, Chapter 878, is not applicable to agencies governed by Article 3A of this Chapter. See opinion of Attorney General to Mr. Phillip T. Fisher, Executive Director, N.C. Real Estate Commission, 57 N.C.A.G. 85 (1987).

**When a contested case hearing is conducted by an agency governed by this article,** a petition or other notice need not be filed with the Office of Administrative Hearings. See opinion of Attorney General to Mr. Phillip T. Fisher, Executive Director, N.C. Real Estate Commission, 57 N.C.A.G. 85 (1987).

**Intended Sanction Not Required in Notice of Hearing.** — While subdivision (b)(2) of this section requires licensing boards to include in their notices a reference to the particular sections of the statutes and rules involved, it does not appear to require a board to state which sanction under the applicable disciplinary statute it intends to impose. However, once a board states with specificity that it is proposing to impose only one or two sanctions available under a referenced disciplinary statute for the stated alleged infractions, the board is then precluded from imposing a greater sanction for these infractions. *Miller v. North Carolina State Bd. of Registration for Professional Eng'rs & Land Surveyors*, 322 N.C. 465, 368 S.E.2d 605 (1988).

## § 150B-39. Depositions; discovery; subpoenas.

(a) A deposition may be used in lieu of other evidence when taken in compliance with the Rules of Civil Procedure, G.S. 1A-1. Parties in a contested case may engage in discovery pursuant to the provisions of the Rules of Civil Procedure, G.S. 1A-1.

(b) Upon a request for an identifiable agency record involving a material fact in a contested case, the agency shall promptly provide the record to a party, unless the record relates solely to the agency's internal procedures or is exempt from disclosure by law.

(c) In preparation for, or in the conduct of, a contested case subpoenas may be issued and served in accordance with G.S. 1A-1, Rule 45. Upon a motion, the agency may quash a subpoena if, upon a hearing, the agency finds that the evidence, the production of which is required, does not relate to a matter in issue, the subpoena does not describe with sufficient particularity the evidence the production of which is required, or for any other reason sufficient in law the subpoena may be quashed. Witness fees shall be paid by the party requesting the subpoena to subpoenaed witnesses in accordance with G.S. 7A-314. However, State officials or employees who are subpoenaed shall not be entitled to any witness fees, but they shall receive their normal salary and they shall not be required to take any annual leave for the witness days. Travel expenses

of State officials or employees who are subpoenaed shall be reimbursed as provided in G.S. 138-6. (1985, c. 746, s. 1; 1991, c. 35, s. 8.)

### **§ 150B-40. Conduct of hearing; presiding officer; ex parte communication.**

(a) Hearings shall be conducted in a fair and impartial manner. At the hearing, the agency and the parties shall be given an opportunity to present evidence on issues of fact, examine and cross-examine witnesses, including the author of a document prepared by, on behalf of or for the use of the agency and offered into evidence, submit rebuttal evidence, and present arguments on issues of law or policy.

If a party fails to appear in a contested case after he has been given proper notice, the agency may continue the hearing or proceed with the hearing and make its decision in the absence of the party.

(b) Except as provided under subsection (e) of this section, hearings under this Article shall be conducted by a majority of the agency. An agency shall designate one or more of its members to preside at the hearing. If a party files in good faith a timely and sufficient affidavit of the personal bias or other reason for disqualification of any member of the agency, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. If a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer shall be assigned to continue with the case, except that if assignment of a new presiding officer will cause substantial prejudice to any party, a new hearing shall be held or the case dismissed without prejudice.

(c) The presiding officer may:

- (1) Administer oaths and affirmations;
- (2) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence;
- (3) Provide for the taking of testimony by deposition;
- (4) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;
- (5) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties; and
- (6) Apply to any judge of the superior court resident in the district or presiding at a term of court in the county where a hearing is pending for an order to show cause why any person should not be held in contempt of the agency and its processes, and the court shall have the power to impose punishment as for contempt for acts which would constitute direct or indirect contempt if the acts occurred in an action pending in superior court.

(d) Unless required for disposition of an ex parte matter authorized by law, a member of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case under this Article shall not communicate, directly or indirectly, in connection with any issue of fact or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually-related case. This section does not apply to an agency employee or

party representative with professional training in accounting, actuarial science, economics or financial analysis insofar as the case involves financial practices or conditions.

(e) When a majority of an agency is unable or elects not to hear a contested case, the agency shall apply to the Director of the Office of Administrative Hearings for the designation of an administrative law judge to preside at the hearing of a contested case under this Article. Upon receipt of the application, the Director shall, without undue delay, assign an administrative law judge to hear the case.

The provisions of this Article, rather than the provisions of Article 3, shall govern a contested case in which the agency requests an administrative law judge from the Office of Administrative Hearings.

The administrative law judge assigned to hear a contested case under this Article shall sit in place of the agency and shall have the authority of the presiding officer in a contested case under this Article. The administrative law judge shall make a proposal for decision, which shall contain proposed findings of fact and proposed conclusions of law.

An administrative law judge shall stay any contested case under this Article on motion of an agency which is a party to the contested case, if the agency shows by supporting affidavits that it is engaged in other litigation or administrative proceedings, by whatever name called, with or before a federal agency, and this other litigation or administrative proceedings will determine the position, in whole or in part, of the agency in the contested case. At the conclusion of the other litigation or administrative proceedings, the contested case shall proceed and be determined as expeditiously as possible.

The agency may make its final decision only after the administrative law judge's proposal for decision is served on the parties, and an opportunity is given to each party to file exceptions and proposed findings of fact and to present oral and written arguments to the agency. (1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, ss. 1(1), 6(3), 6(4).)

#### CASE NOTES

##### **Changes Against Licensees of a Board.**

— The General Assembly intended that any person who prefers charges against, inter alia, a licensee of a board is entitled to a hearing and decision on those charges. *Bryant v. North Carolina State Bd. of Exmrs. of Elec. Contractors*, 338 N.C. 288, 449 S.E.2d 188 (1994).

**Intent of Statute Mandated Hearing.** — It would be contrary to the intent expressed in § 87-47(a1), that of protecting the public, to determine that plaintiff was not entitled to a hearing and decision on charges brought to effectuate that very purpose. *Bryant v. North Carolina State Bd. of Exmrs. of Elec. Contractors*, 338 N.C. 288, 449 S.E.2d 188 (1994).

**Board of Examiners of Electrical Contractors Required to Hold Hearing.** — Though the language is not explicit in requiring

that the Board of Examiners of Electrical Contractors hold a hearing on charges, such a requirement is implicit both in the language referring to "hearings of charges" and in the stated purpose of the statute governing the jurisdiction of the Board to hear such charges. *Bryant v. North Carolina State Bd. of Exmrs. of Elec. Contractors*, 338 N.C. 288, 449 S.E.2d 188 (1994).

**The provisions of this section do not apply to hearings conducted by the Commission for Health Services.** *Act-Up Triangle v. Commission for Health Servs.*, 345 N.C. 699, 483 S.E.2d 388 (1997).

**Cited in** *Bryant v. North Carolina State Bd. of Exmrs. of Elec. Contractors*, 111 N.C. App. 875, 433 S.E.2d 814 (1993).

#### OPINIONS OF ATTORNEY GENERAL

**Editor's Note.** — *The opinions below were issued prior to the 1991 amendments to this Chapter.*

**Applicability of § 150B-23(a).** — Subsec-

tion (a) of § 150B-23, as amended by Session Laws 1987, Chapter 878, is not applicable to agencies governed by Article 3A of this Chapter. See opinion of Attorney General to Mr. Phillip

T. Fisher, Executive Director, N.C. Real Estate Commission, 57 N.C.A.G. 85 (1987).

**When a contested case hearing is conducted by an agency governed by this article,** a petition or other notice need not be

filed with the Office of Administrative Hearings. See opinion of Attorney General to Mr. Phillip T. Fisher, Executive Director, N.C. Real Estate Commission, 57 N.C.A.G. 85 (1987).

## § 150B-41. Evidence; stipulations; official notice.

(a) In all contested cases, irrelevant, immaterial, and unduly repetitious evidence shall be excluded. Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under such rules to show relevant facts, they may be shown by the most reliable and substantial evidence available. It shall not be necessary for a party or his attorney to object to evidence at the hearing in order to preserve the right to object to its consideration by the agency in reaching its decision, or by the court of judicial review.

(b) Evidence in a contested case, including records and documents shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under G.S. 150B-30. Documentary evidence may be received in the form of a copy or excerpt or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original if available.

(c) The parties in a contested case under this Article by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties should agree upon facts when practicable. Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default, or other method agreed upon by the parties.

(d) Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. The noticed fact and its source shall be stated and made known to affected parties at the earliest practicable time, and any party shall on timely request be afforded an opportunity to dispute the noticed fact through submission of evidence and argument. An agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it. (1985, c. 746, s. 1.)

### CASE NOTES

**Cited** in *Woodlief v. North Carolina State Bd. of Dental Exmrs.*, 104 N.C. App. 52, 407 S.E.2d 596 (1991); *Leahy v. North Carolina Bd. of Nursing*, 346 N.C. 775, 488 S.E.2d 245 (1997).

## § 150B-42. Final agency decision; official record.

(a) After compliance with the provisions of G.S. 150B-40(e), if applicable, and review of the official record, as defined in subsection (b) of this section, an agency shall make a written final decision or order in a contested case. The decision or order shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the

proceeding and shall be supported by substantial evidence admissible under G.S. 150B-41. A copy of the decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to his attorney of record.

(b) An agency shall prepare an official record of a hearing that shall include:

- (1) Notices, pleadings, motions, and intermediate rulings;
- (2) Questions and offers of proof, objections, and rulings thereon;
- (3) Evidence presented;
- (4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose;
- (5) Proposed findings and exceptions; and
- (6) Any decision, opinion, order, or report by the officer presiding at the hearing and by the agency.

(c) Proceedings at which oral evidence is presented shall be recorded, but need not be transcribed unless requested by a party. Each party shall bear the cost of the transcript or part thereof or copy of said transcript or part thereof which said party requests. (1985, c. 746, s. 1.)

#### CASE NOTES

**Cited** in *Huang v. North Carolina State Univ.*, 107 N.C. App. 710, 421 S.E.2d 812 (1992).

#### ARTICLE 4.

#### *Judicial Review.*

#### § 150B-43. Right to judicial review.

Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute. Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article. (1973, c. 1331, s. 1; 1985, c. 746, s. 1.)

**Local Modification.** — (As to Article 4) City of Gastonia: 1985 (Reg. Sess., 1986), c. 902, s. 3; 1991, c. 557, s. 1.

**Editor's Note.** — Session Laws 2000-67, ss. 24(a) and (b), establishes a reserve in the Office of State Budget and Management (now the Office of State Budget, Planning, and Management), consisting of appropriations from the General Assembly and funds received from any State agency in accordance with s. 24. When a State agency files a petition for judicial review of a final decision of the Rules Review Commission under Article 4 of Chapter 150B and the Rules Review Commission prevails in that action, that State agency is to deposit to the reserve a sum equal to the Commission's actual attorneys' fees.

Session Laws 2000-67, s. 1.1, provides: "This

act shall be known as "The Current Operations and Capital Improvements Appropriations Act of 2000."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

**Legal Periodicals.** — For comment on former Article 33 of Chapter 143, see 31 N.C.L. Rev. 378, 382 (1953).

For note on determination of validity of rules and regulations before their application in specific cases, see 36 N.C.L. Rev. 473 (1958).

For note on judicial review of student disciplinary proceedings, see 43 N.C.L. Rev. 152 (1964).

For case law survey as to judicial review of decisions of administrative agencies, see 45 N.C.L. Rev. 816 (1967).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

For comment, "The Problem of Procedural Delay in Contested Case Hearings ..." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

For survey of 1979 administrative law, see 58

N.C.L. Rev. 1185 (1980).

For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

For article, "Advisory Rulings by Administrative Agencies: Their Benefits and Dangers," see 2 Campbell L. Rev. 1 (1980).

For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1017 (1981).

For comment discussing life insurance, divorce, and inheritance tax in light of *In re Kapoor*, 303 N.C. 102, 277 S.E.2d 403 (1981), see 13 N.C. Cent. L.J. 253 (1982).

## CASE NOTES

- I. General Consideration.
- II. Aggrieved Person.
- III. Contested Case.
- IV. Final Decision.
- V. Exhaustion of Administrative Remedies.
- VI. Adequate Judicial Review Under Another Statute.
- VII. Illustrative Cases.

### I. GENERAL CONSIDERATION.

**Editor's Note.** — *Most of the cases below were decided under corresponding provisions of former Chapter 150A and earlier statutes, or under this Chapter prior to the 1991 amendments thereto.*

**As to purpose and construction of former provisions,** see *In re Appeal of Harris*, 273 N.C. 20, 159 S.E.2d 539 (1968).

**Construction with Other Provisions.** — Section 113A-123 does not set forth the scope of review but instead provides that judicial review is available pursuant to the provisions of Chapter 150B of the Administrative Procedure Act. *Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n*, 117 N.C. App. 556, 452 S.E.2d 337 (1995).

**Requirements for Judicial Review Generally.** — This section has been interpreted as imposing five requirements in order to have standing for judicial review: (1) the petitioner must be an aggrieved party; (2) there must be a final agency decision; (3) the decision must result from a contested case; (4) the petitioner must have exhausted all administrative remedies; and (5) there must be no other adequate procedure for judicial review. *Charlotte Truck Driver School, Inc. v. North Carolina DMV*, 95 N.C. App. 209, 381 S.E.2d 861 (1989); *Meads v. North Carolina Dep't of Agric.*, 349 N.C. 656, 509 S.E.2d 165 (1998).

There are five requirements under former § 150A-43: (1) plaintiff must be an aggrieved

person; (2) there must be a final agency decision; (3) the decision must result from a contested case; (4) petitioner must have exhausted administrative remedies; and (5) there must be no other adequate procedure for judicial review. *Dyer v. Bradshaw*, 54 N.C. App. 136, 282 S.E.2d 548 (1981); *State ex rel. Tenn. Dep't of Health & Env't v. Environmental Mgt. Comm'n*, 78 N.C. App. 763, 338 S.E.2d 781 (1986); *In re Wheeler*, 85 N.C. App. 150, 354 S.E.2d 374 (1987).

Former § 150A-43 requires a four-part test for standing: an aggrieved party, a final agency decision, a contested case, and exhaustion of administration remedies. *Warren County v. North Carolina*, 528 F. Supp. 276 (E.D.N.C. 1981).

**Whether the jurisdictional prerequisites of the Administrative Procedure Act have been met** is not a question of personal jurisdiction, but one of the ripeness, on a case by case basis, of the subject matter of administrative decisions for judicial review. *Poret v. State Personnel Comm'n*, 74 N.C. App. 536, 328 S.E.2d 880, cert. denied, 314 N.C. 117, 332 S.E.2d 491, 332 S.E.2d 492 (1985), overruled on other grounds, *Batten v. N.C. Dep't of Cor.*, 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, *Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources*, 337 N.C. 569, 447 S.E.2d 168 (1994).

**Standing Is Question of Subject Matter Jurisdiction.** — Whether one has standing to obtain judicial review of an administrative decision is a question of subject matter jurisdiction. *Carter v. North Carolina State Bd. of*

Registration, 86 N.C. App. 308, 357 S.E.2d 705 (1987).

**No statutory authority exists for the State Personnel Commission to review an administrative law judge's recommended decision** in a case involving an exempt employee. *Johnson v. Natural Resources & Community Dev.*, 98 N.C. App. 334, 391 S.E.2d 48, cert. denied, 327 N.C. 140, 394 S.E.2d 176 (1990), rev'd on other grounds, 328 N.C. 689, 394 S.E.2d 469 (1991).

**Administrative Remedy is Exclusive.** — When the General Assembly provides an effective administrative remedy by statute, that remedy is exclusive, and the party must pursue and exhaust it before resorting to the courts. *Jackson v. North Carolina Dep't of Human Res.*, 131 N.C. App. 179, 505 S.E.2d 899 (1998), cert. denied, 350 N.C. 594, 537 S.E.2d 213 (1999).

**Requirements for Judicial Review Generally.** — This section has been interpreted as imposing five requirements in order to have standing for judicial review: (1) the petitioner must be an aggrieved party; (2) there must be a final agency decision; (3) the decision must result from a contested case; (4) the petitioner must have exhausted all administrative remedies; and (5) there must be no other adequate procedure for judicial review. *Charlotte Truck Driver School, Inc. v. North Carolina DMV*, 95 N.C. App. 209, 381 S.E.2d 861 (1989).

**Record Must Indicate Basis for Exercise of Discretion.** — While it is true that the determination whether by common judgment certain conduct is disqualifying is left to the sound discretion of the board, the record must include an indication of the basis upon which the board or other agency exercised its expert discretion. *Dailey v. North Carolina State Bd. of Dental Exmrs.*, 309 N.C. 710, 309 S.E.2d 219 (1983).

**Corresponding former provisions were inappropriate to initiate an attack upon the constitutionality of a statute** fixing the powers and duties of the Board of Paroles (now Parole Commission). The question of the constitutionality of a statute is not for administrative boards, but for the judicial branch. *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971).

**Review of Executive Interpretation of Statute Not Authorized.** — Corresponding former provisions did not authorize the filing of a petition in the superior court seeking an advisory opinion on the correctness of an executive interpretation of a statute. *Housing Auth. v. Johnson*, 261 N.C. 76, 134 S.E.2d 121 (1964).

**Upon review pursuant to former § 150A-43, the "whole record" test is applicable,** and the decision of the State Board of Alcoholic Control may be reversed if substantial rights of the licensee are prejudiced by administrative findings, inferences, conclusions or decisions

which are not supported by competent, material and substantial evidence in view of the entire record as submitted. *Fay v. State Bd. of Alcoholic Control*, 30 N.C. App. 492, 227 S.E.2d 298, cert. denied, 291 N.C. 175, 229 S.E.2d 689 (1976).

The clear intent of the legislature is to make the "whole record" test the principal standard of judicial review of administrative findings in this State. *North Carolina State Bar v. DuMont*, 304 N.C. 627, 286 S.E.2d 89 (1982).

**Scope of Review Must Be Defined.** — In presenting appeals to the judicial branch from State administrative agencies, it is essential that the parties present their contentions as to the applicable scope of judicial review; likewise, the reviewing court should make clear the review standard under which it proceeds. *State ex rel. Utils. Comm'n v. Bird Oil Co.*, 302 N.C. 14, 273 S.E.2d 232 (1981).

**Administrative Procedure Act does not preclude entirely the possibility of judicial review by use of the Declaratory Judgment Act or other procedures** outside the act. *High Rock Lake Ass'n v. North Carolina Env'tl. Mgt. Comm'n*, 39 N.C. App. 699, 252 S.E.2d 109 (1979).

**Quasi-Judicial Hearing Contemplated.** — Former provisions contemplated a quasi-judicial hearing in which the parties were permitted an opportunity to offer evidence and a decision was rendered applicable to a specific factual situation. *Housing Auth. v. Johnson*, 261 N.C. 76, 134 S.E.2d 121 (1964).

**An agency's denial of a petition for rule making** under former § 150A-16 is subject to judicial review pursuant to the provisions of former § 150A-43. *In re Wheeler*, 85 N.C. App. 150, 354 S.E.2d 374 (1987).

**Doctrine of Res Judicata.** — Where an administrative determination has been reviewed by the courts, the res judicata effect, if any, attaches to the court's judgment rather than to the administrative decision. *State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 463, 385 S.E.2d 451 (1989).

**Mandatory Suspension of Driving Privilege.** — Petitioner whose driving privilege was mandatorily suspended under § 20-17(2) and § 20-19(e) did not have the right to appeal under § 20-25 or under this Chapter. However, the superior court could review the actions of the Commissioner by issuing a writ of certiorari. *Davis v. Hiatt*, 326 N.C. 462, 390 S.E.2d 338 (1990).

**Once the right to drive has been mandatorily revoked** and a petitioner unsuccessfully seeks to have the license reinstated by the DMV, no superior court review of the denial is mandated unless the denial was arbitrary or illegal, because reinstatement is not a legal right but is an act of grace. *Alpiser v. Eagle*

Pontiac-GMC-Isuzu, Inc., 97 N.C. App. 610, 389 S.E.2d 293 (1990).

**Applied** in *Concerned Citizens v. North Carolina Env'tl. Mgt. Comm'n*, 89 N.C. App. 708, 367 S.E.2d 13 (1988); *Wilson v. State Residence Comm.*, 92 N.C. App. 355, 374 S.E.2d 415 (1988); *North Buncombe Ass'n of Concerned Citizens v. Rhodes*, 100 N.C. App. 24, 394 S.E.2d 462 (1990), appeal dismissed, 327 N.C. 484, 397 S.E.2d 215 (1990); *Meyers v. Dep't of Human Resources*, 105 N.C. App. 665, 415 S.E.2d 70 (1992); *Deep River Citizens Coalition v. North Carolina Dep't of Env't, Health & Natural Resources*, 119 N.C. App. 232, 457 S.E.2d 772 (1995); *North Carolina Chiropractic Ass'n v. North Carolina State Bd. of Educ.*, 122 N.C. App. 122, 468 S.E.2d 539 (1996); *Williams v. North Carolina Dep't of Env't & Natural Resources*, 144 N.C. App. 479, 548 S.E.2d 793 (2001).

**Quoted** in *Huang v. North Carolina State Univ.*, 107 N.C. App. 710, 421 S.E.2d 812 (1992); *Harding v. North Carolina Dep't of Cor.*, 334 N.C. 414, 432 S.E.2d 298 (1993); *In re McCrary*, 112 N.C. App. 161, 435 S.E.2d 359 (1993); *Prentiss v. Allstate Ins. Co.*, 144 N.C. App. 404, 548 S.E.2d 557 (2001).

**Stated** in *Gummels v. North Carolina Dep't of Human Resources*, 97 N.C. App. 245, 388 S.E.2d 223 (1990); *Prentiss v. Allstate Ins. Co.*, 87 F. Supp. 2d 514 (W.D.N.C. 1999).

**Cited** in *North Carolina Dep't of Justice v. Eaker*, 90 N.C. App. 30, 367 S.E.2d 392 (1988); *Tay v. Flaherty*, 90 N.C. App. 346, 368 S.E.2d 403 (1988); *Davis v. Hiatt*, 92 N.C. App. 748, 376 S.E.2d 44 (1989); *Batten v. North Carolina Dep't of Cor.*, 326 N.C. 338, 389 S.E.2d 35 (1990); *Tay v. Flaherty*, 100 N.C. App. 51, 394 S.E.2d 217 (1990); *North Carolina Dep't of Cor. v. Hodge*, 99 N.C. App. 602, 394 S.E.2d 285 (1990); *Johnson v. North Carolina DOT*, 107 N.C. App. 63, 418 S.E.2d 700 (1992); *Brooks v. BCF Piping, Inc.*, 109 N.C. App. 26, 426 S.E.2d 282 (1993); *Professional Food Servs. Mgt., Inc. v. North Carolina Dep't of Admin.*, 109 N.C. App. 265, 426 S.E.2d 447 (1993); *North Carolina DOT v. Davenport*, 334 N.C. 428, 432 S.E.2d 303 (1993); *Williams v. North Carolina Dep't of Economic & Community Dev.*, 119 N.C. App. 535, 458 S.E.2d 750 (1995); *North Carolina Dep't of Cors. v. Harding*, 120 N.C. App. 451, 462 S.E.2d 671 (1995); *Gainey v. North Carolina Dep't of Justice*, 121 N.C. App. 253, 465 S.E.2d 36 (1996); *Bryant v. Hogarth*, 127 N.C. App. 79, 488 S.E.2d 269 (1997), cert. denied, 347 N.C. 396, 494 S.E.2d 406 (1997); *Norman v. Cameron*, 127 N.C. App. 44, 488 S.E.2d 297 (1997), cert. denied, 347 N.C. 398, 494 S.E.2d 416 (1997); *Britt v. North Carolina Sheriffs' Educ. & Training Stds. Comm'n*, 348 N.C. 573, 501 S.E.2d 75 (1998); *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 507 S.E.2d 272 (1998); *Avant v. Sandhills Ctr. for*

*Mental Health, Dev. Disabilities & Substance Abuse Servs.*, 132 N.C. App. 542, 513 S.E.2d 79 (1999); *Simpson v. Macon County*, 132 F. Supp. 2d 407 (2001).

## II. AGGRIEVED PERSON.

**Meaning of "Person Aggrieved".** — The expression "person aggrieved" has no technical meaning. What it means depends on the circumstances involved. *In re Halifax Paper Co.*, 259 N.C. 589, 131 S.E.2d 441 (1963); *Albemarle Elec. Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E.2d 811 (1972); *Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina Dep't of Transp.*, 46 N.C. App. 350, 265 S.E.2d 890 (1980).

"Person aggrieved" means one who is adversely affected in respect of legal rights, or is suffering from an infringement or denial of legal rights. *Carter v. North Carolina State Bd. of Registration*, 86 N.C. App. 308, 357 S.E.2d 705 (1987).

**Personal Rights or Interests Not at Issue.** — Where none of petitioner's personal rights or interests, nor any rights or interests properly attributable to him in a cognizable representative capacity, were either directly or indirectly at issue in requested rule making proceeding, he was not substantially affected by Department of Human Resources' denial of his petition for rule making. Therefore, he was not a "person aggrieved" as a result of the agency decision and had no standing to seek judicial review thereof. *In re Wheeler*, 85 N.C. App. 150, 354 S.E.2d 374 (1987).

**Person Aggrieved in Representative Capacity.** — One may be aggrieved when he is affected only in a representative capacity. *In re Halifax Paper Co.*, 259 N.C. 589, 131 S.E.2d 441 (1963).

**Administrative Agency as Person Aggrieved.** — An administrative agency cannot be a person aggrieved by its own order, but it may be an aggrieved party to secure judicial review of a decision of an administrative reviewing agency. *In re Halifax Paper Co.*, 259 N.C. 589, 131 S.E.2d 441 (1963).

**County as "Person Aggrieved".** — A county may be an aggrieved person when an agency issues a ruling that could affect the county's revenue. *In re Brunswick County*, 81 N.C. App. 391, 344 S.E.2d 584 (1986).

**Appeals by Public Officials and Governmental Units in Cases Involving Taxation and Public Funds.** — Where statutes permit appeals by persons aggrieved, appeals by public officials and governmental units are usually allowed in cases involving questions of law relating to taxation and public funds. *In re Halifax Paper Co.*, 259 N.C. 589, 131 S.E.2d 441 (1963).

**County as Party Aggrieved.** — A county is

a party aggrieved and is entitled to appeal from a decision of the State Board of Assessment (now the Property Tax Commission) reducing the valuation of property appraised by the county for tax purposes. In re Appeal of Harris, 273 N.C. 20, 159 S.E.2d 539 (1968).

**County had standing to challenge establishment of a toxic waste site** within its borders under this Chapter because of the effect on its tax base and planning jurisdiction, because of the final agency determination upon issuance of an environmental impact statement, and because the Environmental Policy Act (Art. 1 of Ch. 113A) includes the right to judicial review of an issue which involves a contested case. *Warren County v. North Carolina*, 528 F. Supp. 276 (E.D.N.C. 1981).

**Petitioners Ordered to Forfeit Bid Bond "Aggrieved"**. — Petitioners were aggrieved persons when the Secretary of Administration ordered them to forfeit their \$316,600.00 bid bond or be subject to liability for twice that amount. In re Metric Constructors, Inc., 31 N.C. App. 88, 228 S.E.2d 533 (1976).

**Property Owners, etc., Within Proposed Corridor of Highway Were Aggrieved**. — Plaintiffs were all "aggrieved" by a decision of the State Board of Transportation on the location of an interstate highway within the meaning of former § 150A-43 where the individual plaintiffs were property owners within the proposed corridor of the highway, the members of plaintiff nonprofit corporation were citizens and taxpayers living in or near the proposed corridor, and plaintiff county's tax base and planning jurisdiction would be affected by the proposed highway. *Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina Dep't of Transp.*, 46 N.C. App. 350, 265 S.E.2d 890 (1980).

**"Procedural injury" implicit in agency failure to prepare an environmental impact statement** as to a proposed highway project was itself a sufficient "injury in fact" to support standing as "aggrieved parties" under former § 150A-43, as long as such injury was alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project that he might be expected to suffer whatever environmental consequences the project may have. *Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina Dep't of Transp.*, 46 N.C. App. 350, 265 S.E.2d 890 (1980).

**Impairment of Hearing Rights in Pollution Discharge Permit Proceeding**. — "Procedural injury," whereby petitioner State of Tennessee's right to be heard on certain aspects of a National Pollutant Discharge Elimination System (NPDES) permit was substantially impaired, was sufficient under former § 150A-43 to qualify petitioner as an "aggrieved person" for purposes of appeal of issuance of Environ-

mental Management Commission's consent special order with corporation. In addition, where the consent special order contained provisions substantially identical to provisions which petitioner opposed in the proposed NPDES permit, which affected the property rights of the petitioner in the Pigeon River, these allegations also established petitioner's "aggrieved person" status. *State ex rel. Tenn. Dep't of Health & Env't v. Environmental Mgt. Comm'n*, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

**Petitioner Who Had Won Case Not Aggrieved Party**. — Where, although petitioner claimed that it had attempted to preserve a cross-assignment of error, the Commissioner's decision in petitioner's favor was upheld both in the trial court and by the court of appeals; the petitioner was not a party aggrieved. *GMC v. Carolina Truck & Body Co.*, 102 N.C. App. 349, 402 S.E.2d 139 (1991).

### III. CONTESTED CASE.

A "contested case" means an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. *State ex rel. Envtl. Mgt. Comm'n v. House of Raeford Farms, Inc.*, 101 N.C. App. 433, 400 S.E.2d 107 (1991), discretionary review denied, 328 N.C. 576, 403 S.E.2d 521 (1991).

A contested case hearing is distinguishable from a contested case. The phrase "contested case" extends beyond an adjudicatory hearing to include any agency proceeding, by whatever name called, wherein the legal rights, duties and privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing. *Community Psychiatric Ctrs. v. North Carolina Dep't of Human Resources*, 103 N.C. App. 514, 405 S.E.2d 769 (1991).

**Proceeding Sufficient to Constitute a "Contested Case"**. — The Superior Court had jurisdiction over a petition for review of denial of services under the Rehabilitation Act of 1973, P.L. 102-569, 42 U.S.C. § 701, et seq. as amended, where, although the petitioner's claims were not heard by an Administrative Law Judge, they were heard by an agency hearing officer, at a proceeding in which petitioner and respondent were allowed to submit and cross-examine evidence and where respondent's director reviewed and affirmed the hearing officer's decision, in accordance with its own regulations. *Hedgepeth v. North Carolina Div. of Servs. for the Blind*, 142 N.C. App. 338, 543 S.E.2d 169 (2001).

**Case challenging a consent special order** entered into by Environmental Manage-

ment Commission and a corporation, which order was alleged to intrude upon the NPDES permit process (which process requires a hearing), was "contested" for the purposes of former § 150A-43. *State ex rel. Tenn. Dep't of Health & Env't v. Environmental Mgt. Comm'n*, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

**Decision of State Board of Transportation as to location of an interstate highway constituted a "contested case"** within the meaning of former § 150A-43, where the North Carolina Environmental Policy Act, §§ 113A-1 through 113A-10, was involved. *Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina Dep't of Transp.*, 46 N.C. App. 350, 265 S.E.2d 890 (1980).

**Where rights of petitioner were determined by an in-person interview and by an investigation** conducted by a hearing officer of the North Carolina DMV, a state agency, they constituted "an agency proceeding." Therefore, the case was "contested" for purposes of this section. *Charlotte Truck Driver Training School, Inc. v. North Carolina DMV*, 95 N.C. App. 209, 381 S.E.2d 861 (1989).

**The result of a petitioner's ineffective attempts to file a petition for a contested case hearing was only a contested case.** *Community Psychiatric Ctrs. v. North Carolina Dep't of Human Resources*, 103 N.C. App. 514, 405 S.E.2d 769 (1991).

**Without the jurisdictional prerequisite of a contested case hearing,** a petitioner cannot utilize § 131E-188(b) to appeal to the Court of Appeals. *Community Psychiatric Ctrs. v. North Carolina Dep't of Human Resources*, 103 N.C. App. 514, 405 S.E.2d 769 (1991).

#### IV. FINAL DECISION.

**Decision to end a preliminary inquiry is not "a final agency decision in a contested case."** *Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979).

**Dismissal of State Employee.** — A recommendation by the State Personnel Commission is not a final decision from which a party may petition for judicial review; thus, the superior court was without jurisdiction to uphold a recommendation by the State Personnel Commission prior to review by the Local Appointing Authority, which ultimately reversed the recommendation. *Howell v. Morton*, 131 N.C. App. 626, 508 S.E.2d 804 (1998).

**Decision by State Board of Transportation to deny plaintiffs a hearing concerning location of an interstate highway was a "final" decision** within the meaning of former § 150A-43, since the decision affected a right which plaintiffs had pursuant to the board's own administrative regulations. *Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina Dep't of Transp.*,

46 N.C. App. 350, 265 S.E.2d 890 (1980).

**Delay Caused by Order for Rehearing Insufficient to Make Order a Final Decision.** — Delay caused when the full State Personnel Commission ordered a rehearing of a dismissal case involving an employee of the Department of Transportation after declining to accept the recommendation of the hearing officer that a default be entered against the Department for its failure to appear was not an undue delay within the meaning of former § 150A-23(a), nor such a delay as could allow the Court of Appeals to treat the order for rehearing as a final agency decision under former § 150A-43. *Davis v. North Carolina Dep't of Transp.*, 39 N.C. App. 190, 250 S.E.2d 64 (1978), cert. denied, 296 N.C. 735, 254 S.E.2d 177 (1979).

**Claim as to Statute's Unconstitutionality Involved No "Decision".** — Plaintiffs could not obtain judicial review under former § 150A-43 of their claim that § 143B-350(f)(8), conferring on the State Board of Transportation the power and duty to approve all highway construction programs, unconstitutionally delegated legislative power to the board, since the claim involved no agency "decision"; however, such claim could be heard pursuant to N.C. Const., Art. IV, § 1. *Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina Dep't of Transp.*, 46 N.C. App. 350, 265 S.E.2d 890 (1980).

#### V. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

**Exhaustion of Administrative Remedies Required.** — The Administrative Procedure Act allows judicial review of a final agency decision in a contested case when all relevant administrative remedies have been exhausted and there is no adequate judicial review provided under any other statute. In re *Estate of Kapoor*, 303 N.C. 102, 277 S.E.2d 403 (1981).

This section provides no authority for permitting plaintiff to bypass the requirements of § 113A-121.1, because by enacting the provisions for administrative review of rules, the legislature wisely determined that the agency itself should have the first opportunity to review the propriety and applicability of its own rules, and so long as the statutory procedures provide an effective means of review of the agency action, the courts will require parties to exhaust their administrative remedies. *Leeuwenburg v. Waterway Inv. Ltd. Partnership*, 115 N.C. App. 541, 445 S.E.2d 614 (1994).

Where board of trustee's decision denying plaintiff's claim was subject to judicial review only under the terms of the Administrative Procedure Act and, at the time he brought the action in the District Court, plaintiff had not

exhausted the administrative remedies available to him under the Act, the court of appeals did not err in concluding that the trial court was without subject matter jurisdiction and that the plaintiff's civil action must be dismissed. *Vass v. Board of Trustees*, 324 N.C. 402, 379 S.E.2d 26 (1989).

As a general rule a party must exhaust all applicable administrative remedies before filing in the superior court. *Jackson v. Department of Admin.*, 127 N.C. App. 434, 490 S.E.2d 248 (1997).

Plaintiffs' challenge to insurance company's assessment of driving record points under the safe driver incentive plan (SDIP) required them to first exhaust their administrative remedies, as the approval of the SDIP was required by the commissioner of insurance and fell within the administrative procedures act. *Prentiss v. Allstate Ins. Co.*, 144 N.C. App. 404, 548 S.E.2d 557 (2001).

**As to necessity for exhaustion of administrative remedies under former provisions**, see *Sinodis v. State Bd. of Alcoholic Control*, 258 N.C. 282, 128 S.E.2d 587 (1962); *Porter v. State Bd. of Alcoholic Control*, 4 N.C. App. 284, 166 S.E.2d 695 (1969).

**The doctrine of exhaustion of administrative remedies** is designed to avoid the interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies. *Jackson v. Department of Admin.*, 127 N.C. App. 434, 490 S.E.2d 248 (1997).

**Judicial Review Precluded by Failure to Exhaust Administrative Remedies.** — Plaintiff collection agency was not entitled to seek a declaratory judgment in the superior court as to the validity and applicability of a regulation of the Department of Insurance prohibiting collection agencies from instituting judicial proceedings on behalf of other persons, where plaintiff failed to exhaust available administrative remedies by petitioning the Department of Insurance for amendment or repeal of the regulation under former § 150A-16 or seeking a declaratory ruling from the Department of Insurance as to the validity and applicability of the regulation under former § 150A-17, and then by seeking judicial review of an adverse Department of Insurance decision under former § 150A-43 et seq. *Porter v. North Carolina Dep't of Ins.*, 40 N.C. App. 376, 253 S.E.2d 44, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979).

The guardian of a child entitled to Medicaid was required to exhaust administrative remedies before seeking judicial review where the child's admission to a hospital was not approved. *Jackson v. North Carolina Dep't of Human Res.*, 131 N.C. App. 179, 505 S.E.2d 899

(1998), cert. denied, 350 N.C. 594, 537 S.E.2d 213 (1999).

**Failure to Exhaust Inadequate Remedy Not Required.** — Failure to exhaust an administrative remedy will not bar judicial review if that remedy has been shown to be inadequate. *Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina Dep't of Transp.*, 46 N.C. App. 350, 265 S.E.2d 890 (1980).

**Exhaustion of Remedies Held Unnecessary for Preliminary Injunctive Relief in Civil Rights Case.** — Where a state employee asserted civil rights violations under 42 U.S.C. § 1983 for his wrongful dismissal, the superior court retained its traditional power to grant preliminary injunctive relief without requiring him to exhaust the administrative remedies provided in Chapter 126 of the General Statutes. *Williams v. Greene*, 36 N.C. App. 80, 243 S.E.2d 156, cert. denied and appeal dismissed, 295 N.C. 471, 246 S.E.2d 12 (1978).

**Application of Exhaustion Requirement Not Waived.** — By entering into a Consent Judgment, which resolved ten cases then pending in the courts and the administrative hearing office, the plaintiff did not waive the application of the exhaustion requirement of this Chapter to penalties which would be assessed in the future. *State ex rel. Envtl. Mgt. Comm'n v. House of Raeford Farms, Inc.*, 101 N.C. App. 433, 400 S.E.2d 107 (1991), discretionary review denied, 328 N.C. 576, 403 S.E.2d 521 (1991).

## VI. ADEQUATE JUDICIAL REVIEW UNDER ANOTHER STATUTE.

**"Adequate procedure for judicial review" exists only if the scope of review is equal to that under Article 4 of former Chapter 150A.** *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 240 S.E.2d 460 (1977); *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

**As to reviewability of decisions under corresponding former provisions where no other adequate procedure provided**, see *State ex rel. N.C. Utils. Comm'n v. Old Fort Finishing Plant*, 264 N.C. 416, 142 S.E.2d 8 (1965).

**Statutory provision for review "by proceedings in the nature of certiorari" is an "adequate procedure for judicial review"** only if the scope of review is equal to that under this Chapter. *Jarrell v. Board of Adjustment*, 258 N.C. 476, 128 S.E.2d 879 (1963).

**Section 93A-6, regulating real estate brokers and salesmen, provides adequate procedure for judicial review of an order of**

the Real Estate Licensing Board revoking a license, and former § 150A-43 does not apply. In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962).

**Section 136-134.1 preempts former § 150A-43** and specifically provides the opportunity to have a de novo proceeding before a trial judge which satisfies due process requirements. National Adv. Co. v. Bradshaw, 48 N.C. App. 10, 268 S.E.2d 816, cert. denied and appeal dismissed, 301 N.C. 400, 273 S.E.2d 446 (1980).

## VII. ILLUSTRATIVE CASES.

### Decisions of Property Tax Commission.

— Any person aggrieved by a final decision of the Property Tax Commission, and who has exhausted all administrative remedies available to him, is entitled to judicial review under former § 150A-43. Brock v. North Carolina Property Tax Comm'n, 290 N.C. 731, 228 S.E.2d 254 (1976).

Administrative decisions of the Property Tax Commission, whether with respect to the schedule of values or the appraisal of property, are always subject to judicial review after administrative procedures have been exhausted. Brock v. North Carolina Property Tax Comm'n, 290 N.C. 731, 228 S.E.2d 254 (1976).

**Appeal by Commissioner (Now Secretary) of Revenue from Decision of Tax Review Board.** — The Tax Review Board is an administrative agency of the State, and the Commissioner (now Secretary) of Revenue is entitled to appeal from a decision of the Board reversing in part an assessment of taxes made by the Commissioner (now Secretary). Section 105-241.3 does not impliedly amend former § 150A-43 so as to preclude the right of the Commissioner (now Secretary) to appeal, but the two statutes must be construed together and effect given the provisions of both. In re Halifax Paper Co., 259 N.C. 589, 131 S.E.2d 441 (1963).

**Rule-Making Procedure Under § 143-215.13(c) Not Subject to Judicial Review.** — An informal hearing conducted by the Commission to consider whether to initiate a proceeding to declare the Yadkin River Basin a capacity use area was no more than a § 143-215.13(c) rule-making type procedure, and thus the plaintiffs were not entitled to judicial review under former § 150A-43 et seq. High Rock Lake Ass'n v. North Carolina Env'tl. Mgt. Comm'n, 39 N.C. App. 699, 252 S.E.2d 109 (1979).

**As to availability of judicial review of suspension of university student,** see In re Carter, 262 N.C. 360, 137 S.E.2d 150 (1964).

**As to former limitation of court review of suspensions and exclusions,** see Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972).

**OSHA Review Board Decisions.** — Judicial review of Occupational Safety and Health Act (OSHA) Review Board decisions is under this Article. Brooks v. Austin Berryhill Fabricators, Inc., 102 N.C. App. 212, 401 S.E.2d 795 (1991).

**Termination of Employment of County Superintendent of Schools Reviewable.** — Decision of the Wayne County Board of Education terminating the employment of the superintendent of schools and declaring the office vacant was subject to review under former provisions, since although the section providing for the removal of school superintendents contained a proviso that such superintendent would have the right to try his title to office in the courts of the State, the statute was silent as to the procedure and the scope of review contemplated. James v. Wayne County Bd. of Educ., 15 N.C. App. 531, 190 S.E.2d 224, appeal dismissed, 282 N.C. 672, 194 S.E.2d 151 (1972).

**Findings of fact and conclusions of law made by the State Board of Elections may be reviewed** in an action instituted in the superior court, but appellant is not entitled to a jury trial in such action. Ponder v. Joslin, 262 N.C. 496, 138 S.E.2d 143 (1964).

**Cancellation of Truck Driver School License.** — Superior court had jurisdiction pursuant to this section to review order cancelling petitioner's truck driver school license, even though petitioner waived its right to an evidentiary hearing. Charlotte Truck Driver Training School, Inc. v. North Carolina DMV, 95 N.C. App. 209, 381 S.E.2d 861 (1989).

**Suspension of Retail Beer Permit.** — Judicial review of an order of the State Board of Alcoholic Control suspending a retail beer permit is governed by former § 150A-43. Fay v. State Bd. of Alcoholic Control, 30 N.C. App. 492, 227 S.E.2d 298, cert. denied, 291 N.C. 175, 229 S.E.2d 689 (1976).

**Environmental Impact Statement.** — Department of Administration decision that an environmental impact statement was not required did not automatically mean that a permit would be issued by Department of Environmental Health and Natural Resources. Petitioners' action to challenge the decision did not become ripe until Department of Environmental Health and Natural Resources made its decision to issue the National Pollutant Discharge Elimination System permit to applicant. Because petitioners' claim was not ripe at the time of Department of Administration decision, they did not have the right to a contested case hearing. Citizens for Clean Indus., Inc. v. Lofton, 109 N.C. App. 229, 427 S.E.2d 120 (1993), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 768, rehearing denied, 338 N.C. 314, 451 S.E.2d 634 (1994).

**Petition Not Sufficiently Explicit.** — Where petition for judicial review of county health director's decision affirming employee's termination lacked even a single exception to particular findings of fact or conclusions of law but instead, baldly asserted only that the health department's decision was "contrary to the Recommended Decision of the Administrative Law Judge and the State Personnel Com-

mission," petition was not sufficiently explicit to permit effective judicial review of the proceedings, and department's motion to dismiss should have been allowed. *Gray v. Orange County Health Dep't*, 119 N.C. App. 62, 457 S.E.2d 892, cert. denied, 341 N.C. 649, 462 S.E.2d 511, rehearing dismissed, 342 N.C. 192, 463 S.E.2d 236 (1995).

## § 150B-44. Right to judicial intervention when decision unreasonably delayed.

Unreasonable delay on the part of any agency or administrative law judge in taking any required action shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency or administrative law judge. An agency that is subject to Article 3 of this Chapter and is not a board or commission has 60 days from the day it receives the official record in a contested case from the Office of Administrative Hearings to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 60 days. An agency that is subject to Article 3 of this Chapter and is a board or commission has 60 days from the day it receives the official record in a contested case from the Office of Administrative Hearings or 60 days after its next regularly scheduled meeting, whichever is longer, to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 60 days. If an agency subject to Article 3 of this Chapter has not made a final decision within these time limits, the agency is considered to have adopted the administrative law judge's decision as the agency's final decision. Failure of an agency subject to Article 3A of this Chapter to make a final decision within 120 days of the close of the contested case hearing is justification for a person whose rights, duties, or privileges are adversely affected by the delay to seek a court order compelling action by the agency or, if the case was heard by an administrative law judge, by the administrative law judge. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(17); 1987, c. 878, ss. 5, 27; 1991, c. 35, s. 9; 2000-190, s. 9.)

**Effect of Amendments.** — Session Laws 2000-190, s. 9, effective January 1, 2001, and applicable to contested cases commenced on or after that date, substituted "60 days" for "90 days" five times; deleted "recommended" following "administrative law judge's" in the next to

last sentence; and substituted "120 days" for "180 days" in the last sentence.

**Legal Periodicals.** — For article, "Advisory Rulings by Administrative Agencies: Their Benefits and Dangers," see 2 *Campbell L. Rev.* 1 (1980).

### CASE NOTES

**Editor's Note.** — *The cases below were decided under corresponding provisions of former Chapter 150A, or under this Chapter prior to the 1991 amendments thereto.*

**Protection from Unreasonable Delay.** — Parties are protected from unreasonable delay on the part of agencies in reaching final decisions by former § 150A-44 (see now this section), which allows a party adversely affected by such delay to seek a court order compelling action by the agency. In *re Alamance Sav. &*

*Loan Ass'n*, 53 N.C. App. 326, 280 S.E.2d 748, cert. denied, 304 N.C. 588, 291 S.E.2d 148 (1981).

The right under former § 150A-44 (see now this section) may be asserted to prevent unreasonable delay in reaching a final agency decision. *Stevenson v. North Carolina Dep't of Ins.*, 31 N.C. App. 299, 229 S.E.2d 209 (1976).

**Decision Held Unreasonably Delayed.** — State Personnel Commission's decision against a county employee issued 130 days after it had

received the official record from the hearing officer was "unreasonably delayed" as defined in this section; however, the hearing officer's decision would not be reinstated. The only available remedy was a court order compelling action by the agency or hearing officer. *Davis v. Vance County Dep't of Soc. Servs.*, 91 N.C. App. 428, 372 S.E.2d 88 (1988).

The Department of Human Resources did not make its final decision within the time limits of this section, where the Department filed an extension, but did not render its final decision until almost six months after it received the record. *Holland Group, Inc. v. North Carolina Dep't of Admin.*, 130 N.C. App. 721, 504 S.E.2d 300 (1998).

### § 150B-45. Procedure for seeking review; waiver.

To obtain judicial review of a final decision under this Article, the person seeking review must file a petition in the Superior Court of Wake County or in the superior court of the county where the person resides.

The person seeking review must file the petition within 30 days after the person is served with a written copy of the decision. A person who fails to file a petition within the required time waives the right to judicial review under this Article. For good cause shown, however, the superior court may accept an untimely petition. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1987, c. 878, s. 16.)

**Local Modification.** — Durham: 1983, c. 373; 1993, c. 227, s. 3; 1993 (Reg. Sess., 1994), c. 658, s. 1.2; city of Asheville: 1999-2006, s. 3; city of Gastonia: 1985 (Reg. Sess., 1986), c. 902, s. 3; 1991, c. 557, s. 1.

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

**Self-Executing Decisions** — When an Article 3 administrative agency failed to issue a final decision regarding the recognition of a tribe as an indigenous North Carolina Indian tribe within the time limits set forth in § 150B-44, the recommended decision of an administrative law judge became the final decision in the case by operation of law. *Occaneechi Band v. North Carolina Comm'n of Indian Affairs*, — N.C. App. —, 551 S.E.2d 535, 2001 N.C. App. LEXIS 734 (2001).

**Applied** in *White v. North Carolina Dep't of Cor.*, 117 N.C. App. 521, 451 S.E.2d 876 (1995).

For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

### CASE NOTES

**Editor's Note.** — *The cases below were decided under corresponding provisions of former Chapter 150A, or under this Chapter prior to the 1991 amendments thereto.*

**Application of Section.** — Where the complaints and notices of hearing were filed prior to Jan. 1, 1986, the action was commenced prior to Jan. 1, 1986, and Chapter 150B had no application in the case; thus, § 150A-45 (rewritten and recodified as this section), requiring a person seeking review to file a petition in the Superior Court of Wake County, and not this section, permitting such filing in either Wake County or the county where the person resides, governed. *Pinewood Manor Mobile Homes, Inc. v. North Carolina Manufactured Hous. Bd.*, 84 N.C. App. 564, 353 S.E.2d 231, cert. denied, 319 N.C. 674, 356 S.E.2d 780 (1987).

**Under Article 3 of Chapter 150B of the General Statutes**, judicial review of a final decision under that article is to be had in the Superior Court of Wake County or the superior

court of the county where the person seeking review resides. *Iredell Mem. Hosp. v. North Carolina Dep't of Human Resources*, 103 N.C. App. 637, 406 S.E.2d 304 (1991).

**Where declaratory ruling was not served on county in accordance with statute**, county did not waive its right to seek judicial review by waiting more than 30 days after it received a copy of the decision to file its petition for review. *In re Brunswick County*, 81 N.C. App. 391, 344 S.E.2d 584 (1986).

**Former § 150A-45 (rewritten and recodified as this section) confers exclusive jurisdiction** for judicial review of final agency decisions on the Superior Court of Wake County when a state rather than a local agency made the initial determination. *State ex rel. Lee v. Williams*, 55 N.C. App. 80, 284 S.E.2d 572 (1981).

**Strict Construction of Waiver Provisions.** — Statutory provisions providing for the waiver or forfeiture of the right to judicial

review under certain conditions should be construed strictly; and, when so construed, the right to petition for review continues unless and until 30 days have expired from the date "a written copy" of the administrative order has been served on the party seeking review, either by personal service or by registered mail, return receipt requested. In re Appeal of Harris, 273 N.C. 20, 159 S.E.2d 539 (1968), decided prior to enactment of this Chapter.

**No statutory authority exists for the State Personnel Commission to review an administrative law judge's recommended decision** in a case involving an exempt employee. *Johnson v. Natural Resources & Community Dev.*, 98 N.C. App. 334, 391 S.E.2d 48, cert. denied, 327 N.C. 140, 394 S.E.2d 176 (1990), rev'd on other grounds, 328 N.C. 689, 394 S.E.2d 469 (1991).

**A petitioner seeking judicial review of a decision of the North Carolina Driver License Medical Review Board** must file such petition in the Superior Court of Wake County pursuant to former § 150A-45 (rewritten and recodified as this section), and may not obtain a hearing under § 20-25 in the superior court of the county in which he resides. *Cox v. Miller*, 26 N.C. App. 749, 217 S.E.2d 198 (1975).

**Denial of ABC Permit Constituting Action on "Issuance"**. — Where application for an ABC permit was initially denied by commission on Dec. 9, 1985, this denial was clearly a commission action on "issuance" of an ABC permit, and, pursuant to the provisions of § 18B-906, the ruling on the application became a "contested case" for purposes of the Administrative Procedure Act on Dec. 9, 1985. Therefore, former § 150A-45 (rewritten and recodified as this section), which required petitions for review to be filed in Wake County, was applicable, rather than this section, and the trial court properly dismissed petition for judicial review, which had been filed in Craven County. In re Melkonian, 85 N.C. App. 715, 355

S.E.2d 798, cert. denied, 320 N.C. 793, 361 S.E.2d 78 (1987).

**The result of a petitioner's ineffective attempts to file a petition** for a contested case hearing was only a contested case. *Community Psychiatric Ctrs. v. North Carolina Dep't of Human Resources*, 103 N.C. App. 514, 405 S.E.2d 769 (1991).

**Without the jurisdictional prerequisite of a contested case hearing**, a petitioner cannot utilize § 131E-188(b) to appeal to the Court of Appeals. *Community Psychiatric Ctrs. v. North Carolina Dep't of Human Resources*, 103 N.C. App. 514, 405 S.E.2d 769 (1991).

**Applied** in *Concerned Citizens v. North Carolina Env'tl. Mgt. Comm'n*, 89 N.C. App. 708, 367 S.E.2d 13 (1988); *Gummels v. North Carolina Dep't of Human Resources*, 97 N.C. App. 245, 388 S.E.2d 223 (1990); *North Buncombe Ass'n of Concerned Citizens v. Rhodes*, 100 N.C. App. 24, 394 S.E.2d 462 (1990), appeal dismissed, 327 N.C. 484, 397 S.E.2d 215 (1990); *Meyers v. Dep't of Human Resources*, 105 N.C. App. 665, 415 S.E.2d 70 (1992); *Citizens for Responsible Road-Ways v. North Carolina DOT*, — N.C. App. —, 550 S.E.2d 253, 2001 N.C. App. LEXIS 655 (2001).

**Quoted** in *Huang v. North Carolina State Univ.*, 107 N.C. App. 710, 421 S.E.2d 812 (1992).

**Cited** in *North Carolina DOT v. Davenport*, 102 N.C. App. 476, 402 S.E.2d 477 (1991); *Bashford v. North Carolina Licensing Bd.*, 107 N.C. App. 462, 420 S.E.2d 466 (1992); *Ocean Hill Joint Venture v. North Carolina Dep't of Environment, Health & Natural Resources*, 333 N.C. 318, 426 S.E.2d 274 (1993); *Davenport v. North Carolina DOT*, 3 F.3d 89 (4th Cir. 1993); *Ellis v. North Carolina Crime Victims Comp. Comm'n*, 111 N.C. App. 157, 432 S.E.2d 160 (1993); *Homoly v. North Carolina State Bd. of Dental Exmrs.*, 125 N.C. App. 127, 479 S.E.2d 215 (1997); *County of Durham v. North Carolina Dep't of Env't & Natural Resources*, 131 N.C. App. 395, 507 S.E.2d 310 (1998).

## § 150B-46. Contents of petition; copies served on all parties; intervention.

The petition shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks. Within 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were parties of record to the administrative proceedings. Names and addresses of such parties shall be furnished to the petitioner by the agency upon request. Any party to the administrative proceeding is a party to the review proceedings unless the party withdraws by notifying the court of the withdrawal and serving the other parties with notice of the withdrawal. Other parties to the proceeding may file a response to the petition within 30 days of service. Parties, including agencies, may state exceptions to the decision or procedure and what relief is sought in the response.

Any person aggrieved may petition to become a party by filing a motion to intervene as provided in G.S. 1A-1, Rule 24. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 35, s. 10.)

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For article, "A Powerless Judiciary? The

North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

#### CASE NOTES

**Editor's Note.** — *The cases below were decided under corresponding provisions of former Chapter 150A and earlier statutes, or under this Chapter prior to the 1991 amendments thereto.*

**Purpose of Statute Necessitates Liberal Construction.** — The primary purpose of the statute is to confer the right of review, and the statute should be liberally construed to preserve and effectuate that right. *James v. Wayne County Bd. of Educ.*, 15 N.C. App. 531, 190 S.E.2d 224, appeal dismissed, 282 N.C. 672, 194 S.E.2d 151 (1972).

"**Explicit**" means characterized by full clear expression; being without vagueness or ambi-

guity; leaving nothing implied. *Vann v. North Carolina State Bar*, 79 N.C. App. 173, 339 S.E.2d 97 (1986).

**Applied** in *Gummels v. North Carolina Dep't of Human Resources*, 97 N.C. App. 245, 388 S.E.2d 223 (1990).

**Quoted** in *Huang v. North Carolina State Univ.*, 107 N.C. App. 710, 421 S.E.2d 812 (1992); *Leeuwenburg v. Waterway Inv. Ltd. Partnership*, 115 N.C. App. 541, 445 S.E.2d 614 (1994).

**Cited** in *Save Our Rivers, Inc. v. Town of Highlands*, 341 N.C. 635, 461 S.E.2d 333 (1995).

### § 150B-47. Records filed with clerk of superior court; contents of records; costs.

Within 30 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the agency that made the final decision in the contested case shall transmit to the reviewing court the original or a certified copy of the official record in the contested case under review together with: (i) any exceptions, proposed findings of fact, or written arguments submitted to the agency in accordance with G.S. 150B-36(a); and (ii) the agency's final decision or order. With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable. (1973, c. 1331, s. 1; 1983, c. 919, s. 3; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(18); 1987, c. 878, s. 22.)

#### CASE NOTES

**Editor's Note.** — *The case below was decided under corresponding provisions of former Chapter 150A.*

**Former § 150A-47 does not apply to decisions made by town boards**, including boards of adjustment. *Burton v. New Hanover County Zoning Bd. of Adjustment*, 49 N.C. App. 439, 271 S.E.2d 550 (1980), cert. denied, 302 N.C. 217, 276 S.E.2d 914 (1981).

**Applied** in *Leeuwenburg v. Waterway Inv.*

*Ltd. Partnership*, 115 N.C. App. 541, 445 S.E.2d 614 (1994).

**Cited** in *Huang v. North Carolina State Univ.*, 107 N.C. App. 710, 421 S.E.2d 812 (1992); *Harding v. North Carolina Dep't of Cor.*, 334 N.C. 414, 432 S.E.2d 298 (1993); *Deep River Citizens Coalition v. North Carolina Dep't of Env't, Health & Natural Resources*, 119 N.C. App. 232, 457 S.E.2d 772 (1995).

## § 150B-48. Stay of decision.

At any time before or during the review proceeding, the person aggrieved may apply to the reviewing court for an order staying the operation of the administrative decision pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper and subject to the provisions of G.S. 1A-1, Rule 65. (1973, c. 1331, s. 1; 1985, c. 746, s. 1.)

**Legal Periodicals.** — For comment, “The Problem of Procedural Delay in Contested Case Hearings ...” under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

For article, “Advisory Rulings by Administrative Agencies: Their Benefits and Dangers,” see 2 Campbell L. Rev. 1 (1980).

### CASE NOTES

**Editor’s Note.** — *The cases below were decided under corresponding provisions of former Chapter 150A.*

**Former § 150A-48 must be construed in pari materia with the rest of this Article,** and particularly former § 150A-43, which states that any person who is aggrieved by a final agency decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under Article 4 of former Chapter 150A. *Stevenson v. North Carolina Dep’t of Ins.*, 31 N.C. App. 299, 229 S.E.2d 209, cert. denied, 291 N.C. 450, 230 S.E.2d 767 (1976); *Davis v. North Carolina Dep’t of Transp.*, 39 N.C. App. 190, 250 S.E.2d 64 (1978), cert. denied, 296 N.C. 735, 254 S.E.2d 177 (1979).

**Former § 150A-48 was meant to entitle the aggrieved person to a stay order only after the final agency decision** and either before or after initiation of judicial review. *Stevenson v. North Carolina Dep’t of Ins.*, 31 N.C. App. 299, 229 S.E.2d 209 (1976); *Davis v. North Carolina Dep’t of Transp.*, 39 N.C. App. 190, 250 S.E.2d 64 (1978), cert. denied, 296

N.C. 735, 254 S.E.2d 177 (1979).

**Stay of Decision Unavailable Prior to “Final Agency Decision”.** — Former § 150A-48 is a vehicle for reinstatement only “before or during the review proceeding.” Since, according to former § 150A-43, review is available only after a “final agency decision,” the stay of a decision is similarly only available after a “final agency decision.” *Davis v. North Carolina Dep’t of Transp.*, 39 N.C. App. 190, 250 S.E.2d 64 (1978), cert. denied, 296 N.C. 735, 254 S.E.2d 177 (1979).

**Exhaustion of Administrative Remedies Held Unnecessary for Preliminary Injunctive Relief in Federal Civil Rights Action.** — Where a state employee asserted civil rights violations under 42 U.S.C. § 1983 for his wrongful dismissal, the superior court retained its traditional power to grant preliminary injunctive relief without requiring him to exhaust the administrative remedies provided in Chapter 126. *Williams v. Greene*, 36 N.C. App. 80, 243 S.E.2d 156, cert. denied and appeal dismissed, 295 N.C. 471, 246 S.E.2d 12 (1978).

**Applied in Unigard Mut. Ins. Co. v. Ingram**, 71 N.C. App. 725, 323 S.E.2d 442 (1984).

## § 150B-49. New evidence.

An aggrieved person who files a petition in the superior court may apply to the court to present additional evidence. If the court is satisfied that the evidence is material to the issues, is not merely cumulative, and could not reasonably have been presented at the administrative hearing, the court may remand the case so that additional evidence can be taken. If an administrative law judge did not make a decision in the case, the court shall remand the case to the agency that conducted the administrative hearing. After hearing the evidence, the agency may affirm or modify its previous findings of fact and final decision. If an administrative law judge made a decision in the case, the court shall remand the case to the administrative law judge. After hearing the evidence, the administrative law judge may affirm or modify his previous findings of fact and decision. The administrative law judge shall forward a copy of his decision to the agency that made the final decision, which in turn may affirm or modify its previous findings of fact and final decision. The additional

evidence and any affirmation or modification of a decision of the administrative law judge or final decision shall be made part of the official record. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1987, c. 878, s. 17; 2000-190, s. 10.)

**Effect of Amendments.** — Session Laws 2000-190, s. 10, effective January 1, 2001, and applicable to contested cases commenced on or after that date, deleted “recommended” preceding “decision” three times and substituted “decision of the administrative law judge” for “rec-

ommended decision” in the last sentence.

**Legal Periodicals.** — For comment, “The Problem of Procedural Delay in Contested Case Hearings ...” under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

#### CASE NOTES

**Editor’s Note.** — *The cases below were decided prior to the 1991 amendments to this Chapter.*

**Whether new evidence offered by an organization should “reasonably have been presented”** to the Coastal Resources Commission before, or during the course of, the organization’s petition for a contested case hearing was a question which could not be determined from the record, and therefore, had to be remanded to the superior court for determination. Pamlico Tar River Found., Inc. v. Coastal Resources Comm’n, 103 N.C. App. 24, 404 S.E.2d 167 (1991).

**When Superior Court Must Remand Case for Taking of New Evidence.** — If the evidence is “material,” “not merely cumulative,” and “could not reasonably have been presented at the administrative hearing,” the superior

court must remand the case to the Coastal Resources Commission for the taking of new evidence offered by an organization opposing issuance of a permit. Pamlico Tar River Found., Inc. v. Coastal Resources Comm’n, 103 N.C. App. 24, 404 S.E.2d 167 (1991).

**Denial of Remand Upheld.** — Trial court’s decision to deny petitioner’s motion to remand for additional evidence relative to petitioner’s alcohol assessment and subsequent treatment after hearing before the commission upheld. Ritter v. Department of Human Resources, 118 N.C. App. 564, 455 S.E.2d 901 (1995).

**Applied** in Save Our Rivers, Inc. v. Town of Highlands, 341 N.C. 635, 461 S.E.2d 333 (1995).

**Cited** in Harding v. North Carolina Dep’t of Cor., 334 N.C. 414, 432 S.E.2d 298 (1993).

### § 150B-50. Review by superior court without jury.

The review by a superior court of agency decisions under this Chapter shall be conducted by the court without a jury. (1973, c. 1331, s. 1; 1983, c. 919, s. 2; 1985, c. 746, s. 1; 1987, c. 878, s. 18.)

**Legal Periodicals.** — For article, “A Powerless Judiciary? The North Carolina Courts’ Perceptions of Review of Administrative Action,”

see 12 N.C. Cent. L.J. 21 (1980).

For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

#### CASE NOTES

**Editor’s Note.** — *The cases below were decided under corresponding provisions of former Chapter 150A.*

**Judge Not Subject to Rule 52(a) Requirements.** — When the judge of the superior court sits as an appellate court to review the decision of an administrative agency pursuant to former § 150B-50 he is not required to make findings of fact and enter a judgment thereon in the same sense as is a trial judge pursuant to § 1A-1, Rule 52(a). In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979), appeal dismissed, 299 N.C. 545, 265 S.E.2d 403 (1980).

**Appellate Review of Local Government**

**Actions.** — Although this section of the Act provides review only for agency decisions and local units of government are not within the definition of agencies in § 150B-2(1), the principles embodied in the Act “are highly pertinent” to appellate review of local government actions. Vulcan Materials Co. v. Guilford County Bd. of County Comm’rs, 115 N.C. App. 319, 444 S.E.2d 639, cert. denied, 337 N.C. 807, 449 S.E.2d 758 (1994).

**Review of Order of Real Estate Licensing Board.** — Under § 93A-6, review of an order of the Real Estate Licensing Board suspending or revoking a license is de novo in the superior court in all cases, and former article

corresponding to Article 4 of former Chapter 150A did not apply, regardless of whether or not the Board has made a record of its proceedings. In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962).

**Standard on Review of City's Special Zoning Request Decisions.** — Although the North Carolina Administrative Procedure Act provides judicial review only for agency decisions and exempts cities and other local municipalities, a similar standard of review is appropriate to review city council special zoning

request decisions. *Jennewein v. City Council*, 62 N.C. App. 89, 302 S.E.2d 7, cert. denied, 309 N.C. 461, 307 S.E.2d 365 (1983).

**Stated** in *Huang v. North Carolina State Univ.*, 107 N.C. App. 710, 421 S.E.2d 812 (1992).

**Cited** in *McHugh v. North Carolina Dep't of Env'tl., Health & Natural Resources*, 126 N.C. App. 469, 485 S.E.2d 861 (1997); *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 507 S.E.2d 272 (1998).

## § 150B-51. Scope and standard of review.

(a) In reviewing a final decision in a contested case in which an administrative law judge made a recommended decision and the State Personnel Commission made an advisory decision in accordance with G.S. 126-37(b1), the court shall make two initial determinations. First, the court shall determine whether the applicable appointing authority heard new evidence after receiving the recommended decision. If the court determines that the applicable appointing authority heard new evidence, the court shall reverse the decision or remand the case to the applicable appointing authority to enter a decision in accordance with the evidence in the official record. Second, if the applicable appointing authority did not adopt the recommended decision, the court shall determine whether the applicable appointing authority's decision states the specific reasons why the applicable appointing authority did not adopt the recommended decision. If the court determines that the applicable appointing authority did not state specific reasons why it did not adopt a recommended decision, the court shall reverse the decision or remand the case to the applicable appointing authority to enter the specific reasons.

(a1) In reviewing a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B-34(a), and the agency adopted the administrative law judge's decision, the court shall determine whether the agency heard new evidence after receiving the decision. If the court determines that the agency heard new evidence, the court shall reverse the decision or remand the case to the agency to enter a decision in accordance with the evidence in the official record. The court shall also determine whether the agency specifically rejected findings of fact contained in the administrative law judge's decision in the manner provided by G.S. 150B-36(b1) and made findings of fact in accordance with G.S. 150B-36(b2). If the court determines that the agency failed to follow the procedure set forth in G.S. 150B-36, the court may take appropriate action under subsection (b) of this section.

(b) Except as provided in subsection (c) of this section, in reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
  - (2) In excess of the statutory authority or jurisdiction of the agency;
  - (3) Made upon unlawful procedure;
  - (4) Affected by other error of law;
  - (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted;
- or

(6) Arbitrary, capricious, or an abuse of discretion.

(c) In reviewing a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B-34(a), and the agency does not adopt the administrative law judge's decision, the court shall review the official record, de novo, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record. The court reviewing a final decision under this subsection may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision; may remand the case to the agency for further explanations under G.S. 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or modify the final decision for the agency's failure to provide the explanations; and may take any other action allowed by law.

(d) In reviewing a final agency decision allowing judgment on the pleadings or summary judgment, or in reviewing an agency decision that does not adopt an administrative law judge's decision allowing judgment on the pleadings or summary judgment pursuant to G.S. 150B-36(d), the court may enter any order allowed by G.S. 1A-1, Rule 12(c) or Rule 56. If the order of the court does not fully adjudicate the case, the court shall remand the case to the administrative law judge for such further proceedings as are just. (1973, c. 1331, s. 1; 1983, c. 919, s. 4; 1985, c. 746, s. 1; 1987, c. 878, s. 19; 2000-140, s. 94.1; 2000-190, s. 11.)

**Local Modification.** — City of Durham: 1993 (Reg. Sess., 1994) c. 658, s. 1.2.

**Effect of Amendments.** — Session Laws 2000-140, s. 94.1, effective July 21, 2000, in this section as amended by Session Laws 2000-190, s. 11, substituted "applicable appointing authority" for "agency" and substituted "applicable appointing authority's" for "agency's" in subsection (a).

Session Laws 2000-190, s. 11, effective January 1, 2001, and applicable to contested cases commenced on or after that date, inserted "and standard" in the catchline; in subsection (a), deleted the subsection heading, and inserted "and the State Personnel Commission made an advisory decision in accordance with G.S. 126-

37(b1)" in the first sentence; added subsection (a1); rewrote subsection (b); rewrote subdivision (b)(6), which had read "Arbitrary or capricious"; and added subsections (c) and (d).

**Legal Periodicals.** — For comment, "The Problem of Procedural Delay in Contested Case Hearings ..." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

## CASE NOTES

- I. General Consideration.
- II. Exceeding Statutory Authority or Jurisdiction.
- III. Unlawful Procedure.
- IV. "Whole Record" Test.
- V. Arbitrary or Capricious Findings, Decisions, etc.

### I. GENERAL CONSIDERATION.

**Editor's Note.** — *Most of the cases below were decided under corresponding provisions of former Chapter 150A and earlier statutes, or under this Chapter prior to the 1991 amendments thereto.*

**The precise scope of review by the Court**

**of Appeals is contained in this section.** *Dockery v. North Carolina Dep't of Human Resources*, 120 N.C. App. 827, 463 S.E.2d 580 (1995).

**Reasons for Not Adopting Decision.** — If the State Board of Elections determines that it will not adopt the recommended decision of a county board, it should include in its order

specific reasons for such decision. In re Ramseur, 120 N.C. App. 521, 463 S.E.2d 254 (1995).

**Chapter Not Applicable to Decisions of Municipalities and Town Boards.** — The current general administrative agencies review statutes are expressly not applicable to the decisions of town boards. Former Chapter 150A provides judicial review only for agency decisions, from which the decisions of local municipalities are expressly exempt. Coastal Ready-Mix Concrete Co. v. Board of Comm'rs, 299 N.C. 620, 265 S.E.2d 379, rehearing denied, 300 N.C. 562, 270 S.E.2d 106 (1980).

**But Principles of Former § 150A-51 Are Pertinent.** — While former § 150A-51 is not directly applicable to reviews of town board zoning decisions, the principles it embodies are highly pertinent. Coastal Ready-Mix Concrete Co. v. Board of Comm'rs, 299 N.C. 620, 265 S.E.2d 379, rehearing denied, 300 N.C. 562, 270 S.E.2d 106 (1980).

**Review of Discretionary Agency Decisions.** — Former Chapter 150A does not preclude judicial review of agency decisions which are discretionary. High Rock Lake Ass'n v. North Carolina Env'tl. Mgt. Comm'n, 51 N.C. App. 275, 276 S.E.2d 472 (1981).

**Superior Court Review of Agency Decision.** — In its role as an appellate court, the superior court reviews the agency's decision, but is not allowed to replace the agency's judgment with its own when there are two reasonably conflicting views, even though the court could have reached a different result upon de novo review. Rector v. North Carolina Sheriffs' Educ. & Training Stds. Comm'n, 103 N.C. App. 527, 406 S.E.2d 613 (1991).

**Review of Agency Decisions.** — Under § 150B-36(b), a final agency decision in a contested case hearing must be based on the official record prepared pursuant to § 150B-37; the agency is not permitted to hear new evidence, and if it does so, the trial court on review is required to reverse or remand the agency decision. Everhart & Assocs. v. Department of Env't, Health & Natural Resources, 127 N.C. App. 693, 493 S.E.2d 66 (1997), cert. denied, 347 N.C. 575, 502 S.E.2d 590 (1998).

**Nature of Error Dictates Manner of Review.** — The nature of the error asserted by the party seeking review dictates the appropriate manner of review, so that if the appellant contends the agency's decision was affected by a legal error, de novo review is required, whereas if he contends the decision was not supported by the evidence or was arbitrary or capricious the whole record test is used. Dillingham v. North Carolina Dep't of Human Resources, 132 N.C. App. 704, 513 S.E.2d 823 (1999).

**Administrative agency decisions may be reversed as arbitrary or capricious if they are patently in bad faith, or whimsical in the sense**

that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment. Rector v. North Carolina Sheriffs' Educ. & Training Stds. Comm'n, 103 N.C. App. 527, 406 S.E.2d 613 (1991).

**Constitutional Review Not Contemplated Absent Assertion of Constitutional Violations.** — Former section 58-9.6(b)(1) (now § 58-2-90(b)(1)) and subdivision (1) of former § 150A-51 do not contemplate constitutional review where appellants, rate bureau and member companies, made no assertion that their rights were prejudiced because any of the findings or conclusions of the Commissioner of Insurance were in violation of any constitutional provisions. State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

The superior court misperceived the proper scope of its review where the record nowhere demonstrated petitioners raised any constitutional issues in a manner requiring the superior court to pass on the constitutional validity of any assessment under § 113A-64. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

**Appellate Review of Improper Constitutional Consideration.** — Although the trial court improperly considered a constitutional issue, where that court vacated the Department of Natural Resources and Community Development's (now the Department of Environment and Natural Resources) assessment based on an interpretation of N.C. Const., Art. IV, § 3, which the department properly challenged on appeal, the Court of Appeals would address that constitutional ground in the exercise of its supervisory jurisdiction. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

**Official Acts Presumed to Be Made Lawfully and in Good Faith.** — The members of the State Board of Assessment (now the Property Tax Commission) are public officers, and the Board's official acts are presumed to be made in good faith and in accordance with law; the burden is upon the party asserting otherwise to overcome such presumptions by competent evidence to the contrary. Albemarle Elec. Membership Corp. v. Alexander, 282 N.C. 402, 192 S.E.2d 811 (1972).

There is a rebuttable presumption that an administrative agency has properly performed its official duties, and while arbitrary and capricious agency action is itself prohibited by federal and state due process, any assertion of arbitrary agency action does not necessarily

require the agency's action be reviewed for compliance with every other requirement under the state and federal Constitutions. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

**Authority of Judge on Review.** — The authority of the judge when reviewing the actions of administrative agencies is limited to affirming, modifying, reversing or remanding the decision of the agency. *Faulkner v. North Carolina State Hearing Aid Dealers & Fitters Bd.*, 38 N.C. App. 222, 247 S.E.2d 668 (1978).

Under former Chapter 150A, a reviewing court's power to affirm the decision of the agency and to remand for further proceedings is not circumscribed. *Harrell v. Wilson County Schools*, 58 N.C. App. 260, 293 S.E.2d 687 (1982), cert. denied, 460 U.S. 1012, 103 S. Ct. 1251, 75 L. Ed. 2d 481 (1983).

It is unnecessary for a trial judge who reviews administrative action under former § 150A-51 to explain the reasons for his decision to affirm such action. *Area Mental Health v. Speed*, 69 N.C. App. 247, 317 S.E.2d 22, cert. denied, 312 N.C. 81, 321 S.E.2d 893 (1984).

**Standards for Judicial Review.** — The standards for judicial review set forth in this section, the whole record test, govern appeals from decisions of city or county boards of education. *Warren v. New Hanover County Bd. of Educ.*, 104 N.C. App. 522, 410 S.E.2d 232 (1991).

**Standards for Judicial Review Must Be Clearly Applied.** — A case involving the denial of Rehabilitation Act benefits under P.L. 102-569, 42 U.S.C. § 701, et seq. as amended, was remanded to the trial court so it could: (1) advance its own characterization of the issues presented by petitioner; and (2) clearly delineate the standards of review, detailing the standards used to resolve each distinct issue raised. *Hedgepeth v. North Carolina Div. of Servs. for the Blind*, 142 N.C. App. 338, 543 S.E.2d 169 (2001).

**Review of Statutory Interpretation.** — As incorrect statutory interpretation by an agency constitutes an error of law under subdivision (b)(4), when the issue on appeal is whether the state agency erred in interpreting a statutory term, an appellate court may substitute its own judgment for that of the agency and employ de novo review. *Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n*, 117 N.C. App. 556, 452 S.E.2d 337 (1995).

**This Section Distinguished from Review Pursuant to § 150B-52.** — When an appellate court reviews the decision of a lower court (as opposed to when it reviews an administrative

agency's decision on direct appeal), the scope of review to be applied under § 150B-52 is the same as it is for other civil cases. *Henderson v. North Carolina Dep't of Human Resources*, 91 N.C. App. 527, 372 S.E.2d 887 (1988).

**Unlawful Delegation of Power to Make Final Decision.** — Where the Commissioner of Insurance delegated to his appointed hearing officer the power to make the final agency decision, the Commissioner made an unlawful delegation of his powers. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 61 N.C. App. 262, 300 S.E.2d 586, cert. denied, 308 N.C. 548, 304 S.E.2d 242 (1983).

**Application in Insurance Ratemaking Cases.** — While former § 150A-51 is the controlling judicial review statute in insurance ratemaking cases, to the extent that former § 58-9.6(b) (now § 58-2-90(b)) adds to the judicial review function, and in light of the virtually identical thrust of the two statutes, the Supreme Court would apply the review standards of both former § 58-9.6 (now § 58-2-90) and former § 150A-51, where such standards could be construed as being consistent with each other. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

Since the scope of review provided in Article 4 of former Chapter 150A is substantially broader than that provided by former § 58-9.3 (now § 58-2-75), the scope of judicial review applicable to a denial by the Commissioner of Insurance of a plan by a domestic insurance company to reorganize under a holding company structure was that provided for in Article 4. *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

**Along with Former §§ 58-9 Through 58-27 (Now §§ 58-2-40 Through 58-2-200) Insofar as Compatible.** — While former Chapter 150A controls judicial review of insurance ratemaking procedures, the review provisions of former §§ 58-9 through 58-27 (now §§ 58-2-40 through 58-2-200) should also apply insofar as those provisions are compatible with the act. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 460, 269 S.E.2d 538 (1980).

**Application of Review Standards in This Section and § 58-2-75.** — Although § 58-2-75 and this section are comparable, this section is the controlling judicial review statute; however, to the extent that § 58-2-75 added to and was consistent with the judicial review function of this section, the court would apply the review standards articulated in both statutes. *North Carolina Reinsurance Facility v. Long*, 98 N.C. App. 41, 390 S.E.2d 176 (1990).

**When De Novo Review Permissible.** — When the issue on appeal is whether a state agency erred in interpreting a statutory term,

an appellate court may freely substitute its judgment for that of the agency and employ de novo review. *Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 372 S.E.2d 342 (1988).

Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. *Bashford v. North Carolina Licensing Bd.*, 107 N.C. App. 462, 420 S.E.2d 466 (1992).

When a petitioner alleges that an agency violated his constitutional rights, the Supreme Court will undertake de novo review. *Meads v. North Carolina Dep't of Agric.*, 349 N.C. 656, 509 S.E.2d 165 (1998).

Because appellees alleged in their petition for judicial review that appellants erroneously construed State and federal law regarding the relation between Medicare and Medicaid, the court would review the matter de novo and was free to substitute its judgment for that of the administrative agency. *Duke Univ. Medical Ctr. v. Bruton*, 134 N.C. App. 39, 516 S.E.2d 633 (1999).

**This section, as recodified in 1985, and prior to its amendment in 1987, did not require the reviewing court to set out its reasons** for reversal or modification, unlike under former § 150A-51, which required the reviewing court to set out written reasons only when reversing or modifying an agency decision. *Shepherd v. Consolidated Judicial Retirement Sys.*, 89 N.C. App. 560, 366 S.E.2d 604 (1988).

**Appellate Court Review Not Limited to Superior Court's Findings and Conclusions.** — Appellate court's review is limited to assignments of error to the superior court's order, but is not required to accord any particular deference to the superior court's findings and conclusions concerning the Commission's actions. *Watson v. North Carolina Real Estate Comm'n*, 87 N.C. App. 637, 362 S.E.2d 294 (1987), cert. denied, 321 N.C. 746, 365 S.E.2d 296 (1988).

**Court of Appeals merely determines whether an administrative decision has a rational basis in the evidence.** *North Carolina Dep't of Cor. v. Hodge*, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

**Reasons for Not Adopting Recommendations.** — Subsection (a) did not entitle petitioner to a review of whether the specific reasons the State Personnel Commission did not adopt the recommended decision were correct; only that they be stated. *Oates v. North Carolina Dep't of Cor.*, 114 N.C. App. 597, 442 S.E.2d 542 (1994).

**Review by Court of Appeals.** — Court of Appeals' review of trial court's consideration of final agency decision is to determine whether trial court failed to properly apply review standard articulated in this section. Review is fur-

ther limited to exceptions and assignments of error set forth to order of superior court. *Walker v. North Carolina Dep't of Human Resources*, 100 N.C. App. 498, 397 S.E.2d 350 (1990), cert. denied, 328 N.C. 98, 402 S.E.2d 430 (1991).

Generally, review by Court of Appeals is limited by properly presented assignments of error and exceptions. *North Carolina Dep't of Cor. v. Hodge*, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

The scope of review applied by an appellate court when reviewing a decision of a lower court is the same as in other civil cases. Thus, the appellate court's review is limited to determining whether the superior court committed any errors of law. *Crowell Constructors, Inc. v. North Carolina Dep't of Env't, Health & Natural Resources*, 107 N.C. App. 716, 421 S.E.2d 612 (1992), cert. denied, 333 N.C. 343, 426 S.E.2d 704 (1993).

The standard of review for an appellate court upon an appeal from an order of the superior court affirming or reversing an administrative agency decision is the same standard of review as that employed by the superior court. *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 468 S.E.2d 557 (1996).

**Standards of Review Contrasted.** — Proper standard to be applied on appeal depends on the issues presented. If it is alleged that the agency's decision was based on an error of law, then de novo review is required. Review of whether an agency decision is supported by evidence, or is arbitrary or capricious, requires the court to employ the whole record test. *Walker v. North Carolina Dep't of Human Resources*, 100 N.C. App. 498, 397 S.E.2d 350 (1990), cert. denied, 328 N.C. 98, 402 S.E.2d 430 (1991).

**Inadequate Notice.** — Agency decision dismissing a state employee was reversed where the reviewing court found that notice given to the employee did not provide her with adequate notice of the reasons for her dismissal. *Owen v. UNC-G Physical Plant*, 121 N.C. App. 682, 468 S.E.2d 813 (1996), discretionary review improvidently allowed, 344 N.C. 73, 477 S.E.2d 33 (1996).

Procedural safeguards within § 126-35(a) serve as a prophylactic protection against summary dismissal of state employees based on inadequate notice. *Owen v. UNC-G Physical Plant*, 121 N.C. App. 682, 468 S.E.2d 813 (1996), discretionary review improvidently allowed, 344 N.C. 73, 477 S.E.2d 33 (1996).

**The statute does not require a point-by-point refutation** of the Administrative Law Judge's findings and conclusions. *Webb v. North Carolina Dep't of Env't, Health & Natural Resources, Coastal Resources Comm'n*, 102 N.C. App. 767, 404 S.E.2d 29 (1991).

**Where the commission's findings discussed the flawed premises of the recom-**

**mended decision** of the Administrative Law Judge, those findings were adequate, quite specific indeed, and went to the heart of the case. *Webb v. North Carolina Dep't of Env't, Health & Natural Resources, Coastal Resources Comm'n*, 102 N.C. App. 767, 404 S.E.2d 29 (1991).

**Remand Required for Insufficiency of Findings Under Former § 150A-36.** — Where, on review of an order of a state commission permitting petitioner savings and loan association to open a branch office, the trial court determined that the commission's findings were insufficient in that they lacked the specificity required by former § 150A-36, the trial court should never have reached the question of whether reversal under subdivision (5) of former § 150A-51 was appropriate, as remand for further findings was essential upon concluding that the findings of record presented an inadequate basis for review. Under no applicable theory of law would it be appropriate for the trial court to reverse the commission and substitute its judgment for the commission's. *Community Sav. & Loan Ass'n v. North Carolina Sav. & Loan Comm'n*, 43 N.C. App. 493, 259 S.E.2d 373 (1979).

**Findings of Fact Binding Where Respondent Failed to Object.** — Respondent did not object to adopted findings of fact at superior court level. Findings of fact were binding, therefore, at that appellate level, and binding for purposes of review by the Court of Appeals. *Walker v. North Carolina Dep't of Human Resources*, 100 N.C. App. 498, 397 S.E.2d 350 (1990), cert. denied, 328 N.C. 98, 402 S.E.2d 430 (1991).

**Review of Decisions of Boards of Education.** — The appropriate standard of judicial review for reviewing administrative decisions of boards of education is set forth in former § 150A-51. *Faulkner v. New Bern-Craven County Bd. of Educ.*, 65 N.C. App. 483, 309 S.E.2d 548 (1983), rev'd on other grounds, 311 N.C. 42, 316 S.E.2d 281 (1984).

**Applicable standard of judicial review for an appeal of a school board decision** is set forth in former § 150A-51. *Goodwin v. Goldsboro City Bd. of Educ.*, 67 N.C. App. 243, 312 S.E.2d 892, cert. denied, 311 N.C. 304, 317 S.E.2d 680 (1984).

The standards for judicial review set forth in former § 150A-51 are applicable to appeals from school boards to the courts, since no other statute provides guidance for judicial review of school board decisions and in the interest of uniformity in reviewing administrative board decisions. *Faulkner v. New Bern-Craven County Bd. of Educ.*, 311 N.C. 42, 316 S.E.2d 281 (1984).

While § 150B-2(1) expressly excepts local boards of education from the coverage of the Administrative Procedure Act, nonetheless the

standards for judicial review set forth in this section apply to appeals from school boards. *Evers v. Pender County Bd. of Educ.*, 104 N.C. App. 1, 407 S.E.2d 879 (1991), aff'd, 331 N.C. 380, 416 S.E.2d 3 (1992).

**Appeal to Superior Court.** — A teacher who is denied a promotion under the career ladder program may appeal to the superior court after exhausting his administrative remedies by appealing to the local board of education. *Warren v. New Hanover County Bd. of Educ.*, 104 N.C. App. 522, 410 S.E.2d 232 (1991).

**As to review of teacher dismissal proceedings under former § 150A-51 and former § 115-142,** see *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538 (1977).

**Review of a decision by Commission of Motor Vehicles** is governed by former § 150A-51. *GMC v. Kinlaw*, 78 N.C. App. 521, 338 S.E.2d 114 (1985).

**Basis for Review of Personnel Commission Decision.** — While respondent's and petitioner's motions for summary judgment in superior court on review of State Personnel Commission's decision were procedurally incorrect, the trial court's order allowing respondent's motion for summary judgment was tantamount to affirming the full Commission's ruling, and sufficiently set forth a reviewable basis for affirming such ruling. *Parks v. Department of Human Resources*, 79 N.C. App. 125, 338 S.E.2d 826, cert. denied, 316 N.C. 553, 344 S.E.2d 8, 345 S.E.2d 383 (1986).

**Review of Award of Industrial Commission.** — In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) Whether or not there was any competent evidence before the Commission to support its findings of fact; and (2) Whether or not the findings of fact of the Commission justified its legal conclusions and decision. *Waggoner v. North Carolina Bd. of Alcoholic Control*, 7 N.C. App. 692, 173 S.E.2d 548 (1970).

**Cancellation of Truck Driver School License.** — Superior court had jurisdiction pursuant to this section to review order cancelling petitioner's truck driver school license, even though petitioner waived its right to an evidentiary hearing. *Charlotte Truck Driver Training School, Inc. v. North Carolina DMV*, 95 N.C. App. 209, 381 S.E.2d 861 (1989).

**Rescission of Coastal Area Management Act Development Permit.** — Trial court's rescission of Coastal Area Management Act Development permit was affirmed where there were a variety of ecological concerns, potential environmental damage, and interference with public access to and use of the affected waters, and the whole record showed that the only

basis for issuing the permit was that it would make the public waters adjacent to the permittee's condominium project more convenient for the permittee's use. *Ballance v. North Carolina Coastal Resources Comm'n*, 108 N.C. App. 288, 423 S.E.2d 815 (1992), petition for reconsideration dismissed, 333 N.C. 789, 431 S.E.2d 21 (1993).

**Determining Unnecessary Hardship from Coastal Area Management Act.** — To determine whether a parcel of property suffers from unnecessary hardship due to strict application of the Coastal Area Management Act, the Coastal Resources Commission must make findings of fact and conclusions of law as to the impact of the Act on the landowner's ability to make reasonable use of his property. *Williams v. North Carolina Dep't of Env't & Natural Resources*, 144 N.C. App. 479, 548 S.E.2d 793 (2001).

**Superior court is without power to order the North Carolina Board of Alcoholic Control to issue a permit to petitioners, but can order the Board to exercise its discretion in accordance with law.** *Waggoner v. North Carolina Bd. of Alcoholic Control*, 7 N.C. App. 692, 173 S.E.2d 548 (1970).

**Evidence held incompetent to sustain a finding of the State Board of Alcoholic Control that a licensee sold beer to a minor or failed to give his licensed premises proper supervision.** *Thomas v. State Bd. of Alcoholic Control*, 258 N.C. 513, 128 S.E.2d 884 (1963).

**Safety training violation by contractor was considered "serious" where the evidence showed that (1) the lack of proper training created the possibility of an accident, and (2) if an accident did occur, there was a substantial probability of death or serious physical harm.** *Associated Mechanical Contractors v. Payne*, 342 N.C. 825, 467 S.E.2d 398 (1996).

**Statement of Reasons for Reversing Decision Held Adequate.** — Statement of superior court judge in reversing Hearing Aid Dealers and Fitters Board's conclusions that the facts found by the agency failed "to support its conclusion of law that the petitioner was grossly incompetent within the purview of § 93D-13(a)(2)" constituted a succinct and adequate statement of its reasons for reversing the agency's decision. *Faulkner v. North Carolina State Hearing Aid Dealers & Fitters Bd.*, 38 N.C. App. 222, 247 S.E.2d 668 (1978).

**Evidence Supported Conclusion State Funds Had Been Misused.** — Where petitioner had charged a number of personal calls to the State Telephone Network credit card he had been issued, there was substantial evidence before the commission to support its conclusion that petitioner had willfully and repeatedly misused state funds. *White v. North Carolina Dep't of Env'tl., Health, & Natural*

*Resources*, 117 N.C. App. 545, 451 S.E.2d 376 (1995).

**Error of Law.** — An error of law, as that term is used in subdivision (b)(4), exists if a conclusion of law entered by the administrative agency is not supported by the findings of fact entered by the agency or if the conclusion of law does not support the decision of the agency. *Brooks v. Anasco & Assocs.*, 114 N.C. App. 711, 443 S.E.2d 89 (1994).

**The standard of review to be applied by the reviewing court depends on the issues presented on appeal.** *Homoly v. North Carolina State Bd. of Dental Exmrs.*, 125 N.C. App. 127, 479 S.E.2d 215 (1997).

**Offers of Proof Properly Considered.** — Commission properly considered offers of proof included in the record since offers of proof are part of the official record under § 150B-37(a)(2) and not "new evidence" violative of subsection (a) of this section. *Everhart & Assocs. v. Department of Env't, Health & Natural Resources*, 127 N.C. App. 693, 493 S.E.2d 66 (1997), cert. denied, 347 N.C. 575, 502 S.E.2d 590 (1998).

**Applied in Johnson v. Division of Social Servs.**, 89 N.C. App. 481, 366 S.E.2d 538 (1988); *Meyers v. Department of Human Resources*, 92 N.C. App. 193, 374 S.E.2d 280 (1988); *Wilson v. State Residence Comm.*, 92 N.C. App. 355, 374 S.E.2d 415 (1988); *Uicker v. North Carolina State Bd. of Dental Exmrs.*, 93 N.C. 295, 378 S.E.2d 45 (1989); *Cameron v. North Carolina State Bd. of Dental Exmrs.*, 95 N.C. App. 332, 382 S.E.2d 864 (1989); *Boston v. North Carolina Private Protective Servs. Bd.*, 96 N.C. App. 204, 385 S.E.2d 148 (1989); *Cowan v. North Carolina Private Protective Servs. Bd.*, 98 N.C. App. 498, 391 S.E.2d 217 (1990); *Gadson v. North Carolina Mem. Hosp.*, 99 N.C. App. 169, 392 S.E.2d 618 (1990); *Huntington Manor v. North Carolina Dep't of Human Resources*, 99 N.C. App. 52, 393 S.E.2d 104 (1990); *Evans v. North Carolina Dep't of Crime Control & Pub. Safety*, 101 N.C. App. 108, 398 S.E.2d 880 (1990); *McKoy v. Department of Human Resources*, 101 N.C. App. 356, 399 S.E.2d 382 (1991); *Jarrett v. North Carolina Dep't of Cultural Resources*, 101 N.C. App. 475, 400 S.E.2d 66 (1991); *Brooks v. Austin Berryhill Fabricators, Inc.*, 102 N.C. App. 212, 401 S.E.2d 795 (1991); *Cramer Mt. Country Club & Properties, Inc. v. North Carolina Dep't of Natural Resources & Community Dev., Div. of Land Resources*, 102 N.C. App. 236, 401 S.E.2d 851 (1991); *GMC v. Carolina Truck & Body Co.*, 102 N.C. App. 349, 402 S.E.2d 139 (1991); *North Carolina DOT v. Davenport*, 102 N.C. App. 476, 402 S.E.2d 477 (1991); *Ford v. North Carolina Dep't of Env't, Health, & Natural Resources*, 107 N.C. App. 192, 419 S.E.2d 204 (1992); *Teague v. Western Carolina Univ.*, 108 N.C. App. 689, 424 S.E.2d 684 (1993); *In re E.I. DuPont de Nemours & Co.*, 109 N.C. App. 435, 428 S.E.2d 195 (1993);

*Ellis v. North Carolina Crime Victims Comp. Comm'n*, 111 N.C. App. 157, 432 S.E.2d 160 (1993); *Chesapeake Microfilm, Inc. v. North Carolina Dep't of Env't, Health & Natural Resources*, 111 N.C. App. 737, 434 S.E.2d 218 (1993), appeal dismissed, cert. denied, 335 N.C. 768, 442 S.E.2d 511, aff'd per curiam, 337 N.C. 797, 448 S.E.2d 514 (1994); *King v. North Carolina Env'tl. Mgt. Comm'n*, 112 N.C. App. 813, 436 S.E.2d 865 (1993); *Fain v. State Residence Comm.*, 117 N.C. App. 541, 451 S.E.2d 663 (1995); *Williams v. North Carolina Dep't of Economic & Community Dev.*, 119 N.C. App. 535, 458 S.E.2d 750 (1995); *In re Ramseur*, 120 N.C. App. 521, 463 S.E.2d 254 (1995); *Walker v. Board of Trustees*, 348 N.C. 63, 499 S.E.2d 429 (1998); *Wright v. Blue Ridge Area Auth.*, 134 N.C. App. 668, 518 S.E.2d 772 (1999), cert. denied, 351 N.C. 122, 541 S.E.2d 472 (1999); *Burke Health Investors, L.L.C. v. North Carolina Dep't of Human Resources*, 135 N.C. App. 568, 522 S.E.2d 96 (1999); *Johnston Health Care Ctr., L.L.C. v. North Carolina Dep't of Human Res.*, 136 N.C. App. 307, 524 S.E.2d 352 (2000); *Christenbury Surgery Ctr. v. North Carolina Health & Human Servs.*, 138 N.C. App. 309, 531 S.E.2d 219 (2000); *Living Centers-Southeast, Inc. v. North Carolina Health & Human Servs.*, 138 N.C. App. 572, 532 S.E.2d 192 (2000).

**Quoted** in *North Buncombe Ass'n of Concerned Citizens v. Rhodes*, 100 N.C. App. 24, 394 S.E.2d 462 (1990), appeal dismissed, 327 N.C. 484, 397 S.E.2d 215 (1990); *Cafiero v. North Carolina Bd. of Nursing*, 102 N.C. App. 610, 403 S.E.2d 582 (1991); *Harding v. North Carolina Dep't of Cor.*, 106 N.C. App. 350, 416 S.E.2d 587 (1992); *Best v. North Carolina State Bd. of Dental Exmrs.*, 108 N.C. App. 158, 423 S.E.2d 330 (1992); *Professional Food Servs. Mgt., Inc. v. North Carolina Dep't of Admin.*, 109 N.C. App. 265, 426 S.E.2d 447 (1993); *Clay v. Employment Sec. Comm'n*, 111 N.C. App. 599, 432 S.E.2d 873 (1993); *In re McCrary*, 112 N.C. App. 161, 435 S.E.2d 359 (1993); *Beaufort County Schs. v. Roach*, 114 N.C. App. 330, 443 S.E.2d 339, cert. denied, 336 N.C. 602, 447 S.E.2d 384, 513 U.S. 989, 115 S. Ct. 486, 130 L. Ed. 2d 398 (1994); *Eury v. North Carolina Emp. Sec. Comm'n*, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994); *White v. North Carolina Dep't of Cor.*, 117 N.C. App. 521, 451 S.E.2d 876 (1995); *Gainey v. North Carolina Dep't of Justice*, 121 N.C. App. 253, 465 S.E.2d 36 (1996); *Presbyterian-Orthopaedic Hosp. v. North Carolina Dep't of Human Resources*, 122 N.C. App. 529, 470 S.E.2d 831 (1996); *Beneficial N.C., Inc. v. State ex rel. N.C. State Banking Comm'n*, 126 N.C. App. 117, 484 S.E.2d 808 (1997); *Dialysis Care of N.C., LLC v. Department of Health & Human Servs.*, 137 N.C. App. 638, 529 S.E.2d 257 (2000), aff'd, 353 N.C. 258, 538 S.E.2d 566

(2000); *Williams v. North Carolina Dep't of Env't & Natural Resources*, 144 N.C. App. 479, 548 S.E.2d 793 (2001).

**Stated** in *Conservation Council v. Haste*, 102 N.C. App. 411, 402 S.E.2d 447 (1991); *Pamlico Tar River Found., Inc. v. Coastal Resources Comm'n*, 103 N.C. App. 24, 404 S.E.2d 167 (1991); *In re Cobb*, 102 N.C. App. 466, 402 S.E.2d 475; *Correll v. Division of Social Servs.*, 103 N.C. App. 562, 406 S.E.2d 633 (1991); *Urback v. East Carolina Univ.*, 105 N.C. App. 605, 414 S.E.2d 100 (1992); *Vass v. Board of Trustees*, 108 N.C. App. 251, 423 S.E.2d 796 (1992); *Air-A-Plane Corp. v. North Carolina Dep't of Env't*, 118 N.C. App. 118, 454 S.E.2d 297 (1995); *In re Ramseur*, 139 N.C. App. 442, 533 S.E.2d 295 (2000).

**Cited** in *Charter Pines Hosp. v. North Carolina Dep't of Human Resources*, 83 N.C. App. 161, 349 S.E.2d 639 (1986); *Harris v. Flaherty*, 90 N.C. App. 110, 367 S.E.2d 364 (1988); *In re Medical Ctr.*, 91 N.C. App. 107, 370 S.E.2d 597 (1988); *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 324 N.C. 373, 379 S.E.2d 30 (1989); *Brooks v. Dover Elevator Co.*, 94 N.C. App. 139, 379 S.E.2d 707 (1989); *Taborn v. Hammonds*, 324 N.C. 546, 380 S.E.2d 513 (1989); *In re Coastal Resources Comm'n*, 96 N.C. App. 502, 386 S.E.2d 92 (1989); *White v. North Carolina State Bd. of Exmrs. of Practicing Psychologists*, 97 N.C. App. 144, 388 S.E.2d 148 (1990); *Gummels v. North Carolina Dep't of Human Resources*, 97 N.C. App. 245, 388 S.E.2d 223 (1990); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Tay v. Flaherty*, 100 N.C. App. 51, 394 S.E.2d 217 (1990); *Woodlief v. North Carolina State Bd. of Dental Exmrs.*, 104 N.C. App. 52, 407 S.E.2d 596 (1991); *In re Freeman*, 109 N.C. App. 100, 426 S.E.2d 100 (1993); *Brooks v. BCF Piping, Inc.*, 109 N.C. App. 26, 426 S.E.2d 282 (1993); *In re Huang*, 110 N.C. App. 683, 431 S.E.2d 541 (1993); *McCullough v. North Carolina State Bd. of Dental Exmrs.*, 111 N.C. App. 186, 431 S.E.2d 816 (1993); *Davis v. North Carolina Dep't of Human Resources*, 110 N.C. App. 730, 432 S.E.2d 132 (1993); *Harding v. North Carolina Dep't of Cor.*, 334 N.C. 414, 432 S.E.2d 298 (1993); *Cauthen v. North Carolina Dep't of Human Resources*, 112 N.C. App. 238, 435 S.E.2d 81 (1993); *Davenport v. North Carolina DOT*, 3 F.3d 89 (4th Cir. 1993); *Amanini v. N.C. Dep't of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994); *Elliot ex rel. Casstevens v. Department of Human Resources*, 115 N.C. App. 613, 446 S.E.2d 809, aff'd, 341 N.C. 191, 459 S.E.2d 273 (1995); *Laurel Wood of Henderson, Inc. v. North Carolina Dep't of Human Resources*, 117 N.C. App. 601, 452 S.E.2d 334 (1995); *Ritter v. Department of Human Resources*, 118 N.C. App. 564, 455 S.E.2d 901 (1995); *Rusher v. Tomlinson*, 119

N.C. App. 458, 459 S.E.2d 285 (1995), *aff'd*, 343 N.C. 119, 468 S.E.2d 57 (1996); *North Carolina Dep't of Cors. v. Myers*, 120 N.C. App. 437, 462 S.E.2d 824 (1995); *Cates v. North Carolina Dep't of Justice*, 121 N.C. App. 243, 465 S.E.2d 64 (1996), modified and *aff'd*, 346 N.C. 781, 487 S.E.2d 723 (1997); *Cape Fear Mem. Hosp. v. North Carolina Dep't of Human Resources*, 121 N.C. App. 492, 466 S.E.2d 299 (1996); *Fuqua v. Rockingham County Bd. of Social Servs.*, 125 N.C. App. 66, 479 S.E.2d 273 (1996); *Yates Constr. Co. v. Commissioner of Labor*, 126 N.C. App. 147, 484 S.E.2d 430 (1997); *Bellsouth Telecommunications, Inc. v. North Carolina Dep't of Revenue*, 126 N.C. App. 409, 485 S.E.2d 333 (1997); *McHugh v. North Carolina Dep't of Env'tl., Health & Natural Resources*, 126 N.C. App. 469, 485 S.E.2d 861 (1997); *Elliott v. North Carolina Psychology Bd.*, 126 N.C. App. 453, 485 S.E.2d 882 (1997), *rev'd* on other grounds, 348 N.C. 230, 498 S.E.2d 616 (1998); *Andrews v. Crump*, 984 F. Supp. 393 (W.D.N.C. 1996); *McHugh v. North Carolina Dep't of Env'tl., Health & Natural Resources*, 126 N.C. App. 469, 485 S.E.2d 861 (1997); *Norman v. Cameron*, 127 N.C. App. 44, 488 S.E.2d 297 (1997), *cert. denied*, 347 N.C. 398, 494 S.E.2d 416 (1997); *Dew v. State ex rel. N.C. DMV*, 127 N.C. App. 309, 488 S.E.2d 836 (1997); *Elliott v. North Carolina Psychology Bd.*, 348 N.C. 230, 498 S.E.2d 616 (1998); *Britt v. North Carolina Sheriffs' Educ. & Training Stds. Comm'n*, 348 N.C. 573, 501 S.E.2d 75 (1998); *Hubbard v. State Constr. Office*, 130 N.C. App. 254, 502 S.E.2d 652 (1998), *cert. denied*, 349 N.C. 230, 515 S.E.2d 704 (1998), *cert. denied*, 349 N.C. 358, — S.E.2d — (1998); *Darryl Burke Chevrolet, Inc. v. Aikens*, 131 N.C. App. 31, 505 S.E.2d 581 (1998), *aff'd*, 350 N.C. 83, 511 S.E.2d 639 (1999); *D.G. Matthews & Son v. State ex rel. McDevitt*, 131 N.C. App. 520, 508 S.E.2d 331 (1998); *North Carolina State Bar v. Barrett*, 132 N.C. App. 110, 511 S.E.2d 15 (1999); *Avant v. Sandhills Ctr. for Mental Health, Dev. Disabilities & Substance Abuse Servs.*, 132 N.C. App. 542, 513 S.E.2d 79 (1999); *Wallace v. Board of Trustees*, — N.C. App. —, 550 S.E.2d 552, 2001 N.C. App. LEXIS 650 (2001).

## II. EXCEEDING STATUTORY AUTHORITY OR JURISDICTION.

**Prohibitions in Former § 150A-51(2) and (3) Distinguished.** — The prohibition against agency action “in excess of statutory authority” in former § 58-9.6(b)(2) (now § 58-2-90(b)(2)) and subdivision (2) of former § 150A-51 refers to the general authority of an administrative agency properly to discharge its statutorily assigned responsibilities, while the prohibition against agency action “made upon unlawful

procedure” in former § 58-9.6(b)(3) (now § 58-2-90(b)(3)) and subdivision (3) of former § 150A-51 refers to the procedures employed by the agency in discharging its statutorily authorized acts. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

**Order Not In Excess of Statutory Powers.** — An order of the Commissioner of Insurance that data submitted in a ratemaking case be audited was not in excess of his statutory powers as contemplated by former § 58-9.6(b)(2) (now § 58-2-90(b)(2)) or subdivision (2) of former § 150A-51. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

### Assessment Based upon Penalty Factors Reasonably Related to Act's Enforcement.

— Department's assessment was not based upon the secretary's “absolute” discretion, but instead upon numerous penalty factors reasonably related to the act's administration and enforcement, which resulted in a fair and reasoned penalty assessment. *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 92 N.C. App. 1, 373 S.E.2d 572 (1988), *rev'd* on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

### Exceeding Authority Did Not Prejudice Competitor.

— While the Department of Health and Human Services technically exceeded its authority and jurisdiction and committed errors of law by awarding a certificate of need to establish a new dialysis center on the basis of an application that was never shown to be conforming to all applicable criteria, its actions did not prejudice the applicant's competitor because the alleged mistakes and omissions, made under a settlement agreement, were corrected by final agency decision. *Bio-Medical Applications of N.C., Inc. v. North Carolina Dep't of Human Resources*, 136 N.C. App. 103, 523 S.E.2d 677 (1999).

## III. UNLAWFUL PROCEDURE.

### Attempt to Establish Rule Violated Former § 150A-51(3).

— Attempt by Commissioner of Insurance to establish a rule requiring audited data in an insurance ratemaking hearing was “made upon unlawful procedure” as contemplated by former § 58-9.6(b) (3) (now § 58-2-90(b)(3)) and subdivision (3) of former § 150A-51, where the Commissioner sought to establish the rule on an ad hoc adjudication basis rather than following normal North Carolina Administrative Procedure Act rulemaking requirements, since the process of rulemaking would have presented no danger that its use would frustrate the effective accomplishment of the agency's functions. *State ex rel. Comm'r of*

*Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

**Verification Procedure Unsupported by Federal Regulations Violated Subdivision (b)(3).** — Federal regulations govern verification of information concerning a food stamp recipient by a State agency. And thus where the verification procedure used by a county was unsupported by the federal regulations, it was in violation of subdivision (b)(3) of this section. *Tay v. Flaherty*, 90 N.C. App. 346, 368 S.E.2d 403, cert. denied, 323 N.C. 370, 373 S.E.2d 556 (1988).

#### IV. "WHOLE RECORD" TEST.

**Whole Record Test Retained.** — Although the 1985 amendment of former § 150A-51 deleted the phrase "in view of the entire record as submitted," the amendment maintained the whole record test for judicial review under the Administrative Procedure Act. In *re K-mart Corp.*, 319 N.C. 378, 354 S.E.2d 468 (1987), decided prior to 1987 amendment which reinserted the phrase "in view of the entire record as submitted"; *Bashford v. North Carolina Licensing Bd.*, 107 N.C. App. 462, 420 S.E.2d 466 (1992).

**Function of "Whole Record" Test.** — The "whole record" test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence. *North Carolina Dep't of Cor. v. Gibson*, 58 N.C. App. 241, 293 S.E.2d 664 (1982), *rev'd* on other grounds, 308 N.C. 131, 301 S.E.2d 78 (1983).

**"Whole Record" Test.** — In reviewing an agency's decision, the superior court applies the "whole record" test, which requires the examination of all competent evidence to determine if the administrative agency's decision is supported by substantial evidence. *Rector v. North Carolina Sheriffs' Educ. & Training Stds. Comm'n*, 103 N.C. App. 527, 406 S.E.2d 613 (1991).

The whole record test is applied when determining whether a decision is arbitrary and capricious. *Rector v. North Carolina Sheriffs' Educ. & Training Stds. Comm'n*, 103 N.C. App. 527, 406 S.E.2d 613 (1991).

The applicable scope of review is the "whole record" test. When the test is applied, the reviewing court is required to take into account all of the evidence, including that which supports the findings and contradictory evidence. *Crowell Constructors, Inc. v. North Carolina Dep't of Env't, Health & Natural Resources*, 107 N.C. App. 716, 421 S.E.2d 612 (1992), cert. denied, 333 N.C. 343, 426 S.E.2d 704 (1993).

**"Whole Record" Test Inappropriate** — The trial court erred in applying the "Whole

Record" test where the appellant/ex-police officer alleged that the appellee/civil service board incorrectly applied the law in terminating his employment. The trial court was required to review that decision "de novo." *Jordan v. Charlotte Civil Serv. Bd.*, 137 N.C. App. 575, 528 S.E.2d 927 (2000).

**"Substantial Evidence" Defined.** — Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is more than a scintilla or a permissible inference. *Lackey v. North Carolina Dep't of Human Resources*, 306 N.C. 231, 293 S.E.2d 171 (1982).

Substantial evidence is that which a reasonable mind would regard as adequately supporting a particular conclusion. *Walker v. North Carolina Dep't of Human Resources*, 100 N.C. App. 498, 397 S.E.2d 350 (1990), cert. denied, 328 N.C. 98, 402 S.E.2d 430 (1991).

**Standard of judicial review set forth in former § 150A-51(5) is known as the "whole record" test** and must be distinguished from both de novo review and the "any competent evidence" standard of review. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538 (1977); *North Carolina A & T Univ. v. Kimber*, 49 N.C. App. 46, 270 S.E.2d 492 (1980); *Overton v. Goldsboro City Bd. of Educ.*, 51 N.C. App. 303, 276 S.E.2d 458, *aff'd*, 304 N.C. 312, 283 S.E.2d 495 (1981); *Dailey v. North Carolina State Bd. of Dental Exmrs.*, 60 N.C. App. 441, 299 S.E.2d 473, *rev'd* on other grounds, 309 N.C. 710, 309 S.E.2d 219 (1983); *Burrow v. Randolph County Bd. of Educ.*, 61 N.C. App. 619, 301 S.E.2d 704 (1983); *Faulkner v. New Bern-Craven County Bd. of Educ.*, 65 N.C. App. 483, 309 S.E.2d 548 (1983), *rev'd* on other grounds, 311 N.C. 42, 316 S.E.2d 281 (1984); *Goodwin v. Goldsboro City Bd. of Educ.*, 67 N.C. App. 243, 312 S.E.2d 892 (1984).

As distinguished from the "any competent evidence" test and a de novo review, the "whole record" test "gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Bennett v. Hertford County Bd. of Educ.*, 69 N.C. App. 615, 317 S.E.2d 912, cert. denied, 312 N.C. 81, 321 S.E.2d 893 (1984).

In reviewing an administrative decision to determine whether the decision is supported by substantial evidence, the appellate court must apply the "whole record" test. *Leiphart v. North Carolina School of Arts*, 80 N.C. App. 339, 342 S.E.2d 914, cert. denied, 318 N.C. 507, 349 S.E.2d 862 (1986), decided under former § 150A-51.

In determining whether reversal or modification of an administrative decision is appropriate under former § 150A-51(5), the test applied to the evidence must be the "whole record" test. *Community Sav. & Loan Ass'n v. North Caro-*

lina Sav. & Loan Comm'n, 43 N.C. App. 493, 259 S.E.2d 373 (1979).

**Court Must Consider All Evidence.** — The applicable scope of review of the decision of an administrative agency is the "whole record" test. In applying the whole record test, the court must consider all the evidence, including that which supports the findings and contradictory evidence. *Mount Olive Home Health Care Agency, Inc. v. N.C. Dep't of Human Resources*, 78 N.C. App. 224, 336 S.E.2d 625 (1985).

The "whole record" test requires the court to take into account all the evidence, both that which supports the decision of the Commission and that which in fairness detracts from it. *Leiphart v. North Carolina School of Arts*, 80 N.C. App. 339, 342 S.E.2d 914, cert. denied, 318 N.C. 507, 349 S.E.2d 862 (1986).

Court of Appeals review of an administrative agency's decision is governed by the Administrative Procedure Act, and court may reverse or modify the agency's decision only if it violates one of five statutory grounds. Court will determine if the agency's findings, inferences, conclusions, or decisions are affected by error of law or unsupported by substantial evidence admissible under §§ 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted. *North Carolina Dep't of Cor. v. Hodge*, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

**And Must Examine the "Whole Record" to Determine If Substantial Evidence Supports Agency's Decision.** — The reviewing court is required to examine all of the competent evidence, pleadings, etc., which comprise the "whole record" to determine if there is substantial evidence in the record to support the administrative tribunal's findings and conclusions. *Community Sav. & Loan Ass'n v. North Carolina Sav. & Loan Comm'n*, 43 N.C. App. 493, 259 S.E.2d 373 (1979); *Henderson v. North Carolina Dep't of Human Resources*, 91 N.C. App. 527, 372 S.E.2d 887 (1988).

To determine whether an agency's findings are supported by substantial evidence, the reviewing court applies the "whole record" test. *Employment Sec. Comm'n v. Peace*, 122 N.C. App. 313, 470 S.E.2d 63 (1996), review granted, 345 N.C. 640, 483 S.E.2d 706 (1997).

**Including Contradictory and Conflicting Evidence.** — The "whole record" rule set forth in former § 150A-51(5) requires the court, in determining the substantiality of evidence supporting the board's decision, to take into account whatever in the record fairly detracts from the weight of the board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538 (1977); *Chesnutt*

*v. Peters*, 300 N.C. 359, 266 S.E.2d 623 (1980); *McCormick v. Peters*, 48 N.C. App. 365, 269 S.E.2d 168 (1980); *North Carolina A & T Univ. v. Kimber*, 49 N.C. App. 46, 270 S.E.2d 492 (1980); *In re Land & Mineral Co.*, 49 N.C. App. 608, 272 S.E.2d 878 (1980), cert. denied, 302 N.C. 397, 279 S.E.2d 351 (1981); *Overton v. Goldsboro City Bd. of Educ.*, 51 N.C. App. 303, 276 S.E.2d 458, aff'd, 304 N.C. 312, 283 S.E.2d 495 (1981); *North Carolina Dep't of Cor. v. Gibson*, 58 N.C. App. 241, 293 S.E.2d 664 (1982); *Faulkner v. New Bern-Craven County Bd. of Educ.*, 65 N.C. App. 483, 309 S.E.2d 548 (1983), rev'd on other grounds, 311 N.C. 42, 316 S.E.2d 281 (1984); *Crump v. Board of Educ.*, 79 N.C. App. 372, 339 S.E.2d 483, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

Consideration of the sufficiency of the evidence to support a decision under the "whole record" test does not allow the Supreme Court to replace the agency's judgment where there are two reasonably conflicting views. However, the Supreme Court is required to take into account the evidence supporting the agency's decision as well as the evidence that detracts from the weight of that evidence and its decision. *In re Broad & Gales Creek Community Ass'n*, 300 N.C. 267, 266 S.E.2d 645 (1980).

The "whole record" test properly takes into account the specialized expertise of the staff of an administrative agency, and thus does not allow the reviewing court to substitute its own judgment for that of the agency. It does require, however, that the court take into account evidence in the record which fairly detracts from the weight of the evidence the agency relied upon to make its decision. *High Rock Lake Ass'n v. North Carolina Envtl. Mgt. Comm'n*, 51 N.C. App. 275, 276 S.E.2d 472 (1981).

**And Testimony of All Witnesses.** — Under the whole record test, judge reviewing an administrative decision must consider the complete testimony of all the witnesses. *In re Environmental Mgt. Comm'n*, 53 N.C. App. 135, 280 S.E.2d 520 (1981).

The reviewing court must take into account contradictory evidence or evidence from which conflicting inferences could be drawn and determine whether the administrative decision had a rational basis in the evidence. *Henderson v. North Carolina Dep't of Human Resources*, 91 N.C. App. 527, 372 S.E.2d 887 (1988).

**Judgment Held to Meet Requirements of Section.** — Where the judgment recited that the court had reviewed the record and matters on file and had considered the oral arguments and relevant statutory provisions, and based on these considerations, the judge concluded that declaratory ruling was not erroneous as a matter of law and was due to be affirmed, the judgment met all the requirements of this section and was clearly sufficient as a matter of law. *Shepherd v. Consolidated Judicial Retire-*

ment Sys., 89 N.C. App. 560, 366 S.E.2d 604 (1988).

The trial court applied the “whole record test,” the correct standard of review, to determine the sufficiency of the evidence, thus, no further findings were necessary where the court determined that the Real Estate Commission properly refused to license an applicant on the basis that he did not possess the requisite integrity because he had been convicted of soliciting a crime against nature. *Hodgkins v. North Carolina Real Estate Comm’n*, 130 N.C. App. 626, 504 S.E.2d 789 (1998).

**Insufficiency of an agency’s findings does not relieve trial court of responsibility for considering all competent evidence** in the whole record to determine whether substantial evidence is present to support the commission’s conclusions. *Community Sav. & Loan Ass’n v. North Carolina Sav. & Loan Comm’n*, 43 N.C. App. 493, 259 S.E.2d 373 (1979).

**Conflicting Evidence.** — When evidence is conflicting, the standard for judicial review of administrative decisions is that of the “whole record” test. *State ex rel. Comm’r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980); *Lackey v. North Carolina Dep’t of Human Resources*, 306 N.C. 231, 293 S.E.2d 171 (1982).

The “whole record” test does not allow the reviewing court to replace the board’s judgment as between two reasonable conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. *Wilkie v. North Carolina Wildlife Resources Comm’n*, 118 N.C. App. 475, 455 S.E.2d 871 (1995).

**The whole record test is not a tool of judicial intrusion;** instead it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence. Thus, the task before the trial court is to consider all the evidence, both that which supports the decision of the board and that which detracts from it. *Goodwin v. Goldsboro City Bd. of Educ.*, 67 N.C. App. 243, 312 S.E.2d 892, cert. denied, 311 N.C. 304, 317 S.E.2d 680 (1984).

The “whole record” test is not a tool of judicial intrusion and the court is not permitted to replace the agency’s judgment with its own even though the court might rationally justify reaching a different conclusion. *Floyd v. North Carolina Dep’t of Commerce*, 99 N.C. App. 125, 392 S.E.2d 660 (1990).

**The “whole record” standard of review is not intended to encourage “judicial duplication” of administrative decision-making.** *Watson v. North Carolina Real Estate Comm’n*, 87 N.C. App. 637, 362 S.E.2d 294

(1987), cert. denied, 321 N.C. 746, 365 S.E.2d 296 (1988).

**Mathematically Inconsistent Testimony.** — Commissioner’s derived figure for underwriting profit would not be based on “substantial evidence” if it relied on mathematically inconsistent testimony. *State ex rel. Comm’r of Ins. v. North Carolina Rate Bureau*, 96 N.C. App. 220, 385 S.E.2d 510 (1989).

**Court May Not Replace Agency’s Judgment with Its Own.** — The “whole record” test set forth in subdivision (5) of former § 150A-51 does not allow the reviewing court to replace the board’s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538 (1977); *Chesnutt v. Peters*, 300 N.C. 359, 266 S.E.2d 623 (1980); *North Carolina A & T Univ. v. Kimber*, 49 N.C. App. 46, 270 S.E.2d 492 (1980); *Overton v. Goldsboro City Bd. of Educ.*, 51 N.C. App. 303, 276 S.E.2d 458, aff’d, 304 N.C. 312, 283 S.E.2d 495 (1981); *Faulkner v. New Bern-Craven County Bd. of Educ.*, 65 N.C. App. 483, 309 S.E.2d 548 (1983), rev’d on other grounds, 311 N.C. 42, 316 S.E.2d 281 (1984); *Crump v. Board of Educ.*, 79 N.C. App. 372, 339 S.E.2d 483, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

The “whole record” test is distinguishable from both *de novo* review and the “any competent evidence” standard of review. Under the “whole record” test, the reviewing court cannot replace the board’s judgment between two reasonably conflicting views, even though the court could have reached a different conclusion had the matter been before it *de novo*. *Boehm v. North Carolina Bd. of Podiatry Exmrs.*, 41 N.C. 567, 255 S.E.2d 328, cert. denied, 298 N.C. 294, 259 S.E.2d 298 (1979); *North Carolina Dep’t of Cor. v. Gibson*, 58 N.C. App. 241, 293 S.E.2d 664 (1982), rev’d on other grounds, 308 N.C. 131, 301 S.E.2d 78 (1983).

The whole record test does not allow the reviewing court to replace the board’s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been heard before it *de novo*. *Community Sav. & Loan Ass’n v. North Carolina Sav. & Loan Comm’n*, 43 N.C. App. 493, 259 S.E.2d 373 (1979); *Dailey v. North Carolina State Bd. of Dental Exmrs.*, 60 N.C. App. 441, 299 S.E.2d 473, rev’d on other grounds, 309 N.C. 710, 309 S.E.2d 219 (1983); *Meads v. North Carolina Dep’t of Agric.*, 349 N.C. 656, 509 S.E.2d 165 (1998).

No court may weigh evidence presented to the State board and substitute its evaluation of the evidence for that of the board. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E.2d 752 (1975); *North Carolina Dep’t of Cor. v. Gibson*,

58 N.C. App. 241, 293 S.E.2d 664 (1982), rev'd on other grounds, 308 N.C. 131, 301 S.E.2d 78 (1983).

The mere existence of conflicting evidence does not permit the reviewing court to weigh the evidence and substitute its determination for that of the administrative agency. The credibility of the witnesses and the resolution of conflicts in their testimony is a matter for the agency, not a reviewing court. *Dailey v. North Carolina State Bd. of Dental Exmrs.*, 60 N.C. App. 441, 299 S.E.2d 473, rev'd on other grounds, 309 N.C. 710, 309 S.E.2d 219 (1983).

The whole record test does not allow the reviewing court to replace the board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo. On the other hand, the whole record rule requires the court, in determining the substantiality of evidence supporting the board's decision, to take into account whatever in the record fairly detracts from the weight of the board's evidence. *Goodwin v. Goldsboro City Bd. of Educ.*, 67 N.C. App. 243, 312 S.E.2d 892, cert. denied, 311 N.C. 304, 317 S.E.2d 680 (1984).

The "whole record" test does not permit the reviewing court to substitute its judgment for the agency's as between two reasonably conflicting views; however, it does require the court to take into account both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached. *Floyd v. North Carolina Dep't of Commerce*, 99 N.C. App. 125, 392 S.E.2d 660 (1990).

In applying the whole record test, reasonable but conflicting views emerge from the evidence, the Court of Appeals cannot replace the agency's judgment with its own. It must, however, take into account whatever in the record fairly detracts from the weight of the evidence which supports the decision. Ultimately it must determine whether the decision has a rational basis in the evidence. *GMC v. Kinlaw*, 78 N.C. App. 521, 338 S.E.2d 114 (1985); *In re Kozy*, 91 N.C. App. 342, 371 S.E.2d 778 (1988), cert. denied, 299 N.C. 736, 267 S.E.2d 672 (1980).

The reviewing court may reverse or modify an agency's decision if the substantial rights of the petitioner may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are unsupported by substantial evidence in view of the entire record as submitted; this standard, the "whole record" test, does not allow the reviewing court to replace the agency's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo. *Mendenhall v. North Carolina Dep't of Human Resources*, 119 N.C. App. 644, 459 S.E.2d 820 (1995).

The whole record test does not permit a reviewing court to replace the Disciplinary Hearing Commission's judgment as between two reasonably conflicting views, even though the court may have justifiably reached a different decision. *North Carolina State Bar v. Maggiolo*, 124 N.C. App. 22, 475 S.E.2d 727 (1996).

**Weight and Sufficiency of Evidence.** — It is for the administrative agency to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

**Agency's Findings of Fact Supported by Competent Evidence Are Conclusive.** — The law of this State regarding the respective roles of the administrative agency and the reviewing court concerning conflicting evidence is premised on the notion that the credibility of the witnesses and the resolution of conflicts in their testimony is for the agency, not a reviewing court, and the findings of the agency supported by competent evidence, are conclusive upon judicial review of the agency's order. *Dailey v. North Carolina State Bd. of Dental Exmrs.*, 60 N.C. App. 441, 299 S.E.2d 473, rev'd on other grounds, 309 N.C. 710, 309 S.E.2d 219 (1983).

When the judge of the superior court sits as an appellate court to review the decision of an administrative agency pursuant to this section, the findings of fact made by the administrative agency, if supported by competent, material and substantial evidence when viewed on the record as a whole, are conclusive upon the reviewing court. *North Carolina Dep't of Cor. v. Gibson*, 58 N.C. App. 241, 293 S.E.2d 664 (1982), rev'd on other grounds, 308 N.C. 131, 301 S.E.2d 78 (1983).

The administrative findings of fact made by the State Board of Opticians, if supported by competent, material and substantial evidence in view of the entire record, are conclusive upon a reviewing court, and not within the scope of its reviewing powers. *In re Berman*, 245 N.C. 612, 96 S.E.2d 836 (1957); *In re Hawkins*, 17 N.C. App. 378, 194 S.E.2d 540, cert. denied and appeal dismissed, 283 N.C. 393, 196 S.E.2d 275, cert. denied, 414 U.S. 1001, 94 S. Ct. 355, 38 L. Ed. 2d 237 (1973); *Faulkner v. North Carolina State Hearing Aid Dealers & Fitters Bd.*, 38 N.C. App. 222, 247 S.E.2d 668 (1978).

**And Court May Not Make Findings at Variance Therewith.** — Upon a review of an order of the Property Tax Commission, the superior court is without authority to make findings at variance with the findings of the board when the findings of the board are supported by competent, material and substantial

evidence. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E.2d 752 (1975). See also, *In re Property of Pine Raleigh Corp.*, 258 N.C. 398, 128 S.E.2d 855 (1963); *In re Appeal of Reeves Broadcasting Corp.*, 273 N.C. 571, 160 S.E.2d 728 (1968).

Where the superior court, at the instance of appellant, found additional facts which the Tax Review Board had, although requested, refused to make, the court, in making these findings, weighed the evidence and substituted its evaluation of the evidence for that of the Board, and in so doing it exceeded its right of review. *Clark Equip Co. v. Johnson*, 261 N.C. 269, 134 S.E.2d 327 (1964).

The court cannot substitute its judgment for that of the State Board of Opticians in making findings of fact. *In re Berman*, 245 N.C. 612, 96 S.E.2d 836 (1957).

**When Court May Make Findings at Variance with Agency's.** — Where the reviewing court determines that the findings of the agency are not supported by substantial evidence, the court may make findings of variance with those of the agency. *Scroggs v. North Carolina Criminal Justice Educ. & Training Stds. Comm'n*, 101 N.C. App. 699, 400 S.E.2d 742 (1991).

**Finding of Fact in Accordance with Uncontradicted Evidence.** — When an administrative body finds a fact in accordance with uncontradicted evidence, little remains for the reviewing court to do, other than to find no error in the administrative body's election to accord the necessary weight and credibility to the testimony. *North Carolina Dep't of Cor. v. Gibson*, 58 N.C. App. 241, 293 S.E.2d 664 (1982), *rev'd on other grounds*, 308 N.C. 131, 301 S.E.2d 78 (1983).

**Agency's Judgment Must Be Affirmed If Supported by Competent Evidence.** — The reviewing court, while obligated to consider evidence of record that detracts from the administrative ruling, is not free to weigh all of the evidence and reach its own conclusions on the merits. If, after all the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand. Substantial evidence in this context has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Dailey v. North Carolina State Bd. of Dental Exmrs.*, 60 N.C. App. 441, 299 S.E.2d 473, *rev'd on other grounds*, 309 N.C. 710, 309 S.E.2d 219 (1983).

The "whole record" test requires the board's judgment to be affirmed if upon consideration of the whole record as submitted, the facts found by the board are supported by competent, material and substantial evidence, taking into account any contradictory evidence, or evidence from which conflicting inferences could be drawn. *Boehm v. North Carolina Bd. of Podia-*

*try Exmrs.*, 41 N.C. App. 567, 255 S.E.2d 328, *cert. denied*, 298 N.C. 294, 259 S.E.2d 298 (1979).

The reviewing court, while obligated to consider evidence of record that detracts from the administrative ruling, is not free to weigh all of the evidence and reach its own conclusions of the merits. If, after the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand. *Community Sav. & Loan Ass'n v. North Carolina Sav. & Loan Comm'n*, 43 N.C. App. 493, 259 S.E.2d 373 (1979).

Agency findings of fact are conclusive if, upon review of the whole record, they are supported by competent, material, and substantial evidence. *Humana Hosp. Corp. v. North Carolina Dep't of Human Resources*, 81 N.C. App. 628, 345 S.E.2d 235 (1986).

**But May Be Reversed If Not So Supported.** — Upon review, the decision of the Board of Alcoholic Control may be reversed if substantial rights of the licensee are prejudiced by administrative findings, inferences, conclusions or decisions which are not supported by competent, material, and substantial evidence in view of the entire record as submitted. *Underwood v. State Bd. of Alcoholic Control*, 278 N.C. 623, 181 S.E.2d 1 (1971).

An agency decision may be reversed or modified if it is unsupported by substantial evidence, in view of the entire record as submitted. This standard of review is known as the "whole record" test. *GMC v. Kinlaw*, 78 N.C. App. 521, 338 S.E.2d 114 (1985).

Trial court properly reversed order of state board of elections ordering a new election based on the fact that it did not agree with the propriety of the county board's reliance on the affidavits of ineligible voters to show the effect of those votes on the outcome of the election, as the established law of the state holds that such testimony is proper. *In re Harper*, 118 N.C. App. 698, 456 S.E.2d 878 (1995).

**Findings of Fact by Judge Not Required.** — When the judge of the superior court sits as an appellate court to review the decision of an administrative agency pursuant to former § 150A-51, the judge is not required to make findings of fact. *Faulkner v. North Carolina State Hearing Aid Dealers and Fitters Bd.*, 38 N.C. App. 222, 247 S.E.2d 668 (1978).

**Findings Based on Unsworn Statement Not Authorized.** — Absent stipulations or waiver, a zoning board of adjustment may not base critical findings of fact as to the existence or nonexistence of a nonconforming use on unsworn statements. *Jarrell v. Board of Adjustment*, 258 N.C. 476, 128 S.E.2d 879 (1963).

**Applicability of "Whole Record" Test to Insurance Ratemaking Proceedings.** — The "whole record" test is applicable to judicial review of administrative decisions in North

Carolina, and both former § 58-9.6(b)(5) (now § 58-2-90(b)(5)) and former § 150A-51(5) put forth that test as a proper standard of judicial review of insurance ratemaking proceedings. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

**The superior court did not exceed the bounds of appropriate judicial review** by engaging in independent fact finding when it reversed the Commissioner of Motor Vehicle's decision upon a review of the whole record, upon finding that the findings of fact and conclusions of law set out by the Commissioner were unsupported by substantial evidence. *Star Auto. Co. v. Saab-Scania of Am., Inc.*, 84 N.C. App. 531, 353 S.E.2d 260 (1987).

**Record Devoid of Substantial Evidence.**

— Department of Human Resources erred in terminating spousal support where the record is clear that nursing home resident wanted his "money" but the record was devoid of any substantial evidence that he intended to apply all of his income, exceeding his personal needs allowance, to his nursing care, rather than towards the support of his wife. *English v. Britt*, 121 N.C. App. 320, 465 S.E.2d 48 (1996).

**Review of disciplinary hearing decisions** of the Disciplinary Hearing Commission is governed by the "whole record" test. *North Carolina State Bar v. Maggiolo*, 124 N.C. App. 22, 475 S.E.2d 727 (1996).

**V. ARBITRARY OR CAPRICIOUS FINDINGS, DECISIONS, ETC.**

**Infection of an agency decision by consideration of arbitrary and capricious matter is clearly violative of subdivision (6)** of former § 150A-51. *North Carolina A & T Univ. v. Kimber*, 49 N.C. App. 46, 270 S.E.2d 492 (1980).

**Where an employee has engaged in off-duty criminal conduct**, the agency need not show actual harm to its interests to demonstrate just cause for an employee's dismissal; however, it is well established that administrative agencies may not engage in arbitrary and capricious conduct. *Eury v. North Carolina Emp. Sec. Comm'n*, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994).

**Rational Nexus Required.** — In cases in which an employee has been dismissed based upon an act of off-duty criminal conduct, the agency must demonstrate that the dismissal is supported by the existence of a rational nexus between the type of criminal conduct committed and the potential adverse impact on the employee's future ability to perform for the agency. *Eury v. North Carolina Emp. Sec. Comm'n*, 115 N.C. App. 590, 446 S.E.2d 383,

cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994).

**Factors to Consider in Determining If a Nexus Exists.** — In determining whether a rational nexus exists between the type of off-duty criminal activity conducted by the employee and the employee's future ability to do his job, the Commission may consider the following factors: (1) how the conduct may have adversely affected clients or colleagues; (2) the relationship between the work performed by the employee and the type of criminal conduct committed; (3) the likelihood of recurrence of the questioned conduct and how the conduct may affect work performance, work quality, and the agency's goodwill and interests; (4) the proximity or remoteness in time of the conduct to the commencement of the disciplinary proceedings; (5) extenuating or aggravating circumstances; (6) the blameworthiness or praiseworthiness of the motives resulting in the conduct; and (7) the presence or absence of any relevant factors in mitigation. *Eury v. North Carolina Emp. Sec. Comm'n*, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994).

**"Whole Record" Standard of Review Applied.** — The "whole record" test is applied when the court considers whether an agency decision is arbitrary and capricious. *Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 372 S.E.2d 342 (1988).

**Action Held Arbitrary and Capricious.** — Where the Commissioner of Insurance did nothing more, in adopting a complicated and novel formula for determining underwriting profit, than listen to one employee of an insurance department in a sister state which was refining the policy adopted and which was given only limited approval by the Supreme Court of Massachusetts, his approach was a clear example of an arbitrary and capricious action by an administrative agency as contemplated by the North Carolina Legislature in establishing that criterion for judicial review in former § 58-9.6(b)(6) (now § 58-2-90(b)(6)) and subdivision (6) of former § 150A-51. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

Action of the Commissioner of Insurance ordering audited data in a ratemaking case was arbitrary and capricious, as contemplated by former § 58-9.6(b)(6) (now § 58-2-90(b)(6)) and subdivision (6) of former § 150A-51, where (1) The order was vague and uncertain in that it did not establish the extent to which examination of "original source documents" was required; (2) It did not make clear whether auditing must be performed by certified public accountants, other accountants, or actuaries; (3) It did not specify the degree of precision and

reliability required of "statistical sampling"; (4) It generally did not provide adequate guidelines for compliance with the general conclusion that data in a ratemaking hearing be audited; (5) It included no determination by the Commissioner as to the possibility of performance of his new rule nor whether implementation of the rule would be economically feasible; (6) It included no determination whether statutory time limits could be complied with in face of the new rule; and (7) It included no determination whether the "original source data" contemplated by the new rule was even available for the past years involved in this filing or whether such data, if available, was located in North Carolina or outside the State in the case of the several hundred companies writing insurance in this State. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, rehearing denied, 301 N.C. 107, 273 S.E.2d 300 (1980).

**School Board's Termination of Teacher Was Not an Abuse of Discretion.** — Where school board took into consideration the attribution rate, the qualifications, certification, evaluations and experience of teachers, and respondent had the lowest level of certification and the least amount of experience, the school board's determination to terminate respondent was not arbitrary, capricious or an abuse of discretion. *Taborn v. Hammonds*, 91 N.C. App. 302, 371 S.E.2d 736 (1988), rev'd on other grounds, 324 N.C. 546, 380 S.E.2d 513 (1989).

**State Personnel Commission abused its discretion** and lacked careful and impartial decisionmaking when it passed over personnel office employee and filled a vacant position with an applicant who did not meet state qualifications for the position and who had filed her application and had been effectively offered the job a month before it was posted. *Joyce v. Winston-Salem State Univ.*, 91 N.C. App. 153, 370 S.E.2d 866, cert. denied, 323 N.C. 476, 373 S.E.2d 862 (1988).

**Assessment of Penalty Held Not Arbitrary or Capricious.** — Where the penalty assessed by the Department of Natural Resources and Community Development (now the Department of Environment and Natural Resources) was within the statutory limits provided in § 113A-64, and the record evidenced the secretary's reasoned weighing of the penalty factors announced in 15 N.C. Adm. Code 4C.006, which were reasonably related to the act's administration and enforcement, the department's assessment of the monetary penalty in this case was not arbitrary and capricious. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

**Dismissal Held Not Arbitrary or Capricious.** — Department of Human Resource's dismissal of employee's appeal on grounds it was filed one day after the deadline was neither arbitrary or capricious where employee was informed of the time limits for perfecting appeal, offered assistance for complying with appeal procedures since legal representation was not allowed at that time of the proceeding, and employee's apparent justification for filing late was difficulty in retaining an attorney. *Lewis v. North Carolina Dep't of Human Resources*, 92 N.C. App. 737, 375 S.E.2d 712 (1989).

**Issuance of Injunction Requiring Insurance Commissioner to Act Upheld.** — The trial court did not exceed its power and authority by issuing its mandatory injunction requiring the Commissioner of Insurance to approve a domestic insurance corporation's plan to reorganize under a holding company structure where the Commissioner acted arbitrarily and capriciously when he disapproved the plan. *Occidental Life Ins. Co. v. Ingram*, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

**Showing Necessary to Obtain Relief from Valuations of Property for Taxation.** — In order to obtain relief from valuations upon their property by the State Board of Assessment (now the Property Tax Commission), appellant electric membership corporations must show that the methods used in determining true value were illegal and arbitrary, and that appellants were substantially injured by a resulting excessive valuation of their property. *Albemarle Elec. Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E.2d 811 (1972); *In re Land & Mineral Co.*, 49 N.C. App. 608, 272 S.E.2d 878 (1980), cert. denied, 302 N.C. 397, 279 S.E.2d 351 (1981).

It is only when the actions of the State Board of Assessment (now the Property Tax Commission) are found to be arbitrary and capricious that courts will interfere with tax assessments because of asserted violations of the due process clause. *Albemarle Elec. Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E.2d 811 (1972).

**Evidence Held Sufficient.** — There was substantial evidence in the record to support State Code Officials Qualification Board's findings and conclusions as to the revocation of petitioner's certificates based on Board's findings of several different violations of the N.C. Uniform Residential Building Code; many of the violations were plainly visible and should have been discovered by an inspection performed with ordinary care and prudence and many of the remaining violations, although less obvious or more technical, could have been discovered by an inspection performed with ordinary care and prudence. *Bunch v. North*

Carolina Code Officials Qualifications Bd., 119 N.C. App. 293, 468 S.E.2d 248 (1995), aff'd in part and rev'd in part, 343 N.C. 97, 468 S.E.2d 55 (1996).

## § 150B-52. Appeal; stay of court's decision.

A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in G.S. 7A-27. The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. In cases reviewed under G.S. 150B-51(c), the court's findings of fact shall be upheld if supported by substantial evidence. Pending the outcome of an appeal, an appealing party may apply to the court that issued the judgment under appeal for a stay of that judgment or a stay of the administrative decision that is the subject of the appeal, as appropriate. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1987, c. 878, s. 20; 2000-140, s. 94; 2000-190, s. 12.)

**Effect of Amendments.** — Session Laws 2000-140, s. 94, effective July 21, 2000, substituted "G.S. 150B-51(c)" for "G.S. 150B-51(a1)(3)" in this section as amended by Session Laws 2000-190, s. 12.

Session Laws 2000-190, s. 12, effective January 1, 2001, and applicable to contested cases commenced on or after that date, added the second and third sentences.

### CASE NOTES

**Editor's Note.** — *Most of the cases below were decided under corresponding provisions of former Chapter 150A and earlier statutes, or under this Chapter prior to the 1991 amendments thereto.*

**Scope of Appellate Review.** — The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. That is, it must be determined whether the trial court committed any errors of law. *American Nat'l Ins. Co. v. Ingram*, 63 N.C. App. 38, 303 S.E.2d 649, cert. denied, 309 N.C. 819, 310 S.E.2d 348 (1983); *Tay v. Flaherty*, 90 N.C. App. 346, 368 S.E.2d 403, cert. denied, 323 N.C. 370, 373 S.E.2d 556 (1988).

Under this section, the appellate court examines the trial court's order for error of law, determining whether the trial court exercised the appropriate scope of review and, if appropriate, deciding whether the court did so properly. *Eury v. North Carolina Emp. Sec. Comm'n*, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994).

When an appellate court reviews the decision of a lower court, (as opposed to when it reviews an administrative agency's decision on direct appeal), the scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. *Henderson v. North Carolina Dep't of Human Resources*, 91 N.C. App. 527, 372 S.E.2d 887 (1988).

The Court of Appeal's review of the superior court's determination under this section, is limited to whether the superior court made any errors in law in light of the record as a whole. *Scroggs v. North Carolina Criminal Justice*

*Educ. & Training Stds. Comm'n*, 101 N.C. App. 699, 400 S.E.2d 742 (1991).

Pursuant to this section, court review of a trial court's consideration of a final agency decision is to determine whether the trial court committed any errors of law which would be based upon its failure to properly apply the review standard set forth in § 150B-51. *Sherrod v. North Carolina Dep't of Human Resources*, 105 N.C. App. 526, 414 S.E.2d 50 (1992).

**Appellate Review of Improper Constitutional Consideration.** — Although the trial court improperly considered a constitutional issue, where that court vacated the Department of Natural Resources and Community Development's assessment based on an interpretation of N.C. Const., Art. IV, § 3, which the department properly challenged on appeal, the Court of Appeals would address that constitutional ground in the exercise of its supervisory jurisdiction. In *re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 92 N.C. App. 1, 373 S.E.2d 572, supersedeas allowed on reconsideration, 323 N.C. 625, 374 S.E.2d 873 (1988).

**Examination for Error — A Twofold Task.** — The appellate court should examine the trial court's order for error of law, which has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly. *Amanini v. N.C. Dep't of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994).

**Legal proceeding must be prosecuted by**

**a legal person**, whether it be a natural person who is sui juris or a group of individuals or other entity having the capacity to sue and be sued, such as a corporation, partnership, unincorporated association, or governmental body or agency. Even a class action must be prosecuted or defended by one or more named members of the class. A legal proceeding prosecuted by an aggregation of anonymous individuals, known only to their counsel, is a phenomenon unknown to the law of this jurisdiction. In re Coleman, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

**Rule that appeal to appellate division may be prosecuted only at the instance of a party or parties aggrieved** by the judgment of the court or tribunal from which the appeal is taken applies with as much force to proceedings governed by former Article 33 of Chapter 143 as to ordinary civil cases. In re Coleman, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

**No statutory authority exists for the State Personnel Commission to review an administrative law judge's recommended decision** in a case involving an exempt employee. Johnson v. Natural Resources & Community Dev., 98 N.C. App. 334, 391 S.E.2d 48 (1990).

**Failure to Cross-Appeal as Waiver.** — Where trial court erroneously failed to render conclusions concerning all statutory grounds for review raised by the petition for review, petitioners' failure to cross-appeal any such error to the appellate court waived its consideration on appeal. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572, supersedeas allowed on reconsideration, 323 N.C. 625, 374 S.E.2d 873 (1988).

**§§ 150B-53 through 150B-57:** Reserved for future codification purposes.

## ARTICLE 5.

### *Publication of Administrative Rules.*

**§§ 150B-58 through 150B-64:** Repealed by Session Laws 1991, c. 418, s. 5, effective October 1, 1991.

**Editor's Note.** — Section 150B-63.1 was repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1(20).

**Appeal Must Follow Theory of Trial.** — Where petitioner relied upon jurisdiction under former § 143-314 before the trial court, on appeal he could not argue that the trial court had original subject matter jurisdiction pursuant to § 7A-240 based upon a constitutional right to hearing and judicial review, since an appeal must follow the theory of the trial. Grissom v. North Carolina Dep't of Revenue, 34 N.C. App. 381, 238 S.E.2d 311 (1977), cert. denied, 294 N.C. 183, 241 S.E.2d 517 (1978).

**Applied** in In re Coastal Resources Comm'n, 96 N.C. App. 468, 386 S.E.2d 92 (1989); Professional Food Servs. Mgt., Inc. v. North Carolina Dep't of Admin., 109 N.C. App. 265, 426 S.E.2d 447 (1993); In re E.I. DuPont de Nemours & Co., 109 N.C. App. 435, 428 S.E.2d 195 (1993); North Carolina Dep't of Cor. v. McNeely, 135 N.C. App. 587, 521 S.E.2d 730 (1999).

**Cited** in Brooks v. Dover Elevator Co., 94 N.C. App. 139, 379 S.E.2d 707 (1989); Floyd v. North Carolina Dep't of Commerce, 99 N.C. App. 125, 392 S.E.2d 660 (1990); Cafiero v. North Carolina Bd. of Nursing, 102 N.C. App. 610, 403 S.E.2d 582 (1991); Rector v. North Carolina Sheriffs' Educ. & Training Stds. Comm'n, 103 N.C. App. 527, 406 S.E.2d 613 (1991); Best v. North Carolina State Bd. of Dental Exmrs., 108 N.C. App. 158, 423 S.E.2d 330 (1992); In re Huang, 110 N.C. App. 683, 431 S.E.2d 541 (1993); In re McCrary, 112 N.C. App. 161, 435 S.E.2d 359 (1993); Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 452 S.E.2d 337 (1995); Willoughby v. Board of Trustees, 121 N.C. App. 444, 466 S.E.2d 285 (1996); Bellsouth Telecommunications, Inc. v. North Carolina Dep't of Revenue, 126 N.C. App. 409, 485 S.E.2d 333 (1997).



**Chapter 151.**

**Constables.**

**§§ 151-1 through 151-8:** Repealed by Session Laws 1969, c. 1190, s. 57.



## Chapter 152.

### Coroners.

Sec.	Sec.
152-1. Election; vacancies in office; appointment by clerk in special cases.	152-7. Duties of coroners with respect to inquests and preliminary hearings.
152-2. Oaths to be taken.	152-8. Acts as sheriff in certain cases; special coroner.
152-3. Coroner's bond.	152-9. Compensation of jurors at inquest.
152-4. Coroners' bonds registered; certified copies evidence.	152-10. Hearing by coroner in lieu of other preliminary hearing; habeas corpus.
152-5. Fees of coroners.	152-11. Service of process issued by coroner.
152-6. Powers, penalties, and liabilities of special coroner.	

#### § 152-1. Election; vacancies in office; appointment by clerk in special cases.

In each county a coroner shall be elected by the qualified voters thereof in the same manner and at the same time as the election of members of the General Assembly, and shall hold office for a term of four years, or until his successor is elected and qualified.

A vacancy in the office of coroner shall be filled by the county commissioners, and the person so appointed shall, upon qualification, hold office until his successor is elected and qualified. If the coroner were elected as the nominee of a political party, then the county commissioners shall consult with the county executive committee of that political party before filling the vacancy, and shall appoint the person recommended by that committee if the party makes a recommendation within 30 days of the occurrence of the vacancy; this sentence shall apply only to the counties of Alamance, Alleghany, Avery, Beaufort, Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Cherokee, Clay, Cleveland, Davidson, Davie, Graham, Guilford, Haywood, Henderson, Jackson, Madison, McDowell, Mecklenburg, Moore, New Hanover, Polk, Randolph, Rockingham, Rutherford, Stanly, Stokes, Transylvania, Wake, and Yancey.

When the coroner shall be out of the county, or shall for any reason be unable to hold the necessary inquest as provided by law, or there is a vacancy existing in the office of coroner which has not been filled by the county commissioners and it is made to appear to the clerk of the superior court by satisfactory evidence that a deceased person whose body has been found within the county probably came to his death by the criminal act or default of some person, it is the duty of the clerk to appoint some suitable person to act as coroner in such special case. (Const., art. 4, s. 24; 1903, c. 661; Rev., ss. 1047, 1049; C.S., ss. 1014, 1018; Ex. Sess. 1924, c. 65; 1935, c. 376; 1981, c. 504, s. 8; c. 763, s. 5; c. 830.)

**Local Modification.** — Alamance (office of coroner abolished): 1975, c. 577; Alleghany (office of coroner abolished): 1979, c. 29; Anson (office of coroner abolished): 1975, c. 270; (as to Chapter 152) Ashe (office of coroner abolished): 1998-90, s. 3; Bertie (office of coroner abolished): 1979, c. 794; Buncombe (assistant coroner): 1963, c. 358; Burke (assistant coroner): 1963, c. 952; Catawba: 1973, c. 354 (Chapter 152 inapplicable); Cherokee (office of coroner abolished): 1997, c. 49, s. 2; Chowan (office of coroner abolished): 1979, 2nd Sess., c. 1163; Clay (office of coroner abolished): 1993, c. 75, s.

1; Cleveland: 1967, c. 431; Craven (office of coroner abolished): 1973, c. 1049; Cumberland (office of coroner abolished): 1979, c. 794; Davidson (office of coroner abolished): 1973, c. 1049; Davie (office of coroner abolished): 1973, c. 1146; Duplin (office of coroner abolished): 1979, c. 231; Forsyth (assistant coroner): 1955, c. 95, s. 1; Franklin (office of coroner abolished): 1975, c. 333; Gaston (assistant coroner): 1973, c. 1371; 1975, c. 201; (as to Chapter 152; office of coroner abolished) 1998-90, ss. 1,3; Greene (office of coroner abolished): 1985, c. 165; Halifax (office of coroner abolished): 1993, c. 36;

Harnett (office of coroner abolished): 1981 (Reg. Sess., 1982), c. 1144; Hertford (office of coroner abolished): 1979, c. 281; Iredell: 1965, c. 159; Jackson (office of coroner abolished): 1981 (Reg. Sess., 1982), c. 1132; (as to Chapter 152) Martin (effective upon the expiration of the term of the current coroner): 1998-145; McDowell (effective upon the expiration of the term of the current coroner): 1989, c. 192, s. 1; Moore (office of coroner abolished effective July 1, 1984): 1983, c. 36; 1985, c. 236; New Hanover (office of coroner abolished, effective December 1, 1986): 1983, c. 36; 1985, c. 236; Northampton, Orange, Pender and Perquimans (office of coroner abolished): 1973, c. 1146; Pitt: 1963, c. 330; Randolph: 1965, c. 754, s. 1; Richmond (office of coroner abolished): 1981, c. 829; Robeson (office of coroner abolished): 1997, c. 51; (as to Chapter 152) Rockingham (office of coroner abolished): 1998-90, s. 3; 1998-145; Rowan (office of coroner abolished): 1985, c. 40; Sampson (office of coroner abolished): 1981 (Reg. Sess., 1982), c. 1190;

Scotland (office of coroner abolished): 1993, c. 272, s. 1 (effective upon the expiration of the current term of office); Stokes (office of coroner abolished): 1977, c. 348; Surry (assistant coroner): 1953, c. 291; (office of coroner): 1973, c. 37; Tyrrell (office of coroner reestablished): 1977, 2nd Sess., c. 1172; Wake: 1957, c. 638; Yancey (effective upon the expiration of the term of the current coroner): 1989, c. 192, s. 4.

**Editor's Note.** — An amendment to this section in Session Laws 1981, c. 504, s. 8, was made effective upon certification of approval of the constitutional amendments proposed by ss. 1 through 3 of the act. The constitutional amendments were submitted to the people at an election held June 29, 1982, and were defeated. Therefore, the amendment never went into effect.

**Legal Periodicals.** — For article discussing the provisions of this Chapter and suggesting the abolition of the coroner system, see 26 N.C.L. Rev. 96 (1948).

## § 152-2. Oaths to be taken.

Every coroner, before entering upon the duties of his office, shall take and subscribe to the oaths prescribed for public officers, and an oath of office. (Code, s. 661; Rev., s. 1048; C.S., s. 1015; Ex. Sess. 1924, c. 65.)

**Local Modification.** — Randolph: 1965, c. 754, s. 1.

**Cross References.** — As to oaths required of public officers, see N.C. Const., Art. VI, § 7,

and § 11-1 et seq. As to form of oath, see § 11-11. As to penalty for failure to take oath, see § 128-5. As to oath of county officers generally, see § 153A-26.

## § 152-3. Coroner's bond.

Every coroner shall execute an undertaking conditioned upon the faithful discharge of the duties of his office with good and sufficient surety in the penal sum of two thousand dollars (\$2,000), payable to the State of North Carolina, and approved by the board of county commissioners. (1791, c. 342, ss. 1, 2, P. R.; 1820, c. 1047, ss. 1, 2, P. R.; R. C., c. 25, s. 2; Code, s. 661; 1899, c. 54, s. 52; Rev., s. 299; C.S., s. 1016; Ex. Sess. 1924, c. 65.)

**Local Modification.** — Randolph: 1965, c. 754, s. 1; Yancey: 1945, c. 271.

**Cross References.** — As to official bonds generally, see § 58-72-1 et seq.

### CASE NOTES

**Validity of Acts of Coroner De Facto.** — Where an individual has been appointed coroner of a county, even though it may appear that he has not renewed his official bond as required

by law, yet his acts as a coroner de facto are valid, at least as regards third persons. *Mabry v. Turrentine*, 30 N.C. 201 (1847).

## § 152-4. Coroners' bonds registered; certified copies evidence.

All official bonds of coroners shall be duly approved, certified, registered, and filed as sheriffs' bonds are required to be; and certified copies of the same duly

certified by the register of deeds, with official seal attached, shall be received and read in evidence in the like cases and in like manner as such copies of sheriffs' bonds are now allowed to be read in evidence. (1860-1, c. 18; Code, s. 662; Rev., s. 300; C.S., s. 1017; Ex. Sess. 1924, c. 65.)

**Local Modification.** — Randolph: 1965, c. 754, s. 1.

**Cross References.** — As to official bonds, see §§ 58-72-10 through 58-72-70.

### § 152-5. Fees of coroners.

Fees of coroners shall be the same as are or may be allowed sheriffs in similar cases:

For holding an inquest over a dead body, five dollars (\$5.00); if necessarily engaged more than one day, for each additional day, five dollars (\$5.00).

For burying a pauper over whom an inquest has been held, all necessary and actual expenses, to be approved by the board of county commissioners, and paid by the county. (Code, s. 3743; 1903, c. 781; Rev., s. 2775; C.S., s. 3905; 1967, c. 1154, s. 6.)

**Local Modification.** — Alamance: 1959, c. 1105, s. 2; Buncombe: 1949, c. 910; Burke: 1963, c. 952; Cabarrus: 1947, c. 410; 1953, c. 567; Caldwell: Pub. Loc. 1939, c. 191; Camden: 1947, c. 200; Cleveland: Pub. Loc. 1921, c. 75; Columbus: 1959, c. 467, s. 3; Cumberland: 1941, c. 73; 1953, c. 90; Davidson: Pub. Loc. 1923, c. 402; Forsyth: 1955, c. 95, s. 2, amended by 1959, c. 942, s. 1; Graham: 1961, c. 572; Halifax: 1953, c. 362; 1973, c. 924; Harnett: 1955, c. 752; 1959, c. 999; Johnston: Pub. Loc. 1927, c. 113; Pub. Loc. 1933, c. 365; Lenoir: 1941, c. 84; McDowell: 1963, c. 1199; Mitchell: 1953, c. 416; New

Hanover: 1955, c. 1110; 1959, c. 1049; Northampton: 1953, c. 420, s. 4; Onslow: 1951, c. 516; Orange: 1953, c. 281, s. 3; Pasquotank: Pub. Loc. 1939, c. 102; 1943, c. 630; Pender: 1947, c. 52; Polk: 1959, c. 982; Randolph: 1965, c. 754, s. 1; Richmond: 1951, c. 267; 1959, c. 372; Rockingham: 1951, c. 430; Rowan: 1967, c. 676; Sampson: 1947, c. 747; Transylvania: 1957, c. 757; Union: Pub. Loc. 1921, c. 75; 1961, c. 305, s. 2; 1963, c. 440; Wake: Pub. Loc. 1923, c. 573; 1931, c. 137; Washington: 1963, c. 574; Watauga: 1959, c. 951.

### § 152-6. Powers, penalties, and liabilities of special coroners.

The special coroner appointed under the provisions of G.S. 152-1 shall be invested with all the powers and duties conferred upon the several coroners in respect to holding inquests over deceased bodies, and shall be subject to the penalties and liabilities imposed on the said coroners. (1903, c. 661, s. 2; Rev., s. 1050; C.S., s. 1019; Ex. Sess. 1924, c. 65.)

**Local Modification.** — Randolph: 1965, c. 754, s. 1.

### § 152-7. Duties of coroners with respect to inquests and preliminary hearings.

The duties of the several coroners with respect to inquests and preliminary hearings shall be as follows:

- (1) Whenever it appears that the deceased probably came to his death by the criminal act or default of some person, he shall go to the place where the body of such deceased person is and make a careful investigation and inquiry as to when and by what means such deceased person came to his death and the name of the deceased, if to be found out, together with all the material circumstances attending his death, and shall make a complete record of such personal inves-

tigation: Provided, however, that the coroner shall not proceed to summon a jury as is hereinafter provided if he shall be satisfied from his personal investigation that the death of the said deceased was from natural causes, or that no person is blamable in any respect in connection with such death, and shall so find and make such finding in writing as a part of his report, giving the reason for such finding; unless an affidavit be filed with the coroner indicating blame in connection with the death of the deceased. A written report of said investigation shall be filed by the coroner with the medical examiner and the district attorney of the superior court.

- (2) To empanel a jury of six persons, under oath, to make further inquiry as to the circumstances of death and to call witnesses as necessary to determine the circumstances. The coroner shall order that the names of at least 15 persons be drawn from the jury box in accordance with the procedure in G.S. 9-5. The coroner shall examine the jurors appearing in obedience to the summons, and may excuse jurors for whom service would be an extreme hardship, who would be unable to remain impartial in determining the issues, or are otherwise disqualified to serve as jurors. If the remaining jurors are less than six in number, the coroner shall cause sufficient additional names to be drawn from the jury box and have them summoned, so as to obtain the immediate attendance of at least six qualified jurors. The first six qualified jurors constitute the inquest jury.
- (3) If it appears that the deceased was slain, or came to his death in such manner as to indicate any person or persons guilty of the crime in connection with the said death, then the said inquiry shall ascertain who was guilty, either as principal or accessory, or otherwise, if known; and the cause and manner of his death.
- (4) Whenever in such investigations, whether preliminary or before his jury, it shall appear to the coroner or to the jury that any person or persons are culpable in the matter of such death, he shall forthwith issue his warrant for such persons and cause the same to be brought before him and the inquiry shall proceed as in the case of preliminary hearings in the district court, and in case it appears to the said coroner and the jury that such persons are probably guilty of any crime in connection with the death of the deceased, then the said coroner shall commit such persons to jail, if it appears that such persons are probably guilty of a capital crime, and in case it appears that such persons are not probably guilty of a capital crime, but are probably guilty of a lesser crime, then such coroner is to have the power and authority to fix bail for such person or persons. All such persons as are found probably guilty in such hearing shall be delivered to the keeper of the common jail for such county by the sheriff or such other officer as may perform his duties at such hearings and committed to jail unless such persons have been allowed and given the bail fixed by such coroner.
- (5) As many persons as are found to be material witnesses in the matters involved in such inquiry and hearings, and are not culpable themselves shall be bound in recognizance with sufficient surety to appear at the next superior court to give evidence, and such as may default in giving such recognizance may be by such coroner committed to jail as is provided for State witnesses in other cases.
- (6) Immediately upon information of the death of a person within his county, under such circumstances as call for an investigation as provided in G.S. 130-198, the coroner shall notify the district attorney of the superior court and the medical examiner.

- (7) If an inquest or preliminary hearing be ordered, to arrange for the examination of any and all witnesses including those who may be offered by the county medical examiner.
- (8) To permit counsel for the family of the deceased, the solicitor of his district, or anyone designated by him, and counsel for any accused person to be present and participate in such hearing and examine and cross-examine witnesses and, whenever a warrant shall have been issued for any accused person, such accused person shall be entitled to counsel and to a full and complete hearing.
- (9) To hold his inquiry where the body of the deceased shall be or at any other place in the county, and the body of the deceased need not be present at such hearing. The hearing may be adjourned to other times and places.
- (10) To reduce to writing all of the testimony of all witnesses, and to have each witness to sign his testimony in the presence of the coroner, who shall attest the same, and, upon direction of the district attorney of the district, all of the testimony heard by the coroner and his jury shall be taken stenographically, and expense of such taking, when approved by the coroner and the district attorney of the district, shall be paid by the county. When the testimony is taken by a stenographer, the witness shall be caused to sign the same after it has been written out, and the coroner shall attest such signature. The attestation of all the signatures of witnesses who shall testify before the coroner shall include attaching his seal, and such statements, when so signed and attested, shall be received as competent evidence in all courts either for the purpose of contradiction or corroboration of witnesses who make the same, under the same rules as other evidence to contradict or corroborate may be now admitted. The coroner shall file a copy of all written testimony given at the hearing with the county medical examiner and with the district attorney of the superior court. (Code, s. 657; 1899, c. 478; 1905, c. 628; Rev., s. 1051; 1909, c. 707, s. 1; C.S., s. 1020; Ex. Sess. 1924, c. 65; 1955, c. 972, s. 2; 1957, c. 503, ss. 1, 2; 1967, c. 1154, s. 6; 1973, c. 47, s. 2; c. 108, s. 92; c. 558.)

**Local Modification.** — Nash: 1951, c. 502; Randolph: 1965, c. 754, s. 1.

**Cross References.** — As to certain omissions of duty punishable as for contempt, see § 5A-11. As to duty to report death involving

motor vehicle, see § 20-166.1.

**Editor's Note.** — Section 130-198, referred to in subdivision (6), was repealed by Session Laws 1983, c. 891, s. 1.

#### CASE NOTES

**This section is simply a statement of the historical function of a coroner.** The coroner is by this section commanded to make an investigation whenever it appears that deceased probably came to his death by criminal act. He is not required to summon a jury unless he is satisfied from his personal investigation that death was the result of criminal conduct. *Gillikin v. United States Fid. & Guar. Co.*, 254 N.C. 247, 118 S.E.2d 606 (1961).

**A coroner has no authority to perform an autopsy in cases where there is no suspicion of foul play.** *Gurganiou v. Simpson*, 213 N.C. 613, 197 S.E. 163 (1938).

**Administration of Oaths.** — Though the

coroner is judge of the coroner's court and the power and authority to administer oaths to the witnesses rests in him, the administration of oaths is a ministerial act and may be performed by anyone by the direction and in the presence of the court. *State v. Knight*, 84 N.C. 789 (1881).

**Swearing and Charging of Jury.** — The inquest is the coroner's court, and it is an indispensable requisite that the jury which is summoned be sworn and charged by the coroner in the presence of the body of the deceased. *State v. Knight*, 84 N.C. 789 (1881).

**Cited in** *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968).

## OPINIONS OF ATTORNEY GENERAL

**Coroner Has No Authority to Order Autopsy.** — See opinion of Attorney General to Mr. Edgar E. Smith, 41 N.C.A.G. 212 (1971).

### § 152-8. Acts as sheriff in certain cases; special coroner.

If at any time there is no person properly qualified to act as sheriff in any county, the coroner of such county is hereby required to execute all process and in all other things to act as sheriff, until some person is appointed sheriff in said county; and he shall be under the same rules and regulations, and subject to the same forfeitures, fines, and penalties as sheriffs are by law for neglect or disobedience of the same duties. If at any time the sheriff of any county is interested in or a party to any proceeding in any court, and there is no coroner in such county, or if the coroner is interested in any such proceeding, then the clerk of the court from which such process issues shall appoint some suitable person to act as special coroner to execute such process, and such special coroner shall be under the same rules, regulations, and penalties as hereinabove provided for. (Code, s. 658; 1891, c. 173; Rev., s. 1052; C.S., s. 1021; Ex. Sess. 1924, c. 65.)

**Local Modification.** — Randolph: 1965, c. 754, s. 1.

## CASE NOTES

The words “any proceedings in any court,” contained in the provision for deputizing special officers where the sheriff and coroner are interested, have been given a literal interpretation, and the provision is held applicable to courts of justices of the peace as well as to the higher courts. *Baker v. Brem*, 127 N.C. 322, 37 S.E. 454 (1900).

**Service of Summons by Coroner When Sheriff Is Party.** — In an action in which the sheriff is a party it is proper that the summons be addressed to and served by the coroner. *State v. Baird*, 118 N.C. 854, 24 S.E. 668 (1896).

**As to service by the coroner's deputy in an action in which the sheriff is a party,** see *Yeargin v. Siler*, 83 N.C. 348 (1880).

### § 152-9. Compensation of jurors at inquest.

All persons who may be summoned to act as jurors in any inquest held by a coroner over dead bodies, and who, in obedience thereto, appear and act as such jurors, shall be entitled to the same compensation in per diem and mileage as is allowed by law to jurors acting in the superior courts. The coroners of the respective counties are authorized and empowered to take proof of the number of days of service of each juror so acting, and also of the number of miles traveled by such juror in going to and returning from such place of inquest, and shall file with the board of commissioners of the county a correct account of the same, which shall be, by such commissioners, audited and paid in the manner provided for the pay of jurors acting in the superior courts. (Code, ss. 659, 660; Rev., s. 1053; C.S., s. 1022; Ex. Sess. 1924, c. 65.)

**Local Modification.** — Randolph: 1965, c. 754, s. 1.

**Cross References.** — As to fees of coroners' jurors in superior court, see now § 7A-312.

### § 152-10. Hearing by coroner in lieu of other preliminary hearing; habeas corpus.

All hearings by a coroner and his jury, as provided herein, when the accused has been arrested and has participated in such hearing, shall be in lieu of any other preliminary hearing, and such cases shall be immediately sent to the clerk of the superior court of such county and docketed by him in the same manner as warrants from magistrates. Any accused person who shall be so committed by a coroner shall have the right, upon habeas corpus, to have a judge of the superior or district court review the action of the coroner in fixing bail or declining the same. (Ex. Sess. 1924, c. 65; 1973, c. 108, s. 93.)

**Local Modification.** — Randolph: 1965, c. 754, s. 1.

### § 152-11. Service of process issued by coroner.

All process, both subpoenas and warrants for the arrest of any person or persons, and orders for the summoning of a jury, in case it may appear necessary for such coroner to issue such order, shall be served by the sheriff or other lawful officer of the county in which such dead body is found, and in case it is necessary to subpoena witnesses or to arrest persons in a county other than such county in which the body of the deceased is found, then such coroner may issue his process to any other county in the State, with his official seal attached, and such process shall be served by the sheriff or other lawful officer of the county to which it is directed, but such process shall not be served outside of the county in which such dead body is found unless attested by the official seal of such coroner. (Ex. Sess. 1924, c. 65.)

**Local Modification.** — Randolph: 1965, c. 754, s. 1.



**Chapter 152A.**  
**County Medical Examiner.**

**§§ 152A-1 through 152A-12:** Repealed by Session Laws 1967, c. 1154,  
s. 8.

**Cross References.** — As to public health,  
see now Chapter 130A.



## Chapter 153.

### Counties and County Commissioners.

**§§ 153-1 through 153-382:** Repealed by Session Laws 1973, c. 822.

**Editor's Note.** — This Chapter was repealed by Session Laws 1973, c. 822, which enacted new Chapter 153A, Counties. The following sections were transferred by the 1973 act to other Chapters: §§ 153-177 to 153-198 was transferred to former § 162-31 and §§ 162-32 to 162-49 by Session Laws 1973, c. 822, s. 3; §§ 153-295 to 153-324 were transferred to §§ 162A-64 to 162A-80 by Session Laws 1973, c. 822, s. 4.

Session Laws 1973, c. 822, ss. 9 through 12, provided:

“Sec. 9. No provision of this act is intended, nor may any be construed, to affect in any way a right or interest, public or private:

“(a) Now vested or accrued, in whole or in part, the validity of which might be sustained or preserved by reference to a provision of law repealed by this act; or

“(b) Derived from or which might be sustained or preserved in reliance upon, action (including the adoption of orders, resolutions,

or ordinances) taken before the effective date of this act pursuant to or within the scope of a provision of law repealed by this act.

“Sec. 10. No law repealed, expressly or by implication, before the effective date of this act and no law granting authority that has been exhausted before the effective date of this act is revived by:

“(a) The repeal in this act of any act repealing such a law; or

“(b) Any provision of this act that disclaims an intention to repeal or affect enumerated, designated, or described laws.

“Sec. 11. No provision of this act is intended, nor may any be construed, to impair the obligation of any bond, note, or coupon outstanding on the effective date of this act.

“Sec. 12. No action or proceeding of any nature (whether civil or criminal, judicial or administrative, or otherwise) pending at the effective date of this act is abated or otherwise affected by the adoption of this act.”



# Chapter 153A.

## Counties.

### Article 1.

#### Definitions and Statutory Construction.

Sec.

- 153A-1. Definitions.
- 153A-2. Effect on prior laws and actions taken pursuant to prior laws.
- 153A-3. Effect of Chapter on local acts.
- 153A-4. Broad construction.
- 153A-5. Statutory references deemed amended to conform to Chapter.
- 153A-6 through 153A-9. [Reserved.]

### Article 2.

#### Corporate Powers.

- 153A-10. State has 100 counties.
- 153A-11. Corporate powers.
- 153A-12. Exercise of corporate power.
- 153A-13. Continuing contracts.
- 153A-14. Grants from other governments.
- 153A-15. Consent of board of commissioners necessary in certain counties before land may be condemned or acquired by a unit of local government outside the county.
- 153A-16. [Reserved.]

### Article 3.

#### Boundaries.

- 153A-17. Existing boundaries.
- 153A-18. Uncertain or disputed boundary.
- 153A-19. Establishing and naming townships.
- 153A-20. Map of electoral districts.
- 153A-21. [Repealed.]
- 153A-22. Redefining electoral district boundaries.
- 153A-23, 153A-24. [Reserved.]

### Article 4.

#### Form of Government.

##### Part 1. General Provisions.

- 153A-25. Qualifications for appointive office.
- 153A-26. Oath of office.
- 153A-27. Vacancies on the board of commissioners.
- 153A-27.1. Vacancies on board of commissioners in certain counties.
- 153A-28. Compensation of board of commissioners.
- 153A-29. [Repealed.]
- 153A-30 through 153A-33. [Reserved.]

##### Part 2. Structure of the Board of Commissioners.

- 153A-34. Structure of boards of commissioners.

Sec.

153A-35 through 153A-38. [Reserved.]

##### Part 3. Organization and Procedures of the Board of Commissioners.

- 153A-39. Selection of chairman and vice-chairman; powers and duties.
- 153A-40. Regular and special meetings.
- 153A-41. Procedures.
- 153A-42. Minutes to be kept; ayes and noes.
- 153A-43. Quorum.
- 153A-44. (Effective until July 1, 2002) Members excused from voting.
- 153A-44. (Effective July 1, 2002) Members excused from voting.
- 153A-45. Adoption of ordinances.
- 153A-46. Franchises.
- 153A-47. Technical ordinances.
- 153A-48. Ordinance book.
- 153A-49. Code of ordinances.
- 153A-50. Pleading and proving county ordinances.
- 153A-51. [Reserved.]
- 153A-52. Conduct of public hearing.
- 153A-53 through 153A-57. [Reserved.]

##### Part 4. Modification in the Structure of the Board of Commissioners.

- 153A-58. Optional structures.
- 153A-59. Implementation when board has members serving a combination of four- and two-year terms.
- 153A-60. Initiation of alterations by resolution.
- 153A-61. Submission of proposition to voters; form of ballot.
- 153A-62. Effective date of any alteration.
- 153A-63. Filing copy of resolution.
- 153A-64. Filing results of election.
- 153A-65 through 153A-75. [Reserved.]

### Article 5.

#### Administration.

##### Part 1. Organization and Reorganization of County Government.

- 153A-76. Board of commissioners to organize county government.
- 153A-77. Authority of boards of commissioners in certain counties over commissions, boards, agencies, etc.
- 153A-77.1. Single portal of entry.
- 153A-78 through 153A-80. [Reserved.]

## CH. 153A. COUNTIES

### Part 2. Administration in Counties Having Managers.

Sec.

- 153A-81. Adoption of county-manager plan; appointment or designation of manager.
- 153A-82. Powers and duties of manager.
- 153A-83. Acting county manager.
- 153A-84. Interim county manager.
- 153A-85, 153A-86. [Reserved.]

### Part 3. Administration in Counties Not Having Managers.

- 153A-87. Administration in counties not having managers.
- 153A-88. Acting department heads.
- 153A-89. Interim department heads.
- 153A-90, 153A-91. [Reserved.]

### Part 4. Personnel.

- 153A-92. Compensation.
- 153A-93. Retirement benefits.
- 153A-94. Personnel rules; office hours, workdays, and holidays.
- 153A-95. Personnel board.
- 153A-96. Participation in the Social Security Act.
- 153A-97. Defense of officers, employees and others.
- 153A-98. Privacy of employee personnel records.
- 153A-99. County employee political activity.
- 153A-100. [Reserved.]

### Part 5. Board of Commissioners and Other Officers, Boards, Departments, and Agencies of the County.

- 153A-101. Board of commissioners to direct fiscal policy of the county.
- 153A-102. Commissioners to fix fees.
- 153A-103. Number of employees in offices of sheriff and register of deeds.
- 153A-104. Reports from officers, employees, and agents of the county.
- 153A-105 through 153A-110. [Reserved.]

### Part 6. Clerk to the Board of Commissioners.

- 153A-111. Appointment; powers and duties.
- 153A-112, 153A-113. [Reserved.]

### Part 7. County Attorney.

- 153A-114. Appointment; duties.
- 153A-115 through 153A-120. [Reserved.]

## Article 6.

### Delegation and Exercise of the General Police Power.

- 153A-121. General ordinance-making power.
- 153A-122. Territorial jurisdiction of county ordinances.

Sec.

- 153A-123. Enforcement of ordinances.
- 153A-124. Enumeration not exclusive.
- 153A-125. Regulation of solicitation campaigns, flea markets and itinerant merchants.
- 153A-126. Regulation of begging.
- 153A-127. Abuse of animals.
- 153A-128. Regulation of explosive, corrosive, inflammable, or radioactive substances.
- 153A-129. Firearms.
- 153A-130. Pellet guns.
- 153A-131. Possession or harboring of dangerous animals.
- 153A-132. Removal and disposal of abandoned and junked motor vehicles.
- 153A-132.1. To provide for the removal and disposal of trash, garbage, etc.
- 153A-132.2. Regulation, restraint and prohibition of abandonment of junked motor vehicles.
- 153A-133. Noise regulation.
- 153A-134. Regulating and licensing businesses, trades, etc.
- 153A-135. Regulation of places of amusement.
- 153A-136. Regulation of solid wastes.
- 153A-137. Cable television franchises.
- 153A-138. Registration of mobile homes, house trailers, etc.
- 153A-139. Regulation of traffic at parking areas and driveways.
- 153A-140. Abatement of public health nuisances.
- 153A-141. [Repealed.]
- 153A-142. Curfews.
- 153A-143 through 153A-145. [Reserved.]

## Article 7.

### Taxation.

- 153A-146. General power to impose taxes.
- 153A-147. Remedies for collecting taxes other than property taxes.
- 153A-148. Continuing taxes.
- 153A-148.1. Disclosure of certain information prohibited.
- 153A-149. Property taxes; authorized purposes; rate limitation.
- 153A-150. Reserve for octennial reappraisal.
- 153A-151. Sales tax.
- 153A-152. Privilege license taxes.
- 153A-152.1. Privilege license tax on low-level radioactive and hazardous waste facilities.
- 153A-153. Animal tax.
- 153A-154. Cable television franchise tax.
- 153A-154.1. Uniform penalties for local meals taxes.
- 153A-155. Uniform provisions for room occupancy taxes.
- 153A-156. Gross receipts tax on short-term leases or rentals.

**Article 8.**

**County Property.**

Part 1. Acquisition of Property.

Sec.

- 153A-157. [Recodified.]
- 153A-158. Power to acquire property.
- 153A-158.1. Acquisition and improvement of school property in certain counties.
- 153A-158.2. Acquisition and improvement of community college property.
- 153A-159 through 153A-162. [Repealed.]
- 153A-163. Acquisition of property at a judicial sale, execution sale, or sale pursuant to a power of sale; disposition of such property.
- 153A-164. Joint buildings.
- 153A-165. Leases.
- 153A-166 through 153A-168. [Reserved.]

Part 2. Use of County Property.

- 153A-169. Care and use of county property; sites of county buildings.
- 153A-170. Regulation of parking on county property.
- 153A-171 through 153A-175. [Reserved.]

Part 3. Disposition of County Property.

- 153A-176. Disposition of property.
- 153A-177. Reconveyance of property donated to a local government.
- 153A-178 through 153A-184. [Reserved.]

**Article 9.**

**Special Assessments.**

- 153A-185. Authority to make special assessments.
- 153A-186. Bases for making assessments.
- 153A-187. Corner lot exemptions.
- 153A-188. Lands exempt from assessment.
- 153A-189. State participation in improvement projects.
- 153A-190. Preliminary resolution; contents.
- 153A-191. Notice of preliminary resolution.
- 153A-192. Hearing on preliminary resolution; assessment resolution.
- 153A-193. Determination of costs.
- 153A-193.1. Discounts authorized.
- 153A-194. Preliminary assessment roll; publication.
- 153A-195. Hearing on preliminary assessment roll; revision; confirmation; lien.
- 153A-196. Publication of notice of confirmation of assessment roll.
- 153A-197. Appeal to the General Court of Justice.
- 153A-198. Reassessment.
- 153A-199. Payment of assessments in full or by installments.

Sec.

- 153A-200. Enforcement of assessments; interest; foreclosure; limitations.
- 153A-201. Authority to hold assessments in abeyance.
- 153A-202. Assessments on property held by tenancy for life or years; contribution.
- 153A-203. Lien in favor of a cotenant or joint owner paying special assessments.
- 153A-204. Apportionment of assessments.
- 153A-204.1. Maintenance assessments.
- 153A-205. Improvements to subdivision and residential streets.
- 153A-206. Street light assessments.
- 153A-207 through 153A-210. [Reserved.]

**Article 10.**

**Law Enforcement and Confinement Facilities.**

Part 1. Law Enforcement.

- 153A-211. Training and development programs for law enforcement.
- 153A-212. Cooperation in law-enforcement matters.
- 153A-212.1. Resources to protect the public.
- 153A-213 through 153A-215. [Reserved.]

Part 2. Local Confinement Facilities.

- 153A-216. Legislative policy.
- 153A-217. Definitions.
- 153A-218. County confinement facilities.
- 153A-219. District confinement facilities.
- 153A-220. Jail and detention services.
- 153A-221. Minimum standards.
- 153A-221.1. Standards and inspections.
- 153A-222. Inspections of local confinement facilities.
- 153A-223. Enforcement of minimum standards.
- 153A-224. Supervision of local confinement facilities.
- 153A-225. Medical care of prisoners.
- 153A-225.1. Duty of custodial personnel when prisoners are unconscious or semi-conscious.
- 153A-226. Sanitation and food.
- 153A-227. [Repealed.]
- 153A-228. Separation of sexes.
- 153A-229. Jailers' report of jailed defendants.

Part 3. Satellite Jail/Work Release Units.

- 153A-230. Legislative policy.
- 153A-230.1. Definitions.
- 153A-230.2. Creation of Satellite Jail/Work Release Unit Fund.
- 153A-230.3. Basic requirements for satellite jail/work release units.
- 153A-230.4. Standards.

- Sec.  
 153A-230.5. Satellite jails/work release units built with non-State funds.  
 153A-231, 153A-232. [Reserved.]

**Article 11.**

**Fire Protection.**

- 153A-233. Fire-fighting and prevention services.  
 153A-234. Fire marshal.  
 153A-235. [Repealed.]  
 153A-236, 153A-237. [Reserved.]

**Article 12.**

**Roads and Bridges.**

- 153A-238. Public road defined for counties.  
 153A-239. [Repealed.]  
 153A-239.1. Naming roads and assigning street numbers in unincorporated areas for counties.  
 153A-240. [Repealed.]  
 153A-241. Closing public roads or easements.  
 153A-242. Regulation or prohibition of fishing from bridges.  
 153A-243. Authorizing bridges over navigable waters.  
 153A-244. Railroad revitalization programs.  
 153A-245, 153A-246. [Reserved.]

**Article 13.**

**Health and Social Services.**

Part 1. Health Services.

- 153A-247. Provision for public health and mental health.  
 153A-248. Health-related appropriations.  
 153A-249. Hospital services.  
 153A-250. Ambulance services.  
 153A-251 through 153A-254. [Reserved.]

Part 2. Social Service Provisions.

- 153A-255. Authority to provide social service programs.  
 153A-256. County home.  
 153A-257. Legal residence for social service purposes.  
 153A-258. [Reserved.]

Part 3. Health and Social Services Contracts.

- 153A-259. Counties authorized to contract with other entities for health and social services.  
 153A-260. [Reserved.]

**Article 14.**

**Libraries.**

- 153A-261. Declaration of State policy.  
 153A-262. Library materials defined.  
 153A-263. Public library systems authorized.

- Sec.  
 153A-264. Free library services.  
 153A-265. Library board of trustees.  
 153A-266. Powers and duties of trustees.  
 153A-267. Qualifications of chief librarian; library employees.  
 153A-268. Financing library systems.  
 153A-269. Title to library property.  
 153A-270. Joint libraries; contracts for library services.  
 153A-271. Library systems operated under local acts brought under this Article.  
 153A-272. Designation of library employees to register voters.  
 153A-273. [Reserved.]

**Article 15.**

**Public Enterprises.**

Part 1. General Provisions.

- 153A-274. Public enterprise defined.  
 153A-275. Authority to operate public enterprises.  
 153A-276. Financing public enterprises.  
 153A-277. Authority to fix and enforce rates.  
 153A-278. Joint provision of enterprisory services.  
 153A-279 through 153A-282. [Reserved.]

Part 2. Special Provisions for Water and Sewer Services.

- 153A-283. Nonliability for failure to furnish water or sewer services.  
 153A-284. Power to require connections.  
 153A-285. [Repealed.]  
 153A-286. Law with respect to riparian rights not changed.  
 153A-287. [Repealed.]  
 153A-288. Venue for actions by riparian owners.  
 153A-289, 153A-290. [Reserved.]

Part 3. Special Provisions for Solid Waste Collection and Disposal.

- 153A-291. Cooperation between the Department of Transportation and any county in establishing or operating solid waste disposal facilities.  
 153A-292. County collection and disposal facilities.  
 153A-293. (See editor's note) Collection of fees for solid waste disposal facilities and solid waste collection services.  
 153A-294. Solid waste defined.  
 153A-295 through 153A-299. [Reserved.]

Part 4. Long Term Contracts for Disposal of Solid Waste.

- 153A-299.1 through 153A-299.6. [Repealed.]

**Article 16.**

**County Service Districts; County Research and Production Service Districts.**

Part 1. County Service Districts.

- Sec.  
 153A-300. Title; effective date.  
 153A-301. Purposes for which districts may be established.  
 153A-302. Definition of service districts.  
 153A-303. Extension of service districts.  
 153A-304. Consolidation of service districts.  
 153A-304.1. Reduction in district after annexation.  
 153A-304.2. Reduction in district after annexation to Chapter 69 fire district.  
 153A-305. Required provision or maintenance of services.  
 153A-306. Abolition of service districts.  
 153A-307. Taxes authorized; rate limitation.  
 153A-308. Bonds authorized.  
 153A-309. EMS services in fire protection districts.  
 153A-309.1. [Reserved.]  
 153A-309.2. Rate limitation in certain districts.  
 153A-310. Rate limitation in certain districts.

Part 2. County Research and Production Service Districts.

- 153A-311. Purposes for which districts may be established.  
 153A-312. Definition of research and production service district.  
 153A-313. Advisory committee.  
 153A-314. Extension of service districts.  
 153A-315. Required provision or maintenance of services.  
 153A-316. Abolition of service districts.  
 153A-317. Taxes authorized; rate limitation.

**Article 17.**

[Reserved.]

153A-318, 153A-319. [Reserved.]

**Article 18.**

**Planning and Regulation of Development.**

Part 1. General Provisions.

- 153A-320. Territorial jurisdiction.  
 153A-321. Planning agency.  
 153A-322. Supplemental powers.  
 153A-323. Procedure for adopting or amending ordinances under this Article and Chapter 160A, Article 19.  
 153A-324. Enforcement of ordinances.  
 153A-325. Submission of statement concerning improvements.

Sec.

- 153A-326. Building setback lines.  
 153A-327 through 153A-329. [Reserved.]

Part 2. Subdivision Regulation.

- 153A-330. Subdivision regulation.  
 153A-331. Contents and requirements of ordinance.  
 153A-332. Ordinance to contain procedure for plat approval; approval prerequisite to plat recordation; statement by owner.  
 153A-333. Effect of plat approval on dedications.  
 153A-334. Penalties for transferring lots in unapproved subdivisions.  
 153A-335. "Subdivision" defined.  
 153A-336 through 153A-339. [Reserved.]

Part 3. Zoning.

- 153A-340. Grant of power.  
 153A-341. Purposes in view.  
 153A-341.1. Zoning regulations for manufactured homes.  
 153A-342. Districts; zoning less than entire jurisdiction.  
 153A-343. Method of procedure.  
 153A-344. Planning agency; zoning plan; certification to board of commissioners; amendments.  
 153A-344.1. Vesting rights.  
 153A-345. Board of adjustment.  
 153A-346. Conflict with other laws.  
 153A-347. Part applicable to buildings constructed by the State and its subdivisions; exception.  
 153A-348. Statute of limitations.  
 153A-349. [Reserved.]

Part 4. Building Inspection.

- 153A-350. "Building" defined.  
 153A-350.1. Tribal lands.  
 153A-351. Inspection department; certification of electrical inspectors.  
 153A-351.1. Qualifications of inspectors.  
 153A-352. Duties and responsibilities.  
 153A-353. Joint inspection department; other arrangements.  
 153A-354. Financial support.  
 153A-355. Conflicts of interest.  
 153A-356. Failure to perform duties.  
 153A-357. Permits.  
 153A-358. Time limitations on validity of permits.  
 153A-359. Changes in work.  
 153A-360. Inspections of work in progress.  
 153A-361. Stop orders.  
 153A-362. Revocation of permits.  
 153A-363. Certificates of compliance.  
 153A-364. Periodic inspections for hazardous or unlawful conditions.  
 153A-365. Defects in buildings to be corrected.

CH. 153A. COUNTIES

- Sec.
- 153A-366. Unsafe buildings condemned.
- 153A-367. Removing notice from condemned building.
- 153A-368. Action in event of failure to take corrective action.
- 153A-369. Order to take corrective action.
- 153A-370. Appeal; finality of order not appealed.
- 153A-371. Failure to comply with order.
- 153A-372. Equitable enforcement.
- 153A-373. Records and reports.
- 153A-374. Appeals.
- 153A-375. Establishment of fire limits.

Part 5. Community Development.

- 153A-376. Community development programs and activities.
- 153A-377. Acquisition and disposition of property for redevelopment.
- 153A-378. Low- and moderate-income housing programs.
- 153A-379 through 153A-390. [Reserved.]

Article 19.

Regional Planning Commissions.

- 153A-391. Creation; admission of new members.
- 153A-392. Contents of resolution.
- 153A-393. Withdrawal from commission.
- 153A-394. Organization of the commission.
- 153A-395. Powers and duties.
- 153A-396. Fiscal affairs.
- 153A-397. Reports.
- 153A-398. Regional planning and economic development commissions.
- 153A-399, 153A-400. [Reserved.]

Article 20.

Consolidation and Governmental Study Commissions.

- 153A-401. Establishment; support.
- 153A-402. Purposes of a commission.
- 153A-403. Content of concurrent resolutions.
- 153A-404. Powers of a commission.
- 153A-405. Referendum; General Assembly action.

Article 21.

[Reserved.]

- 153A-406 through 153A-420. [Reserved.]

Article 22.

Regional Solid Waste Management Authorities.

- 153A-421. Definitions; applicability; creation of authorities.

- Sec.
- 153A-422. Purposes of an authority.
- 153A-423. Membership; board; delegates.
- 153A-424. Contents of charter.
- 153A-425. Organization of authorities.
- 153A-426. Withdrawal from an authority.
- 153A-427. Powers of an authority.
- 153A-428. Fiscal accountability; support from other governments.
- 153A-429. Long-term contract permitted by and with an authority.
- 153A-430. Compliance with other law.
- 153A-431. Issuance of revenue bonds and notes.
- 153A-432. Advances.
- 153A-433, 153A-434. [Reserved.]

Article 23.

Miscellaneous Provisions.

- 153A-435. Liability insurance; damage suits against a county involving governmental functions.
- 153A-436. Photographic reproduction of county records.
- 153A-437. Assistance to historical organizations.
- 153A-438. Beach erosion control and flood and hurricane protection works.
- 153A-439. Support of extension activities; personnel rules for extension employees.
- 153A-440. Promotion of soil and water conservation work.
- 153A-440.1. Watershed improvement programs; drainage and water resources development projects.
- 153A-441. County surveyor.
- 153A-442. Animal shelters.
- 153A-443. Redesignation of site of "courthouse door," etc.
- 153A-444. Parks and recreation.
- 153A-445. Miscellaneous powers found in Chapter 160A.
- 153A-446. County may offer reward for information as to persons damaging county property.
- 153A-447. Certain counties may appropriate funds to Western North Carolina Development Association, Inc.
- 153A-448. Mountain ridge protection.
- 153A-449. Contracts with private entities.
- 153A-450. Contracts for construction of satellite campuses of community colleges.

## ARTICLE 1.

*Definitions and Statutory Construction.***§ 153A-1. Definitions.**

Unless otherwise specifically provided, or unless otherwise clearly required by the context, the words and phrases defined in this section have the meaning indicated when used in this Chapter.

- (1) "City" means a city as defined by G.S. 160A-1(2), except that it does not include a city that, without regard to its date of incorporation, would be disqualified from receiving gasoline tax allocations by G.S. 136-41.2(a).
- (2) "Clerk" means the clerk to the board of commissioners.
- (3) "County" means any one of the counties listed in G.S. 153A-10.
- (4) "General law" means an act of the General Assembly that applies to all units of local government, to all counties, to all counties within a class defined by population or other criteria, to all cities, or to all cities within a class defined by population or other criteria, including a law that meets the foregoing standards but contains a clause or section exempting from its effect one or more counties, cities, or counties and cities.
- (5) "Local act" means an act of the General Assembly that applies to one or more specific counties, cities, or counties and cities by name. "Local act" is interchangeable with the terms "special act," "special law," "public-local act," and "private act," is used throughout this Chapter in preference to those terms, and means a local act as defined in this subdivision without regard to the terminology employed in local acts or other portions of the General Statutes.
- (6) "Publish," "publication," and other forms of the verb "to publish" mean insertion in a newspaper qualified under G.S. 1-597 to publish legal advertisements in the county. (1973, c. 822, s. 1.)

**Local Modification.** — New Hanover: 1983, c. 365.

**Editor's Note.** — Session Laws 1973, c. 822, repealed Chapter 153, Counties, and enacted in its place a new Chapter 153A. Certain other 1973 acts originally codified in Chapter 153 are included in Chapter 153A as directed in Session Laws 1973, c. 822, s. 2. Where appropriate, the historical citations to sections in the repealed Chapter have been added to corresponding sections in new Chapter 153A.

Session Laws 1973, c. 822, ss. 9 through 12, provided:

"Sec. 9. No provision of this act is intended, nor may any be construed, to affect in any way a right or interest, public or private:

"(a) Now vested or accrued, in whole or in part, the validity of which might be sustained or preserved by reference to a provision of law repealed by this act; or

"(b) Derived from or which might be sustained or preserved in reliance upon, action (including the adoption of orders, resolutions,

or ordinances) taken before the effective date of this act pursuant to or within the scope of a provision of law repealed by this act.

"Sec. 10. No law repealed, expressly or by implication, before the effective date of this act and no law granting authority that has been exhausted before the effective date of this act is revived by:

"(a) The repeal in this act of any act repealing such a law; or

"(b) Any provision of this act that disclaims an intention to repeal or affect enumerated, designated, or described laws.

"Sec. 11. No provision of this act is intended, nor may any be construed, to impair the obligation of any bond, note, or coupon outstanding on the effective date of this act.

"Sec. 12. No action or proceeding of any nature (whether civil or criminal, judicial or administrative, or otherwise) pending at the effective date of this act is abated or otherwise affected by the adoption of this act."

## CASE NOTES

**Applied** in *Ratcliff v. County of Buncombe*, 663 F. Supp. 1003 (W.D.N.C. 1987).

**Cited** in *Ratcliff v. County of Buncombe*, 759 F.2d 1183 (4th Cir. 1985).

### § 153A-2. Effect on prior laws and actions taken pursuant to prior laws.

The provisions of this Chapter, insofar as they are the same in substance as laws in effect as of December 31, 1973, are intended to continue those laws in effect and not to be new enactments. The enactment of this Chapter does not require the readoption of any county or city ordinance adopted pursuant to laws that were in effect as of December 31, 1973, and that are restated or revised in this Chapter. The provisions of this Chapter do not affect any act heretofore done, any liability incurred, any right accrued or vested, or any suit or prosecution begun or cause of action accrued as of January 1, 1974. (1973, c. 822, s. 1.)

### § 153A-3. Effect of Chapter on local acts.

(a) Except as provided in this section, nothing in this Chapter repeals or amends a local act in effect as of January 1, 1974, or any portion of such an act, unless this Chapter or a subsequent enactment of the General Assembly clearly shows a legislative intent to repeal or supersede that local act.

(b) If this Chapter and a local act each provide a procedure that contains every action necessary for the performance or execution of a power, right, duty, function, privilege, or immunity, the two procedures may be used in the alternative, and a county may follow either one.

(c) If this Chapter and a local act each provide a procedure for the performance or execution of a power, right, duty, function, privilege, or immunity, but the local act procedure does not contain every action necessary for the performance or execution, the two procedures may be used in the alternative, and a county may follow either one; but the local act procedure shall be supplemented as necessary by this Chapter's procedure. If a local act procedure is being supplemented in such a manner, and there is a conflict or inconsistency between the local act procedure and this Chapter's procedure, the local act procedure shall be followed.

(d) If a power, right, duty, function, privilege, or immunity is conferred on counties by this Chapter, and a local act enacted earlier than this Chapter omits or expressly denies or limits the same power, right, duty, function, privilege, or immunity, this Chapter supersedes the local act. (1973, c. 822, s. 1.)

## CASE NOTES

**Section 153A-345 did not change Forsyth County zoning ordinance** enacted pursuant to Session Laws 1947, c. 677 in April, 1967. *Cardwell v. Forsyth County Zoning Bd. of Adjustment*, 88 N.C. App. 244, 362 S.E.2d 843

(1987), aff'd, 321 N.C. 742, 366 S.E.2d 858 (1988).

**Cited** in *Cardwell v. Smith*, 92 N.C. App. 505, 374 S.E.2d 625 (1988); *Bethune v. County of Harnett*, 349 N.C. 343, 507 S.E.2d 40 (1998).

### § 153A-4. Broad construction.

It is the policy of the General Assembly that the counties of this State should have adequate authority to exercise the powers, rights, duties, functions, privileges, and immunities conferred upon them by law. To this end, the

provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power. (1973, c. 822, s. 1.)

#### CASE NOTES

**Legislative Intent.** — This legislative mandate requires broad construction of those statutes granting power and restrictive readings of those purporting to limit the power. *Stillings v. City of Winston-Salem*, 63 N.C. App. 618, 306 S.E.2d 489 (1983), rev'd on other grounds, 311 N.C. 689, 319 S.E.2d 233 (1984).

**Amendment to county zoning ordinance constituted a valid legislative prerogative** to change the sanitary landfill use from a "special use permit" category to a "use by right under prescribed conditions" category and that section of the county zoning ordinance, which

allowed county zoning administrator to approve the county's permit application for the siting of a landfill, was constitutional and lawful on its face. *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 434 S.E.2d 604 (1993).

**Quoted** in *Summey Outdoor Adv., Inc. v. County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439 (1989).

**Cited** in *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996); *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 480 S.E.2d 681 (1997).

### § 153A-5. Statutory references deemed amended to conform to Chapter.

If a reference is made in another portion of the General Statutes, in a local act, or in a city or county ordinance, resolution, or order to a portion of Chapter 153, and the reference is to Chapter 153 as it existed immediately before February 1, 1974, the reference is deemed amended to refer to that portion of this Chapter that most nearly corresponds to the repealed or superseded portion of Chapter 153. (1973, c. 822, s. 1.)

§§ 153A-6 through 153A-9: Reserved for future codification purposes.

## ARTICLE 2.

### *Corporate Powers.*

### § 153A-10. State has 100 counties.

North Carolina has 100 counties. They are: Alamance, Alexander, Alleghany, Anson, Ashe, Avery, Beaufort, Bertie, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Camden, Carteret, Caswell, Catawba, Chatham, Cherokee, Chowan, Clay, Cleveland, Columbus, Craven, Cumberland, Currituck, Dare, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Gates, Graham, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Jackson, Johnston, Jones, Lee, Lenoir, Lincoln, Macon, Madison, Martin, McDowell, Mecklenburg, Mitchell, Montgomery, Moore, Nash, New Hanover, Northampton, Onslow, Orange, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Tyrrell, Union, Vance, Wake, Warren, Washington, Watauga, Wayne, Wilkes, Wilson, Yadkin, and Yancey. (1973, c. 822, s. 1.)

**Editor's Note.** — Session Laws 1998-15 provides for the ratification of the Meck Neck Transfer Joint Undertaking Agreement made as

of November 18, 1997, by and between Iredell County and Mecklenburg County. Provision is provided for the filing and recording of public

records, taxation, completion of the Street Assessment Program begun by Mecklenburg County, resolution of criminal actions, voter

registration, jury lists and court jurisdiction, and education and tuition for children residing in the affected area.

#### CASE NOTES

**Cited in** *In re University of N.C.*, 300 N.C. 563, 268 S.E.2d 472 (1980).

### § 153A-11. Corporate powers.

The inhabitants of each county are a body politic and corporate under the name specified in the act creating the county. Under that name they are vested with all the property and rights of property belonging to the corporation; have perpetual succession; may sue and be sued; may contract and be contracted with; may acquire and hold any property and rights of property, real and personal, that may be devised, bequeathed, sold, or in any manner conveyed, dedicated to, or otherwise acquired by the corporation, and from time to time may hold, invest, sell, or dispose of the property and rights of property; may have a common seal and alter and renew it at will; and have and may exercise in conformity with the laws of this State county powers, rights, duties, functions, privileges, and immunities of every name and nature. (1868, c. 20, ss. 1, 2, 3, 8; 1876-7, c. 141, s. 1; Code, ss. 702, 703, 704, 707; Rev., ss. 1309, 1310, 1318; C.S., ss. 1290, 1291, 1297; 1973, c. 822, s. 1.)

**Legal Periodicals.** — For note on abrogation of contractual sovereign immunity, see 12 *Wake Forest L. Rev.* 1082 (1976).

#### CASE NOTES

- I. General Consideration.
- II. Suits By and Against County.

##### I. GENERAL CONSIDERATION.

**Editor's Note.** — *Many of the cases cited below were decided under corresponding sections of former law.*

**Counties Are Bodies Politic and Corporate.** — Counties are bodies politic and corporate, which may exercise as agents for the State only such powers as are prescribed by statute and those which are necessarily implied therefrom by law, essential to the exercise of the powers specifically conferred. *O'Neal v. Wake County*, 196 N.C. 184, 145 S.E. 28 (1928). See also, *Board of Comm'rs v. Hanchett Bond Co.*, 194 N.C. 137, 138 S.E. 614 (1927).

**The Constitution recognizes the existence of counties as governmental agencies.** *White v. Commissioners of Chowan*, 90 N.C. 437 (1884); *Woodall v. Western Wake Hwy. Comm'n*, 176 N.C. 377, 97 S.E. 226 (1918).

**Which Are Part of the State Government.** — Counties are of, and constitute a part of, the State government. Their chief purpose is to establish its political organization, and effectuate the local civil administration of its powers

and authority. They are in their general nature governmental—mere instrumentalities of government—and possess corporate powers adapted to its purposes. It is not their purpose to create civil liability on their part, and become answerable to individuals civilly or otherwise. *Manuel v. Board of Comm'rs*, 98 N.C. 9, 3 S.E. 829 (1887), citing *White v. Commissioners of Chowan*, 90 N.C. 437 (1884) and *McCormac v. Commissioners of Robeson*, 90 N.C. 441 (1884).

Counties are a branch of the State government. *Bell v. Commissioners of Johnston County*, 127 N.C. 85, 37 S.E. 136 (1900).

**By Art. VII of the Constitution of 1868, counties were regarded as municipal corporations.** *Winslow v. Commissioners of Perquimans County*, 64 N.C. 218 (1870). See also, *Gooch v. Gregory*, 65 N.C. 142 (1871).

**But counties are not, in a strictly legal sense, municipal corporations,** like cities and towns. Their purposes are more general and partake more largely of the purposes and powers of government proper. *Manuel v. Board of Comm'rs*, 98 N.C. 9, 3 S.E. 829 (1887); *Bell v.*

Commissioners of Johnston County, 127 N.C. 85, 37 S.E. 136 (1900); *Martin v. Board of Comm'rs*, 208 N.C. 354, 180 S.E. 777 (1935).

**The powers of the legislature over counties are very broad and far-reaching**, giving to it practically full control of them. *Jones v. Commissioners*, 137 N.C. 579, 50 S.E. 291 (1905); *Woodall v. Western Wake Hwy. Comm'n*, 176 N.C. 377, 97 S.E. 226 (1918).

**Legislature May Create Counties and Invest Them with Powers.** — It is within the power of the legislature to subdivide the territory of the State and invest the inhabitants of such subdivisions with corporate functions, more or less extensive and varied in their character, for the purpose of government. The legislature alone can create counties, directly or indirectly, and invest them, and agencies in them, with powers, corporate or otherwise in their nature, to effectuate the purposes of the government, whether these be local or general, or both. Such organizations are intended to be instrumentalities and agencies employed to aid in the administration of the government, and are always under the control of the power that created them unless the same shall be restricted by some constitutional limitations. *McCormac v. Commissioners of Robeson*, 90 N.C. 441 (1884); *Board of Trustees v. Webb*, 155 N.C. 379, 71 S.E. 520 (1911); *Commissioners of Cumberland County v. Commissioners of Harnett County*, 157 N.C. 517, 73 S.E. 195 (1911); *Woodall v. Western Wake Hwy. Comm'n*, 176 N.C. 377, 97 S.E. 226 (1918).

**And May Impose Liability on Counties.** — The legislature, subject to constitutional limitations, may confer upon counties such corporate powers to make contracts, create civil liabilities, and serve such business purposes, as it may deem expedient and wise, and may make them answerable in damages for the negligence of their officers and agents in failing to properly exercise the powers with which they are charged, or for exercising them improperly, to the injury of individuals. But such corporate authority and liability must be especially created by and appear from statutory provision, expressed in terms or necessarily implied. *Manuel v. Board of Comm'rs*, 98 N.C. 9, 3 S.E. 829 (1887).

**The legislature may direct counties to perform as duties all things which it can empower them to do.** *State ex rel. Tate v. Board of Comm'rs*, 122 N.C. 812, 30 S.E. 352 (1898).

**And May Enlarge, Abridge or Modify Counties' Functions.** — The functions of counties are not always the same, and they may be enlarged, abridged or modified at the will of the legislature. *White v. Commissioners of Chowan*, 90 N.C. 437 (1884).

**As Well as Alter or Abolish Counties.** — Counties are legislative creations and subject

to be changed, even abolished, or divided and subdivided, at the will of the General Assembly. *Jones v. Commissioners*, 143 N.C. 59, 55 S.E. 427 (1906); *Board of Trustees v. Webb*, 155 N.C. 379, 71 S.E. 520 (1911); *Woodall v. Western Wake Hwy. Comm'n*, 176 N.C. 377, 97 S.E. 226 (1918).

**As to construction of powers granted to counties under former statutes**, see *Vaughn v. Commissioners of Forsyth County*, 118 N.C. 636, 24 S.E. 425 (1896).

**Supervisory Control of Boards of Commissioners.** — Under the Constitution and public laws of North Carolina, the boards of county commissioners are generally given supervision and control of governmental matters in the several counties. *Bunch v. Commissioners of Randolph County*, 159 N.C. 335, 74 S.E. 1048 (1912).

**County Must Act Through Commissioners Convened in a Legal Session.** — For a county to exercise its power to contract, it is essential that it act through its county commissioners as a body convened in legal session, regular, adjourned or special, and, as a rule, authorized meetings are prerequisite to corporate action, which should be based upon deliberate conference and intelligent discussion of proposed measures. *O'Neal v. Wake County*, 196 N.C. 184, 145 S.E. 28 (1928); *Davenport v. Pitt County Drainage Dist.*, 220 N.C. 237, 17 S.E.2d 1 (1941); *Jefferson Std. Life Ins. Co. v. Guilford County*, 225 N.C. 293, 34 S.E.2d 430 (1945).

**And Not in Joint Meeting with Other Governmental Agencies.** — The commissioners of a county are without authority, constitutional or statutory, to enter into a joint meeting with other State governmental agencies functioning as entirely separate departments respectively of the county and the State, and therein to make a binding corporate contract by the adoption of a joint verbal agreement to pledge the faith and credit of the county for its part in paying for the employment of a person to render service in the capacity of a detective to determine and procure evidence against those who have committed a criminal offense. *O'Neal v. Wake County*, 196 N.C. 184, 145 S.E. 28 (1928).

**In order to make a binding pecuniary obligation on a county under former statute imposing duty on county commissioners to provide for the poor**, there had to be a contract to that effect, express in its terms, or the service had to be done at the express request of an officer or agent charged with the duty and having the power to make contracts concerning it. *Copple v. Commissioners*, 138 N.C. 127, 50 S.E. 574 (1905).

**A county may not exercise jurisdiction over any part of a city located within its borders.** *Davidson County v. City of High Point*,

321 N.C. 252, 362 S.E.2d 553 (1987).

**Applied** in *Malloy v. Durham County Dep't of Social Servs.*, 58 N.C. App. 61, 293 S.E.2d 285 (1982); *Cabarrus County v. City of Charlotte*, 71 N.C. App. 192, 321 S.E.2d 476 (1984); *Hubbard v. County of Cumberland*, 143 N.C. App. 149, 544 S.E.2d 587 (2001), cert. denied, 354 N.C. 69, — S.E.2d — (2001).

**Stated** in *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976); *Avery v. County of Burke*, 660 F.2d 111 (4th Cir. 1981).

**Cited** in *In re University of N.C.*, 300 N.C. 563, 268 S.E.2d 472 (1980); *Ratliff v. Burney*, 505 F. Supp. 105 (W.D.N.C. 1981); *Davidson County v. City of High Point*, 85 N.C. App. 26, 354 S.E.2d 280 (1987); *Barnhill San. Serv., Inc. v. Gaston County*, 87 N.C. App. 532, 362 S.E.2d 161 (1987); *Craig v. County of Chatham*, 143 N.C. App. 30, 545 S.E.2d 455 (2001), cert. granted, 354 N.C. 68, — S.E.2d — (2001).

## II. SUITS BY AND AGAINST COUNTY.

**Suit in Name of County.** — Where a county is the real party in interest, it must sue and be sued in its own name. *Lenoir County v. Crabtree*, 158 N.C. 357, 74 S.E. 105 (1912); *Fountain v. County of Pitt*, 171 N.C. 113, 87 S.E. 990 (1916); *Johnson v. Marrow*, 228 N.C. 58, 44 S.E.2d 468 (1947).

A county is not required in an action for mandatory injunction to bring the suit in the name of the county commissioners. Such a suit should be brought in the name of the county. *Lenoir County v. Crabtree*, 158 N.C. 357, 74 S.E. 105 (1912).

Absent a refusal of the board of commissioners of a county to institute an action in its behalf, the action must be instituted in the name of the county or on relation of the county. *Johnson v. Marrow*, 228 N.C. 58, 44 S.E.2d 468 (1947).

**As to requirement of former statute that all actions and proceedings by or against a county in its corporate capacity be in the name of the board of commissioners**, see *Pegram v. Commissioners of Cleveland County*, 65 N.C. 114 (1871); *Askew v. Pollock*, 66 N.C. 49 (1872); *State ex rel. Wescott v. Thees*, 89 N.C. 55 (1883); *Fountain v. County of Pitt*, 171 N.C. 113, 87 S.E. 990 (1916).

**As to venue of action under former statute providing that a county should sue and be sued in the name of the board of commissioners**, see *Jones v. Board of Comm'rs*, 69 N.C. 412 (1873); *Steele v. Commissioners of Rutherford*, 70 N.C. 137 (1874).

**Form of Action Against County.** — Where a good cause of action exists, a county may be sued in any form appropriate to the cause of action, and its liability does not differ as respects the form of the action from that of a private corporation or of an individual.

*Winslow v. Commissioners of Perquimans County*, 64 N.C. 218 (1870).

**Failure to Join the County in Rezoning Dispute Was Fatal.** — The trial court erred in denying the Board of Commissioners' motion to dismiss under § 1A-1, Rule 12(b)(1), (2), (4), (6) and (7) where the plaintiffs brought their action challenging a rezoning solely against the board and not against the county, and where the plaintiffs' attempts to amend the complaint to substitute the county as the named defendant were ineffective as they occurred after the statute of limitations had run under § 1-54.1. *Piland v. Board of Comm'rs*, 141 N.C. App. 293, 539 S.E.2d 669 (2000).

**Counties and County Commissioners Do Not Have Sovereign Immunity.** — These powers and the many others enumerated in this Chapter show that a county and the county commissioners are not part of the State of North Carolina and they do not enjoy its sovereign immunity. *Meares v. Brunswick County*, 615 F. Supp. 14 (E.D.N.C. 1985).

**Counties may be sued only in such cases and for such causes as may be allowed by statute.** *Bell v. Commissioners of Johnston County*, 127 N.C. 85, 37 S.E. 136 (1900).

**And Are Not Ordinarily Liable for Exercise of Corporate Powers.** — Counties are not ordinarily liable to be sued civilly for the manner in which they exercise or fail to exercise their corporate powers. *White v. Commissioners of Chowan*, 90 N.C. 437 (1884).

**Generally a county is not liable for damages by reason of the neglect of its officers or agents.** *Manuel v. Board of Comm'rs*, 98 N.C. 9, 3 S.E. 829 (1887).

**Absent Statutory Provisions Giving a Right of Action.** — Counties are not liable in damages for the torts of their officials, in the absence of statutory provisions giving a right of action. *Keenan v. Commissioners of New Hanover County*, 167 N.C. 356, 83 S.E. 556 (1914), petition for rehearing denied, 169 N.C. 246, 85 S.E. 5 (1915). As to waiver of governmental immunity by county, see § 153A-435.

**For case holding county not liable in damages for injury occasioned by a defective bridge forming a part of the highway**, see *Moffitt v. City of Asheville*, 103 N.C. 237, 9 S.E. 695 (1889).

**Power to Compromise Suits.** — The power to sue and to defend suits carries with it, by necessary implication, the power to make bona fide compromise adjustments of such suits. *Board of Comm'rs v. Tollman*, 145 F. 753 (4th Cir. 1906).

**Power to Enter Consent Judgment.** — County commissioners have authority to assent to the entry of a consent judgment in an action pending against the county, when such judgment is entered in good faith and is free from fraud, etc., a consent judgment being a contract

of the parties spread upon the records with the approval and sanction of a court of competent jurisdiction. *Weaver v. Hampton*, 204 N.C. 42, 167 S.E. 484 (1933).

**County revenue is safe from seizure by creditors, or even for taxes due the federal government**, because to admit the right to appropriate such revenue in satisfaction of a claim would be to concede the power to destroy the State government by depriving its agencies of the means of performing their proper functions. Subject to the restrictions contained in the federal Constitution, the State is a sovereignty, and it is essential to its preservation to give to all property held for it by such agencies as counties the same protection as is given to that held in its own name. *Hughes v. Commissioners of Craven County*, 107 N.C. 598, 12 S.E. 465 (1890); *Vaughn v. Commissioners of Forsyth County*, 118 N.C. 636, 24 S.E. 425 (1896).

**Property and Revenue of County Not Subject to Execution.** — A county can only acquire and hold property for necessary public purposes and for the benefit of all its citizens, and the principles of public policy prevent such property from being sold under execution to satisfy the debt of an individual. *Hughes v. Commissioners of Craven County*, 107 N.C.

598, 12 S.E. 465 (1890). See also, *Gooch v. Gregory*, 65 N.C. 142 (1871).

**Ordinarily, the only remedy of a judgment creditor of a county is a writ of mandamus** to compel its commissioners to levy a tax to pay the debt. *Hughes v. Commissioners of Craven County*, 107 N.C. 598, 12 S.E. 465 (1890), citing *Pegram v. Commissioners of Cleveland County*, 64 N.C. 557 (1870); *Lutterloh v. Board of Comm'rs*, 65 N.C. 403 (1871); *Rogers v. Jenkins*, 98 N.C. 129, 3 S.E. 821 (1887).

A plaintiff who has obtained a judgment against a county is not entitled to an execution against it. His remedy is by writ of mandamus against the board of commissioners of the county to compel them to levy a tax for the satisfaction of the judgment. *Gooch v. Gregory*, 65 N.C. 142 (1871).

**When Mandamus Unnecessary.** — An action may be maintained against county commissioners establishing a debt against the county without asking for a writ of mandamus where it appears that the county has property subject to trusts, or such as can be reached only by proceedings supplemental to execution. *Hughes v. Commissioners of Craven County*, 107 N.C. 598, 12 S.E. 465 (1890).

## § 153A-12. Exercise of corporate power.

Except as otherwise directed by law, each power, right, duty, function, privilege and immunity of the corporation shall be exercised by the board of commissioners. A power, right, duty, function, privilege, or immunity shall be carried into execution as provided by the laws of the State; a power, right, duty, function, privilege, or immunity that is conferred or imposed by law without direction or restriction as to how it is to be exercised or performed shall be carried into execution as provided by ordinance or resolution of the board of commissioners. (1868, c. 20, ss. 1, 2; 1876-7, c. 141, s. 1; Code, ss. 702, 703; Rev., s. 1309; C.S., s. 1290; 1973, c. 882, s. 1.)

### CASE NOTES

**Counties and County Commissioners Do Not Have Sovereign Immunity.** — These powers and the many others enumerated in this Chapter show that a county and the county commissioners are not part of the State of North Carolina and they do not enjoy its sovereign immunity. *Meares v. Brunswick County*, 615 F. Supp. 14 (E.D.N.C. 1985).

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challenging a rezoning solely against the board and not against the county, and where the plaintiffs' attempts to amend the complaint to substitute the county as the named defendant were ineffective as they occurred after the statute of limitations had run under § 1-54.1. *Piland v. Board of Comm'rs*, 141 N.C. App. 293, 539 S.E.2d 669 (2000).

**Applied** in *Malloy v. Durham County Dep't of Social Servs.*, 58 N.C. App. 61, 293 S.E.2d 285 (1982).

**Cited** in *Bethune v. County of Harnett*, 349 N.C. 343, 507 S.E.2d 40 (1998).

### § 153A-13. Continuing contracts.

A county may enter into continuing contracts, some portion or all of which are to be performed in ensuing fiscal years. In order to enter into such a contract, the county must have sufficient funds appropriated to meet any amount to be paid under the contract in the fiscal year in which it is made. In each year, the board of commissioners shall appropriate sufficient funds to meet the amounts to be paid during the fiscal year under continuing contracts previously entered into. (1959, c. 250; 1973, c. 822, s. 1.)

**Cross References.** — As to report on guaranteed energy savings contracts, see § 143-64.17G.

#### CASE NOTES

**Cited in** *Bostic v. Wall*, 588 F. Supp. 994 (W.D.N.C. 1984).

### § 153A-14. Grants from other governments.

A county may contract for and accept grants and loans as permitted by G.S. 160A-17.1. (1973, c. 822, s. 1.)

### § 153A-15. Consent of board of commissioners necessary in certain counties before land may be condemned or acquired by a unit of local government outside the county.

(a) Notwithstanding the provisions of Chapter 40A of the General Statutes or any other general law or local act conferring the power of eminent domain, before final judgment may be entered in any action of condemnation initiated by a county, city or town, special district, or other unit of local government which is located wholly or primarily outside another county, whereby the condemnor seeks to acquire property located in the other county, the condemnor shall furnish proof that the county board of commissioners of the county where the land is located has consented to the taking.

(b) Notwithstanding the provisions of G.S. 153A-158, 160A-240.1, 130A-55, or any other general law or local act conferring the power to acquire real property, before any county, city or town, special district, or other unit of local government which is located wholly or primarily outside another county acquires any real property located in the other county by exchange, purchase or lease, it must have the approval of the county board of commissioners of the county where the land is located.

(c) This section applies to Alamance, Alleghany, Anson, Ashe, Bertie, Bladen, Brunswick, Burke, Buncombe, Cabarrus, Caldwell, Camden, Carteret, Caswell, Catawba, Chatham, Cherokee, Clay, Cleveland, Columbus, Craven, Cumberland, Currituck, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Graham, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hoke, Iredell, Jackson, Johnston, Jones, Lee, Lenoir, Lincoln, Macon, Madison, Martin, McDowell, Mecklenburg, Montgomery, Nash, New Hanover, Onslow, Orange, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Polk, Richmond, Robeson, Rockingham, Rowan, Sampson, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Union, Vance, Wake, Warren, Watauga, Wayne, Wilkes, and Yancey Counties only.

(d) This section does not apply as to any condemnation or acquisition of real property or an interest in real property by a city where the property to be

condemned or acquired is within the corporate limits of that city. (1981, c. 134, ss. 1, 2; c. 270, ss. 1, 2; c. 283, ss. 1-3; c. 459, s. 1; c. 941, s. 1; 1981 (Reg. Sess., 1982), c. 1150, s. 1; 1989 (Reg. Sess., 1990), c. 973, s. 1; c. 1061, s. 1; 1991, c. 615, s. 3; 1991 (Reg. Sess., 1992), c. 790, s. 1; 1993 (Reg. Sess., 1994), c. 624, s. 1; c. 628, s. 1; 1995 (Reg. Sess., 1996), c. 681, s. 1; 1997-164, s. 1; 1997-263, s. 1; 1998-110, s. 1; 1998-217, s. 47; 1999-6, s. 1.)

**Local Modification.** — Anson, Bertie, Buncombe, Burke, Caldwell: 1989 (Reg. Sess., 1990), c. 1061, s. 2; Caswell: 1981, c. 941, s. 2; Cleveland, Davidson, Davie, Forsyth: 1989 (Reg. Sess., 1990), c. 1061, s. 2; Granville: 1981, c. 941, s. 2; Kannapolis: 1997, c. 295; Martin, Montgomery: 1989 (Reg. Sess., 1990), c. 1061, s. 2; Person: 1981, c. 941, s. 2; Rowan, Transylvania: 1989 (Reg. Sess., 1990), c. 1061, s. 2; Vance, Warren: 1981, c. 941, s. 2; Wilkes: 1989 (Reg. Sess., 1990), c. 1061, s. 2.

**Editor's Note.** — Sections 1 and 2 of Session Laws 1981, cc. 134 and 270, and ss. 1 through 3

of Session Laws 1981, c. 283, as amended by Session Laws 1981, cc. 459, 941, and 1150, and Session Laws 1989 (Reg. Sess., 1990), cc. 973, and 1061, have been codified as this section under the direction of the Revisor of Statutes.

Sections 130-130 and 153A-159, most of Article 11 of Chapter 160A, and Chapter 40, referred to in this section, have been repealed. As to eminent domain, see now Chapter 40A.

For similar provisions pertaining to Cabarrus County, see Session Laws 1985, c. 194.

### CASE NOTES

**Quoted** in County of Johnston v. City of Wilson, 136 N.C. App. 775, 525 S.E.2d 826 (2000).

§ **153A-16:** Reserved for future codification purposes.

## ARTICLE 3.

### *Boundaries.*

#### § **153A-17. Existing boundaries.**

The boundaries of each county shall remain as presently established, until changed in accordance with law. (1973, c. 822, s. 1.)

#### § **153A-18. Uncertain or disputed boundary.**

(a) If two or more counties are uncertain as to the exact location of the boundary between them, they may cause the boundary to be surveyed, marked, and mapped. The counties may appoint special commissioners to supervise the surveying, marking, and mapping. A commissioner so appointed or a person surveying or marking the boundary may enter upon private property to view and survey the boundary or to erect boundary markers. Upon ratification of the survey by the board of commissioners of each county, a map showing the surveyed boundary shall be recorded in the office of the register of deeds of each county in the manner provided by law for the recordation of maps or plats and in the Secretary of State's office. The map shall contain a reference to the date of each resolution of ratification and to the page in the minutes of each board of commissioners where the resolution may be found. Upon recordation, the map is conclusive as to the location of the boundary.

(b) If two or more counties dispute the exact location of the boundary between them, and the dispute cannot be resolved pursuant to subsection (a) of this section, any of the counties may apply to a superior court judge who has

jurisdiction pursuant to G.S. 7A-47.1 or 7A-48 in any of the districts or sets of districts as defined in G.S. 7A-41.1 in which any of the counties is located for appointment of a boundary commission. The application shall identify the disputed boundary and ask that a boundary commission be appointed. Upon receiving the application, the court shall set a date for a hearing on whether to appoint the commission. The court shall cause notice of the hearing to be served on the other county or counties. If, after the hearing, the court finds that the location of the boundary is disputed, it shall appoint a boundary commission.

The commission shall consist of one resident of each disputing county and a resident of some other county. The court may appoint one or more surveyors to assist the commission. The commission shall locate, survey, and map and may mark the disputed boundary. To do so it may take evidence and hear testimony, and any commissioner and any person surveying or marking the boundary may enter upon private property to view and survey the boundary or to erect boundary markers. Within 45 days after the day it is appointed, unless this time is extended by the court, the commission shall make its report (which shall include a map of the surveyed boundary) to the court. To be sufficient, the report must be concurred in by a majority of the commissioners. If the court is satisfied that the commissioners have made no error of law, it shall ratify the report, after which the map shall be recorded in the office of the register of deeds of each county in the manner provided by law for the recordation of maps or plats and in the Secretary of State's office. Upon recordation, the map is conclusive as to the location of the boundary.

The disputing counties shall divide equally the costs of locating, surveying, marking, and mapping the boundary, unless the court finds that an equal division of the costs would be unjust. In that case the court may determine the division of costs.

(c) Two or more counties may establish the boundary between them pursuant to subsection (a), above, by the use of base maps prepared from orthophotography, which base maps show the monuments of the United States Geological Survey and North Carolina State Plane Coordinate System established pursuant to Chapter 102 of the General Statutes. Upon ratification of the location of the boundary determined from orthophotography by the board of commissioners of each county, the map showing the boundary and the monuments of the United States Geological Survey and North Carolina State Plane Coordinate System shall be recorded in the Office of the Register of Deeds of each county and in the Secretary of State's office. The map shall contain a reference to the date of each resolution of ratification and to the page in the minutes of each board of commissioners where the resolution may be found. Upon recordation, the map is conclusive as to the location of the boundary. (1836, c. 3; R.C., c. 27; Code, s. 721; Rev., s. 1322; C.S., s. 1299; 1925, c. 251; 1973, c. 822, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 121; 1997-299, s. 1.)

**Local Modification.** — Session Laws 1997-299, s. 1, repealed the local modifications to this section.

## § 153A-19. Establishing and naming townships.

(a) A county may by resolution establish and abolish townships, change their boundaries, and prescribe their names, except that no such resolution may become effective during the period beginning January 1, 1998, and ending January 2, 2000, and any resolution providing that the boundaries of a township shall change automatically with changes in the boundaries of a city shall not be effective during that period. The current boundaries of each

township within a county shall at all times be drawn on a map, or set out in a written description, or shown by a combination of these techniques. This current delineation shall be available for public inspection in the office of the clerk.

(b) Any provision of a city charter or other local act which provides that the boundaries of a township shall change automatically upon a change in a city boundary shall not be effective during the period beginning January 1, 1998, and ending January 2, 2000.

(c) The county manager or, where there is no county manager, the chairman of the board of commissioners, shall report township boundaries and changes in those boundaries to the United States Bureau of the Census in the Boundary and Annexations Survey. In responding to the surveys, each county manager or, if there is no manager, chairman of the board of commissioners shall consult with the county board of elections and other appropriate local agencies as to the location of township boundaries, so that the Census Bureau's mapping of township boundaries does not disagree with any county voting precinct boundaries that may be based on township boundaries. (1868, c. 20, s. 8; Code, s. 707; Rev., s. 1318; C.S., s. 1297; 1973, c. 822, s. 1; 1987, c. 715, s. 1; c. 879, s. 2; 1993, c. 352, s. 1; 1995, c. 423, s. 4.)

#### CASE NOTES

*Editor's Note.* — The cases cited below were decided under corresponding sections of former law.

**Townships are within the power and control of the General Assembly, just as are counties,** cities, towns and other municipal corporations. It may confer upon them, or any single one of them, corporate powers, with the view to accomplish any lawful purpose. Such powers may be conferred for a single purpose as well as many. *Brown v. Commissioners of Hertford*, 100 N.C. 92, 5 S.E. 178 (1888); *Jones v. Commissioners of Person County*, 107 N.C. 248, 12 S.E. 69 (1890).

**Power to Subdivide Territory and Bestow Corporate Functions.** — It is within the power of the legislature to subdivide the territory of the State and invest the inhabitants of such subdivisions with corporate functions. Moreover, it is not essential that such subdivisions be created directly by legislative enactment, certain agencies may be required by statute to establish them. *McCormac v. Commissioners of Robeson*, 90 N.C. 441 (1884).

**As to former corporate powers of townships and former boards of township trustees,** see *Mitchell v. Board of Trustees*, 71 N.C. 400 (1874); *Wallace v. Board of Trustees*, 84 N.C. 164 (1881); *Jones, Gaskill & Co. v. Commissioners of Rowan*, 85 N.C. 278 (1881); *Brown v. Commissioners of Hertford*, 100 N.C. 92, 5 S.E. 178 (1888); *Jones v. Commissioners of*

*Person County*, 107 N.C. 248, 12 S.E. 69 (1890).

**As to liability of trustees for torts,** see *Price v. Board of Trustees*, 172 N.C. 84, 89 S.E. 1066 (1916).

**Charging of County Officers with Township Duties.** — The townships are constituent parts of the county organization, and the county officers may well be charged with duties and authority in respect to debts they may be allowed by statute to contract. *Jones v. Commissioners of Person County*, 107 N.C. 248, 12 S.E. 69 (1890).

**County commissioners are not authorized to issue bonds on the credit of a township for construction of a railroad.** *Graves v. Commissioners*, 135 N.C. 49, 47 S.E. 134 (1904).

**County Bonds Not to Be Issued for Road Purposes of One Township or Taxing District.** — While the building of public roads has been held a necessary expense, application of the principle may not be extended to instances where a statute requires the county to issue its bonds for road purposes to obtain aid for a township or local taxing district therein, upon the approval of the voters of the particular district alone, and without benefit to the others. *Commissioners of Johnston County v. Lacy*, 174 N.C. 141, 93 S.E. 482 (1917).

**Cited in** *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990).

### § 153A-20. Map of electoral districts.

If a county is divided into electoral districts for the purpose of nominating or electing persons to the board of commissioners, the current boundaries of the

electoral districts shall at all times be drawn on a map, or set out in a written description, or shown by a combination of these techniques. This current delineation shall be available for public inspection in the office of the clerk. (1973, c. 822, s. 1.)

**§ 153A-21:** Repealed by Session Laws 1973, c. 884.

**Editor's Note.** — Session Laws 1975, c. 389, applicable only to Robeson County, reenacted this section.

**§ 153A-22. Redefining electoral district boundaries.**

(a) If a county is divided into electoral districts for the purpose of nominating or electing persons to the board of commissioners, the board of commissioners may find as a fact whether there is substantial inequality of population among the districts.

(b) If the board finds that there is substantial inequality of population among the districts, it may by resolution redefine the electoral districts.

(c) Redefined electoral districts shall be so drawn that the quotients obtained by dividing the population of each district by the number of commissioners apportioned to the district are as nearly equal as practicable, and each district shall be composed of territory within a continuous boundary.

(d) No change in the boundaries of an electoral district may affect the unexpired term of office of a commissioner residing in the district and serving on the board on the effective date of the resolution. If the terms of office of members of the board do not all expire at the same time, the resolution shall state which seats are to be filled at the initial election held under the resolution.

(e) A resolution adopted pursuant to this section shall be the basis of electing persons to the board of commissioners at the first general election for members of the board of commissioners occurring after the resolution's effective date, and thereafter. A resolution becomes effective upon its adoption, unless it is adopted during the period beginning 150 days before the day of a primary and ending on the day of the next succeeding general election for membership on the board of commissioners, in which case it becomes effective on the first day after the end of the period.

(f) Not later than 10 days after the day on which a resolution becomes effective, the clerk shall file in the Secretary of State's office, in the office of the register of deeds of the county, and with the chairman of the county board of elections, a certified copy of the resolution.

(g) This section shall not apply to counties where under G.S. 153A-58(3)d. or under public or local act, districts are for residence purposes only, and the qualified voters of the entire county nominate all candidates for and elect all members of the board. (1981, c. 795.)

**Local Modification.** — Dare: 1991, Ex. Sess., c. 2, ss. 4-5.1 (As to applicability and contingency provisions, see 1991 Session Laws, Ex. Sess., c. 2, s. 7).

**Editor's Note.** — Session Laws 1993, c. 521, s. 2 provides: "Section 1 of this act supersedes

any previous action under G.S. 153A-22." Section 1 provides: "Chapter 136, Session Laws of 1991, [relating to expanding and redistricting the Guilford County Board of Commissioners] is reenacted."

**§§ 153A-23, 153A-24:** Reserved for future codification purposes.

## ARTICLE 4.

*Form of Government.*

## Part 1. General Provisions.

**§ 153A-25. Qualifications for appointive office.**

The board of commissioners may fix qualifications for any appointive office, including a requirement that a person serving in such an office reside within the county. The board may not waive qualifications fixed by law for an appointive office but may fix additional qualifications for that office. (1973, c. 822, s. 1.)

**§ 153A-26. Oath of office.**

Each person elected by the people or appointed to a county office shall, before entering upon the duties of the office, take and subscribe the oath of office prescribed in Article VI, Sec. 7 of the Constitution. The oath of office shall be administered by some person authorized by law to administer oaths and shall be filed with the clerk.

On the first Monday in December following each general election at which county officers are elected, the persons who have been elected to county office in that election shall assemble at the regular meeting place of the board of commissioners. At that time each such officer shall take and subscribe the oath of office. An officer not present at this time may take and subscribe the oath at a later time. (1868, c. 20, s. 8; 1874-5, c. 237, s. 3; Code, ss. 707, 708; 1895, c. 135, ss. 3, 4; Rev., ss. 1316, 1318; C.S., ss. 1295, 1297; 1965, c. 26; 1973, c. 822, s. 1.)

## CASE NOTES

**Applied** in *Ratcliff v. County of Buncombe*, 663 F. Supp. 1003 (W.D.N.C. 1987).

**§ 153A-27. Vacancies on the board of commissioners.**

If a vacancy occurs on the board of commissioners, the remaining members of the board shall appoint a qualified person to fill the vacancy. If the number of vacancies on the board is such that a quorum of the board cannot be obtained, the chairman of the board shall appoint enough members to make up a quorum, and the board shall then proceed to fill the remaining vacancies. If the number of vacancies on the board is such that a quorum of the board cannot be obtained and the office of chairman is vacant, the clerk of superior court of the county shall fill the vacancies upon the request of any remaining member of the board or upon the petition of any five registered voters of the county. If for any other reason the remaining members of the board do not fill a vacancy within 60 days after the day the vacancy occurs, the clerk shall immediately report the vacancy to the clerk of superior court of the county. The clerk of superior court shall, within 10 days after the day the vacancy is reported to him, fill the vacancy.

If the member being replaced was serving a two-year term, or if the member was serving a four-year term and the vacancy occurs later than 60 days before

the general election held after the first two years of the term, the appointment to fill the vacancy is for the remainder of the unexpired term. Otherwise, the term of the person appointed to fill the vacancy extends to the first Monday in December next following the first general election held more than 60 days after the day the vacancy occurs; at that general election, a person shall be elected to the seat vacated, either to the remainder of the unexpired term or, if the term has expired, to a full term.

To be eligible for appointment to fill a vacancy, a person must (i) be a member of the same political party as the member being replaced, if that member was elected as the nominee of a political party, and (ii) be a resident of the same district as the member being replaced, if the county is divided into electoral districts. The board of commissioners or the clerk of superior court, as the case may be, shall consult the county executive committee of the appropriate political party before filling a vacancy, but neither the board nor the clerk of the superior court is bound by the committee's recommendation. (Code, s. 719; 1895, c. 135, s. 7; Rev., s. 1314; 1909, c. 490, s. 1; C.S., s. 1294; 1959, c. 1325; 1965, cc. 239, 382; 1967, cc. 7, 424, 439, 1022; 1969, cc. 82, 222; 1971, c. 743, s. 1; 1973, c. 822, s. 1; 1985, c. 563, ss. 7.3, 7.4.)

**Cross References.** — As to counties not subject to this section, see § 153A-27.1.

#### CASE NOTES

**Authority to Accept Resignation.** — Under former statute which authorized the clerk of the superior court to fill vacancies on boards of commissioners in all cases, it was held that a tender of resignation by a county commissioner to the clerk of the superior court was a tender to

the proper authority. While the mere filing of the resignation did not vacate the office, its acceptance by the clerk was final, and after its acceptance the commissioner had no power to withdraw it. *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929).

### § 153A-27.1. Vacancies on board of commissioners in certain counties.

(a) If a vacancy occurs on the board of commissioners, the remaining members of the board shall appoint a qualified person to fill the vacancy. If the number of vacancies on the board is such that a quorum of the board cannot be obtained, the chairman of the board shall appoint enough members to make up a quorum, and the board shall then proceed to fill the remaining vacancies. If the number of vacancies on the board is such that a quorum of the board cannot be obtained and the office of chairman is vacant, the clerk of superior court of the county shall fill the vacancies upon the request of any remaining member of the board or upon the petition of any registered voters of the county.

(b) If the member being replaced was serving a two-year term, or if the member was serving a four-year term and the vacancy occurs later than 60 days before the general election held after the first two years of the term, the appointment to fill the vacancy is for the remainder of the unexpired term. Otherwise, the term of the person appointed to fill the vacancy extends to the first Monday in December next following the first general election held more than 60 days after the day the vacancy occurs; at that general election, a person shall be elected to the seat vacated for the remainder of the unexpired term.

(c) To be eligible for appointment to fill a vacancy, a person must (i) be a member of the same political party as the member being replaced, if that member was elected as the nominee of a political party, and (ii) be a resident of the same district as the member being replaced, if the county is divided into electoral districts.

(d) If the member who vacated the seat was elected as a nominee of a political party, the board of commissioners, the chairman of the board, or the clerk of superior court, as the case may be, shall consult the county executive committee of the appropriate political party before filling the vacancy, and shall appoint the person recommended by the county executive committee of the political party of which the commissioner being replaced was a member, if the party makes a recommendation within 30 days of the occurrence of the vacancy.

(e) Whenever because of G.S. 153A-58(3)b. or because of any local act, only the qualified voters of an area which is less than the entire county were eligible to vote in the general election for the member whose seat is vacant, the appointing authority must accept the recommendation only if the county executive committee restricted voting to committee members who represent precincts all or part of which were within the territorial area of the district of the county commissioner.

(f) The provisions of any local act which provides that a county executive committee of a political party shall fill any vacancy on a board of county commissioners are repealed.

(g) Counties subject to this section are not subject to G.S. 153A-27.

(h) This section shall apply only in the following counties: Alamance, Alexander, Alleghany, Avery, Beaufort, Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Carteret, Cherokee, Clay, Cleveland, Cumberland, Dare, Davidson, Davie, Forsyth, Graham, Guilford, Haywood, Henderson, Hyde, Jackson, Lincoln, Macon, Madison, McDowell, Mecklenburg, Moore, Pender, Polk, Randolph, Rockingham, Rutherford, Sampson, Stanly, Stokes, Transylvania, Wake, and Yancey. (1981, c. 763, ss. 6, 14; c. 830; 1983, c. 418; 1985, c. 563, s. 7.2; 1987, c. 196, s. 1; 1989, c. 296; c. 497, s. 2; 1991, c. 395, s. 1; c. 558, s. 1; 1995 (Reg. Sess., 1996), c. 683, s. 1; 1997-88, s. 1.)

**Local Modification.** — Beaufort: 1997-248, s. 3(a); Wake: 1981, c. 763, s. 12.

**OPINIONS OF ATTORNEY GENERAL**

**For a discussion of the proper authority and procedures for appointing an interim county tax collector,** see opinion of Attorney

General to The Honorable Charles Beall, North Carolina House of Representatives, 1998 N.C.A.G. 35 (8/5/98).

**§ 153A-28. Compensation of board of commissioners.**

The board of commissioners may fix the compensation and allowances of the chairman and other members of the board by inclusion of the compensation and allowances in and adoption of the budget ordinance. In addition, if the chairman or any other member of the board becomes a full-time county official, pursuant to G.S. 153A-81 or 153A-84, his compensation and allowances may be adjusted at any time during his service as a full-time official, for the duration of that service. (Code, s. 709; Rev., s. 2785; 1907, c. 500; C.S., s. 3918; 1969, c. 180, s. 1; 1971, c. 1125, s. 1; 1973, c. 822, s. 1.)

**CASE NOTES**

**Erroneous But Innocent Mileage Allowance.** — Where a board of county commissioners audited in favor of its members for mileage, to which they were not entitled, and it was found as a fact that they did so under advice

and without any corrupt or fraudulent motive, it was held that the members of the board were not indictable either under § 14-234 or at common law. *State v. Norris*, 111 N.C. 652, 16 S.E. 2 (1892), decided under former law.

## OPINIONS OF ATTORNEY GENERAL

**Authority of the county commissioners to amend the county budget to raise or lower their compensation** at any time during the fiscal year is limited by their authority to fix their compensation in the adoption of the

annual budget. See opinion of Attorney General to Mr. James C. Fox, New Hanover County Attorney, 42 N.C.A.G. 132 (1972), issued under former law.

§ 153A-29: Repealed by Session Laws 1975, c. 514, s. 17.

§§ 153A-30 through 153A-33: Reserved for future codification purposes.

## Part 2. Structure of the Board of Commissioners.

## § 153A-34. Structure of boards of commissioners.

Each county is governed by a board of commissioners. The structure and manner of election of the board of commissioners in each county shall remain as it is on February 1, 1974, until changed in accordance with law. (Rev., s. 1311; C.S., s. 1292; 1973, c. 822, s. 1.)

**Editor's Note.** — Session Laws 1973, c. 822, s. 2, provided, in part, that the repeal of former §§ 153-4 and 153-5 did not affect in any way the structure or manner of election of any board of county commissioners nor the structure or manner of election of which was established by those sections, and that each board of commissioners would continue to have the same struc-

ture and manner of election as it had on the effective date of the 1973 act until that structure or manner of election was changed in accordance with law.

**Legal Periodicals.** — For note on one man, one vote as applied to local governing bodies, see 47 N.C.L. Rev. 413 (1969).

## CASE NOTES

**Editor's Note.** — *The cases cited below were decided under corresponding sections of former law.*

**Board of commissioners of a county has a perpetual existence,** continued by members who succeed each other, and the body remains the same, notwithstanding a change in the individuals who compose it. *Pegram v. Commissioners of Cleveland County*, 65 N.C. 114 (1871).

**Powers of Board of Commissioners.** — The board of commissioners in a county possesses only those powers which have been prescribed by statute and those necessarily implied by law, and no others. This is the general rule. *Fidelity & Deposit Co. v. Fleming*, 132 N.C. 332, 43 S.E. 899 (1903).

**Powers of De Facto Board.** — An old board of commissioners, holding over as de facto officers, has the right and duty of performing, to the fullest extent, all the appropriate functions of office. *State ex rel. Jones v. Jones*, 80 N.C. 127 (1879).

**Exercise of Powers by Board as Exercise by County.** — The board's exercise of statutory

powers is, in contemplation of law, the exercise of such powers by the county. *Board of Comm'rs v. Hanchett Bond Co.*, 194 N.C. 137, 138 S.E. 614 (1927).

**Powers to Be Exercised by Majority.** — A majority of the commissioners constitute the legal body, and generally a majority of the members of the legally organized body can exercise the powers delegated to the county. *Cleveland Cotton Mills v. Commissioners of Cleveland County*, 108 N.C. 678, 13 S.E. 271 (1891).

**There is no grade among the duties and powers of county commissioners,** and no preference is given to one over another. *Long v. Commissioners of Richmond County*, 76 N.C. 273 (1877).

**The board of commissioners has the power and duty of auditing and passing upon the validity of claims.** *Reed v. Farmer*, 211 N.C. 249, 189 S.E. 882 (1937), citing *Martin v. Clark*, 135 N.C. 178, 47 S.E. 397 (1904).

**Remedy for Failure of Board to Act on Claim.** — If the board of commissioners refuses to audit or act upon a claim, mandamus will lie

to compel them to do so. If after a hearing the board refuses to allow or issue a warrant for its payment, an action will lie against the commissioners to establish the debt and for such other relief as the party may be entitled to. *Reed v. Farmer*, 211 N.C. 249, 189 S.E. 882 (1937), citing *Martin v. Clark*, 135 N.C. 178, 47 S.E. 397 (1904).

**Mandamus will lie against county commissioners who refuse to issue bonds**, as required by an act of the legislature. *Jones v. Commissioners*, 137 N.C. 579, 50 S.E. 291 (1905).

**Who Must Obey Mandamus When Membership of Board Changes Between Order and Service Thereof.** — When a writ of mandamus is obtained against a board of commissioners, and there is a change in the individual members between the time when the writ is ordered and the time when it is served, those who compose the board at the time of service must obey it. *Pegram v. Commissioners of Cleveland County*, 65 N.C. 114 (1871).

**Correction of Clerical Error in Record by Board.** — Where the record of the board of county commissioners, through a clerical error, stated that a twenty cents (20¢) tax levy for general county purposes was on \$100.00 valuation of property, this error could subsequently be corrected by the board, at its own instance, to correctly show that in fact the levy was actually made for 15 cents for general county purposes, 5 cents thereof being for the improvement of the courthouse and county home, and thus within the constitutional requirement. *Norfolk S.R.R. v. Forbes*, 188 N.C. 151, 124 S.E. 132 (1924).

**Retaining the consideration of an ultra vires contract can impose no contractual liability** upon a municipal corporation of this character. *Berlin Iron Bridge Co. v. Board of Comm'rs*, 111 N.C. 317, 16 S.E. 314 (1892), citing *Weir v. Page*, 109 N.C. 220, 13 S.E. 773 (1891).

**A court has no power to interfere with the domestic administration of affairs of a county**, so long as the board of commissioners acts *intra vires*. *Long v. Commissioners of Richmond County*, 76 N.C. 273 (1877).

**As to remedies to try title to the office of county commissioner**, see *Lyon v. Board of Comm'rs*, 120 N.C. 237, 26 S.E. 929 (1897); *State ex rel. Houghtalling v. Taylor*, 122 N.C. 141, 122 N.C. 171, 29 S.E. 101, 29 S.E. 101 (1898). See also § 1-515.

**Personal Liability of Commissioners as Imposed by Legislature.** — Where the legislature has created certain duties to be performed by county commissioners, and has expressly imposed a personal liability upon their failure to perform some of them but not others, such liability only attaches where it is expressly so declared. *Fore v. Feimster*, 171 N.C. 551, 88 S.E. 977 (1916).

**Personal Liability for Negligent Performance or Omission of Ministerial Duties.** — County commissioners are held to an individual liability in the negligent performance of, or negligent omission to perform, a purely ministerial duty, to a person specially injured thereby, when the means to act are available and the matter does not involve the exercise of a discretionary or judicial power conferred upon them by statute. *Hipp v. Farrell*, 169 N.C. 551, 86 S.E. 570 (1915).

**Personal Liability for Judicial and Discretionary Acts.** — Public officers are not personally liable to persons specially injured by their acts done in the exercise of judicial or discretionary powers conferred on them by statute, unless it is alleged and shown that in doing the acts complained of they did so corruptly and with malice. *Hipp v. Farrell*, 169 N.C. 551, 86 S.E. 570 (1915).

**Cited in** *Bostic v. Wall*, 588 F. Supp. 994 (W.D.N.C. 1984).

§§ 153A-35 through 153A-38: Reserved for future codification purposes.

### Part 3. Organization and Procedures of the Board of Commissioners.

#### § 153A-39. Selection of chairman and vice-chairman; powers and duties.

On:

(1) The first Monday in December of each even-numbered year; and  
 (2) Its first regular meeting in December of each odd-numbered year,  
 the board of commissioners shall choose one of its members as chairman for the ensuing year, unless the chairman is elected as such by the people or otherwise

designated by law. The board shall also at that time choose a vice-chairman to act in the absence or disability of the chairman. If the chairman and the vice-chairman are both absent from a meeting of the board, the members present may choose a temporary chairman.

The chairman is the presiding officer of the board of commissioners. Unless excused by rule of the board, the presiding officer has the duty to vote on any question before the board, but he has no right to break a tie vote in which he participated. (Code, s. 706; Rev., s. 1317; C.S., s. 1296; 1945, c. 132; 1951, c. 904, s. 1; 1961, c. 154; 1967, c. 617, s. 1; 1969, c. 349, s. 1; c. 1036; 1973, c. 822, s. 1; 1993, c. 95, s. 1.)

### § 153A-40. Regular and special meetings.

(a) The board of commissioners shall hold a regular meeting at least once a month, and may hold more frequent regular meetings. The board may by resolution fix the time and place of its regular meetings. If such a resolution is adopted, at least 10 days before the first meeting to which the resolution is to apply, the board shall cause a copy of it to be posted on the courthouse bulletin board and a summary of it to be published. If no such resolution is adopted, the board shall meet at the courthouse on the first Monday of each month, or on the next succeeding business day if the first Monday is a holiday.

If use of the courthouse or other designated regular meeting place is made temporarily impossible, inconvenient, or unwise, the board may change the time or place or both of a regular meeting or of all regular meetings within a specified period of time. The board shall cause notice of the temporary change to be posted at or near the regular meeting place and shall take any other action it considers helpful in informing the public of the temporary change.

The board may adjourn a regular meeting from day to day or to a day certain until the business before the board is completed.

(b) The chairman or a majority of the members of the board may at any time call a special meeting of the board of commissioners by signing a written notice stating the time and place of the meeting and the subjects to be considered. The person or persons calling the meeting shall cause the notice to be delivered to the chairman and each other member of the board or left at the usual dwelling place of each at least 48 hours before the meeting and shall cause a copy of the notice to be posted on the courthouse bulletin board at least 48 hours before the meeting. Only those items of business specified in the notice may be transacted at a special meeting, unless all members are present or those not present have signed a written waiver.

If a special meeting is called to deal with an emergency, the notice requirements of this subsection do not apply. However, the person or persons calling such a special meeting shall take reasonable action to inform the other members and the public of the meeting. Only business connected with the emergency may be discussed at a meeting called pursuant to this paragraph.

In addition to the procedures set out in this subsection, a person or persons calling a special or emergency meeting of the board of commissioners shall comply with the notice requirements of Article 33B of General Statutes Chapter 143.

(c) The board of commissioners shall hold all its meetings within the county except:

- (1) In connection with a joint meeting of two or more public bodies; provided, however, that such a meeting shall be held within the boundaries of the political subdivision represented by the members of one of the public bodies participating;
- (2) In connection with a retreat, forum, or similar gathering held solely for the purpose of providing members of the board with general informa-

tion relating to the performance of their public duties; provided, however, that members of the board of commissioners shall not vote upon or otherwise transact public business while in attendance at such a gathering;

- (3) In connection with a meeting between the board of commissioners and its local legislative delegation during a session of the General Assembly; provided, however, that at any such meeting the members of the board of commissioners may not vote upon or otherwise transact public business except with regard to matters directly relating to legislation proposed to or pending before the General Assembly;
- (4) While in attendance at a convention, association meeting or similar gathering; provided, however, that any such meeting may be held solely to discuss or deliberate the board's position concerning convention resolutions, elections of association officers and similar issues that are not legally binding upon the board of commissioners or its constituents.

All meetings held outside the county shall be deemed "official meetings" within the meaning of G.S. 143-318.10(d). (Code, s. 706; Rev., s. 1317; C.S., s. 1296; 1945, c. 132; 1951, c. 904, s. 1; 1961, c. 154; 1967, c. 617, s. 1; 1969, c. 349, s. 1; c. 1036; 1973, c. 822, s. 1; 1977, 2nd Sess., c. 1191, s. 6; 1985, c. 745.)

**Editor's Note.** — Article 33B of Chapter 143, referred to in subsection (b) of this section, was repealed. For present provisions concerning meetings of public bodies, see Chapter 143,

Article 33C (§§ 143-318.9 through 143-318.18.)  
For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

CASE NOTES

**Statute setting days for meetings was directory** and was intended to forbid commissioners from receiving compensation for attendance on days other than those of regular meetings. It did not disable the commissioners from acting at other times on due notice to all concerned. *People ex rel. McNeill v. Green*, 75 N.C. 329 (1876), decided under former law.

**Commissioners elected by county commissioners at an adjourned meeting subject to the call of the chairman were at**

**least de facto officers**, whose title could not be collaterally attacked. *Tripp v. Commissioners of Pitt County*, 158 N.C. 180, 73 S.E. 896 (1912), decided under former law.

**Stated** in *News & Observer Publishing Co. v. Interim Bd. of Educ.*, 29 N.C. App. 37, 223 S.E.2d 580 (1976); *Wright v. County of Macon*, 64 N.C. App. 718, 308 S.E.2d 97 (1983).

**Cited** in *MacDonald v. Newsome*, 437 F. Supp. 796 (E.D.N.C. 1977); *Pittman v. Wilson County*, 839 F.2d 225 (4th Cir. 1988).

§ 153A-41. Procedures.

The board of commissioners may adopt its own rules of procedure, in keeping with the size and nature of the board and in the spirit of generally accepted principles of parliamentary procedure. (Code, s. 706; Rev., s. 1317; C.S., s. 1296; 1945, c. 132; 1951, c. 904, s. 1; 1961, c. 154; 1967, c. 617, s. 1; 1969, c. 349, s. 1; c. 1036; 1973, c. 822, s. 1.)

§ 153A-42. Minutes to be kept; ayes and noes.

The clerk shall keep full and accurate minutes of the proceedings of the board of commissioners, which shall be available for public inspection. The clerk shall record the results of each vote in the minutes; and upon the request of any member of the board, the ayes and noes upon any question shall be taken and recorded. (Code, s. 712; 1905, c. 530; Rev., s. 1325; C.S., s. 1310; 1953, c. 973, s. 3; 1973, c. 822, s. 1.)

## CASE NOTES

**Record of a board of county commissioners may be corrected nunc pro tunc** to speak the truth by the board itself. *Norfolk S.R.R. v. Reid*, 187 N.C. 320, 121 S.E. 534 (1924), decided under former law.

Where county commissioners exercised their statutory authority to loan county funds to the State Highway Commission (now the Board of Transportation), anticipating the allotment of State funds for the building of highways within the county, and lawfully contracted for that purpose, they could not, after the passage of a

later act taking away this power, materially change the contract, but the county commissioners nunc pro tunc could correct the entries on their minutes theretofore duly passed and entered of record so as to make the entry speak the truth as to what had been regularly done, to this end parol evidence being admissible, the time of the correction so made relating back to the time the entry should have been correctly made. *Oliver v. Board of Comm'rs*, 194 N.C. 380, 139 S.E. 767 (1927), decided under former law.

### § 153A-43. Quorum.

A majority of the membership of the board of commissioners constitutes a quorum. The number required for a quorum is not affected by vacancies. If a member has withdrawn from a meeting without being excused by majority vote of the remaining members present, he shall be counted as present for the purposes of determining whether a quorum is present. The board may compel the attendance of an absent member by ordering the sheriff to take the member into custody. (Code, s. 706; Rev., s. 1317; C.S., s. 1296; 1945, c. 132; 1951, c. 904, s. 1; 1961, c. 154; 1967, c. 617, s. 1; 1969, c. 349, s. 1; c. 1036; 1973, c. 822, s. 1.)

### § 153A-44. (Effective until July 1, 2002) Members excused from voting.

The board may excuse a member from voting, but only upon questions involving his own financial interest or his official conduct. (For purposes of this section, the question of the compensation and allowances of members of the board does not involve a member's own financial interest or official conduct.) (Code, s. 706; Rev., s. 1317; C.S., s. 1296; 1945, c. 132; 1951, c. 904, s. 1; 1961, c. 154; 1967, c. 617, s. 1; 1969, c. 349, s. 1; c. 1036; 1973, c. 822, s. 1.)

**Section Set Out Twice.** — The section above is effective until July 1, 2002. For the section as amended July 1, 2002, see the following section, also numbered § 153A-44.

## CASE NOTES

**Cited in** *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 434 S.E.2d 604 (1993).

## OPINIONS OF ATTORNEY GENERAL

**Disqualification.** — Any situation in which a county commissioner has a personal economic interest would disqualify that commissioner from voting. See opinion of Attorney General to C. Preston Cornelius, Senior Resident Superior Court Judge, 60 N.C.A.G. 50 (1990).

**No Conflict of Interest Found.** — A county commissioner who is also chairman of the county social services board can present the department of social services budget to the county commissioners and thereafter partici-

pate and vote as a member of the county commissioners regarding the approval or disapproval of that budget, as the budget for the department of social services would not ordinarily involve an economic conflict of interest. See opinion of Attorney General to C. Preston Cornelius, Senior Resident, Superior Court Judge, 60 N.C.A.G. 50 (1990).

The chairman of the county social services board, who is also a county commissioner, can participate in discussions and vote at county

commission meetings in matters pertaining to personnel and the operation of the county department of social services. It is apparent that the legislature contemplates county commissioners serving on other boards and commissions as an extension of commissioner duties,

and that such service will not ordinarily disqualify the commissioners from participating in discussions and voting at county commission meetings. See opinion of Attorney General to C. Preston Cornelius, Senior Resident, Superior Court Judge, 60 N.C.A.G. 50 (1990).

### § 153A-44. (Effective July 1, 2002) Members excused from voting.

The board may excuse a member from voting, but only upon questions involving the member's own financial interest or official conduct or on matters on which the member is prohibited from voting under G.S. 14-234. For purposes of this section, the question of the compensation and allowances of members of the board does not involve a member's own financial interest or official conduct. (Code, s. 706; Rev., s. 1317; C.S., s. 1296; 1945, c. 132; 1951, c. 904, s. 1; 1961, c. 154; 1967, c. 617, s. 1; 1969, c. 349, s. 1; c. 1036; 1973, c. 822, s. 1; 2001-409, s. 8.)

**Section Set Out Twice.** — The section above is effective July 1, 2002. For the section as in effect until July 1, 2002, see the preceding section, also numbered 153A-44.

**Editor's Note.** — Session Laws 2001-409, s. 10, provides that prosecutions for offenses committed before the effective dates of the provisions of the act are not abated or affected by the act, and the statutes that would be applicable but for the act remain applicable to those prosecutions.

**Effect of Amendments.** — Session Laws 2001-409, s. 8, effective July 1, 2002, and applicable to actions taken and offenses committed on or after that date, in the first sentence substituted "the member's own financial interest or official conduct" for "his own financial interest or his official conduct" and added the language beginning "or on matters on which" at the end of that sentence, and deleted parentheses that had enclosed the second sentence.

### § 153A-45. Adoption of ordinances.

To be adopted at the meeting at which it is first introduced, an ordinance or any action having the effect of an ordinance (except the budget ordinance, any bond order, or any other ordinance on which a public hearing must be held before the ordinance may be adopted) must receive the approval of all the members of the board of commissioners. If the ordinance is approved by a majority of those voting but not by all the members of the board, or if the ordinance is not voted on at that meeting, it shall be considered at the next regular meeting of the board. If it then or at any time thereafter within 100 days of its introduction receives a majority of the votes cast, a quorum being present, the ordinance is adopted. (1963, c. 1060, ss. 1, 11/2; 1965, cc. 388, 567, 1083, 1158; 1967, c. 495, s. 2; 1969, c. 36, s. 1; 1971, c. 702, ss. 1-3; 1973, c. 822, s. 1.)

#### CASE NOTES

**For discussion of the distinction between an ordinance and a resolution,** see *Pittman v. Wilson County*, 839 F.2d 225 (4th Cir. 1988).

**Personnel Rules.** — Absent evidence that "personnel resolution" containing "rules and regulations" for the dismissal of county employees, incorporated in an employee handbook, was passed with the formality required for the

enactment of an ordinance, the court would conclude that it was not an ordinance. *Pittman v. Wilson County*, 839 F.2d 225 (4th Cir. 1988).

**Cited** in *MacDonald v. Newsome*, 437 F. Supp. 796 (E.D.N.C. 1977); *Vulcan Materials Co. v. Iredell County*, 103 N.C. App. 779, 407 S.E.2d 283 (1991); *Vereen v. Holden*, 127 N.C. App. 205, 487 S.E.2d 822 (1997).

## § 153A-46. Franchises.

No ordinance making a grant, renewal, extension, or amendment of any franchise may be finally adopted until it has been passed at two regular meetings of the board of commissioners. No such grant, renewal, extension, or amendment may be made except by ordinance. (1973, c. 822, s. 1.)

**Cross References.** — As to approval, under this section, of long-term contracts entered into by boards of county commissioners for the disposal of solid waste, see § 153A-299.5.

## § 153A-47. Technical ordinances.

Subject to G.S. 143-138(e), a county may in an ordinance adopt by reference a published technical code or a standard or regulation promulgated by a public agency. A technical code or standard or regulation so adopted has the force of law in any area of the county in which the ordinance is applicable. An official copy of a technical code or standard or regulation adopted by reference shall be available for public inspection in the office of the clerk and need not be filed in the ordinance book. (1973, c. 822, s. 1.)

### CASE NOTES

**Cited** in *Bostic v. Wall*, 588 F. Supp. 994 (W.D.N.C. 1984).

## § 153A-48. Ordinance book.

The clerk shall maintain an ordinance book, separate from the minute book of the board of commissioners. The ordinance book shall be indexed and shall be available for public inspection in the office of the clerk. Except as provided in this section and in G.S. 153A-47, each county ordinance shall be filed and indexed in the ordinance book.

The budget ordinance and any amendments thereto, any bond order, and any other ordinance of limited interest or transitory nature may be omitted from the ordinance book. However, the ordinance book shall contain a section showing the caption of each omitted ordinance and the page in the commissioners' minute book at which the ordinance may be found.

If a county adopts and issues a code of its ordinances, county ordinances need be recorded and indexed in the ordinance book only until they are placed in the codification. (1963, c. 1060, ss. 1, 11/2; 1965, cc. 388, 567, 1083, 1158; 1967, c. 495, s. 2; 1969, c. 36, s. 1; 1971, c. 702, ss. 1-3; 1973, c. 822, s. 1.)

### CASE NOTES

**For discussion of the distinction between an ordinance and a resolution**, see *Pittman v. Wilson County*, 839 F.2d 225 (4th Cir. 1988).

**Personnel Rules.** — Absent evidence that "personnel resolution" containing "rules and

regulations" for the dismissal of county employees, incorporated in an employee handbook, was passed with the formality required for the enactment of an ordinance, the court would conclude that it was not an ordinance. *Pittman v. Wilson County*, 839 F.2d 225 (4th Cir. 1988).

## § 153A-49. Code of ordinances.

A county may adopt and issue a code of its ordinances. The code may be reproduced by any method that gives legible and permanent copies, and may be issued as a securely bound book or books with periodic separately bound supplements, or as a loose-leaf book maintained by replacement pages.

Supplements or replacement pages should be adopted and issued at least annually, unless there have been no additions to or modifications of the code during the year.

A code may consist of two parts, the "General Ordinances" and the "Technical Ordinances." The technical ordinances may be published as separate books or pamphlets, and may include ordinances regarding the construction of buildings, the installation of plumbing and electric wiring, and the installation of cooling and heating equipment; ordinances regarding the use of public utilities, buildings, or facilities operated by the county; the zoning ordinance; the subdivision control ordinance; the privilege license tax ordinance; and other similar ordinances designated as technical ordinances by the board of commissioners. The board may omit from the code the budget ordinance, any bond orders, and other designated classes of ordinances of limited interest or transitory nature, but the code shall clearly describe the classes of ordinances omitted from it.

The board of commissioners may provide that ordinances (i) establishing or amending the boundaries of county zoning areas or (ii) establishing or amending the boundaries of zoning districts shall be codified by appropriate entries upon official map books to be retained permanently in the office of the clerk or some other county office generally accessible to the public. (1973, c. 822, s. 1.)

#### CASE NOTES

**Cited** in *Bostic v. Wall*, 588 F. Supp. 994 (W.D.N.C. 1984).

### § 153A-50. Pleading and proving county ordinances.

County ordinances shall be pleaded and proved under the rules and procedures of G.S. 160A-79. References to G.S. 160A-77 and G.S. 160A-78 appearing in G.S. 160A-79 are deemed, for purposes of this section, to refer to G.S. 153A-49 and G.S. 153A-48, respectively. (1973, c. 822, s. 1.)

§ 153A-51: Reserved for future codification purposes.

### § 153A-52. Conduct of public hearing.

The board of commissioners may hold public hearings at any place within the county. The board may adopt reasonable rules governing the conduct of public hearings, including but not limited to rules (i) fixing the maximum time allotted to each speaker, (ii) providing for the designation of spokesmen for groups of persons supporting or opposing the same position, (iii) providing for the selection of delegates from groups of persons supporting or opposing the same positions when the number of persons wishing to attend the hearing exceeds the capacity of the hall, and (iv) providing for the maintenance of order and decorum in the conduct of the hearing.

The board may continue a public hearing without further advertisement. If a public hearing is set for a given date and a quorum of the board is not then present, the board shall continue the hearing without further advertisement until its next regular meeting. (1973, c. 822, s. 1.)

§§ 153A-53 through 153A-57: Reserved for future codification purposes.

## Part 4. Modification in the Structure of the Board of Commissioners.

### § 153A-58. Optional structures.

A county may alter the structure of its board of commissioners by adopting one or any combination of the options prescribed by this section.

- (1) Number of members of the board of commissioners: The board may consist of any number of members not less than three, except as limited by subdivision (2)d of this section.
- (2) Terms of office of members of the board of commissioners:
  - a. Members shall be elected for two-year terms of office.
  - b. Members shall be elected for four-year terms of office.
  - c. Members shall be elected for overlapping four-year terms of office.
  - d. The board shall consist of an odd number of members, who are elected for a combination of four- and two-year terms of office, so that a majority of members is elected each two years. This option may be used only if all members of the board are nominated and elected by the voters of the entire county, and only if the chairman of the board is elected by and from the members of the board.
- (3) Mode of election of the board of commissioners:
  - a. The qualified voters of the entire county shall nominate all candidates for and elect all members of the board.  
For options b, c, and d, the county shall be divided into electoral districts, and board members shall be apportioned to the districts so that the quotients obtained by dividing the population of each district by the number of commissioners apportioned to the district are as nearly equal as practicable.
  - b. The qualified voters of each district shall nominate candidates and elect members who reside in the district for seats apportioned to that district; and the qualified voters of the entire county shall nominate candidates and elect members apportioned to the county at large, if any.
  - c. The qualified voters of each district shall nominate candidates who reside in the district for seats apportioned to that district, and the qualified voters of the entire county shall nominate candidates for seats apportioned to the county at large, if any; and the qualified voters of the entire county shall elect all the members of the board.
  - d. Members shall reside in and represent the districts according to the apportionment plan adopted, but the qualified voters of the entire county shall nominate all candidates for and elect all members of the board.  
If any of options b, c, or d is adopted, the board shall divide the county into the requisite number of electoral districts according to the apportionment plan adopted, and shall cause a delineation of the districts so laid out to be drawn up and filed as required by G.S. 153A-20. No more than half the board may be apportioned to the county at large.
- (4) Selection of chairman of the board of commissioners:
  - a. The board shall elect a chairman from among its membership to serve a one-year term, as provided by G.S. 153A-39.
  - b. The chairmanship shall be a separate office. The qualified voters of the entire county nominate candidates for and elect the chairman for a two- or four-year term. (1927, c. 91, s. 3; 1969, c. 717, s. 1; 1973, c. 822, s. 1.)

**Local Modification.** — (As to Part 4 of Article 4) Bladen: 1987, c. 646; Dare: 1991, Ex. Sess., c. 2, s. 4 (As to applicability and contingency provisions, see 1991 Session Laws, Ex. Sess., c. 2, s. 7); Lee (as to Part 4 and § 153A-58): 1989, c. 195, ss. 4, 5 (effective June 1, 1989, but only applicable to resolutions approved on

or before Aug. 1, 1990), as amended by 1989, c. 770, s. 43. Lee (as to Part 4 and § 153A-58): 1989, c. 195, ss. 4, 5 (effective June 1, 1989, but only applicable to resolutions approved on or before Aug. 1, 1990), as amended by 1989, c. 770, s. 43.

#### CASE NOTES

**Cited** in *Ratcliff v. County of Buncombe*, 759 F.2d 1183 (4th Cir. 1985); *Ratcliff v. County of Buncombe*, 663 F. Supp. 1003 (W.D.N.C. 1987).

### § 153A-59. Implementation when board has members serving a combination of four- and two-year terms.

If the structure of the board of commissioners is altered to establish a board with an odd number of members serving a combination of four- and two-year terms of office, the new structure shall be implemented as follows:

At the first election all members of the board shall be elected. A simple majority of those elected shall be elected for two-year terms, and the remaining members shall be elected for four-year terms. The candidate or candidates receiving the highest number of votes shall be elected for the four-year terms.

At each subsequent general election, a simple majority of the board shall be elected. That candidate who is elected with the least number of votes shall be elected for a two-year term, and the other member or members elected shall be elected for four-year terms. (1927, c. 91, s. 3; 1969, c. 717, s. 1; 1973, c. 822, s. 1.)

### § 153A-60. Initiation of alterations by resolution.

The board of commissioners shall initiate any alteration in the structure of the board by adopting a resolution. The resolution shall:

- (1) Briefly but completely describe the proposed alterations;
- (2) Prescribe the manner of transition from the existing structure to the altered structure;
- (3) Define the electoral districts, if any, and apportion the members among the districts;
- (4) Call a special referendum on the question of adoption of the alterations. The referendum shall be held and conducted by the county board of elections. The referendum may be held at the same time as any other state, county or municipal primary, election, special election or referendum, or on any date set by the board of county commissioners, provided, that such referendum shall not be held within the period of time beginning 60 days before and ending 60 days after any other primary, election, special election or referendum held in the county.

Upon its adoption, the resolution shall be published in full. (1927, c. 91, s. 4; 1969, c. 717, s. 1; 1973, c. 822, s. 1; 1977, c. 382.)

**Local Modification.** — Craven: 2001-447, s. 1 (applicable only to resolutions adopted before January 1, 2002); Dare: 1991, Ex. Sess., c. 2, s. 1 (As to applicability and contingency provisions, see 1991 Session Laws, Ex. Sess., c. 2, s.

7); Lee: 1989, c. 195, s. 1 (effective June 1, 1989, but only applicable to resolutions approved on or before Aug. 1, 1990); Wayne: 1987, c. 119 (only applicable to resolutions approved on or before Nov. 30, 1988).

**Legal Periodicals.** — For survey of 1977 administrative law affecting state government, see 56 N.C.L. Rev. 867 (1978).

**CASE NOTES**

**Cited** in Pittman v. Wilson County, 839 F.2d 225 (4th Cir. 1988).

**§ 153A-61. Submission of proposition to voters; form of ballot.**

A proposition to approve an alteration shall be printed on the ballot in substantially the following form:

“Shall the structure of the board of commissioners be altered? (Describe the effect of the alteration.)

- YES
- NO”

The ballot shall be separate from other ballots used at the election.

If a majority of the votes cast on the proposition are in the affirmative, the plan contained in the resolution shall be put into effect as provided in this Part. If a majority of the votes cast are in the negative, the resolution and the plan contained therein are void. (1927, c. 91, s. 4; 1969, c. 717, s. 1; 1973, c. 822, s. 1.)

**Local Modification.** — Craven: 2001-447, s. 1 (applicable only to resolutions adopted before January 1, 2002); Dare: 1991, Ex. Sess., c. 2, s. 2 (As to applicability and contingency provisions, see 1991 Session Laws, Ex. Sess., c. 2, s. 7); Lee: 1989, c. 195, s. 2 (effective June 1, 1989, but only applicable to resolutions approved on or before Aug. 1, 1990); Wayne: 1987, c. 119 (only applicable to resolutions approved on or before Nov. 30, 1988).

**§ 153A-62. Effective date of any alteration.**

Any approved alteration shall be the basis for nominating and electing the members of the board of commissioners at the first succeeding primary and general election for county offices held after approval of the alteration; and the alteration takes effect on the first Monday in December following that general election. (1927, c. 91, s. 4; 1969, c. 717, s. 1; 1973, c. 822, s. 1.)

**OPINIONS OF ATTORNEY GENERAL**

**Effect of County Referendum.** — A referendum on reorganizing the Board of Commissioners in Madison County, if approved, would be effective for the next general election in which county offices are scheduled to be filled. See opinion of Attorney General to Mr. Larry Leake, Chairman, State Board of Elections, 1998 N.C.A.G. 37 (8/27/98).

**§ 153A-63. Filing copy of resolution.**

A copy of a resolution approved pursuant to this Part shall be filed and indexed in the ordinance book required by G.S. 153A-48. (1927, c. 91, s. 4; 1969, c. 717, s. 1; 1973, c. 822, s. 1.)

**§ 153A-64. Filing results of election.**

If the proposition is approved under G.S. 153A-61, a certified true copy of the resolution and a copy of the abstract of the election shall be filed with the

Secretary of State, and with the Legislative Library. (1985 (Reg. Sess., 1986), c. 935, s. 1; 1989, c. 191, s. 1.)

**Local Modification.** — Craven: 2001-447, s. 2 (applicable only to resolutions adopted before January 1, 2002); Dare: 1991, Ex. Sess., c. 2, s. 3 (As to applicability and contingency provisions, see 1991 Session Laws, Ex. Sess., c. 2, s. 7); Lee: 1989, c. 195, s. 3 (effective June 1, 1989, but only applicable to resolutions approved on or before Aug. 1, 1990); Wayne: 1987, c. 119 (only applicable to resolutions approved on or before Nov. 30, 1988).

**§§ 153A-65 through 153A-75:** Reserved for future codification purposes.

ARTICLE 5.

*Administration.*

Part 1. Organization and Reorganization of County Government.

**§ 153A-76. Board of commissioners to organize county government.**

The board of commissioners may create, change, abolish, and consolidate offices, positions, departments, boards, commissions, and agencies of the county government, may impose ex officio the duties of more than one office on a single officer, may change the composition and manner of selection of boards, commissions, and agencies, and may generally organize and reorganize the county government in order to promote orderly and efficient administration of county affairs, subject to the following limitations:

- (1) The board may not abolish an office, position, department, board, commission, or agency established or required by law.
- (2) The board may not combine offices or confer certain duties on the same officer when this action is specifically forbidden by law.
- (3) The board may not discontinue or assign elsewhere a function or duty assigned by law to a particular office, position, department, board, commission, or agency.
- (4) The board may not change the composition or manner of selection of a local board of education, the board of health, the board of social services, the board of elections, or the board of alcoholic beverage control. (1973, c. 822, s. 1.)

**Cross References.** — As to prevalence of Article 7 of Chapter 115C (§ 115C-65 et seq.) over subdivision (4) of this section, see § 115C-68.3.

CASE NOTES

**County Department and Board of Social Services Do Not Have Sovereign Immunity.** — Because a county department of social services and a county board of social services are extensions of the county, which does not enjoy sovereign immunity, neither do they have sovereign immunity. *Meares v. Brunswick*

*County*, 615 F. Supp. 14 (E.D.N.C. 1985). These powers and the many others enumerated in this Chapter show that a county and the county commissioners are not part of the State of North Carolina and they do not enjoy its sovereign immunity. *Meares v. Brunswick County*, 615 F. Supp. 14 (E.D.N.C. 1985).

## OPINIONS OF ATTORNEY GENERAL

**For a discussion of the proper authority and procedures for appointing an interim county tax collector,** see opinion of Attorney General to The Honorable Charles Beall, North Carolina House of Representatives, 1998 N.C.A.G. 35 (8/5/98).

**Division of County Health Department.**

— Although a board of commissioners may organize county government pursuant to this

section, the section expressly prohibits the board from abolishing a department, such as the county health department, and assigning elsewhere its functions and duties. Therefore, a county health department may not be divided into two or more agencies. See opinion of Attorney General to Dr. Ronald H. Levine, State Health Director, 52 N.C.A.G. 44 (1982).

**§ 153A-77. Authority of boards of commissioners in certain counties over commissions, boards, agencies, etc.**

(a) In the exercise of its jurisdiction over commissions, boards and agencies, the board of county commissioners may assume direct control of any activities theretofore conducted by or through any commission, board or agency by the adoption of a resolution assuming and conferring upon the board of county commissioners all powers, responsibilities and duties of any such commission, board or agency. This subsection shall apply to the board of health, the social services board, area mental health, developmental disabilities, and substance abuse area board and any other commission, board or agency appointed by the board of county commissioners or acting under and pursuant to authority of the board of county commissioners of said county. A board of county commissioners exercising the power and authority under this subsection may, notwithstanding G.S. 130A-25, enforce public health rules adopted by the board through the imposition of civil penalties. If a public health rule adopted by a board of county commissioners imposes a civil penalty, the provisions of G.S. 130A-25 making its violation a misdemeanor shall not be applicable to that public health rule unless the rule states that a violation of the rule is a misdemeanor. The board of county commissioners may exercise the power and authority herein conferred only after a public hearing held by said board pursuant to 30 days' notice of said public hearing given in a newspaper having general circulation in said county.

The board of county commissioners may also appoint advisory boards, committees, councils and agencies composed of qualified and interested county residents to study, interpret and develop community support and cooperation in activities conducted by or under the authority of the board of county commissioners of said county.

(b) In the exercise of its jurisdiction over commissions, boards, and agencies, the board of county commissioners of a county having a county manager pursuant to G.S. 153A-81 may:

- (1) Consolidate the provision of human services in the county under the direct control of a human services director appointed and supervised by the county manager in accordance with subsection (e) of this section;
- (2) Create a consolidated human services board having the powers conferred by subsection (c) of this section;
- (3) Create a consolidated county human services agency having the authority to carry out the functions of the local health department, the county department of social services, and the area mental health, developmental disabilities, and substance abuse services authority; and
- (4) Assign other county human services functions to be performed by the consolidated human services agency under the direction of the human

services director, with policy-making authority granted to the consolidated human services board as determined by the board of county commissioners.

(c) A consolidated human services board appointed by the board of county commissioners shall serve as the policy-making, rule-making, and administrative board of the consolidated human services agency. The consolidated human services board shall be composed of no more than 25 members. The composition of the board shall reasonably reflect the population makeup of the county and shall include:

- (1) Eight persons who are consumers of human services, public advocates, or family members of clients of the consolidated human services agency, including: one person with mental illness, one person with a developmental disability, one person in recovery from substance abuse, one family member of a person with mental illness, one family member of a person with a developmental disability, one family member of a person with a substance abuse problem, and two consumers of other human services.
- (2) Eight persons who are professionals, each with qualifications in one of these categories: one psychologist, one pharmacist, one engineer, one dentist, one optometrist, one veterinarian, one social worker, and one registered nurse.
- (3) Two physicians licensed to practice medicine in this State, one of whom shall be a psychiatrist.
- (4) One member of the board of county commissioners.
- (5) Other persons, including members of the general public representing various occupations.

The board of county commissioners may elect to appoint a member of the consolidated human services board to fill concurrently more than one category of membership if the member has the qualifications or attributes of more than one category of membership.

All members of the consolidated human services board shall be residents of the county. The members of the board shall serve four-year terms. No member may serve more than two consecutive four-year terms. The county commissioner member shall serve only as long as the member is a county commissioner.

The initial board shall be appointed by the board of county commissioners upon the recommendation of a nominating committee comprised of members of the preconsolidation board of health, social services board, and area mental health, developmental disabilities, and substance abuse services board. In order to establish a uniform staggered term structure for the board, a member may be appointed for less than a four-year term. After the subsequent establishment of the board, its board shall be appointed by the board of county commissioners from nominees presented by the human services board. Vacancies shall be filled for any unexpired portion of a term.

A chairperson shall be elected annually by the members of the consolidated human services board. A majority of the members shall constitute a quorum. A member may be removed from office by the county board of commissioners for (i) commission of a felony or other crime involving moral turpitude; (ii) violation of a State law governing conflict of interest; (iii) violation of a written policy adopted by the county board of commissioners; (iv) habitual failure to attend meetings; (v) conduct that tends to bring the office into disrepute; or (vi) failure to maintain qualifications for appointment required under this subsection. A board member may be removed only after the member has been given written notice of the basis for removal and has had the opportunity to respond.

A member may receive a per diem in an amount established by the county board of commissioners. Reimbursement for subsistence and travel shall be in

accordance with a policy set by the county board of commissioners. The board shall meet at least quarterly. The chairperson or three of the members may call a special meeting.

(d) The consolidated human services board shall have authority to:

- (1) Set fees for departmental services based upon recommendations of the human services director. Fees set under this subdivision are subject to the same restrictions on amount and scope that would apply if the fees were set by a county board of health, a county board of social services, or a mental health, developmental disabilities, and substance abuse area authority.
- (2) Assure compliance with laws related to State and federal programs.
- (3) Recommend creation of local human services programs.
- (4) Adopt local health regulations and participate in enforcement appeals of local regulations.
- (5) Perform regulatory health functions required by State law.
- (6) Act as coordinator or agent of the State to the extent required by State or federal law.
- (7) Plan and recommend a consolidated human services budget.
- (8) Conduct audits and reviews of human services programs, including quality assurance activities, as required by State and federal law or as may otherwise be necessary periodically.
- (9) Advise local officials through the county manager.
- (10) Perform public relations and advocacy functions.
- (11) Protect the public health to the extent required by law.
- (12) Perform comprehensive mental health services planning.
- (13) Develop dispute resolution procedures for human services contractors and clients and public advocates, subject to applicable State and federal dispute resolution procedures for human services programs, when applicable.

Except as otherwise provided, the consolidated human services board shall have the powers and duties conferred by law upon a board of health, a social services board, and an area mental health, developmental disabilities, and substance abuse services board.

Local employees who serve as staff of a consolidated county human services agency are subject to county personnel policies and ordinances only and are not subject to the provisions of the State Personnel Act.

(e) The human services director of a consolidated county human services agency shall be appointed and dismissed by the county manager with the advice and consent of the consolidated human services board. The human services director shall report directly to the county manager. The human services director shall:

- (1) Appoint staff of the consolidated human services agency with the county manager's approval.
- (2) Administer State human services programs.
- (3) Administer human services programs of the local board of county commissioners.
- (4) Act as secretary and staff to the consolidated human services board under the direction of the county manager.
- (5) Plan the budget of the consolidated human services agency.
- (6) Advise the board of county commissioners through the county manager.
- (7) Perform regulatory functions of investigation and enforcement of State and local health regulations, as required by State law.
- (8) Act as an agent of and liaison to the State, to the extent required by law.

Except as otherwise provided by law, the human services director or the director's designee shall have the same powers and duties as a social services

director, a local health director, and a director of an area mental health, developmental disabilities, and substance abuse services authority.

(f) This section applies to counties with a population in excess of 425,000. (1973, c. 454, ss. 1-21/2; 1985, c. 589, s. 56; c. 754, s. 1; 1987, c. 217, ss. 1, 2; 1995 (Reg. Sess., 1996), c. 690, s. 3; 2001-120, s. 1.)

**Editor's Note.** — Session Laws 1995 (Reg. Sess., 1996), c. 690, s. 16, effective July 1, 1996, and expiring on January 1, 2001, provides that counties which consolidate human services pursuant to G.S. 153A-77(b) shall report by January 1, 1998, and annually thereafter to the Chairs of the House Appropriations Subcommittees on Human Resources and Natural and Economic Resources and the Chairs of the Senate Appropriations Committees on Human Re-

sources and Natural and Economic Resources, to the Joint Legislative Commission on Governmental Operations, and to the Fiscal Research Division regarding the county's implementation of consolidated human services.

**Effect of Amendments.** — Session Laws 2001-120, s. 1, effective May 25, 2001, inserted the third and fourth sentences in the first paragraph of subsection (a).

#### CASE NOTES

**Personal Jurisdiction Involving Negligent Placement of Foster Child.** — Where defendants raised the issues of failure to state a claim and lack of subject matter jurisdiction, but failed to raise the issue of personal jurisdiction, and stipulated in the record before the appellate court that they were properly before

the trial court, the defendants could not argue that they were not subject to suit under this section and Chapters 108A and 122C. *Hobbs v. North Carolina Dep't of Human Resources*, 135 N.C. App. 412, 520 S.E.2d 595 (1999).

**Cited** in *Meares v. Brunswick County*, 615 F. Supp. 14 (E.D.N.C. 1985).

#### OPINIONS OF ATTORNEY GENERAL

**County Board of Health.** — Pursuant to this section, a board of commissioners, in a county with a population in excess of 325,000 (now 425,000), may assume all powers, responsibilities and duties of a county board of health. The board may exercise the power and authority after conducting a public hearing pursuant to 30 days' notice. Although the board may appoint advisory groups, the statute does not authorize the delegation of the former power and authority of the county board of health to another agency. See Opinion of Attorney General to Dr. Ronald H. Levine, State Health Director, 52 N.C.A.G. 44 (1982).

**Local Health Director.** — The authority

conferred by this section is limited to commissions, boards and agencies appointed by the board of commissioners or acting pursuant to its authority. The local health director is appointed by the county board of health and his authority is conferred by statute. Furthermore, the authority of the board of commissioners to assume the power and responsibilities of agencies is limited by the statute to boards, such as health and social services, and similar agencies. The office of local health director is unaffected by this section and must be filled by the board of commissioners. See opinion of Attorney General to Dr. Ronald H. Levine, State Health Director, 52 N.C.A.G. 44 (1982).

#### § 153A-77.1. Single portal of entry.

A county may develop for human services a single portal of entry, a consolidated case management system, and a common data base; provided that if the county is part of a district health department or multicounty public health authority or a multicounty area mental health, developmental disabilities, and substance abuse authority, such action must be approved by the district board of health or public health authority board or the area mental health, developmental disabilities, and substance abuse board to affect any matter within the jurisdiction of that board. Nothing in this section shall be construed to abrogate a patient's right to confidentiality as provided by law. (1987, c. 422, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 47; 1997-502, s. 5.)

§§ 153A-78 through 153A-80: Reserved for future codification purposes.

## Part 2. Administration in Counties Having Managers.

### § 153A-81. Adoption of county-manager plan; appointment or designation of manager.

The board of commissioners may by resolution adopt or discontinue the county-manager plan. If it adopts the county-manager plan, the board may, in the alternative:

- (1) Appoint a county manager to serve at its pleasure. The manager shall be appointed solely on the basis of his executive and administrative qualifications. He need not be a resident of the county or the State at the time of his appointment.
- (2) Confer upon the chairman or some other member of the board of commissioners the duties of county manager. If this is done, the chairman or member shall become a full-time county official, and the board may increase his salary pursuant to G.S. 153A-28.
- (3) Confer upon any other officer, employee, or agent of the county the duties of county manager.

As used in this Part, the word "manager" includes the chairman or any member of the board of commissioners exercising the duties of manager or any officer, employee, or agent of a county exercising the duties of manager. (1927, c. 91, ss. 5, 8; 1973, c. 822, s. 1.)

#### CASE NOTES

**Applied** in *Ratcliff v. County of Buncombe*, 663 F. Supp. 1003 (W.D.N.C. 1987).

**Cited** in *Ratcliff v. County of Buncombe*, 759 F.2d 1183 (4th Cir. 1985).

### § 153A-82. Powers and duties of manager.

The manager is the chief administrator of county government. He is responsible to the board of commissioners for the administration of all departments of county government under the board's general control and has the following powers and duties:

- (1) He shall appoint with the approval of the board of commissioners and suspend or remove all county officers, employees, and agents except those who are elected by the people or whose appointment is otherwise provided for by law. The board may by resolution permit the manager to appoint officers, employees, and agents without first securing the board's approval. The manager shall make his appointments, suspensions, and removals in accordance with any general personnel rules, regulations, policies, or ordinances that the board may adopt. The board may require the manager to report each suspension or removal to the board at the board's first regular meeting following the suspension or removal; and, if the board has permitted the manager to make appointments without board approval, the board may require the manager to report each appointment to the board at the board's first regular meeting following the appointment.
- (2) He shall direct and supervise the administration of all county offices, departments, boards, commissions and agencies under the general control of the board of commissioners, subject to the general direction and control of the board.

- (3) He shall attend all meetings of the board of commissioners and recommend any measures that he considers expedient.
- (4) He shall see that the orders, ordinances, resolutions, and regulations of the board of commissioners are faithfully executed within the county.
- (5) He shall prepare and submit the annual budget and capital program to the board of commissioners.
- (6) He shall annually submit to the board of commissioners and make available to the public a complete report on the finances and administrative activities of the county as of the end of the fiscal year.
- (7) He shall make any other reports that the board of commissioners may require concerning the operations of county offices, departments, boards, commissions, and agencies.
- (8) He shall perform any other duties that may be required or authorized by the board of commissioners. (1927, c. 91, ss. 6, 7; 1973, c. 822, s. 1.)

CASE NOTES

**Severance Pay.** — The right of a public officer to receive compensation can only arise out of the rendition of the public services related to his office. *Leete v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995).

Where county manager worked one month after giving notice of his resignation and received all compensation due him under the terms of his employment with the County, severance pay would be compensation beyond that due for services rendered and, thus, constitutionally impermissible. *Leete v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995).

**Severance pay to county manager who voluntarily resigned violated North Carolina Constitution, Art. 1, sec. 32**, because county manager was to be compensated for duties that were not performed, since the record reflected that the compensation was not for prior services rendered, and he was paid all benefits due him. *Leete v. County of Warren*, 341 N.C. 116, 459 S.E.2d 232 (1995).

**Applied** in *Ratcliff v. County of Buncombe*, 663 F. Supp. 1003 (W.D.N.C. 1987).

**Cited** in *Pittman v. Wilson County*, 839 F.2d 225 (4th Cir. 1988).

§ 153A-83. Acting county manager.

By letter filed with the clerk, the manager may designate, subject to the approval of the board of commissioners, a qualified person to exercise the powers and perform the duties of manager during the manager’s temporary absence or disability. During an absence or disability, the board may revoke the designation at any time and appoint another person to serve until the manager returns or his disability ceases. (1973, c. 822, s. 1.)

§ 153A-84. Interim county manager.

Whenever the position of county manager is vacant, the board of commissioners shall designate a qualified person to exercise the powers and perform the duties of manager until the vacancy is filled. The board may designate the chairman or some other member as interim manager; for the interim the chairman or member shall become a full-time county official, and the board may increase his salary pursuant to G.S. 153A-28. (1973, c. 822, s. 1.)

CASE NOTES

**Cited** in *Ratcliff v. County of Buncombe*, 759 F.2d 1183 (4th Cir. 1985).

§§ **153A-85, 153A-86:** Reserved for future codification purposes.

### Part 3. Administration in Counties Not Having Managers.

#### § **153A-87. Administration in counties not having managers.**

In a county that has not adopted or does not operate under the county-manager plan, the board of commissioners shall appoint, suspend, and remove all county officers, employees, and agents except those who are elected by the people or whose appointment is otherwise provided for by law. The board may delegate to the head of any county department the power to appoint, suspend, and remove county officers or employees assigned to his department. (1973, c. 822, s. 1.)

#### § **153A-88. Acting department heads.**

By letter filed with the clerk, the head of a department may designate, subject to the approval of the board of commissioners, a qualified person to exercise the powers and perform the duties of head of that department during the department head's temporary absence or disability. During an absence or disability, the board may revoke the designation at any time and appoint another person to serve until the department head returns or his disability ceases. (1973, c. 822, s. 1.)

#### § **153A-89. Interim department heads.**

Whenever the position of head of a department is vacant, the board may designate a qualified person to exercise the powers and perform the duties of head of the department until the vacancy is filled. (1973, c. 822, s. 1.)

§§ **153A-90, 153A-91:** Reserved for future codification purposes.

### Part 4. Personnel.

#### § **153A-92. Compensation.**

(a) Subject to the limitations set forth in subsection (b) of this section, the board of commissioners shall fix or approve the schedule of pay, expense allowances, and other compensation of all county officers and employees, whether elected or appointed, and may adopt position classification plans.

(b) In exercising the authority granted by subsection (a) of this section, the board of commissioners is subject to the following limitations:

- (1) The board of commissioners may not reduce the salary, allowances, or other compensation paid to an officer elected by the people for the duties of his elective office if the reduction is to take effect during the term of office for which the incumbent officer has been elected, unless the officer agrees to the reduction or unless the Local Government Commission pursuant to Chapter 159, Article 10, orders a reduction.
- (2) During the year of a general election, the board of commissioners may reduce the salary, allowances, or other compensation of an officer to be elected at the general election only in accordance with this subdivision. The board of commissioners shall by resolution give notice of intention to make the reduction no later than 14 days before the last

day for filing notice of candidacy for the office. The resolution shall set forth the reduced salary, allowances, and other compensation and shall provide that the reduction is to take effect at the time the person elected to the office in the general election takes office. Once adopted, the resolution may not be altered until the person elected to the office in the general election has taken office. The filing fee for the office shall be determined by reference to the reduced salary.

- (3) If the board of commissioners reduces the salaries, allowances, or other compensation of employees assigned to an officer elected by the people, and the reduction does not apply alike to all county offices and departments, the elected officer involved must approve the reduction. If the elected officer refuses to approve the reduction, he and the board of commissioners shall meet and attempt to reach agreement. If agreement cannot be reached, either the board or the officer may refer the dispute to arbitration by the senior resident superior court judge of the superior court district or set of districts as defined in G.S. 7A-41.1 in which the county is located. The judge shall make an award within 30 days after the day the matter is referred to him. The award may extend for no more than two fiscal years, including the fiscal year for which it is made.
- (4) The board of commissioners shall fix their own salaries, allowances, and other compensation in accordance with G.S. 153A-28.
- (5) The board of commissioners shall fix the salaries, allowances and other compensation of county employees subject to the State Personnel Act according to the procedures set forth in Chapter 126. The board may make these employees subject to a county position classification plan only as provided in Chapter 126.

(c) In counties with a county manager, the manager is responsible for preparing position classification and pay plans for submission to the board of commissioners and for administering the pay plan and any position classification plan in accordance with general policies and directives adopted by the board. In counties without a county manager, the board of commissioners shall appoint or designate a personnel officer, who shall then be responsible for administering the pay plan and any position classification plan in accordance with general policies and directives adopted by the board.

(d) A county may purchase life insurance or health insurance or both for the benefit of all or any class of county officers and employees as a part of their compensation. A county may provide other fringe benefits for county officers and employees. (1927, c. 91, s. 8; 1953, c. 1227, ss. 1-3; 1969, c. 358, s. 1; c. 1017; 1973, c. 822, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 122.)

**Cross References.** — As to compensation of board of education members, see § 115C-38.

#### CASE NOTES

**Severance Pay.** — The right of a public officer to receive compensation can only arise out of the rendition of the public services related to his office. *Leete v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995).

Where county manager worked one month after giving notice of his resignation and received all compensation due him under the

terms of his employment with the County, severance pay would be compensation beyond that due for services rendered and, thus, constitutionally impermissible. *Leete v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995).

**Severance pay to county manager who voluntarily resigned violated North Carolina Constitution, Art. 1, Sec. 32,** because

county manager was to be compensated for duties that were not performed, since the record reflected that the compensation was not for prior services rendered, and he was paid all benefits due him. *Leete v. County of Warren*, 341 N.C. 116, 459 S.E.2d 232 (1995).

**Quoted** in *Hubbard v. County of Cumberland*, 143 N.C. App. 149, 544 S.E.2d 587 (2001), cert. denied, 354 N.C. 69, — S.E.2d — (2001).

**Cited** in *Bostic v. Wall*, 588 F. Supp. 994 (W.D.N.C. 1984).

#### OPINIONS OF ATTORNEY GENERAL

**County Board of Commissioners Has No Authority to Abolish Office or Reduce Salary of Incumbent Coroner During Term of Office.** — See opinion of Attorney General to Mr. Harold Price, Chairman, Alexander County Board of Elections, 40 N.C.A.G. 568 (1970).

**As to authority of county to increase officers' salaries in election year,** see opin-

ion of Attorney General to Mr. Dallas W. McPherson, Greene County Attorney, 40 N.C.A.G. 569 (1970).

**As to when a local or special act is applicable in fixing salaries,** see opinion of Attorney General to Mr. James R. Sugg, Craven County Attorney, 41 N.C.A.G. 22A (1970).

### § 153A-93. Retirement benefits.

(a) The board of commissioners may provide for enrolling county officers and employees in the Local Governmental Employees' Retirement System, the Law-Enforcement Officers' Benefit and Relief Fund, the Firemen's Pension Fund, or a retirement plan certified to be actuarially sound by a qualified actuary as defined in subsection (c) of this section and may make payments into such a retirement system or plan on behalf of its employees.

(b) No county may make payments into a retirement system or plan established or authorized by a local act unless the system or plan is certified to be actuarially sound by a qualified actuary as defined in subsection (c) of this section.

(c) A qualified actuary means a member of the American Academy of Actuaries or an individual certified as qualified by the Commissioner of Insurance.

(d) A county which is providing health insurance under G.S. 153A-92(d) may provide health insurance for all or any class of former officers and employees of the county who are receiving benefits under subsection (a) of this section. Such health insurance may be paid entirely by the county, partly by the county and former officer or employee, or entirely by the former officer or employee, at the option of the county.

(e) The board of commissioners may provide a deferred compensation plan. Where the board of commissioners provides a deferred compensation plan, the investment of funds for the plan shall be exempt from the provisions of G.S. 159-30 and G.S. 159-31. Counties may invest deferred compensation plan funds in life insurance, fixed or variable annuities and retirement income contracts, regulated investment trusts, or other forms of investments approved by the Board of Trustees of the North Carolina Public Employee Deferred Compensation Plan. (1973, c. 822, s. 1; 1981, c. 347, s. 1; 1991, c. 277, s. 1.)

#### CASE NOTES

**Cited** in *Bostic v. Wall*, 588 F. Supp. 994 (W.D.N.C. 1984).

### § 153A-94. Personnel rules; office hours, workdays, and holidays.

(a) The board of commissioners may adopt or provide for rules and regulations or ordinances concerning but not limited to annual leave, sick leave, special leave with full pay or with partial pay supplementing workers' compensation payments for employees injured in accidents arising out of and in the course of employment, working conditions, service award and incentive award programs, other personnel policies, and any other measures that promote the hiring and retention of capable, diligent, and honest career employees.

(b) The board of commissioners may prescribe the office hours, workdays, and holidays to be observed by the various offices, departments, boards, commissions, and agencies of the county. (1959, c. 251; 1973, c. 822, s. 1; 1991, c. 636, s. 3.)

### § 153A-95. Personnel board.

The board of commissioners may establish a personnel board with authority, as regards employees in offices, departments, boards, commissions, and agencies under the general control of the board of commissioners, to administer tests designed to determine the merit and fitness of candidates for appointment or promotion, to conduct hearings upon the appeal of employees who have been suspended, demoted, or discharged, to hear employee grievances, or to undertake any other duties relating to personnel administration that the board of commissioners may direct. (1973, c. 822, s. 1.)

### § 153A-96. Participation in the Social Security Act.

The board of commissioners may take any action necessary to allow county officers and employees to participate fully in benefits provided by the Federal Social Security Act. (1973, c. 822, s. 1.)

### § 153A-97. Defense of officers, employees and others.

A county may, pursuant to G.S. 160A-167, provide for the defense of:

- (1) Any county officer or employee, including the county board of elections or any county election official.
- (2) Any member of a volunteer fire department or rescue squad which receives public funds.
- (2a) Any soil and water conservation supervisor, and any local soil and water conservation employee, whether the employee is a county employee or an employee of a soil and water conservation district.
- (3) Any person or professional association who at the request of the board of county commissioners provides medical or dental services to inmates in the custody of the sheriff and is sued pursuant to 42 U.S.C. § 1983 with respect to the services. (1957, c. 436; 1973, c. 822, s. 1; 1977, c. 307, s. 1; 1989, c. 733, s. 2; 2001-300, s. 1.)

**Effect of Amendments.** — Session Laws 2001-300, s. 1, effective July 21, 2001, made a minor punctuation change at the end of subdivi-

vision (1); deleted "and" at the end of subdivision (2); and added subdivision (2a).

## CASE NOTES

**Applied** in *Gray v. Laws*, 51 F.3d 426 (4th Cir. 1995).

**Cited** in *Bostic v. Wall*, 588 F. Supp. 994 (W.D.N.C. 1984).

### § 153A-98. Privacy of employee personnel records.

(a) Notwithstanding the provisions of G.S. 132-6 or any other general law or local act concerning access to public records, personnel files of employees, former employees, or applicants for employment maintained by a county are subject to inspection and may be disclosed only as provided by this section. For purposes of this section, an employee's personnel file consists of any information in any form gathered by the county with respect to that employee and, by way of illustration but not limitation, relating to his application, selection or nonselection, performance, promotions, demotions, transfers, suspension and other disciplinary actions, evaluation forms, leave, salary, and termination of employment. As used in this section, "employee" includes former employees of the county.

(b) The following information with respect to each county employee is a matter of public record: name; age; date of original employment or appointment to the county service; current position title; current salary; date and amount of the most recent increase or decrease in salary; date of the most recent promotion, demotion, transfer, suspension, separation or other change in position classification; and the office to which the employee is currently assigned. The board of county commissioners shall determine in what form and by whom this information will be maintained. Any person may have access to this information for the purpose of inspection, examination, and copying, during regular business hours, subject only to such rules and regulations for the safekeeping of public records as the board of commissioners may have adopted. Any person denied access to this information may apply to the appropriate division of the General Court of Justice for an order compelling disclosure, and the court shall have jurisdiction to issue such orders.

(c) All information contained in a county employee's personnel file, other than the information made public by subsection (b) of this section, is confidential and shall be open to inspection only in the following instances:

- (1) The employee or his duly authorized agent may examine all portions of his personnel file except (i) letters of reference solicited prior to employment, and (ii) information concerning a medical disability, mental or physical, that a prudent physician would not divulge to his patient.
- (2) A licensed physician designated in writing by the employee may examine the employee's medical record.
- (3) A county employee having supervisory authority over the employee may examine all material in the employee's personnel file.
- (4) By order of a court of competent jurisdiction, any person may examine such portion of an employee's personnel file as may be ordered by the court.
- (5) An official of an agency of the State or federal government, or any political subdivision of the State, may inspect any portion of a personnel file when such inspection is deemed by the official having custody of such records to be necessary and essential to the pursuance of a proper function of the inspecting agency, but no information shall be divulged for the purpose of assisting in a criminal prosecution of the employee, or for the purpose of assisting in an investigation of the employee's tax liability. However, the official having custody of such records may release the name, address, and

telephone number from a personnel file for the purpose of assisting in a criminal investigation.

- (6) An employee may sign a written release, to be placed with his personnel file, that permits the person with custody of the file to provide, either in person, by telephone, or by mail, information specified in the release to prospective employers, educational institutions, or other persons specified in the release.
- (7) The county manager, with concurrence of the board of county commissioners, or, in counties not having a manager, the board of county commissioners may inform any person of the employment or nonemployment, promotion, demotion, suspension or other disciplinary action, reinstatement, transfer, or termination of a county employee and the reasons for that personnel action. Before releasing the information, the manager or board shall determine in writing that the release is essential to maintaining public confidence in the administration of county services or to maintaining the level and quality of county services. This written determination shall be retained in the office of the manager or the county clerk, is a record available for public inspection and shall become part of the employee's personnel file.

(c1) Even if considered part of an employee's personnel file, the following information need not be disclosed to an employee nor to any other person:

- (1) Testing or examination material used solely to determine individual qualifications for appointment, employment, or promotion in the county's service, when disclosure would compromise the objectivity or the fairness of the testing or examination process.
- (2) Investigative reports or memoranda and other information concerning the investigation of possible criminal actions of an employee, until the investigation is completed and no criminal action taken, or until the criminal action is concluded.
- (3) Information that might identify an undercover law enforcement officer or a law enforcement informer.
- (4) Notes, preliminary drafts and internal communications concerning an employee. In the event such materials are used for any official personnel decision, then the employee or his duly authorized agent shall have a right to inspect such materials.

(c2) The board of county commissioners may permit access, subject to limitations they may impose, to selected personnel files by a professional representative of a training, research, or academic institution if that person certifies that he will not release information identifying the employees whose files are opened and that the information will be used solely for statistical, research, or teaching purposes. This certification shall be retained by the county as long as each personnel file so examined is retained.

(d) The board of commissioners of a county that maintains personnel files containing information other than the information mentioned in subsection (b) of this section shall establish procedures whereby an employee who objects to material in his file on grounds that it is inaccurate or misleading may seek to have the material removed from the file or may place in the file a statement relating to the material.

(e) A public official or employee who knowingly, willfully, and with malice permits any person to have access to information contained in a personnel file, except as is permitted by this section, is guilty of a Class 3 misdemeanor and upon conviction shall only be fined an amount not more than five hundred dollars (\$500.00).

(f) Any person, not specifically authorized by this section to have access to a personnel file designated as confidential, who shall knowingly and willfully

examine in its official filing place, remove or copy any portion of a confidential personnel file shall be guilty of a Class 3 misdemeanor and upon conviction shall only be fined in the discretion of the court but not in excess of five hundred dollars (\$500.00). (1975, c. 701, s. 1; 1981, c. 926, ss. 1, 5-8; 1993, c. 539, ss. 1059, 1060; 1994, Ex. Sess., c. 24, s. 14(c).)

**Legal Periodicals.** — For comment, “You Can’t Always Get What You Want: A Look at North Carolina’s Public Records Law,” see 72 N.C.L. Rev. 1527 (1994).

**CASE NOTES**

**Applications for position of county sherriff sought by board of county commissioners** were governed by the provisions of this section rather than the Public Records Law and, therefore were not subject to disclosure to the public. *Durham Herald Co. v. County of Durham*, 334 N.C. 677, 435 S.E.2d 317 (1993).  
**Cited** in *Paschal v. Myers*, 129 N.C. App. 23, 497 S.E.2d 311 (1998).

**OPINIONS OF ATTORNEY GENERAL**

**For discussion concerning legal impediments which prohibit employers from disclosing personal information about their employees**, see opinion of Attorney General to Bryan E. Beatty, Inspector General, North Carolina Department of Justice, 1998 N.C.A.G. 49 (12/1/98).

**§ 153A-99. County employee political activity.**

(a) Purpose. The purpose of this section is to ensure that county employees are not subjected to political or partisan coercion while performing their job duties, to ensure that employees are not restricted from political activities while off duty, and to ensure that public funds are not used for political or partisan activities.

It is not the purpose of this section to allow infringement upon the rights of employees to engage in free speech and free association. Every county employee has a civic responsibility to support good government by every available means and in every appropriate manner. Employees shall not be restricted from affiliating with civic organizations of a partisan or political nature, nor shall employees, while off duty, be restricted from attending political meetings, or advocating and supporting the principles or policies of civic or political organizations, or supporting partisan or nonpartisan candidates of their choice in accordance with the Constitution and laws of the State and the Constitution and laws of the United States of America.

(b) Definitions. For the purposes of this section:

- (1) “County employee” or “employee” means any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds;
- (2) “On duty” means that time period when an employee is engaged in the duties of his or her employment; and
- (3) “Workplace” means any place where an employee engages in his or her job duties.

(c) No employee while on duty or in the workplace may:

- (1) Use his or her official authority or influence for the purpose of interfering with or affecting the result of an election or nomination for political office; or
- (2) Coerce, solicit, or compel contributions for political or partisan purposes by another employee.

(d) No employee may be required as a duty or condition of employment, promotion, or tenure of office to contribute funds for political or partisan purposes.

(e) No employee may use county funds, supplies, or equipment for partisan purposes, or for political purposes except where such political uses are otherwise permitted by law.

(f) To the extent that this section conflicts with the provisions of any local act, local ordinance, resolution, or policy, this section prevails to the extent of the conflict. (1991, c. 619, s. 1; 1993, c. 298, s. 1.)

#### CASE NOTES

**Cited** in Carter v. Good, 951 F. Supp. 1235 (W.D.N.C. 1996).

#### OPINIONS OF ATTORNEY GENERAL

**The provisions of this section and § 160A-169 are applicable to elected officials of counties and cities.** See opinion of Attorney General to Mr. William R. Gilkeson, Staff Attorney, N.C. General Assembly, 1998 N.C.A.G. 1 (1/14/98).

§ **153A-100**: Reserved for future codification purposes.

Part 5. Board of Commissioners and Other Officers, Boards, Departments, and Agencies of the County.

### § **153A-101. Board of commissioners to direct fiscal policy of the county.**

The board of commissioners has and shall exercise the responsibility of developing and directing the fiscal policy of the county government under the provisions and procedures of the Local Government Budget and Fiscal Control Act. (1777, c. 129, s. 4, P.R.; R.C., c. 28, s. 16; Code, s. 753; Rev., s. 1379; C.S., s. 1325; 1927, c. 91, s. 11; 1953, c. 973, s. 2; 1973, c. 822, s. 1.)

#### CASE NOTES

**Editor's Note.** — *The cases cited below were decided under corresponding sections of former law.*

**The legislature may confer upon a county the power to create debts for necessary expenses**, without the approval of a majority of the qualified voters in the county. Evans v. Commissioners of Cumberland, 89 N.C. 154 (1883).

**Necessity of Expense to Be Determined by Commissioners.** — What is a "necessary expense" for a county is to be determined by the sound judgment and discretion of its board of commissioners. Broadnax v. Groom, 64 N.C. 244 (1870); Commissioners of Yancey County v. Road Comm'rs, 165 N.C. 632, 81 S.E. 1001 (1914); Hargrave v. Board of Comm'rs, 168 N.C. 626, 84 S.E. 1044 (1915); Wilson v. Holding, 170 N.C. 352, 86 S.E. 1043 (1915).

**The commissioners' exercise of their discretion will not be reviewed except when mala fides is shown.** Jackson v. Board of Comm'rs, 171 N.C. 379, 88 S.E. 521 (1916).

**If the entire fund which can be raised by taxation is required to meet necessary expenses** of an economical administration of the county government, and none can be diverted to pay its indebtedness without serious detriment to the public, none ought to be thus appropriated. Cromartie v. Commissioners of Bladen, 85 N.C. 211 (1881).

**As to the province of the courts and the legislature**, see Burgin v. Smith, 151 N.C. 561, 66 S.E. 607 (1909), citing Cromartie v. Commissioners of Bladen, 87 N.C. 134 (1882); Hightower v. City of Raleigh, 150 N.C. 569, 65 S.E. 279 (1909).

**County May Hire Auditors.** — The com-

missioners of a county have the right to contract with skilled expert accountants for auditing of the books and accounts of the various departments of the county at a price agreed upon, and may order that such sum to be paid by the county treasurer out of county funds. *Wilson v. Holding*, 170 N.C. 352, 86 S.E. 1043 (1915).

**Support of county convicts must be paid out of the general county fund.** *Chambers v. Walker*, 120 N.C. 401, 27 S.E. 77 (1897).

**Legislature to Determine Care of Indigents.** — It is the exclusive right of the legislature to determine how the indigents of the State who are entitled to support shall be ascertained, and from what fund and by whom

allowances for their support shall be made. *Board of Educ. v. Commissioners of Bladen*, 113 N.C. 379, 18 S.E. 661 (1893).

**Severance pay to county manager who voluntarily resigned violated North Carolina Constitution, Art. 1, Sec. 32,** because county manager was to be compensated for duties that were not performed, since the record reflected that the compensation was not for prior services rendered, and he was paid all benefits due him. *Leete v. County of Warren*, 341 N.C. 116, 459 S.E.2d 232 (1995).

**Cited** in *Bostic v. Wall*, 588 F. Supp. 994 (W.D.N.C. 1984); *Leete v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995).

### § 153A-102. Commissioners to fix fees.

The board of commissioners may fix the fees and commissions charged by county officers and employees for performing services or duties permitted or required by law. The board may not, however, fix fees in the General Court of Justice or modify the fees of the register of deeds prescribed by G.S. 161-10 or the fees of the board of elections prescribed by G.S. 163-107. (1953, c. 1227, ss. 1-3; 1969, c. 358, s. 1; c. 1017; 1973, c. 822, s. 1.)

#### OPINIONS OF ATTORNEY GENERAL

**A county may charge a fee for issuing licenses pursuant to § 127B-3.** See Opinion of Attorney General to Mr. Garris N.

*Yarborough*, Cumberland County Attorney, 55 N.C.A.G. 41 (1985).

### § 153A-103. Number of employees in offices of sheriff and register of deeds.

Subject to the limitations set forth below, the board of commissioners may fix the number of salaried employees in the offices of the sheriff and the register of deeds. In exercising the authority granted by this section, the board of commissioners is subject to the following limitations:

- (1) Each sheriff and register of deeds elected by the people has the exclusive right to hire, discharge, and supervise the employees in his office. However, the board of commissioners must approve the appointment by such an officer of a relative by blood or marriage of nearer kinship than first cousin or of a person who has been convicted of a crime involving moral turpitude.
- (2) Each sheriff and register of deeds elected by the people is entitled to at least two deputies who shall be reasonably compensated by the county, provided that the register of deeds justifies to the Board of County Commissioners the necessity of the second deputy. Each deputy so appointed shall serve at the pleasure of the appointing officer.

Notwithstanding the foregoing provisions of this section, approval of the board of commissioners is not required for the reappointment or continued employment of a near relative of a sheriff or register of deeds who was not related to the appointing officer at the time of initial appointment. (1953, c. 1227, ss. 1, 2; 1969, c. 358, s. 1; 1973, c. 822, s. 1; 1977, c. 36; 1979, c. 551; 1987, c. 362.)

**Legal Periodicals.** — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2281 (1997).

#### CASE NOTES

**Sheriff Can Make Official Government Policy.** — Official government policy can be established not only by the formal policymaking actions of the lawmakers, but also by the actions of officials with final policymaking authority; the sheriff is such an official, as indicated in subsection (1), which gives the sheriff exclusive control over supervision of employees in his office. *Flood v. Hardy*, 868 F. Supp. 809 (E.D.N.C. 1994).

**Government Employees Cannot Impose Unconstitutional Conditions on Public Employment.** — Deputies work at the pleasure of the sheriff. However, government employees including sheriffs can neither impose unconstitutional conditions upon public employment such as requiring employees to relinquish their rights of free speech and association nor discharge employees for a constitutionally infirm reason. *Joyner v. Lancaster*, 553 F. Supp. 809 (M.D.N.C. 1982).

**Control of the employees hired by the sheriff** is vested exclusively in the sheriff. The sheriff has the exclusive right to fire any deputy or employee in his office. The only authority vested in the board of commissioners is in determining the number of employees the sheriff can hire and the ability to approve the appointment of a relative or a person convicted of a crime involving moral turpitude. *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 368 S.E.2d 892, appeal dismissed, 323 N.C. 366, 373 S.E.2d 547 (1988).

**Sheriff Not Liable for County's Salary Administration.** — Because there was absolutely no evidence that defendant sheriff "acted in concert" with defendant county, as alleged, or had anything to do with the administration of plaintiffs' salaries, he was an unnecessary party to their case. *Hubbard v. County of Cumberland*, 143 N.C. App. 149, 544 S.E.2d 587 (2001), cert. denied, 354 N.C. 69, — S.E.2d — (2001).

**This section explicitly grants sheriffs exclusive power over employment decisions**, and the North Carolina courts have interpreted this statute to deny sheriffs' employees any property right in their employment. *Jackson v. Long*, 102 F.3d 722 (4th Cir. 1996).

**Employee of Sheriff Held Not an Employee of the County.** — Plaintiff's argument that even though she was hired by the sheriff, she remained the employee of the county, and that thus all the protections and privileges provided by the Board of Commissioners to

other county employees should have been afforded her, was without merit. *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 368 S.E.2d 892, appeal dismissed, 323 N.C. 366, 373 S.E.2d 547 (1988).

County, having no control over sheriff's deputy department, could not be a party to any employment contract deputy may have had, and therefore, deputy could not recover against the county for breach of her employment contract. *Spencer v. Byrd*, 899 F. Supp. 1439 (M.D.N.C. 1995).

**County May Be Bound by Sheriff's Decisions.** — In North Carolina, where the sheriff is given exclusive control over the supervision of his employees, including deputies and jailers, the sheriff may bind the county by his decisions. *Flood v. Hardy*, 868 F. Supp. 809 (E.D.N.C. 1994).

**County is not liable for deputy's or sheriff's actions**, as their employer. *Clark v. Burke County*, 117 N.C. App. 85, 450 S.E.2d 747 (1994).

**County Not Liable for Sheriff's Decision.** — County could not be liable under 42 U.S.C. 1983 for sheriff's employment decisions where the state gives the sheriff final policymaking authority on employment decisions. *Harter v. Vernon*, 953 F. Supp. 685 (M.D.N.C. 1996), aff'd, 101 F.3d 334 (4th Cir. 1996), cert. denied, 521 U.S. 1120, 117 S. Ct. 2511, 138 L. Ed. 2d 1014 (1997).

Because, pursuant to this section, sheriff/defendant, and not the county, had exclusive responsibility for discharging plaintiff/jailer (who claimed the discharge was retaliatory), the district court properly granted summary judgment for the county on plaintiff's § 1983 claims. *Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000).

**Deputy Sheriffs enjoy no property right in continued employment.** *Burns v. Brinkley*, 933 F. Supp. 528 (E.D.N.C. 1996).

The fact that North Carolina has established a generous pension system for its public employees as part of its compensatory and incentive package does not confer upon those employees a property interest in continued employment; the programs are merely part of the consideration forming the basis for public employment contracts, and do not alter the at-will nature of such employment relationships. *Burns v. Brinkley*, 933 F. Supp. 528 (E.D.N.C. 1996).

**Plaintiffs who made no claim that they were exempted from the employment-at-**

**will rule** other than that their employment was subject to a general order allowing appeal to a Termination Review Board had no property interest in their employment which could form the basis for a denial of due process. *Buchanan v. Hight*, 133 N.C. App. 299, 515 S.E.2d 225 (1999).

**Quoted** in *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997), cert. denied, 522 U.S. 1090, 118

S. Ct. 881, 139 L. Ed. 2d 869 (1998).

**Stated** in *Harter v. Vernon*, 101 F.3d 334 (4th Cir. 1996), cert. denied, 521 U.S. 1120, 117 S. Ct. 2511, 138 L. Ed. 2d 1014 (1997); *Knight v. Vernon*, 23 F. Supp. 2d 634 (M.D.N.C. 1998).

**Cited** in *Cline v. Brown*, 24 N.C. App. 209, 210 S.E.2d 446 (1974); *Bostic v. Wall*, 588 F. Supp. 994 (W.D.N.C. 1984).

## § 153A-104. Reports from officers, employees, and agents of the county.

The board of commissioners may require any officer, employee, or agent of the county to make to the board, either directly or through the county manager, periodic or special reports concerning any matter connected with the officer's, employee's or agent's duties. The board may require that such a report be made under oath. If a person fails or refuses to obey a reasonable order to make a report, issued pursuant to this section, the board may apply to the appropriate division of the General Court of Justice for an order requiring that its order be obeyed. The court has jurisdiction to issue these orders. (1868, c. 20, s. 8; Code, s. 707; Rev., s. 1318; C.S., s. 1297; 1973, c. 822, s. 1.)

§§ 153A-105 through 153A-110: Reserved for future codification purposes.

### Part 6. Clerk to the Board of Commissioners.

## § 153A-111. Appointment; powers and duties.

The board of commissioners shall appoint or designate a clerk to the board. The board may designate the register of deeds or any other county officer or employee as clerk. The clerk shall perform any duties that may be required by law or the board of commissioners. The clerk shall serve as such at the pleasure of the board. (Const., art. 7, s. 2; Code, s. 710; 1895, c. 135, s. 4; Rev., s. 1324; C.S., s. 1309; 1955, c. 247, s. 1; 1963, c. 372; 1969, c. 207; 1973, c. 822, s. 1.)

#### CASE NOTES

**County Commissioners' Actions Not Protected by Legislative Immunity.** — The county commissioners' refusal to reappoint plaintiff as clerk, the elimination of the clerk's salary, the consolidation of the clerk's position

with another, and the refusal to select plaintiff for the combined position constituted administrative actions that were not entitled to immunity. *Alexander v. Holden*, 66 F.3d 62 (4th Cir. 1995).

§§ 153A-112, 153A-113: Reserved for future codification purposes.

### Part 7. County Attorney.

## § 153A-114. Appointment; duties.

The board of commissioners shall appoint a county attorney to serve at its pleasure and to be its legal adviser. (1973, c. 822, s. 1.)

§§ 153A-115 through 153A-120: Reserved for future codification purposes.

## ARTICLE 6.

### *Delegation and Exercise of the General Police Power.*

#### § 153A-121. General ordinance-making power.

(a) A county may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county; and may define and abate nuisances.

(b) This section does not authorize a county to regulate or control vehicular or pedestrian traffic on a street or highway under the control of the Board of Transportation, nor to regulate or control any right-of-way or right-of-passage belonging to a public utility, electric or telephone membership corporation, or public agency of the State. In addition, no county ordinance may regulate or control a highway right-of-way in a manner inconsistent with State law or an ordinance of the Board of Transportation.

(c) This section does not impair the authority of local boards of health to adopt rules and regulations to protect and promote public health. (1963, c. 1060, ss. 1, 11/2; 1965, cc. 388, 567, 1083, 1158; 1967, c. 495, s. 2; 1969, c. 36, s. 1; 1971, c. 702, ss. 1-3; 1973, c. 507, s. 5; c. 822, s. 1.)

**Local Modification.** — Orange: 1991, c. 246, s. 5.

**Legal Periodicals.** — For article on local legislation in the General Assembly, discussing former § 153-9(55), see 45 N.C.L. Rev. 340 (1967).

For article, "Regulating Obscenity Through the Power to Define and Abate Nuisances," see 14 Wake Forest L. Rev. 1 (1978).

For survey of 1983 developments in property law, see 62 N.C.L. Rev. 1346 (1984).

#### CASE NOTES

**Editor's Note.** — Many of the cases cited below were decided under former § 153-9.

**Ordinance Upheld.** — County ordinance which regulated the location of adult and sexually oriented businesses (but did not prohibit them) for the stated purpose of promoting the health, safety and morals and general welfare of the citizenry of the county was well within the parameters of this section. *Maynor v. Onslow County*, 127 N.C. App. 102, 488 S.E.2d 289 (1997), appeal dismissed, 347 N.C. 268, 493 S.E.2d 458 (1997), cert. denied, 347 N.C. 400, 496 S.E.2d 385 (1997).

**Former § 153-9(55) Was a Home Rule Statute.** — Former § 153-9(55), authorizing boards of county commissioners to adopt ordinances for the better government of the county, was a Home Rule statute, applicable throughout the State. It enabled the county commissioners of every county to enact ordinances in the exercise of the general police power within the prescribed territory, just as other statutes enable the governing bodies of cities and towns to enact ordinances in the exercise of the gen-

eral police powers within their corporate limits. *Whitney Stores, Inc. v. Clark*, 277 N.C. 322, 177 S.E.2d 418 (1970).

**And a General Law.** — Former § 153-9(55) was a general law and therefore did not contravene N.C. Const. 1868, Art. II, § 29. *Whitney Stores, Inc. v. Clark*, 277 N.C. 322, 177 S.E.2d 418 (1970).

**Conferring General Police Powers.** — Former § 153-9(55) did not confer or withhold authority in respect of specific activities; on the contrary, it conferred authority to enact ordinances in the exercise of the general police power. In this respect, the statute was similar to the statutes which confer general police power upon cities and towns. *Whitney Stores, Inc. v. Clark*, 277 N.C. 322, 177 S.E.2d 418 (1970); *State v. Tenore*, 280 N.C. 238, 185 S.E.2d 644 (1972).

**Such as That Conferred Upon Cities and Towns.** — The authority conferred by former § 153-9(55) upon the boards of commissioners of the respective counties was the same as that conferred upon cities and towns by §§ 160A-

174 and 160A-181. *State v. Tenore*, 280 N.C. 238, 185 S.E.2d 644 (1972).

**Regulation of Signs Held Constitutional.**

— The off-premise/on-premise classification is a constitutionally valid basis for regulation of outdoor advertising signs. *Summey Outdoor Adv., Inc. v. County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439 (1989).

County ordinance regulating off-premises signs larger than 15 square feet held to meet the constitutional requirements of due process. *Summey Outdoor Adv., Inc. v. County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439 (1989).

**Regulation of Signs Did Not Constitute a Taking.** — Five year amortization provisions of county ordinance regulating off-premises signs of over 15 square feet were sufficient, and the ordinance did not constitute a taking of plaintiff's property without compensation. *Summey Outdoor Adv., Inc. v. County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439 (1989).

**This section and § 153A-340 do not operate exclusively** of each other. *Summey Outdoor Adv., Inc. v. County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439 (1989).

**Subsection (a) of this section** confers general police power upon cities and towns. *Summey Outdoor Adv., Inc. v. County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439 (1989).

**Legislative Authority of County Board of Commissioners.** — A county board of commissioners has no legislative authority not granted to it expressly or by necessary implication from expressly granted powers. *State v. Tenore*, 280 N.C. 238, 185 S.E.2d 644 (1972).

**Power of General Assembly to Delegate Authority to County Boards.** — Subject to constitutional limitations, the power of the General Assembly to delegate to county commissioners the authority to adopt ordinances in the lawful exercise of the police power is well established. *Whitney Stores, Inc. v. Clark*, 277 N.C. 322, 177 S.E.2d 418 (1970).

**Courts Are Not Concerned with Motives, Wisdom or Expediency of Board's Acts.** — If the board of commissioners does not exceed its delegated or constitutional authority, the courts are not concerned with the motives, wisdom or expediency which prompt its actions. *Whitney Stores, Inc. v. Clark*, 277 N.C. 322, 177 S.E.2d 418 (1970).

**When the most that can be said against an ordinance is that it is fairly debatable** whether it is an unreasonable, arbitrary or unequal exercise of power, the courts will not interfere. *County of Hoke v. Byrd*, 107 N.C. App. 658, 421 S.E.2d 800 (1992).

**Ordinance May Not Forbid Conduct Dealt with by Statute.** — The board of commissioners of a county cannot enact a valid ordinance forbidding certain conduct if a state-

wide statute in effect at the time the ordinance in question is adopted deals specifically with the identical conduct. *State v. Tenore*, 280 N.C. 238, 185 S.E.2d 644 (1972).

**And Repeal of Statute Does Not Breathe Life into Ordinance.** — The repeal of a statewide law which, during its life, prohibited the enactment of a county ordinance, is prospective and does not breathe life into an ordinance which was beyond the authority of the ordaining body when it was adopted. *State v. Tenore*, 280 N.C. 238, 185 S.E.2d 644 (1972).

**A county's zoning authority is limited:** it can be applied only to buildings within the county's borders which are outside city limits, and it is confined to the purposes of promoting health, safety, morals, or the general welfare. *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987).

**Right of County to Proscribe Obscenity Which Is Not Forbidden by State Law.** — Nothing in §§ 14-190.1 through 14-190.9, statewide laws relating to obscene literature and exhibitions and to indecent exposure, expresses or indicates an intent by the General Assembly to preclude cities and towns or counties from enacting and enforcing ordinances requiring a higher standard of conduct or condition within their respective jurisdictions. *State v. Tenore*, 280 N.C. 238, 185 S.E.2d 644 (1972).

**Authority to Regulate Signs.** — Fact that defendant county had authority to regulate signs under the zoning power in § 153A-340 did not mean that it could not regulate signs in a similar manner under the general police powers in this section, allowing regulation of "conditions detrimental to the health, safety or welfare of its citizens and the peace and dignity of the county." *Summey Outdoor Adv., Inc. v. County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439 (1989).

County's moratorium on outdoor advertising signs did not require a notice or a public hearing prior to passage, as it was enacted pursuant to the county's general police powers, and a property owner did not have a statutory vested right to erect a sign. *PNE AOA Media, L.L.C. v. Jackson County*, — N.C. App. —, 554 S.E.2d 657, 2001 N.C. App. LEXIS 981 (2001).

**Defendant county's ordinance regulating off-premises signs larger than 15 square feet** was well within the parameters of this section; while it might have been more desirable and better planning for defendant county to adopt a county-wide zoning ordinance, the fact that defendant did not do so did not preclude it from regulating outdoor advertising signs under this section. *Summey Outdoor Adv., Inc. v. County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439 (1989).

**Authority for County Ordinance Concerning Drive-In Theaters.** — Former

§ 153-9(55) provided plenary authority for enacting a county ordinance making it unlawful to operate a drive-in motion picture theater near streets or highways in such a manner that the screen is visible to passing motorists. *Variety Theaters, Inc. v. Cleveland County*, 282 N.C. 272, 192 S.E.2d 290 (1972), appeal dismissed, 411 U.S. 911, 93 S. Ct. 1548, 36 L. Ed. 2d 303 (1973).

**As to constitutionality of county ordinance concerning drive-in theaters**, see *Variety Theaters, Inc. v. Cleveland County*, 282 N.C. 272, 192 S.E.2d 290 (1972), appeal dismissed, 411 U.S. 911, 93 S. Ct. 1548, 36 L. Ed. 2d 303 (1973).

**Authority to Regulate Location of Adult and Sexually Oriented Businesses.** — Failure of a county to adopt a county-wide comprehensive zoning plan did not preclude it from regulating the location of adult and sexually oriented businesses pursuant to its police powers. *Onslow County v. Moore*, 129 N.C. App. 376, 499 S.E.2d 780 (1998).

**Sunday Closing Ordinances.** — Former § 153-9(55) conferred authority to enact Sunday closing ordinances upon the boards of commissioners of the respective counties. *State v. Atlas*, 283 N.C. 165, 195 S.E.2d 496 (1973).

**As to constitutionality of Sunday closing ordinances**, see *State v. Atlas*, 283 N.C. 165, 195 S.E.2d 496 (1973).

**Authority for County Ordinance Concerning Collection and Disposal of Solid Waste.** — County governments are delegated by the state with a general police power. Additionally, counties are specifically vested by statute with authority to regulate by ordinance the collection and disposal of solid waste within their jurisdictions. In order to effect this regulatory power and meet their police power re-

sponsibilities, counties are specifically authorized by statute to enact ordinances granting exclusive franchises to commercially collect or dispose of solid waste within all or a defined portion of the county. *Stillings v. City of Winston-Salem*, 63 N.C. App. 618, 306 S.E.2d 489 (1983), rev'd on other grounds, 311 N.C. 689, 319 S.E.2d 233 (1984).

**Use of City-Owned Sewage Treatment Plant Without Prior Approval of County.**

— Since county had no authority to restrict or regulate city's provision of sewer service to its residents, the city could use city-owned sewage treatment plant located outside the city but within the county, which was upgraded pursuant to the county's special use permit, with a condition attached to the permit requiring the county's prior approval of service to county citizens, to meet its statutory mandate to provide sewer service to residents in newly annexed areas without seeking the county's prior approval, even though the facility was located in the county. *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987).

**Regulation of Junkyards.** — Requirements of ordinance which imposed expensive requirements on junkyard owners which could prohibit them from continuing to use their property in one manner did not exceed the boundaries of the board's discretion and, therefore, the ordinance would be left undisturbed. *County of Hoke v. Byrd*, 107 N.C. App. 658, 421 S.E.2d 800 (1992).

**Cited** in *State v. Taylor*, 128 N.C. App. 616, 495 S.E.2d 413 (1998); *Derwort v. Polk County*, 129 N.C. App. 789, 501 S.E.2d 379 (1998); *State v. Baggett*, 133 N.C. App. 47, 514 S.E.2d 536 (1999); *Craig v. County of Chatham*, 143 N.C. App. 30, 545 S.E.2d 455 (2001), cert. granted, 354 N.C. 68, — S.E.2d — (2001).

## § 153A-122. Territorial jurisdiction of county ordinances.

Except as otherwise provided in this Article, the board of commissioners may make any ordinance adopted pursuant to this Article applicable to any part of the county not within a city. In addition, the governing board of a city may by resolution permit a county ordinance adopted pursuant to this Article to be applicable within the city. The city may by resolution withdraw its permission to such an ordinance. If it does so, the city shall give written notice to the county of its withdrawal of permission; 30 days after the day the county receives this notice the county ordinance ceases to be applicable within the city. (1963, c. 1060, ss. 1, 1 1/2; 1965, cc. 388, 567, 1083, 1158; 1967, c. 495, s. 2; 1969, c. 36, s. 1; 1971, c. 702, ss. 1-3; 1973, c. 822, s. 1.)

**Local Modification.** — Catawba: 1987 (Reg. Sess., 1988), c. 1021, s. 3; Currituck: 1985 (Reg. Sess., 1986), c. 875; 2001-33; Davie: 1985

(Reg. Sess., 1986), c. 830, s. 1; New Hanover: 1981, c. 458; Rowan: 1985, c. 63, ss. 2, 4.

## CASE NOTES

**Power to Enact Ordinances Giving Franchise Rights.** — In general, a state legislature has the power to delegate to the state or inferior agency the authority to make ordinances, such as those giving rise to franchise rights, as it deems appropriate in the lawful exercise of the police power. *Stillings v. City of Winston-Salem*, 311 N.C. 689, 319 S.E.2d 233 (1984).

**Authority of counties to issue exclusive solid waste collection franchises** is derived from this section and § 153A-136. *Stillings v. City of Winston-Salem*, 311 N.C. 689, 319 S.E.2d 233 (1984).

**Effect of Annexation on Franchises.** — Given the limited territorial jurisdiction of a county ordinance granting exclusive solid waste collection franchises, such franchises were not protected from the city's actions in annexing some areas of the county served by the franchisees and providing free solid waste collection services in the newly annexed areas, and therefore did not survive annexation as to those areas which became part of the city. *Stillings v. City of Winston-Salem*, 311 N.C. 689, 319 S.E.2d 233 (1984).

**Cited** in *State v. Baggett*, 133 N.C. App. 47, 514 S.E.2d 536 (1999).

## OPINIONS OF ATTORNEY GENERAL

**A City Is Not Required to Approve by Resolution County Parking Ordinances Pertaining to County Property Located**

**Within the City.** — See opinion of Attorney General to Mr. F.L. Carr, 43 N.C.A.G. 409 (1974).

## § 153A-123. Enforcement of ordinances.

(a) A county may provide for fines and penalties for violation of its ordinances and may secure injunctions and abatement orders to further insure compliance with its ordinances, as provided by this section.

(b) Unless the board of commissioners has provided otherwise, violation of a county ordinance is a misdemeanor or infraction as provided by G.S. 14-4. An ordinance may provide by express statement that the maximum fine, term of imprisonment, or infraction penalty to be imposed for a violation is some amount of money or number of days less than the maximum imposed by G.S. 14-4.

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

(c1) An ordinance may provide for the recovery of a civil penalty by the county for violation of the fire prevention code of the State Building Code as authorized under G.S. 143-139.

(d) An ordinance may provide that it may be enforced by an appropriate equitable remedy issuing from a court of competent jurisdiction. In such a case, the General Court of Justice has jurisdiction to issue any order that may be appropriate, and it is not a defense to the county's application for equitable relief that there is an adequate remedy at law.

(e) An ordinance that makes unlawful a condition existing upon or use made of real property may provide that it may be enforced by injunction and order of abatement, and the General Court of Justice has jurisdiction to issue such an order. When a violation of such an ordinance occurs, the county may apply to the appropriate division of the General Court of Justice for a mandatory or prohibitory injunction and order of abatement commanding the defendant to correct the unlawful condition upon or cease the unlawful use of the property. The action shall be governed in all respects by the laws and rules governing civil proceedings, including the Rules of Civil Procedure in general and Rule 65 in particular.

In addition to an injunction, the court may enter an order of abatement as a part of the judgment in the cause. An order of abatement may direct that

buildings or other structures on the property be closed, demolished, or removed; that fixtures, furniture, or other movable property be removed from buildings on the property; that grass and weeds be cut; that improvements or repairs be made; or that any other action be taken that is necessary to bring the property into compliance with the ordinance. If the defendant fails or refuses to comply with an injunction or with an order of abatement within the time allowed by the court, he may be cited for contempt and the county may execute the order of abatement. If the county executes the order, it has a lien on the property, in the nature of a mechanic's and materialman's lien, for the costs of executing the order. The defendant may secure cancellation of an order of abatement by paying all costs of the proceedings and posting a bond for compliance with the order. The bond shall be given with sureties approved by the clerk of superior court in an amount approved by the judge before whom the matter was heard and shall be conditioned on the defendant's full compliance with the terms of the order of abatement within the time fixed by the judge. Cancellation of an order of abatement does not suspend or cancel an injunction issued in conjunction with the order.

(f) Subject to the express terms of the ordinance, a county ordinance may be enforced by any one or more of the remedies authorized by this section.

(g) A county ordinance may provide, when appropriate, that each day's continuing violation is a separate and distinct offense. (1973, c. 822, s. 1; 1985, c. 764, s. 34; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1993, c. 329, s. 5.)

**Local Modification.** — Orange: 1989, c. 478, s. 3; 1995, c. 339, s. 3.

**Editor's Note.** — The Rules of Civil Procedure are found in § 1A-1.

CASE NOTES

**Enforcement of Zoning Ordinances.** — This section and § 153A-345 give the superior court the power to enforce zoning ordinances through the issuance of an injunction. *Mize v. County of Mecklenburg*, 80 N.C. App. 279, 341 S.E.2d 767 (1986).

**Ordinance Itself Need Not Provide for Equitable Enforcement.** — It is unnecessary for a zoning ordinance itself to contain any specific provision for equitable enforcement be-

cause § 153A-324 allows any remedy under this section to be used at the county's election as a matter of right and without qualification, unless the county's zoning ordinance provides otherwise. *New Hanover County v. Pleasant*, 59 N.C. App. 644, 297 S.E.2d 760 (1982).

**Cited in** *Bostic v. Wall*, 588 F. Supp. 994 (W.D.N.C. 1984); *Pittman v. Wilson County*, 839 F.2d 225 (4th Cir. 1988).

§ 153A-124. Enumeration not exclusive.

The enumeration in this Article or other portions of this Chapter of specific powers to define, regulate, prohibit, or abate acts, omissions, or conditions is not exclusive, nor is it a limit on the general authority to adopt ordinances conferred on counties by G.S. 153A-121. (1973, c. 822, s. 1.)

CASE NOTES

**Quoted in** *Summy Outdoor Adv., Inc. v. County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439 (1989).

§ 153A-125. Regulation of solicitation campaigns, flea markets and itinerant merchants.

A county may by ordinance regulate, restrict, or prohibit the solicitation of contributions from the public for charitable or eleemosynary purposes, and

also the business activities of itinerant merchants, salesmen, promoters, drummers, peddlers, flea market operators and flea market vendors and hawkers. These ordinances may include, but are not limited to, requirements that an application be made and a permit issued, that an investigation be made, that activities be reasonably limited as to time and place, that proper credentials and proof of financial stability be submitted, that not more than a stated percentage of contributions to solicitation campaigns be retained for administrative expenses, and that an adequate bond be posted to protect the public from fraud. A county may charge a fee for a permit issued pursuant to such an ordinance. (1967, c. 80, ss. 1-21/2; 1973, c. 822, s. 1; 1987, c. 708, s. 7.)

### CASE NOTES

*Editor's Note.* — The cases cited below were decided under former § 105-53.

- I. General Consideration.
- II. Regulation and Taxation by Cities and Counties.

#### I. GENERAL CONSIDERATION.

**Tax Is on Occupation, Not Goods.** — Peddlers and transient dealers are commonly taxed a specific sum because they are likely to escape any other tax. A peddler's tax is on the occupation, not on the goods, and one who engages in the business, whether as agent or owner, must pay it. *State v. Rhyne*, 119 N.C. 905, 26 S.E. 126 (1896).

**Statute Not Applicable to Citizens of Other States.** — The provision of a statute similar to this was held unconstitutional on the grounds that it was made to apply to citizens of other states, thus regulating interstate commerce. *In re Spain*, 47 F. 208 (E.D.N.C. 1891). See also *In re Flinn*, 57 F. 496 (W.D.N.C. 1893).

**Subsections (e) and (g) relate exclusively to privileges taxes** upon peddlers. *State v. Bridgers*, 211 N.C. 235, 189 S.E. 869 (1937).

**"Peddler" Defined.** — A peddler is one who sells and delivers the identical goods he carries about with him. *State v. Lee*, 113 N.C. 681, 18 S.E. 713 (1893).

A peddler is primarily one who travels around on foot, selling or bartering the identical goods he carries. *State v. Frank*, 130 N.C. 724, 41 S.E. 785 (1902).

**Peddling Is Lawful Business.** — Under general State law, "peddling," as defined in this section, is a lawful business or occupation. *State v. Byrd*, 259 N.C. 141, 130 S.E.2d 55 (1963).

**Peddling Is a Privilege and Not a Right.** — To peddle is not a matter of right under the laws, which any person can demand upon the payment of the tax. It is a privilege. It is discretionary with the county commissioners whether or not they will grant a license to a peddler. The privilege is personal to the appli-

cant, and is not assignable. *State v. Rhyne*, 119 N.C. 905, 26 S.E. 126 (1896).

**State license issued under this section authorizes the licensee to engage in the business of peddling.** *State v. Byrd*, 259 N.C. 141, 130 S.E.2d 55 (1963).

**Such as Peddling Ice Cream.** — Under a license issued in accordance with general State law, the sale and offering for sale of ice cream products on public streets in the area covered by such license is a lawful business or occupation. *State v. Byrd*, 259 N.C. 141, 130 S.E.2d 55 (1963).

**Sales by Samples.** — It was held that a former statute, similar to this section, did not apply to sales by sample of goods not at the time of sale within the State and ready for immediate delivery, but applied only where goods were actually exposed and offered for sale, and ready for delivery at once to the purchaser. *In re Flinn*, 57 F. 496 (W.D.N.C. 1893).

A person who travels from house to house on foot selling goods by sample, and afterwards delivers them on foot, is not a peddler. *State v. Frank*, 130 N.C. 724, 41 S.E. 785 (1902).

One who sells goods by sample, which goods are shipped to the purchaser in care of one who sold them and delivered by him, is a peddler. *State v. Franks*, 127 N.C. 510, 37 S.E. 70 (1900).

**A picture dealer** who contracts to sell pictures, has them sent out to him, delivers to the purchaser, and receives the price agreed upon beforehand, is no peddler. *City of Greensboro v. Williams*, 124 N.C. 167, 32 S.E. 492 (1899).

**Selling Fruit in Wholesale Lots.** — It was held that a former statute, similar to this section, did not apply to a person selling watermelons in wholesale lots in the city of Salisbury, to be shipped from a nearby town,

and only delivered to those from whom he had taken orders. *State v. Ninestein*, 132 N.C. 1039, 132 N.C. 4039, 43 S.E. 936, 43 S.E. 936 (1903).

**The words "any articles of the farm,"** in an earlier statute, were used to embrace all the products of the farm, and a farmer who butchered cattle raised on his farm and sold the beef was not a peddler. *State v. Smith*, 173 N.C. 772, 92 S.E. 325 (1917).

**Use of Motor Vehicles.** — And the statutory provisions contemplate the use of motor vehicles by peddlers in the prosecution of their business or occupation. *State v. Byrd*, 259 N.C. 141, 130 S.E.2d 55 (1963).

**Presumption as to Having License.** — If a peddler is required by proper authorities to exhibit his license and he fails to do so the presumption is that he has none. *State v. Crump*, 104 N.C. 763, 10 S.E. 468 (1889).

**Former Subsection Requiring License for Display of Goods by One Not Regular Retailer Was Unconstitutional.** — Former subsection (e), requiring one not a regular retail merchant in North Carolina to obtain a \$250 license to entitle him to display goods for purpose of securing orders for retail sale, violated "commerce" clause of federal Constitution as applied to a New York merchandise establishment which rented display room in a North Carolina hotel for several days and took orders for goods corresponding to samples, which orders were filled by shipping direct to customers from New York City, where regular retail merchants in North Carolina were subject to only an annual \$1 license tax for privilege of doing business. *Best & Co. v. Maxwell*, 311 U.S. 454, 61 S. Ct. 334, 85 L. Ed. 275 (1940), commented on in 18 N.C.L. Rev. 48.

**Cited in** *Kohn v. Elizabeth City*, 199 N.C. 529, 155 S.E. 152 (1930).

## II. REGULATION AND TAXATION BY CITIES AND COUNTIES.

**Subsection (g) Does Not Prohibit City Tax on Trades and Businesses.** — A tax levied under the general authority given a city in its charter, authorizing the levying of a tax upon trades and businesses carried on within its corporate limits is not such a tax as is prohibited by subsection (g) of this section. The

prohibition relates to license taxes levied "under this section." The tax complained of was not levied "under this section." *State v. Bridgers*, 211 N.C. 235, 189 S.E. 869 (1937).

**There Is No Express Grant of Powers as to Peddling.** — Section 160A-11 which sets forth express powers conferred on municipal corporations, contains no provision relating to the prohibition or regulation of the business or occupation of peddling. *State v. Byrd*, 259 N.C. 141, 130 S.E.2d 55 (1963).

**Other Than to Impose License Taxes.** — No express power has been conferred by the General Assembly on municipal corporations to prohibit or to regulate the business or occupation of peddling otherwise than by imposing license taxes thereon. *State v. Byrd*, 259 N.C. 141, 130 S.E.2d 55 (1963).

**Whether City May Prohibit or Regulate Selling on Streets Depends on Delegated Powers.** — Whether a municipal corporation has the power to regulate or prohibit the sale of articles of merchandise on its streets and sidewalks depends upon the legislative power delegated to it by the State legislature. *State v. Byrd*, 259 N.C. 141, 130 S.E.2d 55 (1963).

**City cannot, by ordinance, prohibit conduct that is legalized and sanctioned by the General Assembly.** *Eastern Carolina Taste-Freez, Inc. v. City of Raleigh*, 256 N.C. 208, 123 S.E.2d 632 (1962), holding invalid a municipal ordinance prohibiting the peddling of ice cream along the streets and sidewalks of a city.

**City Has Implied Power to Regulate Selling on Streets from Mobile Units.** — In the exercise of express powers conferred upon municipal corporations by the General Assembly a municipal corporation has the implied power to adopt an ordinance providing for the reasonable regulation, but not for the prohibition, of the sale and offering for sale of merchandise upon its streets from mobile units. *State v. Byrd*, 259 N.C. 141, 130 S.E.2d 55 (1963).

**Discretion of County Commissioners to Grant Exemptions.** — The discretion vested in the county commissioners to exempt from the peddler's tax the "poor and infirm" is necessary to the administration of statutes like this, and will not be interfered with unless arbitrarily exercised. *Smith v. Wilkins*, 164 N.C. 135, 80 S.E. 168 (1913).

## OPINIONS OF ATTORNEY GENERAL

**Applicability to Traveling Auctioneers.** — If an auctioneer travels into a city or county in which he does not maintain a regular place of business and sells or auctions property owned by him, he must obtain an itinerant merchant license pursuant to this section, as well as comply with any ordinances of the particular

city or county governing itinerant merchants. See opinion of Attorney General to Mr. DeWitt S. McCarley, City Attorney, Greenville, North Carolina, 55 N.C.A.G. 38 (1985).

An auctioneer is not deemed to be an itinerant merchant if he travels into a city or county in which he does not maintain a regular place of

business and auctions merchandise belonging to another person, whether or not that person maintains a regular place of business in the particular city or county. Therefore, such an auctioneer would not be required to comply with § 105-53(d) or any local ordinances of the particular city or county governing itinerant merchants. However, if the owner of the goods

to be auctioned off does not maintain a regular place of business in the particular city or county, that person would be required to comply with § 105-53(d) and any local ordinances governing itinerant merchants. See opinion of Attorney General to Mr. DeWitt S. McCarley, City Attorney, Greenville, North Carolina, 55 N.C.A.G. 38 (1985).

### § 153A-126. Regulation of begging.

A county may by ordinance prohibit or regulate begging or otherwise canvassing the public for contributions for the private benefit of the solicitor or any other person. (1973, c. 822, s. 1.)

#### CASE NOTES

**Cited** in *Pittman v. Wilson County*, 839 F.2d 225 (4th Cir. 1988).

### § 153A-127. Abuse of animals.

A county may by ordinance define and prohibit the abuse of animals. (1973, c. 822, s. 1.)

### § 153A-128. Regulation of explosive, corrosive, inflammable, or radioactive substances.

A county may by ordinance regulate, restrict, or prohibit the sale, possession, storage, use or conveyance of any explosive, corrosive, inflammable, or radioactive substance or of any weapon or instrumentality of mass death and destruction. (1973, c. 822, s. 1.)

### § 153A-129. Firearms.

A county may by ordinance regulate, restrict, or prohibit the discharge of firearms at any time or place except when used to take birds or animals pursuant to Chapter 113, Subchapter III, when used in defense of person or property, or when used pursuant to lawful directions of law-enforcement officers. A county may also regulate the display of firearms on the public roads, sidewalks, alleys, or other public property. This section does not limit a county's authority to take action under Chapter 14, Article 36A. (1973, c. 822, s. 1.)

**Local Modification.** — Davidson: 1989 (Reg. Sess., 1990), c. 852, s. 1; Davie: 1989 (Reg. Sess., 1990), c. 929, s. 1.

#### CASE NOTES

**Cited** in *Pittman v. Wilson County*, 839 F.2d 225 (4th Cir. 1988).

### § 153A-130. Pellet guns.

A county may by ordinance regulate, restrict, or prohibit the sale, possession, or use of pellet guns or any other mechanism or device designed or used to

project a missile by compressed air or mechanical action with less than deadly force. (1973, c. 822, s. 1.)

**§ 153A-131. Possession or harboring of dangerous animals.**

A county may by ordinance regulate, restrict, or prohibit the possession or harboring of animals which are dangerous to persons or property. No such ordinance shall have the effect of permitting any activity or condition with respect to a wild animal which is prohibited or more severely restricted by regulations of the Wildlife Resources Commission. (1973, c. 822, s. 1; 1977, c. 407, s. 1.)

**Cross References.** — As to the power of session or harboring of dangerous animals, see cities to regulate, restrict or prohibit the pos- § 160A-187.

**§ 153A-132. Removal and disposal of abandoned and junked motor vehicles.**

(a) Grant of Power. — A county may by ordinance prohibit the abandonment of motor vehicles on public grounds and private property within the county's ordinance-making jurisdiction and on county-owned property wherever located. The county may enforce the ordinance by removing and disposing of abandoned or junked motor vehicles according to the procedures prescribed in this section.

(b) Definitions. — "Motor vehicle" includes any machine designed or intended to travel over land or water by self-propulsion or while attached to self-propelled vehicle.

- (1) An "abandoned motor vehicle" is one that:
  - a. Is left on public grounds or county-owned property in violation of a law or ordinance prohibiting parking; or
  - b. Is left for longer than 24 hours on property owned or operated by the county; or
  - c. Is left for longer than two hours on private property without the consent of the owner, occupant, or lessee of the property; or
  - d. Is left for longer than seven days on public grounds.
- (2) A "junked motor vehicle" is an abandoned motor vehicle that also:
  - a. Is partially dismantled or wrecked; or
  - b. Cannot be self-propelled or moved in the manner in which it originally was intended to move; or
  - c. Is more than five years old and appears to be worth less than one hundred dollars (\$100.00); or
  - d. Does not display a current license plate.

(c) Removal of Vehicles. — A county may remove to a storage garage or area an abandoned or junked motor vehicle found to be in violation of an ordinance adopted pursuant to this section. A vehicle may not be removed from private property, however, without the written request of the owner, lessee, or occupant of the premises unless the board of commissioners or a duly authorized county official or employee has declared the vehicle to be a health or safety hazard. Appropriate county officers and employees have a right, upon presentation of proper credentials, to enter on any premises within the county ordinance-making jurisdiction at any reasonable hour in order to determine if any vehicles are health or safety hazards. The county may require a person requesting the removal from private property of an abandoned or junked motor vehicle to indemnify the county against any loss, expense, or liability incurred because of the vehicle's removal, storage, or sale.

When an abandoned or junked motor vehicle is removed, the county shall give notice to the owner as required by G.S. 20-219.11(a) and (b).

(d) Hearing Procedure. — Regardless of whether a county does its own removal and disposal of motor vehicles or contracts with another person to do so, the county shall provide a hearing procedure for the owner. For purposes of this subsection, the definitions in G.S. 20-219.9 apply.

- (1) If the county operates in such a way that the person who tows the vehicle is responsible for collecting towing fees, all provisions of Article 7A, Chapter 20, apply.
- (2) If the county operates in such a way that it is responsible for collecting towing fees, it shall:
  - a. Provide by contract or ordinance for a schedule of reasonable towing fees,
  - b. Provide a procedure for a prompt fair hearing to contest the towing,
  - c. Provide for an appeal to district court from that hearing,
  - d. Authorize release of the vehicle at any time after towing by the posting of a bond or paying of the fees due, and
  - e. Provide a sale procedure similar to that provided in G.S. 44A-4, 44A-5, and 44A-6, except that no hearing in addition to the probable cause hearing is required. If no one purchases the vehicle at the sale and if the value of the vehicle is less than the amount of the lien, the county may destroy it.

(e), (f) Repealed by Session Laws 1983, c. 420, s. 10.

(g) No Liability. — No person nor any county may be held to answer in a civil or criminal action to any owner or other person legally entitled to the possession of an abandoned, junked, lost, or stolen motor vehicle for disposing of the vehicle as provided in this section.

(h) Exceptions. — This section does not apply to any vehicle in an enclosed building, to any vehicle on the premises of a business enterprise being operated in a lawful place and manner if the vehicle is necessary to the operation of the enterprise, or to any vehicle in an appropriate storage place or depository maintained in a lawful place and manner by the county. (1971, c. 489; 1973, c. 822, s. 1; 1975, c. 716, s. 5; 1983, c. 420, ss. 8-10; 1997-456, s. 27.)

**Editor’s Note.** — Subdivision designations in subsection (b) were renumbered pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections

and parts of sections having a number or letter designation that is incompatible with the General Assembly’s computer database.

**Local Modification.** — Wake: 1979, c. 375.

**§ 153A-132.1. To provide for the removal and disposal of trash, garbage, etc.**

The board of county commissioners of any county is hereby authorized to enact ordinances governing the removal, method or manner of disposal, depositing or dumping of any trash, debris, garbage, litter, discarded cans or receptacles or any waste matter whatsoever within the rural areas of the county and outside and beyond the corporate limits of any municipality of said county. An ordinance adopted pursuant hereto may make it unlawful to place, discard, dispose, leave or dump any trash, debris, garbage, litter, discarded cans or receptacles or any waste matter whatsoever upon a street or highway located within that county or upon property owned or operated by the county unless such trash, debris, garbage, litter, discarded cans or receptacles or any waste matter is placed in a designated location or container for removal by a specific garbage or trash service collector.

Boards of county commissioners may also provide by ordinance enacted pursuant to this section, that the placing, discarding, disposing, leaving or

dumping of the articles forbidden by this section shall, for each day or portion thereof the articles or matter are left, constitute a separate offense, and that a person in violation of the ordinance may be punished by a fine not exceeding fifty dollars (\$50.00) or imprisoned not exceeding 30 days, or both, for each offense. (1973, c. 952.)

**Local Modification.** — Davie: 1985 (Reg. Sess., 1986), c. 830, s. 1; Rowan: 1985, c. 63, ss. 1, 4.

### § 153A-132.2. Regulation, restraint and prohibition of abandonment of junked motor vehicles.

(a) A county may by ordinance regulate, restrain or prohibit the abandonment of junked motor vehicles on public grounds and on private property within the county's ordinance-making jurisdiction upon a finding that such regulation, restraint or prohibition is necessary and desirable to promote or enhance community, neighborhood or area appearance, and may enforce any such ordinance by removing and disposing of junked motor vehicles subject to the ordinance according to the procedures prescribed in this section. The authority granted by this section shall be supplemental to any other authority conferred upon counties. Nothing in this section shall be construed to authorize a county to require the removal or disposal of a motor vehicle kept or stored at a bona fide "automobile graveyard" or "junkyard" as defined in G.S. 136-143.

For purposes of this section, the term "junked motor vehicle" means a vehicle that does not display a current license plate and that:

- (1) Is partially dismantled or wrecked; or
- (2) Cannot be self-propelled or moved in the manner in which it originally was intended to move; or
- (3) Is more than five years old and appears to be worth less than one hundred dollars (\$100.00).

(a1) Any junked motor vehicle found to be in violation of an ordinance adopted pursuant to this section may be removed to a storage garage or area, but no such vehicle shall be removed from private property without the written request of the owner, lessee, or occupant of the premises unless the board of commissioners or a duly authorized county official or employee finds in writing that the aesthetic benefits of removing the vehicle outweigh the burdens imposed on the private property owner. Such finding shall be based on a balancing of the monetary loss of the apparent owner against the corresponding gain to the public by promoting or enhancing community, neighborhood or area appearance. The following, among other relevant factors, may be considered:

- (1) Protection of property values;
- (2) Promotion of tourism and other economic development opportunities;
- (3) Indirect protection of public health and safety;
- (4) Preservation of the character and integrity of the community; and
- (5) Promotion of the comfort, happiness, and emotional stability of area residents.

(a2) The county may require any person requesting the removal of a junked or abandoned motor vehicle from private property to indemnify the county against any loss, expense, or liability incurred because of the removal, storage, or sale thereof. When an abandoned or junked motor vehicle is removed, the county shall give notice to the owner as required by G.S. 20-219.11(a) and (b).

(a3) Hearing Procedure. — Regardless of whether a county does its own removal and disposal of motor vehicles or contracts with another person to do

so, the county shall provide a prior hearing procedure for the owner. For purposes of this subsection, the definitions in G.S. 20-219.9 apply.

- (1) If the county operates in such a way that the person who tows the vehicle is responsible for collecting towing fees, all provisions of Article 7A, Chapter 20, apply.
- (2) If the county operates in such a way that it is responsible for collecting towing fees, it shall:
  - a. Provide by contract or ordinance for a schedule of reasonable towing fees,
  - b. Provide a procedure for a prompt fair hearing to contest the towing,
  - c. Provide for an appeal to district court from that hearing,
  - d. Authorize release of the vehicle at any time after towing by the posting of a bond or paying of the fees due, and
  - e. Provide a sale procedure similar to that provided in G.S. 44A-4, 44A-5, and 44A-6, except that no hearing in addition to the probable cause hearing is required. If no one purchases the vehicle at the sale and if the value of the vehicle is less than the amount of the lien, the city may destroy it.

(a4) Any person who removes a vehicle pursuant to this section shall not be held liable for damages for the removal of the vehicle to the owner, lienholder or other person legally entitled to the possession of the vehicle removed; however, any person who intentionally or negligently damages a vehicle in the removal of such vehicle, or intentionally or negligently inflicts injury upon any person in the removal of such vehicle, may be held liable for damages.

(b) Any ordinance adopted pursuant to this section shall include a prohibition against removing or disposing of any motor vehicle that is used on a regular basis for business or personal use. (1983, c. 841, s. 1; 1985, c. 737, s. 1; 1987, c. 42, s. 1; c. 451, s. 1; 1987 (Reg. Sess., 1988), c. 902, s. 1; 1989, c. 743, s. 1.)

**Editor's Note.** — As enacted by Session Laws 1983, c. 841, s. 1, effective October 1, 1983, this section was applicable only to the Counties of Dare, Stokes, Alleghany, Carteret and Columbus. Subsequently, Session Laws 1985, c. 737, s. 1, effective July 12, 1985, amended this section by making it applicable to

an additional 19 counties. Subsequently, Session Laws 1987, cc. 42 and 451, added six additional counties to those listed in subsection (a). At the direction of the Revisor of Statutes, the section has been set out above as § 153A-132.2.

## § 153A-133. Noise regulation.

A county may by ordinance regulate, restrict, or prohibit the production or emission of noises or amplified speech, music, or other sounds that tend to annoy, disturb, or frighten its citizens. (1973, c. 822, s. 1.)

**Local Modification.** — Currituck: 1991, c. 5; Rockingham: 1991 (Reg. Sess., 1992), c. 996, s. 1.

### CASE NOTES

**Ordinance Declared Partially Unconstitutional.** — The partial unconstitutionality of county's noise ordinance did not support the granting of plaintiff's motions to dismiss the charges, where part of it remained valid and enforceable, and the State was entitled to pro-

ceed with the prosecution under this ordinance. *State v. Garren*, 117 N.C. App. 393, 451 S.E.2d 315 (1994).

**Cited** in *State v. Taylor*, 128 N.C. App. 616, 495 S.E.2d 413 (1998).

## § 153A-134. Regulating and licensing businesses, trades, etc.

A county may by ordinance, subject to the general law of the State, regulate and license occupations, businesses, trades, professions, and forms of amusement or entertainment and prohibit those that may be inimical to the public health, welfare, safety, order, or convenience. In licensing trades, occupations, and professions, the county may, consistent with the general law of the State, require applicants for licenses to be examined and charge a reasonable fee therefor. This section does not authorize a county to examine or license a person holding a license issued by an occupational licensing board of this State as to the profession or trade that he has been licensed to practice or pursue by the State.

This section does not impair the county's power to levy privilege license taxes on occupations, businesses, trades, professions, and other activities pursuant to G.S. 153A-152. (1868, c. 20, s. 8; Code, s. 707; Rev., s. 1318; C.S., s. 1297; 1973, c. 822, s. 1.)

### CASE NOTES

**For cases as to licenses to retail spirituous and other liquors**, decided prior to enactment of Chapter 18B and former Chapters 18 and 18A, relating to regulation of alcoholic beverages, see *W.O. Muller & Co. v. Commissioners of Buncombe County*, 89 N.C. 171 (1883); *State v. Voight*, 90 N.C. 741 (1884); *Jones v. Commissioners of Moore County*, 106

N.C. 436, 11 S.E. 514 (1890); *Board of Comm'rs v. Smith*, 110 N.C. 417, 14 S.E. 972 (1892), all decided under former law prior to enactment of this Chapter.

**Stated** in *Treants Enters., Inc. v. Onslow County*, 320 N.C. 776, 360 S.E.2d 783 (1987).

**Cited** in *Pittman v. Wilson County*, 839 F.2d 225 (4th Cir. 1988).

## § 153A-135. Regulation of places of amusement.

A county may by ordinance regulate places of amusement and entertainment, and may regulate, restrict, or prohibit the operation of pool and billiard halls, dance halls, carnivals, circuses, or itinerant shows or exhibitions of any kind. Places of amusement and entertainment include coffeehouses, cocktail lounges, nightclubs, beer halls, and similar establishments, but any regulation of such places shall be consistent with any permit or license issued by the North Carolina Alcoholic Beverage Control Commission. (1963, c. 1060, ss. 1, 11/2; 1965, cc. 388, 567, 1083, 1158; 1967, c. 495, s. 2; 1969, c. 36, s. 1; 1971, c. 702, ss. 1-3; 1973, c. 822, s. 1; 1981, c. 412, ss. 4, 5.)

### CASE NOTES

**Stated** in *Treants Enters., Inc. v. Onslow County*, 320 N.C. 776, 360 S.E.2d 783 (1987).

## § 153A-136. Regulation of solid wastes.

(a) A county may by ordinance regulate the storage, collection, transportation, use, disposal, and other disposition of solid wastes. Such an ordinance may:

- (1) Regulate the activities of persons, firms, and corporations, both public and private.
- (2) Require each person wishing to commercially collect or dispose of solid wastes to secure a license from the county and prohibit any person from commercially collecting or disposing of solid wastes without a license. A fee may be charged for a license.

- (3) Grant a franchise to one or more persons for the exclusive right to commercially collect or dispose of solid wastes within all or a defined portion of the county and prohibit any other person from commercially collecting or disposing of solid wastes in that area. The board of commissioners may set the terms of any franchise, except that no franchise may be granted for a period exceeding 30 years, nor may any franchise by its terms impair the authority of the board of commissioners to regulate fees as authorized by this section.
- (4) Regulate the fees, if any, that may be charged by licensed or franchised persons for collecting or disposing of solid wastes.
- (5) Require the source separation of materials prior to collection of solid waste for disposal.
- (6) Require participation in a recycling program by requiring separation of designated materials by the owner or occupant of the property prior to disposal. An owner of recovered materials as defined by G.S. 130A-290(a)(24) retains ownership of the recovered materials until the owner conveys, sells, donates, or otherwise transfers the recovered materials to a person, firm, company, corporation, or unit of local government. A county may not require an owner to convey, sell, donate, or otherwise transfer recovered materials to the county or its designee. If an owner places recovered materials in receptacles or delivers recovered materials to specific locations, receptacles, and facilities that are owned or operated by the county or its designee, then ownership of these materials is transferred to the county or its designee.
- (6a) Regulate the illegal disposal of solid waste, including littering on public and private property, provide for enforcement by civil penalties as well as other remedies, and provide that such regulations may be enforced by county employees specially appointed as environmental enforcement officers.
- (7) Include any other proper matter.

(b) Any ordinance adopted pursuant to this section shall be consistent with and supplementary to any rules adopted by the Commission for Health Services or the Department of Environment and Natural Resources.

(c) The board of commissioners of a county shall consider alternative sites and socioeconomic and demographic data and shall hold a public hearing prior to selecting or approving a site for a new sanitary landfill that receives residential solid waste that is located within one mile of an existing sanitary landfill within the State. The distance between an existing and a proposed site shall be determined by measurement between the closest points on the outer boundary of each site. The definitions set out in G.S. 130A-290 apply to this subsection. As used in this subsection:

- (1) "Approving a site" refers to prior approval of a site under G.S. 130A-294(a)(4).
- (2) "Existing sanitary landfill" means a sanitary landfill that is in operation or that has been in operation within the five-year period immediately prior to the date on which an application for a permit is submitted.
- (3) "New sanitary landfill" means a sanitary landfill that includes areas not within the legal description of an existing sanitary landfill as set out in the permit for the existing sanitary landfill.
- (4) "Socioeconomic and demographic data" means the most recent socioeconomic and demographic data compiled by the United States Bureau of the Census and any additional socioeconomic and demographic data submitted at the public hearing.

(d) As used in this section, "solid waste" means nonhazardous solid waste, that is, solid waste as defined in G.S. 130A-290 but not including hazardous

waste. (1955, c. 1050; 1957, cc. 120, 376; 1961, c. 40; c. 514, s. 1; cc. 711, 803; c. 806, s. 1; 1965, c. 452; 1967, cc. 34, 90; c. 183, s. 1; cc. 304, 339; c. 495, s. 4; 1969, cc. 79, 155, 176; c. 234, s. 1; c. 452; c. 1003, s. 4; 1973, c. 476, s. 128; c. 822, s. 1; 1989 (Reg. Sess., 1990), c. 1009, s. 1; 1991 (Reg. Sess., 1992), c. 1013, s. 1; 1993, c. 165, s. 1; 1997-443, s. 11A.123; 2001-512, s. 5.)

**Local Modification.** — Orange: 2000-107, s. 2 (except for Carr and Cheeks Precincts).

**Editor's Note.** — Session Laws 1991 (Reg. Sess., 1992), c. 1013, which amended this section, in s. 8 provides: "Any contract for solid waste collection or disposal entered into by any county, city, or town that would have been lawful if this act had been in effect at the time the contract was entered into is validated. The provisions of this act that limit a contract or franchise for the collection and disposal of solid waste to a period of not more than 30 years shall not be construed to invalidate any contract or franchise for a longer period up to 60 years that was entered into by any county, city, or town prior to the date this act is effective." The act became effective July 22, 1992.

Session Laws 1991 (Reg. Sess., 1992), c. 1013, s. 9 provides: "G.S. 153A-136(c), as enacted by Section 1 of this act, and G.S. 160A-325(a), as enacted by Section 3 of this act, shall not apply to the selection or approval of a site for a new sanitary landfill if, prior to the effective date of this act:

"(1) The site was selected or approved by the board of commissioners of a county or the

governing board of a city;

"(2) A public hearing on the selection or approval of the site has been held;

"(3) A long-term contract was approved by the Department of Environment, Health, and Natural Resources [now the Department of Environment and Natural Resources] under Part 4 of Article 15 of Chapter 153A of the General Statutes; or

"(4) An application for a permit for a sanitary landfill to be located on the site has been submitted to the Department of Environment, Health and Natural Resources [now the Department of Environment or Natural Resources]." The act became effective July 22, 1992.

Session Laws 2001-512, s. 15, provides: "This act shall not be construed to obligate the General Assembly to appropriate any funds to implement the provisions of this act. Every agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to the agency."

**Effect of Amendments.** — Session Laws 2001-512, s. 5, effective January 4, 2002, added subdivision (a)(6a).

## CASE NOTES

**Constitutionality of Former § 153-272.** — Former § 153-272, authorizing counties to regulate private collectors of garbage, was not an unconstitutional delegation of legislative power, but came within the exception permitting the delegation to municipal corporations and counties of power to legislate concerning local problems. *Porter v. Suburban San. Serv., Inc.*, 283 N.C. 479, 196 S.E.2d 760 (1973), decided under former § 153-272.

**For history of former statute,** see *Lafayette Transp. Serv., Inc. v. County of Robeson*, 283 N.C. 494, 196 S.E.2d 770 (1973).

**Power to Enact Ordinances Giving Franchise Rights.** — In general, a state legislature has the power to delegate to the state or inferior agency the authority to make ordinances, such as those giving rise to franchise rights, as it deems appropriate in the lawful exercise of the police power. *Stillings v. City of Winston-Salem*, 311 N.C. 689, 319 S.E.2d 233 (1984).

**Authority of County Ordinance Concerning Collection and Disposal of Solid Waste.** — County governments are delegated by the state with a general police power. Addi-

tionally, counties are specifically vested by statute with authority to regulate by ordinance the collection and disposal of solid waste within their jurisdictions. In order to effect this regulatory power and meet their police power responsibilities, counties are specifically authorized by statute to enact ordinances granting exclusive franchises to commercially collect or dispose of solid waste within all or a defined portion of the county. *Stillings v. City of Winston-Salem*, 63 N.C. App. 618, 306 S.E.2d 489 (1983), rev'd on other grounds, 311 N.C. 689, 319 S.E.2d 233 (1984).

Authority of counties to issue exclusive solid waste collection franchises is derived from § 153A-122 and this section. *Stillings v. City of Winston-Salem*, 311 N.C. 689, 319 S.E.2d 233 (1984).

**County was without power to impose its own fee schedule on city for landfill operated by the city but located in the county.** *Cabarrus County v. City of Charlotte*, 71 N.C. App. 192, 321 S.E.2d 476 (1984).

A county ordinance providing that no fees could be charged residents of the county or franchise haulers by the owners or operators of

a sanitary landfill located within the county was improper, because it based fees upon the wrong criteria (residence rather than kind and degree of service) in violation of § 160A-314. Therefore, the county could not enforce the ordinance against a city which operated a sanitary landfill in the county. *Cabarrus County v. City of Charlotte*, 71 N.C. App. 192, 321 S.E.2d 476 (1984).

**Consideration of Alternative Sites.** — Subsection (c) requires a board of commissioners to give careful and thorough consideration to alternative sites for a landfill within the county. *Greene Citizens for Responsible Growth, Inc. v. Greene County Bd. of Comm'rs*, 143 N.C. App. 702, 547 S.E.2d 480 (2001), cert. denied, 354 N.C. 69, — S.E.2d — (2001), review denied, 354 N.C. 69, 553 S.E.2d 41 (2001).

**Effect of Annexation on Franchises.** — Given the limited territorial jurisdiction of a

county ordinance granting exclusive solid waste collection franchises, such franchises were not protected from the city's actions in annexing some areas of the county served by the franchisees and providing free solid waste collection services in the newly annexed areas, and therefore did not survive annexation as to those areas which became part of the city. *Stillings v. City of Winston-Salem*, 311 N.C. 689, 319 S.E.2d 233 (1984).

**Competing Government Service.** — The word "commercially," as used in this section, leads to the conclusion that a commercial service franchise does not provide protection to the holder against government service which would compete with it. *Stillings v. City of Winston-Salem*, 311 N.C. 689, 319 S.E.2d 233 (1984).

**Cited** in *Grassy Creek Neighborhood Alliance v. City of Winston-Salem*, 142 N.C. App. 290, 542 S.E.2d 296 (2001).

## § 153A-137. Cable television franchises.

Consistent with the rules and regulations of the Federal Communications Commission, a county may by ordinance grant upon reasonable terms franchises for the operation of cable television systems within any portion of the county, exclusive of incorporated areas and make it unlawful to operate such a system without a franchise. A franchise may not be granted for a period longer than the maximum term prescribed by the Federal Communications Commission.

As used in this section, "cable television system" means a facility that, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes these signals by wire or cable to subscribing members of the public who pay for the service. "Cable television system" does not include a facility that serves only the residents of one or more apartment dwellings under common ownership, control, or management and commercial establishments located on the premises of such an apartment dwelling. (1973, c. 822, s. 1.)

**Legal Periodicals.** — For note, "Municipal Ownership of Cable Television Systems: Madison Cablevision, Inc. v. City of Morganton," see 68 N.C.L. Rev. 1295 (1990).

## § 153A-138. Registration of mobile homes, house trailers, etc.

A county may by ordinance provide for the annual registration of mobile homes, house trailers and similar vehicular equipment designed for use as living or business quarters and for the display of a sticker or other device thereon as evidence of such registration. No fee shall be charged for such registration. (1975, c. 693.)

## § 153A-139. Regulation of traffic at parking areas and driveways.

The governing body of any county may, by ordinance, regulate the stopping, standing, or parking of vehicles in specified areas of any parking areas or driveways of a hospital, shopping center, apartment house, condominium

complex, or commercial office complex or any other privately owned public vehicular area, or prohibit such stopping, standing, or parking during any specified hours, provided the owner or person in general charge of the operation and control of that area requests in writing that such an ordinance be adopted. The owner of a vehicle parked in violation of an ordinance adopted pursuant to this subsection shall be deemed to have appointed any appropriate law-enforcement officer as his agent for the purpose of arranging for the transportation and safe storage of such vehicle. (1979, c. 745, s. 1.)

**Local Modification.** — Wake: 1981, c. 256.

### § 153A-140. Abatement of public health nuisances.

A county shall have authority, subject to the provisions of Article 57 of Chapter 106 of the General Statutes, to remove, abate, or remedy everything that is dangerous or prejudicial to the public health. The expense of the action shall be paid by the person in default, and, if not paid, shall be a lien upon the land or premises where the nuisance arose, and shall be collected as unpaid taxes. The authority granted by this section may only be exercised upon adequate notice, the right to a hearing, and the right to appeal to the General Court of Justice. Nothing in this section shall be deemed to restrict or repeal the authority of any municipality to abate or remedy health nuisances pursuant to G.S. 160A-174, 160A-193, or any other general or local law. This section shall not affect bona fide farms, but any use of farm property for nonfarm purposes is subject to this section. (1981 (Reg. Sess., 1982), c. 1314, s. 1.)

§ 153A-141: Repealed by Session Laws 1995, c. 501, s. 3.

### § 153A-142. Curfews.

A county may by an appropriate ordinance impose a curfew on persons of any age less than 18. (1997-189, s. 2.)

**Legal Periodicals.** — For 1997 legislative survey, see 20 Campbell L. Rev. 417.

§§ 153A-143 through 153A-145: Reserved for future codification purposes.

## ARTICLE 7.

### *Taxation.*

### § 153A-146. General power to impose taxes.

A county may impose taxes only as specifically authorized by act of the General Assembly. Except when the statute authorizing a tax provides for penalties and interest, the power to impose a tax includes the power to impose reasonable penalties for failure to declare tax liability, if required, and to impose penalties or interest for failure to pay taxes lawfully due within the time prescribed by law or ordinance. The power to impose a tax also includes the power to provide for its administration in a manner not inconsistent with the statute authorizing the tax. (1868, c. 20, s. 8; Code, s. 707; Rev., s. 1318; C.S., s. 1297; 1973, c. 822, s. 1.)

**Cross References.** — As to State and local finance, see N.C. Const., Art. V.

#### CASE NOTES

**Editor's Note.** — *Most of the cases cited below were decided under corresponding sections of former law.*

**Powers of Counties Derived from Legislature.** — A sovereign state possesses the inherent power of taxation, but counties must derive that power, as well as all others, from the legislature. *Stam v. State*, 302 N.C. 357, 275 S.E.2d 439 (1981).

**Acts Beyond Power Granted Void.** — Counties must derive the power of taxation from the legislature, and any attempt to exercise the taxing power which is found not to be within the powers granted to the county is ultra vires and void. *Stam v. State*, 302 N.C. 357, 275 S.E.2d 439 (1981).

**Authority of County to Raise Revenues.** — While the General Assembly may regulate the amount of and methods for raising county revenues, the system of county government contemplates that such function shall be performed by the county authorities, subject to the limitations prescribed by the Constitution. *Parker v. Board of Comm'rs*, 104 N.C. 166, 10 S.E. 137 (1889).

**Strict Construction of Grant of Power to Levy Taxes.** — A grant to a county of the power to levy taxes must be strictly construed. It is an established rule that the authority of municipalities to levy a tax must be made clearly to appear, and that doubts, if any, as to the power sought to be exercised must be re-

solved against the municipality. *Stam v. State*, 302 N.C. 357, 275 S.E.2d 439 (1981).

**Constitutional requirement that every act levying taxes shall state the objects to which they shall be applied has no application to taxes levied by county** for county purposes. *Parker v. Board of Comm'rs*, 104 N.C. 166, 10 S.E. 137 (1889).

**Mandamus to Compel Levy of Tax and Payment of Debt.** — A plaintiff, upon a proper prayer for judgment, may have a mandamus to compel the board of commissioners to levy a tax and pay the debt of a county. *Winslow v. Commissioners of Perquimans County*, 64 N.C. 218 (1870).

**Injunction Against Levy of Unconstitutional Tax.** — A taxpayer may enjoin county commissioners from making a tax levy to pay interest on railroad bonds issued under an unconstitutional statute, without restoring to the bona fide holders of the bonds the consideration paid therefor. *Graves v. Commissioners*, 135 N.C. 49, 47 S.E. 134 (1904).

**Where it was alleged that board of commissioners had not levied a sufficient tax to defray the ordinary expenses of the county, on account of the levy of a tax to pay for repairing the courthouse, it was held to be no ground for interference by the courts.** *Long v. Commissioners of Richmond County*, 76 N.C. 273 (1877).

### § 153A-147. Remedies for collecting taxes other than property taxes.

In addition to any other remedies provided by law, a county may collect any county tax by use of the remedies of levy and sale and attachment and garnishment, under the rules and according to the procedures prescribed by the Machinery Act (Chapter 105, Subchapter II) for the enforcement of tax liability against personal property. However, these remedies become available only on the due date of the tax and not before that time. (1973, c. 822, s. 1.)

### § 153A-148. Continuing taxes.

Except for taxes levied on property under the Machinery Act (Chapter 105, Subchapter II), a county may impose any authorized tax by a permanent ordinance that shall stand from year to year until amended or repealed, and it is not necessary to reimpose the tax in each annual budget ordinance. (1973, c. 822, s. 1.)

**Legal Periodicals.** — See legislative survey, 21 Campbell L. Rev. 323 (1999).

### § 153A-148.1. Disclosure of certain information prohibited.

(a) Disclosure Prohibited. — Notwithstanding Chapter 132 of the General Statutes or any other law regarding access to public records, local tax records that contain information about a taxpayer's income or receipts are not public records. A current or former officer, employee, or agent of a county who in the course of service to or employment by the county has access to information about the amount of a taxpayer's income or receipts may not disclose the information to any other person unless the disclosure is made for one of the following purposes:

- (1) To comply with a court order or a law.
- (2) Review by the Attorney General or a representative of the Attorney General.
- (3) To sort, process, or deliver tax information on behalf of the county, as necessary to administer a tax.
- (4) To exchange information with a regional public transportation authority or a regional transportation authority created pursuant to Article 26 or Article 27 of Chapter 160A of the General Statutes, when the information is needed to fulfill a duty imposed on the authority or on the county.
- (5) To exchange information with the Department of Revenue, when the information is needed to fulfill a duty imposed on the Department or on the county.

(b) Punishment. — A person who violates this section is guilty of a Class 1 misdemeanor. If the person committing the violation is an officer or employee, that person shall be dismissed from public office or public employment and may not hold any public office or public employment in this State for five years after the violation. (1993, c. 485, s. 33; 1994, Ex. Sess., c. 14, s. 66; 1998-139, s. 2.)

### § 153A-149. Property taxes; authorized purposes; rate limitation.

(a) Pursuant to Article V, Sec. 2(5) of the Constitution of North Carolina, the General Assembly confers upon each county in this State the power to levy, within the limitations set out in this section, taxes on property having a situs within the county under the rules and according to the procedures prescribed in the Machinery Act (Chapter 105, Subchapter II).

(b) Each county may levy property taxes without restriction as to rate or amount for the following purposes:

- (1) Courts. — To provide adequate facilities for and the county's share of the cost of operating the General Court of Justice in the county.
- (2) Debt Service. — To pay the principal of and interest on all general obligation bonds and notes of the county.
- (3) Deficits. — To supply an unforeseen deficiency in the revenue (other than revenues of public enterprises), when revenues actually collected or received fall below revenue estimates made in good faith and in accordance with the Local Government Budget and Fiscal Control Act.
- (4) Elections. — To provide for all federal, State, district and county elections.
- (5) Jails. — To provide for the operation of a jail and other local confinement facilities.
- (6) Joint Undertakings. — To cooperate with any other county, city, or political subdivision in providing any of the functions, services, or activities listed in this subsection.

- (7) Schools. — To provide for the county's share of the cost of kindergarten, elementary, secondary, and post-secondary public education.
- (8) Social Services. — To provide for public assistance required by Chapters 108A and 111 of the General Statutes.

(c) Each county may levy property taxes for one or more of the purposes listed in this subsection up to a combined rate of one dollar and fifty cents (\$1.50) on the one hundred dollars (\$100.00) appraised value of property subject to taxation. Authorized purposes subject to the rate limitation are:

- (1) To provide for the general administration of the county through the board of county commissioners, the office of the county manager, the office of the county budget officer, the office of the county finance officer, the office of the county assessor, the office of the county tax collector, the county purchasing agent, and the county attorney, and for all other general administrative costs not allocated to a particular board, commission, office, agency, or activity of the county.
- (2) Agricultural Extension. — To provide for the county's share of the cost of maintaining and administering programs and services offered to agriculture by or through the Agricultural Extension Service or other agencies.
- (3) Air Pollution. — To maintain and administer air pollution control programs.
- (4) Airports. — To establish and maintain airports and related aeronautical facilities.
- (5) Ambulance Service. — To provide ambulance services, rescue squads, and other emergency medical services.
- (6) Animal Protection and Control. — To provide animal protection and control programs.
- (6a) Arts Programs and Museums. — To provide for arts programs and museums as authorized in G.S. 160A-488.
- (6b) Auditoriums, coliseums, and convention and civic centers. — To provide public auditoriums, coliseums, and convention and civic centers.
- (7) Beach Erosion and Natural Disasters. — To provide for shoreline protection, beach erosion control, and flood and hurricane protection.
- (8) Cemeteries. — To provide for cemeteries.
- (9) Civil Preparedness. — To provide for civil preparedness programs.
- (10) Debts and Judgments. — To pay and discharge any valid debt of the county or any judgment lodged against it, other than debts and judgments evidenced by or based on bonds and notes.
- (10a) Defense of Employees and Officers. — To provide for the defense of, and payment of civil judgments against, employees and officers or former employees and officers, as authorized by this Chapter.
- (10b) Economic Development. — To provide for economic development as authorized by G.S. 158-12.
- (11) Fire Protection. — To provide fire protection services and fire prevention programs.
- (12) Forest Protection. — To provide forest management and protection programs.
- (13) Health. — To provide for the county's share of maintaining and administering services offered by or through the local health department.
- (14) Historic Preservation. — To undertake historic preservation programs and projects.
- (15) Hospitals. — To establish, support and maintain public hospitals and clinics, and other related health programs and facilities, or to aid any private, nonprofit hospital, clinic, related facility, or other health program or facility.

- (15a) Housing Rehabilitation. — To provide for housing rehabilitation programs authorized by G.S. 153A-376, including personnel costs related to the planning and administration of these programs. This subdivision applies only to counties with a population of 400,000 or more, according to the most recent decennial federal census.
- (15b) Housing. — To undertake housing programs for low- and moderate-income persons as provided in G.S. 153A-378.
- (16) Human Relations. — To undertake human relations programs.
- (16a) Industrial Development. — To provide for industrial development as authorized by G.S. 158-7.1.
- (17) Joint Undertakings. — To cooperate with any other county, city, or political subdivision in providing any of the functions, services, or activities listed in this subsection.
- (18) Law Enforcement. — To provide for the operation of the office of the sheriff of the county and for any other county law-enforcement agency not under the sheriff's jurisdiction.
- (19) Libraries. — To establish and maintain public libraries.
- (20) Mapping. — To provide for mapping the lands of the county.
- (21) Medical Examiner. — To provide for the county medical examiner or coroner.
- (22) Mental Health. — To provide for the county's share of the cost of maintaining and administering services offered by or through the area mental health, developmental disabilities, and substance abuse authority.
- (23) Open Space. — To acquire open space land and easements in accordance with Article 19, Part 4, Chapter 160A of the General Statutes.
- (24) Parking. — To provide off-street lots and garages for the parking and storage of motor vehicles.
- (25) Parks and Recreation. — To establish, support and maintain public parks and programs of supervised recreation.
- (26) Planning. — To provide for a program of planning and regulation of development in accordance with Article 18 of this Chapter and Article 19, Parts 3A and 6, of Chapter 160A of the General Statutes.
- (26a) Ports and Harbors. — To participate in programs with the North Carolina Ports Authority and provide for harbor masters.
- (27) Public Transportation. — To provide public transportation by rail, motor vehicle, or another means of conveyance other than a ferry, including any facility or equipment needed to provide the public transportation. This subdivision does not authorize a county to provide public roads in the county in violation of G.S. 136-51.
- (27a) Railway Corridor Preservation. — To acquire property for railroad corridor preservation as authorized by G.S. 160A-498.
- (28) Register of Deeds. — To provide for the operation of the office of the register of deeds of the county.
- (28a) Roads. — To provide for the maintenance of county roads as authorized by G.S. 153A-301(d).
- (29) Sewage. — To provide sewage collection and treatment services as defined in G.S. 153A-274(2).
- (30) Social Services. — To provide for the public welfare through the maintenance and administration of public assistance programs not required by Chapters 108A and 111 of the General Statutes, and by establishing and maintaining a county home.
- (31) Solid Waste. — To provide solid waste collection and disposal services, and to acquire and operate landfills.
- (31a) Stormwater. — To provide structural and natural stormwater and drainage systems of all types.

- (32) Surveyor. — To provide for a county surveyor.
- (33) Veterans' Service Officer. — To provide for the county's share of the cost of services offered by or through the county veterans' service officer.
- (34) Water. — To provide water supply and distribution systems.
- (35) Watershed Improvement. — To undertake watershed improvement projects.
- (36) Water Resources. — To participate in federal water resources development projects.
- (37) Armories. — To supplement available State or federal funds to be used for the construction (including the acquisition of land), enlargement or repair of armory facilities for the North Carolina national guard.

(d) With an approving vote of the people, any county may levy property taxes for any purpose for which the county is authorized by law to appropriate money. Any property tax levy approved by a vote of the people shall not be counted for purposes of the rate limitation imposed in subsection (c).

The county commissioners may call a referendum on approval of a property tax levy. The referendum may be held at the same time as any other referendum or election, but may not be otherwise held within the period of time beginning 30 days before and ending 10 days after any other referendum or election to be held in the county and already validly called or scheduled by law at the time the tax referendum is called. The referendum shall be conducted by the county board of elections. The clerk to the board of commissioners shall publish a notice of the referendum at least twice. The first publication shall be not less than 14 days and the second publication not less than seven days before the last day on which voters may register for the referendum. The notice shall state the date of the referendum, the purpose for which it is being held, and a statement as to the last day for registration for the referendum under the election laws then in effect.

The proposition submitted to the voters shall be substantially in one of the following forms:

- (1) Shall \_\_\_\_\_ County be authorized to levy annually a property tax at a rate not in excess of \_\_\_\_\_ cents on the one hundred dollars (\$100.00) value of property subject to taxation for the purpose of \_\_\_\_\_?
- (2) Shall \_\_\_\_\_ County be authorized to levy annually a property tax at a rate not in excess of that which will produce \$ \_\_\_\_\_ for the purpose of \_\_\_\_\_?
- (3) Shall \_\_\_\_\_ County be authorized to levy annually a property tax without restriction as to rate or amount for the purpose of \_\_\_\_\_?

If a majority of those participating in the referendum approve the proposition, the board of commissioners may proceed to levy annually a property tax within the limitations (if any) described in the proposition.

The board of elections shall canvass the referendum and certify the results to the board of commissioners. The board of commissioners shall then certify and declare the result of the referendum and shall publish a statement of the result once, with the following statement appended: "Any action or proceeding challenging the regularity or validity of this tax referendum must be begun within 30 days after (date of publication)." The statement of results shall be filed in the clerk's office and inserted in the minutes of the board.

Any action or proceeding in any court challenging the regularity or validity of a tax referendum must be begun within 30 days after the publication of the results of the referendum. After the expiration of this period of limitation, no right of action or defense based upon the invalidity of or any irregularity in the referendum shall be asserted, nor shall the validity of the referendum be open

to question in any court upon any ground whatever, except in an action or proceeding begun within the period of limitation prescribed herein.

Except for supplemental school taxes and except for tax referendums on functions not included in subsection (c) of this section, any referendum held before July 1, 1973, on the levy of property taxes is not valid for the purposes of this subsection. Counties in which such referendums have been held may support programs formerly supported by voted property taxes within the general rate limitation set out in subsection (c) at any appropriate level and are not subject to the former voted rate limitation.

(e) With an approving vote of the people, any county may increase the property tax rate limitation imposed in subsection (c) and may call a referendum for that purpose. The referendum may be held at the same time as any other referendum or election, but may not be otherwise held within the period of time beginning 30 days before and ending 30 days after any other referendum or election. The referendum shall be conducted by the county board of elections.

The proposition submitted to the voters shall be substantially in the following form: "Shall the property tax rate limitation applicable to \_\_\_\_\_ County be increased from \_\_\_\_\_ on the one hundred dollars (\$100.00) value of property subject to taxation to \_\_\_\_\_ on the one hundred dollars (\$100.00) value of property subject to taxation?"

If a majority of those participating in the referendum approve the proposition, the rate limitation imposed in subsection (c) shall be increased for the county.

(f) With respect to any of the categories listed in subsections (b) and (c) of this section, the county may provide the necessary personnel, land, buildings, equipment, supplies, and financial support from property tax revenues for the program, function, or service.

(g) This section does not authorize any county to undertake any program, function, joint undertaking, or service not otherwise authorized by law. It is intended only to authorize the levy of property taxes within the limitations set out herein to finance programs, functions, or services authorized by other portions of the General Statutes or by local acts. (1973, c. 803, s. 1; c. 822, s. 2; c. 963; c. 1446, s. 25; 1975, c. 734, s. 17; 1977, c. 148, s. 5; c. 834, s. 3; 1979, c. 619, s. 4; 1981, c. 66, s. 2; c. 562, s. 11; c. 692, s. 1; 1983, c. 511, ss. 1, 2; 1985, c. 589, s. 57; 1987, c. 45, s. 2; c. 697, s. 2; 1989, c. 600, s. 5; c. 625, s. 25; c. 643, s. 1; 1989 (Reg. Sess., 1990), c. 1005, ss. 3-5; 1991 (Reg. Sess., 1992), c. 764, s. 1; c. 896, s. 1; 1993, c. 378, s. 2; 1997-502, s. 6; 1999-366, s. 3.)

**Local Modification.** — Gaston: 1987 (Reg. Sess., 1988), c. 897, s. 6(c); Mecklenburg: 1987 (Reg. Sess., 1988), c. 897, s. 6(c).

**Editor's Note.** — The above section was enacted as § 153-65 by Session Laws 1973, c. 803, s. 1. As directed by Session Laws 1973, c. 822, s. 2, it has been substituted for § 153A-149, as enacted by Session Laws 1973, c. 822, s. 1.

Subdivision (c)(27a) was originally codified as subdivision (c)(38); it was recodified to facilitate alphabetization.

Part 3A of Article 19 of Chapter 160A, referred to in subdivision (c)(26) of this section, was repealed by Session Laws 1989, c. 706. See now Part 3C.

The introductory language of Session Laws 1997-502, s. 6, read: "G.S. 153A-149(13) reads as rewritten"; however, the amendment has

been made to subdivision (c)(13), as the apparently intended subdivision.

Session Laws 1999-366, s. 1, provides: "The General Assembly finds and declares that the purpose of this act is to provide authority for counties in North Carolina to provide funds for residential housing construction, new or rehabilitated, and to provide for the sale or rental of housing to persons and families of low and moderate income. The General Assembly finds and declares that there exists in counties in the State a serious shortage of decent, safe, and sanitary residential housing available at low prices or rentals to persons and families of low and moderate income. This shortage is inimical to the health, safety, welfare, and prosperity of all residents of the State and to the sound growth of North Carolina communities."

**Legal Periodicals.** — For survey of 1980

constitutional law, see 59 N.C.L. Rev. 1116 (1981).

For survey of 1981 administrative law, see 60

N.C.L. Rev. 1165 (1982).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2281 (1997).

### CASE NOTES

*Editor's Note.* — *Most of the cases cited below were decided under corresponding sections of former law.*

**Where a statute authorizing the levy of a tax beyond the constitutional limit for a special purpose is *intra vires*, the taxes collected beyond the requirements of the special purpose may be turned into the general fund and used for general purposes; but where the act authorizes the levy partly for a "special purpose" and partly for general purposes it is *ultra vires*, and no part of the levy can be collected.** *Williams v. Commissioners of Craven County*, 119 N.C. 520, 26 S.E. 150 (1896).

**Levy to Fund Medically Unnecessary Abortions Is *Ultra Vires* and Void.** — Section 153A-255 does not give counties the underlying authority to levy taxes pursuant to subdivision (c)(30) of this section to fund medically unnecessary abortions, since the authority conferred upon counties to provide social services pursuant to § 153A-255 is limited to providing the poor with the basic necessities of life, and a medically unnecessary abortion is not a basic necessity of life; therefore, a county exceeds its statutorily conferred power in levying a tax to fund medically unnecessary abortions, and the tax levy is *ultra vires* and void. *Stam v. State*, 302 N.C. 357, 275 S.E.2d 439 (1981).

**Appropriation for Dyslexia School Unauthorized.** — An appropriation by the Gaston County Board of Commissioners to the Dyslexia School of North Carolina was not authorized by either subdivision (c)(30) of this section or § 153A-255. *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1979).

**General taxes for county purposes are leviable only once a year.** *Bradshaw v. Board of Comm'rs*, 92 N.C. 278 (1885).

**Tax Rate Variable.** — There is no constitutional requirement that the tax rate for county purposes shall be the same everywhere. It varies in the different counties, and may vary in different townships, parts of townships, districts, towns, and cities in the same county. *Jones v. Commissioners of Stokes County*, 143 N.C. 59, 55 S.E. 427 (1906).

**Assessment of Property Subject to Taxation.** — All of the property, including solvent credits, in the State, shall be assessed and taxed at its value in money. *Caldwell Land & Lumber Co. v. Smith*, 146 N.C. 199, 59 S.E. 653 (1907).

**The legislature has the power to provide for the listing, assessment, and taxing of personal property omitted to be listed by**

**the owner as the law requires.** And there is no reason why it may not be taxed for five or more preceding years if it has escaped taxation so long. *Kyle v. Mayor & Comm'rs*, 75 N.C. 445 (1876); *North Carolina R.R. v. Commissioners of Alamance*, 82 N.C. 260 (1880); *City of Wilmington v. Cronly*, 122 N.C. 388, 30 S.E. 9 (1898); *Caldwell Land & Lumber Co. v. Smith*, 146 N.C. 199, 59 S.E. 653 (1907).

**An assessment for the building of a stock law fence is not a tax** which requires a referendum vote by the people. *Tripp v. Commissioners of Pitt County*, 158 N.C. 180, 73 S.E. 896 (1912).

**Land of Schools and Railroads Held Exempt from Special Tax.** — An act which provided for the construction of a fence to enclose the whole of several districts and that the commissioners should levy a special tax on all the real estate in the district which was taxable by the State and county did not embrace the real estate of schools and railroads, which was not taxable for general purposes. *Bradshaw v. Board of Comm'rs*, 92 N.C. 278 (1885).

**Application of Tax Raised for One Purpose to Another Purpose.** — There is no statute nor any rule of law or of public policy which prevents county commissioners from applying a tax raised professedly for one purpose to any other legitimate purpose. There may, perhaps, be an exception where a tax is levied by a special authority from the legislature, or upon the vote of the people, which would not otherwise be lawful. *Long v. Commissioners of Richmond County*, 76 N.C. 273 (1877).

**Funds Impressed with a Trust.** — Where taxes are levied and collected to pay coupons on bonds issued by a county, the funds so collected are impressed with a trust for the benefit of the owners of the coupons. *Board of Comm'rs v. Tollman*, 145 F. 753 (4th Cir. 1906).

**Tax Necessary to Maintain Schools for Required Term.** — When it becomes necessary, the county commissioners are required to levy a tax sufficient to maintain the county schools for the required term each year. Former constitutional limitation did not apply to defeat such a levy. *Collie v. Commissioners of Franklin County*, 145 N.C. 170, 59 S.E. 44 (1907), expressly overruling *Barksdale v. Commissioners of Sampson County*, 93 N.C. 472 (1885), and *Board of Educ. v. Board of Comm'rs*, 111 N.C. 578, 16 S.E. 621 (1892); *Southern Ry. v. Cherokee County*, 177 N.C. 86, 97 S.E. 758 (1919).

**Tax to Erect and Maintain Courthouse.**

— Power of limited taxation for the purpose of erecting and maintaining a county courthouse and its exercise is no invasion of the Bill of Rights. *Lockhart v. Harrington*, 8 N.C. 408 (1821).

Taxpayers cannot enjoin the levy of taxes necessary to pay the principal and interest on bonds issued for repairs to the courthouse. *Harrell v. Board of Comm'rs*, 206 N.C. 225, 173 S.E. 614 (1934).

**Tax Levied According to Procedures in Machinery Act.** — The legislature authorized defendant and other counties to levy property taxes, including taxes on plaintiff's system property, according to the procedures in the Machinery Act (Chapter 105, Subchapter II). *North Carolina E. Mun. Power v. Wake County*, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert.

denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

**Resolution Correcting Record as to Purpose of Levy.** — Resolutions of the board of county commissioners correcting records as to the purpose of tax levies will, in the absence of evidence to the contrary, be presumed bona fide. *Atlantic Coast Line R.R. v. Duplin County*, 226 N.C. 719, 40 S.E.2d 371 (1946).

**Counties and County Commissioners Do Not Have Sovereign Immunity.** — These powers and the many others enumerated in this Chapter show that a county and the county commissioners are not part of the State of North Carolina and they do not enjoy its sovereign immunity. *Mearns v. Brunswick County*, 615 F. Supp. 14 (E.D.N.C. 1985).

**Applied** in *Gray v. Laws*, 51 F.3d 426 (4th Cir. 1995).

OPINIONS OF ATTORNEY GENERAL

**Local School Administrative Unit May Levy Taxes at Local Level.** — The legislature may by statute, consistently with the Constitution, provide that a local school administrative unit may levy taxes at the local level but such taxing authority must be conferred either by a

general law, applicable statewide, or by local act subject to a vote of those persons affected. See opinion of Attorney General to Mr. John B. Dunn, Superintendent, Edenton-Chowan Schools, 60 N.C.A.G. 17 (1990).

§ 153A-150. Reserve for octennial reappraisal.

Before the beginning of the fiscal year immediately following the effective date of an octennial reappraisal of real property conducted as required by G.S. 105-286, the county budget officer shall present to the board of commissioners an eight-year budget for financing the cost of the next octennial reappraisal. The budget shall estimate the cost of the reappraisal and shall propose a plan for raising the necessary funds in eight annual installments during the next fiscal years, with all installments as nearly uniform as practicable. The board shall consider this budget, making any amendments to the budget it deems advisable, and shall adopt a resolution establishing a special reserve fund for the next octennial reappraisal. In the budget ordinance of the first fiscal year of the plan, the board of commissioners shall appropriate to the special reappraisal reserve fund the amount set out in the plan for the first year's installment. When the county budget for each succeeding fiscal year is in preparation, the board shall review the eight-year reappraisal budget with the budget officer and shall amend it, if necessary, so that it will reflect the probable cost at that time of the reappraisal and will produce the necessary funds at the end of the eight-year period. In the budget ordinance for each succeeding fiscal year, the board shall appropriate to the special reappraisal reserve fund the amount set out in the plan as due in that year.

Moneys appropriated to the special reappraisal reserve fund shall not be available or expended for any purpose other than the reappraisal of real property required by G.S. 105-286, except that the funds may be deposited at interest or invested as permitted by G.S. 159-30. If there is a fund balance in the reserve fund following payment for the required reappraisal, it shall be retained in the fund for use in financing the next required reappraisal.

Within 10 days after the adoption of each annual budget ordinance, the county finance officer shall report to the Department of Revenue, on forms to be supplied by the Department, the terms of the county's eight-year reap-

praisal budget, the current condition of the special reappraisal reserve fund, and the amount appropriated to the reserve fund in the current fiscal year. (1959, c. 704, s. 6; 1971, c. 806, s. 4; c. 931, s. 2; 1973, c. 476, s. 193; c. 822, s. 1.)

**§ 153A-151. Sales tax.**

A county may levy a local sales and use tax under the rules and according to the procedures prescribed by the Local Government Sales and Use Tax Act (Chapter 105, Subchapter VIII). (1973, c. 822, s. 1.)

**§ 153A-152. Privilege license taxes.**

(a) Authority. — A county may levy privilege license taxes on trades, occupations, professions, businesses, and franchises to the extent authorized by Article 2 of Chapter 105 of the General Statutes and any other acts of the General Assembly. A county may levy privilege license taxes to the extent formerly authorized by the following sections of Article 2 of Chapter 105 of the General Statutes before they were repealed:

- G.S. 105-50 Pawnbrokers.
- G.S. 105-53 Peddlers, itinerant merchants, and specialty market operators.
- G.S. 105-55 Installing elevators and automatic sprinkler systems.
- G.S. 105-58 Fortune tellers, palmists, etc.
- G.S. 105-65 Music machines.
- G.S. 105-66.1 Electronic video games.
- G.S. 105-80 Firearms dealers and dealers in other weapons.
- G.S. 105-89 Automobiles, wholesale supply dealers and service stations.
- G.S. 105-89.1 Motorcycle dealers.
- G.S. 105-90 Emigrant and employment agents.
- G.S. 105-102.5 General business license.

(b) Telecommunications Restriction. — A county may not impose a license, franchise, or privilege tax on a company taxed under G.S. 105-164.4(a) (4c). (1973, c. 822, s. 1; 1996, 2nd Ex. Sess., c. 14, s. 22; 2001-430, s. 16.)

**Effect of Amendments.** — Session Laws 2001-430, s. 16, effective January 1, 2002, and applicable to taxable services reflected on bills

dated on or after January 1, 2002, inserted the subsection (a) designation and subsection catchline; and added subsection (b).

**CASE NOTES**

*Editor's Note.* — The cases cited below were decided under former § 105-90.

**Constitutionality of Tax on Emigrant Agent.** — A former statute imposing a tax “on every emigrant agent or person engaged in procuring laborers to accept employment in another state” was held constitutional. *State v. Hunt*, 129 N.C. 686, 40 S.E. 216, 85 Am. St. R. 758 (1901).

**Valid Exercise of Taxing Power.** — A former statute taxing persons engaged in the business of procuring laborers for employment outside the State was held a valid exercise of the legislative power to tax trades and profes-

sions and was not a police regulation. *State v. Roberson*, 136 N.C. 587, 48 S.E. 595 (1904). See also *State v. Hunt*, 129 N.C. 686, 40 S.E. 216, 85 Am. St. R. 758 (1901); *Carr v. Commissioners of Duplin County*, 136 N.C. 125, 48 S.E. 597 (1904); *Lane v. Commissioners of Rowan County*, 139 N.C. 443, 52 S.E. 140 (1905).

**Statute Applied to Agents in Business of Hiring Laborers.** — A former statute imposing a license tax upon “every emigrant agent or person engaged in procuring laborers for employment out of this State” applied to agents who made it their business to hire laborers in this State to be sent beyond the limits of the

State to be employed by others. Carr v. Commissioners of Duplin County, 136 N.C. 125, 48 S.E. 597 (1904).

**Employment of Laborers to Work for Hirer.** — Public Laws 1903, c. 247, s. 74, imposing a license tax upon “every emigrant agent or person engaged in procuring laborers for employment out of this State” was held not to apply to a person who came into this State and employed laborers to work for him in another state. Carr v. Commissioners of Duplin County, 136 N.C. 125, 48 S.E. 597 (1904).

**Officer of foreign corporation coming into this State and hiring hands for employment by the corporation** in another state was not “engaged in the business of hiring hands,” etc., and was held liable for the tax of emigrant agents, under a former statute. Lane v. Commissioners of Rowan County, 139

N.C. 443, 52 S.E. 140 (1905).

**Amount of Tax Not Reviewable.** — A tax on the business of procuring laborers for employment outside the State being an exercise of the power of the State to levy taxes, the amount is not reviewable by the courts. When the Constitution confers upon the legislature the power to levy taxes, the amount of the tax to be levied is committed to that department of the government and not open to review by the judicial department. The Supreme Court may inquire into the question of power, but not as to the manner of its exercise. State v. Roberson, 136 N.C. 587, 48 S.E. 595 (1904).

**Applied** in State v. Moore, 113 N.C. 697, 18 S.E. 342 (1893); Cabarrus County v. City of Charlotte, 71 N.C. App. 192, 321 S.E.2d 476 (1984).

OPINIONS OF ATTORNEY GENERAL

**Municipality may not levy privilege license tax on employment agency** when the only contact is by telephone into the municipal-

ity. See opinion of Attorney General to Mr. John H. McMurray, Morgantown City Attorney, 41 N.C.A.G. 82 (1970).

**§ 153A-152.1. Privilege license tax on low-level radioactive and hazardous waste facilities.**

(a) Counties in which hazardous waste facilities as defined in G.S. 130A-290 or low-level radioactive waste facilities as defined in G.S. 104E-5(9b) are located may levy an annual privilege license tax on persons or firms operating such facilities only in accordance with this section.

(b) The rate or rates of a tax levied under authority of this section shall be in an amount calculated to compensate the county for the additional costs incurred by it from having a hazardous waste facility or a low-level radioactive waste facility located in its jurisdiction to the extent to which compensation for such costs is not otherwise provided, which costs may include the loss of ad valorem property tax revenues from the property on which a facility is located, the cost of providing any additional emergency services, the cost of monitoring air, surface water, groundwater, and other environmental media to the extent other monitoring data is not available, and other costs the county establishes as being associated with the facilities and for which it is not otherwise compensated.

(c) Any person or firm taxed pursuant to this section may appeal the tax rate to the Board, but shall pay the tax when due, subject to a refund when the appeal is resolved by the Board or in the courts. (1981, c. 704, s. 16; 1985, c. 462, s. 11; 1987, c. 850, s. 21; 1989, c. 168, s. 34.)

**Editor’s Note.** — Session Laws 1987 (Reg. Sess., 1988), c. 993, s. 23, repealed Session Laws 1987, c. 850, s. 27(a), which provided that

c. 850 should not be construed as a revenue bill within the meaning of N.C. Const., Art. II, § 23.

**§ 153A-153. Animal tax.**

A county may levy an annual license tax on the privilege of keeping dogs and other pets within the county. (1973, c. 822, s. 1.)

## CASE NOTES

**Applied** in *Development Assocs. v. Wake County Bd. of Adjustment*, 48 N.C. App. 541, 269 S.E.2d 700 (1980).

### § 153A-154. Cable television franchise tax.

A county may levy an annual franchise tax on cable television companies franchised under G.S. 153A-137. (1973, c. 822, s. 1.)

#### § 153A-154.1. Uniform penalties for local meals taxes.

(a) Penalties. — Notwithstanding any other provision of law, the civil and criminal penalties that apply to State sales and use taxes under Chapter 105 of the General Statutes apply to local meals taxes. The governing board of a taxing county has the same authority to waive the penalties for a local meals tax that the Secretary of Revenue has to waive the penalties for State sales and use taxes.

(b) Scope. — This section applies to every county authorized by the General Assembly to levy a meals tax. As used in this section, the term “meals tax” means a tax on prepared food and drink. (2001-264, s. 1.)

**Editor’s Note.** — Session Laws 2001-264, s. 4, made this section effective October 1, 2001. Session Laws 2001-264, s. 3, provides: “Any provision of a local act that conflicts with G.S. 153A-154.1 or G.S. 160A-214.1 is repealed.”

### § 153A-155. Uniform provisions for room occupancy taxes.

(a) Scope. — This section applies only to counties the General Assembly has authorized to levy room occupancy taxes.

(b) Levy. — A room occupancy tax may be levied only by resolution, after not less than 10 days’ public notice and after a public hearing held pursuant thereto. A room occupancy tax shall become effective on the date specified in the resolution levying the tax. That date must be the first day of a calendar month, however, and may not be earlier than the first day of the second month after the date the resolution is adopted.

(c) Collection. — Every operator of a business subject to a room occupancy tax shall, on and after the effective date of the levy of the tax, collect the tax. The tax shall be collected as part of the charge for furnishing a taxable accommodation. The tax shall be stated and charged separately from the sales records and shall be paid by the purchaser to the operator of the business as trustee for and on account of the taxing county. The tax shall be added to the sales price and shall be passed on to the purchaser instead of being borne by the operator of the business. The taxing county shall design, print, and furnish to all appropriate businesses and persons in the county the necessary forms for filing returns and instructions to ensure the full collection of the tax. An operator of a business who collects a room occupancy tax may deduct from the amount remitted to the taxing county a discount equal to the discount the State allows the operator for State sales and use tax.

(d) Administration. — The taxing county shall administer a room occupancy tax it levies. A room occupancy tax is due and payable to the county finance officer in monthly installments on or before the 15th day of the month following the month in which the tax accrues. Every person, firm, corporation, or association liable for the tax shall, on or before the 15th day of each month, prepare and render a return on a form prescribed by the taxing county. The return shall state the total gross receipts derived in the preceding month from

rentals upon which the tax is levied. A room occupancy tax return filed with the county finance officer is not a public record and may not be disclosed except in accordance with G.S. 153A-148.1 or G.S. 160A-208.1.

(e) Penalties. — A person, firm, corporation, or association who fails or refuses to file a room occupancy tax return or pay a room occupancy tax as required by law is subject to the civil and criminal penalties set by G.S. 105-236 for failure to pay or file a return for State sales and use taxes. The governing board of the taxing county has the same authority to waive the penalties for a room occupancy tax that the Secretary of Revenue has to waive the penalties for State sales and use taxes.

(f) Repeal or Reduction. — A room occupancy tax levied by a county may be repealed or reduced by a resolution adopted by the governing body of the county. Repeal or reduction of a room occupancy tax shall become effective on the first day of a month and may not become effective until the end of the fiscal year in which the resolution was adopted. Repeal or reduction of a room occupancy tax does not affect a liability for a tax that was attached before the effective date of the repeal or reduction, nor does it affect a right to a refund of a tax that accrued before the effective date of the repeal or reduction.

(g) This section applies only to Anson, Brunswick, Buncombe, Cabarrus, Carteret, Craven, Cumberland, Currituck, Dare, Davie, Durham, Granville, Madison, Montgomery, Nash, Pender, Person, Randolph, Richmond, Rowan, Scotland, Stanly, Transylvania, Tyrrell, Vance, and Washington Counties, and to the Township of Averasboro in Harnett County. (1997-102, s. 3; 1997-255, s. 2; 1997-342, s. 2; 1997-364, s. 3; 1997-410, s. 6; 1998-14, s. 2; 1999-155, s. 2; 1999-205, s. 2; 1999-286, s. 2; 2000-103, s. 5; 2001-162, s. 2; 2001-305, s. 2; 2001-321, s. 3; 2001-381, s. 10; 2001-434, s. 1; 2001-439, s. 18.2; 2001-468, s. 3; 2001-480, s. 14; 2001-484, s. 2.)

**Editor's Note.** — Session Laws 1997-102, s. 3 enacted this section and made it effective to Madison County only. Session Laws 1997-255, s. 2 made this section applicable to Nash County. Session Laws 1997-342, s. 2 made this section applicable to Randolph County. Session Laws 1997-364, s. 3 made this section applicable to Brunswick and Person Counties. Session Laws 1997-410, s. 6 made this section applicable to Avery and Scotland Counties. Session Laws 1998-14, s. 2 made this section applicable to Davie County. Session Laws 1999-155, s. 2 made this section applicable to Currituck County. Session Laws 1999-205, s. 2 made this section applicable to Transylvania County. Session Laws 1999-286, s. 2 made this section applicable to Craven County. This section has been codified at the direction of the Revisor of Statutes.

Session Laws 2001-321, s. 2, amended this section by adding "Vance" preceding "Counties" at the end of subsection (g). However, Session Laws 2001-321, s. 3 provided that if House Bill 757 of the 2001 Session became law, then instead of the amendment by s. 2, subsection (g) would be amended by inserting "Vance" preceding "and Washington." House Bill 757 was enacted as Session Laws 2001-305.

Session Laws 2001-480, s. 6(d), effective December 5, 2001, except that any taxes levied under this section become effective March 1,

2002, provides that G.S. 153A-155(a) and G.S. 153A-155(b) apply to Durham County.

Session Laws 2001-480, s. 6(e), provides that Part III of the act [which inserted "Durham" in subsection (g)] is effective only if Durham County has, prior to February 1, 2002, levied all of the taxes authorized by 6(a), 6(b), and 6(c) of the act.

**Tourism Promotion and Development.** — Session Laws 2001-162, 2001-305, 2001-321, 2001-365, 2001-381, 2001-434, 2001-439, 2001-480, and 2001-484 authorize the affected localities (the counties of Anson, Avery, Buncombe, Dare, Durham, Cabarrus, Carteret, Cumberland, Montgomery, Pender, Richmond, Rowan, Stanly, Washington and Vance, the Cities of Durham, Gastonia, Kings Mountain, Lincolnton, Monroe, and North Topsail Beach, the towns of Beech Mountain, Carrboro, Selma, Smithfield, Wilkesboro and Averasboro Township in Harnett County) to levy additional occupancy taxes for tourism promotion and development.

**Effect of Amendments.** — Session Laws 2000-103, s. 5, effective October 1, 2000, and applicable to taxes collected on or after that date, added "Granville" to the list of counties in subsection (g).

Session Laws 2001-162, s. 2, effective June 4, 2001, added "Buncombe" to the list of counties in subsection (g).

Session Laws 2001-305, s. 2, effective July 24, 2001, inserted "Washington" in the list of counties in subsection (g).

Session Laws 2001-321, s. 3, effective July 30, 2001, inserted "Vance" in the list of counties in subsection (g).

Session Laws 2001-381, s. 10, effective August 20, 2001, added "Carteret" to subsection (g).

Session Laws 2001-434, s. 1, effective October 11, 2001, inserted "Anson," "Montgomery," and "Stanly" in subsection (g).

Session Laws 2001-439, s. 18.2, effective Oc-

tober 15, 2001, added "Cabarrus," "Dare," "Pender," "Richmond," "Rowan" and "the Township of Averagesboro in Harnett County" in subsection (g).

Session Laws 2001-468, s. 3, effective November 27, 2001, added Tyrrell to the list of counties in subsection (g).

Session Law 2001-480, s. 14, added "Durham" to subsection (g). See editor's note for effective date.

Session Laws 2001-484, s. 2, effective December 6, 2001, in subsection (g), deleted "Avery," following "Anson," and added "Cumberland."

## § 153A-156. Gross receipts tax on short-term leases or rentals.

(a) As a substitute for and in replacement of the ad valorem tax, which is excluded by G.S. 105-275(42), a county may levy a gross receipts tax on the gross receipts from the short-term lease or rental of vehicles at retail to the general public. The tax rate shall not exceed one and one-half percent (1.5%) of the gross receipts from such short-term leases or rentals.

(b) If a county enacts the substitute and replacement gross receipts tax pursuant to this section, any entity required to collect the tax shall include a provision in each retail short-term lease or rental agreement noting that the percentage amount enacted by the county of the total lease or rental price, excluding highway use tax, is being charged as a tax on gross receipts. For purposes of this section, the transaction giving rise to the tax shall be deemed to have occurred at the location of the entity from which the customer takes delivery of the vehicle. The tax shall be collected at the time of lease or rental and placed in a segregated account until remitted to the county.

(c) The collection and use of taxes under this section are not subject to highway use tax and are not included in the gross receipts of the entity. The proceeds collected under this section belong to the county and are not subject to creditor liens against the entity.

(d) A tax levied under this section shall be collected by the county but otherwise administered in the same manner as the tax levied under G.S. 105-164.4(a)(2).

(e) The following definitions apply in this section:

(1) Short-term lease or rental. — Defined in G.S. 105-187.1(4).

(2) Vehicle. — Any of the following:

- a. A motor vehicle of the passenger type, including a passenger van, minivan, or sport utility vehicle.
- b. A motor vehicle of the cargo type, including cargo van, pickup truck, or truck with a gross vehicle weight of 26,000 pounds or less used predominantly in the transportation of property for other than commercial freight and that does not require the operator to possess a commercial drivers license.
- c. A trailer or semitrailer with a gross vehicle weight of 6,000 pounds or less.

(f) The penalties and remedies that apply to local sales and use taxes levied under Subchapter VIII of Chapter 105 of the General Statutes apply to a tax levied under this section. The county board of commissioners may exercise any power the Secretary of Revenue may exercise in collecting local sales and use taxes. (2000-2, s. 2; 2000-140, s. 75(b).)

**Editor's Note.** — Session Laws 2000-2, s. 5, made this section effective July 1, 2000.

Session Laws 2000-2, s. 4, directs the Fiscal Research Division of the General Assembly to compare the revenue generated statewide by the substitute and replacement gross receipts tax authorized by the act with the revenue that would have been generated by an ad valorem tax and to report its findings to the 2003 Session of the 2003-2004 General Assembly.

The definitions in subsection (e) have been

set out in alphabetical order at the direction of the Revisor of Statutes.

**Effect of Amendments.** — Session Laws 2000-140, s. 75(b), effective July 1, 2000, substituted "G.S. 105-275(42)" for "G.S. 105-275(41)" in subsection (a); substituted "highway use" for "sales" in subsections (b) and (c); deleted "private" preceding "passenger type" in subdivision (e)(2)a; and substituted "Chapter 105 of the General Statutes" for "this Chapter" in subsection (f).

## ARTICLE 8.

### County Property.

#### Part 1. Acquisition of Property.

§ 153A-157: Recodified as § 153A-158.1(a) by Session Laws 1995, c. 17, s. 15(a), effective March 23, 1995.

**Editor's Note.** — This section was recodified by Session Laws 1995, c. 17, s. 15(a) as § 153A-158.1(a).

Session Laws 1989 (Reg. Sess., 1990), c. 885, s. 1, effective July 10, 1990, as amended by Session Laws 1991 (Reg. Sess., 1992), c. 832, s.

1, effective July 2, 1992; c. 848, s. 1, effective July 6, 1992; c. 865, s. 1, effective July 7, 1992; and c. 1001, s. 1, effective July 21, 1992, had been codified as this section at the direction of the Revisor of Statutes.

#### § 153A-158. Power to acquire property.

A county may acquire, by gift, grant, devise, bequest, exchange, purchase, lease, or any other lawful method, the fee or any lesser interest in real or personal property for use by the county or any department, board, commission, or agency of the county. In exercising the power of eminent domain a county shall use the procedures of Chapter 40A. (1868, c. 20, ss. 3, 8; 1879, c. 144, s. 1; Code, ss. 704, 707; Rev., ss. 1310, 1318; C.S., ss. 1291, 1297; 1973, c. 822, s. 1; 1981, c. 919, s. 21; 1995, c. 17, s. 14.)

**Cross References.** — As to counties in which the consent of the board of commissioners is required before land may be condemned or acquired by a local governmental unit outside the county, see § 153A-15.

**Editor's Note.** — Session Laws 1999-115, s. 4, provides that s. 3, which repealed local modifications to this section, becomes effective

January 1, 2000, and shall not be construed to alter any agreements entered into before that date.

**Legal Periodicals.** — For comment, "Urban Planning and Land Use Regulation: The Need for Consistency," see 14 Wake Forest L. Rev. 81 (1978).

#### CASE NOTES

**Editor's Note.** — Many of the cases cited below were decided under corresponding sections of former law.

**Purchase and Gift of Property Improper.** — County exceeded its statutory authority where it purchased land and gave it to the State as an enticement for the building of a State prison. *Carter v. Stanly County*, 125 N.C.

App. 628, 482 S.E.2d 9 (1997), cert. denied, 346 N.C. 276, 487 S.E.2d 540 (1997).

**The building and repairing of a courthouse by the county is a part of its necessary expense.** *Burgin v. Smith*, 151 N.C. 561, 66 S.E. 607 (1909); *Jackson v. Board of County Comm'rs*, 171 N.C. 379, 88 S.E. 521 (1916).

**As Is a Jail.** — A jail is a necessary county

expense, and in the absence of statutory restrictions, the county commissioners may pledge the credit of the county in order to obtain one. *Haskett v. Tyrrell County*, 152 N.C. 714, 68 S.E. 202 (1910).

**Courts cannot substitute their judgment for that of the county officials honestly and fairly exercised.** For a court to enjoin a proposed expenditure, there must be allegation and proof that the county officials acted in wanton disregard of public good. *Barbour v. Carteret County*, 255 N.C. 177, 120 S.E.2d 448 (1961).

**Effect of Limit on Expense Imposed by Legislature.** — When a special act of the legislature has imposed a limit on the expense of a county to be incurred in improving its courthouse, the commissioners cannot avoid the will of the legislature as therein declared by setting up a general power of contracting debts for necessary expenses, limited only by the constitutional limitation of taxation, and thus under an entire contract made beforehand expend a larger amount for the purpose than that prescribed by the special act. *Burgin v. Smith*, 151 N.C. 561, 66 S.E. 607 (1909).

**Authority to Levy Special Tax.** — While the county commissioners are clothed with the necessary power to erect and repair county buildings, they have no power to levy a special tax out of which to pay the interest and create a sinking fund, unless they have the special authority of the General Assembly. *Harrell v.*

*Board of Comm'rs*, 206 N.C. 225, 173 S.E. 614 (1934), holding that the county had such authority under former §§ 153-1, 153-9(8) and 153-77.

**County Bound by Conditions Expressed in Conveyance.** — Where a county, owning a site upon which to build its courthouse, is authorized by statute to buy, sell, and exchange real estate surrounding it upon such terms and conditions as it may deem just and proper, and for the best interest of the county, and in pursuance of this authority has acquired a conveyance of lands from adjoining owners upon condition that they shall be used as a public square and kept open for that purpose, etc., regardless of whether such conditions are called conditions subsequent or otherwise they are within the purview of the authority conferred upon the county; and coming within the intent of the parties as expressed in the conveyance, and forming a material part of the consideration for the lands, they are valid and binding upon the county. *Guilford County v. Porter*, 167 N.C. 366, 83 S.E. 564 (1914).

**Commissioners Not Individually Liable for Failure to Take Contractor's Bond.** — County commissioners are not individually liable for the failure of their ministerial duty to take the bond required from a contractor for the erection of a county home, such not having been expressly declared; and the remedy is by indictment. *Fore v. Feimster*, 171 N.C. 551, 88 S.E. 977 (1916).

## § 153A-158.1. Acquisition and improvement of school property in certain counties.

(a) Acquisition by County. — A county may acquire, by any lawful method, any interest in real or personal property for use by a school administrative unit within the county. In exercising the power of eminent domain a county shall use the procedures of Chapter 40A. The county shall use its authority under this subsection to acquire property for use by a school administrative unit within the county only upon the request of the board of education of that school administrative unit and after a public hearing.

(b) Construction or Improvement by County. — A county may construct, equip, expand, improve, renovate, or otherwise make available property for use by a school administrative unit within the county. The local board of education shall be involved in the design, construction, equipping, expansion, improvement, or renovation of the property to the same extent as if the local board owned the property.

(c) Lease or Sale by Board of Education. — Notwithstanding the provisions of G.S. 115C-518 and G.S. 160A-274, a local board of education may, in connection with additions, improvements, renovations, or repairs to all or part of any of its property, lease or sell the property to the board of commissioners of the county in which the property is located for any price negotiated between the two boards.

(d) Board of Education May Contract for Construction. — Notwithstanding the provisions of G.S. 115C-40 and G.S. 115C-521, a local board of education may enter into contracts for the erection of school buildings upon sites owned

in fee simple by one or more counties in which the local school administrative unit is located.

(e) Scope. — This section applies to Alamance, Alexander, Alleghany, Anson, Ashe, Avery, Bertie, Bladen, Brunswick, Burke, Cabarrus, Caldwell, Camden, Carteret, Catawba, Chatham, Cherokee, Chowan, Clay, Columbus, Craven, Cumberland, Currituck, Dare, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Gates, Graham, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hoke, Hyde, Iredell, Jackson, Johnston, Jones, Lee, Lenoir, Lincoln, Macon, Madison, Martin, McDowell, Mecklenburg, Mitchell, Montgomery, Moore, Nash, New Hanover, Onslow, Orange, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Transylvania, Union, Vance, Wake, Watauga, Wayne, Wilkes, Wilson, and Yadkin Counties. (1868, c. 20, ss. 3, 8; 1879, c. 144, s. 1; Code, ss. 704, 707; Rev., ss. 1310, 1318; C.S., ss. 1291, 1297; 1973, c. 822, s. 1; 1981, c. 919, s. 21; 1991, cc. 120, 533; 1991, c. 1001, s. 2; 1991 (Reg. Sess., 1992), c. 832, s. 1; c. 848, s. 1; c. 865, s. 1; c. 1001, s. 1; 1993 (Reg. Sess., 1994), c. 611, ss. 1.1, 2; c. 612, ss. 1-3; c. 614, ss. 1-4; c. 622, ss. 1-3; c. 623, ss. 1-3; c. 642, s. 3(a), (c), (d); c. 655, ss. 1-3; 1995, c. 17, ss. 15(a), (b), (16); c. 251, ss. 1, 2; 1995 (Reg. Sess., 1996), c. 651, s. 1; c. 702, s. 1; c. 703, s. 1; c. 705, s. 1; c. 737, s. 1; 1996, 2nd Ex. Sess., c. 11, s. 1; 1997-24, s. 1; 1997-162, s. 1; 1997-190, s. 1; 1997-236, s. 3; 1997-409, s. 1; 1998-33, s. 1; 1998-48, s. 1; 1998-201, s. 1; 1999-65, s. 1; 2001-76, s. 1; 2001-427, s. 7(a).)

**Local Modification.** — Ashe: 1993 (Reg. Sess., 1994), c. 622, s. 1.1; Avery: 1993 (Reg. Sess., 1994), c. 622, s. 1.1; Bladen: 1981, c. 134, s. 2; Brunswick: 1981, c. 283; 1993 (Reg. Sess., 1994), c. 612, s. 1.1; Cabarrus: 1985, c. 194, s. 3; Chowan: 1993 (Reg. Sess., 1994), c. 655, s. 1.1; Columbus: 1981, c. 270; Currituck: 1995, c. 363, s. 1; Forsyth: 1993 (Reg. Sess., 1994), c. 642, s. 3(b), (d); Franklin: 1981, c. 941; Guilford: 1995 (Reg. Sess., 1996), c. 750; Harnett: 1993 (Reg. Sess., 1994), c. 622, s. 1.1; c. 623, s. 1.1; Haywood: 1993 (Reg. Sess., 1994), c. 611, s. 1.1; Johnston: 1981, c. 459; Lee: 1993 (Reg. Sess., 1994), c. 622, s. 1.1; c. 623, s. 1.1; Macon: 1993 (Reg. Sess., 1994), c. 611, s. 1.1; Mecklenburg: 1995 (Reg. Sess., 1996), c. 750; Nash: 1993 (Reg. Sess., 1994), c. 642, s. 3(b), (d); Orange: 1993 (Reg. Sess., 1994), c. 642, s. 3(b), (d); Pasquotank: 1993 (Reg. Sess., 1994), c. 655, s. 1.1; Pender: 1981, c. 283; Richmond: 1991, c. 533, s. 1; 1993 (Reg. Sess., 1994), c. 614, s. 2; Sampson: 1981, c. 459; 1991, c. 533, s. 1; 1993

(Reg. Sess., 1994), c. 614; Union: 1995, c. 363, s. 1.

**Editor's Note.** — At the direction of the Revisor of Statutes, local modifications to § 153A-157 have been enacted as this section. Subsection (a) of this section is former § 153A-157 as recodified by Session Laws 1995, c. 17, s. 15(a). The historical citation from the former section has been added to this section as recodified.

**Effect of Amendments.** — Session Laws 2001-76, s. 1, effective May 15, 2001, amended subsection (e) to include Anson, Craven, McDowell, Montgomery and Pamlico in the list of counties to which this section is applicable.

Session Laws 2001-427, s. 7(a), effective September 28, 2001, in this section as amended by Session Laws 2001-76, in subsection (e), inserted in their respective alphabetical order the following counties: Bertie, Chatham, Clay, Rutherford, Transylvania and Yadkin.

## § 153A-158.2. Acquisition and improvement of community college property.

(a) Acquisition. — A county may acquire, by any lawful method, any interest in real or personal property for use by a community college within the county. In exercising the power of eminent domain for real property, a county shall use the procedures of Chapter 40A of the General Statutes.

(b) Construction; Disposition. — A county may construct, equip, expand, improve, renovate, repair, or otherwise make available property for use by a community college within the county and may lease, sell, or otherwise dispose of property for use by a community college within the county for any price and

on any terms negotiated by the board of county commissioners and the board of trustees of the community college.

(c) Public Hearing. — A county may use its authority under this section to acquire an interest in real or personal property for use by a community college within the county only upon request of the board of trustees of the community college for which property is to be made available. The board of county commissioners shall hold a public hearing prior to final action. A notice of the public hearing shall be published at least once at least 10 days before the date fixed for the hearing. (1999-115, s. 1.)

**§§ 153A-159 through 153A-162:** Repealed by Session Laws 1981, c. 919, s. 20.

**Cross References.** — For present provisions as to eminent domain, see Chapter 40A.

**§ 153A-163. Acquisition of property at a judicial sale, execution sale, or sale pursuant to a power of sale; disposition of such property.**

A county, city, or other unit of local government may purchase real property at a judicial sale, an execution sale, or a sale made pursuant to a power of sale, to secure a debt due the county, city, or other unit. The purchasing government may sell any property so acquired by private sale for not less than the amount of its bid or may sell or exchange the property for any amount according to the procedures prescribed by Chapter 160A, Article 12. (1868, c. 20, s. 8; 1879, c. 144, s. 1; Code, s. 707; Rev., s. 1318; C.S., s. 1297; 1973, c. 822, s. 1.)

**§ 153A-164. Joint buildings.**

Two or more counties, cities, other units of local government (including local boards of education), or any combination of such governments may jointly acquire or construct public buildings to house offices, departments, bureaus, agencies, or facilities of each government. The governments may acquire any land necessary for a joint building or may use land already held by one of the governments.

In exercising the powers granted by this section, the governments shall proceed according to the procedures and provisions of Chapter 160A, Article 20, Part 1. (1965, c. 682, s. 1; 1973, c. 822, s. 1.)

**§ 153A-165. Leases.**

A county may lease as lessee, with or without option to purchase, any real or personal property for any authorized public purpose. A lease of personal property with an option to purchase is subject to Chapter 143, Article 8. (1973, c. 822, s. 1.)

**§§ 153A-166 through 153A-168:** Reserved for future codification purposes.

## Part 2. Use of County Property.

**§ 153A-169. Care and use of county property; sites of county buildings.**

The board of commissioners shall supervise the maintenance, repair, and use of all county property. The board may issue orders and adopt by ordinance or resolution regulations concerning the use of county property, may designate and redesignate the location of any county department, office, or agency, and may designate and redesignate the site for any county building, including the courthouse. Before it may redesignate the site of the courthouse, the board of commissioners shall cause notice of its intention to do so to be published once at least four weeks before the meeting at which the redesignation is made. (1868, c. 20, ss. 3, 8; Code, ss. 704, 707; Rev., ss. 1310, 1318; C.S., ss. 1291, 1297; 1925, c. 229; 1927, c. 91, ss. 11, 13; 1957, c. 909, s. 1; 1961, c. 811; 1967, c. 581, s. 1; 1973, c. 822, s. 1.)

## CASE NOTES

**Editor's Note.** — *The cases cited below were decided under corresponding sections of former law.*

**Duties Involving Construction of Public Building Inherent in Office of County Commissioner.** — County commissioners, in approving the design, the method of construction and the site for a public building and the amount to be paid for the site are performing duties inherent in their offices, expressly conferred by the legislature. *Barbour v. Carteret County*, 255 N.C. 177, 120 S.E.2d 448 (1961).

**Repairing a courthouse is a necessary county expense.** *Burgin v. Smith*, 151 N.C. 561, 66 S.E. 607 (1909).

**Discretion of Commissioners with Respect to Repair or Erection of Courthouse or Jail.** — It is within the sound discretion of the county commissioners to have the courthouse or jail of the county repaired or to erect new ones on the same sites as a necessary county expense, which will not be reviewed in the courts in the absence of mala fides; and should a bill of indictment be drawn by the

solicitor, at the request of the judge holding the courts of the county, and a true bill be found by the grand jury thereon, it is open to the commissioners to set up any available defense they may have. *Jackson v. Board of County Comm'rs*, 171 N.C. 379, 88 S.E. 521 (1916).

**As to extent of commissioners' responsibility with respect to a privy,** see *Threadgill v. Board of Comm'rs*, 99 N.C. 352, 6 S.E. 189 (1888).

**The site of a county building embraces only the space occupied by the building and such adjacent land as is reasonably required** for the convenient use of the building. *Brown v. Candler*, 236 N.C. 576, 73 S.E.2d 550 (1952).

**Location of Court House.** — The Board of County Commissioners had authority under this section to redesignate the location of the county courthouse, where the new location was outside the boundaries designated by prior special acts of the General Assembly. *Bethune v. County of Harnett*, 349 N.C. 343, 507 S.E.2d 40 (1998).

**§ 153A-170. Regulation of parking on county property.**

A county may by ordinance regulate parking of motor vehicles on county-owned property. Such an ordinance may be enforced pursuant to G.S. 153A-123. In addition, the ordinance may provide that vehicles parked in violation thereof may be removed from the property by the county or an agent of the county to a storage area or garage. If a vehicle is so removed, the owner, as a condition of regaining possession of the vehicle, shall be required to pay to the county all reasonable costs incidental to the removal and storage of the vehicle and any fine or penalty due for the violation. (1961, c. 191; 1971, c. 109; 1973, c. 822, s. 1.)

§§ 153A-171 through 153A-175: Reserved for future codification purposes.

### Part 3. Disposition of County Property.

#### § 153A-176. Disposition of property.

A county may dispose of any real or personal property belonging to it according to the procedures prescribed in Chapter 160A, Article 12. For purposes of this section references in Chapter 160A, Article 12, to the "city," the "council," or a specific city official are deemed to refer, respectively, to the county, the board of commissioners, and the county official who most nearly performs the same duties performed by the specified city official. For purposes of this section, references in G.S. 160A-266(c) to "one or more city officials" are deemed to refer to one or more county officials designated by the board of county commissioners. (1868, c. 20, ss. 3, 8; Code, ss. 704, 707; Rev., ss. 1310, 1318; C.S., ss. 1291, 1297; 1973, c. 822, s. 1; 1983, c. 130, s. 2.)

**Local Modification.** — Alamance: 1995 (Reg. Sess., 1996), c. 618, s. 2; Bladen: 1993 (Reg. Sess., 1994), c. 721, ss. 1, 2; Durham: 1985 (Reg. Sess., 1986), c. 908; Halifax: 1987, cc. 238, 239; Lee: 1987 (Reg. Sess., 1988), c. 933; Lincoln: 1983 (Reg. Sess., 1984), c. 944; 1989, c. 411, s. 1; McDowell: 1987 (Reg. Sess., 1988), c. 909; Pamlico: 1985, c. 386; Pender: 1989, c. 503, s. 1; 1993, c. 52, s. 1; Polk: 1989, c. 375, s. 1; Rowan: 1987, c. 157; Scotland: 1987, c. 57; Transylvania: 1989, c. 4; Tyrrell: 1987, c. 9.

**Editor's Note.** — Session Laws 1999-386, s. 4, effective August 4, 1999, provides that, notwithstanding the requirements of G.S. 131E-8,

G.S. 131E-13, G.S. 131E-14, G.S. 153A-176, and Article 12 of Chapter 160A of the General Statutes, and any past compliance or failure to comply with those requirements, the prior conveyance by a municipality as defined in G.S. 131E-6(5), or by a hospital authority as defined in G.S. 131E-16(14), of a hospital facility that currently serves as collateral in a transaction involving North Carolina Medical Care Commission bonds issued under Part 10 of Article 3 of Chapter 143B of the General Statutes is hereby validated. Section 5 of the act provides that Section 4 shall not apply to litigation pending on or before the effective date.

#### CASE NOTES

**Editor's Note.** — *The cases cited below were decided under corresponding sections of former law.*

**Commissioners Act as Fiduciaries or Trustees.** — Boards of commissioners, in selling or leasing real property belonging to the county, are acting as fiduciaries or trustees for the taxpayers and citizens of the county, and must exercise their best judgment and skill, as reasonable men, to obtain the best price for the land. Puett v. Gaston County, 19 N.C. App. 231, 198 S.E.2d 440 (1973).

**When Commissioners May Not Sell Property.** — County commissioners have no power to sell property held for corporate purposes where its alienation would tend to embarrass or prevent the performance of their duties to the public. Vaughn v. Commissioners of Forsyth County, 118 N.C. 636, 24 S.E. 425 (1896).

**Power to sell is not a power to mortgage;** hence, express authority conferred upon county commissioners to sell real estate of the county at a fair price does not imply power to encum-

ber the same by a mortgage. Threadgill v. Board of Comm'rs, 99 N.C. 352, 6 S.E. 189 (1888).

**County commissioners had no authority to convey land on which they proposed to erect courthouse by a mortgage deed** to secure the bonds issued to build it, and thereby render the site and buildings liable to sale for satisfaction of the debt. Vaughn v. Commissioners of Forsyth County, 118 N.C. 636, 24 S.E. 425 (1896).

**Right of Taxpayer to Bring Action to Restrain Execution of Mortgage.** — Though a proposed mortgage of county land by the county commissioners to secure bonds issued to build a courthouse would be void, and equity would enjoin foreclosure thereunder, a taxpayer may bring an action to restrain the execution of the mortgage without waiting until foreclosure is threatened. Vaughn v. Commissioners of Forsyth County, 118 N.C. 636, 24 S.E. 425 (1896).

**Applied in National Medical Enters., Inc. v. Sandrock,** 72 N.C. App. 245, 324 S.E.2d 268 (1985).

### § 153A-177. Reconveyance of property donated to a local government.

If real or personal property is conveyed without consideration to a county, city, or other unit of local government to be used for a specific purpose set out in the instrument of conveyance and the governing body of the county, city, or other unit of local government determines that the property will not be used for that purpose, the county, city, or other unit of local government may reconvey the property without consideration to the grantor or his heirs, assigns, or nominees. Before it may make a reconveyance, the county, city, or other unit of local government shall publish once a week for two weeks notice of its intention to do so. (1937, c. 441; 1973, c. 822, s. 1.)

§§ 153A-178 through 153A-184: Reserved for future codification purposes.

## ARTICLE 9.

### *Special Assessments.*

### § 153A-185. Authority to make special assessments.

A county may make special assessments against benefited property within the county for all or part of the costs of:

- (1) Constructing, reconstructing, extending, or otherwise building or improving water systems;
- (2) Constructing, reconstructing, extending, or otherwise building or improving sewage collection and disposal systems of all types, including septic tank systems or other on-site collection or disposal facilities or systems;
- (3) Acquiring, constructing, reconstructing, extending, renovating, enlarging, maintaining, operating, or otherwise building or improving
  - a. Beach erosion control or flood and hurricane protection works; and
  - b. Watershed improvement projects, drainage projects and water resources development projects (as those projects are defined in G.S. 153A-301).
- (4) Constructing, reconstructing, paving, widening, installing curbs and gutters, and otherwise building and improving streets, as provided in G.S. 153A-205.
- (5) Providing street lights and street lighting in a residential subdivision, as provided in G.S. 153A-206.

A county may not assess property within a city pursuant to subdivision (1) or (2) of this section unless the governing board of the city has by resolution approved the project. (1963, c. 985, s. 1; 1965, c. 714; 1969, c. 474, s. 1; 1973, c. 822, s. 1; 1975, c. 487, s. 1; 1979, c. 619, s. 11; 1983, c. 321, s. 1; 1989 (Reg. Sess., 1990), c. 923, s. 1.)

**Local Modification.** — (As to Article 9) Avery and Brunswick: 1987 (Reg. Sess., 1988), c. 1046; Lincoln: 1997, c. 169; Mecklenburg: 1983, c. 189.

**Cross References.** — As to applicability to assessments levied by water and sewer authorities established pursuant to Chapter 162A, Article 1, see G.S. § 162A-6.

### § 153A-186. Bases for making assessments.

- (a) For water or sewer projects, assessments may be made on the basis of:

- (1) The frontage abutting on the project, at an equal rate per foot of frontage; or
  - (2) The street frontage of the lots served, or subject to being served, by the project, at an equal rate per foot of frontage; or
  - (3) The area of land served, or subject to being served, by the project, at an equal rate per unit of area; or
  - (4) The valuation of land served, or subject to being served, by the project, being the value of the land without improvements as shown on the tax records of the county, at an equal rate per dollar of valuation; or
  - (5) The number of lots served, or subject to being served, by the project when the project involves extension of an existing system to a residential or commercial subdivision, at an equal rate per lot; or
  - (6) A combination of two or more of these bases.
- (b) For beach erosion control or flood and hurricane protection works, watershed improvement projects, drainage projects and water resources development projects, assessments may be made on the basis of:
- (1) The frontage abutting on the project, at an equal rate per foot of frontage; or
  - (2) The frontage abutting on a beach or shoreline or watercourse protected or benefited by the project, at an equal rate per foot of frontage; or
  - (3) The area of land benefited by the project, at an equal rate per unit of area; or
  - (4) The valuation of land benefited by the project, being the value of the land without improvements as shown on the tax records of the county, at an equal rate per dollar of valuation; or
  - (5) A combination of two or more of these bases.
- (c) Whenever the basis selected for assessment is either area or valuation, the board of commissioners shall provide for the laying out of one or more benefit zones according (i), in water or sewer projects, to the distance of benefited property from the project being undertaken and (ii), in beach erosion control or flood and hurricane protection works, watershed improvement projects, drainage projects and water resources development projects, to the distance from the shoreline or watercourse, the distance from the project, the elevation of the land, or other relevant factors. If more than one benefit zone is established, the board shall establish differing rates of assessment to apply uniformly throughout each benefit zone.
- (d) For each project, the board of commissioners shall endeavor to establish an assessment method from among the bases set out in this section that will most accurately assess each lot or parcel of land according to the benefit conferred upon it by the project. The board's decision as to the method of assessment is final and not subject to further review or challenge. (1963, c. 985, s. 1; 1965, c. 714; 1973, c. 822, s. 1; 1983, c. 321, ss. 2, 3.)

### § 153A-187. Corner lot exemptions.

The board of commissioners may establish schedules of exemptions from assessments for water or sewer projects for corner lots when water or sewer lines are installed along both sides of the lots. A schedule of exemptions shall be based on categories of land use (residential, commercial, industrial, and agricultural) and shall be uniform for each category. A schedule may not allow exemption of more than seventy-five percent (75%) of the frontage of any side of a corner lot, or 150 feet, whichever is greater. (1963, c. 985, s. 1; 1973, c. 822, s. 1.)

**Local Modification.** — Forsyth: 1999-89, s. 2; city of Winston-Salem: 1999-89, s. 2.

### § 153A-188. Lands exempt from assessment.

Except as provided in this Article, no land within a county is exempt from special assessments except land belonging to the United States that is exempt under the provisions of federal statutes and, in the case of water or sewer projects, land within any floodway delineated by a local government pursuant to Chapter 143, Article 21, Part 6. In addition, in the case of water or sewer projects, land owned, leased, or controlled by a railroad company is exempt from assessments by a county to the same extent that it would be exempt from assessments by a city under G.S. 160A-222. (1963, c. 958, s. 1; 1973, c. 822, s. 1.)

**Local Modification.** — Brunswick: 1987, c. 712.

### § 153A-189. State participation in improvement projects.

If a county proposes to undertake a project that would benefit land owned by the State of North Carolina or a board, agency, commission, or institution of the State and to finance all or a part of the project by special assessments, the board of commissioners may request the Council of State to authorize the State to pay its ratable part of the cost of the project, and the Council of State may authorize these payments. The Council of State may authorize the Secretary of Administration to approve or disapprove requests from counties for payment pursuant to this section, but a county may appeal to the Council of State if the Secretary disapproves a request. The Council of State may direct that any payment authorized pursuant to this section be made from the Contingency and Emergency Fund of the State of North Carolina or from any other available funds. Except as State payments are authorized pursuant to this section, state-owned property is exempt from assessment under this Article. (1973, c. 822, s. 1; 1975, c. 879, s. 46.)

### § 153A-190. Preliminary resolution; contents.

Whenever the board of commissioners decides to finance all or part of a proposed project by special assessments, it shall first adopt a preliminary assessment resolution containing the following:

- (1) A statement of intent to undertake the project;
- (2) A general description of the nature and location of the project;
- (3) A statement as to the proposed basis for making assessments, which shall include a general description of the boundaries of the area benefited if the basis of assessment is either area or valuation;
- (4) A statement as to the percentage of the cost of the work that is to be specially assessed;
- (5) A statement as to which, if any, assessments shall be held in abeyance and for how long;
- (6) A statement as to the proposed terms of payment of the assessment; and
- (7) An order setting a time and place for a public hearing on all matters covered by the preliminary assessment resolution. The hearing shall be not earlier than three weeks and not later than 10 weeks from the day on which the preliminary resolution is adopted. (1963, c. 985, s. 1; 1965, c. 714; 1973, c. 822, s. 1.)

## CASE NOTES

**Duties of County Commissioners When Financing Project by Special Assessments.**

— Pursuant to this section, when all or any portion of a public enterprise is to be financed by assessments, the county commissioners are required to adopt a preliminary assessment resolution, which must contain information about the proposed project, a statement as to the percentage of the cost of the project that will be assessed, and an order setting a date for public hearing. The preliminary assessment

resolution must be sent by first-class mail to each property owner in the project at least ten days prior to the public hearing. In return, the county receives a specific lien; the delinquency of the assessed obligation authorizes a foreclosure of property without any exemptions allowed or the payment of prior recorded liens except local, state, and federal taxes. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**§ 153A-191. Notice of preliminary resolution.**

At least 10 days before the date set for the public hearing, the board of commissioners shall publish a notice that a preliminary assessment resolution has been adopted and that a public hearing on it will be held at a specified time and place. The notice shall describe generally the nature and location of the improvement. In addition, at least 10 days before the date set for the hearing, the board shall cause a copy of the preliminary assessment resolution to be mailed by first-class mail to each owner, as shown on the county tax records, of property subject to assessment if the project is undertaken. The person designated to mail these resolutions shall file with the board a certificate stating that they were mailed by first-class mail and on what date. In the absence of fraud, the certificate is conclusive as to compliance with the mailing requirements of this section. (1963, c. 985, s. 1; 1965, c. 714; 1973, c. 822, s. 1.)

**Local Modification.** — Brunswick: 1987 (Reg. Sess., 1988), c. 984.

## CASE NOTES

**Duties of County Commissioners When Financing Project by Special Assessments.**

— Pursuant to § 153A-190, when all or any portion of a public enterprise is to be financed by assessments, the county commissioners are required to adopt a preliminary assessment resolution, which must contain information about the proposed project, a statement as to the percentage of the cost of the project that will be assessed, and an order setting a date for public hearing. The preliminary assessment resolution must be sent by first-class mail to each property owner in the project at least ten days prior to the public hearing. In return, the county receives a specific lien; the delinquency of the assessed obligation authorizes a foreclosure of property without any exemptions allowed or the payment of prior recorded liens except local, state, and federal taxes. *McNeill v.*

*Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**County's Election of Procedural Requirements Determines Remedies and Owners' Protections.** — If no special assessment liens under § 153A-200 exist on the property, the process invoked and completed, rather than the words used, is of paramount importance. If the requirements of this Article are met, the County then has certain remedies otherwise not available to it. However, if the County does not elect to acquire these statutory benefits by following the procedural requirements which would culminate in a lien on the property, the plaintiffs do not receive the statutory protections of notice and a hearing as set out in this section. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

### § 153A-192. Hearing on preliminary resolution; assessment resolution.

At the public hearing, the board of commissioners shall hear all interested persons who appear with respect to any matter covered by the preliminary assessment resolution. At or after the hearing, the board may adopt a final assessment resolution directing that the project or portions thereof be undertaken. The final assessment resolution shall describe the project in general terms (which may be by reference to projects described in the preliminary resolution) and shall set forth the following:

- (1) The basis on which the special assessments will be made, together with a general description of the boundaries of the areas benefited if the basis of assessment is either area or valuation;
- (2) The percentage of the cost of the work that is to be specially assessed; and
- (3) The terms of payment, including the conditions, if any, under which assessments are to be held in abeyance.

The percentage of cost to be assessed may not be different from the percentage proposed in the preliminary assessment resolution, nor may the project authorized be greater in scope than the project described in that resolution. If the board decides that a different percentage of the cost should be assessed than that proposed in the preliminary assessment resolution, or that the project should be greater in scope than that described in that resolution, it shall adopt and advertise a new preliminary assessment resolution as provided in this Article. (1963, c. 985, s. 1; 1965, c. 714; 1973, c. 822, s. 1.)

**Local Modification.** — Brunswick: 1987  
(Reg. Sess., 1988), c. 984.

### § 153A-193. Determination of costs.

When a project is complete, the board of commissioners shall determine the project's total cost. In determining total cost, the board may include construction costs, the cost of necessary legal services, the amount of interest paid during construction, the cost of rights-of-way, and the cost of publishing and mailing notices and resolutions. The board's determination of the total cost of a project is conclusive. (1963, c. 985, s. 1; 1965, c. 714; 1973, c. 822, s. 1.)

**Local Modification.** — Brunswick: 1987  
(Reg. Sess., 1988), c. 984.

### § 153A-193.1. Discounts authorized.

The board of commissioners is authorized to establish a schedule of discounts to be applied to assessments paid before the expiration of 30 days from the date that notice is published of confirmation of the assessment roll pursuant to G.S. 153A-196. Such a schedule of discounts may be established even though it was not included among the terms of payment as specified in the preliminary assessment resolution or final assessment resolution. The amount of any discount may not exceed thirty percent (30%). (1983, c. 381, s. 1.)

### § 153A-194. Preliminary assessment roll; publication.

When the total cost of a project has been determined, the board of commissioners shall cause a preliminary assessment roll to be prepared. The roll shall contain a brief description of each lot, parcel, or tract of land

assessed, the basis for the assessment, the amount assessed against each, the terms of payment, including the schedule of discounts, if such a schedule is to be established and the name of the owner of each lot, parcel, or tract as far as this can be ascertained from the county tax records. A map of the project on which is shown each lot, parcel, or tract assessed, the basis of its assessment, the amount assessed against it, and the name of its owner as far as this can be ascertained from the county tax records is a sufficient assessment roll.

After the preliminary assessment roll has been completed, the board shall cause the roll to be filed in the clerk's office, where it shall be available for public inspection, and shall set the time and place for a public hearing on the roll. At least 10 days before the date set for the hearing, the board shall publish a notice that the preliminary assessment roll has been completed. The notice shall describe the project in general terms, note that the roll in the clerk's office is available for inspection, and state the time and place for the hearing on the roll. In addition, at least 10 days before the date set for the hearing, the board shall cause a notice of the hearing to be mailed by first-class mail to each owner of property listed on the roll. The mailed notice shall state the time and place of the hearing, note that the roll in the clerk's office is available for inspection, and state the amount as shown on the roll of the assessment against the property of the owner. The person designated to mail these notices shall file with the board a certificate stating that they were mailed by first-class mail and on what date. In the absence of fraud, the certificate is conclusive as to compliance with the mailing requirements of this section. (1963, c. 985, s. 1; 1965, c. 714; 1973, c. 822, s. 1; 1983, c. 381, s. 2.)

**Local Modification.** — Brunswick: 1987  
(Reg. Sess., 1988), c. 984.

### § 153A-195. Hearing on preliminary assessment roll; revision; confirmation; lien.

At the public hearing the board of commissioners shall hear all interested persons who appear with respect to the preliminary assessment roll. At or after the hearing, the board shall annul, modify, or confirm the assessments, in whole or in part, either by confirming the preliminary assessments against any lot, parcel, or tract described in the preliminary assessment roll or by cancelling, increasing, or reducing the assessments as may be proper in compliance with the basis of assessment. If any property is found to be omitted from the preliminary assessment roll, the board may place it on the roll and make the proper assessment. When the board confirms assessments for a project, the clerk shall enter in the minutes of the board the date, hour, and minute of confirmation. From the time of confirmation, each assessment is a lien on the property assessed of the same nature and to the same extent as the lien for county or city property taxes, under the priorities set out in G.S. 153A-200. After the assessment roll is confirmed, the board shall cause a copy of it to be delivered to the county tax collector for collection in the same manner (except as provided in this Article) as property taxes. (1963, c. 985, s. 1; 1965, c. 714; 1973, c. 822, s. 1.)

**Local Modification.** — Brunswick: 1987  
(Reg. Sess., 1988), c. 984.

**Cross References.** — As to meaning of term  
"county tax collector," see G.S. § 162A-6.

#### CASE NOTES

**Cited in** *McNeill v. Harnett County*, 97 N.C. App. 41, 387 S.E.2d 206 (1990).

### § 153A-196. Publication of notice of confirmation of assessment roll.

No earlier than 20 days from the date the assessment roll is confirmed, the county tax collector shall publish once a notice that the roll has been confirmed. The notice shall also state that assessments may be paid without interest at any time before the expiration of 30 days from the date that the notice is published and that if they are not paid within this time, all installments thereof shall bear interest as determined by the board of commissioners. The notice shall also state the schedule of discounts, if one has been established, to be applied to assessments paid before the expiration date for payment of assessments without interest. (1963, c. 985, s. 1; 1965, c. 714; 1973, c. 822, s. 1; 1983, c. 381, s. 3.)

**Local Modification.** — Brunswick: 1987 (Reg. Sess., 1988), c. 984.

**Cross References.** — As to meaning of term "county tax collector," see G.S. § 162A-6.

### § 153A-197. Appeal to the General Court of Justice.

If the owner of, or any person having an interest in, a lot, parcel, or tract of land against which an assessment is made is dissatisfied with the amount of the assessment, he may, within 10 days after the day the assessment roll is confirmed, file a notice of appeal to the appropriate division of the General Court of Justice. He shall then have 20 days after the day the roll is confirmed to serve on the board of commissioners or the clerk a statement of facts upon which the appeal is based. The appeal shall be tried like other actions at law. (1963, c. 985, s. 1; 1965, c. 714; 1973, c. 822, s. 1.)

### § 153A-198. Reassessment.

When in its judgment an irregularity, omission, error, or lack of jurisdiction has occurred in any proceeding related to a special assessment made by it, the board of commissioners may set aside the assessment and make a reassessment. In that case, the board may include in the total project cost all additional interest paid, or to be paid, as a result of the delay in confirming the assessment. A reassessment proceeding shall, as far as practicable, follow the comparable procedures of an original assessment proceeding. A reassessment has the same force as if it originally had been made properly. (1963, c. 985, s. 1; 1965, c. 714; 1973, c. 822, s. 1.)

### § 153A-199. Payment of assessments in full or by installments.

Within 30 days after the day that notice of confirmation of the assessment roll is published, each owner of assessed property shall pay his assessment in full, unless the board of commissioners has provided that assessments may be paid in annual installments. If payment by installments is permitted, any portion of an assessment not paid within the 30-day period shall be paid in annual installments. The board shall in the assessment resolution determine whether payment may be made by annual installments and set the number of installments, which may not be more than 10. With respect to payment by installment, the board may provide

- (1) That the first installment with interest is due on the date when property taxes are due, and one installment with interest is due on the same date in each successive year until the assessment is paid in full, or

- (2) That the first installment with interest is due 60 days after the date that the assessment roll is confirmed, and one installment with interest is due on that same day in each successive year until the assessment is paid in full. (1963, c. 985, s. 1; 1965, c. 714; 1973, c. 822, s. 1.)

**Local Modification.** — Brunswick: 1987  
(Reg. Sess., 1988), c. 984.

### § 153A-200. Enforcement of assessments; interest; foreclosure; limitations.

(a) Any portion of an assessment that is not paid within 30 days after the day that notice of confirmation of the assessment roll is published shall, until paid, bear interest at a rate to be fixed in the assessment resolution. The maximum rate at which interest may be set is eight percent (8%) per annum.

(b) If an installment of an assessment is not paid on or before the due date, all of the installments remaining unpaid immediately become due, unless the board of commissioners waives acceleration. The board may waive acceleration and permit the property owner to pay all installments in arrears together with interest due thereon and the cost to the county of attempting to obtain payment. If this is done, any remaining installments shall be reinstated so that they fall due as if there had been no default. The board may waive acceleration and reinstate further installments at any time before foreclosure proceedings have been instituted.

(c) A county may foreclose assessment liens under any procedure provided by law for the foreclosure of property tax liens, except that (i) lien sales and lien sale certificates are not required and (ii) foreclosure may be begun at any time after 30 days after the due date. The county is not entitled to a deficiency judgment in an action to foreclose an assessment lien. The lien of special assessments is inferior to all prior and subsequent liens for State, local, and federal taxes, and superior to all other liens.

(d) No county may maintain an action or proceeding to foreclose any special assessment lien unless the action or proceeding is begun within 10 years from the date that the assessment or the earliest installment thereof included in the action or proceeding became due. Acceleration of installments under subsection (b) of this section does not have the effect of shortening the time within which foreclosure may be begun; in that event the statute of limitations continues to run as to each installment as if acceleration had not occurred. (1963, c. 985, s. 1; 1965, c. 714; 1973, c. 822, s. 1.)

**Local Modification.** — Rockingham: 1985  
(Reg. Sess., 1986), c. 817.

#### CASE NOTES

**Foreclosure of Assessment Liens.** — Pursuant to § 153A-190, when all or any portion of a public enterprise is to be financed by assessments, the county commissioners are required to adopt a preliminary assessment resolution, which must contain information about the proposed project, a statement as to the percentage of the cost of the project that will be assessed, and an order setting a date for public hearing. The preliminary assessment resolution must be sent by first-class mail to each property owner

in the project at least ten days prior to the public hearing. In return, the county receives a specific lien; the delinquency of the assessed obligation authorizes a foreclosure of property without any exemptions allowed or the payment of prior recorded liens except local, state, and federal taxes. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Special Assessment Proceeding.** — Forced sale of land under a general lien is subjected to exemptions and prior recorded

liens. It is, therefore, the special assessment proceeding itself which creates the lien for the assessment. If the county commissioners elect not to pursue the procedure which would establish the lien, then the special proceeding is not necessary. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**County's Election of Procedural Requirements Determines Remedies and Owners' Protections.** — If no special assessment liens under this section exist on the property, the process invoked and completed, rather than the words used, is of paramount

importance. If the requirements of this Article are met, the County then has certain remedies otherwise not available to it. However, if the County does not elect to acquire these statutory benefits by following the procedural requirements which would culminate in a lien on the property, the plaintiffs do not receive the statutory protections of notice and a hearing as set out in § 153A-191. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Cited** in *McNeill v. Harnett County*, 97 N.C. App. 41, 387 S.E.2d 206 (1990).

### § 153A-201. Authority to hold assessments in abeyance.

The assessment resolution may provide that assessments made pursuant to this Article shall be held in abeyance without interest for any benefited property assessed. Water or sewer assessments may be held in abeyance until improvements on the assessed property are connected to the water or sewer system for which the assessment was made, or until a date certain not more than 10 years from the date of confirmation of the assessment roll, whichever event occurs first. Beach erosion control or flood and hurricane protection assessments may be held in abeyance for not more than 10 years from the date of confirmation of the assessment roll. When the period of abeyance ends, the assessment is payable in accordance with the terms set out in the assessment resolution.

If assessments are to be held in abeyance, the assessment resolution shall classify the property assessed according to general land use, location with respect to the water or sewer system (for water or sewer assessments), or other relevant factors. The resolution shall also provide that the period of abeyance shall be the same for all assessed property in the same class.

Statutes of limitations are suspended during the time that any assessment is held in abeyance without interest. (1963, c. 985, s. 1; 1965, c. 714; 1973, c. 822, s. 1.)

### § 153A-202. Assessments on property held by tenancy for life or years; contribution.

(a) Assessments upon real property in the possession or enjoyment of a tenant for life or a tenant for a term of years shall be paid pro rata by the tenant and the remaindermen after the life estate or by the tenant and the owner in fee after the expiration of the tenancy for years according to their respective interests in the land as calculated pursuant to G.S. 37-13.

(b) If a person having an interest in land held by tenancy for life or years pays more than his pro rata share of an assessment against the property, he may maintain an action in the nature of a suit for contribution against any delinquent party to recover from that party his pro rata share of the assessment, with interest thereon from the date of the payment; and in addition, he is subrogated to the right of the county to a lien on the property for the delinquent party's share of the assessment. (1963, c. 985, c. 1; 1965, c. 714; 1973, c. 822, s. 1.)

**Editor's Note.** — Section 37-13, referred to in this section, was repealed by Session Laws 1973, c. 729, s. 3. See now § 37-36.

### **§ 153A-203. Lien in favor of a cotenant or joint owner paying special assessments.**

Any one of several tenants in common or joint tenants (other than copartners) may pay the whole or any part of a special assessment made against property held in common or jointly. Any amount so paid that exceeds his share of the assessment and that was not paid through agreement with or on behalf of the other joint owners is a lien in his favor upon the shares of the other joint owners. This lien may be enforced in a proceeding for actual partition, a proceeding for partition and sale, or by any other appropriate judicial proceeding. This lien is not effective against an innocent purchaser for value until notice of the lien is filed in the office of the clerk of superior court in the county in which the land lies and indexed and docketed in the same manner as other liens required by law to be filed in that clerk's office. (1963, c. 985, s. 1; 1965, c. 714; 1973, c. 822, s. 1.)

### **§ 153A-204. Apportionment of assessments.**

If a special assessment has been made against property that has been or is about to be subdivided, the board of commissioners may, with the consent of the owner of the property, (i) apportion the assessment among the lots or tracts within the subdivision, or (ii) release certain lots or tracts from the assessment if, in the board's opinion, the released lots or tracts are not benefited by the project, or (iii) both. Upon an apportionment each of the lots or tracts in the subdivision is released from the lien of the original assessment, and the portion of the original assessment assessed against each lot or tract has, as to that lot or tract, the same force as the original assessment. At the time the board makes an apportionment under this section, the clerk shall enter on the minutes of the board the date, hour, and minute of apportionment and a statement to the effect that the apportionment is made with the consent of the owners of the property affected, which entry is conclusive in the absence of fraud. The apportionment is effective at the time shown in the minute book. Apportionments may include past due installments with interest, as well as installments not then due; and any installment not then due shall fall due at the same date as it would have under the original assessment. (1963, c. 985, s. 1; 1965, c. 714; 1973, c. 822, s. 1.)

### **§ 153A-204.1. Maintenance assessments.**

(a) In order to pay for the costs of maintaining and operating a project, the board of commissioners may annually or at less frequent intervals levy maintenance and operating assessments for any project purpose set forth in G.S. 153A-185(3) on the same basis as the original assessment. The amount of these assessments shall be determined by the board of commissioners on the basis of the board's estimate of the cost of maintaining and operating a project during the ensuing budget period, and the board's decision as to the amount of the assessment is conclusive. In determining the total cost to be included in the assessment the board may include estimated costs of maintaining and operating the project, of necessary legal services, of interest payments, of rights-of-way, and of publishing and mailing notices and resolutions. References to "total costs" in provisions of this Article that apply to maintenance and operating assessments shall be construed to mean "total estimated costs." Within the meaning of this section a "budget period" may be one year or such other budget period as the board determines.

(b) All of the provisions of this Article shall apply to maintenance and operating assessments, except for G.S. 153A-190 through G.S. 153A-193. (1983, c. 321, s. 4.)

### **§ 153A-205. Improvements to subdivision and residential streets.**

(a) A county may finance the local share of the cost of improvements made under the supervision of the Department of Transportation to subdivision and residential streets that are a part of the State maintained system located in the county and outside of a city and shall levy and collect pursuant to the procedures of Article 9 of Chapter 153A of the General Statutes special assessments against benefited property to recoup that portion of the costs financed by the county. The local share is that share required by policies of the Secondary Roads Council, and may be paid by the county from funds not otherwise limited as to use by law. Land owned, leased, or controlled by a railroad company is exempt from such assessments to the same extent that it would be exempt from street assessments of a city under G.S. 160A-222. No project may be commenced under this section unless it has been approved by the Department of Transportation.

(b) A county may finance the local share of the cost of improvements made under the supervision of the Department of Transportation to subdivision and residential streets located in the county and outside of a city in order to bring those streets up to the standards of the Secondary Roads Council so that they may become a part of the State-maintained system and shall levy and collect pursuant to the procedures of Article 9 of Chapter 153A of the General Statutes special assessments against benefited property to recoup that portion of the costs financed by the county. The local share is that share required by policies of the Secondary Roads Council, and may be paid by the county from funds not otherwise limited as to use by law. Land owned, leased, or controlled by a railroad company is exempt from such assessments to the same extent that it would be exempt from street assessments of a city under G.S. 160A-222. No project may be commenced under this section unless it has been approved by the Department of Transportation.

(c) Before a county may finance all or a portion of the cost of improvements to a subdivision or residential street, it must receive a petition for the improvements signed by at least seventy-five percent (75%) of the owners of property to be assessed, who must represent at least seventy-five percent (75%) of all the lineal feet of frontage of the lands abutting on the street or portion thereof to be improved. The petition shall state that portion of the cost of the improvement to be assessed, which shall be the local share required by policies of the Secondary Roads Council. A county may treat as a unit and consider as one street two or more connecting State-maintained subdivision or residential streets in a petition filed under this subsection calling for the improvement of subdivision or residential streets subject to property owner sharing in the cost of improvement under policies of the Department of Transportation.

Property owned by the United States shall not be included in determining the lineal feet of frontage on the improvement, nor shall the United States be included in determining the number of owners of property abutting the improvement. Property owned by the State of North Carolina shall be included in determining frontage and the number of owners only if the State has consented to assessment as provided in G.S. 153A-189. Property owned, leased, or controlled by railroad companies shall be included in determining frontage and the number of owners to the extent the property is subject to assessment under G.S. 160A-222. Property owned, leased, or controlled by railroad companies that is not subject to assessment shall not be included in determining frontage or the number of owners.

No right of action or defense asserting the invalidity of street assessments on grounds that the county did not comply with this subsection in securing a valid petition may be asserted except in an action or proceeding begun within 90

days after the day of publication of the notice of adoption of the preliminary assessment resolution.

(d) This section is intended to provide a means of assisting in financing improvements to subdivision and residential streets that are on the State highway system or that will, as a result of the improvements, become a part of the system. By financing improvements under this section, a county does not thereby acquire or assume any responsibility for the street or streets involved, and a county has no liability arising from the construction of such an improvement or the maintenance of such a street. Nothing in this section shall be construed to alter the conditions and procedures under which State system streets or other public streets are transferred to municipal street systems pursuant to G.S. 136-66.1 and 136-66.2 upon annexation by, or incorporation of, a municipality. (1975, c. 487, s. 2; c. 716, s. 7; 1981, c. 768.)

**Local Modification.** — Hyde: 1991 (Reg. Sess., 1992), c. 824. county for emergency medical services for prisoners working pursuant to § 162-58, see § 162-

**Cross References.** — As to liability of 61.

### § 153A-206. Street light assessments.

(a) Authorization. A county may annually levy special assessments against benefited property in a residential subdivision within the county and not within a city for the costs of providing street lights and street lighting pursuant to the procedures provided in this Article. The provisions of this Article, other than G.S. 153A-186, G.S. 153A-187 and G.S. 153A-190 through G.S. 153A-193, apply to street light assessments under this section.

(b) Basis of Assessment. The estimated costs of providing street lights and street lighting shall be apportioned among all benefited property on the basis of the number of lots served, or subject to being served, by the street lights, at an equal rate per lot.

(c) Amount of Assessment. The county shall determine the amount of the assessments on the basis of an estimate of the cost of constructing or operating the street lights during the ensuing year, and the board of commissioners' determination of the amount of the assessment is conclusive. In determining the total cost to be included in the assessment, the board may also include estimated costs of necessary legal services, projected utility rate increases, and the costs to the county of administering and collecting the assessment.

(d) Procedure. The county may approve the levy of street light assessments under this section upon petition of at least two-thirds of the owners of the lots within the subdivision. The request or petition shall include an estimate from the appropriate utility of the charge for providing street lights and street lighting within the subdivision for one year. Upon approval of the petition, the petitioning owner or owners shall pay to the tax collector the total estimated assessment amount for the ensuing year as determined by the county. This payment shall be set aside by the county tax office in escrow as security for payment of the assessments.

(e) Collection and Administration. The county shall levy the street light assessments on an annual basis and shall pay the costs of providing street lights and street lighting to the appropriate utility on a periodic basis. The assessment amount shall be adjusted on an annual basis in order to maintain in the escrow account an amount equal to the estimated cost of providing street lighting plus related expenses for the ensuing year. (1989 (Reg. Sess., 1990), c. 923, s. 2.)

§§ 153A-207 through 153A-210: Reserved for future codification purposes.

ARTICLE 10.

*Law Enforcement and Confinement Facilities.*

Part 1. Law Enforcement.

§ 153A-211. **Training and development programs for law enforcement.**

A county may plan and execute training and development programs for law-enforcement agencies, and for that purpose may:

- (1) Contract with other counties, cities, and the State and federal governments and their agencies;
- (2) Accept, receive, and disburse funds, grants, and services;
- (3) Pursuant to the procedures and provisions of Chapter 160A, Article 20, Part 1, create joint agencies to act for and on behalf of the participating counties and cities;
- (4) Apply for, receive, administer, and expend federal grant funds;
- (5) Appropriate funds not otherwise limited as to use by law. (1969, c. 1145, s. 2; 1973, c. 822, s. 1.)

**Local Modification.** — Onslow: 1985 (Reg. Sess., 1986), c. 895.

§ 153A-212. **Cooperation in law-enforcement matters.**

A county may cooperate with the State and other local governments in law-enforcement matters, as permitted by G.S. 160A-283 (joint auxiliary police), by G.S. 160A-288 (emergency aid), G.S. 160A-288.1 (assistance by State law-enforcement officers), and by Chapter 160A, Article 20, Part 1. (1973, c. 822, s. 1; 1979, c. 639, s. 2.)

§ 153A-212.1. **Resources to protect the public.**

Subject to the requirements of G.S. 7A-41, 7A-44.1, 7A-64, 7A-102, 7A-133, and 7A-498.7, a county may appropriate funds under contract with the State for the provision of services for the speedy disposition of cases involving drug offenses, domestic violence, or other offenses involving threats to public safety. Nothing in this section shall be construed to obligate the General Assembly to make any appropriation to implement the provisions of this section. Further, nothing in this section shall be construed to obligate the Administrative Office of the Courts or the Office of Indigent Defense Services to maintain positions or services initially provided for under this section. (1999-237, s. 17.17(b); 2000-67, s. 15.4(e); 2001-424, s. 22.11(e).)

**Editor’s Note.** — Session Laws 2000-67, s. 1.1, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2000.’”

Session Laws 2000-67, s. 28.4, contains a severability clause.

Session Laws 2001-424, s. 1.2, provides:

“This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2001.’”

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-67, s. 15.4.(e), effective July 1, 2000, sub-

stituted "G.S. 7A-41, 7A-44.1, 7A-64, 7A-102, 7A-133, and 7A-467" for "G.S. 7A-64."

Session Laws 2001-424, s. 22.11(e), effective July 1, 2001, substituted "7A-498.7" for "7A-

467" in the first sentence and inserted "or the Office of Indigent Defense Services" in the last sentence.

**§§ 153A-213 through 153A-215:** Reserved for future codification purposes.

Part 2. Local Confinement Facilities.

**§ 153A-216. Legislative policy.**

The policy of the General Assembly with respect to local confinement facilities is:

- (1) Local confinement facilities should provide secure custody of persons confined therein in order to protect the community and should be operated so as to protect the health and welfare of prisoners and provide for their humane treatment.
- (2) Minimum statewide standards should be provided to guide and assist local governments in planning, constructing, and maintaining confinement facilities and in developing programs that provide for humane treatment of prisoners and contribute to the rehabilitation of offenders.
- (3) The State should provide services to local governments to help improve the quality of administration and local confinement facilities. These services should include inspection, consultation, technical assistance, and other appropriate services.
- (4) Adequate qualifications and training of the personnel of local confinement facilities are essential to improving the quality of these facilities. The State shall establish entry level employment standards for jailers and supervisory and administrative personnel of local confinement facilities to include training as a condition of employment in a local confinement facility pursuant to the provisions of Chapter 17C and Chapter 17E and the rules promulgated thereunder. (1967, c. 581, s. 2; 1973, c. 822, s. 1; 1983, c. 745, s. 4.)

**Legal Periodicals.** — For note as to sheriff's liability for prisoner suicide, in light of

*Helmly v. Bebbler*, 77 N.C. App. 275, 335 S.E.2d 182 (1985), see 64 N.C.L. Rev. 1520 (1986).

CASE NOTES

**The enforcement of minimum standards at local jails is a discretionary duty.** *Reid v. Johnston County*, 688 F. Supp. 200 (E.D.N.C. 1988), *aff'd sub nom. Reid v. Kayye*, 878 F.2d 1430 (4th Cir.), 885 F.2d 129 (4th Cir. 1989).

**State Officials Held Not Vicariously Liable for Conditions at County Jail.** — In an action by inmates of a county jail against state officials of the Department of Human Resources alleging the existence of unconstitutional conditions at the jail, the state officials

could not be held vicariously liable under 42 U.S.C.A. § 1983, where plaintiffs did not demonstrate that actions taken by the officials under color of state law in any way caused constitutionally deficient conditions at the county jail. *Reid v. Johnston County*, 688 F. Supp. 200 (E.D.N.C. 1988), *aff'd sub nom. Reid v. Kayye*, 878 F.2d 1430 (4th Cir.), 885 F.2d 129 (4th Cir. 1989).

**Stated** in *Knight v. Vernon*, 23 F. Supp. 2d 634 (M.D.N.C. 1998).

## § 153A-217. Definitions.

Unless otherwise clearly required by the context, the words and phrases defined in this section have the meanings indicated when used in this Part:

- (1) "Commission" means the Social Services Commission.
- (2) "Secretary" means the Secretary of Health and Human Services.
- (3) "Department" means the Department of Health and Human Services.
- (4) "Governing body" means the governing body of a county or city or the policy-making body for a district or regional confinement facility.
- (5) "Local confinement facility" includes a county or city jail, a local lockup, a regional or district jail, a juvenile detention facility, a detention facility for adults operated by a local government, and any other facility operated by a local government for confinement of persons awaiting trial or serving sentences except that it shall not include a county satellite jail/work release unit governed by Part 3 of Article 10 of Chapter 153A.
- (6) "Prisoner" includes any person, adult or juvenile, confined or detained in a confinement facility.
- (7) "Unit," "unit of local government," or "local government" means a county or city. (1967, c. 581, s. 2; 1969, c. 981, s. 1; 1973, c. 476, s. 138; c. 822, s. 1; 1987, c. 207, s. 2; 1997-443, s. 11A.118(a); 1998-202, s. 4(cc).)

### OPINIONS OF ATTORNEY GENERAL

**"Local Confinement Facility" Definition Applicable to § 15A-1352(a).** — Although by its terms, the definition of "local confinement facility" in subsection (5) applies only to Chapter 153A, Article 10, Pt. 1, as this definition is the only definition of "local confinement facility" appearing in the General Statutes, it may

be assumed that this was the meaning intended by the General Assembly when it adopted § 15A-1352(a). See Opinion of Attorney General to Mr. Bruce Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

## § 153A-218. County confinement facilities.

A county may establish, acquire, erect, repair, maintain, and operate local confinement facilities and may for these purposes appropriate funds not otherwise limited as to use by law. A juvenile detention facility may be located in the same facility as a county jail provided that the juvenile detention facility meets the requirements of this Article and G.S. 147-33.40. (1868, c. 20, s. 8; Code, s. 707; Rev., s. 1318; 1915, c. 140; C.S., s. 1297; 1973, c. 822, s. 1; 1998-202, s. 4(dd).)

**Editor's Note.** — The section of Chapter 147 referred to above was repealed by Session Laws 2000-137, s. 1(a). As to juvenile facilities, see now § 143B-525 et seq.

**Legal Periodicals.** — For note, "North Carolina County Jail Inmates' Right of Access to Courts," see 66 N.C.L. Rev. 583 (1988).

### CASE NOTES

**Editor's Note.** — Most of the cases cited below were decided under corresponding sections of former law.

**Requirements for Persons Confined in Prison.** — The least that is required is that persons confined in any public prison shall have a clean place, comfortable bedding, whole-

some food and drink, and necessary attendance. *Lewis v. City of Raleigh*, 77 N.C. 229 (1877).

**County and Board of Commissioners were liable under 42 U.S.C. § 1983 for past and continuing deprivations of constitutional rights of county prisoners** and were

subject to equitable remedies against them. *Parnell v. Waldrep*, 538 F. Supp. 1203 (W.D.N.C. 1982).

**County Responsible for Its Own Confinement Facilities.** — This section makes clear that the primary responsibility for county confinement facilities rests upon the county itself. *Reid v. Johnston County*, 688 F. Supp. 200 (E.D.N.C. 1988), *aff'd sub nom. Reid v. Kayye*, 878 F.2d 1430 (4th Cir.), 885 F.2d 129 (4th Cir. 1989).

**For case holding that an action could not be maintained against a county for damages sustained by a person while imprisoned** in the county jail by reason of the failure of the commissioners to provide adequate means for his health and protection, see *Manuel v. Board of Comm'rs of Cumberland County*, 98 N.C. 9, 3 S.E. 829 (1887).

**State Officials Held Not Liable for Conditions of a County Jail.** — In an action by inmates of a county jail against state officials of the Department of Human Resources alleging the existence of unconstitutional conditions at the jail, the state officials could not be held vicariously liable under 42 U.S.C.A. § 1983, where plaintiffs did not demonstrate that actions taken by the officials under color of state law in any way caused constitutionally deficient conditions at the county jail. *Reid v. Johnston County*, 688 F. Supp. 200 (E.D.N.C.

1988), *aff'd sub nom. Reid v. Kayye*, 878 F.2d 1430 (4th Cir.), 885 F.2d 129 (4th Cir. 1989).

**Liability for Failure to Make Regulations for Safety of Prisoners.** — The duty to make proper rules and regulations imposes a discretionary duty on the board of commissioners exercisable only in its corporate capacity, and the commissioners are not liable as individuals for failure to make regulations for the safety of prisoners unless they corruptly or with malice fail to make proper rules and regulations. *Moye v. McLawhorn*, 208 N.C. 812, 182 S.E. 493 (1935).

**Liability for Nuisance in Erection and Maintenance of Jail.** — A county is not liable for a nuisance to a citizen in the erection of a jail in the immediate vicinity of his residence, nor for suffering it to become so filthy and disorderly as to be a nuisance to him and his family. The doctrine is that while such corporate agencies must provide the means and employ the men to perform such duties, they are not personally and by their own labor to perform such menial services; the default to make them liable must be in neglecting to exercise their authority in the use of labor and money for that purpose, and so it must be charged to make a cause of action against them. *Threadgill v. Board of Comm'rs*, 99 N.C. 352, 6 S.E. 189 (1888).

## § 153A-219. District confinement facilities.

(a) Two or more units of local government may enter into and carry out an agreement to establish, finance, and operate a district confinement facility. The units may construct such a facility or may designate an existing facility as a district confinement facility. In addition, two or more units of local government may enter into and carry out agreements under which one unit may use the local confinement facility owned and operated by another. In exercising the powers granted by this section, the units shall proceed according to the procedures and provisions of Chapter 160A, Article 20, Part 1.

(b) If a district confinement facility is established, the units involved shall provide for a jail administrator for the facility. The administrator need not be the sheriff or any other official of a participating unit. The administrator and the other custodial personnel of a district confinement facility have the authority of law-enforcement officers for the purposes of receiving, maintaining custody of, and transporting prisoners.

(c) If a district confinement facility is established, or if one unit contracts to use the local confinement facility of another, the law-enforcement officers of the contracting units and the custodial personnel of the facility may transport prisoners to and from the facility.

(d) The Department shall provide technical and other assistance to units wishing to exercise any of the powers granted by this section. (1933, c. 201; 1967, c. 581, s. 2; 1969, c. 743; 1971, c. 341, s. 1; 1973, c. 822, s. 1.)

**Local Modification.** — Camden, Albemarle District Jail in Elizabeth City: 1991, Pasquotank and Perquimans: 1991, c. 371; c. 371.

### § 153A-220. Jail and detention services.

The Commission has policy responsibility for providing and coordinating State services to local government with respect to local confinement facilities. The Department shall:

- (1) Consult with and provide technical assistance to units of local government with respect to local confinement facilities.
- (2) Develop minimum standards for the construction and operation of local confinement facilities.
- (3) Visit and inspect local confinement facilities; advise the sheriff, jailer, governing board, and other appropriate officials as to deficiencies and recommend improvements; and submit written reports on the inspections to appropriate local officials.
- (4) Review and approve plans for the construction and major modification of local confinement facilities.
- (5) Repealed by Session Laws 1983, c. 745, s. 5.
- (6) Perform any other duties that may be necessary to carry out the State's responsibilities concerning local confinement facilities. (1967, c. 581, s. 2; 1973, c. 476, s. 138; c. 822, s. 1; 1983, c. 745, s. 5.)

**Cross References.** — As to juvenile detention services, see § 134A-36 et seq.

### § 153A-221. Minimum standards.

(a) The Secretary shall develop and publish minimum standards for the operation of local confinement facilities and may from time to time develop and publish amendments to the standards. The standards shall be developed with a view to providing secure custody of prisoners and to protecting their health and welfare and providing for their humane treatment. The standards shall provide for:

- (1) Secure and safe physical facilities;
- (2) Jail design;
- (3) Adequacy of space per prisoner;
- (4) Heat, light, and ventilation;
- (5) Supervision of prisoners;
- (6) Personal hygiene and comfort of prisoners;
- (7) Medical care for prisoners, including mental health, mental retardation, and substance abuse services;
- (8) Sanitation;
- (9) Food allowances, food preparation, and food handling;
- (10) Any other provisions that may be necessary for the safekeeping, privacy, care, protection, and welfare of prisoners.

(b) In developing the standards and any amendments thereto, the Secretary shall consult with organizations representing local government and local law enforcement, including the North Carolina Association of County Commissioners, the North Carolina League of Municipalities, the North Carolina Sheriffs' Association, and the North Carolina Police Executives' Association. The Secretary shall also consult with interested State departments and agencies, including the Department of Correction, the Department of Health and Human Services, the Department of Insurance, and the North Carolina Criminal Justice Education and Training Standards Commission, and the North Carolina Sheriffs' Education and Training Standards Commission.

(c) Before the standards or any amendments thereto may become effective, they must be approved by the Commission and the Governor. Upon becoming effective, they have the force and effect of law. (1967, c. 581, s. 2; 1973, c. 476,

ss. 128, 133, 138; c. 822, s. 1; 1983, c. 745, s. 6; c. 768, s. 20; 1991, c. 237, s. 1; 1997-443, s. 11A.118(a).)

**Cross References.** — As to detention of juveniles in holdover facilities meeting the minimum standards of this section where no juvenile detention home is available, see now §§ 7B-505, 7B-1905.

**Editor's Note.** — Session Laws 1999-237, s. 18.11 provides that the Department of Corrections shall consult with State and local government officials and may consult with private

for-profit or nonprofit firms regarding the transfer, lease, or conversion to other use of prison facilities closed or consolidated under the Government Performance Audit Committee.

**Legal Periodicals.** — For note, "North Carolina County Jail Inmates' Right of Access to Courts," see 66 N.C.L. Rev. 583 (1988).

#### CASE NOTES

**Applied** in State ex rel. Williams v. Adams, 288 N.C. 501, 219 S.E.2d 198 (1975).

**Cited** in Reid v. Johnston County, 688 F. Supp. 200 (E.D.N.C. 1988), aff'd sub nom. Reid

v. Kayye, 878 F.2d 1430 (4th Cir.), 885 F.2d 129 (4th Cir. 1989); Reid v. Kayye, 885 F.2d 129 (4th Cir. 1989).

### § 153A-221.1. Standards and inspections.

The legal responsibility of the Secretary of Health and Human Services and the Social Services Commission for State services to county juvenile detention homes under this Article is hereby confirmed and shall include the following: development of State standards under the prescribed procedures; inspection; consultation; technical assistance; and training.

The Secretary of Health and Human Services shall also develop standards under which a local jail may be approved as a holdover facility for not more than five calendar days pending placement in a juvenile detention home which meets State standards, providing the local jail is so arranged that any child placed in the holdover facility cannot converse with, see, or be seen by the adult population of the jail while in the holdover facility. The personnel responsible for the administration of a jail with an approved holdover facility shall provide close supervision of any child placed in the holdover facility for the protection of the child. (1973, c. 1230, s. 2; c. 1262, s. 10; 1975, c. 426, s. 2; 1983, c. 768, s. 21; 1997-443, s. 11A.118(a); 1998-202, s. 13(nn); 1999-423, s. 12; 2000-137, s. 4(hh).)

**Effect of Amendments.** — Session Laws 2000-137, s. 4(hh), effective July 20, 2000, deleted the former second paragraph, pertaining to the duty of the Director of the Office of

Juvenile Justice to develop standards for county detention homes and regional detention homes.

### § 153A-222. Inspections of local confinement facilities.

Department personnel shall visit and inspect each local confinement facility at least semiannually. The purpose of the inspections is to investigate the conditions of confinement, the treatment of prisoners, the maintenance of entry level employment standards for jailers and supervisory and administrative personnel of local confinement facilities as provided for in G.S. 153A-216(4), and to determine whether the facilities meet the minimum standards published pursuant to G.S. 153A-221. The inspector shall make a written report of each inspection and submit it within 30 days after the day the inspection is completed to the governing body and other local officials responsible for the facility. The report shall specify each way in which the facility does not meet the minimum standards. The governing body shall consider the

report at its first regular meeting after receipt of the report and shall promptly initiate any action necessary to bring the facility into conformity with the standards. Notwithstanding the provisions of G.S. 8-53 or any other provision of law relating to the confidentiality of communications between physician and patient, the representatives of the Department of Health and Human Services who make these inspections may review any writing or other record in any recording medium which pertains to the admission, discharge, medication, treatment, medical condition, or history of persons who are or have been inmates of the facility being inspected. Physicians, psychologists, psychiatrists, nurses, and anyone else involved in giving treatment at or through a facility who may be interviewed by representatives of the Department may disclose to these representatives information related to an inquiry, notwithstanding the existence of the physician-patient privilege in G.S. 8-53 or any other rule of law; provided the patient, resident or client has not made written objection to such disclosure. The facility, its employees, and any person interviewed during these inspections shall be immune from liability for damages resulting from the disclosure of any information to the Department. Any confidential or privileged information received from review of records or interviews shall be kept confidential by the Department and not disclosed without written authorization of the inmate or legal representative, or unless disclosure is ordered by a court of competent jurisdiction. The Department shall institute appropriate policies and procedures to ensure that this information shall not be disclosed without authorization or court order. The Department shall not disclose the name of anyone who has furnished information concerning a facility without the consent of that person. Neither the names of persons furnishing information nor any confidential or privileged information obtained from records or interviews shall be considered "public records" within the meaning of G.S. 132-1. Prior to releasing any information or allowing any inspections referred to in this section the patient, resident or client must be advised in writing that he has the right to object in writing to such release of information or review of his records and that by an objection in writing he may prohibit the inspection or release of his records. (1947, c. 915; 1967, c. 581, s. 2; 1973, c. 822, s. 1; 1981, c. 586, s. 6; 1983, c. 745, s. 7; 1997-443, s. 11A.118(a).)

**Cross References.** — As to detention of juveniles in holdover facilities inspected pursuant to §§ 131D-11 through 131D-13 and this section where no juvenile detention home is available, see now §§ 7B-505, 7B-1905.

**CASE NOTES**

**Cited** in *Reid v. Johnston County*, 688 F. Supp. 200 (E.D.N.C. 1988), *aff'd sub nom. Reid v. Kayye*, 878 F.2d 1430 (4th Cir.), 885 F.2d 129 (4th Cir. 1989); *Reid v. Kayye*, 885 F.2d 129 (4th Cir. 1989).

**OPINIONS OF ATTORNEY GENERAL**

**Posting of Sign Concerning Right to Object to Release of Information Is Insufficient Notice.** — See opinion of Attorney General to Mr. I.O. Wilkerson, Jr., Director, Division of Facility Services, 51 N.C.A.G. 17 (1981).

**§ 153A-223. Enforcement of minimum standards.**

If an inspection conducted pursuant to G.S. 153A-222 discloses that the jailers and supervisory and administrative personnel of a local confinement facility do not meet the entry level employment standards established pursu-

ant to Chapter 17C or Chapter 17E or that a local confinement facility does not meet the minimum standards published pursuant to G.S. 153A-221 and, in addition, if the Secretary determines that conditions in the facility jeopardize the safe custody, safety, health, or welfare of persons confined in the facility, the Secretary may order corrective action or close the facility, as provided in this section:

- (1) The Secretary shall give notice of his determination to the governing body and each other local official responsible for the facility. The Secretary shall also send a copy of this notice, along with a copy of the inspector's report, to the senior resident superior court judge of the superior court district or set of districts as defined in G.S. 7A-41.1 in which the facility is located. Upon receipt of the Secretary's notice, the governing body shall call a public hearing to consider the report. The hearing shall be held within 20 days after the day the Secretary's notice is received. The inspector shall appear at this hearing to advise and consult with the governing body concerning any corrective action necessary to bring the facility into conformity with the standards.
- (2) The governing body shall, within 30 days after the day the Secretary's notice is received, request a contested case hearing, initiate appropriate corrective action or close the facility. The corrective action must be completed within a reasonable time.
- (3) A contested case hearing, if requested, shall be conducted pursuant to G.S. 150B, Article 3. The issues shall be: (i) whether the facility meets the minimum standards; (ii) whether the conditions in the facility jeopardize the safe custody, safety, health, or welfare of persons confined therein; and (iii) the appropriate corrective action to be taken and a reasonable time to complete that action.
- (4) If the governing body does not, within 30 days after the day the Secretary's notice is received, or within 30 days after service of the final agency decision if a contested case hearing is held, either initiate corrective action or close the facility, or does not complete the action within a reasonable time, the Secretary may order that the facility be closed.
- (5) The governing body may appeal an order of the Secretary to the senior resident superior court judge. The governing body shall initiate the appeal by giving by registered mail to the judge and to the Secretary notice of its intention to appeal. The notice must be given within 15 days after the day the Secretary's order is received. If notice is not given within the 15-day period, the right to appeal is terminated.
- (6) The senior resident superior court judge shall hear the appeal. He shall cause notice of the date, time, and place of the hearing to be given to each interested party, including the Secretary, the governing body, and each other local official involved. The Secretary, if a contested case hearing has been held, shall file the official record, as defined in G.S. 150B-37, with the senior resident superior court judge and shall serve a copy on each person who has been given notice of the hearing. The judge shall conduct the hearing without a jury. He shall consider the official record, if any, and may accept evidence from the Secretary, the governing body, and each other local official which he finds appropriate. The issue before the court shall be whether the facility continues to jeopardize the safe custody, safety, health, or welfare of persons confined therein. The court may affirm, modify, or reverse the Secretary's order. (1947, c. 915; 1967, c. 581, s. 2; 1973, c. 476, s. 138; c. 822, s. 1; 1981, c. 614, ss. 20, 21; 1983, c. 745, s. 8; 1987, c. 827, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 123.)

## CASE NOTES

**The use of the word "may" in this section is not accidental.** It is consistent with the clearly defined statutory role of the Department and its Secretary. *Reid v. Johnston County*, 688 F. Supp. 200 (E.D.N.C. 1988), *aff'd sub nom. Reid v. Kayye*, 878 F.2d 1430 (4th Cir.), 885 F.2d 129 (4th Cir. 1989).

**The enforcement of minimum standards at local jails is a discretionary duty.** *Reid v. Johnston County*, 688 F. Supp. 200 (E.D.N.C. 1988), *aff'd sub nom. Reid v. Kayye*, 878 F.2d 1430 (4th Cir.), 885 F.2d 129 (4th Cir. 1989).

**Secretary's affirmative duties are limited** by the discretionary language in this section. *Reid v. Johnston County*, 688 F. Supp. 200 (E.D.N.C. 1988), *aff'd sub nom. Reid v. Kayye*, 878 F.2d 1430 (4th Cir.), 885 F.2d 129 (4th Cir. 1989).

**Discretion of Secretary.** — Use of the word "may" in this section is purposeful. Department of Human Resources officials are not vested with the mandatory duty to remedy substandard jail conditions, since there is no evidence that the General Assembly intends the Secretary to have anything more than the discretion-

ary power to act when and if he chooses to use that discretion. *Reid v. Kayye*, 885 F.2d 129 (4th Cir. 1989).

**County and its Board of Commissioners were liable under 42 U.S.C. § 1983 for past and continuing deprivations of constitutional rights of county prisoners** and were subject to equitable remedies against them. *Parnell v. Waldrep*, 538 F. Supp. 1203 (W.D.N.C. 1982).

**State Officials Held Not Liable for Conditions at a County Jail.** — In an action by inmates of a county jail against state officials of the Department of Human Resources alleging the existence of unconstitutional conditions at the jail, the state officials could not be held vicariously liable under 42 U.S.C.A. § 1983, where plaintiffs did not demonstrate that actions taken by the officials under color of state law in any way caused constitutionally deficient conditions at the county jail. *Reid v. Johnston County*, 688 F. Supp. 200 (E.D.N.C. 1988), *aff'd sub nom. Reid v. Kayye*, 878 F.2d 1430 (4th Cir.), 885 F.2d 129 (4th Cir. 1989).

## § 153A-224. Supervision of local confinement facilities.

(a) No person may be confined in a local confinement facility unless custodial personnel are present and available to provide continuous supervision in order that custody will be secure and that, in event of emergency, such as fire, illness, assaults by other prisoners, or otherwise, the prisoners can be protected. These personnel shall supervise prisoners closely enough to maintain safe custody and control and to be at all times informed of the prisoners' general health and emergency medical needs.

(b) In a medical emergency, the custodial personnel shall secure emergency medical care from a licensed physician according to the unit's plan for medical care. If a physician designated in the plan is not available, the personnel shall secure medical services from any licensed physician who is available. The unit operating the facility shall pay the cost of emergency medical services unless the inmate has third-party insurance, in which case the third-party insurer shall be the initial payor and the medical provider shall bill the third-party insurer. The county shall only be liable for costs not reimbursed by the third-party insurer, in which event the county may recover from the inmate the cost of the non-reimbursed medical services.

(c) If a person violates any provision of this section, he is guilty of a Class 1 misdemeanor. (1967, c. 581, s. 2; 1973, c. 822, s. 1; 1993, c. 510, s. 1; c. 539, s. 1061; 1994, Ex. Sess., c. 24, s. 14(c).)

**Cross References.** — As to liability of county for emergency medical services for prisoners working pursuant to § 162-58, see § 162-61.

**Legal Periodicals.** — For note as to sheriff's liability for prisoner suicide, in light of *Helmly v. Bebbler*, 77 N.C. App. 275, 335 S.E.2d 182 (1985), see 64 N.C.L. Rev. 1520 (1986).

## CASE NOTES

**Subdivision (b) of this section and § 153A-225 require** that a county provide emergency medical services to prisoners incarcerated in the county's jail and pay for such services. *University of N.C. v. Hill*, 96 N.C. App. 673, 386 S.E.2d 755, aff'd, 327 N.C. 465, 396 S.E.2d 323 (1990).

**City Not Liable for Cost of Treatment Where Persons Arrested Were Confined in County Jail.** — A city was not liable to a hospital for the cost of treating a habitual inebriate who was injured when he fell while being assisted by city police officers, where there was no express agreement to pay for such services. Nor was there an implied promise to pay, pursuant to a statutory duty, since persons arrested by city police officers, if confined, were confined in the county jail. Under subsection (b) of this section, the cost of emergency medical services rendered to persons confined in local confinement facilities is imposed on the local governmental unit operating the facility. *Craven County Hosp. Corp. v. Lenoir County*, 75 N.C. App. 453, 331 S.E.2d 690, cert. denied, 314 N.C. 663, 336 S.E.2d 620 (1985).

**Payment of Expenses Under Insurance**

**Policy.** — Since medical payments made by county were mandated by statute, paying jail inmate's medical expenses was not voluntary, and therefore, payment under insurance policy was not barred for this reason. *County of Guilford v. National Union Fire Ins. Co.*, 108 N.C. App. 1, 422 S.E.2d 360 (1992).

**County's Claim Not Barred by Policy Exclusion.** — Although insurance company argued that since county had a contract with hospital to provide medical care for prison inmates, policy exclusion barred coverage of payments made under that contract, since the county's liability for inmate's medical expenses was due not to its contract with the hospital, but rather to the statutory requirement that county prisons implement a plan for providing medical care to inmates, the county's claim was not barred by this policy exclusion. *County of Guilford v. National Union Fire Ins. Co.*, 108 N.C. App. 1, 422 S.E.2d 360 (1992).

**Stated** in *Knight v. Vernon*, 23 F. Supp. 2d 634 (M.D.N.C. 1998).

**Cited** in *Slade v. Vernon*, 110 N.C. App. 422, 429 S.E.2d 744 (1993); *Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000).

## § 153A-225. Medical care of prisoners.

(a) Each unit that operates a local confinement facility shall develop a plan for providing medical care for prisoners in the facility. The plan

- (1) Shall be designed to protect the health and welfare of the prisoners and to avoid the spread of contagious disease;
- (2) Shall provide for medical supervision of prisoners and emergency medical care for prisoners to the extent necessary for their health and welfare;
- (3) Shall provide for the detection, examination and treatment of prisoners who are infected with tuberculosis or venereal diseases.

The unit shall develop the plan in consultation with appropriate local officials and organizations, including the sheriff, the county physician, the local or district health director, and the local medical society. The plan must be approved by the local or district health director after consultation with the area mental health, developmental disabilities, and substance abuse authority, if it is adequate to protect the health and welfare of the prisoners. Upon a determination that the plan is adequate to protect the health and welfare of the prisoners, the plan must be adopted by the governing body.

As a part of its plan, each unit may establish fees of not more than ten dollars (\$10.00) per incident for the provision of nonemergency medical care to prisoners. In establishing fees pursuant to this section, each unit shall establish a procedure for waiving fees for indigent prisoners.

(b) If a prisoner in a local confinement facility dies, the medical examiner and the coroner shall be notified immediately. Within five days after the day of the death, the administrator of the facility shall make a written report to the local or district health director and to the Secretary of Health and Human Services. The report shall be made on forms developed and distributed by the Department of Health and Human Services.

(c) If a person violates any provision of this section (including the requirements regarding G.S. 130-97 and 130-121), he is guilty of a Class 1 misdemeanor. (1967, c. 581, s. 2; 1973, c. 476, ss. 128, 138; c. 822, s. 1; 1973, c. 1140, s. 3; 1989, c. 727, s. 204; 1991, c. 237, s. 2; 1993, c. 539, s. 1062; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 385, s. 1; 1997-443, s. 11A.112.)

**Editor's Note.** — Sections 130-97 and 130-121, referred to in subsection (c) of this section, were repealed by Session Laws 1983, c. 891, s. 1.

#### CASE NOTES

**This section and § 153A-224(b) require** that a county provide emergency medical services to prisoners incarcerated in the county's jail and pay for such services. *University of N.C. v. Hill*, 96 N.C. App. 673, 386 S.E.2d 755, aff'd, 327 N.C. 465, 396 S.E.2d 323 (1990).

**Liability of County for Emergency Medical Services.** — Where a sheriff in an emergency requested a physician to render services to a prisoner in his custody who had been badly wounded resisting arrest, and there was evidence tending to show that under the circumstances he could not have obtained in time an order from the board of county commissioners assuming responsibility on behalf of the county to pay for such services, the objection of the commissioners that under such circumstances the county would not pay for the services and that liability would only attach as to those prisoners delivered at the county jail was untenable. *Spicer v. Williamson*, 191 N.C. 487, 132 S.E. 291 (1926), decided under former law.

#### **Payment of Expenses Under Insurance**

**Policy.** — Since medical payments made by county were mandated by statute, paying jail inmate's medical expenses was not voluntary, and therefore, payment under insurance policy was not barred for this reason. *County of Guilford v. National Union Fire Ins. Co.*, 108 N.C. App. 1, 422 S.E.2d 360 (1992).

**County's Claim Not Barred by Policy Exclusion.** — Although insurance company argued that since county had a contract with hospital to provide medical care for prison inmates, policy exclusion barred coverage of payments made under that contract, since the county's liability for inmate's medical expenses was due not to its contract with the hospital, but rather to the statutory requirement that county prisons implement a plan for providing medical care to inmates, the county's claim was not barred by this policy exclusion. *County of Guilford v. National Union Fire Ins. Co.*, 108 N.C. App. 1, 422 S.E.2d 360 (1992).

**Applied** in *State ex rel. Williams v. Adams*, 288 N.C. 501, 219 S.E.2d 198 (1975).

### § 153A-225.1. Duty of custodial personnel when prisoners are unconscious or semiconscious.

(a) Whenever a custodial officer of a local confinement facility takes custody of a prisoner who is unconscious, semiconscious, or otherwise apparently suffering from some disabling condition and unable to provide information on the causes of the condition, the officer should make a reasonable effort to determine if the prisoner is wearing a bracelet or necklace containing the Medic Alert Foundation's emergency alert symbol to indicate that the prisoner suffers from diabetes, epilepsy, a cardiac condition or any other form of illness which would cause a loss of consciousness. If such a symbol is found indicating that the prisoner suffers from one of those conditions, the officer must make a reasonable effort to have appropriate medical care provided.

(b) Failure of a custodial officer of a local confinement facility to make a reasonable effort to discover an emergency alert symbol as required by this section does not by itself establish negligence of the officer but may be considered along with other evidence to determine if the officer took reasonable precautions to ascertain the emergency medical needs of the prisoner in his custody.

(c) A prisoner who is provided medical care under the provisions of this section is liable for the reasonable costs of that care unless he is indigent.

(d) Repealed by Session Laws 1975, c. 818, s. 2. (1975, c. 306, s. 2; c. 818, s. 2.)

### § 153A-226. Sanitation and food.

(a) The Commission for Health Services shall adopt rules governing the sanitation of local confinement facilities, including the kitchens and other places where food is prepared for prisoners. The rules shall address, but not be limited to, the cleanliness of floors, walls, ceilings, storage spaces, utensils, ventilation equipment, and other facilities; adequacy of lighting, water, lavatory facilities, bedding, food protection facilities, treatment of eating and drinking utensils, and waste disposal; methods of food preparation, handling, storage, and serving; and any other item necessary to the health of the prisoners or the public.

(b) The Commission for Health Services shall prepare a score sheet to be used by local health departments in inspecting local confinement facilities. The local health departments shall inspect local confinement facilities as often as may be required by the Commission for Health Services. If an inspector of the Department finds conditions that reflect hazards or deficiencies in the sanitation or food service of a local confinement facility, he shall immediately notify the local health department. The health department shall promptly inspect the facility. After making its inspection, the local health department shall forward a copy of its report to the Department of Health and Human Services and to the unit operating the facility, on forms prepared by the Department of Environment and Natural Resources. The report shall indicate whether the facility and its kitchen or other place for preparing food is approved or disapproved for public health purposes. If the facility is disapproved, the situation shall be rectified according to the procedures of G.S. 153A-223. (1967, c. 581, s. 2; 1973, c. 476, s. 128; c. 822, s. 1; 1989, c. 727, s. 205; 1993, c. 262, s. 5; 1997-443, ss. 11A.113, 11A.118(a).)

§ 153A-227: Repealed by Session Laws 1983, c. 745, s. 9.

### § 153A-228. Separation of sexes.

Male and female prisoners shall be confined in separate facilities or in separate quarters in local confinement facilities. (1967, c. 581, s. 2; 1973, c. 822, s. 1.)

### § 153A-229. Jailers' report of jailed defendants.

The person having administrative control of a local confinement facility must furnish to the clerk of superior court a report listing such information reasonably at his disposal as is necessary to enable said clerk of superior court to comply with the provisions of G.S. 7A-109.1. (1973, c. 1286, s. 23; 1981, c. 522.)

## Part 3. Satellite Jail/Work Release Units.

### § 153A-230. Legislative policy.

The policy of the General Assembly with respect to satellite jail/work release units is:

- (1) To encourage counties to accept responsibility for incarcerated misdemeanants thereby relieving the State prison system of its misdemeanant population;
- (2) To assist counties in providing suitable facilities for certain misdemeanants who receive active sentences;

- (3) To allow more misdemeanants who are employed at the time of sentencing to retain their jobs by eliminating the time involved in processing persons through the State system;
- (4) To enable misdemeanants to pay for their upkeep while serving time, to pay restitution, to continue to support their dependents, and to remain near the communities and families to which they will return after serving their time;
- (5) To provide more appropriate, cost effective housing for certain minimum custody misdemeanants and to utilize vacant buildings where possible and suitable for renovation;
- (6) To provide a rehabilitative atmosphere for non-violent misdemeanants who otherwise would face a substantial threat of imprisonment; and
- (7) To encourage the use of alternative to incarceration programs. (1987, c. 207, s. 1.)

**Editor's Note.** — Session Laws 1987, c. 207, s. 4 made this Part effective July 1, 1987, but provided that the act should not be construed to obligate the General Assembly to make any appropriation to implement its provisions, nor should it be construed to obligate the State to

make any grant for which no funds have been appropriated by the General Assembly.

**Legal Periodicals.** — For note, "North Carolina County Jail Inmates' Right of Access to Courts," see 66 N.C.L. Rev. 583 (1988).

## § 153A-230.1. Definitions.

Unless otherwise clearly required by the context, the words and phrases defined in this section have the meanings indicated when used in this Part:

- (1) "Office" means the Office of State Budget and Management.
- (2) "Satellite Jail/Work Release Unit" means a building or designated portion of a building primarily designed, staffed, and used for the housing of misdemeanants participating in a work release program. These units shall house misdemeanants only, except that, if he so chooses, the Sheriff may accept responsibility from the Department of Correction for the housing of felons who do not present security risks, who have achieved work release status, and who will be employed on work release, or for felons committed directly to his custody pursuant to G.S. 15A-1352(b). These units shall be operated on a full time basis, i.e., seven days/nights a week. (1987, c. 207, s. 1; 1987, (Reg. Sess., 1988), c. 1106, s. 1; 2000-140, s. 93.1(a); 2001-424, s. 12.2(b).)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-140, s. 93.1(a), effective July 21, 2000,

substituted "Office of State Budget, Planning, and Management" for "Office of State Budget and Management" in subsection (1).

Session Laws 2001-424, s. 12.2(b), effective July 1, 2001, substituted "Office of State Budget and Management" for "Office of State Budget, Planning, and Management" in subdivision (1).

## § 153A-230.2. Creation of Satellite Jail/Work Release Unit Fund.

(a) There is created in the Office of State Budget and Management the County Satellite Jail/Work Release Unit Fund to provide State grant funds for counties or groups of counties for construction of satellite jail/work release units for certain misdemeanants who receive active sentences. A county or group of counties may apply to the Office for a grant under this section. The application shall be in a form established by the Office. The Office shall:

- (1) Develop application and grant criteria based on the basic requirements listed in this Part,
- (2) Provide all Boards of County Commissioners and Sheriffs with the criteria and appropriate application forms, technical assistance, if requested, and a proposed written agreement,
- (3) Review all applications,
- (4) Select grantees and award grants,
- (5) Award no more than seven hundred fifty thousand dollars (\$750,000) for any one county or group of counties except that if a group of counties agrees to jointly operate one unit for males and one unit for females, the maximum amount may be awarded for each unit,
- (6) Take into consideration the potential number of misdemeanants and the percentage of the county's or counties' misdemeanor population to be diverted from the State prison system,
- (7) Take into consideration the utilization of existing buildings suitable for renovation where appropriate,
- (8) Take into consideration the timeliness with which a county proposes to complete and occupy the unit,
- (9) Take into consideration the appropriateness and cost effectiveness of the proposal,
- (10) Take into consideration the plan with which the county intends to coordinate the unit with other community service programs such as intensive probation, community penalties, and community service.

When considering the items listed in subdivisions (6) through (10), the Office shall determine the appropriate weight to be given each item.

(b) A county or group of counties is eligible for a grant under this section if it agrees to abide by the basic requirements for satellite jail/work release units established in G.S. 153A-230.3. In order to receive a grant under this section, there must be a written agreement to abide by the basic requirements for satellite jail/work release units set forth in G.S. 153A-230.3. The written agreement shall be signed by the Chairman of the Board of County Commissioners, with approval of the Board of County Commissioners and after consultation with the Sheriff, and a representative of the Office of State Budget and Management. If a group of counties applies for the grant, then the agreement must be signed by the Chairman of the Board of County Commissioners of each county. Any variation from, including termination of, the original signed agreement must be approved by both the Office of State Budget and Management and by a vote of the Board of County Commissioners of the county or counties.

When the county or group of counties receives a grant under this section, the county or group of counties accepts ownership of the satellite jail/work release unit and full financial responsibility for maintaining and operating the unit, and for the upkeep of its occupants who comply with the eligibility criteria in G.S. 153A-230.3(a)(1). The county shall receive from the Department of Correction the amount paid to local confinement facilities under G.S. 148-32.1 for prisoners which are in the unit, but do not meet the eligibility of requirements under G.S. 153A-230.3(a)(1). (1987, c. 207, s. 1; 1987 (Reg. Sess., 1988), c. 1106, ss. 2, 3; 1989, c. 761, s. 2; 2000-140, s. 93.1(a); 2001-424, s. 12.2(b).)

**Editor's Note.** — Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws

2000-140, s. 93.1(a), effective July 21, 2000, substituted "Office of State Budget, Planning, and Management" for "Office of State Budget and Management."

Session Laws 2001-424, s. 12.2(b), effective July 1, 2001, substituted "Office of State Budget and Management" for "Office of State Bud-

get, Planning, and Management" in the introductory paragraphs of subsections (a) and (b).

### § 153A-230.3. Basic requirements for satellite jail/work release units.

(a) Eligibility for Unit. — The following rules shall govern which misdemeanants are housed in a satellite jail/work release unit:

- (1) Any convicted misdemeanant who:
  - a. Receives an active sentence in the county or group of counties operating the unit,
  - b. Is employed in the area or can otherwise earn his keep by working at the unit on maintenance and other jobs related to upkeep and operation of the unit or by assignment to community service work, and
  - c. Consents to placement in the unit under these conditions, shall not be sent to the State prison system except by written findings of the sentencing judge that the misdemeanant is violent or otherwise a threat to the public and therefore unsuitable for confinement in the unit.
- (2) The County shall offer work release programs to both male and female misdemeanants, through local facilities for both, or through a contractual agreement with another entity for either, provided that such arrangement is in reasonable proximity to the misdemeanant's workplace.
- (3) The sentencing judge shall make a finding of fact as to whether the misdemeanant is qualified for occupancy in the unit pursuant to G.S. 15A-1352(a). If the sentencing judge determines that the misdemeanant is qualified for occupancy in the unit and the misdemeanant meets the requirements of subdivision (1), then the custodian of the local confinement facility may transfer the misdemeanant to the unit. If at any time either prior to or after placement of an inmate into the unit the Sheriff determines that there is an indication of violence, unsuitable behavior, or other threat to the public that could make the prisoner unsuitable for the unit, the Sheriff may place the prisoner in the county jail.
- (4) The Sheriff may accept work release misdemeanants from other counties provided that those inmates agree to pay for their upkeep, that space is available, and that the Sheriff is willing to accept responsibility for the prisoner after screening.
- (5) The Sheriff may accept work release misdemeanants or felons from the Department of Correction provided that those inmates agree to pay for their upkeep, that space is available, and that the Sheriff is willing to accept responsibility for the prisoner after screening.

(a1) Non-eligible for unit. — If the sentencing judge finds that the misdemeanant does not meet the eligibility criteria set forth in G.S. 135A-230.3(a)(1)b, but is otherwise eligible for placement in the unit, then the Sheriff may transfer the misdemeanant from the local confinement facility to the unit if the misdemeanant meets the eligibility criteria at a later date. The Sheriff may also transfer prisoners who were placed in the unit pursuant to G.S. 148-32.1(b) to the local confinement facility when space becomes available.

(b) Operation of Satellite Jail/Work Release Unit. — A county or group of counties operating a satellite jail/work release unit shall comply with the following requirements concerning operation of the unit:

- (1) The county shall make every effort to ensure that at least eighty percent (80%) of the unit occupants shall be employed and on work

release, and that the remainder shall earn their keep by working at the unit on maintenance and other jobs related to the upkeep and operation of the unit or by assignment to community service work, and that alcohol and drug rehabilitation be available through community resources.

- (2) The county shall require the occupants to give their earnings, less standard payroll deduction required by law and premiums for group health insurance coverage, to the Sheriff. The county may charge a per day charge from those occupants who are employed or otherwise able to pay from other resources available to the occupants. The per day charge shall be calculated based on the following formula: The charge shall be either the amount that the Department of Correction deducts from a prisoner's work-release earnings to pay for the cost of the prisoner's keep or fifty percent (50%) of the occupant's net weekly income, whichever is greater, but in no event may the per day charge exceed an amount that is twice the amount that the Department of Correction pays each local confinement facility for the cost of providing food, clothing, personal items, supervision, and necessary ordinary medical expenses. The per day charge may be adjusted on an individual basis where restitution and/or child support has been ordered, or where the occupant's salary or resources are insufficient to pay the charge.

The county also shall accumulate a reasonable sum from the earnings of the occupant to be returned to him when he is released from the unit. The county also shall follow the guidelines established for the Department of Correction in G.S. 148-33.1(f) for determining the amount and order of disbursements from the occupant's earnings.

- (3) Any and all proceeds from daily fees shall belong to the county's General Fund to aid in offsetting the operation and maintenance of the satellite unit.
- (4) The unit shall be operated on a full-time basis, i.e., seven days/nights a week, but weekend leave may be granted by the Sheriff. In granting weekend leave, the Sheriff shall follow the policies and procedures of the Department of Correction for granting weekend leave for Level 3 minimum custody inmates.
- (5) Earned time shall be applied to these county prisoners in the same manner as prescribed in G.S. 15A-1340.20 and G.S. 148-13 for State prisoners.
- (6) The Sheriff shall maintain complete and accurate records on each inmate. These records shall contain the same information as required for State prisoners that are housed in county local confinement facilities. (1987, c. 207, s. 1; 1987 (Reg. Sess., 1988), c. 1106, ss. 4, 5; 1989, c. 761, ss. 4, 7; 1993 (Reg. Sess., 1994), c. 767, s. 3.)

**Editor's Note.** — The reference in subsection (a1) of this section to § 135A-230.3 was probably intended to refer to this section.

## § 153A-230.4. Standards.

The county satellite jail/work release units for misdemeanants shall not be subject to the standards promulgated for local confinement facilities pursuant to G.S. 153A-221. The Secretary of Health and Human Services shall develop and enforce standards for satellite/work release units. The Secretary shall take into consideration that they are to house only screened misdemeanants most of whom are on work release and therefore occupy the premises only in their

off-work hours. After consultation with the North Carolina Sheriff's Association, the North Carolina Association of County Commissioners, and the Joint Legislative Commission on Governmental Operations, the Secretary of Health and Human Services shall promulgate standards suitable for these units by January 1, 1988, and shall include these units in the Department's monitoring and inspection responsibilities. Further, the North Carolina Sheriffs' Education and Training Standards Commission shall include appropriate training for Sheriffs and other county law enforcement personnel in regard to the operation, management and guidelines for county work release centers pursuant to its authority under G.S. 17E-4. (1987, c. 207, s. 1; 1987 (Reg. Sess., 1988), c. 1106, s. 6; 1997-443, s. 11A.118(a).)

### § 153A-230.5. Satellite jails/work release units built with non-State funds.

(a) If a county is operating a satellite jail/work release unit prior to the enactment of this act, the county may apply to the Office of State Budget and Management for grant funds to recover any verifiable construction or renovation costs for those units and for improvement funds except that the total for reimbursement and improvement shall not exceed seven hundred fifty thousand dollars (\$750,000). Any county accepting such a grant or any other State monies for county satellite jails must agree to all of the basic requirements listed in G.S. 153A-230.2 and G.S. 153A-230.3.

(b) If a county operates a non-State funded satellite jail/work release unit that does not comply with the basic requirements listed in G.S. 153A-230.2 and G.S. 153A-230.3, then the satellite jail shall be subject to the standards, rules, and regulations to be promulgated by the Secretary of Health and Human Services pursuant to Part 2 of Article 10 of Chapter 153A. If a county is reimbursed for the cost of a prisoner's keep from an inmate's work release earnings in an amount equal to or greater than that paid by the Department of Correction to local confinement facilities under G.S. 148-32.1, the county may not receive additional payments from the department for the cost of a prisoner's keep. However, if reimbursement to the county for the cost of a prisoner's keep is less than the amount allowed under G.S. 148-32.1, the county may receive from the Department of Correction the difference in the amount received from work release earnings and the amount paid by the department to local confinement facilities. The department may promulgate rules regarding such payment arrangements. (1987, c. 207, s. 1; 1987 (Reg. Sess., 1988), c. 1106, s. 7; 1989, c. 761, s. 5; 1997-443, s. 11A.118(a); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b).)

**Editor's Note.** — The phrase "this act" in subsection (a) refers to Session Laws 1987, c. 207, which became effective July 1, 1987.

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

**Effect of Amendments.** — Session Laws

2000-140, s. 93.1(a), effective July 21, 2000, substituted "Office of State Budget, Planning, and Management" for "Office of State Budget and Management" in subsection (a).

Session Laws 2001-424, s. 12.2(b), effective July 1, 2001, substituted "Office of State Budget and Management" for "Office of State Budget, Planning, and Management" in subsection (a).

§§ 153A-231, 153A-232: Reserved for future codification purposes.

## ARTICLE 11.

*Fire Protection.***§ 153A-233. Fire-fighting and prevention services.**

A county may establish, organize, equip, support, and maintain a fire department; may prescribe the duties of the fire department; may provide financial assistance to incorporated volunteer fire departments; may contract for fire-fighting or prevention services with one or more counties, cities, or other units of local government or with an agency of the State government, or with one or more incorporated volunteer fire departments; and may for these purposes appropriate funds not otherwise limited as to use by law. The county may also designate fire districts or parts of existing districts and prescribe the boundaries thereof for insurance grading purposes. (1945, c. 244; 1973, c. 822, s. 1; 1977, c. 158.)

**Local Modification.** — Graham: 1985, c. 272; (As to Article 11) Richmond: 1995 (Reg. Sess., 1996), c. 657, s. 1; Macon: 1985, c. 272; (As to Article 11) Halifax: 1993, c. 316, s. 1;

**§ 153A-234. Fire marshal.**

A county may appoint a fire marshal and employ persons as his assistants. A county may also impose any duty that might be imposed on a fire marshal on any other officer or employee of the county. The board of commissioners shall set the duties of the fire marshal, which may include but are not limited to:

- (1) Advising the board on improvements in the fire-fighting or fire prevention activities under the county's supervision or control.
- (2) Coordinating fire-fighting and training activities under the county's supervision or control.
- (3) Coordinating fire prevention activities under the county's supervision or control.
- (4) Assisting incorporated volunteer fire departments in developing and improving their fire-fighting or fire prevention capabilities.
- (5) Making fire prevention inspections, including the periodic inspections and reports of school buildings required by Chapter 115 and the inspections of child care facilities required by Chapter 110. A fire marshal shall not make electrical inspections unless he is qualified to do so under G.S. 153A-351. (1959, c. 290; 1969, c. 1064, s. 2; 1973, c. 822, s. 1; 1997-506, s. 62.)

**Editor's Note.** — Chapter 115, referred to in subdivision (5), was repealed by Session Laws 1981, c. 423, s. 1, and replaced by Chapter 115C.

**§ 153A-235:** Repealed by Session Laws 1989, c. 681, s. 14, effective July 1, 1991.

**Editor's Note.** — Session Laws 1989, c. 681, s. 14 repealed this section upon adoption of fire protection code provisions by the North Carolina Building Code Council. Such provisions were adopted July 1, 1991.

**§§ 153A-236, 153A-237:** Reserved for future codification purposes.

## ARTICLE 12.

*Roads and Bridges.***§ 153A-238. Public road defined for counties.**

(a) In this Article “public road” or “road” means any road, street, highway, thoroughfare, or other way of passage that has been irrevocably dedicated to the public or in which the public has acquired rights by prescription, without regard to whether it is open for travel, except that in G.S. 153A-239.1, the word “road” means both private roads and public roads.

(b) Repealed by Session Laws 1993, c. 62, s. 1. (1979, 2nd Sess., c. 1319, s. 1; 1981, c. 568; 1983, cc. 98, 299; 1987 (Reg. Sess., 1988), cc. 900, 906; 1989, c. 335, s. 1; 1989 (Reg. Sess., 1990), cc. 836, 854, 911; 1991, c. 9, s. 1; 1991 (Reg. Sess., 1992), c. 778, s. 1; c. 849, ss. 1, 2.1; c. 936, s. 1; 1993, c. 62, s. 1.)

**Editor’s Note.** — Session Laws 1979, 2nd Sess., c. 1319, s. 1, as amended by Session Laws 1981, c. 568; 1983, cc. 98 and 299; 1987 (Reg. Sess., 1988), cc. 900 and 906; 1989, c. 335, s. 1;

and 1989 (Reg. Sess., 1990), c. 836, was codified as this section at the direction of the Revisor of Statutes.

**§ 153A-239:** Repealed by Session Laws 1993, c. 62, s. 2, effective May 24, 1993.

**Editor’s Note.** — Section 153A-238 formerly excepted certain counties from the application of this section. Session Laws 1993, c. 62, re-

pealed this section and made § 153A-238 statewide in application.

**§ 153A-239.1. Naming roads and assigning street numbers in unincorporated areas for counties.**

(a) A county may by ordinance name or rename any road within the county and not within a city, and may pursuant to a procedure established by ordinance assign or reassign street numbers for use on such a road. In naming or renaming a road, a county may not:

- (1) Change the name, if any, given to the road by the Board of Transportation, unless the Board of Transportation agrees;
- (2) Change the number assigned to the road by the Board of Transportation, but may give the road a name in addition to its number; or
- (3) Give the road a name that is deceptively similar to the name of any other public road in the vicinity.

A county shall not name or rename a road or adopt an ordinance to establish a procedure to assign or reassign street numbers on a road until it has held a public hearing on the matter. At least 10 days before the day of the hearing to name or rename a road, the board of commissioners shall cause notice of the time, place and subject matter of the hearing to be prominently posted at the county courthouse, in at least two public places in the township or townships where the road is located, and shall publish a notice of such hearing in a newspaper of general circulation published in the county. At least 10 days before the day of the hearing to adopt an ordinance to establish a procedure to assign or reassign street numbers on a road, the board of commissioners shall publish a notice of such hearing in a newspaper of general circulation in the county. After naming or renaming a road, or assigning or reassigning street numbers on a road, a county shall cause notice of its action to be given to the local postmaster with jurisdiction over the road, to the Board of Transportation, and to any city within five miles of the road. Names may be initially

assigned to new roads by recordation of an approved subdivision plat without following the procedure established by this section.

(b) Repealed by Session Laws 1993, c. 62, s. 3. (1979, 2nd Sess., c. 1319, s. 2; 1981, c. 568; 1983, cc. 98, 299; 1987 (Reg. Sess., 1988), cc. 900, 906; 1989, c. 335, s. 1; 1989 (Reg. Sess., 1990), cc. 836, 854, 911; 1991, c. 9, s. 2; 1991 (Reg. Sess., 1992), c. 778, s. 2; c. 849, ss. 2, 2.2; c. 936, s. 2; 1993, c. 62, s. 3; 2001-145, s. 1.)

**Local Modification.** — Cleveland: 1989, c. 156.

**Editor’s Note.** — Session Laws 1979, 2nd Sess., c. 1319, s. 2, as amended by Session Laws 1981, c. 568; 1983, cc. 98 and 299; 1987 (Reg. Sess., 1988), cc. 900 and 906; 1989, c. 335, s. 1; and 1989 (Reg. Sess., 1990), cc. 836, 854 and 911 has been codified as this section at the direction of the Revisor of Statutes.

**Effect of Amendments.** — Session Laws

2001-146, s. 1, effective May 31, 2001, in subsection (a), inserted “pursuant to a procedure established by ordinance” in the introductory language, and in the last paragraph, inserted “adopt an ordinance to establish a procedure to” in the first sentence, inserted “to name or rename a road” in the second sentence, added the third and fifth sentences, and made minor punctuation changes.

**§ 153A-240:** Repealed by Session Laws 1993, c. 62, s. 4, effective May 24, 1993.

**Editor’s Note.** — Section 153A-239.1 formerly excepted certain counties from the application of this section. Session Laws 1993, c. 62,

repealed this section and made § 153A-239.1 statewide in application.

**§ 153A-241. Closing public roads or easements.**

A county may permanently close any public road or any easement within the county and not within a city, except public roads or easements for public roads under the control and supervision of the Department of Transportation. The board of commissioners shall first adopt a resolution declaring its intent to close the public road or easement and calling a public hearing on the question. The board shall cause a notice of the public hearing reasonably calculated to give full and fair disclosure of the proposed closing to be published once a week for three successive weeks before the hearing, a copy of the resolution to be sent by registered or certified mail to each owner as shown on the county tax records of property adjoining the public road or easement who did not join in the request to have the road or easement closed, and a notice of the closing and public hearing to be prominently posted in at least two places along the road or easement. At the hearing the board shall hear all interested persons who appear with respect to whether the closing would be detrimental to the public interest or to any individual property rights. If, after the hearing, the board of commissioners is satisfied that closing the public road or easement is not contrary to the public interest and (in the case of a road) that no individual owning property in the vicinity of the road or in the subdivision in which it is located would thereby be deprived of reasonable means of ingress and egress to his property, the board may adopt an order closing the road or easement. A certified copy of the order (or judgment of the court) shall be filed in the office of the register of deeds of the county.

Any person aggrieved by the closing of a public road or an easement may appeal the board of commissioners’ order to the appropriate division of the General Court of Justice within 30 days after the day the order is adopted. The court shall hear the matter de novo and has jurisdiction to try the issues arising and to order the road or easement closed upon proper findings of fact by the trier of fact.

No cause of action founded upon the invalidity of a proceeding taken in closing a public road or an easement may be asserted except in an action or proceeding begun within 30 days after the day the order is adopted.

Upon the closing of a public road or an easement pursuant to this section, all right, title, and interest in the right-of-way is vested in those persons owning lots or parcels of land adjacent to the road or easement, and the title of each adjoining landowner, for the width of his abutting land, extends to the center line of the public road or easement. However, the right, title or interest vested in an adjoining landowner by this paragraph remains subject to any public utility use or facility located on, over, or under the road or easement immediately before its closing, until the landowner or any successor thereto pays to the utility involved the reasonable cost of removing and relocating the facility. (1949, c. 1208, ss. 1-3; 1957, c. 65, s. 11; 1965, cc. 665, 801; 1971, c. 595; 1973, c. 507, s. 5; c. 822, s. 1; 1977, c. 464, s. 34; 1995, c. 374, s. 1.)

**Local Modification.** — Durham: 1993, c. 76, s. 1; Guilford: 1979, c. 282; 1981, c. 59.

**Legal Periodicals.** — For note discussing the disposition of property within the bound-

aries of a dedicated street when use of the street is discontinued, see 45 N.C.L. Rev. 564 (1967).

#### CASE NOTES

**Editor's Note.** — *Some of the cases cited below were decided under corresponding sections of former law.*

**Owners of property on a street which is to be partially closed have an interest in the hearing** on the request to close the street. In re City of Washington, 15 N.C. App. 505, 190 S.E.2d 309, cert. denied, 282 N.C. 151, 191 S.E.2d 601 (1972).

**Legislative Intent as to Giving Notice.** — The true legislative intent is that if a municipality wishes to close a street, or a part thereof, the notices required must be given. Such an intent is fair and just, because it affords all interested parties an opportunity to be heard. In re City of Washington, 15 N.C. App. 505, 190 S.E.2d 309, cert. denied, 282 N.C. 151, 191 S.E.2d 601 (1972).

**Notice to Adjoining Property Owners Not to Be Limited to Those with Special Interest.** — The statute requires notice by registered mail to the owners of property adjoining the street to be closed who did not join in the request for closing the street. The words of the statute are clear and unequivocal. There is nothing to indicate that only those with a "special interest" must be notified by registered mail. In re City of Washington, 15 N.C. App. 505, 190 S.E.2d 309, cert. denied, 282 N.C. 151, 191 S.E.2d 601 (1972).

**Restrictions on County's Power to Close a Way of Passage.** — From this section and former § 153A-239, it was clear that a county did not have the power to close a way of passage which had not been dedicated to the public or in which the public had not acquired rights by prescription. In re Easement of Right of Way, 90 N.C. App. 303, 368 S.E.2d 639 (1988).

**The closing of a street must not deprive a property owner of reasonable ingress or egress.** Wofford v. North Carolina State Hwy. Comm'n, 263 N.C. 677, 140 S.E.2d 376, cert. denied, 382 U.S. 822, 86 S. Ct. 50, 15 L. Ed. 2d 67 (1965).

**An individual may restrain the wrongful obstruction of a public way,** of whatever origin, if he will suffer injury thereby as distinct from the inconvenience to the public generally, and he may recover such special damages as he has sustained by reason of the obstruction. Wofford v. North Carolina State Hwy. Comm'n, 263 N.C. 677, 140 S.E.2d 376, cert. denied, 382 U.S. 822, 86 S. Ct. 50, 15 L. Ed. 2d 67 (1965).

**Applied in Whitehead Community Club v. Hoppers,** 43 N.C. App. 671, 260 S.E.2d 94 (1979).

#### OPINIONS OF ATTORNEY GENERAL

**This section does not apply to closing a portion of a street in a subdivision that has been offered for dedication but never accepted** by a public authority nor opened for

public use. Subdivision streets are not open to the public as a matter of right until they have been accepted on behalf of the public in a manner recognized by law. County authorities

can only proceed under this section to close a road after an offer of dedication has been accepted and public rights have attached. See

opinion of Attorney General to William P. Mayo, County Attorney, Beaufort County, 49 N.C.A.G. 188 (1980).

**§ 153A-242. Regulation or prohibition of fishing from bridges.**

A county may by ordinance regulate or prohibit fishing from any bridge within the county and not within a city. In addition, the governing board of a city may by resolution permit a county to regulate or prohibit fishing from any bridge within the city. The city may by resolution withdraw its permission to the county ordinance. If it does so, the city shall give written notice to the county of its withdrawal of permission; 30 days after the date the county receives this notice the county ordinance ceases to be applicable within the city. An ordinance adopted pursuant to this section shall provide for signs to be posted on each bridge affected, summarizing the regulation or prohibition pertaining to that bridge.

No person may fish from the drawspan of a regularly attended bridge, and no county may permit any person to do so.

The authority granted by this section is subject to the authority of the Department of Transportation to prohibit fishing from any bridge on the State highway system. (1971, c. 690, ss. 1, 6; 1973, c. 507, s. 5; c. 822, s. 1; 1977, c. 464, s. 34.)

**§ 153A-243. Authorizing bridges over navigable waters.**

A county may grant to persons who between them own or occupy real property on both sides of a body of navigable water lying wholly within the county the right to construct and maintain across the body of water a bridge connecting the property. The board of commissioners shall first adopt a resolution declaring its intent to grant the right and calling a public hearing on the question. The board shall cause the resolution to be published once a week for four successive weeks before the hearing. At the hearing the board shall hear all interested persons who appear with respect to whether the grant would be in the public interest. If, after the hearing, the board finds that the grant is not contrary to the public interest, it may adopt an order granting the right to construct the bridge. The board may place reasonable terms and conditions, including time limitations, on the grant.

A person aggrieved by a grant may appeal the board of commissioners' order to the appropriate division of the General Court of Justice within 30 days after the day it is adopted. The court shall hear the matter de novo and has jurisdiction to try the issues arising and to grant the right to construct the bridge.

Before construction may be commenced on any bridge authorized pursuant to this section, the bridge's location and plans must be submitted to and approved by the Chief of Engineers of the United States Army and the Secretary of the Army. (Pub. Loc. 1191, c. 227; C.S., s. 1297; 1973, c. 822, s. 1.)

**§ 153A-244. Railroad revitalization programs.**

Any county is authorized to participate in State and federal railroad revitalization programs necessary to insure continued or improved rail service to the county, as are authorized in Article 2D of Chapter 136 of the General Statutes. County participation includes the authority to enter into contracts with the North Carolina Department of Transportation to provide for the nonfederal matching funds for railroad revitalization programs. Such funds

may be comprised of State funds distributed to the counties under the provisions of G.S. 136-44.38 and of county funds. County governments are also authorized to levy local property tax for railroad revitalization programs subject to G.S. 153A-149(d). County funds for any project may not exceed ten percent (10%) of total project costs. (1979, c. 658, s. 4.)

**Legal Periodicals.** — For note as to sheriff's liability for prisoner suicide, in light of *Helmly v. Bebbler*, 77 N.C. App. 275, 335 S.E.2d 182 (1985), see 64 N.C.L. Rev. 1520 (1986).

§§ 153A-245, 153A-246: Reserved for future codification purposes.

ARTICLE 13.

*Health and Social Services.*

Part 1. Health Services.

**§ 153A-247. Provision for public health and mental health.**

A county may provide for and regulate the public health pursuant to Chapter 130A of the General Statutes and any other law authorizing local public health activities and may provide mental health[,], mental retardation, and substance abuse programs pursuant to Chapter 122C of the General Statutes. (1973, c. 822, s. 1; 1985, c. 589, s. 58.)

**Editor's Note.** — A comma, which was apparently inadvertently omitted from the 1985 amendatory act, has been placed in brackets preceding "mental retardation."

CASE NOTES

**Boards of county commissioners can establish public hospitals** for their several counties in cases of necessity and make rules, regulations and bylaws for preventing the spread of contagious and infectious diseases and for taking care of those afflicted thereby, the same not being inconsistent with the laws of the State. *Prichard v. Board of Comm'rs*, 126 N.C. 908, 36 S.E. 353 (1900), decided under former law.

**A board of county commissioners cannot burn a residence to prevent the spread of contagious and infectious diseases.** A proper disinfection would be the extent of their powers in respect to property thus tainted or infected. *Prichard v. Board of Comm'rs*, 126 N.C. 908, 36 S.E. 353 (1900), decided under former law.

**§ 153A-248. Health-related appropriations.**

(a) A county may appropriate revenues not otherwise limited as to use by law:

- (1) To a licensed facility for the mentally retarded, whether publicly or privately owned, to assist in maintaining and developing facilities and treatment, if the board of commissioners determines that the care offered by the facility is available to residents of the county. The facility need not be located within the county.
- (2) To a sheltered workshop or other private, nonprofit, charitable organization offering work or training activities to the physically or mentally handicapped, and may otherwise assist such an organization.

- (3) To an orthopedic hospital, whether publicly or privately owned, to assist in maintaining and developing facilities and treatment, if the board of commissioners determines that the care offered by the hospital is available to residents of the county. The hospital need not be located within the county.
- (4) To a training center or other private, nonprofit, charitable organization offering education, treatment, rehabilitation, or developmental programs to the physically or mentally handicapped, and may otherwise assist such organizations; provided, however, such action shall be with the concurrence of the county board of education; and provided, further, that within 30 days after receipt of the request for concurrence, the county board of education shall notify the board of county commissioners whether it concurs, and should it fail to so notify the board of county commissioners within such period, it shall be deemed to have concurred.

(b) The ordinance making the appropriation shall state specifically what the appropriation is to be used for, and the board of commissioners shall require that the recipient account for the appropriation at the close of the fiscal year. (1967, cc. 464, 1074; 1969, c. 802; 1973, c. 822, s. 1; 1977, c. 474; 1979, c. 1074, s. 2.)

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

**CASE NOTES**

**Subdivision (a)(2) Is Inapplicable to Learning-Disabled Children.** — While the general terms of subdivision (a)(2) of this section could conceivably be construed to address the problem of inadequate educational opportunities for learning-disabled children in the school system, it is evident that the specific remedies prescribed in former §§ 115-315.7, et seq., 115-377, and 115-384 were controlling. *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1979).

**And subdivision (a)(2) cannot be reasonably interpreted to encompass schools for dyslexic children.** *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1979).

**Hence an appropriation by Gaston County to the Dyslexia School of North Carolina was not authorized** by subdivision (a)(2) of this section. *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1979).

**§ 153A-249. Hospital services.**

A county may provide and support hospital services pursuant to Chapters 122C, 131 and 131E of the General Statutes. (1868, c. 20, s. 8; Code, s. 707; Rev., s. 1318; C.S., s. 1297; 1923, c. 81; 1973, c. 822, s. 1; 1985, c. 589, s. 59.)

**Editor's Note.** — Chapter 131, referred to in this section, was repealed by Session Laws 1983, c. 775, s. 1. As to health care facilities and services, see now Chapter 131E.

**CASE NOTES**

**County commissioners are not liable for failure to establish hospitals.** *Bell v. Commissioners of Johnston County*, 127 N.C. 85, 37 S.E. 136 (1900), decided under former law.

**Funds paid to memorial hospital by city and county under contract** did not make the hospital a State agency subject to federal interdiction. *Eaton v. Board of Managers*, 261 F.2d

521 (4th Cir. 1958), cert. denied, 359 U.S. 984, 79 S. Ct. 941, 3 L. Ed. 2d 934 (1959) decided under former law.

**Applied** in *National Medical Enters., Inc. v. Sandrock*, 72 N.C. App. 245, 324 S.E.2d 268 (1985).

#### OPINIONS OF ATTORNEY GENERAL

**As to duty of county to pay for hospitalization of prisoner in county jail**, see Opinion of Attorney General to Mr. Charles W.

Ogletree, Tyrrell County Attorney, 40 N.C.A.G. 352 (1970).

### § 153A-250. Ambulance services.

(a) A county may by ordinance franchise ambulance services provided in the county to the public at large, whether the service is based inside or outside the county. The ordinance may:

- (1) Grant franchises to ambulance operators on terms set by the board of commissioners;
- (2) Make it unlawful to provide ambulance services or to operate an ambulance in the county without such a franchise;
- (3) Limit the number of ambulances that may be operated within the county;
- (4) Limit the number of ambulances that may be operated by each franchised operator;
- (5) Determine the areas of the county that may be served by each franchised operator;
- (6) Establish and from time to time revise a schedule of rates, fees, and charges that may be charged by franchised operators;
- (7) Set minimum limits of liability insurance for each franchised operator;
- (8) Establish other necessary regulations consistent with and supplementary to any statute or any Department of Health and Human Services regulation relating to ambulance services.

Before it may adopt an ordinance pursuant to this subsection, the board of commissioners must first hold a public hearing on the need for ambulance services. The board shall cause notice of the hearing to be published once a week for two successive weeks before the hearing. After the hearing the board may adopt an ordinance if it finds that to do so is necessary to assure the provision of adequate and continuing ambulance service and to preserve, protect, and promote the public health, safety, and welfare.

If a person, firm, or corporation is providing ambulance services in a county or any portion thereof on the effective date of an ordinance adopted pursuant to this subsection, the person, firm, or corporation is entitled to a franchise to continue to serve that part of the county in which the service is being provided. The board of commissioners shall determine whether the person, firm, or corporation so entitled to a franchise is in compliance with Chapter 130, Article 26; and if that is the case, the board shall grant the franchise.

(b) In lieu of or in addition to adopting an ordinance pursuant to subsection (a) of this section, a county may operate or contract for ambulance services in all or a portion of the county. A county may appropriate for ambulance services any revenues not otherwise limited as to use by law, and may establish and from time to time revise schedules of rates, fees, charges, and penalties for the ambulance services. A county may operate its ambulance services as a line department or may create an ambulance commission and vest in it authority to operate the ambulance services.

(c) A city may adopt an ordinance pursuant to and under the procedures of subsection (a) of this section and may operate or contract for ambulance services pursuant to subsection (b) of this section if (i) the county in which the

city is located has adopted a resolution authorizing the city to do so or (ii) the county has not, within 180 days after being requested by the city to do so, provided for ambulance services within the city pursuant to this section. Any action taken by a city pursuant to this subsection shall apply only within the corporate limits of the city.

If a city is exercising a power granted by this subsection, the county in which the city is located may thereafter take action to provide for ambulance service within the city, either under subsection (a) or subsection (b) of this section, only after having given to the city 180 days' notice of the county's intention to take action. At the end of the 180 days, the city's authority under this subsection is preempted by the county.

(d) A county or a city may contract with a franchised ambulance operator or with another county or city for ambulance service to be provided upon the call of a department or agency of the county or city. A county may contract with a franchised ambulance operator for transportation of indigents or persons certified by the county department of social services to be public assistance recipients.

(e) Each county or city operating ambulance services is subject to the provisions of Chapter 130, Article 26 ("Regulation of Ambulance Services"). (1967, c. 343, s. 5; 1969, c. 147; 1973, c. 476, s. 128; c. 822, s. 1; 1997-443, s. 11A.118(a).)

**Cross References.** — As to the providing of emergency medical, rescue and ambulance service by rural fire protection districts, see § 69-25.4.

**Editor's Note.** — Chapter 130, Article 26,

referred to in this section, was repealed by Session Laws 1983, c. 891, s. 1. As to regulation of ambulance services, see now § 131E-155 et seq.

#### CASE NOTES

**Editor's Note.** — *Many of the cases cited below were decided under corresponding sections of former law.*

**Constitutionality of Liability Insurance Provision.** — Subdivision a6 of former § 153-9(58), which was identical to subdivision (a)(7) of this section, was not void as being in contravention of constitutional prohibitions against monopolies and exclusive emoluments, since it did not provide that liability insurance should be the exclusive method of indemnifying persons or property against loss due to negligent operation of the ambulance service. *Whaley v. Lenoir County*, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

**Regulation of ambulance service is a valid and legitimate exercise of the police power.** *Whaley v. Lenoir County*, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

**But Authority of County Cannot Exceed That Given by Enabling Act.** — The authority of the county to regulate ambulance service, whether it be by franchise, permit, certificate of public convenience or necessity, license or whatever name is given, can only come from and cannot exceed that given by the enabling act. *Whaley v. Lenoir County*, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

**For case holding county ordinance reg-**

**ulating ambulance service unconstitutional,** see *Whaley v. Lenoir County*, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

**County-operated ambulance service was entitled to governmental immunity,** even though it charged a fee to help defray operating costs. *McIver v. Smith*, 134 N.C. App. 583, 518 S.E.2d 522 (1999).

**Contract with Funeral Home for Ambulance Services.** — In the absence of a vote or of authority expressly granted by the legislature, a county may not legally contract with a funeral home for ambulance services, and its attempt to do so prior to the enactment of an enabling statute was ultra vires. *Moody v. Transylvania County*, 271 N.C. 384, 156 S.E.2d 716 (1967).

**The grandfather clause in this section is not self-executing.** *Nursing Registry, Inc. v. Eastern N.C. Regional Emergency Medical Servs. Consortium, Inc.*, 959 F. Supp. 298 (E.D.N.C. 1997).

**Application Required.** — In order to notify the board of commissioners that one is currently providing ambulance services, and in order to give the board an opportunity to affirmatively grant a franchise to continue doing business, it is necessary that an ambulance company actually submit an application that

can be granted. *Nursing Registry, Inc. v. Eastern N.C. Regional Emergency Medical Servs.*

*Consortium, Inc.*, 959 F. Supp. 298 (E.D.N.C. 1997).

### OPINIONS OF ATTORNEY GENERAL

**Provision of Ambulance Service Within Discretion of Board of Commissioners.** — Former § 153-9(58) did not authorize the holding of a “straw vote” election, or any type of referendum to determine whether ambulance services should be provided or continued. Whether ambulance service should be provided or continued is a matter within the discretion of

the board of county commissioners. See opinion of Attorney General to Mr. E. Ray Etheridge, Camden County Attorney, 40 N.C.A.G. 74 (1969).

**County May, in Certain Cases, Provide Free Ambulance Service.** — See opinion of Attorney General to Mr. Joe O. Brewer, 43 N.C.A.G. 157 (1973).

§§ 153A-251 through 153A-254: Reserved for future codification purposes.

## Part 2. Social Service Provisions.

### § 153A-255. Authority to provide social service programs.

Each county shall provide social service programs pursuant to Chapter 108A and Chapter 111 and may otherwise undertake, sponsor, organize, engage in, and support other social service programs intended to further the health, welfare, education, employment, safety, comfort, and convenience of its citizens. (1868, c. 20, s. 8; Code, s. 707; Rev., s. 1318; C.S., s. 1297; 1973, c. 822, s. 1; 1981, c. 562, s. 12; 1997-443, s. 12.13.)

**Legal Periodicals.** — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

### CASE NOTES

**Editor’s Note.** — *Some of the cases cited below were decided under corresponding sections of former law.*

**Appropriation for Dyslexia School Not Authorized.** — An appropriation by the Gaston County Board of Commissioners to the Dyslexia School of North Carolina was not authorized by either § 153A-149(c)(30) or this section. *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1979).

**Tax Levy to Fund Medically Unnecessary Abortions Ultra Vires and Void.** — This section does not give counties the underlying authority to levy taxes pursuant to § 153A-149(c)(30) to fund medically unnecessary abortions, since the authority conferred upon counties to provide social services pursuant to this section is limited to providing the poor with the basic necessities of life, and a medically unnecessary abortion is not a basic necessity of life; therefore, a county exceeds its statutorily conferred power in levying a tax to fund medically unnecessary abortions, and the tax levy is ultra vires and void. *Stam v. State*,

302 N.C. 357, 275 S.E.2d 439 (1981).

**Ascertainment of Indigents Entitled to Support.** — It is the exclusive right of the legislature to determine and declare by whom and how the indigent of the State entitled to support shall be ascertained, and from what fund and by whom allowances for their support shall be made. *Board of Educ. v. Commissioners of Bladen*, 113 N.C. 379, 18 S.E. 661 (1893).

**The legislature may delegate authority to county officials** to provide and care for one class of the indigent or unfortunate inhabitants of the State, and to disburse a part of the fund devoted to the support of the poor, by appropriating it more directly to another class, whose wants, in the opinion of the lawmakers, can be best supplied through public agencies of a different kind. *Board of Educ. v. Commissioners of Bladen*, 113 N.C. 379, 18 S.E. 661 (1893).

**No Recovery from County for Officially Providing for Pauper.** — Although a person may be a proper subject of county charge, anyone who officiously provides for such person cannot recover the amount of his outlay from

the county. *Copple v. Commissioners of Davie County*, 138 N.C. 127, 50 S.E. 574 (1905).

**Express Contract or Express Request for Service Necessary to Bind County.** — In order to make a binding pecuniary obligation on the county, there must be an express contract to that effect, or the service must be done at the express request of the proper county officer or agent. *Copple v. Commissioners of Davie County*, 138 N.C. 127, 50 S.E. 574 (1905).

**Thirty-Year Contract Upheld.** — Where the General Assembly authorized a county to enter into a contract with a public hospital for

the care of its indigent sick for a period of 30 years, and the board of commissioners of the county, in the exercise of the discretion vested in the board by the statute, agreed to contract for that period, the contract would not be held invalid because of its duration. *Martin v. Board of Comm'rs*, 208 N.C. 354, 180 S.E. 777 (1935).

**For case holding contracts for the loan of money made by the late county courts for the support of paupers ultra vires**, and therefore void, see *Daniel v. Board of Comm'rs*, 74 N.C. 494 (1876).

#### OPINIONS OF ATTORNEY GENERAL

**County-owned pharmacy which is operated with the approval of the county commissioners** for the purpose of dispensing drugs to needy persons may be a participant in the State Board of Social Services' (now Department of Human Resources') drug program un-

der which the board (department) makes payments to pharmacies for drugs dispensed to welfare recipients. See opinion of Attorney General to Mr. Emmett L. Sellers, Director, Division of Medical Services, State Department of Social Services, 40 N.C.A.G. 704 (1969).

### § 153A-256. County home.

A county may establish, erect, acquire, lease as lessor or lessee, equip, support, operate, and maintain a county home for aged and infirm persons and may appropriate funds for these purposes.

The superintendent of each county home shall make an annual report on its operation to the board of commissioners of the county operating the home and to the Department of Health and Human Services. The report shall contain any information that the board of commissioners and the Department of Health and Human Services, respectively, require, and the Department may provide forms for this report. (1876-7, c. 277, s. 3; Code, ss. 3541, 3543; 1891, c. 138; Rev., ss. 1328, 1329; 1919, c. 72; C.S., ss. 1336, 1337, 1338; 1961, c. 139, s. 1; 1973, c. 476, s. 138; c. 822, s. 1; 1997-443, s. 11A.118(a).)

#### CASE NOTES

**Three-year statute of limitations applies to an action brought by a county against an inmate of a county home** to secure reimbursement or indemnity for sums expended for

her upkeep in the home. *Guilford County v. Hampton*, 224 N.C. 817, 32 S.E.2d 606 (1945), decided under former law.

### § 153A-257. Legal residence for social service purposes.

(a) Legal residence in a county determines which county is responsible (i) for financial support of a needy person who meets the eligibility requirements for a public assistance or medical care program offered by the county or (ii) for other social services required by the person.

Legal residence in a county is determined as follows:

- (1) Except as modified below, a person has legal residence in the county in which he resides.
- (2) If a person is in a hospital, mental institution, nursing home, boarding home, confinement facility, or similar institution or facility, he does not, solely because of that fact, have legal residence in the county in which the institution or facility is located.

(3) A minor has the legal residence of the parent or other relative with whom he resides. If the minor does not reside with a parent or relative and is not in a foster home, hospital, mental institution, nursing home, boarding home, educational institution, confinement facility, or similar institution or facility, he has the legal residence of the person with whom he resides. Any other minor has the legal residence of his mother, or if her residence is not known then the legal residence of his father; if his mother's or father's residence is not known, the minor is a legal resident of the county in which he is found.

(b) A legal residence continues until a new one is acquired, either within or outside this State. When a new legal residence is acquired, all former legal residences terminate.

(c) This section is intended to replace the law defining "legal settlement." Therefore any general law or local act that refers to "legal settlement" is deemed to refer to this section and the rules contained herein. (1777, c. 117, s. 16, P.R.; R.C., c. 86, s. 12; Code, s. 3544; Rev., s. 1333; C.S., s. 1342; 1931, c. 120; 1943, c. 753, s. 2; 1959, c. 272; 1973, c. 822, s. 1.)

#### CASE NOTES

**Editor's Note.** — *The cases cited below were decided under corresponding sections of former law.*

**Each County Charged with Support of Its Poor.** — It is the manifest purpose of the law in regard to pauper settlements to charge each county with the support of its own poor. *Commissioners of County of Burke v. Commissioners of County of Buncombe*, 101 N.C. 520, 8 S.E. 176 (1888).

**Liability of County Dependent on Residence or Settlement.** — The liability of a county for the support of a pauper does not depend upon the law of domicile or citizenship, but upon that of residence or settlement. *Commissioners of County of Burke v. Commissioners of County of Buncombe*, 101 N.C. 520, 8 S.E. 176 (1888).

The legal settlement of the pauper determines the liability. *Board of Comm'rs of McDowell County v. Board of Comm'rs of Forsyth County*, 121 N.C. 295, 28 S.E. 412 (1897).

Although in most cases the county of domicile and the county of settlement are the same, yet they are sometimes different, and in such case the county of settlement is chargeable with the maintenance of an illegitimate child. *State v. Elam*, 61 N.C. 460 (1868).

**Liability for Illegitimate Child Fixed by Mother's Settlement.** — The liability of the county for the maintenance of an illegitimate child is fixed not by its birth but by the settlement of its mother at the time of its birth. *State v. Elam*, 61 N.C. 460 (1868).

An illegitimate child, who has not gained a new settlement by a year's residence in some other county, is, for the purpose of being apprenticed, subject to the jurisdiction of the court of that county in which its mother was

settled at the time of its birth. *Ferrell v. Boykin*, 61 N.C. 9 (1866).

**Settlement Not Ipso Facto Obtained by Birth.** — Neither legitimate nor illegitimate children shall gain a settlement by birth in the county in which they may be born, if neither of their parents had any settlement therein. *State v. Elam*, 61 N.C. 460 (1868).

**What County Liable When Mother of Illegitimate Child Is Without Settlement.** — An illegitimate child, born in this State of a mother who had not resided in it for 12 months, as required by the statute then in effect, was chargeable for maintenance upon the county in which it was born. Since the statute did not contemplate the case of foreign paupers, the question of settlement was left as at common law. *State ex rel. Merritt v. McQuaig*, 63 N.C. 550 (1869).

**A legal settlement continues until a new one is acquired.** *Board of Comm'rs of McDowell County v. Board of Comm'rs of Forsyth County*, 121 N.C. 295, 28 S.E. 412 (1897).

**Recovery for Medical Services Furnished Pauper Injured in Another County.** — Where a pauper, temporarily absent from the county where he had a "legal settlement," was so disabled as to require immediate medical services and was furnished by the authorities of another county with such attention and board, the latter was entitled to recover the expenses thereof from the county where the pauper had his settlement. *Board of Comm'rs of McDowell County v. Board of Comm'rs of Forsyth County*, 121 N.C. 295, 28 S.E. 412 (1897).

**Cited in** *In re Phillips*, 99 N.C. App. 159, 392 S.E.2d 407 (1990).

## OPINIONS OF ATTORNEY GENERAL

**As to legal settlement of mental incompetent for welfare payment purposes**, see opinion of Attorney General to Mr. Joseph P.B. McCauley, Director, Gaston County Department of Social Services, 40 N.C.A.G. 678 (1970), issued under former law.

**Nursing Home Residence Not Sufficient for "Legal Settlement"**. — See opinion of Attorney General to Mr. Joe Freeman Britt, Robeson County Attorney, 41 N.C.A.G. 197

(1971), issued under former law.

**Daughter reaching majority and confined in institution retained settlement in county from which she came** although her parent moved to another county while she was confined. See opinion of Attorney General to Mrs. Bing Lau, Social Worker, Murdoch Center, 41 N.C.A.G. 472 (1971), issued under former law.

§ **153A-258**: Reserved for future codification purposes.

## Part 3. Health and Social Services Contracts.

§ **153A-259. Counties authorized to contract with other entities for health and social services.**

A county is authorized to contract with any governmental agency, person, association, or corporation for the provision of health or social services provided that the expenditure of funds pursuant to such contracts shall be for the purpose for which the funds were appropriated and is not otherwise prohibited by law. (1979, 2nd Sess., c. 1094, s. 2.)

**Editor's Note.** — The preamble to Session Laws 1979, 2nd Sess., c. 1094, cited as the reason for the enactment of the act the case of

*Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1979), requiring statutory authority for third-party contracts.

§ **153A-260**: Reserved for future codification purposes.

## ARTICLE 14.

*Libraries.*§ **153A-261. Declaration of State policy.**

The General Assembly recognizes that the availability of adequate, modern library services and facilities is in the general interest of the people of North Carolina and a proper concern of the State and of local governments. Therefore it is the policy of the State of North Carolina to promote the establishment and development of public library services throughout the State. (1973, c. 822, s. 1.)

## CASE NOTES

**Operation of a public library meets the test of "governmental function."** Seibold v. Kinston-Lenoir County Pub. Library, 264 N.C.

360, 141 S.E.2d 519 (1965), decided under former law.

§ **153A-262. Library materials defined.**

For purposes of this Article, the phrase "library materials" includes, without limitation, books, plates, pictures, engravings, maps, magazines, pamphlets, newspapers, manuscripts, films, transparencies, microforms, recordings, or

other specimens, works of literature, or objects of art, historical significance, or curiosity. (1953, c. 721; 1963, c. 945; 1971, c. 698, s. 3; 1973, c. 822, s. 1.)

### § 153A-263. Public library systems authorized.

A county or city may:

- (1) Establish, operate, and support public library systems;
- (2) Set apart lands and buildings for a public library system;
- (3) Acquire real property for a public library system by gift, grant, purchase, lease, exercise of the power of eminent domain, or any other lawful method. If a library board of trustees is appointed, a county or city shall, before acquiring real property by purchase, lease, or exercise of the power of eminent domain, seek the recommendations of the board of trustees regarding the proposed acquisition;
- (4) Provide, acquire, construct, equip, operate, and maintain buildings and other structures for a public library system;
- (5) Acquire library materials by purchase, exchange, bequest, gift, or any other lawful method;
- (6) Appropriate funds to carry out the provisions of this Article;
- (7) Accept any gift, grant, lease, loan, exchange, bequest, or devise of real or personal property for a public library system. Devises, bequests, grants, and gifts may be accepted and held subject to any term or condition that may be imposed by the grantor or trustor, except that no county or city may accept or administer any term or condition that requires it to discriminate among its citizens on the basis of race, sex, or religion. (1953, c. 721; 1963, c. 945; 1971, c. 698, s. 3; 1973, c. 822, s. 1.)

### § 153A-264. Free library services.

If a county or city, pursuant to this Article, operates or makes contributions to the support of a library, any resident of the county or city, as the case may be, is entitled to the free use of the library. (1953, c. 721; 1963, c. 945; 1971, c. 698, s. 3; 1973, c. 822, s. 1.)

### § 153A-265. Library board of trustees.

The governing body of a county or city may appoint a library board of trustees. The governing body shall determine the number of members of the board of trustees (which may not be more than 12), the length of their terms, the manner of filling vacancies, and the amount, if any, of their compensation and allowances. The governing body may remove a trustee at any time for incapacity, unfitness, misconduct, or neglect of duty. (1953, c. 721; 1963, c. 945; 1971, c. 698, s. 1; 1973, c. 822, s. 1.)

**Local Modification.** — Burke: 1977, 2nd Sess., c. 1168; 1981 (Reg. Sess., 1982), c. 1141.

### § 153A-266. Powers and duties of trustees.

If a board of trustees is appointed, it shall elect a chairman and may elect other officers. The governing body may delegate to the board of trustees any of the following powers:

- (1) To formulate and adopt programs, policies, and regulations for the government of the library;

- (2) To make recommendations to the governing body concerning the construction and improvement of buildings and other structures for the library system;
- (3) To supervise and care for the facilities of the library system;
- (4) To appoint a chief librarian or director of library services and, with his advice, to appoint other employees of the library system. If some other body or official is to appoint the chief librarian or director of library services, to advise that body or official concerning that appointment;
- (5) To establish, a schedule of fines and charges for late return of, failure to return, damage to, and loss of library materials, and to take other measures to protect and regulate the use of such materials;
- (6) To participate in preparing the annual budget of the library system;
- (7) To extend the privileges and use of the library system to nonresidents of the county or city establishing or supporting the system, on any terms or conditions the board may prescribe.
- (8) To otherwise advise the board of commissioners on library matters.

The board of trustees shall make an annual report on the operations of the library to the governing body of the county or city and shall make an annual report to the Department of Cultural Resources as required by G.S. 125-5. If no board of trustees is established, the governing body shall make the annual report to the Department. (1953, c. 721; 1963, c. 945; 1969, c. 488; 1971, c. 698, s. 3; 1973, c. 476, s. 84; c. 822, s. 1.)

### **§ 153A-267. Qualifications of chief librarian; library employees.**

(a) To be eligible for appointment and service as chief administrative officer of a library system (whether designated chief librarian, director of library services, or some other title), a person must have a professional librarian certificate issued by the Secretary of Cultural Resources, pursuant to G.S. 125-9, under regulations for certification of public librarian as established by the North Carolina Public Librarian Certification Commission pursuant to the provisions of G.S. 143B-67.

(b) The employees of a county or city library system are, for all purposes, employees of the county or city, as the case may be. (1953, c. 721; 1963, c. 945; 1969, c. 488; 1971, c. 698, s. 3; 1973, c. 476, s. 53; c. 822, s. 1; 1975, c. 516.)

### **§ 153A-268. Financing library systems.**

A county or city may appropriate for library purposes any funds not otherwise limited as to use by law. (1973, c. 822, s. 1.)

### **§ 153A-269. Title to library property.**

The title to all property acquired by a county or city for library purposes shall be in the name of the county or city. If property is given, granted, devised, bequeathed, or otherwise conveyed to the board of trustees of a county or city library system, it shall be deemed to have been conveyed to the county or city and shall be held in the name of the county or city. (1953, c. 721; 1963, c. 945; 1971, c. 698, s. 3; 1973, c. 822, s. 1.)

### **§ 153A-270. Joint libraries; contracts for library services.**

Two or more counties or cities or counties and cities may establish a joint library system or contract for library services, according to the procedures and

provisions of Chapter 160A, Article 20, Part 1. (1953, c. 721; 1963, c. 945; 1971, c. 698, s. 3; 1973, c. 822, s. 1.)

### § 153A-271. Library systems operated under local acts brought under this Article.

If a county or city operates a library system pursuant to a local act, the governing body of the county or city may by ordinance provide that the library system is to be operated pursuant to this Article. (1973, c. 822, s. 1.)

### § 153A-272. Designation of library employees to register voters.

The governing body of each public library with four or more employees shall designate at least one employee of the library to be appointed by the county board of elections to register voters pursuant to G.S. 163-80(a)(6). With the approval of the board of elections, additional employees may also be designated for this purpose by the governing body. (1983, c. 588, s. 1.)

**Editor's Note.** — G.S. 163-80, referred to above, has been repealed.

§ 153A-273: Reserved for future codification purposes.

## ARTICLE 15.

### *Public Enterprises.*

#### Part 1. General Provisions.

### § 153A-274. Public enterprise defined.

As used in this Article, "public enterprise" includes:

- (1) Water supply and distribution systems.
- (2) Wastewater collection, treatment, and disposal systems of all types, including septic tank systems or other on-site collection or disposal facilities or systems.
- (3) Solid waste collection and disposal systems and facilities.
- (4) Airports.
- (5) Off-street parking facilities.
- (6) Public transportation systems.
- (7) Stormwater management programs designed to protect water quality by controlling the level of pollutants in, and the quantity and flow of, stormwater and structural and natural stormwater and drainage systems of all types. (1965, c. 370; 1957, c. 266, s. 3; 1961, c. 514, s. 1; c. 1001, s. 1; 1971, c. 568; 1973, c. 822, s. 1; c. 1214; 1977, c. 514, s. 1; 1979, c. 619, s. 1; 1989, c. 643, s. 2; 1991 (Reg. Sess., 1992), c. 944, s. 13; 2000-70, s. 1.)

**Local Modification.** — Bladen: 1985, c. 433, s. 1; 1989 (Reg. Sess., 1990), c. 839; Columbus: 1991 (Reg. Sess., 1992), c. 844; Duplin: 1991 (Reg. Sess., 1992), c. 844; Franklin: 1991 (Reg. Sess., 1992), c. 864; Hertford: 1991 (Reg. Sess., 1992), c. 844; Martin: 1991 (Reg. Sess., 1992), c.

844; Northampton: 1991 (Reg. Sess., 1992), c. 864; Sampson: 1985, c. 433, s. 1; 1991, c. 13; Stanly: 1985, c. 433, s. 1.

**Editor's Note.** — Session Laws 2000-70, s. 8, effective June 30, 2000, is a severability clause.

**Effect of Amendments.** — Session Laws 2000-70, s. 1, effective retroactively to July 15, 1989, added the language beginning “Stormwater management programs” and end-

ing “stormwater and” in subdivision (7); and made stylistic and punctuation changes throughout.

CASE NOTES

**A public enterprise includes sewage collection and disposal systems of all types.** McNeill v. Harnett County, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Greater in Scope Than a Building.** — A public enterprise denotes a complex systematic activity or undertaking — something greater in scope than a building. Davidson County v. City of High Point, 85 N.C. App. 26, 354 S.E.2d 280, modified and aff’d, 321 N.C. 252, 362 S.E.2d 553 (1987).

**The word “building,” as used in § 153A-347, does not encompass a “public enterprise,”** as used in this section and § 160A-311. Davidson County v. City of High Point, 85 N.C. App. 26, 354 S.E.2d 280, modified and aff’d, 321 N.C. 252, 362 S.E.2d 553 (1987).

**Operation of a Water and/or Sewer System for and on Behalf of Another Unit of Local Government.** — Pursuant to an interlocal cooperative agreement and pursuant to authority granted in this Article, a county may, among other things, operate a water and/or sewer system for and on behalf of another unit of local government, such as a water and sewer district, and in conjunction therewith may exercise those rights, powers, and functions granted to water and sewer districts as found in § 162A-88 and those rights, powers, and functions granted to counties in this Article. McNeill v. Harnett County, 327 N.C.

552, 398 S.E.2d 475 (1990).

Sewer district and Harnett County entered into a contract on July 23, 1984, wherein it was agreed that the sewer district’s sewer system, which had been completed that year, would be operated by Harnett County through its Department of Public Utilities. Such units of local government may contract with each other to execute undertakings such as public enterprises, which would include a sewer system. McNeill v. Harnett County, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Use of City-Owned Sewage Treatment Plant Without Prior Approval of County.**

— Since county had no authority to restrict or regulate city’s provision of sewer service to its residents, the city could use city-owned sewage treatment plant located outside the city but within the county, which was upgraded pursuant to the county’s special use permit, with a condition attached to the permit requiring the county’s prior approval of service to county citizens, to meet its statutory mandate to provide sewer service to residents in newly annexed areas without seeking the county’s prior approval, even though the facility was located in the county. Davidson County v. City of High Point, 321 N.C. 252, 362 S.E.2d 553 (1987).

**Cited in** McIver v. Smith, 134 N.C. App. 583, 518 S.E.2d 522 (1999).

**§ 153A-275. Authority to operate public enterprises.**

(a) A county may acquire, lease as lessor or lessee, construct, establish, enlarge, improve, extend, maintain, own, operate, and contract for the operation of public enterprises in order to furnish services to the county and its citizens. A county may acquire, construct, establish, enlarge, improve, maintain, own, and operate outside its borders any public enterprise.

(b) A county may adopt adequate and reasonable rules to protect and regulate a public enterprise belonging to or operated by it. The rules shall be adopted by ordinance, shall apply to the public enterprise system both within and outside the county, and may be enforced with the remedies available under any provision of law. (1955, c. 370; 1957, c. 266, s. 3; 1961, c. 514, s. 1; c. 1001, s. 1; 1967, c. 462; 1971, c. 568; 1973, c. 822, s. 1; 1991 (Reg. Sess., 1992), c. 836, s. 2.)

CASE NOTES

**Constitutionality of Former Statute.** — Former § 153-9(46), was constitutional, violating neither § 5 nor § 17 of Art. I of the Consti-

tution of 1868. Ramsey v. Rollins, 246 N.C. 647, 100 S.E.2d 55 (1957).

The limitation upon the counties contained in

Art. VII, § 7 of the Constitution of 1868, requiring that bonds for the construction of water and sewer systems be approved by the voters in such county, did not impair the constitutionality of the grant of the power to construct such systems in any respect. *Ramsey v. Rollins*, 246 N.C. 647, 100 S.E.2d 55 (1957).

**Public Enterprises Outside County's Boundaries.** — By the broad language which the legislature has used in § 160A-312 and this section, it has evidenced its intent to give cities and counties comprehensive authority to own and operate public enterprises outside their boundaries with respect to the service of themselves and their citizens. *Davidson County v. City of High Point*, 85 N.C. App. 26, 354 S.E.2d 280 (1987).

**No Blanket Subjection to Host Jurisdiction's Zoning Regulations.** — The Legislature has not seen fit to curtail the broad grant of authority it has given cities and counties in § 160A-312 and this section, respectively, by

blanketly subjecting public enterprises to a host jurisdiction's zoning regulations. Rather, when in its judgment it has deemed it necessary to restrict one political subdivision's ability to establish a particular type of public enterprise in another political subdivision the legislature has enacted a statute to accomplish that specific goal. *Davidson County v. City of High Point*, 85 N.C. App. 26, 354 S.E.2d 280, modified and aff'd, 321 N.C. 252, 362 S.E.2d 553 (1987).

**A county is authorized to operate a public enterprise in order to furnish services to its citizens.** *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Water and sewer districts may contract with counties to carry out their purposes.** *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Cited in** *Barnhill San. Serv., Inc. v. Gaston County*, 87 N.C. App. 532, 362 S.E.2d 161 (1987).

#### OPINIONS OF ATTORNEY GENERAL

**As to authority for county to appropriate nontax funds for water and sewer system,** see opinion of Attorney General to Mr. M.

*Alexander Biggs*, Special Counsel, Nash County Board of Commissioners, 40 N.C.A.G. 92 (1970).

### § 153A-276. Financing public enterprises.

Subject to the restrictions, limitations, procedures, and regulations otherwise provided by law, a county may finance the cost of a public enterprise by levying taxes, borrowing money, and appropriating any other revenues, and by accepting and administering gifts and grants from any source. (1973, c. 822, s. 1.)

#### CASE NOTES

**The operation of the sewer system is a public enterprise,** and, as such, the method of financing the system is subject to this section. However, the mandate of this section applies only where such "restrictions, limitations, procedures, and regulations otherwise provided by law" are themselves mandatory. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Procedures and Regulations Provided by Law Applicable to Public Enterprises.** — When an ordinance regulating a public enterprise is adopted by a local government to finance the public enterprise, the procedures supplied in the General Statutes for adopting

such an ordinance must likewise be followed; when a general obligation bond is issued by a local government, the provisions of Chapter 159 must be followed; and when a local government purchases equipment, the applicable statutes regarding competitive bidding, where applicable, must likewise be followed. There is no statute or law that mandates notice and hearing requirements for ordinances requiring mandatory connections and fixing related connection charges and user fees. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Quoted in** *McNeill v. Harnett County*, 97 N.C. App. 41, 387 S.E.2d 206 (1990).

### § 153A-277. Authority to fix and enforce rates.

(a) A county may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by a public enterprise. Schedules of rents, rates, fees, charges, and penalties may

vary for the same class of service in different areas of the county and may vary according to classes of service, and different schedules may be adopted for services provided outside of the county. A county may include a fee relating to subsurface discharge wastewater management systems and services on the property tax bill for the real property where the system for which the fee is imposed is located.

- (a1)(1) Before it establishes or revises a schedule of rates, fees, charges, or penalties for stormwater management programs and structural and natural stormwater and drainage systems under this section, the board of commissioners shall hold a public hearing on the matter. A notice of the hearing shall be given at least once in a newspaper having general circulation in the area, not less than seven days before the public hearing. The hearing may be held concurrently with the public hearing on the proposed budget ordinance.
  - (2) The fees established under this subsection must be made applicable throughout the area of the county outside municipalities. Schedules of rates, fees, charges, and penalties for providing stormwater management programs and structural and natural stormwater and drainage system service may vary according to whether the property served is residential, commercial, or industrial property, the property's use, the size of the property, the area of impervious surfaces on the property, the quantity and quality of the runoff from the property, the characteristics of the watershed into which stormwater from the property drains, and other factors that affect the stormwater drainage system. Rates, fees, and charges imposed under this subsection may not exceed the county's cost of providing a stormwater management program and a structural and natural stormwater and drainage system. The county's cost of providing a stormwater management program and a structural and natural stormwater and drainage system includes any costs necessary to assure that all aspects of stormwater quality and quantity are managed in accordance with federal and State laws, regulations, and rules.
  - (3) No stormwater utility fee may be levied under this subsection whenever two or more units of local government operate separate stormwater management programs or separate structural and natural stormwater and drainage system services in the same area within a county. However, two or more units of local government may allocate among themselves the functions, duties, powers, and responsibilities for jointly operating a stormwater management program and structural and natural stormwater and drainage system service in the same area within a county, provided that only one unit may levy a fee for the service within the joint service area. For purposes of this subsection, a unit of local government shall include a regional authority providing stormwater management programs and structural and natural stormwater and drainage system services.
- (b) A county may collect delinquent accounts by any remedy provided by law for collecting and enforcing private debts, and may specify by ordinance the order in which partial payments are to be applied among the various enterprise services covered by a bill for the services. A county may also discontinue service to a customer whose account remains delinquent for more than 10 days. If a delinquent customer is not the owner of the premises to which the services are delivered, the payment of the delinquent account may not be required before providing services at the request of a new and different tenant or occupant of the premises. If water or sewer services are discontinued for delinquency, it is unlawful for a person other than a duly authorized agent or employee of the county to reconnect the premises to the water or sewer system.

(c) Rents, rates, fees, charges, and penalties for enterprisory services are in no case a lien upon the property or premises served and, except as provided in subsection (d) of this section, are legal obligations of the person contracting for them, provided that no contract shall be necessary in the case of structural and natural stormwater and drainage systems.

(d) Rents, rates, fees, charges, and penalties for enterprisory services are legal obligations of the owner of the property or premises served when:

- (1) The property or premises is leased or rented to more than one tenant and services rendered to more than one tenant are measured by the same meter; or
- (2) Charges made for use of a sewerage system are billed separately from charges made for the use of a water distribution system. (1961, c. 1001, s. 1; 1973, c. 822, s. 1; 1991, c. 591, s. 2; 1991 (Reg. Sess., 1992), c. 932, s. 3; c. 1007, s. 45; 2000-70, s. 2.)

**Local Modification.** — Cumberland: 1995, c. 469, § 1; Durham: 1998-60; Mecklenburg: 1999-50, s. 1.

**Editor's Note.** — Session Laws 2000-70, s. 8, effective June 30, 2000, is a severability clause.

**Effect of Amendments.** — Session Laws 2000-70, s. 2, effective retroactively to July 15, 1989, added subdivision designations (1) through (3) in subsection (a1); inserted "stormwater management programs and" in subdivision (a1)(1); in subdivision (a1)(2), in-

serted "stormwater management programs and" in the second sentence, inserted "stormwater management program and a structural and natural" in the third sentence, and added the fourth sentence; and in subdivision (a1)(3), inserted "stormwater management programs or separate" in the first sentence, substituted "stormwater management program and structural" for "single structural" in the second sentence, and inserted "stormwater management programs and" in the third sentence.

#### CASE NOTES

**Rate Classification Must Be Reasonable and Based on Substantial Differences.** — Rates may be fixed in view of dissimilarities in conditions of service, but there must be some reasonable proportion between the variance in the conditions and the variances in the charges. Classification must be based on substantial difference. *Barnhill San. Serv., Inc. v. Gaston County*, 87 N.C. App. 532, 362 S.E.2d 161 (1987), aff'd, 321 N.C. 742, 366 S.E.2d 856 (1988).

**Charge Imposed Only on Commercial, Industrial and Municipal Haulers Upheld.** — It was not a levy of an unreasonable discriminatory rate for a county to charge only commercial, industrial and municipal haulers of garbage for the use of the landfills. *Barnhill San. Serv., Inc. v. Gaston County*, 87 N.C. App. 532, 362 S.E.2d 161 (1987), aff'd, 321 N.C. 742, 366 S.E.2d 856 (1988).

### § 153A-278. Joint provision of enterprisory services.

Two or more counties, cities, or other units of local government may cooperate in the exercise of any power granted by this Article according to the procedures and provisions of Chapter 160A, Article 20, Part 1. (1961, c. 1001, s. 1; 1973, c. 822, s. 1.)

#### CASE NOTES

**Interlocal Cooperative Agreements Sanctioned.** — The use of interlocal cooperative agreements is sanctioned with respect to public enterprises in this section, which provides that "two or more counties, cities, or other

units of local government may cooperate in the exercise of any powers granted by this Article [Article 15 of Chapter 153A]." *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

§§ 153A-279 through 153A-282: Reserved for future codification purposes.

## Part 2. Special Provisions for Water and Sewer Services.

### § 153A-283. Nonliability for failure to furnish water or sewer services.

In no case may a county be held liable for damages for failure to furnish water or sewer services. (1961, c. 1001, s. 1; 1973, c. 822, s. 1.)

#### CASE NOTES

**Water Service Is Not “Property”.** — Water service furnished by the County does not rise to the level of “property” protected by due process requirements. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**No Claim of Entitlement to Water Services.** — While other statutes specifically authorize disconnections in certain situations, this section states specifically that “in no case may a county be held liable for damages for failure to furnish water or sewer services.” In light of this statutory provision, a citizen of a county in North Carolina may not assert a

claim of entitlement to water services. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Applicability.** — This section did not apply to action against county for denying plaintiffs access to county sewer line, where plaintiffs did not seek sewer services from the the county, which were to be provided by town, but all plaintiffs sought from defendant was access to a county-owned sewer line. *Browning-Ferris Indus. of S. Atl., Inc. v. Wake County*, 905 F. Supp. 312 (E.D.N.C. 1995).

### § 153A-284. Power to require connections.

A county may require the owner of developed property on which there are situated one or more residential dwelling units or commercial establishments located so as to be served by a water line or sewer collection line owned, leased as lessee, or operated by the county or on behalf of the county to connect the owner’s premises with the water or sewer line and may fix charges for these connections. In the case of improved property that would qualify for the issuance of a building permit for the construction of one or more residential dwelling units or commercial establishments and where the county has installed water or sewer lines or a combination thereof directly available to the property, the county may require payment of a periodic availability charge, not to exceed the minimum periodic service charge for properties that are connected. (1963, c. 985, s. 1; 1965, c. 969, s. 2; 1973, c. 822, s. 1; 1979, c. 619, s. 13; 1995, c. 511, s. 3.)

#### CASE NOTES

**Constitutionality.** — This section and the ordinances in question, which were passed without notice and an opportunity to be heard and which mandated connections to the sewer lines as well as the payment of related connection charges and user fees, were consistent with federal procedural due process protections and were a valid exercise of the police power. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

This section and county mandating ordinances met the requirements of both the fed-

eral and State Constitutions in authorizing the imposition of connection charges and user/availability fees related to mandated connections. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Exercise of Police Power.** — The establishment and maintenance of a sewer system by a city is ordinarily regarded as an exercise of its police power. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

The establishment and operation of a sewer system by the sewer district and the county is a

valid exercise of the police power under the law of the land clause of the North Carolina Constitution. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Notice and Hearing for Individual Property Owners Not Required.** — The law of the land clause does not require notice and opportunity for hearing prior to the passage of an ordinance mandating connection to a sewer system adopted under the authority of this section. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

To require notice and opportunity for hearing to all individual property owners prior to the adoption of an ordinance mandating connection of improved properties pursuant to the enabling act would be burdensome, costly to local governments, and not consistent with procedures employed in the exercise of other police powers. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Power of County to Mandate Connections and Fix Charges.** — In addition to those powers granted to the Sewer District in § 162A-88, a county, as operator of a public enterprise, is clothed with those powers set forth in Chapter 153A, Article 15, including the power to mandate connections and to fix charges for those connections under this sec-

tion. The plain wording of this section clearly supports this conclusion. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**There is no meaningful legal distinction between a mandated connection and mandated charges and fees for that connection.** The latter naturally follow the former. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**County Must Own "or" Operate Sewage Collection Line.** — This section provides that a county may mandate connections to a sewage collection line "owned or operated" by the county. The use of the word "or," indicating the alternative, is dispositive of this issue. Had the legislature intended that a county could mandate connections only when it both owned and operated a sewage collection line, the language of the statute would have so provided. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Methods of Financing Sewer Project.** — The General Assembly intended that the local government may choose between financing the sewer project using a procedure which would result in an assessment and doing so by other methods not involving a lien-producing assessment. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

### § 153A-285: Repealed by Session Laws 1993, c. 348, s. 4.

**Cross References.** — This section, concerning prerequisites to acquisition of water and water rights in certain counties, was repealed

by Session Laws 1993, c. 348, s. 4, effective January 1, 1994. For present similar provisions, see G.S. 143-215.22I.

### § 153A-286. Law with respect to riparian rights not changed.

Nothing in this Article changes or modifies existing common or statute law with respect to the relative rights of riparian owners or others concerning the use of or disposal of water in the streams of North Carolina. (1961, c. 1001, s. 1; 1973, c. 822, s. 1.)

### § 153A-287: Repealed by Session Laws 1993, c. 348, s. 5.

**Cross References.** — This section, concerning the prohibition of diversion of water from certain river basins, was repealed by Session

Laws 1993, c. 348, s. 5, effective January 1, 1994. For present similar provisions, see G.S. 143-215.22I.

### § 153A-288. Venue for actions by riparian owners.

Any riparian owner alleging injury as a result of an act taken pursuant to this Article by a county or city acting jointly or by a joint agency may maintain an action for relief against the act (i) in the county where the land of the riparian owner lies, (ii) in the county taking the action, or (iii) in any county in which the city or joint agency is located or operates. (1961, c. 1001, s. 1; 1973, c. 822, s. 1.)

§§ 153A-289, 153A-290: Reserved for future codification purposes.

### Part 3. Special Provisions for Solid Waste Collection and Disposal.

#### § 153A-291. Cooperation between the Department of Transportation and any county in establishing or operating solid waste disposal facilities.

A county and the Department of Transportation may enter into an agreement under which the Department of Transportation will make available to the county the use of equipment and prison and other labor in order to establish or operate solid waste disposal facilities within the county. The county shall reimburse the Department of Transportation for the cost of providing the equipment and labor. The agreement shall specify the work to be done thereunder and shall set forth the basis for reimbursement. (1967, c. 707; 1973, c. 507, s. 5; c. 822, s. 1; 1977, c. 464, s. 34.)

#### CASE NOTES

Cited in *Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997).

#### § 153A-292. County collection and disposal facilities.

(a) The board of county commissioners of any county may establish and operate solid waste collection and disposal facilities in areas outside the corporate limits of a city. The board may by ordinance regulate the use of a disposal facility provided by the county, the nature of the solid wastes disposed of in a facility, and the method of disposal. The board may contract with any city, individual, or privately owned corporation to collect and dispose of solid waste in the area. Counties and cities may establish and operate joint collection and disposal facilities. A joint agreement shall be in writing and executed by the governing bodies of the participating units of local government.

(b) The board of county commissioners may impose a fee for the collection of solid waste. The fee may not exceed the costs of collection.

The board of county commissioners may impose a fee for the use of a disposal facility provided by the county. The fee for use may not exceed the cost of operating the facility and may be imposed only on those who use the facility. The fee for use may vary based on the amount, characteristics, and form of recyclable materials present in solid waste brought to the facility for disposal. A county may not impose a fee for the use of a disposal facility on a city located in the county or a contractor or resident of the city unless the fee is based on a schedule that applies uniformly throughout the county.

The board of county commissioners may impose a fee for the availability of a disposal facility provided by the county. A fee for availability may not exceed the cost of providing the facility and may be imposed on all improved property in the county that benefits from the availability of the facility. A county may not impose an availability fee on property whose solid waste is collected by a county, a city, or a private contractor for a fee if the fee imposed by a county, a city, or a private contractor for the collection of solid waste includes a charge for the availability and use of a disposal facility provided by the county. Property served by a private contractor who disposes of solid waste collected from the property in a disposal facility provided by a private contractor is not

considered to benefit from a disposal facility provided by the county and is not subject to a fee imposed by the county for the availability of a disposal facility provided by the county.

In determining the costs of providing and operating a disposal facility, a county may consider solid waste management costs incidental to a county's handling and disposal of solid waste at its disposal facility, including the costs of the methods of solid waste management specified in G.S. 130A-309.04(a) of the Solid Waste Management Act of 1989. A fee for the availability or use of a disposal facility may be based on the combined costs of the different disposal facilities provided by the county.

(c) The board of county commissioners may use any suitable vacant land owned by the county for the site of a disposal facility, subject to the permit requirements of Article 9 of Chapter 130A of the General Statutes. If the county does not own suitable vacant land for a disposal facility, it may acquire suitable land by purchase or condemnation. The board may erect a gate across a highway that leads directly to a disposal facility operated by the county. The gate may be erected at or in close proximity to the boundary of the disposal facility. The county shall pay the cost of erecting and maintaining the gate.

(d), (e) Repealed by Session Laws 1991, c. 652, s. 1.

(f) This section does not prohibit a county from providing aid to low-income persons to pay all or part of the cost of solid waste management services for those persons. (1961, c. 514, s. 1; 1971, c. 568; 1973, c. 535; c. 822, s. 2; 1981, c. 919, s. 22; 1989 (Reg. Sess., 1990), c. 1009, s. 3; 1991, c. 652, s. 1; 1995 (Reg. Sess., 1996), c. 594, s. 27.)

**Editor's Note.** — The above section was enacted by Session Laws 1973, c. 535, and codified as § 153-274. As directed by Session

Laws 1973, c. 822, s. 2, it has also been codified as § 153A-292.

#### CASE NOTES

**Property Under Consideration for Annexation into Municipality.** — When a county initiates condemnation of property for a sanitary landfill, and the property is being considered for voluntary annexation into a municipality, the county may proceed with the condemnation action. The county is entitled to an injunction enjoining the annexation proceeding, and the property owners and the municipality may raise the proposed annexation in the answer to the condemnation complaint, for appropriate consideration by the court. *Yandle v. Mecklenburg County*, 85 N.C. App. 382, 355 S.E.2d 216, cert. denied, 320 N.C. 798, 361 S.E.2d 91 (1987).

**Landfill fees, like sewer service charges, are neither taxes nor assessments, but are tolls or rents** for benefits received by the use

of the landfill. *Barnhill San. Serv., Inc. v. Gaston County*, 87 N.C. App. 532, 362 S.E.2d 161 (1987), aff'd, 321 N.C. 742, 366 S.E.2d 856 (1988).

**Municipality Status Not Available to Privately Owned Corporation to Challenge Validity of an Ordinance.** — Where the record revealed that plaintiff was a privately owned corporation, it could not assert the status of a municipality in order to challenge the validity of an ordinance, as an agent of the municipality. *Barnhill San. Serv., Inc. v. Gaston County*, 87 N.C. App. 532, 362 S.E.2d 161 (1987), aff'd, 321 N.C. 742, 366 S.E.2d 856 (1988).

**Stated** in *Davidson County v. City of High Point*, 85 N.C. App. 26, 354 S.E.2d 280 (1987).

#### OPINIONS OF ATTORNEY GENERAL

**The 1971 General Assembly Gave Its Express Approval to the Levy of Taxes for Garbage Collection and Disposal.** — See opinion of Attorney General to Mr. Edward H. McCormick, Harnett County Attorney, 41 N.C.A.G. 756 (1972), issued under former law.

**Counties Are Required to Charge Fees Sufficient to Defray Costs of Garbage Collection.** — See opinion of Attorney General to Mr. Bill Summerlin, 43 N.C.A.G. 41 (1973), issued under former law.

**County Ordinances Involving Sanita-**

**tion May Not Be Less Stringent Than State Regulations Adopted Pursuant to Former § 130-166.18.** — See opinion of Attorney Gen-

eral to Mr. R. Kason Keiger, Town Attorney, Kernersville, N.C., 44 N.C.A.G. 40 (1974).

**§ 153A-293. (See editor’s note) Collection of fees for solid waste disposal facilities and solid waste collection services.**

A county may adopt an ordinance providing that any fee imposed under G.S. 153A-292 may be billed with property taxes, may be payable in the same manner as property taxes, and, in the case of nonpayment, may be collected in any manner by which delinquent personal or real property taxes can be collected. If an ordinance states that delinquent fees can be collected in the same manner as delinquent real property taxes, the fees are a lien on the real property described on the bill that includes the fee. (1989, c. 591, ss. 1, 2; 1989 (Reg. Sess., 1990), cc. 905, 938, 940, 974, 1017; 1991, c. 652, s. 2; 1991 (Reg. Sess., 1992), c. 1007, s. 26.)

**Editor’s Note.** — This section was originally derived from Session Laws 1989, c. 591, effective July 6, 1989, and was applicable to fees imposed on or after April 1, 1989. As enacted, c. 591 was applicable to Ashe, Robeson and Wayne Counties only. The section was made applicable to additional counties by Session Laws 1989 (Reg. Sess., 1990), as follows: Chapter 905, effective July 13, 1990, made this section applicable to Alleghany, Caswell, Richmond, and Watauga; c. 938, effective July 17, 1990, and applicable to fees imposed on or after Jan. 1, 1991, made this section applicable to Polk, Transylvania, and Cleveland; c. 940, effective July 17, 1990, made this section applicable to Duplin; c. 974, effective July 19, 1990, made this section applicable to Burke, Gaston, Lee, Lenoir, and Washington; c. 1017, effective July 26, 1990, made this section applicable to

Anson and Montgomery.

Section 6 of Session Laws 1991, c. 652 provides: “Chapters 591, 905, 938, 940, 974, 1007, and 1017 of the 1989 Session Laws are repealed. An ordinance adopted under a local act that is repealed by this act is considered to have been adopted under G.S. 153A-293, as amended by this act.”

Session Laws 1991, c. 652, s. 6, as amended by Session Laws 1991 (Reg. Sess., 1992), c. 1007, s. 26, provides: “Chapters 591, 905, 938, 940, 974, 1007, and 1017 of the 1989 Session Laws are repealed to clarify that G.S. 153A-293, as amended by this act, is a statewide statute and not a local statute. An ordinance adopted under a local act that is repealed by this act is considered to have been adopted under G.S. 153A-293, as amended by this act.”

**§ 153A-294. Solid waste defined.**

As used in this Article, “solid waste” means nonhazardous solid waste, that is, solid waste as defined in G.S. 130A-290 but not including hazardous waste. (1991 (Reg. Sess., 1992), c. 1013, s. 4.)

**Editor’s Note.** — Session Laws 1991 (Reg. Sess., 1992), c. 1013, which enacted this section, in s. 8 provides: “Any contract for solid waste collection or disposal entered into by any county, city, or town that would have been lawful if this act had been in effect at the time the contract was entered into is validated. The provisions of this act that limit a contract or

franchise for the collection and disposal of solid waste to a period of not more than 30 years shall not be construed to invalidate any contract or franchise for a longer period up to 60 years that was entered into by any county, city, or town prior to the date this act is effective.” The act became effective July 22, 1992.

**§§ 153A-295 through 153A-299:** Reserved for future codification purposes.

## Part 4. Long Term Contracts for Disposal of Solid Waste.

**§§ 153A-299.1 through 153A-299.6:** Repealed by Session Laws 1991 (Regular Session, 1992), c. 1013, s. 5.

**Editor's Note.** — Session Laws 1991 (Reg. Sess., 1992), c. 1013, which repealed this part, in s. 8 provides: "Any contract for solid waste collection or disposal entered into by any county, city, or town that would have been lawful if this act had been in effect at the time the contract was entered into is validated. The provisions of this act that limit a contract or franchise for the collection and disposal of solid waste to a period of not more than 30 years shall not be construed to invalidate any contract or franchise for a longer period up to 60 years that was entered into by any county, city, or town prior to the date this act is effective." The act became effective July 22, 1992.

Session Laws 1991 (Reg. Sess., 1992), c. 763, s. 2, provides: "Any contract for solid waste

disposal entered into by Bladen, Cumberland, and Hoke Counties which would have been lawful if this act had been in effect at the time the contract was entered into is ratified." The act was ratified June 9, 1992.

Session Laws 1991 (Reg. Sess., 1992), c. 763, s. 1, effective June 9, 1992, inserted "Bladen County," "Cumberland County," and "Hoke County" in § 153A-299.6 prior to its repeal.

Session Laws 1991 (Reg. Sess., 1992), c. 773, s. 1, effective June 22, 1992, inserted "Bertie County," "Chowan County," "Hertford County," and "Tyrrell County" in § 153A-299.6 prior to its repeal.

Session Laws 1991 (Reg. Sess., 1992), c. 775, s. 1, effective June 22, 1992, inserted "Moore County" in § 153A-299.6, prior to its repeal.

## ARTICLE 16.

### *County Service Districts; County Research and Production Service Districts.*

#### Part 1. County Service Districts.

### **§ 153A-300. Title; effective date.**

This Article may be cited as "The County Service District Act of 1973," and is enacted pursuant to Article V, Sec. 2(4) of the Constitution of North Carolina, effective July 1, 1973. (1973, c. 489, s. 1; c. 822, s. 2.)

**Editor's Note.** — Sections 153A-300 through 153A-308 were originally codified as §§ 153-383 through 153-391. They have been recodified in Chapter 153A as directed by Session Laws 1973, c. 822, s. 2.

Session Laws 1985, c. 435, s. 1 designated existing Article 16 as Part 1 of Article 16, entitled "County Service Districts," and added new Part 2 of Article 16.

### **§ 153A-301. Purposes for which districts may be established.**

(a) The board of commissioners of any county may define any number of service districts in order to finance, provide, or maintain for the districts one or more of the following services, facilities and functions in addition to or to a greater extent than those financed, provided or maintained for the entire county:

- (1) Beach erosion control and flood and hurricane protection works.
- (2) Fire protection.

- (3) Recreation.
- (4) Sewage collection and disposal systems of all types, including septic tank systems or other on-site collection or disposal facilities or systems.
- (5) Solid waste collection and disposal systems.
- (6) Water supply and distribution systems.
- (7) Ambulance and rescue.
- (8) Watershed improvement projects, including but not limited to watershed improvement projects as defined in Chapter 139 of the General Statutes; drainage projects, including but not limited to the drainage projects provided for by Chapter 156 of the General Statutes; and water resources development projects, including but not limited to the federal water resources development projects provided for by Article 21 of Chapter 143 of the General Statutes.
- (9) Cemeteries.
- (10) Law enforcement if all of the following apply:
  - a. The population of the county is over 500,000 according to the most recent federal decennial census.
  - b. The county has an interlocal agreement with a city in the county under which the city provides law enforcement services in the entire unincorporated area of the county.
  - c. The county will pay to the city the following percentages of the city-county police department budget if there are no significant changes to the city's statutory annexation authority:
    1. 9.60% for fiscal years 1995-96 and 1996-97.
    2. 7.60% for fiscal years 1997-98 and 1998-99.
    3. 5.60% for fiscal years 1999-2000 and 2000-2001.
    4. 3.60% for fiscal years 2001-02 and 2002-03.
    5. 1.60% for fiscal years 2003-04 and 2004-05.

Provided, if the difference between the ratio of the population in the unincorporated area to the total population served by the city-county police department and the rate for the current year as stated above is greater than fifteen percent (15%), the county's agreement to pay such percentages can be amended to reflect that difference.

(b) The General Assembly finds that coastal-area counties have a special problem with lack of maintenance of platted rights-of-way, resulting in ungraded sand travelways deviating from the original rights-of-way and encroaching on private property, and such cartways exhibit poor drainage and are blocked by junk automobiles.

(c) To address the problem described in subsection (b), the board of commissioners of any coastal-area county as defined by G.S. 113A-103(2) may define any number of service districts in order to finance, provide, or maintain for the districts one or more of the following services, facilities and functions in addition to or to a greater extent than those financed, provided or maintained for the entire county:

- (1) Removal of junk automobiles; and
- (2) Street maintenance.

(d) The board of commissioners of a county that contains a protected mountain ridge, as defined by G.S. 113A-206(6), may define any number of service districts, composed of subdivision lots within one or more contiguous subdivisions that are served by common public roads, to finance for the district the maintenance of such public roads that are either located in the district or provide access to some or all lots in the district from a State road, where some portion of those roads is not subject to compliance with the minimum standards of the Board of Transportation set forth in G.S. 136-102.6. The

service district or districts created shall include only subdivision lots within the subdivision, and one or more additional contiguous subdivisions, where the property owners' association, whose purpose is to represent these subdivision lots, agrees to be included in the service district. For subdivision lots in an additional contiguous subdivision or for other adjacent or contiguous property to be annexed according to G.S. 153A-303, the property owners' association representing the subdivision or property to be annexed must approve the annexation. For the purposes of this subsection: (i) "subdivision lots" are defined as either separate tracts appearing of record upon a recorded plat, or other lots, building sites, or divisions of land for sale or building development for residential purposes; and (ii) "public roads" are defined as roads that are in actual open use as public vehicular areas, or dedicated or offered for dedication to the public use as a road, highway, street, or avenue, by a deed, grant, map, or plat, and that have been constructed and are in use by the public, but that are not currently being maintained by any public authority. (1973, c. 489, s. 1; c. 822, s. 2; c. 1375; 1979, c. 595, s. 1; c. 619, s. 6; 1983 (Reg. Sess., 1984), c. 1078, s. 1; 1989, c. 620; 1993, c. 378, s. 1; 1995, c. 354, s. 1; c. 434, s. 1; 1997-456, s. 24.)

**Local Modification.** — Gaston: 1977, c. 336.

## § 153A-302. Definition of service districts.

(a) Standards. — In determining whether to establish a proposed service district, the board of commissioners shall consider all of the following:

- (1) The resident or seasonal population and population density of the proposed district.
- (2) The appraised value of property subject to taxation in the proposed district.
- (3) The present tax rates of the county and any cities or special districts in which the district or any portion thereof is located.
- (4) The ability of the proposed district to sustain the additional taxes necessary to provide the services planned for the district.
- (5) If it is proposed to furnish water, sewer, or solid waste collection services in the district, the probable net revenues of the projects to be financed and the extent to which the services will be self-supporting.
- (6) Any other matters that the commissioners believe to have a bearing on whether the district should be established.

(a1) Findings. — The board of commissioners may establish a service district if, upon the information and evidence it receives, the board finds that all of the following apply:

- (1) There is a demonstrable need for providing in the district one or more of the services listed in G.S. 153A-301.
- (2) It is impossible or impracticable to provide those services on a countywide basis.
- (3) It is economically feasible to provide the proposed services in the district without unreasonable or burdensome annual tax levies.
- (4) There is a demonstrable demand for the proposed services by persons residing in the district.

Territory lying within the corporate limits of a city or sanitary district may not be included unless the governing body of the city or sanitary district agrees by resolution to such inclusion.

(b) Report. — Before the public hearing required by subsection (c), the board of commissioners shall cause to be prepared a report containing:

- (1) A map of the proposed district, showing its proposed boundaries;

- (2) A statement showing that the proposed district meets the standards set out in subsection (a); and
- (3) A plan for providing one or more of the services listed in G.S. 153A-301 to the district.

The report shall be available for public inspection in the office of the clerk to the board for at least four weeks before the date of the public hearing.

(c) Hearing and Notice. — The board of commissioners shall hold a public hearing before adopting any resolution defining a new service district under this section. Notice of the hearing shall state the date, hour, and place of the hearing and its subject, and shall include a map of the proposed district and a statement that the report required by subsection (b) is available for public inspection in the office of the clerk to the board. The notice shall be published at least once not less than one week before the date of the hearing. In addition, it shall be mailed at least four weeks before the date of the hearing by any class of U.S. mail which is fully prepaid to the owners as shown by the county tax records as of the preceding January 1 (and at the address shown thereon) of all property located within the proposed district. The person designated by the board to mail the notice shall certify to the board that the mailing has been completed and his certificate is conclusive in the absence of fraud.

(d) Effective Date. — The resolution defining a service district shall take effect at the beginning of a fiscal year commencing after its passage, as determined by the board of commissioners.

(e) Exceptions For Countywide District. — The following requirements do not apply to a board of commissioners that proposes to create a law enforcement service district pursuant to G.S. 153A-301(a)(10) that covers the entire unincorporated area of the county:

- (1) The requirement that the district cannot be created unless the board makes the finding in subdivision (a1)(2) of this section.
- (2) The requirement in subsection (c) of this section to notify each property owner by mail, if the board publishes a notice of its proposal to establish the district, once a week for four successive weeks before the date of the hearing required by that subsection. (1973, c. 489, s. 1; c. 822, s. 2; 1981, c. 53, s. 1; 1995, c. 354, s. 2.)

### § 153A-303. Extension of service districts.

(a) Standards. — The board of commissioners may by resolution annex territory to any service district upon finding that:

- (1) The area to be annexed is contiguous to the district, with at least one eighth of the area's aggregate external boundary coincident with the existing boundary of the district; and
- (2) That the area to be annexed requires the services of the district.

(b) Annexation by Petition. — The board of commissioners may also by resolution extend by annexation the boundaries of any service district when one hundred percent (100%) of the real property owners of the area to be annexed have petitioned the board for annexation to the service district.

(c) Territory lying within the corporate limits of a city or sanitary district may not be annexed to a service district unless the governing body of the city or sanitary district agrees by resolution to such annexation.

(d) Report. — Before the public hearing required by subsection (e), the board shall cause to be prepared a report containing:

- (1) A map of the service district and the adjacent territory, showing the present and proposed boundaries of the district;
- (2) A statement showing that the area to be annexed meets the standards and requirements of subsections (a), (b), and (c); and
- (3) A plan for extending services to the area to be annexed.

The report shall be available for public inspection in the office of the clerk to the board for at least two weeks before the date of the public hearing.

(e) Hearing and Notice. — The board shall hold a public hearing before adopting any resolution extending the boundaries of a service district. Notice of the hearing shall state the date, hour and place of the hearing and its subject, and shall include a statement that the report required by subsection (d) is available for inspection in the office of the clerk to the board. The notice shall be published at least once not less than one week before the date of the hearing. In addition, the notice shall be mailed at least four weeks before the date of the hearing to the owners as shown by the county tax records as of the preceding January 1 of all property located within the area to be annexed. The notice may be mailed by any class of U.S. mail which is fully prepaid. The person designated by the board to mail the notice shall certify to the board that the mailing has been completed, and his certificate shall be conclusive in the absence of fraud.

(f) Effective Date. — The resolution extending the boundaries of the district shall take effect at the beginning of a fiscal year commencing after its passage, as determined by the board. (1973, c. 489, s. 1; c. 822, s. 2; 1981, c. 53, s. 2.)

### § 153A-304. Consolidation of service districts.

(a) The board of commissioners may by resolution consolidate two or more service districts upon finding that:

- (1) The districts are contiguous or are in a continuous boundary;
- (2) The services provided in each of the districts are substantially the same; or
- (3) If the services provided are lower for one of the districts, there is a need to increase those services for that district to the level of that enjoyed by the other districts.

(b) Report. — Before the public hearing required by subsection (c), the board of commissioners shall cause to be prepared a report containing:

- (1) A map of the districts to be consolidated;
- (2) A statement showing the proposed consolidation meets the standards of subsection (a); and
- (3) If necessary, a plan for increasing the services for one of the districts so that they are substantially the same throughout the consolidated district.

The report shall be available in the office of the clerk to the board for at least two weeks before the public hearing.

(c) Hearing and Notice. — The board of commissioners shall hold a public hearing before adopting any resolution consolidating service districts. Notice of the hearing shall state the date, hour, and place of the hearing and its subject, and shall include a statement that the report required by subsection (b) is available for inspection in the office of the clerk to the board. The notice shall be published at least once not less than one week before the date of the hearing. In addition, the notice shall be mailed at least four weeks before the hearing to the owners as shown by the county tax records as of the preceding January 1 of all property located within the consolidated district. The notice may be mailed by any class of U.S. mail which is fully prepaid. The person designated by the board to mail the notice shall certify to the board that the mailing has been completed, and his certificate shall be conclusive in the absence of fraud.

(d) Effective Date. — The consolidation of service districts shall take effect at the beginning of a fiscal year commencing after passage of the resolution of consolidation, as determined by the board. (1973, c. 489, s. 1; c. 822, s. 2; 1981, c. 53, s. 2.)

### § 153A-304.1. Reduction in district after annexation.

(a) When the whole or any portion of a county service district organized for fire protection purposes under G.S. 153A-301(2) has been annexed by a municipality furnishing fire protection to its citizens, and the municipality had not agreed to allow territory within it to be within the county service district under G.S. 153A-302(a), then such county service district or the portion thereof so annexed shall immediately thereupon cease to be a county service district or a portion of a county service district; and such district or portion thereof so annexed shall no longer be subject to G.S. 153A-307 authorizing the board of county commissioners to levy and collect a tax in such district for the purpose of furnishing fire protection therein.

(b) Nothing in this section prevents the board of county commissioners from levying and collecting taxes for fire protection in the remaining portion of a county service district not annexed by a municipality.

(c) When all or part of a county service district is annexed, and the effective date of the annexation is a date other than a date in the month of June, the amount of the county service district tax levied on property in the district for the fiscal year in which municipal taxes are prorated under G.S. 160A-58.10 shall be multiplied by the following fraction: the denominator shall be 12 and the numerator shall be the number of full calendar months remaining in the fiscal year following the day on which the annexation becomes effective. For each owner, the product of the multiplication is the prorated fire protection payment. The finance officer of the city shall obtain from the tax supervisor [assessor] or tax collector of the county where the annexed territory was located a list of the owners of property on which fire protection district taxes were levied in the territory being annexed, and the city shall, no later than 90 days after the effective date of the annexation, pay the amount of the prorated fire protection district payment to the owners of that property. Such payments shall come from any funds not otherwise restricted by law.

(d) Whenever a city is required to make fire protection district tax payments by subsection (c) of this section, and the city has paid or has contracted to pay to a rural fire department funds under G.S. 160A-37.1 or G.S. 160A-49.1, the county shall pay to the city from funds of the county service district an amount equal to the amount paid by the city (or to be paid by the city) to a rural fire department under G.S. 160A-37.1 or G.S. 160A-49.1 on account of annexation of territory in the county service district for the number of months in that fiscal year used in calculating the numerator under subsection (c) of this section; provided that the required payments by the county to the city shall not exceed the total of fire protection district payments made to taxpayers in the district on account of that annexation. (1987, c. 711, s. 1.)

**Editor's Note.** — Session Laws 1987, c. 711, s. 3 made this section effective with respect to annexations effective on or after August 1, 1987.

The word "assessor" has been inserted in

brackets following "tax supervisor" in subsection (c), in view of Session Laws 1987, c. 45, which changed the title "tax supervisor" to "assessor" in numerous sections of the General Statutes.

### § 153A-304.2. Reduction in district after annexation to Chapter 69 fire district.

(a) When the whole or any portion of a county service district organized for fire protection purposes under G.S. 153A-301(a)(2) has been annexed into a fire protection district created under Chapter 69 of the General Statutes, then such county service district or the portion thereof so annexed shall immediately thereupon cease to be a county service district or a portion of a county service district; and such district or portion thereof so annexed shall no longer be

subject to G.S. 153A-307 authorizing the board of county commissioners to levy and collect a tax in such district for the purpose of furnishing fire protection therein.

(b) Nothing in this section prevents the board of county commissioners from levying and collecting taxes for fire protection in the remaining portion of a county service district not annexed into a fire protection district. This section does not affect the rights or liabilities of the county, a taxpayer, or other person concerning taxes previously levied. (1989, c. 622.)

**§ 153A-305. Required provision or maintenance of services.**

(a) New District. — When a county defines a new service district, it shall provide, maintain, or let contracts for the services for which the residents of the district are being taxed within a reasonable time, not to exceed one year, after the effective date of the definition of the district.

(b) Extended District. — When a county annexes territory to a service district, it shall provide, maintain, or let contracts for the services provided or maintained throughout the district to the residents of the area annexed to the district within a reasonable time, not to exceed one year, after the effective date of the annexation.

(c) Consolidated District. — When a county consolidates two or more service districts, one of which has had provided or maintained a lower level of services, it shall increase the services within that district (or let contracts therefor) to a level comparable to those provided or maintained elsewhere in the consolidated district within a reasonable time, not to exceed one year, after the effective date of the consolidation. (1973, c. 489, s. 1; c. 822, s. 2.)

**Local Modification.** — Onslow: 1975, c. 757.

**§ 153A-306. Abolition of service districts.**

Upon finding that there is no longer a need for a particular service district and that there are no outstanding bonds or notes issued to finance projects in the district, the board of commissioners may by resolution abolish that district. The board shall hold a public hearing before adopting a resolution abolishing a district. Notice of the hearing shall state the date, hour and place of the hearing, and its subject, and shall be published at least once not less than one week before the date of the hearing. The abolition of any service district shall take effect at the end of a fiscal year following passage of the resolution, as determined by the board. (1973, c. 489, s. 1; c. 822, s. 2.)

**§ 153A-307. Taxes authorized; rate limitation.**

A county may levy property taxes within defined service districts in addition to those levied throughout the county, in order to finance, provide or maintain for the districts services provided therein in addition to or to a greater extent than those financed, provided or maintained for the entire county. In addition, a county may allocate to a service district any other revenues whose use is not otherwise restricted by law.

Property subject to taxation in a newly established district or in an area annexed to an existing district is that subject to taxation by the county as of the preceding January 1.

Property taxes may not be levied within any district established pursuant to this Article in excess of a rate on each one hundred dollars (\$100.00) value of

property subject to taxation which, when added to the rate levied countywide for purposes subject to the rate limitation, would exceed the rate limitation established in G.S. 153A-149(c), unless the portion of the rate in excess of this limitation is submitted to and approved by a majority of the qualified voters residing within the district. Any referendum held pursuant to this paragraph shall be held and conducted as provided in G.S. 153A-149. (1973, c. 489, s. 1; c. 822, s. 2.)

### **§ 153A-308. Bonds authorized.**

A county may issue its general obligation bonds under the Local Government Bond Act to finance services, facilities, or functions provided within a service district. If a proposed bond issue is required by law to be submitted to and approved by the voters of the county, and if the proceeds of the proposed bond issue are to be used in connection with a service that is or, if the bond issue is approved, will be provided only for one or more service districts or at a higher level in service districts than countywide, the proposed bond issue must be approved concurrently by a majority of those voting throughout the entire county and by a majority of the total of those voting in all of the affected or to-be-affected service districts. (1973, c. 489, s. 1; c. 822, s. 2.)

### **§ 153A-309. EMS services in fire protection districts.**

(a) If a service district is established under this Article for fire protection purposes under G.S. 153A-301(a)(2), (including a district established with a rate limitation under G.S. 153A-309.2), and it was not also established under this Article for ambulance and rescue purposes under G.S. 153A-301(a)(7), the board of county commissioners may, by resolution, permit the service district to provide emergency medical, rescue, and/or ambulance services, and may levy property taxes for such purposes under G.S. 153A-307, but if the district was established under G.S. 153A-309.2, the rate limitation established under that section shall continue to apply.

(b) The resolution expanding the purposes of the district under this section shall take effect at the beginning of a fiscal year commencing after its passage. (1983, c. 642; 1989, c. 559.)

**§ 153A-309.1:** Reserved for future codification purposes.

### **§ 153A-309.2. Rate limitation in certain districts.**

(a) In connection with the establishment of a service district for fire protection as provided by G.S. 153A-301(2), if the board of commissioners adopts a resolution within 90 days prior to the public hearing required by G.S. 153A-302(c) but prior to the first publication of notice required by subsection (b) of this section, which resolution states that property taxes within a district may not be levied in excess of a rate of fifteen cents (15¢) on each one hundred dollars (\$100.00) of property subject to taxation, then property taxes may not be levied in that service district in excess of that rate.

(b) Whenever a service district is established under this section, instead of the procedures for hearing and notice under G.S. 153A-302(c), the board of commissioners shall hold a public hearing before adopting any resolution defining a new service district under this section. Notice of the hearing shall state the date, hour and place of the hearing and its subject, and shall include a map of the proposed district and a statement that the report required by G.S. 153A-302(b) is available for public inspection in the office of the clerk to the board. The notice shall be published at least twice, with one publication not

less than two weeks before the hearing, and the other publication on some other day not less than two weeks before the hearing. (1985, c. 724.)

### § 153A-310. Rate limitation in certain districts.

(a) In connection with the establishment of a service district for ambulance and rescue as provided by G.S. 153A-301(7), if the board of commissioners adopts a resolution within 90 days prior to the public hearing required by G.S. 153A-302(c) but prior to the first publication of notice required by subsection (b) of this section, which resolution states that property taxes within a district may not be levied in excess of a rate of five cents (5¢) on each one hundred dollars (\$100.00) of property subject to taxation, then property taxes may not be levied in that service district in excess of that rate.

(b) Whenever a service district is established under this section, instead of the procedures for hearing and notice under G.S. 153A-302(c), the board of commissioners shall hold a public hearing before adopting any resolution defining a new service district under this section. Notice of the hearing shall state the date, hour and place of the hearing and its subject, and shall include a map of the proposed district and a statement that the report required by G.S. 153A-302(b) is available for public inspection in the office of the clerk to the board. The notice shall be published at least twice, with one publication not less than two weeks before the hearing, and the other publication on some other day not less than two weeks before the hearing. (1985, c. 430, s. 1.)

## Part 2. County Research and Production Service Districts.

### § 153A-311. Purposes for which districts may be established.

The board of commissioners of any county may define a county research and production service district in order to finance, provide, and maintain for the district any service, facility, or function that a county or a city is authorized by general law to provide, finance, or maintain. Such a service, facility, or function shall be financed, provided, or maintained in the district either in addition to or to a greater extent than services, facilities, or functions are financed, provided, or maintained for the entire county. (1985, c. 435, s. 1.)

**Editor's Note.** — Session Laws 1985, c. 435, s. 2 prohibited any municipality from annexing a described tract of land in Durham and Wake Counties except under Parts 1 or 4 of Chapter

160A. The legal description of this tract can be found in c. 435, s. 2. The tract described is the Research Triangle Park, which is a county research and production service district.

### § 153A-312. Definition of research and production service district.

(a) Standards. — The board of commissioners may by resolution establish a research and production service district for any area of the county that, at the time the resolution is adopted, meets the following standards:

- (1) All real property in the district is being used for or is subject to covenants that limit its use to research or scientifically-oriented production or for associated commercial or institutional purposes.
- (2) The district contains at least 4,000 acres.
- (3) The district includes research and production facilities that in combination employ at least 5,000 persons.

- (4) All real property located in the district was at one time or is currently owned by a nonprofit corporation, which developed or is developing the property as a research and production park.
- (5) A petition requesting creation of the district signed by at least fifty percent (50%) of the owners of real property in the district who own at least fifty percent (50%) of total area of the real property in the district has been presented to the board of commissioners. In determining the total area of real property in the district and the number of owners of real property, there shall be excluded (1) real property exempted from taxation and real property classified and excluded from taxation and (2) the owners of such exempted or classified and excluded property.
- (6) The district has no more than 25 permanent residents.
- (7) There exists in the district an association of owners and tenants, to which at least seventy-five percent (75%) of the owners of real property belong, which association can make the recommendations provided for in G.S. 153A-313.
- (8) There exist deed-imposed conditions, covenants, restrictions, and reservations that apply to all real property in the district other than property owned by the federal government.
- (9) No part of the district lies within the boundaries of any incorporated city or town.

The Board of Commissioners may establish a research and production service district if, upon the information and evidence it receives, the Board finds that:

- (1) The proposed district meets the standards set forth in this subsection; and
- (2) It is impossible or impracticable to provide on a countywide basis the additional or higher levels of services, facilities, or functions proposed for the district; and
- (3) It is economically feasible to provide the proposed services, facilities, or functions to the district without unreasonable or burdensome tax levies.

(b) Multi-County Districts. — If an area that meets the standards for creation of a research and production service district lies in more than one county, the boards of commissioners of those counties may adopt concurrent resolutions establishing a service district, even if that portion of the district lying in any one of the counties does not by itself meet the standards. Each of the county boards of commissioners shall follow the procedure set out in this section for creation of a service district.

If a multi-county service district is established, as provided in this subsection, the boards of commissioners of the counties involved shall jointly determine whether the same appraisal and assessment standards apply uniformly throughout the district. This determination shall be set out in concurrent resolutions of the boards. If the same appraisal and assessment standards apply uniformly throughout the district, the boards of commissioners of all the counties shall levy the same rate of tax for the district, so that a uniform rate of tax is levied for district purposes throughout the district. If the boards determine that the same standards do not apply uniformly throughout the district, the boards shall agree on the extent of divergence between the counties and on the resulting adjustments of tax rates that will be necessary in order that an effectively uniform rate of tax is levied for district purposes throughout the district.

The boards of commissioners of the counties establishing a multi-county service district pursuant to this subsection may, by concurrent resolution, provide for the administration of services within the district by one county on behalf of all the establishing counties.

(c) Report. — Before the public hearing required by subsection (d), the board of commissioners shall cause to be prepared a report containing:

- (1) A map of the proposed district, showing its proposed boundaries;
- (2) A statement showing that the proposed district meets the standards set out in subsection (a); and
- (3) A plan for providing one or more services, facilities, or functions to the district.

The report shall be available for public inspection in the office of the clerk to the board for at least four weeks before the date of the public hearing.

(d) Hearing and Notice. — The board of commissioners shall hold a public hearing before adopting any resolution defining a service district under this section. Notice of the hearing shall state the date, hour, and place of the hearing and its subject, and shall include a map of the proposed district and a statement that the report required by subsection (c) is available for public inspection in the office of the clerk to the board. The notice shall be published at least once not less than one week before the date of the hearing. In addition, it shall be mailed at least four weeks before the date of the hearing by any class of U.S. mail which is fully prepaid to the owners as shown by the county tax records as of the preceding January 1 (and at the address shown thereon) of all property located within the proposed district. The person designated by the board to mail the notice shall certify to the board that the mailing has been completed and his certificate is conclusive in the absence of fraud.

(e) Effective Date. — The resolution defining a service district shall take effect at the beginning of a fiscal year commencing after its passage, as determined by the board of commissioners. (1985, c. 435, s. 1.)

### § 153A-313. Advisory committee.

The board or boards of commissioners, in the resolution establishing a research and production service district, shall also provide for an advisory committee for the district. Such a committee shall have at least 10 members, serving terms as set forth in the resolution; one member shall be the representative of the developer of the research and production park. The resolution shall provide for the appointment or designation of a chairman. The board of commissioners or, in the case of a multi-county service district, the boards of commissioners shall appoint the members of the advisory committee. If a multi-county service district is established, the concurrent resolutions establishing the district shall provide how many members of the advisory committee are to be appointed by each board of commissioners. Before making the appointments, the appropriate board shall request the association of owners and tenants, required by G.S. 153A-312(a), to submit a list of persons to be considered for appointment to the committee; the association shall submit at least two names for each appointment to be made. Except as provided in the next two sentences, the board of commissioners shall make the appointments to the committee from the list of persons submitted. In addition, the developer of the research and production park shall appoint one person to the advisory committee as the developer's representative on the committee. In addition, in a single county service district, the board of commissioners may make two additional appointments of such other persons as the board of commissioners deems appropriate, and in a multi-county service district, each board of county commissioners may make one additional appointment of such other person as that board of commissioners deems appropriate. Whenever a vacancy occurs on the committee in a position filled by appointment by a board of commissioners, the appropriate board, before filling the vacancy, shall request the association to submit the names of at least two persons to be considered for the vacancy; and the board shall fill the vacancy by appointing

one of the persons so submitted, except that if the vacancy is in a position appointed by the board of commissioners under the preceding sentence of this section, the board of commissioners making that appointment shall fill the vacancy with such person as that board of commissioners deems appropriate.

Each year, before adopting the budget for the service district and levying the tax for the district, the board or boards of commissioners shall request recommendations from the advisory committee as to the level of services, facilities, or functions to be provided for the district for the ensuing year. The board or boards of commissioners shall, to the extent permitted by law, expend the proceeds of any tax levied for the district in the manner recommended by the advisory board. (1985, c. 435, s. 1.)

### § 153A-314. Extension of service districts.

(a) Standards. — A board of commissioners may by resolution annex territory to a research and production service district upon finding that:

- (1) The conditions, covenants, restrictions, and reservations required by G.S. 153A-312(a)(8) that apply to all real property in the research district, other than property owned by the federal government, also apply or will apply to the property, other than property owned by the federal government, to be annexed.
- (2) One hundred percent (100%) of the owners of real property in the area to be annexed have petitioned for annexation.
- (3) The district, following the annexation, will continue to meet the standards set out in G.S. 153A-312(a).
- (4) The area to be annexed requires the services, facilities, or functions financed, provided, or maintained for the district.
- (5) The area to be annexed is contiguous to the district.

(b) Report. — Before the public hearing required by subsection (c), the board shall cause to be prepared a report containing:

- (1) A map of the district and the adjacent territory proposed to be annexed, showing the present and proposed boundaries of the district; and
- (2) A statement showing that the area to be annexed meets the standards and requirements of subsection (a) of this section.

The report shall be available for public inspection in the office of the clerk to the board for at least four weeks before the date of the public hearing.

(c) Hearing and Notice. — The board shall hold a public hearing before adopting any resolution extending the boundaries of a service district. Notice of the hearing shall state the date, hour and place of the hearing and its subject, and shall include a statement that the report required by subsection (b) of this section is available for inspection in the office of the clerk to the board. The notice shall be published at least once not less than four weeks before the hearing. In addition, the notice shall be mailed at least four weeks before the date of the hearing by any class of U.S. mail which is fully prepaid to the owners as shown by the county tax records as of the preceding January 1 (and at the address shown thereon) of all property located within the area to be annexed. The person designated by the board to mail the notice shall certify to the board that the mailing has been completed, and the certificate shall be conclusive in the absence of fraud.

(d) Effective Date. — The resolution extending the boundaries of the district shall take effect at the beginning of a fiscal year commencing after its passage, as determined by the board. (1985, c. 435, s. 1.)

### **§ 153A-315. Required provision or maintenance of services.**

(a) New District. — When a county or counties define a research and production service district, it or they shall provide, maintain, or let contracts for the services for which the district is being taxed within a reasonable time, not to exceed one year, after the effective date of the definition of the district.

(b) Extended District. — When a territory is annexed to a research and production service district, the county or counties shall provide, maintain, or let contracts for the services provided or maintained throughout the district to property in the area annexed to the district within a reasonable time, not to exceed one year, after the effective date of the annexation. (1985, c. 435, s. 1.)

### **§ 153A-316. Abolition of service districts.**

A board or boards of county commissioners may by resolution abolish a research and production service district upon finding that (i) a petition requesting abolition, signed by at least fifty percent (50%) of the owners of real property in the district who own at least fifty percent (50%) of the total area of real property in the district, has been submitted to the board or boards; and (ii) there is no longer a need for such service district. In determining the total area of real property in the district and the number of owners of real property, there shall be excluded (1) real property exempted from taxation and real property classified and excluded from taxation and (2) the owners of such exempted or classified and excluded property. The board or boards shall hold a public hearing before adopting a resolution abolishing a district. Notice of the hearing shall state the date, hour, and place of the hearing, and its subject, and shall be published at least once not less than one week before the date of the hearing. The abolition of any service district shall take effect at the end of a fiscal year following passage of the resolution, as determined by the board or boards. If a multi-county service district is established, it may be abolished only by concurrent resolution of the board of commissioners of each county in which the district is located. (1985, c. 435, s. 1.)

### **§ 153A-317. Taxes authorized; rate limitation.**

A county may levy property taxes within a research and production service district in addition to those levied throughout the county, in order to finance, provide, or maintain for the district services provided therein in addition to or to a greater extent than those financed, provided, or maintained for the entire county. In addition, a county may allocate to a service district any other revenues whose use is not otherwise restricted by law. The proceeds of taxes only within a service district may be expended only for services provided for the district.

Property subject to taxation in a newly established district or in an area annexed to an existing district is that subject to taxation by the county as of the preceding January 1.

Such additional property taxes may not be levied within any district established pursuant to this Article in excess of a rate of ten cents (10¢) on each one hundred dollars (\$100.00) value of property subject to taxation. (1985, c. 435, s. 1.)

## **ARTICLE 17.**

**§§ 153A-318, 153A-319:** Reserved for future codification purposes.

## ARTICLE 18.

*Planning and Regulation of Development.*

## Part 1. General Provisions.

## § 153A-320. Territorial jurisdiction.

Each of the powers granted to counties by this Article, by Chapter 157A, and by Chapter 160A, Article 19 may be exercised throughout the county except as otherwise provided in G.S. 160A-360. (1959, c. 1006, s. 1; c. 1007; 1965, c. 194, s. 2; c. 195; 1969, c. 1066, s. 1; 1973, c. 822, s. 1.)

**Local Modification.** — (As to Article 18, Parts 1, 2, and 3) Cherokee: 1989 (Reg. Sess., 1990), c. 1049; Mecklenburg: 2000-77, as amended by 2001-275; Wake: 1998-192; 2000-66, s. 1; city of Raleigh: 1998-192; 2000-66, s. 1; town of Apex: 1998-192; 2000-66, s. 1; town of

Cary: 1998-192; 2000-66, s. 1; town of Garner: 1998-192; 2000-66, s. 1.

**Editor's Note.** — Chapter 157A, referred to in this section, was transferred to Chapter 160A, Article 19, Part 3B, by Session Laws 1973, c. 426, s. 62.

## CASE NOTES

**A county sign ordinance did not violate the equal protection clause** of U.S. Const., Amend. XIV or N.C. Const., Art. I, § 19, because the county would not enforce the ordinance with respect to any person owning or operating a sign in certain municipalities within the county since the county could not exercise zoning authority within a city which had enacted a zoning ordinance and it could defer from zoning within cities. *County of Cumberland v. Eastern Fed. Corp.*, 48 N.C. App. 518, 269 S.E.2d 672, cert. denied, 301 N.C. 527, 273 S.E.2d 453 (1980).

**A county may not exercise jurisdiction over any part of a city** located within its borders. *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987).

**Statutes do not give a county authority over provision of sewer services within a city, or over newly annexed areas** of the city which also lie in the county. *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987).

**Use of City-Owned Sewage Treatment Plant Without Prior Approval of County.**

— Since county had no authority to restrict or regulate city's provision of sewer service to its residents, the city could use city-owned sewage treatment plant located outside the city but within the county, which was upgraded pursuant to the county's special use permit, with a condition attached to the permit requiring the county's prior approval of service to county citizens, to meet its statutory mandate to provide sewer service to residents in newly annexed areas without seeking the county's prior approval, even though the facility was located in the county. *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987).

**Cited** in *Guilford County Planning & Dev. Dep't v. Simmons*, 102 N.C. App. 325, 401 S.E.2d 659 (1991); *Vulcan Materials Co. v. Iredell County*, 103 N.C. App. 779, 407 S.E.2d 283 (1991).

## § 153A-321. Planning agency.

A county may by ordinance create or designate one or more agencies to perform the following duties:

- (1) Make studies of the county and surrounding areas;
- (2) Determine objectives to be sought in the development of the study area;
- (3) Prepare and adopt plans for achieving these objectives;
- (4) Develop and recommend policies, ordinances, administrative procedures, and other means for carrying out plans in a coordinated and efficient manner;

- (5) Advise the board of commissioners concerning the use and amendment of means for carrying out plans;
- (6) Exercise any functions in the administration and enforcement of various means for carrying out plans that the board of commissioners may direct;
- (7) Perform any other related duties that the board of commissioners may direct.

An agency created or designated pursuant to this section may include but shall not be limited to one or more of the following:

- (1) A planning board or commission of any size (with not fewer than three members) or composition considered appropriate, organized in any manner considered appropriate;
- (2) A joint planning board created by two or more local governments according to the procedures and provisions of Chapter 160A, Article 20, Part 1. (1945, c. 1040, s. 1; 1955, c. 1252; 1957, c. 947; 1959, c. 327, s. 1; c. 390; 1973, c. 822, s. 1; 1979, c. 611, s. 6; 1997-309, s. 5.)

**Legal Periodicals.** — For article, “Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical

Foundations of Government Land Use Deals,” see 65 N.C.L. Rev. 957 (1987).

#### CASE NOTES

**Amendment to county zoning ordinance** constituted a valid legislative prerogative to change the sanitary landfill use from a “special use permit” category to a “use by right under prescribed conditions” category and that section of the county zoning ordinance, which

allowed the county zoning administrator to approve the county’s permit application for the siting of a landfill, was constitutional and lawful on its face. *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 434 S.E.2d 604 (1993).

#### OPINIONS OF ATTORNEY GENERAL

**Member of County Planning Board Serves at Will of Commissioners.** — See opinion of Attorney General to Mr. William C.

Reeves, Madison County Attorney, 41 N.C.A.G. 230 (1971).

### § 153A-322. Supplemental powers.

A county or its designated planning agency may accept, receive, and disburse in furtherance of its functions funds, grants, and services made available by the federal government or its agencies, the State government or its agencies, any local government or its agencies, and private or civic sources. A county, or its designated planning agency with the concurrence of the board of commissioners, may enter into and carry out contracts with the State or federal governments or any agencies of either under which financial or other planning assistance is made available to the county and may agree to and comply with any reasonable conditions that are imposed upon the assistance.

A county, or its designated planning agency with the concurrence of the board of commissioners, may enter into and carry out contracts with any other county, city, regional council, or planning agency under which it agrees to furnish technical planning assistance to the other local government or planning agency. A county, or its designated planning agency with the concurrence of the board of commissioners, may enter into and carry out contracts with any other county, city, regional council, or planning agency under which it agrees to pay the other local government or planning agency for technical planning assistance.

A county may make any appropriations that may be necessary to carry out an activity or contract authorized by this Article, by Chapter 157A, or by Chapter 160A, Article 19 or to support, and compensate members of, any planning agency that it may create or designate pursuant to this Article. (1945, c. 1040, s. 1; 1955, c. 1252; 1957, c. 947; 1959, c. 327, s. 1; c. 390; 1973, c. 822, s. 1; 1983, c. 377, s. 8.)

**Editor's Note.** — Chapter 157A, referred to in this section, was transferred to Chapter 160A, Article 19, Part 3B (§ 160A-399.1 et seq.), by Session Laws 1973, c. 426, s. 62. Chapter 160A, Article 19, Part 3B was later

repealed by Session Laws 1989, c. 706. As to historic districts and landmarks, see now Chapter 160A, Article 19, Part 3C, § 160A-400.1 et seq.

### § 153A-323. Procedure for adopting or amending ordinances under this Article and Chapter 160A, Article 19.

Before adopting or amending any ordinance authorized by this Article or Chapter 160A, Article 19, the board of commissioners shall hold a public hearing on the ordinance or amendment. The board shall cause notice of the hearing to be published once a week for two successive calendar weeks. The notice shall be published the first time not less than 10 days nor more than 25 days before the date fixed for the hearing. In computing such period, the day of publication is not to be included but the day of the hearing shall be included. (1959, c. 1006, s. 1; c. 1007; 1973, c. 822, s. 1; 1981, c. 891, ss. 2, 9.)

**Editor's Note.** — Session Laws 1993, c. 469, s. 3(a), effective January 1, 1994, repeals various acts, including the following local modifications to this section: Session Laws 1993, c. 101, as to Wilkes; 1993, c. 139, as to Stokes; 1993, c. 156, as to Watauga; 1993, c. 267, as to Davidson and Davie; 1993, c. 296, as to Nash and Franklin. Section 3(b) of c. 469 provides that nothing in the section affects any ordinance adopted under the authority of any act repealed by s. 3(a) prior to the effective date of c. 469.

Session Laws 1993, c. 469, s. 5 provides: "Sec. 5. (a) This act becomes effective January 1, 1994, except that as to any city or county, it becomes effective at any time between the date of ratification of this act and January 1, 1994 if the city or county, as appropriate, adopts an

ordinance placing it into effect at such earlier date. Adoption of such ordinance is subject to the procedural requirements of G.S. 160A-364 or G.S. 153A-323, as appropriate, but not to any procedural requirement of the zoning ordinance for adoption of amendments to the zoning ordinance. The ordinance may provide for different dates of applicability based on the stage of the zoning classification action on the effective date.

"If the city or county is subject to a local act repealed by Section 3 of this act, the ordinance prevails over some or all of the local act if the ordinance so provides.

"(b) This section does not apply to Forsyth County or municipalities located within that county."

#### CASE NOTES

**Editor's Note.** — *Some of the cases cited below were decided under corresponding sections of former law.*

**The requirement that a public hearing be conducted is mandatory.** *Freeland v. Orange County*, 273 N.C. 452, 160 S.E.2d 282 (1968); *Orange County v. Heath*, 278 N.C. 688, 180 S.E.2d 810 (1971).

**Hearing and Opportunity to Present Views Intended.** — The manifest intention of the General Assembly was that a public hearing be conducted at which those who opposed and those who favored adoption of the ordi-

nance would have a fair opportunity to present their respective views. *Freeland v. Orange County*, 273 N.C. 452, 160 S.E.2d 282 (1968); *Orange County v. Heath*, 278 N.C. 688, 180 S.E.2d 810 (1971).

**County commissioners are not required to hear all persons in attendance** without limitation as to number and time. *Freeland v. Orange County*, 273 N.C. 452, 160 S.E.2d 282 (1968).

**Nor to Answer Questions.** — The county commissioners are not required to answer questions asked by those in attendance at the

public meeting. *Freeland v. Orange County*, 273 N.C. 452, 160 S.E.2d 282 (1968).

**Repetition of Same Views Not Contemplated.** — The General Assembly did not contemplate that all persons entertaining the same views would have an unqualified right to iterate and reiterate these views in endless repetition. *Freeland v. Orange County*, 273 N.C. 452, 160 S.E.2d 282 (1968).

**Failure to Comply with Notice Requirements.** — Where there was no notice to the public or advertised public hearing prior to

adoption of the ordinance as required by this section; the trial court's conclusion that the ordinance passed by the board imposing a moratorium on building permits pending zoning was invalid. *Vulcan Materials Co. v. Iredell County*, 103 N.C. App. 779, 407 S.E.2d 283 (1991).

**Applied** in *Lee v. Simpson*, 44 N.C. App. 611, 261 S.E.2d 295 (1980).

**Quoted** in *PNE AOA Media, L.L.C. v. Jackson County*, — N.C. App. —, 554 S.E.2d 657, 2001 N.C. App. LEXIS 981 (2001).

**§ 153A-324. Enforcement of ordinances.**

In addition to the enforcement provisions of this Article and subject to the provisions of the ordinance, any ordinance adopted pursuant to this Article, to Chapter 157A, or to Chapter 160A, Article 19 may be enforced by any remedy provided by G.S. 153A-123. (1959, c. 1006, s. 1; 1961, c. 414; 1973, c. 822, s. 1.)

**Editor's Note.** — Chapter 157A, referred to in this section, was transferred to Chapter 160A, Article 19, Part 3B (§ 160A-399.1 et seq.), by Session Laws 1973, c. 426, s. 62. Chapter 160A, Article 19, Part 3B was later

repealed by Session Laws 1989, c. 706. As to historic districts and landmarks, see now Chapter 160A, Article 19, Part 3C (§ 160A-400.1 et seq.).

CASE NOTES

**Zoning Ordinance May Be Enforced by Injunction.** — The relevant enabling acts provide for enforcement of the provisions of a zoning ordinance by injunction. *County of Durham v. Addison*, 262 N.C. 280, 136 S.E.2d 600 (1964), decided under former law.

**Ordinance Itself Need Not Provide for Equitable Enforcement.** — It is unnecessary

for a zoning ordinance itself to contain any specific provision for equitable enforcement because this section allows any remedy under § 153A-123 to be used at the county's election as a matter of right and without qualification, unless the county's zoning ordinance provides otherwise. *New Hanover County v. Pleasant*, 59 N.C. App. 644, 297 S.E.2d 760 (1982).

**§ 153A-325. Submission of statement concerning improvements.**

A county may by ordinance require that when a property owner improves property at a cost of more than twenty-five hundred dollars (\$2,500) but less than five thousand dollars (\$5,000), the property owner must, within 14 days after the completion of the work, submit to the county assessor a statement setting forth the nature of the improvement and the total cost thereof. (1983, c. 614, s. 4; 1987, c. 45, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 614, s. 5, provides that the act shall not apply to Wilson, Nash and Edgecombe Counties.

**§ 153A-326. Building setback lines.**

Counties shall have the same authority to regulate building setback lines as is provided for cities in G.S. 160A-306. (1987, c. 747, s. 15.)

§§ 153A-327 through 153A-329: Reserved for future codification purposes.

## Part 2. Subdivision Regulation.

### § 153A-330. Subdivision regulation.

A county may by ordinance regulate the subdivision of land within its territorial jurisdiction. If a county, pursuant to G.S. 153A-342, has adopted a zoning ordinance that applies only to one or more designated portions of its territorial jurisdiction, it may adopt subdivision regulations that apply only within the areas so zoned and need not regulate the subdivision of land in the rest of its jurisdiction. (1959, c. 1007; 1965, c. 195; 1973, c. 822, s. 1.)

**Local Modification.** — (As to Article 18, Parts 1, 2, and 3) Cherokee: 1989 (Reg. Sess., 1990), c. 1049; Pender: (As to Part 2 of Article 18) 1991, c. 204, ss. 1, 2; c. 761, s. 36; (As to Part 2) Person: 1987 (Reg. Sess., 1988), c. 932, s. 1; Robeson: 1987, c. 535, s. 1; (As to Part 2) 1993, c. 131, s. 1; c. 553, s. 82; 1993 (Reg. Sess., 1994), c. 638, s. 1.

**Cross References.** — As to compliance of subdivision streets with minimum standards of the Board of Transportation required of developers, see § 136-102.6. As to subdivision regulation in cities, see § 160A-371 et seq.

#### CASE NOTES

**Limitation on Authority of County Commissioners to Adopt Subdivision Control Ordinance.** — The authority of a board of county commissioners to adopt a subdivision control ordinance may be lawfully exercised only within prescribed limitations. Thus, a subdivision ordinance adopted by the board of county commissioners applies solely to land

lying within the county and outside the subdivision-regulation jurisdiction of any municipality. *State v. McBane*, 276 N.C. 60, 170 S.E.2d 913 (1969), decided under former law.

**Applied** in *Springdale Estates Ass'n v. Wake County*, 47 N.C. App. 462, 267 S.E.2d 415 (1980).

### § 153A-331. Contents and requirements of ordinance.

A subdivision control ordinance may provide for the orderly growth and development of the county; for the coordination of streets and highways within proposed subdivisions with existing or planned streets and highways and with other public facilities; for the dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision and of rights-of-way or easements for street and utility purposes including the dedication of rights-of-way pursuant to G.S. 136.66.10 or G.S. 136-66.11; and for the distribution of population and traffic in a manner that will avoid congestion and overcrowding and will create conditions essential to public health, safety, and the general welfare. The ordinance may include requirements that the final plat show sufficient data to determine readily and reproduce accurately on the ground the location, bearing, and length of every street and alley line, lot line, easement boundary line, and other property boundaries, including the radius and other data for curved property lines, to an appropriate accuracy and in conformity with good surveying practice. A subdivision control ordinance may provide that a developer may provide funds to the county whereby the county may acquire recreational land or areas to serve the development or subdivision, including the purchase of land which may be used to serve more than one subdivision or development within the immediate area.

The ordinance may provide that in lieu of required street construction, a developer may provide funds to be used for the development of roads to serve the occupants, residents, or invitees of the subdivision or development. All funds received by the county under this section shall be transferred to the municipality to be used solely for the development of roads, including design, land acquisition, and construction. Any municipality receiving funds from a county under this section is authorized to expend such funds outside its corporate limits for the purposes specified in the agreement between the municipality and the county. Any formula adopted to determine the amount of funds the developer is to pay in lieu of required street construction shall be based on the trips generated from the subdivision or development. The ordinance may require a combination of partial payment of funds and partial dedication of constructed streets when the governing body of the county determines that a combination is in the best interest of the citizens of the area to be served.

The ordinance may provide for the more orderly development of subdivisions by requiring the construction of community service facilities in accordance with county policies and standards, and, to assure compliance with these requirements, the ordinance may provide for the posting of bond or any other method that will offer guarantee of compliance.

The ordinance may provide for the reservation of school sites in accordance with comprehensive land use plans approved by the board of commissioners or the planning agency. For the authorization to reserve school sites to be effective, the board of commissioners or planning agency, before approving a comprehensive land use plan, shall determine jointly with the board of education with jurisdiction over the area the specific location and size of each school site to be reserved, and this information shall appear in the plan. Whenever a subdivision that includes part or all of a school site to be reserved under the plan is submitted for approval, the board of commissioners or the planning agency shall immediately notify the board of education. That board shall promptly decide whether it still wishes the site to be reserved and shall notify the board of commissioners or planning agency of its decision. If the board of education does not wish the site to be reserved, no site may be reserved. If the board of education does wish the site to be reserved, the subdivision may not be approved without the reservation. The board of education must acquire the site within 18 months after the date the site is reserved, either by purchase or by exercise of the power of eminent domain. If the board of education has not purchased the site or begun proceedings to condemn the site within the 18 months, the subdivider may treat the land as freed of the reservation.

The ordinance may require that a plat be prepared, approved, and recorded pursuant to its provisions whenever a subdivision of land takes place. (1959, c. 1007; 1973, c. 822, s. 1; 1975, c. 231; 1987, c. 747, ss. 10, 17.)

**Local Modification.** — Orange: 1987, c. 460, ss. 17, 17.1; 1991, c. 246, s. 1; c. 324, s. 1; 1993 (Reg. Sess., 1994), c. 642, s. 4(a), (c); Transylvania: 1991 (Reg. Sess., 1992), c. 972, s. 2.

**Cross References.** — As to developers being required to file map or plat of subdivision streets, see § 136-102.6. As to subdivision regulation by cities, see § 160A-371.

#### CASE NOTES

**Former Statute Did Not Authorize Laying Out, etc., of Highways, Streets or Alleys Within Meaning of Constitution.** — The statutory provisions of former §§ 153-266.3 and 153-266.4, as to what might and

what must be included in a county subdivision ordinance, did not constitute “authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys” within the meaning of N.C. Const., Art. II,

§ 24. State v. McBane, 276 N.C. 60, 170 S.E.2d 913 (1969).

**Effect of Specific Exemption.** — The general health, safety, and welfare language of this section cannot invalidate the specific exemption clearly stated in § 153A-335(2), as the language of subdivision (2) itself is not ambiguous, and plaintiff's division of land falls, with-

out question under this exception. Three Guys Real Estate v. Harnett County, 345 N.C. 468, 480 S.E.2d 681 (1997).

**Cited** in Coastland Corp. v. County of Currituck, 734 F.2d 175 (4th Cir. 1984); Batch v. Town of Chapel Hill, 326 N.C. 1, 387 S.E.2d 655 (1990).

**§ 153A-332. Ordinance to contain procedure for plat approval; approval prerequisite to plat recordation; statement by owner.**

A subdivision ordinance adopted pursuant to this Part shall contain provisions setting forth the procedures to be followed in granting or denying approval of a subdivision plat before its registration.

The ordinance shall provide that the following agencies be given an opportunity to make recommendations concerning an individual subdivision plat before the plat is approved:

- (1) The district highway engineer as to proposed State streets, State highways, and related drainage systems;
- (2) The county health director or local public utility, as appropriate, as to proposed water or sewerage systems;
- (3) Any other agency or official designated by the board of commissioners.

The ordinance may provide that final approval of each individual subdivision plat is to be given by:

- (1) The board of commissioners,
- (2) The board of commissioners on recommendation of a planning agency, or
- (3) A designated planning agency.

From the effective date of a subdivision ordinance that is adopted by the county, no subdivision plat of land within the county's jurisdiction may be filed or recorded until it has been submitted to and approved by the appropriate board or agency, as specified in the subdivision ordinance, and until this approval is entered in writing on the face of the plat by an authorized representative of the county. The Review Officer, pursuant to G.S. 47-30.2, shall not certify a plat of a subdivision of land located within the territorial jurisdiction of the county that has not been approved in accordance with these provisions, and the clerk of superior court may not order or direct the recording of a plat if the recording would be in conflict with this section. (1959, c. 1007; 1973, c. 822, s. 1; 1997-309, s. 6.)

**Legal Periodicals.** — For article, "Transferring North Carolina Real Estate, Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

**§ 153A-333. Effect of plat approval on dedications.**

The approval of a plat does not constitute or effect the acceptance by the county or the public of the dedication of any street or other ground, public utility line, or other public facility shown on the plat and shall not be construed to do so. (1959, c. 1007; 1973, c. 822, s. 1.)

**CASE NOTES**

**Quoted** in Cavin v. Ostwalt, 76 N.C. App. 309, 332 S.E.2d 509 (1985).

## § 153A-334. Penalties for transferring lots in unapproved subdivisions.

If a person who is the owner or the agent of the owner of any land located within the territorial jurisdiction of a county that has adopted a subdivision regulation ordinance subdivides his land in violation of the ordinance or transfers or sells land by reference to, exhibition of, or any other use of a plat showing a subdivision of the land before the plat has been properly approved under the ordinance and recorded in the office of the appropriate register of deeds, he is guilty of a Class 1 misdemeanor. The description by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring land does not exempt the transaction from this penalty. The county may bring an action for injunction of any illegal subdivision, transfer, conveyance, or sale of land, and the court shall, upon appropriate findings, issue an injunction and order requiring the offending party to comply with the subdivision ordinance. (1959, c. 1007; 1973, c. 822, s. 1; 1977, c. 820, s. 1; 1993, c. 539, s. 1063; 1994, Ex. Sess., c. 24, s. 14(c).)

### CASE NOTES

*Editor's Note.* — *The case annotated below was decided under former § 153-266.6.*

**Purpose of Former § 153-266.6.** — The sole purpose of former § 153-266.6, similar to this section, was to compel compliance with ordinance provisions seeking to prevent any subdivision of land covered by its terms unless and until the proposed subdivision map had been submitted to and approved by designated governmental agencies. *State v. McBane*, 276 N.C. 60, 170 S.E.2d 913 (1969).

**What former § 153-266.6 condemned** as a misdemeanor was the description of land in any contract of sale, deed or other instrument of transfer by reference to a subdivision plat that had not been properly approved and recorded. *State v. McBane*, 276 N.C. 60, 170 S.E.2d 913 (1969).

**Recording of Instrument Containing Improper Reference Immaterial.** — The misdemeanor defined in former § 153-266.6 related to a sale or transfer of land with reference to a plat showing a subdivision of land before such plat had been properly approved under the ordinance and recorded in the office of the appropriate register of deeds. Whether the contract of sale, deed or other instrument of transfer was recorded was immaterial. *State v. McBane*, 276 N.C. 60, 170 S.E.2d 913 (1969).

**Ordinance Regulating Subdivision of**

**Land Prerequisite to Conviction.** — As one of the prerequisites to conviction for sale of land by reference to an unapproved plat, it must be alleged and established that an ordinance regulating the subdivision of land was adopted by the board of county commissioners in accordance with the authority conferred by statute. *State v. McBane*, 276 N.C. 60, 170 S.E.2d 913 (1969).

**Person Subject to Prosecution.** — The owner of land or his agent within the "platting jurisdiction" granted the county commissioners by statute was the only person subject to criminal prosecution for the sale of land by reference to an unapproved plat. *State v. McBane*, 276 N.C. 60, 170 S.E.2d 913 (1969).

**Warrant Must Allege That Defendant Was Land Owner or Owner's Agent Within Platting District.** — A warrant is fatally defective if it fails to allege one of the essential elements of the criminal offense, namely, that defendant was the owner of land or his agent within the platting jurisdiction granted to the county commissioners by the statute. *State v. McBane*, 276 N.C. 60, 170 S.E.2d 913 (1969).

**General allegation that defendant's conduct constituted a misdemeanor in violation of the statute was insufficient.** *State v. McBane*, 276 N.C. 60, 170 S.E.2d 913 (1969).

## § 153A-335. "Subdivision" defined.

For purposes of this Part, "subdivision" means all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions for the purpose of sale or building development (whether immediate or future) and includes all division of land involving the dedication of a new street or a change in existing streets; however, the following is not included within this definition and is not subject to any regulations enacted pursuant to this Part:

- (1) The combination or recombination of portions of previously subdivided and recorded lots if the total number of lots is not increased and the resultant lots are equal to or exceed the standards of the county as shown in its subdivision regulations;
- (2) The division of land into parcels greater than 10 acres if no street right-of-way dedication is involved;
- (3) The public acquisition by purchase of strips of land for widening or opening streets; and
- (4) The division of a tract in single ownership the entire area of which is no greater than two acres into not more than three lots, if no street right-of-way dedication is involved and if the resultant lots are equal to or exceed the standards of the county as shown by its subdivision regulations. (1959, c. 1007; 1973, c. 822, s. 1; 1979, c. 611, s. 2.)

**Local Modification.** — Cherokee: 1977, c. 253; Davie: 1995, c. 78, s. 1; Harnett: 1997, c. 246, s. 1; 2001-50, s. 1; Henderson: 1989 (Reg. Sess., 1990), c. 863, s. 1; Jones: 1999-125, s. 1; Montgomery: 1995, c. 337, s. 1; Onslow: 1975, c. 105; Pasquotank: 1993, c. 194, s. 1; Pender: 1991, c. 204, s. 2; Person: 1987 (Reg. Sess.,

1988), c. 932, s. 2; Richmond: 2001-189, s. 1; Robeson: 1987, c. 535, s. 2; Scotland: 1983, c. 96; Stanly: 1987 (Reg. Sess., 1988), c. 930; 1991, c. 504; 1993 (Reg. Sess., 1994), c. 574; 1998-37; 1998-217, s. 7; Transylvania: 1991 (Reg. Sess., 1992), c. 972, s. 1.

#### CASE NOTES

**Specific Exemption Controls.** — The general health, safety, and welfare language of § 153A-331 cannot invalidate the specific exemption clearly stated in subdivision (2) as the language of subdivision (2) itself is not ambiguous, and plaintiff's division of land falls, without question under this exception. *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 480 S.E.2d 681 (1997).

**Land Not Subject to Regulations.** — Where plaintiff's plat showed a division of land into parcels greater than ten acres, and no street right-of-way dedication was involved, plaintiff's division of land was not subject to

any regulations enacted pursuant to §§ 153A-330 to 153A-335. *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 480 S.E.2d 681 (1997).

**Survey Requiring Certification.** — A survey of a division of land that is described in subsection (2) falls under § 47-30(f)(11)(d) and requires a certification of "no approval required" before the plat may be presented for recordation. *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 480 S.E.2d 681 (1997).

**Applied** in *Springdale Estates Ass'n v. Wake County*, 47 N.C. App. 462, 267 S.E.2d 415 (1980).

§§ 153A-336 through 153A-339: Reserved for future codification purposes.

### Part 3. Zoning.

#### § 153A-340. Grant of power.

(a) For the purpose of promoting health, safety, morals, or the general welfare, a county may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes, and to provide density credits or severable development rights for dedicated rights-of-way pursuant to G.S. 136-66.10 or G.S. 136-66.11.

(b)(1) These regulations may affect property used for bona fide farm purposes only as provided in subdivision (3) of this subsection. This subsection does not limit regulation under this Part with respect to the use of farm property for nonfarm purposes.

- (2) Bona fide farm purposes include the production and activities relating or incidental to the production of crops, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and all other forms of agricultural products having a domestic or foreign market.
- (3) The definitions set out in G.S. 106-802 apply to this subdivision. A county may adopt zoning regulations governing swine farms served by animal waste management systems having a design capacity of 600,000 pounds steady state live weight (SSLW) or greater provided that the zoning regulations may not have the effect of excluding swine farms served by an animal waste management system having a design capacity of 600,000 pounds SSLW or greater from the entire zoning jurisdiction.

(c) The regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained. The regulations may also provide that the board of adjustment or the board of commissioners may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits. Where appropriate, the conditions may include requirements that street and utility rights-of-way be dedicated to the public and that recreational space be provided. When issuing or denying special use permits or conditional use permits, the board of commissioners shall follow the procedures for boards of adjustment except that no vote greater than a majority vote shall be required for the board of commissioners to issue such permits, and every such decision of the board of commissioners shall be subject to review by the superior court by proceedings in the nature of certiorari.

(d) A county may regulate the development over estuarine waters and over lands covered by navigable waters owned by the State pursuant to G.S. 146-12, within the bounds of that county.

(e) For the purpose of this section, the term "structures" shall include floating homes.

(f) Any petition for review by the superior court shall be filed with the clerk of superior court within 30 days after the decision of the board of commissioners is filed in such office as the ordinance specifies, or after a written copy thereof is delivered to every aggrieved party who has filed a written request for such copy with the clerk at the time of the hearing of the case, whichever is later. The decision of the board of commissioners may be delivered to the aggrieved party either by personal service or by registered mail or certified mail return receipt requested. (1959, c. 1006, s. 1; 1967, c. 1208, s. 4; 1973, c. 822, s. 1; 1981, c. 891, s. 6; 1983, c. 441; 1985, c. 442, s. 2; 1987, c. 747, s. 12; 1991, c. 69, s. 1; 1997-458, s. 2.1.)

**Local Modification.** — (As to Article 18, Parts 1, 2, and 3) Cherokee: 1989 (Reg. Sess., 1990), c. 1049; Durham: 1989 (Reg. Sess., 1990), c. 950; 1999-70, s. 2; Orange: 1987, c. 460, ss. 18, 18.1; 1991, c. 246, s. 2; c. 324, s. 2; 1993 (Reg. Sess., 1994), c. 642, s. 4(b), (d).

**Editor's Note.** — As to a moratorium on the construction or expansion of swine farms or lagoons or animal waste management systems for swine farms, established by Session Laws 1997-458, ss. 1.1 and 1.2, as amended by Session Laws 1998-188, ss. 2 and 3, by Session Laws 1999-329, ss. 2.1 and 2.2, and by Session Laws 2001-254, ss. 1 and 2, see the Editor's

notes following § 143-215.10A.

Session Laws 1997-458, s. 2.2, provides: "Zoning regulations governing swine farms served by animal waste management systems having a design capacity of 600,000 pounds steady state live weight (SSLW) or greater adopted under G.S. 153A-340(b), as amended by Section 2.1 of this act, shall not, with respect to a swine farm in existence at the time the zoning ordinance is adopted:

"(1) Prohibit the continued existence of the swine farm.

"(2) Require the amortization of the swine farm.

“(3) Prohibit the repair or replacement on the same site of the swine farm so long as the repair or replacement does not increase the swine population beyond the population that the animal waste management system serving the swine farm is designed to accommodate, as set forth in the permit for the animal waste management system.”

**Legal Periodicals.** — For note on coastal land use development and area-wide zoning, see 49 N.C.L. Rev. 866 (1971).

For article discussing North Carolina special exception and zoning amendment cases, see 53 N.C.L. Rev. 925 (1975).

For comment, “Exclusionary Zoning and a Reluctant Supreme Court” (U.S.), see 13 Wake Forest L. Rev. 107 (1977).

For comment, “Urban Planning and Land

Use Regulation: The Need for Consistency,” see 14 Wake Forest L. Rev. 81 (1978).

For article, “Zoning for Direct Social Control,” see 1982 Duke L.J. 761.

For survey of 1983 developments in property law, see 62 N.C.L. Rev. 1346 (1984).

For note, “The North Carolina Supreme Court Solves a City-County Conflict,” see 66 N.C.L. Rev. 1266 (1988).

For comment discussing contract zoning and conditional use zoning in North Carolina, see 68 N.C.L. Rev. 177 (1989).

For 1997 legislative survey, see 20 Campbell L. Rev. 450.

For note, “Hog Farms and Nuisance Law in Parker v. Barefoot: Has North Carolina Become a Hog Heaven and Waste Lagoon?” see 77 N.C. L. Rev. 2355 (1999).

### CASE NOTES

**Editor’s Note.** — *Some of the cases cited below were decided under corresponding sections of former law.*

**Constitutional Protections.** — This Part, §§ 153A-340 through 153A-345, provide adequate constitutional protections for an aggrieved party. *JWL Invs., Inc. v. Guilford County Bd. of Adjustment*, 133 N.C. App. 426, 515 S.E.2d 715 (1999).

**Counties have no inherent authority to enact zoning ordinances.** *Jackson v. Guilford County Bd. of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969).

**Construction with Local Law.** — Counties may not act to zone a swine farm other than as authorized by the limited statutory exception of subsection (b)(3) of this section; because the General Assembly has provided a “complete and integrated regulatory scheme” of swine farm regulations, the county Swine Ordinance and the county Health Board Rules, which were more burdensome than State law, were preempted by State law. *Craig v. County of Chatham*, 143 N.C. App. 30, 545 S.E.2d 455 (2001), cert. granted, 354 N.C. 68, — S.E.2d — (2001).

**This section and § 153A-121 do not operate exclusively** of each other. *Summey Outdoor Adv., Inc. v. County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439 (1989).

**Delegation of Power to Adopt Zoning Ordinances as Exception to Rule of Nondelegation of Legislative Powers.** — The authority of the General Assembly to delegate to municipal corporations power to legislate concerning local problems, such as zoning, is an exception, established by custom in most, if not all, of the states, to the general rule that legislative powers vested in the General Assembly may not be delegated by it. This exception to the doctrine of nondelegation is not limited to

a delegation of such legislative authority to incorporated cities and towns, but extends, as to other types of local matters, to a like delegation to counties and other units established by the General Assembly for local government. *Jackson v. Guilford County Bd. of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969).

**The General Assembly may confer upon county boards of commissioners power to adopt zoning ordinances** otherwise valid, notwithstanding N.C. Const., Art. II, § 1. *Jackson v. Guilford County Bd. of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969).

**But a county zoning ordinance may not delegate such legislative powers to the county board of adjustment.** *Jackson v. Guilford County Bd. of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969).

**Zoning Ordinance Is Presumed Valid.** — The presumption is that a zoning ordinance as a whole is a proper exercise of the police power. *County of Durham v. Addison*, 262 N.C. 280, 136 S.E.2d 600 (1964).

It is the duty of municipal authorities, in their sound discretion, to determine what ordinances or regulations are reasonably necessary for the protection of the public or the better government of the town. When such ordinance is adopted, it is presumed to be valid, and the courts will not declare it invalid unless it is clearly shown to be so. No law or ordinance will be declared unconstitutional unless it clearly is, and every reasonable intentment will be made to sustain it. *County of Cumberland v. Eastern Fed. Corp.*, 48 N.C. App. 518, 269 S.E.2d 672, cert. denied, 301 N.C. 527, 273 S.E.2d 453 (1980).

**When Enactment or Amendment of Ordinance Is Invalid.** — The legislative act of enacting or amending a zoning ordinance is invalid if it is unreasonable, arbitrary, or an

unequal exercise of legislative power. *Chrismon v. Guilford County*, 85 N.C. App. 211, 354 S.E.2d 309 (1987).

**Burden of Showing Invalidity Is on Person Asserting It.** — The burden to show that a zoning ordinance as a whole is not a proper exercise of the police power rests upon the property owner who asserts its invalidity. *County of Durham v. Addison*, 262 N.C. 280, 136 S.E.2d 600 (1964).

**Mere fact that a zoning ordinance seriously depreciates the value of complainant's property is not enough**, standing alone, to establish its invalidity. *County of Durham v. Addison*, 262 N.C. 280, 136 S.E.2d 600 (1964).

**Regulation of Signs.** — Fact that defendant had authority to regulate signs under the zoning power in this section did not mean that it could not regulate signs in a similar manner under the general police powers in § 153A-121, allowing regulation of “conditions detrimental to the health, safety or welfare of its citizens and the peace and dignity of the county. *Summey Outdoor Adv., Inc. v. County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439 (1989).

**The practice of conditional use zoning is an approved practice** in North Carolina, so long as the action of the local zoning authority in accomplishing the zoning is reasonable, neither arbitrary nor unduly discriminatory, and in the public interest. *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988).

Review pursuant to writ of certiorari under this section does not encompass the adjudication of issues such as whether the denial of a special use permit constitutes a taking without the payment of just compensation, inverse condemnation or a violation of 42 U.S.C. 1983. *Guilford County Dep't of Emergency Servs. v. Seaboard Chem. Corp.*, 114 N.C. App. 1, 441 S.E.2d 177, cert. denied, 336 N.C. 604, 447 S.E.2d 390 (1994).

**Property Rezoned to Conditional Use District.** — It is not necessary that property rezoned to a conditional use district be available for all of the uses allowed under the corresponding general use district. *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988).

**Rezoning Held Valid Conditional Use Zoning.** — The rezoning of two tracts of land from A-1 to CU-M-2 so as to allow the storage and sale of agricultural chemicals was valid conditional use zoning and not illegal contract zoning. *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988).

**The phrase, “trade, industry, residence, or other purposes,”** as used in this section, relates to private property, and the phrase “other purposes” is not to be broadened to include the use of land by a municipality for a

public enterprise listed in § 160A-311. *Davidson County v. City of High Point*, 85 N.C. App. 26, 354 S.E.2d 280, modified and aff'd, 321 N.C. 252, 362 S.E.2d 553 (1987).

**City Immune from County's Zoning Ordinances.** — City which owned a sewage treatment facility located in a county and outside the city's boundaries was not required to comply with county's zoning ordinances in upgrading the facility and providing sewage service to newly annexed areas of city with that facility. *Davidson County v. City of High Point*, 85 N.C. App. 26, 354 S.E.2d 280, modified and aff'd, 321 N.C. 252, 362 S.E.2d 553 (1987).

A county's zoning authority is limited: it can be applied only to buildings within the county's borders which are outside city limits, and it is confined to the purposes of promoting health, safety, morals, or the general welfare. *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987).

**Use of City-Owned Sewage Treatment Plant Without Prior Approval of County.** —

Since county had no authority to restrict or regulate city's provision of sewer service to its residents, the city could use city-owned sewage treatment plant located outside the city but within the county, which was upgraded pursuant to the county's special use permit, with a condition attached to the permit requiring the county's prior approval of service to county citizens, to meet its statutory mandate to provide sewer service to residents in newly annexed areas without seeking the county's prior approval, even though the facility was located in the county. *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987).

**Spot Zoning.** — Spot zoning is not invalid per se, but rather, it is beyond the authority of the municipality or county and therefore void only in the absence of a clear showing of a reasonable basis therefor. *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988).

**Clear Showing of Reasonable Basis for Spot Zoning.** —

While the rezoning of two tracts from A-1 to CU-M-2, so as to allow the storage and sale of agricultural chemicals, constituted a form of spot zoning, this activity was legal and not illegal spot zoning. Because of the substantial benefits created for the surrounding community by the rezoning and because of the close relationship between the likely uses of the rezoned property and the uses already present in the surrounding tracts, there was a clear showing of a reasonable basis for the spot zoning. *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988).

**The principal differences between valid conditional use zoning and illegal contract zoning** are related and are essentially two in number: First, valid conditional use zoning features merely a unilateral promise from the landowner to the local zoning author-

ity as to the landowner's intended use of the land in question, while illegal contract zoning anticipates a bilateral contract in which the landowner and the zoning authority make reciprocal promises. Second, in the context of conditional use zoning, the local zoning authority maintains its independent decision-making authority, while in the contract zoning scenario, it abandons that authority by binding itself contractually with the landowner seeking a zoning amendment. *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988).

**Power of County Commissioners to Grant Special Exceptions.** — Statute authorizing the board of county commissioners by regulation to provide that the board of adjustment or the board of county commissioners may issue special use permits or conditional permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified in the zoning ordinance did not purport to confer more power upon the commissioners to grant special exceptions than the commissioners could delegate to the board of adjustment. In re *Ellis*, 277 N.C. 419, 178 S.E.2d 77 (1970).

**Like the board of adjustment, the commissioners cannot deny applicants a permit in their unguided discretion** or, stated differently, refuse it solely because, in their view, a mobile-home park would adversely affect the public interest. The commissioners must also proceed under standards, rules and regulations uniformly applicable to all who apply for permits. In re *Ellis*, 277 N.C. 419, 178 S.E.2d 77 (1970).

**Ordinance Held Valid.** — A county zoning ordinance, applicable only to swine farms "served by an animal waste management system having a design capacity of 600,000 pounds steady state live weight (SSLW) or greater" and enacted pursuant to the express statement of power given by the State, was not preempted. *Craig v. County of Chatham*, 143 N.C. App. 30, 545 S.E.2d 455 (2001), cert. granted, 354 N.C. 68, — S.E.2d — (2001).

**Ordinance Held Invalid.** — So much of an ordinance as required the board of adjustment to deny a permit for the establishment of a mobile-home park in an A-1 agricultural district unless it found that the granting of the special exception would not adversely affect the public interest was beyond the authority of the board of county commissioners to enact and so was invalid. *Keiger v. Winston-Salem Bd. of Adjustment*, 278 N.C. 17, 178 S.E.2d 616 (1971).

**Activities Regarding Transportation of Farm Products.** — The use of large trucks to transport farm products, and the creation of facilities such as driveways and loading docks for such trucks, are both activities so essential to large-scale agricultural production that their

exclusion from the exemption would render it meaningless. *Sedman v. Rijdes*, 127 N.C. App. 700, 492 S.E.2d 620 (1997).

**Constitutionality of County Sign Ordinance.** — A county sign ordinance did not violate the equal protection clause of U.S. Const., Amend. XIV or N.C. Const., Art. I, § 19, because the county would not enforce the ordinance with respect to any person owning or operating a sign in certain municipalities within the county, since the county could not exercise zoning authority within a city which had enacted a zoning ordinance, and it could defer from zoning within cities. *County of Cumberland v. Eastern Fed. Corp.*, 48 N.C. App. 518, 269 S.E.2d 672, cert. denied, 301 N.C. 527, 273 S.E.2d 453 (1980).

Provision of a county sign ordinance requiring nonconforming uses to be discontinued within three years from the effective date of the ordinance, thus giving the owner of a nonconforming sign a three-year period in which to amortize or depreciate the cost of the sign, was reasonable and did not provide for an unconstitutional taking of property. *County of Cumberland v. Eastern Fed. Corp.*, 48 N.C. App. 518, 269 S.E.2d 672, cert. denied, 301 N.C. 527, 273 S.E.2d 453 (1980).

**Soil Remediation Not Agricultural Use.** — Remediation of petroleum contaminated soil is a waste treatment process, not an agricultural use, and thus it was a nonconforming use in a residential agricultural zoning district of a county. *Ball v. Randolph County Bd. of Adjustment*, 129 N.C. App. 300, 498 S.E.2d 833 (1998), petition for discretionary review improvidently granted, 49 N.C. 348, 507 S.E.2d 272 (1998).

**Kennel Operation Not "Farming."** — Dogs are not livestock, and a dog breeding and kennel operation does not constitute "farming," so as to exempt property used therefor from a county's zoning authority pursuant to this section. *Development Assocs. v. Wake County Bd. of Adjustment*, 48 N.C. App. 541, 269 S.E.2d 700 (1980), cert. denied, 301 N.C. 719, 274 S.E.2d 227 (1981).

**Horses Considered Livestock.** — Where activity undertaken by landowner was related and incidental to the farming activities of boarding, breeding, raising, pasturing and watering horses, horses were considered as livestock, qualifying the property for the exemption granted bona fide farms under § 153A-340. *County of Durham v. Roberts*, — N.C. App. —, 551 S.E.2d 494, 2001 N.C. App. LEXIS 747 (2001).

**The use of fans and heating devices is "incidental" to the year-round raising of plants inside greenhouses.** *Sedman v. Rijdes*, 127 N.C. App. 700, 492 S.E.2d 620 (1997).

**Greenhouse Operations Exempt.** — Ac-

tivities of greenhouse operation, including the construction of a driveway, the use of large trucks to export plants, and the operation of fans and heating devices were exempt from compliance with zoning ordinances. *Sedman v. Rijdes*, 127 N.C. App. 700, 492 S.E.2d 620 (1997).

**Cited** in *White v. Union County*, 93 N.C. App. 148, 377 S.E.2d 93 (1989); *Guilford County Planning & Dev. Dep't v. Simmons*, 102 N.C. App. 325, 401 S.E.2d 659 (1991); *County of*

*Lancaster v. Mecklenburg County*, 334 N.C. 496, 434 S.E.2d 604 (1993); *County of Lenoir v. Moore*, 114 N.C. App. 110, 441 S.E.2d 589 (1994), *aff'd*, 340 N.C. 104, 455 S.E.2d 158 (1995); *Vulcan Materials Co. v. Guilford County Bd. of County Comm'rs*, 115 N.C. App. 319, 444 S.E.2d 639, *cert. denied*, 337 N.C. 807, 449 S.E.2d 758 (1994); *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307 (4th Cir. 1999).

## § 153A-341. Purposes in view.

Zoning regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. The regulations shall be made with reasonable consideration as to, among other things, the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the county. In addition, the regulations shall be made with reasonable consideration to expansion and development of any cities within the county, so as to provide for their orderly growth and development. (1959, c. 1006, s. 1; 1973, c. 822, s. 1.)

**Local Modification.** — *Durham*: 1989 (Reg. Sess., 1990), c. 950; 1999-70, s. 2.

**Legal Periodicals.** — For article, "Zoning

for Direct Social Control," see 1982 *Duke L.J.* 761.

### CASE NOTES

**In exercising their zoning authority, counties are limited** in that they are required by statute to exercise their zoning regulations "with reasonable consideration to expansion and development of any cities within the county, so as to provide for their orderly growth and development." *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987).

**Zoning generally must be accomplished in accordance with a comprehensive plan** in order to promote the general welfare and serve the purposes of the enabling statute. *Chrismon v. Guilford County*, 85 N.C. App. 211, 354 S.E.2d 309 (1987), *rev'd* on other grounds, 322 N.C. 611, 370 S.E.2d 579 (1988).

**The language of this section does not require an extensive written plan**, such as a master plan based upon a comprehensive study; the ordinance itself may show that the zoning is comprehensive in nature. *Willis v. Union County*, 77 N.C. App. 407, 335 S.E.2d 76 (1985).

**A county's legislative body has authority to rezone when reasonably necessary** to do so in the interests of the public health, safety,

morals or general welfare; ordinarily the only limitation upon this authority is that it may not be exercised arbitrarily or capriciously. *Willis v. Union County*, 77 N.C. App. 407, 335 S.E.2d 76 (1985); *Nelson v. City of Burlington*, 80 N.C. App. 285, 341 S.E.2d 739 (1986).

**A duly adopted rezoning ordinance is presumed to be valid**, and the burden is upon the plaintiff to establish its invalidity. *Nelson v. City of Burlington*, 80 N.C. App. 285, 341 S.E.2d 739 (1986).

**Statutes do not give a county authority over provision of sewer services within a city, or over newly annexed areas** of the city which also lie in the county. *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987).

**Use of City-Owned Sewage Treatment Plant Without Prior Approval of County.** — Since county had no authority to restrict or regulate city's provision of sewer service to its residents, the city could use city-owned sewage treatment plant located outside the city but within the county, which was upgraded pursuant to the county's special use permit, with a condition attached to the permit requiring the

county's prior approval of service to county citizens, to meet its statutory mandate to provide sewer service to residents in newly annexed areas without seeking the county's prior approval, even though the facility was located in the county. *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987).

**Spot Zoning.** — Because it zones a small area differently than a much larger area surrounding it, spot zoning, by definition, conflicts with the whole purpose of planned zoning. Therefore, unless there is a clear showing of a reasonable basis, spot zoning is beyond the authority of the county or municipality. *Chrismon v. Guilford County*, 85 N.C. App. 211, 354 S.E.2d 309 (1987), rev'd on other grounds, 322 N.C. 611, 370 S.E.2d 579 (1988); *Alderman v. Chatham County*, 89 N.C. App. 610, 366 S.E.2d 885, cert. denied, 323 N.C. 171, 373 S.E.2d 103 (1988).

**In determining whether rezoning was invalid as spot zoning**, the courts have also considered the classification and development of nearby land. *Alderman v. Chatham County*, 89 N.C. App. 610, 366 S.E.2d 885, cert. denied,

323 N.C. 171, 373 S.E.2d 103 (1988).

**Contract Zoning.** — To avoid contract zoning, all the areas in each class must be subject to the same restrictions; if the rezoning is done in consideration of an assurance that a particular tract or parcel will be developed in accordance with a restricted plan, this is contract zoning and is illegal. *Willis v. Union County*, 77 N.C. App. 407, 335 S.E.2d 76 (1985).

**Approval Improper.** — Where county commissioners approved the rezoning application without considering the factors set out in this section, the Commissioners acted arbitrarily and capriciously. *Gregory v. County of Harnett*, 128 N.C. App. 161, 493 S.E.2d 786 (1997).

**Applied in** *Mahaffey v. Forsyth County*, 99 N.C. App. 676, 394 S.E.2d 203 (1990); *Covington v. Town of Apex*, 108 N.C. App. 231, 423 S.E.2d 537 (1992).

**Cited in** *Maynor v. Onslow County*, 127 N.C. App. 102, 488 S.E.2d 289 (1997), appeal dismissed, 347 N.C. 268, 493 S.E.2d 458 (1997), cert. denied, 347 N.C. 400, 496 S.E.2d 385 (1997).

## § 153A-341.1. Zoning regulations for manufactured homes.

The provisions of G.S. 160A-383.1 shall apply to counties. (1987, c. 805, s. 2.)

### CASE NOTES

**County Ordinance Requiring Certain Siding and Shingles.** — A county ordinance requiring mobile homes to have siding and shingles of a type similar to standard residential construction was enacted to remove from the range of safe and satisfactorily performing materials only ones based on undesirable appearance, and left the regulation of safety and

performance of roofing and siding materials to Congress and the Department of Housing and Urban Development, and thus was not preempted. *CMH Mfg., Inc. v. Catawba County*, 994 F. Supp. 697 (W.D.N.C. 1998).

**Cited in** *White v. Union County*, 93 N.C. App. 148, 377 S.E.2d 93 (1989).

## § 153A-342. Districts; zoning less than entire jurisdiction.

A county may divide its territorial jurisdiction into districts of any number, shape, and area that it may consider best suited to carry out the purposes of this Part. Within these districts a county may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. Such districts may include, but shall not be limited to, general use districts, in which a variety of uses are permissible in accordance with general standards; overlay districts, in which additional requirements are imposed on certain properties within one or more underlying general or special use districts; and special use districts or conditional use districts, in which uses are permitted only upon the issuance of a special use permit or a conditional use permit. Property may be placed in a special use district or conditional use district only in response to a petition by the owners of all the property to be included. Except as authorized by the foregoing, all regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts.

A county may determine that the public interest does not require that the entire territorial jurisdiction of the county be zoned and may designate one or more portions of that jurisdiction as a zoning area or areas. A zoning area must originally contain at least 640 acres and at least 10 separate tracts of land in separate ownership and may thereafter be expanded by the addition of any amount of territory. A zoning area may be regulated in the same manner as if the entire county were zoned, and the remainder of the county need not be regulated. (1959, c. 1006, s. 1; 1965, c. 194, s. 2; 1973, c. 822, s. 1; 1985, c. 607, s. 3.)

**Local Modification.** — Alamance: 1997, c. 445, s. 2.1; Durham: 1989 (Reg. Sess., 1990), c. 950; 1999-70, s. 2; Orange: 1991, c. 246, s. 3.

**Legal Periodicals.** — For comment discuss-

ing contract zoning and conditional use zoning in North Carolina, see 68 N.C.L. Rev. 177 (1989).

#### CASE NOTES

**Zoning Map Requirement.** — This section does not require the county to have a zoning map for the entire county when its objective is to implement zoning on an area by area basis; only a map of the area being zoned and a full text of the zoning ordinance zoned are required. *Frizzelle v. Harnett County*, 106 N.C. App. 234, 416 S.E.2d 421, cert. denied, 332 N.C. 147, 419 S.E.2d 571 (1992).

**The practice of conditional use zoning is an approved practice** in North Carolina, so long as the action of the local zoning authority in accomplishing the zoning is reasonable, neither arbitrary nor unduly discriminatory, and in the public interest. *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988).

**Property Rezoned to Conditional Use District.** — It is not necessary that property rezoned to a conditional use district be available for all of the uses allowed under the corresponding general use district. *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988).

**Spot zoning is not invalid per se**, but rather, it is beyond the authority of the municipality or county and therefore void only in the absence of a clear showing of a reasonable basis therefor. *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988).

**Clear Showing of Reasonable Basis for Spot Zoning.** — While the rezoning of two tracts from A-1 to CU-M-2, so as to allow the storage and sale of agricultural chemicals, constituted a form of spot zoning, this activity was legal and not illegal spot zoning. Because of the substantial benefits created for the surrounding community by the rezoning and because of the close relationship between the likely uses of the rezoned property and the uses already present in the surrounding tracts, there was a clear showing of a reasonable basis for the spot zoning. *Chrismon v. Guilford County*, 322 N.C.

611, 370 S.E.2d 579 (1988).

**The principal differences between valid conditional use zoning and illegal contract zoning** are related and are essentially two in number: First, valid conditional use zoning features merely a unilateral promise from the landowner to the local zoning authority as to the landowner's intended use of the land in question, while illegal contract zoning anticipates a bilateral contract in which the landowner and the zoning authority make reciprocal promises. Second, in the context of conditional use zoning, the local zoning authority maintains its independent decision-making authority, while in the contract zoning scenario, it abandons that authority by binding itself contractually with the landowner seeking a zoning amendment. *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988).

**Rezoning Held Valid Conditional Use Zoning.** — The rezoning of two tracts of land from A-1 to CU-M-2 so as to allow the storage and sale of agricultural chemicals was valid conditional use zoning and not illegal contract zoning. *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988).

**A county sign ordinance did not violate the equal protection clause** of U.S. Const., Amend. XIV or N.C. Const., Art. I, § 19, because the county would not enforce the ordinance with respect to any person owning or operating a sign in certain municipalities within the county, since the county could not exercise zoning authority within a city which had enacted a zoning ordinance, and it could defer from zoning within cities. *County of Cumberland v. Eastern Fed. Corp.*, 48 N.C. App. 518, 269 S.E.2d 672, cert. denied, 301 N.C. 527, 273 S.E.2d 453 (1980).

**Cited in** *Chrismon v. Guilford County*, 85 N.C. App. 211, 354 S.E.2d 309 (1987).

### § 153A-343. Method of procedure:

(a) The board of commissioners shall, in accordance with the provisions of this Article, provide for the manner in which zoning regulations and restrictions and the boundaries of zoning districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. The procedures adopted pursuant to this section shall provide that whenever there is a zoning map amendment, the owner of that parcel of land as shown on the county tax listing, and the owners of all parcels of land abutting that parcel of land as shown on the county tax listing, shall be mailed a notice of a public hearing on the proposed amendment by first class mail at the last addresses listed for such owners on the county tax abstracts. This notice must be deposited in the mail at least 10 but not more than 25 days prior to the date of the public hearing. The person or persons mailing such notices shall certify to the Board of Commissioners that fact, and such certificate shall be deemed conclusive in the absence of fraud.

(b) The first class mail notice required under subsection (a) of this section shall not be required if the zoning map amendment directly affects more than 50 properties, owned by a total of at least 50 different property owners, and the county elects to use the expanded published notice provided for in this subsection. In this instance, a county may elect to either make the mailed notice provided for in subsection (a) of this section or may as an alternative elect to publish once a week for four successive calendar weeks in a newspaper having general circulation in the area an advertisement of the public hearing that shows the boundaries of the area affected by the proposed zoning map amendment and explains the nature of the proposed change. The final two advertisements shall comply with and be deemed to satisfy the provisions of G.S. 153A-323. The advertisement shall not be less than one-half of a newspaper page in size. The advertisement shall only be effective for property owners who reside in the area of general circulation of the newspaper which publishes the notice. Property owners who reside outside of the newspaper circulation area, according to the address listed on the most recent property tax listing for the affected property, shall be notified by first class mail pursuant to this section. The person or persons mailing the notices shall certify to the board of commissioners that fact, and the certificates shall be deemed conclusive in the absence of fraud. In addition to the published notice, a county shall post one or more prominent signs on or immediately adjacent to the subject area reasonably calculated to give public notice of the proposed rezoning.

(c) The provisions of this section shall not be applicable to any zoning map adoption that initially zones property added to the territorial coverage of the ordinance. (1973, c. 822, s. 1; 1985, c. 595, s. 1; 1987, c. 807, s. 2; 1989 (Reg. Sess., 1990), c. 980, s. 2; 1993, c. 469, s. 2; 1995, c. 261, s. 1; c. 546, s. 2; 1997-456, s. 25.)

**Local Modification.** — Durham; 1989, c. 516, s. 1; Orange; 1995, c. 339, s. 1.

**Editor's Note.** — Session Laws 1985, c. 595, which added the last two sentences, provides that the amendment is applicable only when tax maps are available for the areas to be zoned.

Session Laws 1985 (Reg. Sess., 1986), c. 950 provides that Session Laws 1985, c. 595, which added the last two sentences of this section, does not apply to the City of Asheboro or the counties of Scotland, Stanly, Union, and Richmond, and incorporated cities or towns located

wholly within those counties.

Session Laws 1993, c. 469, which amended this section, in ss. 5 and 6 provides: "Sec. 5. (a) This act becomes effective January 1, 1994, except that as to any city or county, it becomes effective at any time between the date of ratification of this act and January 1, 1994 if the city or county, as appropriate, adopts an ordinance placing it into effect at such earlier date. Adoption of such ordinance is subject to the procedural requirements of G.S. 160A-364 or G.S. 153A-323, as appropriate, but not to any procedural requirement of the zoning ordi-

nance for adoption of amendments to the zoning ordinance. The ordinance may provide for different dates of applicability based on the stage of the zoning classification action on the effective date.

"If the city or county is subject to a local act repealed by Section 3 of this act, the ordinance prevails over some or all of the local act if the ordinance so provides.

"(b) This section does not apply to Forsyth County or municipalities located within that county.

"Sec. 6. (a) This act becomes effective January 1, 1995 as to Forsyth County or any municipality located within that county, but it becomes effective at any time between the date of ratification of this act and January 1, 1995 if the municipality or Forsyth County, as appropriate, adopts an ordinance placing it into effect at such earlier date. Adoption of such ordinance is subject to the procedural requirements of G.S. 160A-364 or G.S. 153A-323, as appropriate, but not to any procedural requirement of the zoning ordinance for adoption of amendments to the zoning ordinance. The ordinance may provide for different dates of applicability based on the stage of the zoning classification action on the effective date.

"The ordinance prevails over some or all of Chapter 455, Session Laws of 1987, as amended by Chapter 271, Session Laws of

1993, if the ordinance so provides."

Session Laws 1993, c. 469, s. 3(a), effective January 1, 1994, repeals various acts, including the following local modifications to this section: Session Laws 1993, c. 101, as to Wilkes; 1993, c. 139, as to Stokes; 1993, c. 156, as to Watauga; 1993, c. 267, as to Davidson and Davie; 1993, c. 271, as to Rockingham; 1993, c. 296, as to Nash and Franklin; 1993, c. 358, s. 15, as to Orange. In addition, by virtue of Session Laws 1993, c. 469, s. 3, the local modifications for Alexander, Cabarrus, Catawba, Iredell, Johnston, Martin, Randolph, Wake, and Yadkin should be stricken from the main volume. Section 3(b) of c. 469 provides that nothing in the section affects any ordinance adopted under the authority of any act repealed by s. 3(a) prior to the effective date of c. 469.

Session Laws 1995, c. 546, s. 2.1, effective July 29, 1995, provides "Any local act in conflict with this act is repealed to the extent of the conflict."

Session Laws 1997-456, s. 25, effective August 29, 1997, repealed Session Laws 1995, c. 261, s. 1, which had inserted " , at its option, provide said notice or" following "a county shall" in the first sentence following subdivision (b)(5). Subsection (b) was subsequently rewritten by Session Laws 1995, c. 546, s. 2, but that phrase was not shown as deleted.

#### CASE NOTES

Cited in *Frizzelle v. Harnett County*, 106 N.C. App. 234, 416 S.E.2d 421 (1992).

### § 153A-344. Planning agency; zoning plan; certification to board of commissioners; amendments.

(a) To exercise the powers conferred by this Part, a county shall create or designate a planning agency under the provisions of this Article or of a local act. The planning agency shall prepare a proposed zoning ordinance, including both the full text of such ordinance and maps showing proposed district boundaries. The planning agency may hold public hearings in the course of preparing the ordinance. Upon completion, the planning agency shall certify the ordinance to the board of commissioners. The board of commissioners shall not hold the public hearing required by G.S. 153A-323 or take action until it has received a certified ordinance from the planning agency. Following its required public hearing, the board of commissioners may refer the ordinance back to the planning agency for any further recommendations that the agency may wish to make prior to final action by the board in adopting, modifying and adopting, or rejecting the ordinance.

Zoning regulations and restrictions and zone boundaries may from time to time be amended, supplemented, changed, modified, or repealed. Whenever territory is added to an existing designated zoning area, it shall be treated as an amendment to the zoning ordinance for that area. Before an amendment may be adopted, it must be referred to the planning agency for the agency's recommendation. The agency shall be given at least 30 days in which to make

a recommendation. The board of commissioners is not bound by the recommendations, if any, of the planning agency.

(b) Amendments, modifications, supplements, repeal or other changes in zoning regulations and restrictions and zone boundaries shall not be applicable or enforceable without consent of the owner with regard to buildings and uses for which either (i) building permits have been issued pursuant to G.S. 153A-357 prior to the enactment of the ordinance making the change or changes so long as the permits remain valid and unexpired pursuant to G.S. 153A-358 and unrevoked pursuant to G.S. 153A-362 or (ii) a vested right has been established pursuant to G.S. 153A-344.1 and such vested right remains valid and unexpired pursuant to G.S. 153A-344.1. (1959, c. 1006, s. 1; 1965, c. 194, s. 3; 1973, c. 822, s. 1; 1979, c. 611, s. 3; 1985, c. 540, s. 1; 1989 (Reg. Sess., 1990), c. 996, s. 5.)

**Local Modification.** — Guilford: 1985, c. 485.

North Carolina special exception and zoning amendment cases, see 53 N.C.L. Rev. 925 (1975).

**Legal Periodicals.** — For article discussing

### CASE NOTES

**When Enactment or Amendment Is Invalid.** — The legislative act of enacting or amending a zoning ordinance is invalid if it is unreasonable, arbitrary, or an unequal exercise of legislative power. *Chrismon v. Guilford County*, 85 N.C. App. 211, 354 S.E.2d 309 (1987), rev'd on other grounds, 322 N.C. 611, 370 S.E.2d 579 (1988); *Alderman v. Chatham County*, 89 N.C. App. 610, 366 S.E.2d 885, cert. denied, 323 N.C. 171, 373 S.E.2d 103 (1988).

**Amendment Held Not Applicable to Defendants.** — Where the uncontradicted forecast of evidence established as a matter of law that defendants made substantial expenditures for the operation of a quarry on the property in question in good faith and in reliance upon the special use permit previously granted by the Zoning Board, a later amendment by the Zoning Board precluding operation of a quarry on such property would not apply to defendants. *Cardwell v. Smith*, 106 N.C. App. 187, 415 S.E.2d 770, cert. denied, 332 N.C. 146, 419 S.E.2d 569 (1992).

**The manifest intention of the General Assembly was that a public hearing be conducted** at which those who opposed and those who favored adoption of an ordinance would have a fair opportunity to present their respective views. *Orange County v. Heath*, 278 N.C. 688, 180 S.E.2d 810 (1971), decided under former law.

**The requirement that a public hearing be conducted is mandatory.** *Orange County v. Heath*, 278 N.C. 688, 180 S.E.2d 810 (1971), decided under former law.

**Spot Zoning.** — Because it zones a small area differently than a much larger area surrounding it, spot zoning, by definition, conflicts with the whole purpose of planned zoning. Therefore, unless there is a clear showing of a

reasonable basis, spot zoning is beyond the authority of the county or municipality. *Chrismon v. Guilford County*, 85 N.C. App. 211, 354 S.E.2d 309 (1987), rev'd on other grounds, 322 N.C. 611, 370 S.E.2d 579 (1988); *Alderman v. Chatham County*, 89 N.C. App. 610, 366 S.E.2d 885, cert. denied, 323 N.C. 171, 373 S.E.2d 103 (1988).

**Spot zoning is not invalid per se**, but rather, it is beyond the authority of the municipality or county and therefore void only in the absence of a clear showing of a reasonable basis therefor. *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988).

**Clear Showing of Reasonable Basis for Spot Zoning.** — While the rezoning of two tracts from A-1 to CU-M-2, so as to allow the storage and sale of agricultural chemicals, constituted a form of spot zoning, this activity was legal and not illegal spot zoning. Because of the substantial benefits created for the surrounding community by the rezoning and because of the close relationship between the likely uses of the rezoned property and the uses already present in the surrounding tracts, there was a clear showing of a reasonable basis for the spot zoning. *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988).

**Rezoning.** — It is not necessary that property rezoned to a conditional use district be available for all of the uses allowed under the corresponding general use district. *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988).

Rezoning lacks a permissible basis where it is done on consideration of assurances that a particular tract or parcel will be developed in accordance with restricted approval plans. *Chrismon v. Guilford County*, 85 N.C. App. 211, 354 S.E.2d 309 (1987), rev'd on other grounds,

322 N.C. 611, 370 S.E.2d 579 (1988).

**Rezoning Held Valid Conditional Use Zoning.** — The rezoning of two tracts of land from A-1 to CU-M-2 so as to allow the storage and sale of agricultural chemicals was valid conditional use zoning and not illegal contract zoning. *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988).

As the board of commissioners' enactment of

a rezoning ordinance was a legislative act reviewable under the "whole record" test, the trial court erred in considering evidence outside the record of the rezoning process. *Kerik v. Davidson County*, — N.C. App. —, 551 S.E.2d 186, 2001 N.C. App. LEXIS 671 (2001).

**Cited** in *Frizzelle v. Harnett County*, 106 N.C. App. 234, 416 S.E.2d 421 (1992).

## § 153A-344.1. Vesting rights.

(a) The General Assembly finds and declares that it is necessary and desirable, as a matter of public policy, to provide for the establishment of certain vested rights in order to ensure reasonable certainty, stability, and fairness in the land-use planning process, secure the reasonable expectations of landowners, and foster cooperation between the public and private sectors in the area of land-use planning. Furthermore, the General Assembly recognizes that county approval of land-use development typically follows significant landowner investment in site evaluation, planning, development costs, consultant fees, and related expenses.

The ability of a landowner to obtain a vested right after county approval of a site specific development plan or a phased development plan will preserve the prerogatives and authority of local elected officials with respect to land-use matters. There will be ample opportunities for public participation and the public interest will be served. These provisions will strike an appropriate balance between private expectations and the public interest, while scrupulously protecting the public health, safety, and welfare.

(b) Definitions.

- (1) "Landowner" means any owner of a legal or equitable interest in real property, including the heirs, devisees, successors, assigns, and personal representative of such owner. The landowner may allow a person holding a valid option to purchase to act as his agent or representative for purposes of submitting a proposed site specific development plan or a phased development plan under this section, in the manner allowed by ordinance.
- (2) "County" shall have the same meaning as set forth in G.S. 153A-1(3).
- (3) "Phased development plan" means a plan which has been submitted to a county by a landowner for phased development which shows the type and intensity of use for a specific parcel or parcels with a lesser degree of certainty than the plan determined by the county to be a site specific development plan.
- (4) "Property" means all real property subject to zoning regulations and restrictions and zone boundaries by a county.
- (5) "Site specific development plan" means a plan which has been submitted to a county by a landowner describing with reasonable certainty the type and intensity of use for a specific parcel or parcels of property. Such plan may be in the form of, but not be limited to, any of the following plans or approvals: A planned unit development plan, a subdivision plat, a preliminary or general development plan, a conditional or special use permit, a conditional or special use district zoning plan, or any other land-use approval designation as may be utilized by a county. Unless otherwise expressly provided by the county such a plan shall include the approximate boundaries of the site; significant topographical and other natural features effecting development of the site; the approximate location on the site of the proposed buildings, structures, and other improvements; the approximate dimensions,

including height, of the proposed buildings and other structures; and the approximate location of all existing and proposed infrastructure on the site, including water, sewer, roads, and pedestrian walkways. What constitutes a site specific development plan under this section that would trigger a vested right shall be finally determined by the county pursuant to an ordinance, and the document that triggers such vesting shall be so identified at the time of its approval. However, at a minimum, the ordinance to be adopted by the county shall designate a vesting point earlier than the issuance of a building permit. A variance shall not constitute a site specific development plan, and approval of a site specific development plan with the condition that a variance be obtained shall not confer a vested right unless and until the necessary variance is obtained. Neither a sketch plan nor any other document which fails to describe with reasonable certainty the type and intensity of use for a specified parcel or parcels or property may constitute a site specific development plan.

- (6) "Vested right" means the right to undertake and complete the development and use of property under the terms and conditions of an approved site specific development plan or an approved phased development plan.

(c) Establishment of vested right.

A vested right shall be deemed established with respect to any property upon the valid approval, or conditional approval, of a site specific development plan or a phased development plan, following notice and public hearing by the county with jurisdiction over the property. Such vested right shall confer upon the landowner the right to undertake and complete the development and use of said property under the terms and conditions of the site specific development plan or the phased development plan including any amendments thereto. A county may approve a site specific development plan or a phased development plan upon such terms and conditions as may reasonably be necessary to protect the public health, safety, and welfare. Such conditional approval shall result in a vested right, although failure to abide by such terms and conditions will result in a forfeiture of vested rights. A county shall not require a landowner to waive his vested rights as a condition of developmental approval. A site specific development plan or a phased development plan shall be deemed approved upon the effective date of the county's action or ordinance relating thereto.

(d) Duration and termination of vested right.

- (1) A right which has been vested as provided for in this section shall remain vested for a period of two years. This vesting shall not be extended by any amendments or modifications to a site specific development plan unless expressly provided by the county.
- (2) Notwithstanding the provisions of subsection (d)(1), a county may provide that rights shall be vested for a period exceeding two years but not exceeding five years where warranted in light of all relevant circumstances, including, but not limited to, the size and phasing of development, the level of investment, the need for the development, economic cycles, and market conditions. These determinations shall be in the sound discretion of the county.
- (3) Notwithstanding the provisions of (d)(1) and (d)(2), the county may provide by ordinance that approval by a county of a phased development plan shall vest the zoning classification or classifications so approved for a period not to exceed five years. The document that triggers such vesting shall be so identified at the time of its approval. The county still may require the landowner to submit a site specific development plan for approval by the county with respect to each

phase or phases in order to obtain final approval to develop within the restrictions of the vested zoning classification or classifications. Nothing in this section shall be construed to require a county to adopt an ordinance providing for vesting of rights upon approval of a phased development plan.

- (4) Following approval or conditional approval of a site specific development plan or a phased development plan, nothing in this section shall exempt such a plan from subsequent reviews and approvals by the county to ensure compliance with the terms and conditions of the original approval, provided that such reviews and approvals are not inconsistent with said original approval. Nothing in this section shall prohibit the county from revoking the original approval for failure to comply with applicable terms and conditions of the approval or the zoning ordinance.
  - (5) Upon issuance of a building permit, the provisions of G.S. 153A-358 and G.S. 153A-362 shall apply, except that a permit shall not expire or be revoked because of the running of time while a vested right under this section is outstanding.
  - (6) A right which has been vested as provided in this section shall terminate at the end of the applicable vesting period with respect to buildings and uses for which no valid building permit applications have been filed.
- (e) Subsequent changes prohibited; exceptions.
- (1) A vested right, once established as provided for in this section, precludes any zoning action by a county which would change, alter, impair, prevent, diminish, or otherwise delay the development or use of the property as set forth in an approved site specific development plan or an approved phased development plan, except:
    - a. With the written consent of the affected landowner;
    - b. Upon findings, by ordinance after notice and a public hearing, that natural or man-made hazards on or in the immediate vicinity of the property, if uncorrected, would pose a serious threat to the public health, safety, and welfare if the project were to proceed as contemplated in the site specific development plan or the phased development plan;
    - c. To the extent that the affected landowner receives compensation for all costs, expenses, and other losses incurred by the landowner, including, but not limited to, all fees paid in consideration of financing, and all architectural, planning, marketing, legal, and other consultant's fees incurred after approval by the county, together with interest thereon at the legal rate until paid. Compensation shall not include any diminution in the value of the property which is caused by such action;
    - d. Upon findings, by ordinance after notice and a hearing, that the landowner or his representative intentionally supplied inaccurate information or made material misrepresentations which made a difference in the approval by the county of the site specific development plan or the phased development plan; or
    - e. Upon the enactment or promulgation of a State or federal law or regulation which precludes development as contemplated in the site specific development plan or the phased development plan, in which case the county may modify the affected provisions, upon a finding that the change in State or federal law has a fundamental effect on the plan, by ordinance after notice and a hearing.
  - (2) The establishment of a vested right shall not preclude the application of overlay zoning which imposes additional requirements but does not

affect the allowable type or intensity of use, or ordinances or regulations which are general in nature and are applicable to all property subject to land-use regulation by a county, including, but not limited to, building, fire, plumbing, electrical, and mechanical codes. Otherwise applicable new regulations shall become effective with respect to property which is subject to a site specific development plan or a phased development plan upon the expiration or termination of the vesting rights period provided for in this section.

(3) Notwithstanding any provision of this section, the establishment of a vested right shall not preclude, change or impair the authority of a county to adopt and enforce zoning ordinance provisions governing nonconforming situations or uses.

(f) Miscellaneous provisions.

(1) A vested right obtained under this section is not a personal right, but shall attach to and run with the applicable property. After approval of a site specific development plan or a phased development plan, all successors to the original landowner shall be entitled to exercise such rights.

(2) Nothing in this section shall preclude judicial determination, based on common-law principles or other statutory provisions, that a vested right exists in a particular case or that a compensable taking has occurred. Except as expressly provided in this section, nothing in this section shall be construed to alter the existing common law.

(3) In the event a county fails to adopt an ordinance setting forth what constitutes a site specific development plan triggering a vested right, a landowner may establish a vested right with respect to property upon the approval of a zoning permit, or otherwise may seek appropriate relief from the Superior Court Division of the General Court of Justice. (1989 (Reg. Sess., 1990), c. 996, s. 6.)

CASE NOTES

**North Carolina recognizes two methods for a landowner to establish a vested right in a zoning ordinance:** (1) qualify with relevant statutes (§§ 153A-344.1, 160A-385.1) or

(2) qualify under the common law. *Browning-Ferris Indus. of S. Atl., Inc. v. Guilford County Bd. of Adjustment*, 126 N.C. App. 168, 484 S.E.2d 411 (1997).

**§ 153A-345. Board of adjustment.**

(a) The board of commissioners may provide for the appointment and compensation, if any, of a board of adjustment consisting of at least five members, each to be appointed for three years. In appointing the original members of the board, or in filling vacancies caused by the expiration of the terms of existing members, the board of commissioners may appoint some members for less than three years to the end that thereafter the terms of all members do not expire at the same time. The board of commissioners may provide for the appointment and compensation, if any, of alternate members to serve on the board in the absence of any regular member. Alternate members shall be appointed for the same term, at the same time, and in the same manner as regular members. Each alternate member, while attending any regular or special meeting of the board and serving in the absence of a regular member, has and may exercise all the powers and duties of a regular member. If the board of commissioners does not zone the entire territorial jurisdiction of the county, each designated zoning area shall have at least one resident as a member of the board of adjustment.

A county may designate a planning agency to perform any or all of the duties of a board of adjustment in addition to its other duties.

(b) The board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with enforcing an ordinance adopted pursuant to this Part. Any person aggrieved or any officer, department, board, or bureau of the county may take an appeal. Appeals shall be taken within times prescribed by the board of adjustment by general rule, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which action appealed from was taken. An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment, after notice of appeal has been filed with him, that because of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property or that because the violation charged is transitory in nature a stay would seriously interfere with enforcement of the ordinance. In that case proceedings may not be stayed except by a restraining order, which may be granted by the board of adjustment or by a court of record on application, on notice to the officer from whom the appeal is taken and on due cause shown. The board of adjustment shall fix a reasonable time for the hearing of the appeal, give due notice of the appeal to the parties, and decide the appeal within a reasonable time. The board of adjustment may reverse or affirm, in whole or in part, or may modify the order, requirement, decision, or determination appealed from, and shall make any order, requirement, decision, or determination that in its opinion ought to be made in the circumstances. To this end the board has all of the powers of the officer from whom the appeal is taken.

(c) The zoning ordinance may provide that the board of adjustment may permit special exceptions to the zoning regulations in classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance. The ordinance may also authorize the board to interpret zoning maps and pass upon disputed questions of lot lines or district boundary lines and similar questions that may arise in the administration of the ordinance. The board shall hear and decide all matters referred to it or upon which it is required to pass under the zoning ordinance.

(d) When practical difficulties or unnecessary hardships would result from carrying out the strict letter of a zoning ordinance, the board of adjustment may, in passing upon appeals, vary or modify any regulation or provision of the ordinance relating to the use, construction, or alteration of buildings or structures or the use of land, so that the spirit of the ordinance is observed, public safety and welfare secured, and substantial justice done.

(e) The board of adjustment, by a vote of four-fifths of its members, may reverse any order, requirement, decision, or determination of an administrative officer charged with enforcing an ordinance adopted pursuant to this Part, or may decide in favor of the applicant a matter upon which the board is required to pass under the ordinance, or may grant a variance from the provisions of the ordinance. Each decision of the board is subject to review by the superior court by proceedings in the nature of certiorari. Any petition for review by the superior court shall be filed with the clerk of superior court within 30 days after the decision of the board is filed in such office as the ordinance specifies, or after a written copy thereof is delivered to every aggrieved party who has filed a written request for such copy with the secretary or chairman of the board at the time of its hearing of the case, whichever is later. The decision of the board may be delivered to the aggrieved party either by personal service or by registered mail or certified mail return receipt requested.

(f) The chairman of the board of adjustment or any member temporarily acting as chairman may in his official capacity administer oaths to witnesses

in any matter coming before the board. (1959, c. 1006, s. 1; 1965, c. 194, s. 4; 1967, c. 1208, ss. 5-7; 1973, c. 822, s. 1; 1979, c. 611, s. 4; c. 635; 1981, c. 891, s. 8; 1985, c. 397, s. 1.)

**Local Modification.** — Durham: 1997-165; Mecklenburg: 1981, cc. 293, 583; Union: 1987, c. 604, s. 2(3).

**Legal Periodicals.** — For article discussing

North Carolina special exception and zoning amendment cases, see 53 N.C.L. Rev. 925 (1975).

#### CASE NOTES

*Editor's Note.* — Some of the cases cited below were decided under corresponding sections of former law.

**Construction of Section.** — The purpose of this section is to provide a right of review, and statutes providing for review of administrative decisions should be liberally construed to preserve and effectuate that right. *Mize v. County of Mecklenburg*, 80 N.C. App. 279, 341 S.E.2d 767 (1986).

**The legislature may delegate to the board of adjustment, as a quasi-judicial body, authority to determine facts and draw conclusions** as a basis for its official action. *Jackson v. Guilford County Bd. of Adjustment*, 2 N.C. App. 408, 163 S.E.2d 265 (1968), *aff'd*, 275 N.C. 155, 166 S.E.2d 78 (1969).

**Power of Board to Impose Civil Penalties.** — Since the Board possesses all powers of the enforcement officer for non-compliance, the trial court did not err in finding that the Board had authority to impose civil penalties. *JWL Invs., Inc. v. Guilford County Bd. of Adjustment*, 133 N.C. App. 426, 515 S.E.2d 715 (1999).

**Finality of Board's Decisions.** — The decisions of the board are final, subject to the right of the courts to review errors in law and to give relief against its orders which are arbitrary, oppressive or attended with manifest abuse of authority. *Jackson v. Guilford County Bd. of Adjustment*, 2 N.C. App. 408, 163 S.E.2d 265 (1968), *aff'd*, 275 N.C. 155, 166 S.E.2d 78 (1969).

Decisions of the board of adjustment are final, subject to the right of courts on certiorari to review errors in law and to give relief against its orders which are arbitrary, oppressive or attended with manifest abuse of authority. *County of Durham v. Addison*, 262 N.C. 280, 136 S.E.2d 600 (1964).

**Conclusive Effect of Board's Findings.** — Upon review by a superior court upon writ of certiorari issued pursuant to subsection (e) of this section, the findings of fact made by the board, if supported by evidence introduced at the hearing before the board, are conclusive. *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 344 S.E.2d 272 (1986).

**Enforcement of Zoning Ordinances.** — Section 153A-123 and this section give the superior court the power to enforce zoning ordinances through the issuance of an injunction. *Mize v. County of Mecklenburg*, 80 N.C. App. 279, 341 S.E.2d 767 (1986).

**County Board of Adjustment Rightly Applied Local Notice Provision.** — Section 1A-1-6 did not apply in a case where the language of a local ordinance was clear and unambiguous in its requirement that a minimum ten-day "notice of public hearing" be given and further stated how that ten days should be calculated. *Richardson v. Union County Bd. of Adjustment*, 136 N.C. App. 134, 523 S.E.2d 432 (1999).

**Writ permitted to obtain review** of the decision of a board of adjustment is a writ to bring the matter before the court upon the evidence presented by the record itself for review of alleged errors of law. *Jackson v. Guilford County Bd. of Adjustment*, 2 N.C. App. 408, 163 S.E.2d 265 (1968), *aff'd*, 275 N.C. 155, 166 S.E.2d 78 (1969).

**The inquiry on review upon writ of certiorari** under this section is whether the board committed an error of law or whether an order of the board is arbitrary, oppressive or attended with manifest abuse of authority. *Teen Challenge Training Center, Inc. v. Board of Adjustment*, 90 N.C. App. 452, 368 S.E.2d 661 (1988).

**Appeal Held Not Taken Within Reasonable Time.** — Where Board of Adjustment failed to prescribe any time within which an appeal had to be taken from a zoning compliance officer, a notice of appeal, consisting of a letter from an attorney representing adjacent landowners, filed 322 days after the officer issued the certificate of zoning compliance, was not taken within a reasonable time. See *Teen Challenge Training Center, Inc. v. Board of Adjustment*, 90 N.C. App. 452, 368 S.E.2d 661 (1988).

**Challenge Under Dillon's Rule — Certiorari Not Necessary.** — Where owner of mobile home challenged validity of city ordinance as violating requirements of Dillon's Rule, complaint did not need to be in form of a petition for certiorari since trial court should have allowed owner to attack ordinance directly; owner

stated direct attack on ordinance so long as she could show that attack was timely under § 153A-348. *White v. Union County*, 93 N.C. App. 148, 377 S.E.2d 93 (1989).

**Decisions of a board of adjustment are not subject to collateral attack.** County of Durham v. Addison, 262 N.C. 280, 136 S.E.2d 600 (1964).

For case holding that defendant in action for violating zoning ordinance, having failed to exhaust his statutory remedies, could not challenge validity of ordinance, see *Forsyth County v. York*, 19 N.C. App. 361, 198 S.E.2d 770, cert. denied, 284 N.C. 253, 200 S.E.2d 653 (1973).

**Since Board Decision Would Be Rendered Meaningless.** — To allow a collateral attack on an unappealed board decision would make the decision meaningless. *New Hanover County v. Pleasant*, 59 N.C. App. 644, 297 S.E.2d 760 (1982).

**The Zoning Board of Adjustment is a necessary party respondent to a petition filed pursuant to subsection (e) of this section.** *Mize v. County of Mecklenburg*, 80 N.C. App. 279, 341 S.E.2d 767 (1986).

**Board of Adjustment Necessary Party.** — In dispute over zoning code the trial court did not err in dismissing the action based on the failure to join the Board of Adjustment as a necessary party to the lawsuit. *City of Raleigh v. Hudson Belk Co.*, 114 N.C. App. 815, 443 S.E.2d 112 (1994).

**In addition to the Zoning Board of Adjustment, other parties may in fact be necessary** to determine issues raised in a petition under subsection (e) of this section. *Mize v. County of Mecklenburg*, 80 N.C. App. 279, 341 S.E.2d 767 (1986).

**Amendment of Petition to Join Party.** — Where petitioners complied with all the express requirements of this vague section by filing a petition in Mecklenburg County Superior Court within 30 days of the decision of the board, under the circumstances presented, the court abused its discretion by failing to allow the petitioners to amend the petition to join the Zoning Board of Adjustment. *Mize v. County of Mecklenburg*, 80 N.C. App. 279, 341 S.E.2d 767 (1986).

**Time for Filing Petition for Review.** — The language of this section requires only that any petition seeking review by the superior court be filed with the clerk of superior court within 30 days after the decision of the board is filed or after a written copy has been delivered to every aggrieved party. *Mize v. County of Mecklenburg*, 80 N.C. App. 279, 341 S.E.2d 767 (1986).

**The scope of review under subsection (e) of this section is:** (1) Reviewing the record for errors in law; (2) insuring that procedures specified by law in both statute and ordinance are followed; (3) insuring that appropriate due

process rights of a petitioner are protected, including the right to offer evidence, cross-examine witnesses and inspect documents; (4) insuring that the decisions of zoning boards are supported by competent, material and substantial evidence in the whole record; and (5) insuring that decisions are not arbitrary and capricious. *Mize v. County of Mecklenburg*, 80 N.C. App. 279, 341 S.E.2d 767 (1986).

It is not the function of the reviewing court, upon writ of certiorari under subsection (e) of this section, to find the facts, but to determine whether the findings of fact made by the board are supported by the evidence before the board. It may vacate an order based upon a finding of fact not supported by the evidence. *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 344 S.E.2d 272 (1986).

The matter is before the court upon writ of certiorari under subsection (e) of this section to determine whether an error of law has been committed and to give relief from an order of the board which is found to be arbitrary, oppressive or attended with manifest abuse of authority. *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 344 S.E.2d 272 (1986).

**In reviewing zoning decisions, the superior court is not the trier of fact;** it sits in the posture of an appellate court. There is no necessity for, or entitlement to, a jury trial. *Mize v. County of Mecklenburg*, 80 N.C. App. 279, 341 S.E.2d 767 (1986).

**No Ground for Equitable Relief Absent Invasion of Property Rights or Lack of Other Adequate Remedy.** — There is no ground for equitable relief against zoning where there has been no invasion of property rights, or where there is an adequate remedy at law, as by certiorari or mandamus, or by pursuit of a statutory remedy. *Michael v. Guilford County*, 269 N.C. 515, 153 S.E.2d 106 (1967).

**Depreciation of Complainant's Property Does Not Invalidate Ordinance.** — The mere fact that a zoning ordinance seriously depreciates the value of complainant's property is not enough, standing alone, to establish its invalidity. *Michael v. Guilford County*, 269 N.C. 515, 153 S.E.2d 106 (1967).

**Special Exception Defined.** — A special exception, within the meaning of a zoning ordinance, is one which is expressly permitted in a given zone upon proof that certain facts and conditions detailed in the ordinance exist. It is granted by the board, after a public hearing, upon a finding that the specified conditions have been satisfied. *In re Ellis*, 277 N.C. 419, 178 S.E.2d 77 (1970).

**Right to a special exception permit cannot be made to hinge upon whether the board considers proposed structure beneficial or harmful to the community.** Such power would subject the board to the pressures of individuals or groups who, for an infinite

variety of reasons, might oppose the permit, and enable it to make a different rule of law in every case. Statute empowering the commissioners to authorize the board of adjustment to permit special exceptions in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance does not purport to confer such unbridled discretion upon it. In re Ellis, 277 N.C. 419, 178 S.E.2d 77 (1970).

**Provision of a county ordinance requiring board of adjustment to deny a permit if it found the granting of it would adversely affect the public interest** was in excess of the authority which the statute permitted to be so conferred upon the board. Jackson v. Guilford County Bd. of Adjustment, 275 N.C. 155, 166 S.E.2d 78 (1969).

**This section did not change Forsyth County zoning ordinance** enacted pursuant to Session Laws 1947, c. 677 in April, 1967. Cardwell v. Forsyth County Zoning Bd. of Adjustment, 88 N.C. App. 244, 362 S.E.2d 843 (1987), aff'd, 321 N.C. 742, 366 S.E.2d 858 (1988).

**Cemetery was not estopped from asserting that no special use permit was required** for the construction and installation of facilities for above-ground burial since such facilities were not an unlawful extension of its nonconforming use of its cemetery property. Stegall v. Zoning Bd. of Adjustment, 87 N.C. App. 359, 361 S.E.2d 309 (1987), cert. denied, 321 N.C. 480, 364 S.E.2d 671 (1988).

**Above-Ground Burial Facilities Held Legal Extension of Cemetery's Nonconforming Use of Cemetery Property.** — Where the Zoning Ordinance provides for the continuation of pre-existing nonconforming uses of property, a cemetery construction of above-ground burial facilities relates to the process by which the

nonconforming activity is conducted and does not amount to a change in the nature and kind of use to which the property was devoted. Stegall v. Zoning Bd. of Adjustment, 87 N.C. App. 359, 361 S.E.2d 309 (1987), cert. denied, 321 N.C. 480, 364 S.E.2d 671 (1988).

**Board's Action Upheld.** — Petitioners failed to show that Board of Adjustment acted arbitrarily or capriciously in combining standards for granting a special use permit to a broadcasting company. Richardson v. Union County Bd. of Adjustment, 136 N.C. App. 134, 523 S.E.2d 432 (1999).

**Applied** in Lathan v. Zoning Bd. of Adj., 69 N.C. App. 686, 317 S.E.2d 733 (1984); In re Dunn, 73 N.C. App. 243, 326 S.E.2d 309 (1985); JWL Invs., Inc. v. Guilford County Bd. of Adjustment, 133 N.C. App. 426, 515 S.E.2d 715 (1999).

**Quoted** in Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980); Atkins v. Zoning Bd. of Adjustment, 53 N.C. App. 723, 281 S.E.2d 756 (1981); Guilford County Planning & Dev. Dep't v. Simmons, 102 N.C. App. 325, 401 S.E.2d 659 (1991).

**Cited** in Mecklenburg County v. Westbery, 32 N.C. App. 630, 233 S.E.2d 658 (1977); Davis v. Zoning Bd. of Adjustment, 41 N.C. App. 579, 255 S.E.2d 444 (1979); County of Lancaster v. Mecklenburg County, 334 N.C. 496, 434 S.E.2d 604 (1993); Guilford County Planning & Dev. Dep't v. Simmons, 115 N.C. App. 87, 443 S.E.2d 765 (1994); Ball v. Randolph County Bd. of Adjustment, 129 N.C. App. 300, 498 S.E.2d 833 (1998), petition for discretionary review improvidently granted, 49 N.C. 348, 507 S.E.2d 272 (1998); Willis v. City of Southport Bd. of Adjustment, 129 N.C. App. 499, 500 S.E.2d 723 (1998).

## § 153A-346. Conflict with other laws.

When regulations made under authority of this Part require a greater width or size of yards or courts, or require a lower height of a building or fewer number of stories, or require a greater percentage of a lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the regulations made under authority of this Part govern. When the provisions of any other statute or local ordinance or regulation require a greater width or size of yards or courts, or require a lower height of a building or a fewer number of stories, or require a greater percentage of a lot to be left unoccupied, or impose other higher standards than are required by regulations made under authority of this Part, the provisions of the other statute or local ordinance or regulation govern. (1959, c. 1006, s. 1; 1973, c. 822, s. 1.)

## § 153A-347. Part applicable to buildings constructed by the State and its subdivisions; exception.

Each provision of this Part is applicable to the erection, construction, and use of buildings by the State of North Carolina and its political subdivisions.

Notwithstanding the provisions of any general or local law or ordinance, no land owned by the State of North Carolina may be included within an overlay district or a special use or conditional use district without approval of the Council of State. (1959, c. 1006, s. 1; 1973, c. 822, s. 1; 1985, c. 607, s. 4.)

**Legal Periodicals.** — For comment on exclusionary zoning of community facilities, see 12 N.C. Cent. L.J. 167 (1980).

### CASE NOTES

**The word "building," as used in this section, does not encompass a "public enterprise,"** as used in §§ 153A-274 and 160A-311. *Davidson County v. City of High Point*, 85 N.C. App. 26, 354 S.E.2d 280, modified and aff'd, 321 N.C. 252, 362 S.E.2d 553 (1987).

**City Immune from County's Zoning Ordinances.** — City which owned a sewage treatment facility located in a county and outside the city's boundaries was not required to comply with county's zoning ordinances in upgrading the facility and providing sewage service to newly annexed areas of city with that facility. *Davidson County v. City of High Point*, 85 N.C. App. 26, 354 S.E.2d 280, modified and aff'd, 321 N.C. 252, 362 S.E.2d 553 (1987).

**County does not have authority over provision of sewer services within a city, or over newly annexed areas** of a city which also lie in the county. *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987).

**Use of City-Owned Sewage Treatment Plant Without Prior Approval of County.** — Since county had no authority to restrict or regulate city's provision of sewer service to its residents, the city could use city-owned sewage treatment plant located outside the city but within the county, which was upgraded pursuant to the county's special use permit, with a

condition attached to the permit requiring the county's prior approval of service to county citizens, to meet its statutory mandate to provide sewer service to residents in newly annexed areas without seeking the county's prior approval, even though the facility was located in the county. *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987).

**Locating Buildings in Violation of Another Jurisdiction's Zoning Laws.** — While municipalities or counties may exercise the power of eminent domain for the construction, enlarging or improving of those buildings listed in § 40A-3(b)(6), the power of eminent domain does not include locating a particular building in violation of another jurisdiction's zoning laws by virtue of the fact that through this section and § 160A-392 the Legislature has made zoning regulations with regard to buildings specifically applicable to political subdivisions. The same zoning restrictions do not apply, however, to the construction, establishment, enlargement, improvement, maintenance, ownership or operation of a public enterprise unless the Legislature has clearly manifested a contrary intent. *Davidson County v. City of High Point*, 85 N.C. App. 26, 354 S.E.2d 280, modified and aff'd, 321 N.C. 252, 362 S.E.2d 553 (1987).

## § 153A-348. Statute of limitations.

A cause of action as to the validity of any zoning ordinance, or amendment thereto, adopted under this Part or other applicable law shall accrue upon adoption of the ordinance, or amendment thereto, and shall be brought within two months as provided in G.S. 1-54.1. (1981, c. 705, s. 2; 1995 (Reg. Sess., 1996), c. 746, s. 6.)

### CASE NOTES

**This section is absolute bar to plaintiff's attack on validity of amended zoning or-**

**inance** since the period of time between the enactment of the amended zoning ordinance

and the institution of this action was approximately four and one-half years. *Baucom's Nursery Co. v. Mecklenburg County*, 89 N.C. App. 542, 366 S.E.2d 558, cert. denied, 322 N.C. 834, 371 S.E.2d 274 (1988).

**Challenge Under Dillon's Rule — Certiorari Not Necessary.** — Where owner of mobile home challenged validity of city ordinance as

violating requirements of Dillon's Rule, complaint did not need to be in form of a petition for certiorari since trial court should have allowed owner to attack ordinance directly; owner stated direct attack on ordinance so long as she could show that attack was timely under this section. *White v. Union County*, 93 N.C. App. 148, 377 S.E.2d 93 (1989).

§ **153A-349:** Reserved for future codification purposes.

Part 4. Building Inspection.

§ **153A-350. "Building" defined.**

As used in this Part, the words "building" or "buildings" include other structures. (1973, c. 822, s. 1.)

**Legal Periodicals.** — For comment, "Urban Planning and Land Use Regulation: The Need

for Consistency," see 14 *Wake Forest L. Rev.* 81 (1978).

CASE NOTES

**A mobile home is deemed a "building."** *Mecklenburg County v. Westbery*, 32 N.C. App. 630, 233 S.E.2d 658 (1977).

315 N.C. 296, 337 S.E.2d 576 (1985); *Moseley v. L & L Constr., Inc.*, 123 N.C. App. 79, 472 S.E.2d 172 (1996).

**Cited in** *County of Durham v. Maddry & Co.*,

§ **153A-350.1. Tribal lands.**

As used in this Part, the term:

- (1) "Board of commissioners" includes the Tribal Council of such tribe.
- (2) "County" or "counties" also means a federally recognized Indian Tribe, and as to such tribe includes lands held in trust for the tribe. (1999-78, s. 1.)

§ **153A-351. Inspection department; certification of electrical inspectors.**

(a) A county may create an inspection department, consisting of one or more inspectors who may be given the titles of building inspector, electrical inspector, plumbing inspector, housing inspector, zoning inspector, heating and air-conditioning inspector, fire prevention inspector, deputy or assistant inspector, or any other title that is generally descriptive of the duties assigned. The department may be headed by a superintendent or director of inspections.

(a1) Every county shall perform the duties and responsibilities set forth in G.S. 153A-352 either by:

- (1) Creating its own inspection department;
- (2) Creating a joint inspection department in cooperation with one or more other units of local government, pursuant to G.S. 153A-353 or Part 1 of Article 20 of Chapter 160A; or,
- (3) Contracting with another unit of local government for the provision of inspection services pursuant to Part 1 of Article 20 of Chapter 160A.

Such action shall be taken no later than the applicable date in the schedule below, according to the county's population as published in the 1970 United States Census:

Counties over 75,000 population — July 1, 1979

Counties between 50,001 and 75,000 — July 1, 1981

Counties between 25,001 and 50,000 — July 1, 1983

Counties 25,000 and under — July 1, 1985.

In the event that any county shall fail to provide inspection services by the date specified above or shall cease to provide such services at any time thereafter, the Commissioner of Insurance shall arrange for the provision of such services, either through personnel employed by his Department or through an arrangement with other units of government. In either event, the Commissioner shall have and may exercise within the county's jurisdiction all powers made available to the board of county commissioners with respect to building inspection under Part 4 of Article 18 of this Chapter and Part 1 of Article 20 of Chapter 160A. Whenever the Commissioner has intervened in this manner, the county may assume provision of inspection services only after giving the Commissioner two years' written notice of its intention to do so; provided, however, that the Commissioner may waive this requirement or permit assumption at an earlier date if he finds that such earlier assumption will not unduly interfere with arrangements he has made for the provision of those services.

(b) No person may perform electrical inspections pursuant to this Part unless he has been certified as qualified by the Commissioner of Insurance. To be certified a person must pass a written examination based on the electrical regulations included in the latest edition of the State Building Code as filed with the Secretary of State. The examination shall be under the supervision of and conducted according to rules and regulations prescribed by the Chief State Electrical Inspector or Engineer of the State Department of Insurance and the Board of Examiners of Electrical Contractors. It shall be held quarterly, in Raleigh or any other place designated by the Chief State Electrical Inspector or Engineer.

The rules and regulations may provide for the certification of class I, class II, and class III inspectors, according to the results of the examination. The examination shall be based on the type and character of electrical installations being made in the territory in which the applicant wishes to serve as an electrical inspector. A class I inspector may serve anywhere in the State, but class II and class III inspectors shall be limited to service in the territory for which they have qualified.

The Commissioner of Insurance shall issue a certificate to each person who passes the examination, approving the person for service in a designated territory. To remain valid, a certificate must be renewed each January by payment of an annual renewal fee of one dollar (\$1.00). The examination fee shall be five dollars (\$5.00).

If the person appointed by a county as electrical inspector fails to pass the examination, the county shall continue to make appointments until an appointee has passed the examination. For the interim the Commissioner of Insurance may authorize the county to use a temporary inspector.

The provisions of this subsection shall become void and ineffective on such date as the North Carolina Code Officials Qualification Board certifies to the Secretary of State that it has placed in effect a certification system for electrical inspectors pursuant to its authority granted by Article 9C of Chapter 143 of the General Statutes. (1937, c. 57; 1941, c. 105; 1947, c. 719; 1951, c. 651; 1953, c. 984; 1955, cc. 144, 942, 1171; 1957, cc. 415, 456, 1286, 1294; 1959, cc. 399, 940, 1031; 1961, cc. 763, 884, 1036; 1963, cc. 639, 868; 1965, cc. 243, 371, 453, 494, 846; 1967, cc. 45, 73, 113; c. 495, ss. 1, 3; 1969, cc. 675, 918; c. 1003, s. 7; c. 1010, s. 4; c. 1064, ss. 1, 4, 5; c. 1066, s. 1; 1973, c. 822, s. 1; 1977, c. 531, ss. 2, 3; 1991, c. 720, s. 77.)

## CASE NOTES

**Failure of City to Provide Inspection Services.** — Section 160A-411 does not mandate that the city and the county must agree regarding the provision of inspection services; rather, it provides the options available to the city in determining who shall perform the inspections, one of which is arranging for the county to perform them, and if the city fails to provide inspection services via any of the four options, the statute dictates that the Commis-

sioner of Insurance shall arrange for the provision of the services. The legislature does not need to intervene in the process should the county and the city fail to agree; instead, the legislature has provided that the Commissioner of Insurance shall do so should the city fail to follow the requirements of the statute. *City of New Bern v. New Bern-Craven County Bd. of Educ.*, 338 N.C. 430, 450 S.E.2d 735 (1994).

### § 153A-351.1. Qualifications of inspectors.

On and after the applicable date set forth in the schedule in G.S. 153A-351, no county shall employ an inspector to enforce the State Building Code as a member of a county or joint inspection department who does not have one of the following types of certificates issued by the North Carolina Code Officials Qualification Board attesting to his qualifications to hold such position: (i) a probationary certificate, valid for one year only; (ii) a standard certificate; or (iii) a limited certificate, which shall be valid only as an authorization for him to continue in the position held on the date specified in G.S. 143-151.10(c) and which shall become invalid if he does not successfully complete in-service training prescribed by the Qualification Board within the period specified in G.S. 143-151.10(c). An inspector holding one of the above certificates can be promoted to a position requiring a higher level certificate only upon issuance by the Board of a standard certificate or probationary certificate appropriate for such new position. (1977, c. 531, s. 4.)

**Cross References.** — As to the North Carolina Code Officials Qualification Board, see §§ 143-151.8 through 143-151.20.

**Editor's Note.** — The reference to § 143-

151.10(c) in two places above appears to be incorrect. The reference should apparently be to § 143-151.13(c).

### § 153A-352. Duties and responsibilities.

The duties and responsibilities of an inspection department and of the inspectors in it are to enforce within the county's territorial jurisdiction State and local laws and local ordinances and regulations relating to:

- (1) The construction of buildings;
- (2) The installation of such facilities as plumbing systems, electrical systems, heating systems, refrigeration systems, and air-conditioning systems;
- (3) The maintenance of buildings in a safe, sanitary, and healthful condition;
- (4) Other matters that may be specified by the board of commissioners.

These duties and responsibilities include receiving applications for permits and issuing or denying permits, making necessary inspections, issuing or denying certificates of compliance, issuing orders to correct violations, bringing judicial actions against actual or threatened violations, keeping adequate records, and taking any other actions that may be required to adequately enforce the laws and ordinances and regulations. The board of commissioners may enact reasonable and appropriate provisions governing the enforcement of the laws and ordinances and regulations. (1937, c. 57; 1941, c. 105; 1947, c. 719; 1951, c. 651; 1953, c. 984; 1955, cc. 144, 942, 1171; 1957, cc. 415, 456, 1286, 1294; 1959, cc. 399, 940, 1031; 1961, cc. 763, 884, 1036; 1963, cc. 639, 868; 1965, cc. 243, 371, 453, 494, 846; 1967, cc. 45, 73, 113; c. 495, ss. 1, 3; 1969, cc. 675,

918; c. 1003, s. 7; c. 1010, s. 4; c. 1064, ss. 1, 4, 5; c. 1066, s. 1; 1973, c. 822, s. 1.)

#### CASE NOTES

**Cited** in *Moseley v. L & L Constr., Inc.*, 123 N.C. App. 79, 472 S.E.2d 172 (1996).

#### OPINIONS OF ATTORNEY GENERAL

**Statutorily Obligated Services to School System.** — Any agreement between a county school system and the county or a municipality which obligates a school system to pay the county or municipality “development charges” under the guise of consideration for services

which the county or municipality is statutorily obligated to provide would be null and void as contrary to legislative intent. See opinion of Attorney General to The Honorable J. Sam Ellis House of Representatives, 1998 N.C.A.G. 41 (10/13/98).

### § 153A-353. Joint inspection department; other arrangements.

A county may enter into and carry out contracts with one or more other counties or cities under which the parties agree to create and support a joint inspection department for enforcing those State and local laws and local ordinances and regulations specified in the agreement. The governing bodies of the contracting units may make any necessary appropriations for this purpose.

In lieu of a joint inspection department, a county may designate an inspector from another county or from a city to serve as a member of the county inspection department, with the approval of the governing body of the other county or city. A county may also contract with an individual who is not a city or county employee but who holds one of the applicable certificates as provided in G.S. 153A-351.1 or G.S. 160A-411.1 or with the employer of an individual who holds one of the applicable certificates as provided in G.S. 153A-351.1 or G.S. 160A-411.1. The inspector, if designated from another county or city under this section, while exercising the duties of the position, is a county employee. The county shall have the same potential liability, if any, for inspections conducted by an individual who is not an employee of the county as it does for an individual who is an employee of the county. The company or individual with whom the county contracts shall have errors and omissions and other insurance coverage acceptable to the county. (1937, c. 57; 1941, c. 105; 1947, c. 719; 1951, c. 651; 1959, c. 940; 1963, c. 639; 1965, c. 371; 1967, c. 495, s. 1; 1969, c. 918; c. 1010, s. 4; c. 1064, ss. 1, 5; c. 1066, s. 1; 1973, c. 822, s. 1; 1993, c. 232, s. 1; 1999-372, s. 1; 2001-278, s. 1.)

**Effect of Amendments.** — Session Laws 2001-278, s. 1, effective October 1, 2001, deleted the former third sentence in the second paragraph, which read “Contracts with an individ-

ual or with the employer of an individual who is not an employee of another county or a city may be entered into only for specifically designated projects.”

#### CASE NOTES

**Cited** in *Moseley v. L & L Constr., Inc.*, 123 N.C. App. 79, 472 S.E.2d 172 (1996).

### § 153A-354. Financial support.

A county may appropriate any available funds for the support of its inspection department. It may provide for paying inspectors fixed salaries, or it may reimburse them for their services by paying over part or all of any fees collected. It may fix reasonable fees for issuing permits, for inspections, and for other services of the inspection department. (1937, c. 57; 1941, c. 105; 1947, c. 719; 1951, c. 651; 1953, c. 984; 1955, cc. 144, 942, 1171; 1957, cc. 415, 456, 1286, 1294; 1959, cc. 399, 940, 1031; 1961, cc. 763, 884, 1036; 1963, cc. 639, 868; 1965, cc. 243, 371, 453, 494, 846; 1967, cc. 45, 73, 113; c. 495, ss. 1, 3; 1969, cc. 675, 918; c. 1003, s. 7; c. 1010, s. 4; c. 1064, ss. 1, 4, 5; c. 1066, s. 1; 1973, c. 822, s. 1.)

### § 153A-355. Conflicts of interest.

Unless he or she is the owner of the building, no member of an inspection department shall be financially interested or employed by a business that is financially interested in furnishing labor, material, or appliances for the construction, alteration, or maintenance of any building within the county's territorial jurisdiction or any part or system thereof, or in making plans or specifications therefor. No member of any inspection department or other individual or an employee of a company contracting with a county to conduct inspections may engage in any work that is inconsistent with his or her duties or with the interest of the county, as determined by the county. The county must find a conflict of interest if any of the following is the case:

- (1) If the individual, company, or employee of a company contracting to perform inspections for the county has worked for the owner, developer, contractor, or project manager of the project to be inspected within the last two years.
- (2) If the individual, company, or employee of a company contracting to perform inspections for the county is closely related to the owner, developer, contractor, or project manager of the project to be inspected.
- (3) If the individual, company, or employee of a company contracting to perform inspections for the county has a financial or business interest in the project to be inspected. (1937, c. 57; 1941, c. 105; 1947, c. 719; 1951, c. 651; 1953, c. 984; 1955, cc. 144, 942, 1171; 1957, cc. 415, 456, 1286, 1294; 1959, cc. 399, 1031; 1961, cc. 763, 884, 1036; 1963, c. 868; 1965, cc. 243, 453, 494, 846; 1967, cc. 45, 73, 113; c. 495, s. 3; 1969, cc. 675, 918; c. 1003, s. 7; c. 1064, ss. 1, 4; c. 1066, s. 1; 1973, c. 822, s. 1; 1993, c. 232, s. 2; 1999-372, s. 2.)

### § 153A-356. Failure to perform duties.

If a member of an inspection department willfully fails to perform the duties required of him by law, or willfully improperly issues a permit, or gives a certificate of compliance without first making the inspections required by law, or willfully improperly gives a certificate of compliance, he is guilty of a Class 1 misdemeanor. (1969, c. 1066, s. 1; 1973, c. 822, s. 1; 1993, c. 539, s. 1064; 1994, Ex. Sess., c. 24, s. 14(c).)

#### CASE NOTES

Cited in *Moseley v. L & L Constr., Inc.*, 123 N.C. App. 79, 472 S.E.2d 172 (1996).

## § 153A-357. Permits.

(a) No person may commence or proceed with:

- (1) The construction, reconstruction, alteration, repair, movement to another site, removal, or demolition of any building;
- (2) The installation, extension, or general repair of any plumbing system;
- (3) The installation, extension, alteration, or general repair of any heating or cooling equipment system; or
- (4) The installation, extension, alteration, or general repair of any electrical wiring, devices, appliances, or equipment

without first securing from the inspection department with jurisdiction over the site of the work each permit required by the State Building Code and any other State or local law or local ordinance or regulation applicable to the work. A permit shall be in writing and shall contain a provision that the work done shall comply with the State Building Code and all other applicable State and local laws and local ordinances and regulations. Nothing in this section shall require a county to review and approve residential building plans submitted to the county pursuant to Section R-110 of Volume VII of the North Carolina State Building Code; provided that the county may review and approve such residential building plans as it deems necessary. No permit may be issued unless the plans and specifications are identified by the name and address of the author thereof; and if the General Statutes of North Carolina require that plans for certain types of work be prepared only by a registered architect or registered engineer, no permit may be issued unless the plans and specifications bear the North Carolina seal of a registered architect or of a registered engineer. If a provision of the General Statutes of North Carolina or of any ordinance requires that work be done by a licensed specialty contractor of any kind, no permit for the work may be issued unless the work is to be performed by such a duly licensed contractor. No permit issued under Articles 9 or 9C of G.S. Chapter 143 shall be required for any construction, installation, repair, replacement, or alteration costing five thousand dollars (\$5,000) or less in any single-family residence or farm building unless the work involves: the addition, repair or replacement of load bearing structures; the addition (excluding replacement of same size and capacity) or change in the design of plumbing; the addition, replacement or change in the design of heating, air conditioning, or electrical wiring, devices, appliances, or equipment; the use of materials not permitted by the North Carolina Uniform Residential Building Code; or the addition (excluding replacement of like grade of fire resistance) of roofing. Violation of this section constitutes a Class 1 misdemeanor.

(b) No permit shall be issued pursuant to subsection (a) for any land-disturbing activity, as defined in G.S. 113A-52(6), for any activity covered by G.S. 113A-57, unless an erosion control plan has been approved by the Sedimentation Pollution Control Commission pursuant to G.S. 113A-54(d)(4) or by a local government pursuant to G.S. 113A-61 for the site of the activity or a tract of land including the site of the activity. (1969, c. 1066, s. 1; 1973, c. 822, s. 1; 1981, c. 677, s. 2; 1983, c. 377, s. 2; c. 614, s. 2; 1987 (Reg. Sess., 1988), c. 1000, s. 1; 1993, c. 539, s. 1065; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 741, s. 1.)

**Local Modification.** — Alamance: 1993, c. 381, s. 1; Cumberland: 1995 (Reg. Sess., 1996), c. 732, s. 1; Davie: 1991, c. 194; Scotland: 1995, c. 124, s. 1; town of Sunset Beach: 1997-63.

**Cross References.** — For provisions specifying that permits required for installation, alteration or restoration of any insulation or other materials or energy utilization equip-

ment designed or intended to meet the State Building Code requirements for insulation and energy utilization standards meet all requirements of this section or § 160A-417, see § 143-151.30. For provision that a county may by ordinance require that when a property owner improves property at a cost of more than \$2500.00 but less than \$5000.00 the property

owner must submit a statement setting forth the nature of the improvement and the total cost thereof, see § 153A-325.

**Editor's Note.** — Session Laws 1983, c. 614, s. 5, provides that the act shall not apply to Wilson, Nash and Edgecombe Counties.

#### CASE NOTES

**Applied** in *Mecklenburg County v. Westbery*, 32 N.C. App. 630, 233 S.E.2d 658 (1977).

### § 153A-358. Time limitations on validity of permits.

A permit issued pursuant to G.S. 153A-357 expires six months, or any lesser time fixed by ordinance of the county, after the date of issuance if the work authorized by the permit has not commenced. If after commencement the work is discontinued for a period of 12 months, the permit therefor immediately expires. No work authorized by a permit that has expired may thereafter be performed until a new permit has been secured. (1969, c. 1066, s. 1; 1973, c. 822, s. 1.)

### § 153A-359. Changes in work.

After a permit has been issued, no change or deviation from the terms of the application, the plans and specifications, or the permit, except if the change or deviation is clearly permissible under the State Building Code, may be made until specific written approval of the proposed change or deviation has been obtained from the inspection department. (1969, c. 1066, s. 1; 1973, c. 822, s. 1.)

### § 153A-360. Inspections of work in progress.

As the work pursuant to a permit progresses, local inspectors shall make as many inspections of the work as may be necessary to satisfy them that it is being done according to the provisions of the applicable State and local laws and local ordinances and regulations and of the terms of the permit. In exercising this power, each member of the inspection department has a right, upon presentation of proper credentials, to enter on any premises within the territorial jurisdiction of the department at any reasonable hour for the purposes of inspection or other enforcement action. (1969, c. 1066, s. 1; 1973, c. 822, s. 1.)

**Cross References.** — As to inspections by the energy and insulation inspector and issuance of a certificate of compliance for work done with regard to the installation, alteration or restoration of any insulation or other materials

or energy utilization equipment designed or intended to meet the State Building Code requirements for insulation and energy utilization standards, see § 143-151.32.

#### CASE NOTES

**Cited** in *Moseley v. L & L Constr., Inc.*, 123 N.C. App. 79, 472 S.E.2d 172 (1996).

### § 153A-361. Stop orders.

Whenever a building or part thereof is being demolished, constructed, reconstructed, altered, or repaired in a hazardous manner, or in substantial violation of a State or local building law or local building ordinance or regulation, or in a manner that endangers life or property, the appropriate

inspector may order the specific part of the work that is in violation or that presents such a hazard to be immediately stopped. The stop order shall be in writing and directed to the person doing the work, and shall state the specific work to be stopped, the specific reasons for the stoppage, and the conditions under which the work may be resumed. The owner or builder may appeal from a stop order involving alleged violation of the State Building Code or any approved local modification thereof to the North Carolina Commissioner of Insurance or his designee within five days after the day the order is issued. The owner or builder shall give to the Commissioner of Insurance or his designee written notice of appeal, with a copy to the local inspector. The Commissioner or his designee shall promptly conduct an investigation and the appellant and the inspector shall be permitted to submit relevant evidence. The Commissioner or his designee shall as expeditiously as possible provide a written statement of the decision setting forth the facts found, the decision reached, and the reasons for the decision. Pending the ruling by the Commissioner of Insurance or his designee on an appeal, no further work may take place in violation of a stop order. In the event of dissatisfaction with the decision, the person affected shall have the options of:

- (1) Appealing to the Building Code Council, or
- (2) Appealing to the Superior Court as provided in G.S. 143-141.

Violation of a stop order constitutes a Class 1 misdemeanor. (1969, c. 1066, s. 1; 1973, c. 822, s. 1; 1983, c. 377, s. 4; 1989, c. 681, s. 5; 1993, c. 539, s. 1066; 1994, Ex. Sess., c. 24, s. 14(c).)

### § 153A-362. Revocation of permits.

The appropriate inspector may revoke and require the return of any permit by giving written notice to the permit holder, stating the reason for the revocation. Permits shall be revoked for any substantial departure from the approved application or plans and specifications, for refusal or failure to comply with the requirements of any applicable State or local laws or local ordinances or regulations, or for false statements or misrepresentations made in securing the permit. A permit mistakenly issued in violation of an applicable State or local law or local ordinance or regulation also may be revoked. (1969, c. 1066, s. 1; 1973, c. 822, s. 1.)

### § 153A-363. Certificates of compliance.

At the conclusion of all work done under a permit, the appropriate inspector shall make a final inspection. If he finds that the completed work complies with all applicable State and local laws and local ordinances and regulations and with the terms of the permit, he shall issue a certificate of compliance. No new building or part thereof may be occupied, no addition or enlargement of an existing building may be occupied, and no existing building that has been altered or removed may be occupied until the inspection department has issued a certificate of compliance. A temporary certificate of compliance may be issued permitting occupancy for a stated period of specified portions of the building that the inspector finds may safely be occupied before completion of the entire building. Violation of this section constitutes a Class 1 misdemeanor. (1973, c. 822, s. 1; 1993, c. 539, s. 1067; 1994, Ex. Sess., c. 24, s. 14(c).)

**Cross References.** — As to inspections by the energy and insulation inspector and issuance of a certificate of compliance for work done with regard to the installation, alteration or restoration of any insulation or other materials

or energy utilization equipment designed or intended to meet the State Building Code requirements for insulation and energy utilization standards, see § 143-151.32.

## CASE NOTES

**Cited** in *Moseley v. L & L Constr., Inc.*, 123 N.C. App. 79, 472 S.E.2d 172 (1996); *Nolan v. Paramount Homes, Inc.*, 135 N.C. App. 73, 518 S.E.2d 789 (1999).

### § 153A-364. Periodic inspections for hazardous or unlawful conditions.

The inspection department shall make periodic inspections, subject to the board of commissioners' directions, for unsafe, unsanitary, or otherwise hazardous and unlawful conditions in buildings within its territorial jurisdiction. In addition, it shall make any necessary inspections when it has reason to believe that such conditions may exist in a particular building. In exercising these powers, each member of the inspection department has a right, upon presentation of proper credentials, to enter on any premises within the territorial jurisdiction of the department at any reasonable hour for the purposes of inspection or other enforcement action. (1969, c. 1066, s. 1; 1973, c. 822, s. 1.)

### § 153A-365. Defects in buildings to be corrected.

If a local inspector finds any defect in a building, or finds that the building has not been constructed in accordance with the applicable State and local laws and local ordinances and regulations, or finds that a building because of its condition is dangerous or contains fire-hazardous conditions, he shall notify the owner or occupant of the building of its defects, hazardous conditions, or failure to comply with law. The owner and the occupant shall each immediately remedy the defects, hazardous conditions, or violations of law in the property each owns. (1969, c. 1066, s. 1; 1973, c. 822, s. 1.)

### § 153A-366. Unsafe buildings condemned.

The inspector shall condemn as unsafe each building that appears to him to be especially dangerous to life because of its liability to fire, bad conditions of walls, overloaded floors, defective construction, decay, unsafe wiring or heating system, inadequate means of egress, or other causes; and he shall affix a notice of the dangerous character of the building to a conspicuous place on its exterior wall. (1969, c. 1066, s. 1; 1973, c. 822, s. 1.)

### § 153A-367. Removing notice from condemned building.

If a person removes a notice that has been affixed to a building by a local inspector and that states the dangerous character of the building, he is guilty of a Class 1 misdemeanor. (1969, c. 1066, s. 1; 1973, c. 822, s. 1; 1993, c. 539, s. 1068; 1994, Ex. Sess., c. 24, s. 14(c).)

### § 153A-368. Action in event of failure to take corrective action.

If the owner of a building that has been condemned as unsafe pursuant to G.S. 153A-366 fails to take prompt corrective action, the local inspector shall by certified or registered mail to his last known address or by personal service give him written notice:

- (1) That the building is in a condition that appears to constitute a fire or safety hazard or to be dangerous to life, health, or other property;

- (2) That a hearing will be held before the inspector at a designated place and time, not later than 10 days after the date of the notice, at which time the owner is entitled to be heard in person or by counsel and to present arguments and evidence pertaining to the matter; and
- (3) That following the hearing, the inspector may issue any order to repair, close, vacate, or demolish the building that appears appropriate.

If the name or whereabouts of the owner cannot after due diligence be discovered, the notice shall be considered properly and adequately served if a copy thereof is posted on the outside of the building in question at least 10 days before the day of the hearing and a notice of the hearing is published at least once not later than one week before the hearing. (1969, c. 1066, s. 1; 1973, c. 822, s. 1.)

### **§ 153A-369. Order to take corrective action.**

If, upon a hearing held pursuant to G.S. 153A-368, the inspector finds that the building is in a condition that constitutes a fire or safety hazard or renders it dangerous to life, health, or other property, he shall issue a written order, directed to the owner of the building, requiring the owner to remedy the defective conditions by repairing, closing, vacating, or demolishing the building or taking other necessary steps, within such period, not less than 60 days, as the inspector may prescribe; provided, that where the inspector finds that there is imminent danger to life or other property, he may order that corrective action be taken in such lesser period as may be feasible. (1969, c. 1066, s. 1; 1973, c. 822, s. 1; 1979, c. 611, s. 5.)

### **§ 153A-370. Appeal; finality of order not appealed.**

An owner who has received an order under G.S. 153A-369 may appeal from the order to the board of commissioners by giving written notice of appeal to the inspector and to the clerk within 10 days following the day the order is issued. In the absence of an appeal, the order of the inspector is final. The board of commissioners shall hear any appeal within a reasonable time and may affirm, modify and affirm, or revoke the order. (1969, c. 1066, s. 1; 1973, c. 822, s. 1.)

### **§ 153A-371. Failure to comply with order.**

If the owner of a building fails to comply with an order issued pursuant to G.S. 153A-369 from which no appeal has been taken, or fails to comply with an order of the board of commissioners following an appeal, he is guilty of a Class 1 misdemeanor. (1969, c. 1066, s. 1; 1973, c. 822, s. 1; 1993, c. 539, s. 1069; 1994, Ex. Sess., c. 24, s. 14(c).)

### **§ 153A-372. Equitable enforcement.**

Whenever a violation is denominated a misdemeanor under the provisions of this Part, the county, either in addition to or in lieu of other remedies, may initiate any appropriate action or proceeding to prevent, restrain, correct, or abate the violation or to prevent the occupancy of the building involved. (1969, c. 1066, s. 1; 1973, c. 822, s. 1.)

## CASE NOTES

**Applied** in *Mecklenburg County v. Westbery*,  
32 N.C. App. 630, 233 S.E.2d 658 (1977).

### § 153A-373. Records and reports.

The inspection department shall keep complete, and accurate records in convenient form of each application received, each permit issued, each inspection and reinspection made, and each defect found, each certificate of compliance granted, and all other work and activities of the department. These records shall be kept in the manner and for the periods prescribed by the North Carolina Department of Cultural Resources. The department shall submit periodic reports to the board of commissioners and to the Commissioner of Insurance as the board or the Commissioner may require. (1969, c. 1066, s. 1; 1973, c. 822, s. 1; 1983, c. 377, s. 6.)

### § 153A-374. Appeals.

Unless otherwise provided by law, any appeal from an order, decision, or determination of a member of a local inspection department pertaining to the State Building Code or any other State building law shall be taken to the Commissioner of Insurance or his designee or other official specified in G.S. 143-139, by filing a written notice with him and with the inspection department within 10 days after the day of the order, decision, or determination. Further appeals may be taken to the State Building Code Council or to the courts as provided by law. (1969, c. 1066, s. 1; 1973, c. 822, s. 1; 1989, c. 681, s. 7.)

### § 153A-375. Establishment of fire limits.

A county may by ordinance establish and define fire limits in any area within the county and not within a city. The limits may include only business and industrial areas. Within any fire limits, no frame or wooden building or addition thereto may be erected, altered, repaired, or moved (either into the fire limits or from one place to another within the limits) except upon the permit of the inspection department and approval of the Commissioner of Insurance. The board of commissioners may make additional regulations necessary for the prevention, extinguishment, or mitigation of fires within the fire limits. (1969, c. 1066, s. 1; 1973, c. 822, s. 1.)

## Part 5. Community Development.

### § 153A-376. Community development programs and activities.

(a) Any county is authorized to engage in, to accept federal and State grants and loans for, and to appropriate and expend funds for community development programs and activities. In undertaking community development programs and activities, in addition to other authority granted by law, a county may engage in the following activities:

- (1) Programs of assistance and financing of rehabilitation of private buildings principally for the benefit of low and moderate income persons, or for the restoration or preservation of older neighborhoods or properties, including direct repair, the making of grants or loans, the subsidization of interest payments on loans, and the guaranty of loans;

- (2) Programs concerned with employment, economic development, crime prevention, child care, health, drug abuse, education, and welfare needs of persons of low and moderate income.

(b) Any board of county commissioners may exercise directly those powers granted by law to county redevelopment commissions and those powers granted by law to county housing authorities. Any board of county commissioners desiring to do so may delegate to redevelopment commission or to any housing authority the responsibility of undertaking or carrying out any specified community development activities. Any board of county commissioners and any municipal governing body may by agreement undertake or carry out for each other any specified community development activities. Any board of county commissioners may contract with any person, association, or corporation in undertaking any specified community development activities. Any county or city board of health, county board of social services, or county or city board of education, may by agreement undertake or carry out for any board of county commissioners any specified community development activities.

(c) Any board of county commissioners undertaking community development programs or activities may create one or more advisory committees to advise it and to make recommendations concerning such programs or activities.

(d) Any board of county commissioners proposing to undertake any loan guaranty or similar program for rehabilitation of private buildings is authorized to submit to its voters the question whether such program shall be undertaken, such referendum to be conducted pursuant to the general and local laws applicable to special elections in such county.

(e) No state or local taxes shall be appropriated or expended by a county pursuant to this section for any purpose not expressly authorized by G.S. 153A-149, unless the same is first submitted to a vote of the people as therein provided.

(f) All program income from Economic Development Grants from the Small Cities Community Development Block Grant Program may be retained by recipient "economically distressed counties", as defined in G.S. 143B-437A for the purposes of creating local economic development revolving loan funds. Such program income derived through the use by counties of Small Cities Community Development Block Grant money includes but is not limited to: (i) payment of principal and interest on loans made by the county using Community Development Block Grant Funds; (ii) proceeds from the lease or disposition of real property acquired with Community Development Block Grant Funds; and (iii) any late fees associated with loan or lease payments in (i) and (ii) above. The local economic development revolving loan fund set up by the county shall fund only those activities eligible under Title I of the federal Housing and Community Development Act of 1974, as amended (P.L. 93-383), and shall meet at least one of the three national objectives of the Housing and Community Development Act. Any expiration of G.S. 143B-437A or G.S. 105-129.3 shall not affect this subsection as to designations of economically distressed counties made prior to its expiration.

(g) Any county may receive and dispense funds from the Community Development Block Grant Section 108 Loan Guarantee program, Subpart M, 24 CFR 570.700 et seq., either through application to the North Carolina Department of Commerce or directly from the federal government, in accordance with State and federal laws governing these funds. Any county that receives these funds directly from the federal government may pledge current and future CDBG funds for use as loan guarantees in accordance with State and federal laws governing these funds. A county may implement the receipt, dispensing, and pledging of CDBG funds under this subsection by borrowing CDBG funds and lending all or a portion of those funds to a third party in accordance with applicable laws governing the CDBG program.

Any county that has pledged current or future CDBG funds for use as loan guarantees prior to the enactment of this subsection is authorized to have taken such action. A pledge of future CDBG funds under this subsection is not a debt or liability of the State or any political subdivision of the State or a pledge of the faith and credit of the State or any political subdivision of the State. The pledging of future CDBG funds under this subsection does not directly, indirectly, or contingently obligate the State or any political subdivision of the State to levy or to pledge any taxes. (1975, c. 435, s. 2; c. 689, s. 2; 1987 (Reg. Sess., 1988), c. 992, s. 1; 1995, c. 310, s. 2; 1995 (Reg. Sess., 1996), c. 575, s. 2; 1996, 2nd Ex. Sess., c. 13, s. 3.8.)

**Editor's Note.** — Session Laws 1995, c. 310, s. 2, effective July 1, 1995, enacted a subsection (e). As a subsection (e) already existed, that subsection was redesignated as subsection (g)

at the direction of the Revisor of Statutes.

**Legal Periodicals.** — For symposium on municipal finance, see 1976 Duke L.J. 1051.

### § 153A-377. Acquisition and disposition of property for redevelopment.

In addition to the powers granted by G.S. 153A-376, any county is authorized, either as a part of a community development program or independently thereof, and without the necessity of compliance with the Urban Redevelopment Law, to exercise the following powers:

- (1) To acquire, by voluntary purchase from the owner or owners, real property which is either:
  - a. Blighted, deteriorated, deteriorating, undeveloped, or inappropriately developed from the standpoint of sound community development and growth;
  - b. Appropriate for rehabilitation or conservation activities;
  - c. Appropriate for housing construction of the economic development of the community; or
  - d. Appropriate for the preservation or restoration of historic sites, the beautification of urban land, the conservation of open space, natural resources, and scenic areas, the provision of recreational opportunities, or the guidance of urban development;
- (2) To clear, demolish, remove, or rehabilitate buildings and improvements on land so acquired; and
- (3) To retain property so acquired for public purposes, or to dispose, through sale, lease, or otherwise, of any property so acquired to any person, firm, corporation, or governmental unit; provided, the disposition of such property shall be undertaken in accordance with the procedures of G.S. 153A-176, or the procedures of G.S. 160A-514, or any applicable local act modifying such procedures. (1977, c. 660, s. 2.)

#### CASE NOTES

**Cited** in *Vulcan Materials Co. v. Iredell County*, 103 N.C. App. 779, 407 S.E.2d 283 (1991).

### § 153A-378. Low- and moderate-income housing programs.

In addition to the powers granted by G.S. 153A-376 and G.S. 153A-377, any county is authorized to exercise the following powers:

- (1) To engage in and to appropriate and expend funds for residential housing construction, new or rehabilitated, for sale or rental to persons and families of low and moderate income. Any board of commissioners may contract with any person, association, or corporation to implement the provisions of this subdivision.
- (2) To acquire real property by voluntary purchase from the owners to be developed by the county or to be used by the county to provide affordable housing to persons of low and moderate income.
- (3) Under procedures and standards established by the county, to convey property by private sale to any public or private entity that provides affordable housing to persons of low or moderate income. The county shall include as part of any such conveyance covenants or conditions that assure the property will be developed by the entity for sale or lease to persons of low or moderate income.
- (4) Under procedures and standards established by the county, to convey residential property by private sale to persons of low or moderate income in accordance with G.S. 160A-267 and any terms and conditions that the board of commissioners may determine. (1999-366, s. 2.)

**Editor's Note.** — Session Laws 1999-366, s. 5, made this section effective August 4, 1999.

Session Laws 1999-366, s. 1, provides: "The General Assembly finds and declares that the purpose of this act is to provide authority for counties in North Carolina to provide funds for residential housing construction, new or rehabilitated, and to provide for the sale or rental of housing to persons and families of low and

moderate income. The General Assembly finds and declares that there exists in counties in the State a serious shortage of decent, safe, and sanitary residential housing available at low prices or rentals to persons and families of low and moderate income. This shortage is inimical to the health, safety, welfare, and prosperity of all residents of the State and to the sound growth of North Carolina communities."

**§§ 153A-379 through 153A-390:** Reserved for future codification purposes.

## ARTICLE 19.

### *Regional Planning Commissions.*

#### **§ 153A-391. Creation; admission of new members.**

Two or more counties, cities, or counties and cities may create a regional planning commission by adopting identical concurrent resolutions to that effect in accordance with the provisions and procedures of this Article. A county or city may join an existing regional planning commission with the consent of the existing member governments.

The resolution creating a regional planning commission may be modified, amended, or repealed by the unanimous action of the member governments. (1961, c. 722, s. 3; 1973, c. 822, s. 1.)

**Local Modification.** — Cherokee, Graham, Jackson and Swain: 1973, c. 1406.

#### CASE NOTES

**Stated** in *Hyde v. Land-Of-Sky Regional Council*, 572 F.2d 988 (4th Cir. 1978).

## § 153A-392. Contents of resolution.

The resolutions creating a regional planning commission shall:

- (1) Specify the name of the commission;
- (2) Establish the number of delegates to represent each member government, fix the delegates' terms of office and the conditions, if any, for their removal, provide methods for filling vacancies, and prescribe the compensation and allowances, if any, to be paid to delegates;
- (3) Set out the method of determining the financial support that will be given to the commission by each member government;
- (4) Set out the budgetary and fiscal control procedures to be followed by the commission, which shall substantially comply with the Local Government Budget and Fiscal Control Act (Chapter 159, Subchapter III).

In addition the resolution may, but need not, contain rules and regulations for the conduct of commission business and any other matters pertaining to the organization, powers, and functioning of the commission that the member governments consider appropriate. (1961, c. 722, s. 3; 1973, c. 822, s. 1.)

### CASE NOTES

**Contributions Held Due.** — Where, from 1971 through February 1982, defendant county participated as a member in plaintiff regional council's activities, attending meetings and workshops and receiving the benefits of plaintiff's plans and services, and during this time defendant made full payments of its proportionate share of plaintiff's budget as set forth in plaintiff's bylaws, and where, most significantly, defendant indicated in a letter of March 8, 1982, that the county board of commissioners unanimously voted to comply with the obliga-

tions incumbent on a withdrawing member, and furthermore, where defendant did not raise any material question of fact pertaining to plaintiff's request that defendant should be estopped from denying its obligation, grant of plaintiff's motion for summary judgment on its complaint seeking contributions due from defendant would be affirmed. *Land-of-Sky Regional Council v. County of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985), cert. denied, 316 N.C. 553, 344 S.E.2d 7 (1986).

## § 153A-393. Withdrawal from commission.

A member government may withdraw from a regional planning commission by giving at least two years' written notice to the other counties and cities involved. (1961, c. 722, s. 3; 1973, c. 822, s. 1.)

### CASE NOTES

**Contributions Held Due.** — Where from 1971 through February 1982, defendant county participated as a member in plaintiff regional council's activities, attending meetings and workshops and receiving the benefits of plaintiff's plans and services, and during this time defendant made full payments of its proportionate share of plaintiff's budget as set forth in plaintiff's bylaws, and where, most significantly, defendant indicated in a letter of March 8, 1982, that the county board of commissioners unanimously voted to comply with the obliga-

tions incumbent on a withdrawing member, and furthermore, where defendant did not raise any material question of fact pertaining to plaintiff's request that defendant should be estopped from denying its obligation, grant of plaintiff's motion for summary judgment on its complaint seeking contributions due from defendant would be affirmed. *Land-of-Sky Regional Council v. County of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985), cert. denied, 316 N.C. 553, 344 S.E.2d 7 (1986).

### **§ 153A-394. Organization of the commission.**

Upon its creation, a regional planning commission shall meet at a time and place agreed upon by the counties and cities involved. It shall organize by electing a chairman and any other officers that the resolution specifies or that the commission considers advisable. The commission may adopt bylaws for the conduct of its business. All commission meetings shall be open to the public.

The chairman of the commission may appoint any committees authorized by the bylaws. Committee members need not be delegates to the commission. (1961, c. 722, s. 3; 1973, c. 822, s. 1.)

### **§ 153A-395. Powers and duties.**

A regional planning commission may:

- (1) Apply for, accept, receive, and disburse funds, grants, and services made available to it by the State of North Carolina or any agency thereof, the federal government or any agency thereof, any unit of local government or any agency thereof, or any private or civic agency;
- (2) Employ personnel;
- (3) Contract with consultants;
- (4) Contract for services with the State of North Carolina, any other state, the United States, or any agency of those governments;
- (5) Study and inventory regional goals, resources, and problems;
- (6) Prepare and amend regional development plans, which may include recommendations for land use within the region, recommendations concerning the need for and general location of public works of regional concern, recommendations for economic development of the region, and any other relevant matters;
- (7) Cooperate with and provide assistance to federal, State, other regional, and local planning activities within the region;
- (8) Encourage local efforts toward economic development;
- (9) Make recommendations for review and action to its member governments and other public agencies that perform functions within the region;
- (10) Exercise any other power necessary to the discharge of its duties. (1961, c. 722, s. 3; 1973, c. 822, s. 1.)

### **§ 153A-396. Fiscal affairs.**

Each county and city having membership in a regional planning commission may appropriate to the commission revenues not otherwise limited as to use by law. Services of personnel, use of equipment and office space, and other services may be made available to a commission by its member governments as a part of their financial support. (1961, c. 722, s. 3; 1973, c. 822, s. 1.)

### **§ 153A-397. Reports.**

Each regional planning commission shall prepare and distribute to its member governments and make available to the public an annual report of its activities, including a financial statement. (1961, c. 722, s. 3; 1973, c. 822, s. 1.)

### **§ 153A-398. Regional planning and economic development commissions.**

Two or more counties, cities, or counties and cities may create a regional planning and economic development commission by adopting identical concur-

rent resolutions to that effect. Such a commission has the powers granted by this Article and the powers granted by Chapter 158, Article 2. If such a commission is created, it shall maintain separate books of account for appropriations and expenditures made pursuant to this Article and for appropriations and expenditures made pursuant to Chapter 158, Article 2. (1961, c. 722, s. 3; 1973, c. 822, s. 1.)

§§ 153A-399, 153A-400: Reserved for future codification purposes.

## ARTICLE 20.

### *Consolidation and Governmental Study Commissions.*

#### § 153A-401. Establishment; support.

(a) Two or more counties or cities or counties and cities may by concurrent resolutions of their governing bodies establish a charter or governmental study commission as provided in this section:

- (1) Two or more counties that are contiguous or that lie within a continuous boundary may create a commission to study the consolidation of the counties or of one or more functions and services of the counties.
- (2) Two or more cities that are contiguous or that lie within a continuous boundary may create a commission to study the consolidation of the cities or of one or more functions and services of the cities.
- (3) A county and one or more cities within the county may create a commission to study the consolidation of the county and the city or cities or of one or more of their functions and services.

(b) A county or city that participates in the establishment of a commission pursuant to this Article may appropriate for the support of the commission any revenues not otherwise limited as to use by law. (1973, c. 822, s. 1.)

#### § 153A-402. Purposes of a commission.

A commission established pursuant to this Article may be charged with any of the following purposes:

- (1) To study the powers, duties, functions, responsibilities, and organizational structures of the counties or cities that established the commission and of other units of local government and public agencies within those counties or cities;
- (2) To prepare a report on its studies and findings;
- (3) To prepare a plan for consolidating one or more functions and services of the governments that established the commission;
- (4) To prepare drafts of any agreements or legislation necessary to effect the consolidation of one or more functions and services;
- (5) To prepare a plan for consolidating into a single government some or all of the governments that established the commission;
- (6) To prepare drafts of any legislation necessary to effect the plan of governmental consolidation;
- (7) To call a referendum, as provided in G.S. 153A-405, on the plan of governmental consolidation. (1973, c. 822, s. 1.)

#### § 153A-403. Content of concurrent resolutions.

The concurrent resolutions establishing a commission shall:

- (1) Set forth the purposes that are to be vested in the commission pursuant to G.S. 153A-402;
- (2) Determine the composition of the commission, the manner of appointment of its members, and the manner of selection of its officers;
- (3) Determine the compensation, if any, to be paid to commission members;
- (4) Provide for the organizational meeting of the commission;
- (5) Set out the method for determining the financial support that will be given to the commission by each of the governments establishing the commission;
- (6) Set forth the date by which the commission is to complete its work;
- (7) Set forth any other directions or limitations considered necessary. (1973, c. 822, s. 1.)

### § 153A-404. Powers of a commission.

A commission established pursuant to this Article may:

- (1) Adopt rules and regulations for the conduct of its business;
- (2) Apply for, accept, receive, and disburse funds, grants, and services made available to it by the State of North Carolina or any agency thereof, the federal government or any agency thereof, any unit of local government, or any private or civic agency;
- (3) Employ personnel;
- (4) Contract with consultants;
- (5) Hold hearings in the furtherance of its business;
- (6) Take any other action necessary or expedient to the furtherance of its business. (1973, c. 822, s. 1.)

### § 153A-405. Referendum; General Assembly action.

(a) If authorized to do so by the concurrent resolutions that established it, a commission may call a referendum on its proposed plan of governmental consolidation. If authorized or directed in the concurrent resolutions, the ballot question may include the assumption of debt secured by a pledge of faith and credit language and may also include the assumption of the right to issue authorized but unissued faith and credit debt language as provided in subsection (b) of this section. The referendum may be held on the same day as any other referendum or election in the county or counties involved, but may not otherwise be held during the period beginning 30 days before and ending 30 days after the day of any other referendum or election to be conducted by the board or boards of elections conducting the referendum and already validly called or scheduled by law.

(b) The proposition submitted to the voters shall be substantially in one or more of the following forms and may include part or all of the bracketed language as appropriate and other such modifications as may be needed to reflect the issued debt secured by a pledge of faith and credit of any of the consolidating units or the portion of the authorized but unissued debt secured by a pledge of faith and credit of any of the consolidating units the right to issue which is proposed to be assumed by the consolidated city-county:

- (1) "Shall the County of \_\_\_\_\_ and the County of \_\_\_\_\_ be consolidated [and the consolidated unit assume the debt of each secured by a pledge of faith and credit, [the right to issue authorized but unissued debt to be secured by a pledge of faith and credit [(including any such debt as may be authorized for said counties on the date of this referendum)]] and any of said authorized but unissued debt as may be hereafter issued,] and be authorized to levy taxes in an

amount sufficient to pay the principal of and the interest on said debt secured by a pledge of faith and credit]?

YES  NO

- (2) "Shall the City of \_\_\_\_\_ and the City of \_\_\_\_\_ be consolidated [and the consolidated unit assume the debt of each secured by a pledge of faith and credit, [the right to issue authorized but unissued debt to be secured by a pledge of faith and credit [(including any such debt as may be authorized for said cities on the date of this referendum)] and any of said authorized but unissued debt as may be hereafter issued,] and be authorized to levy taxes in an amount sufficient to pay the principal of and the interest on said debt secured by a pledge of faith and credit]?

YES  NO

- (3) "Shall the City of \_\_\_\_\_ and the County of \_\_\_\_\_ be consolidated [and the consolidated unit assume the debt of each secured by a pledge of faith and credit, [the right to issue authorized but unissued debt to be secured by a pledge of faith and credit [(including any such debt as may be authorized for said city or county on the date of this referendum)] and any of said authorized but unissued debt as may be hereafter issued,] and be authorized to levy taxes in an amount sufficient to pay the principal of and the interest on said debt secured by a pledge of faith and credit]?

YES  NO

(c) The proposition submitted to the voters shall be substantially in one of the following forms:

- (1) "Shall the County of \_\_\_\_\_ and the County of \_\_\_\_\_ be consolidated?

YES  NO

- (2) "Shall the City of \_\_\_\_\_ and the City of \_\_\_\_\_ be consolidated?

YES  NO

- (3) "Shall the City of \_\_\_\_\_ and the County of \_\_\_\_\_ be consolidated?

YES  NO

(d) If the proposition is to consolidate two or more counties or to consolidate two or more cities, to be approved it must receive the votes of a majority of those voting in each of the counties or cities, as the case may be. If the proposition is to consolidate one or more cities with a county, to be approved it must receive the votes of a majority of those voting in the referendum. In addition, no governmental consolidation may become effective until enacted into law by the General Assembly.

(e) Subsection (b) of this section applies to any county that has (i) a population over 120,000 according to the most recent federal decennial census and (ii) an area of less than 200 square miles. Subsection (c) of this section applies to all other counties. If any subsection or provision of this section is declared unconstitutional or invalid by the courts, it does not affect the validity of the section as a whole or any part other than the part so declared to be unconstitutional or invalid, provided that if the classifications in subsections (b) and (c) of this section are held unconstitutional or invalid then subsection (c) of this section is repealed and subsection (b) of this section shall be applicable uniformly to all counties. (1973, c. 822, s. 1; 1995, c. 461, s. 5; 1995 (Reg. Sess., 1996), c. 742, s. 38.)

ARTICLE 21.

§§ 153A-406 through 153A-420: Reserved for future codification purposes.

## ARTICLE 22.

*Regional Solid Waste Management Authorities.***§ 153A-421. Definitions; applicability; creation of authorities.**

(a) Unless a different meaning is required by the context, terms relating to the management of solid waste used in this Article have the same meaning as in G.S. 130A-2 and in G.S. 130A-290. As used in this Article, the term "solid waste" means nonhazardous solid waste, that is, solid waste as defined in G.S. 130A-290 but not including hazardous waste. In addition to the meaning set out in G.S. 130A-290, the term "unit of local government" means the Eastern Band of the Cherokee Indians in North Carolina.

(b) This Article shall not be construed to authorize any authority created pursuant to this Article to regulate or manage hazardous waste. An authority created under this Article may manage sludges, other than a sludge that is a hazardous waste, under rules of the Commission for Health Services and criteria established by the Department of Environment and Natural Resources for the management of sludge.

(c) Any two or more units of local government may create a regional solid waste management authority by adopting substantially identical resolutions to that effect in accordance with the provisions of this Article. The resolutions creating a regional solid waste management authority and any amendments thereto are referred to in this Article as the "charter" of the regional solid waste management authority. Units of local government which participate in the creation of a regional solid waste management authority are referred to in this Article as "members".

(d) As used in G.S. 153A-427(a)(24), the term "transferred" means placed at or delivered to any (i) place normally and customarily used by the authority for the collection of solid waste, (ii) other place agreed upon by the generator or owner of recyclable materials and the authority, or (iii) facility owned, operated, or designated by the authority. (1989 (Reg. Sess., 1990), c. 888, s. 1; 1991, c. 580, s. 2; 1991 (Reg. Sess., 1992), c. 932, s. 4; c. 948, s. 1; 1997-443, s. 11A.123.)

**§ 153A-422. Purposes of an authority.**

The purpose of a regional solid waste management authority is to provide environmentally sound, cost effective management of solid waste, including storage, collection, transporting, separation, processing, recycling, and disposal of solid waste in order to protect the public health, safety, and welfare; enhance the environment for the people of this State; and recover resources and energy which have the potential for further use and to encourage, implement and promote the purposes set forth in Part 2A of Article 9 of Chapter 130A of the General Statutes. (1989 (Reg. Sess., 1990), c. 888, s. 1.)

**§ 153A-423. Membership; board; delegates.**

(a) Each unit of local government initially adopting a resolution under G.S. 153A-421 shall become a member of the regional solid waste management authority. Thereafter, any unit of local government may join the authority by ratifying its charter and by being admitted by a unanimous vote of the existing members. All of the rights and privileges of membership in a regional solid waste management authority shall be exercised on behalf of the member units of local government by a board composed of delegates to the authority who

shall be appointed by and shall serve at the pleasure of the governing boards of their respective units of local government. A vacancy on the board shall be filled by appointment by the governing board of the unit of local government having the original appointment.

(b) Any delegate appointed by a member unit of local government to an authority created pursuant to this Article who is a county commissioner or city or town alderman or commissioner serves on the board of the authority in an ex officio capacity and such service shall not constitute the holding of an office for the purpose of determining dual office holding under Section 9 of Article VI of the Constitution of North Carolina or of Article 1 of Chapter 128 of the General Statutes. (1989 (Reg. Sess., 1990), c. 888, s. 1.)

### **§ 153A-424. Contents of charter.**

(a) The charter of a regional solid waste management authority shall:

- (1) Specify the name of the authority;
- (2) Establish the powers, duties and functions that the authority may exercise and perform;
- (3) Establish the number of delegates to represent the member units of local government and prescribe the compensation and allowances, if any, to be paid to delegates;
- (4) Set out the method of determining the financial support that will be given to the authority by each member unit of local government; and
- (5) Establish a method for amending the charter, and for dissolving the authority and liquidating its assets and liabilities.

(b) The charter of a regional solid waste management authority may, but need not, contain rules for the conduct of authority business and any other matter pertaining to the organization, powers, and functioning of the authority that the member units of local government deem appropriate. (1989 (Reg. Sess., 1990), c. 888, s. 1.)

### **§ 153A-425. Organization of authorities.**

The governing board of a regional solid waste management authority shall hold an initial organizational meeting at such time and place as is agreed upon by its member units of local government and shall elect a chairman and any other officers that the charter may specify or the delegates may deem advisable. The authority shall then adopt bylaws for the conduct of its business. All meetings of regional solid waste management authorities shall be subject to the provisions of Article 33C of Chapter 143 of the General Statutes. (1989 (Reg. Sess., 1990), c. 888, s. 1.)

### **§ 153A-426. Withdrawal from an authority.**

If the authority has no outstanding indebtedness, any member may withdraw from a regional solid waste management authority effective at the end of the current fiscal year by giving at least six months notice in writing to each of the other members. Withdrawal of a member shall not dissolve the authority if at least two members remain. (1989 (Reg. Sess., 1990), c. 888, s. 1.)

### **§ 153A-427. Powers of an authority.**

(a) The charter may confer on the regional solid waste management authority any or all of the following powers:

- (1) To apply for, accept, receive, and disburse funds and grants made available to it by the State or any agency thereof, the United States of America or any agency thereof, any unit of local government whether or not a member of the authority, any private or civic agency, and any persons, firms, or corporations;
- (2) To employ personnel;
- (3) To contract with consultants;
- (4) To contract with the United States of America or any agency or instrumentality thereof, the State or any agency, instrumentality, political subdivision, or municipality thereof, or any private corporation, partnership, association, or individual, providing for the acquisition, construction, improvement, enlargement, operation or maintenance of any solid waste management facility, or providing for any solid waste management services;
- (5) To adopt bylaws for the regulation of its affairs and the conduct of its business and to prescribe rules and policies in connection with the performance of its functions and duties, not inconsistent with this Article;
- (6) To adopt an official seal and alter the same;
- (7) To establish and maintain suitable administrative buildings or offices at such place or places as it may determine by purchase, construction, lease, or other arrangements either by the authority alone or through appropriate cost-sharing arrangements with any unit of local government or other person;
- (8) To sue and be sued in its own name, and to plead and be impleaded;
- (9) To receive, administer, and comply with the conditions and requirements respecting any gift, grant, or donation of any property or money;
- (10) To acquire by purchase, lease, gift, or otherwise, or to obtain options for the acquisition of any property, real or personal, improved or unimproved, including an interest in land less than the fee thereof;
- (11) To sell, lease, exchange, transfer, or otherwise dispose of, or to grant options for any such purposes with respect to any real or personal property or interest therein;
- (12) To pledge, assign, mortgage, or otherwise grant a security interest in any real or personal property or interest therein, including the right and power to pledge, assign, or otherwise grant a security interest in any money, rents, charges, or other revenues and any proceeds derived by an authority from any and all sources;
- (13) To issue revenue bonds of the authority and enter into other financial arrangements including those permitted by this Chapter and Chapters 159, 159I, and 160A of the General Statutes to finance solid waste management activities, including but not limited to systems and facilities for waste reduction, materials recovery, recycling, resource recovery, landfilling, ash management, and disposal and for related support facilities, to refund any revenue bonds or notes issued by the authority, whether or not in advance of their maturity or earliest redemption date, or to provide funds for other corporate purposes of the authority;
- (14) With the approval of any unit of local government, to use officers, employees, agents, and facilities of the unit of local government for such purposes and upon such terms as may be mutually agreeable;
- (15) To develop and make data, plans, information, surveys, and studies of solid waste management facilities within the territorial jurisdiction of the members of the authority, to prepare and make recommendations in regard thereto;

- (16) To study, plan, design, construct, operate, acquire, lease, and improve systems and facilities, including systems and facilities for waste reduction, materials recovery, recycling, resource recovery, landfilling, ash management, household hazardous waste management, transportation, disposal, and public education regarding solid waste management, in order to provide environmentally sound, cost-effective management of solid waste including storage, collection, transporting, separation, processing, recycling, and disposal of solid waste in order to protect the public health, safety, and welfare; to enhance the environment for the people of this State; recover resources and energy which have the potential for further use, and to promote and implement the purposes set forth in Part 2A of Article 9 of Chapter 130A of the General Statutes;
- (17) To locate solid waste facilities, including ancillary support facilities, as the authority may see fit;
- (18) To assume any responsibility for disposal and management of solid waste imposed by law on any member unit of local government;
- (19) To operate such facilities together with any person, firm, corporation, the State, any entity of the State, or any unit of local government as appropriate and otherwise permitted by its charter and the laws of this State;
- (20) To set and collect such fees and charges as is reasonable to offset operating costs, debt service, and capital reserve requirements of the authority;
- (21) To apply to the appropriate agencies of the State, the United States of America or any state thereof, and to any other appropriate agency for such permits, licenses, certificates, or approvals as may be necessary, and to construct, maintain, and operate projects in accordance with such permits, licenses, certificates, or approvals in the same manner as any other person or operating unit of any other person;
- (22) To employ engineers, architects, attorneys, real estate counselors, appraisers, financial advisors, and such other consultants and employees as may be required in the judgment of the authority, to fix and pay their compensation from funds available to the authority therefor, to select and retain, subject to approval of the Local Government Commission, the financial consultants, underwriters, and bond attorneys to be associated with the issuance of any revenue bonds, and to pay for services rendered by financial consultants, underwriters, or bond attorneys from funds available to the authority including the proceeds of any revenue bond issue with regard to which the services were performed;
- (23) To acquire property located within the territorial jurisdiction of any member unit of local government by eminent domain pursuant to authority granted to counties;
- (24) To require that any and all (i) solid waste generated within the authority's service area and (ii) recyclable materials generated within the authority's service area and transferred to the authority be separated and delivered to specific locations and facilities provided that if a private landfill shall be substantially affected by such requirement then the regional solid waste management authority shall be required to give the operator of the affected landfill at least two years written notice prior to the effective date of the requirement; and
- (25) To do all things necessary, convenient, or desirable to carry out the purposes and to exercise the powers granted to an authority under its charter.

(b) The acquisition and disposal of real and personal property by an authority created under this Article shall be governed by those provisions of the General Statutes which govern the acquisition and disposal of real and personal property by counties. No authority created pursuant to this Article shall exercise any power of eminent domain with respect to any property located outside the territorial jurisdiction of the members of such authority.

(c) Each authority's plan shall take into consideration facilities and other resources for management of solid waste which may be available through private enterprise. This Article shall be construed to encourage the involvement and participation of private enterprise in solid waste management. (1989 (Reg. Sess., 1990), c. 888, s. 1; 1991, c. 580, s. 1.)

### **§ 153A-428. Fiscal accountability; support from other governments.**

(a) A regional solid waste management authority is a public authority subject to the provisions of Chapter 159 of the General Statutes.

(b) The establishment and operation of an authority as herein authorized are governmental functions and constitute a public purpose, and the State and any unit of local government may appropriate funds to support the establishment and operation of an authority.

(c) The State and any unit of local government may also dedicate, sell, convey, donate, or lease any of their interests in any property to an authority. (1989 (Reg. Sess., 1990), c. 888, s. 1.)

### **§ 153A-429. Long-term contract permitted by and with an authority.**

(a) To the extent authorized by its charter, an authority may enter into long-term and continuing contracts, not to exceed a term of 60 years, with member or other units of local government for the acquisition, construction, improvement, enlargement, operation, or maintenance of any solid waste management facility or for solid waste management services with respect to solid waste generated within their geographic boundaries or brought into their geographic boundaries.

(b) Contracts entered into by an authority may include, but are not limited to, provisions for:

- (1) Payment by the members of the authority and other units of local government of a fee or other charge by the authority to accept and dispose of solid waste;
- (2) Periodic adjustments to the fee or other charges to be paid by each member of the authority and such other units of local government;
- (3) Warranties from the members of the authority and such other units of local government with respect to the quantity of the solid waste which will be delivered to the authority and warranties relating to the content or quality of the solid waste; and
- (4) Legal and equitable title to the solid waste passing to the authority upon delivery of the solid waste to the authority. (1989 (Reg. Sess., 1990), c. 888, s. 1.)

### **§ 153A-430. Compliance with other law.**

(a) Repealed by Session Laws 1989 (Regular Session, 1990), c. 1004, s. 47.

(b) An authority created pursuant to this Article shall comply with all applicable federal and State laws, regulations, and rules, including specifically

those enacted or adopted for the management of solid waste or for the protection of the environment or public health.

(c) Except as provided by subsection (d) of this section, a unit of local government that is exempt from compliance with State laws or rules enacted or adopted for the management of solid waste or for the protection of the environment shall, by becoming a member of a regional solid waste management authority created under this Article and as a condition of such membership, agree to comply with and to be bound by all applicable federal and State laws, regulations, and rules enacted or adopted for the management of solid waste and for the protection of the environment with respect to all solid waste management activities of the authority within the territorial jurisdiction of the unit of local government and with respect to all solid waste management activities performed by the unit of local government in connection with membership in the authority.

(d) A unit of local government that is exempt from compliance with State laws or rules enacted or adopted for the management of solid waste shall obtain all permits that may be necessary for the conduct of solid waste management activities within the territorial jurisdiction of the unit of local government as provided by federal law and regulations. Responsibility for the enforcement of laws, regulations, and rules enacted or adopted for the management of solid waste within the territorial jurisdiction of a unit of local government that is exempt from compliance with State laws or rules enacted or adopted for the management of solid waste shall be as provided by federal law and regulations. (1989 (Reg. Sess., 1990), c. 888, s. 1; c. 1004, s. 47; c. 1075, s. 5; 1991 (Reg. Sess., 1992), c. 948, s. 2.)

### **§ 153A-431. Issuance of revenue bonds and notes.**

The State and Local Government Revenue Bond Act, Article 5 of Chapter 159 of the General Statutes, governs the issuance of revenue bonds by an authority. Article 9 of Chapter 159 of the General Statutes governs the issuance of notes in anticipation of the sale of revenue bonds. (1989 (Reg. Sess., 1990), c. 888, s. 1.)

### **§ 153A-432. Advances.**

Any member or other units of local government may make advances from any monies that may be available for such purpose, in connection with the creation of an authority and to provide for the preliminary expenses of an authority. Any such advances may be repaid to such member or other units of local government from the proceeds of the revenue bonds or anticipation notes issued by such authority or from funds otherwise available to the authority. (1989 (Reg. Sess., 1990), c. 888, s. 1.)

**§§ 153A-433, 153A-434:** Reserved for future codification purposes.

## ARTICLE 23.

### *Miscellaneous Provisions.*

### **§ 153A-435. Liability insurance; damage suits against a county involving governmental functions.**

(a) A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional

damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment. The board of commissioners shall determine what liabilities and what officers, agents, and employees shall be covered by any insurance purchased pursuant to this subsection.

Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function. Participation in a local government risk pool pursuant to Article 39 of General Statute Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section. By entering into an insurance contract with the county, an insurer waives any defense based upon the governmental immunity of the county.

(b) If a county has waived its governmental immunity pursuant to subsection (a) of this section, any person, or if he dies, his personal representative, sustaining damages as a result of an act or omission of the county or any of its officers, agents, or employees, occurring in the exercise of a governmental function, may sue the county for recovery of damages. To the extent of the coverage of insurance purchased pursuant to subsection (a) of this section, governmental immunity may not be a defense to the action. Otherwise, however, the county has all defenses available to private litigants in any action brought pursuant to this section without restriction, limitation, or other effect, whether the defense arises from common law or by virtue of a statute.

Despite the purchase of insurance as authorized by subsection (a) of this section, the liability of a county for acts or omissions occurring in the exercise of governmental functions does not attach unless the plaintiff waives the right to have all issues of law or fact relating to insurance in the action determined by a jury. The judge shall hear and determine these issues without resort to a jury, and the jury shall be absent during any motion, argument, testimony, or announcement of findings of fact or conclusions of law relating to these issues unless the defendant requests a jury trial on them. (1955, c. 911, s. 1; 1973, c. 822, s. 1; 1985 (Reg. Sess., 1986), c. 1027, s. 27.)

**Local Modification.** — Catawba: 1987 (Reg. Sess., 1988), c. 980; Mecklenburg: 1987 (Reg. Sess., 1988), c. 980.

**Legal Periodicals.** — For article, "Statutory Waiver of Municipal Immunity Upon Purchase of Liability Insurance in North Carolina and the Municipal Liability Crisis," see 4 Campbell L. Rev. 41 (1981).

For comment on the need for reform in North Carolina of local government sovereign immunity, see 18 Wake Forest L. Rev. 43 (1982).

For note as to sheriff's liability for prisoner suicide, in light of *Helmly v. Bebbler*, 77 N.C. App. 275, 335 S.E.2d 182 (1985), see 64 N.C.L. Rev. 1520 (1986).

For note, "North Carolina's New AIDS Discrimination Protection: Who Do They Think They're Fooling?," see 12 Campbell L. Rev. 475 (1990).

For survey of 1996 developments in tort law, see 75 N.C.L. Rev. 2468 (1997).

## CASE NOTES

**Editor's Note.** — *Many of the cases cited below were decided under corresponding sections of former law.*

**Construction with Other Provisions.** — The jurisdictional provisions of § 153A-435(b) control whenever they conflict with the jurisdictional provisions of § 143-291(a). *Meyer v. Walls*, 122 N.C. App. 507, 471 S.E.2d 422 (1996), *aff'd in part and rev'd in part*, 347 N.C. 97, 489 S.E.2d 880 (1997).

### Waiver of Immunity by Local Agencies.

— Since cities and counties can waive their immunity by purchasing liability insurance, local agencies of the state such as a county ABC Board can likewise waive their immunity by purchasing such insurance. *McNeill v. Durham County ABC Bd.*, 87 N.C. App. 50, 359 S.E.2d 500 (1987), modified on other grounds, 322 N.C. 425, 368 S.E.2d 619, rehearing denied, 322 N.C. 838, 371 S.E.2d 278 (1988).-

A governmental entity generally retains immunity from civil liability in its governmental capacity to the extent it does not purchase liability insurance or participate in a local government risk pool pursuant to statute. *Kephart v. Pendergraph*, 131 N.C. App. 559, 507 S.E.2d 915 (1998).

**Waiver of Immunity by Nonprofit Fire Company.** — Defendant, a nonprofit fire company employed by the county, was liable for plaintiff's injuries in a nonfire related rescue attempt only to the extent of their insurance coverage, since they had governmental immunity up to their insurance coverages and were engaged in duties other than the suppression of a reported fire. *Geiger v. Guilford College Community Volunteer Firemen's Ass'n*, 668 F. Supp. 492 (M.D.N.C. 1987).

**County Department of Social Services.** — Since County Department of Social Services was not a state agency, the Tort Claims act did not apply to claim against the Department. *Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997).

**Waiver of Immunity by County.** — A county may waive its immunity by purchasing liability insurance to the extent of the insurance coverage. *Marlowe v. Piner*, 119 N.C. App. 125, 458 S.E.2d 220 (1995).

**Constituted Waiver of Immunity.** — By requiring a security company to obtain an insurance policy and to name the county as an additional insured, the county contracted, within the meaning of this section, to have itself insured and, thus, waived its governmental immunity. *Wood v. Guilford County*, 143 N.C. App. 507, 546 S.E.2d 641 (2001).

**Actions Against Sheriffs.** — The legislature has prescribed two ways for a sheriff to be sued in his official capacity, § 58-76-5 and this section. *Smith v. Phillips*, 117 N.C. App. 378, 451 S.E.2d 309 (1994).

**Inclusion of the sheriff in the county's liability insurance policy** did not serve to make the county liable for the sheriff's actions or a proper or necessary defendant in plaintiff's action against the sheriff for illegal seizure of plaintiff's property. *Goodwin v. Furr*, 25 F. Supp. 2d 713 (M.D.N.C. 1998).

**Sheriffs Not Specified as Local Officials.** — This section provides for the availability of insurance for county officials sued for negligence in their official capacity, but does not identify the sheriff or his deputies as local officials nor specify judgments against them will be paid by counties. *Braswell v. Ellis*, 950 F. Supp. 145 (E.D.N.C. 1995).

**Local Government Risk Pool.** — The county's self-funded loss program was not a "local government risk pool," for purposes of determining whether that program waived the county's governmental immunity, since the county was the sole entity retaining risks and funds under the program. *Kephart v.*

*Pendergraph*, 131 N.C. App. 559, 507 S.E.2d 915 (1998).

**Proof of Waiver of Immunity.** — Where plaintiff alleged and offered proof of the county's liability insurance policy, the trial court properly denied defendants' motion to dismiss based upon governmental immunity. *Smith v. Phillips*, 117 N.C. App. 378, 451 S.E.2d 309 (1994).

**Self-funded Loss Program Not Insurance.** — The county's self-funded loss program did not constitute insurance for purposes of waiving governmental immunity. *Kephart v. Pendergraph*, 131 N.C. App. 559, 507 S.E.2d 915 (1998).

**Immunity Not Waived by Ambulance Service.** — Defendant/county-operated ambulance service did not waive its immunity for claims totaling less than \$250,000 since it was only insured for negligence claims equal to or above that amount. *McIver v. Smith*, 134 N.C. App. 583, 518 S.E.2d 522 (1999).

**Immunity Not Waived as to Employees and Premises Not Included in Policy.** — A policy of insurance affording protection to a county against liability caused by negligence of named personnel and employees of the county and covering listed and described premises does not waive the county's governmental immunity for negligence in the operation of a public library when the employees of the library and library premises are not included in the policy. *Seibold v. City of Kinston*, 268 N.C. 615, 151 S.E.2d 654 (1966).

**Immunity Not Waived Where Action Excluded from Coverage.** — Because an insurance policy did not indemnify the defendant county against the negligent acts alleged in the plaintiff's complaint, the county had not waived its sovereign immunity. *Doe v. Jenkins*, 144 N.C. App. 131, 547 S.E.2d 124 (2001).

**Liability Not Waived Where Action Excluded from Coverage.** — Because county liability insurance policy excluded libel action from coverage, the county did not waive its governmental immunity as to this action by purchasing the policy. *Dickens v. Thorne*, 110 N.C. App. 39, 429 S.E.2d 176 (1993).

**Liability for Injury on Public Walk Within Courthouse Grounds.** — The liability of a county for injuries sustained by a pedestrian falling on a public walk within the courthouse grounds is no more extensive than the liability of a city to a pedestrian falling upon a public sidewalk maintained by the city. *Cook v. County of Burke*, 272 N.C. 94, 157 S.E.2d 611 (1967).

**Failure to Protect Minors.** — For case reversing summary judgment in favor of defendants county and social worker in case alleging their tort liability for failure to protect minors from harm, see *Coleman v. Cooper*, 89 N.C. App.

188, 366 S.E.2d 2, cert. denied, 322 N.C. 834, 371 S.E.2d 275 (1988).

**Superior Court Jurisdiction.** — Where sovereign immunity is waived by the purchase of liability insurance, subject matter jurisdiction is statutorily vested in the superior court. *Meyer v. Walls*, 122 N.C. App. 507, 471 S.E.2d 422 (1996), aff'd in part and rev'd in part, 347 N.C. 97, 489 S.E.2d 880 (1997).

**Jurisdiction of Federal Courts.** — Former § 153-9(44), similar to this section, providing that the injured person could sue “in any court of competent jurisdiction in such county,” did not attempt to limit jurisdiction to a State court in such county, nor to a court of such county; the United States District Court was a court of competent jurisdiction in the county. Moreover, even if the legislative intent was to deprive the federal court of jurisdiction, it could not do so, as federal jurisdiction cannot be defeated by a State statute prescribing the court in which an action is to be brought. *Knighon v. Johnston County*, 330 F. Supp. 652 (E.D.N.C. 1971).

**Allegations of Complaint.** — It is appropriate for the complaint to contain allegations regarding liability insurance and waiver of governmental immunity. *Wilkie v. Henderson County*, 1 N.C. App. 155, 160 S.E.2d 505 (1968).

When suing a county or its officers, agents or employees, the complainant must allege waiver of immunity by a county contracting to insure itself in order to recover. Absent an allegation to the effect that immunity has been waived, the complaint fails to state a cause of action against the county. *Clark v. Burke County*, 117 N.C. App. 85, 450 S.E.2d 747 (1994).

**Protection against prejudice is afforded** by providing that no part of the pleadings relating to liability insurance shall be read or mentioned in the presence of the trial jury. *Wilkie v. Henderson County*, 1 N.C. App. 155, 160 S.E.2d 505 (1968).

**Where a county is covered by a policy of liability insurance**, the question of governmental immunity from suit from injuries caused by alleged negligence does not arise with reference to the validity of a judgment of nonsuit. *Cook v. County of Burke*, 272 N.C. 94, 157 S.E.2d 611 (1967).

**Damage Limitations.** — Where government entities waive the defense of sovereign immunity by their purchase of liability insurance, recoverable damages are capped at policy limits. *Meyer v. Walls*, 122 N.C. App. 507, 471 S.E.2d 422 (1996), aff'd in part and rev'd in part, 347 N.C. 97, 489 S.E.2d 880 (1997).

**Stated** in *Sides v. Cabarrus Mem. Hosp.*, 287 N.C. 14, 213 S.E.2d 297 (1975); *Casey v. Wake County*, 45 N.C. App. 522, 263 S.E.2d 360 (1980).

**Cited** in *Vaughn v. County of Durham*, Durham County Dep't of Social Servs., 34 N.C. App. 416, 240 S.E.2d 456 (1977); *Klassette ex rel. Klassette v. Mecklenburg County Area Mental Health, Mental Retardation & Substance Abuse Auth.*, 88 N.C. App. 495, 364 S.E.2d 179 (1988); *Hare v. Butler*, 99 N.C. App. 693, 394 S.E.2d 231 (1990); *Parham v. Iredell County Dep't of Social Servs.*, 127 N.C. App. 144, 489 S.E.2d 610 (1997); *Paschal v. Myers*, 129 N.C. App. 23, 497 S.E.2d 311 (1998); *Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652 (2000).

## § 153A-436. Photographic reproduction of county records.

(a) A county may provide for the reproduction, by photocopy, photograph, microphotograph, or any other method of reproduction that gives legible and permanent copies, of instruments, documents, and other papers filed with the register of deeds and of any other county records. The county shall keep each reproduction of an instrument, document, paper, or other record in a fire-resistant file, vault, or similar container. If a duplicate reproduction is made to provide a security-copy, the county shall keep the duplicate in a fire-resistant file, vault, or similar container separate from that housing the principal reproduction.

If a county has provided for reproducing records, any custodian of public records of the county may cause to be reproduced any of the records under, or coming under, his custody.

(b) If a county has provided for reproducing some or all county records, the custodian of any instrument, document, paper, or other record may permit it to be removed from its regular repository for up to 24 hours in order to be reproduced. An instrument, document, paper or other record may be removed from the county in order to be reproduced. The board of commissioners may permit an instrument, document, paper, or other record to be removed for longer than 24 hours if a longer period is necessary to complete the process of reproduction.

(c) The original of any instrument, document, or other paper received by the register of deeds and reproduced pursuant to this Article shall be filed, maintained, and disposed of in accordance with G.S. 161-17 and G.S. 121-5. The original of any other county record that is reproduced pursuant to this Article may be kept by the county or disposed of pursuant to G.S. 121-5.

(d) If an instrument, document, or other paper received by the register of deeds is reproduced pursuant to this Article, the recording of the reproduction is a sufficient recording for all purposes.

(e) A reproduction, made pursuant to this Article, of an instrument, document, paper, or other record is as admissible in evidence in any judicial or administrative proceeding as the original itself, whether the original is extant or not. An enlargement or other facsimile of the reproduction is also admissible in evidence if the original reproduction is extant and available for inspection under the direction of the court or administrative agency.

(f) The provisions of this section shall apply to records stored on any form of permanent, computer-readable media, such as a CD-ROM, if the medium is not subject to erasure or alteration. Nonerasable, computer-readable storage media shall not be used for preservation duplicates, as defined in G.S. 132-8.2, or for the preservation of permanently valuable records as provided in G.S. 121-5(d), except to the extent expressly approved by the Department of Cultural Resources pursuant to standards and conditions established by the Department. (1945, c. 286, ss. 1-7; c. 944; 1951, c. 19, ss. 1-6; 1953, c. 675, ss. 23, 24; 1957, c. 330, s. 3; 1973, c. 822, s. 1; 1999-131, s. 4; 1999-456, s. 47(d).)

### § 153A-437. Assistance to historical organizations.

(a) A county or city may appropriate revenues not otherwise limited as to use by law to a local historical or preservation society, museum, or other similar organization. Before such an appropriation may be made, the recipient organization shall adopt and present to the county or city a resolution requesting the funds and describing the intended use of the funds. The funds may be used for preserving historic sites, buildings, structures, areas, or objects; for recording and publishing materials relating to the history of the area; for establishing or maintaining historical museums or projects; for paying salaries of personnel employed in such museums or projects; for the costs of acquiring, recording, and maintaining materials and equipment; and for any other purposes that are approved by the county or city and that contribute to the preservation of historic sites, buildings, structures, areas, or objects, or historic materials. The ordinance making the appropriation shall state specifically what the appropriation is to be used for, and the governing board of the county or city shall require that the recipient account for the appropriation at the close of the fiscal year.

(b) A county or city, a board of education, or the board of trustees of a public library may make available space in a building under its control to a local historical society, historical museum, or other historical organization.

(c) This section is supplemental to and does not supersede any other law. (1955, c. 371, ss. 1-4; 1957, c. 398; 1973, c. 822, s. 1.)

**Legal Periodicals.** — For article discussing government in North Carolina, see 17 Wake legal issues of historic preservation for local Forest L. Rev. 707 (1981).

### § 153A-438. Beach erosion control and flood and hurricane protection works.

A county may appropriate revenues not otherwise limited as to use by law to finance the acquisition, construction, reconstruction, extension, maintenance,

improvement, or enlargement of groins, jetties, dikes, moles, walls, sand dunes, vegetation, or other types of works or improvements that are designed for controlling beach erosion, for protection from hurricane floods, or for preserving or restoring facilities and natural features that afford protection to the beaches and other land areas of the county and to the life and property of the county. (1965, c. 307, s. 1; 1971, c. 1159, s. 3; 1973, c. 822, s. 1.)

### **§ 153A-439. Support of extension activities; personnel rules for extension employees.**

A county may support the work of the North Carolina Agricultural Extension Service and for these purposes may appropriate revenues not otherwise limited as to use by law.

If a county adopts rules and regulations concerning annual leave, sick leave, hours of employment, and holidays that apply to county employees generally, these rules and regulations apply to county extension employees. Otherwise, the rules and regulations adopted by the North Carolina Agricultural Extension Service concerning these matters apply to county extension employees. (1911, c. 1; C.S., s. 1297; 1957, c. 1004, s. 5; 1973, c. 822, s. 1.)

### **§ 153A-440. Promotion of soil and water conservation work.**

A county may cooperate with and support the work of the Federal Soil Conservation Service and the State and local soil and water conservation agencies and districts and for these purposes may appropriate revenues not otherwise limited as to use by law. (1959, c. 1213; 1961, cc. 266, 290, 301, 579, 581, 582, 584, 656, 693, 705, 809, 1126; 1963, cc. 290, 701; 1965, cc. 531, 702; 1967, c. 319; 1969, c. 64, s. 1; c. 174, s. 1; c. 1003, s. 1; 1973, c. 822, s. 1.)

### **§ 153A-440.1. Watershed improvement programs; drainage and water resources development projects.**

(a) A county may establish and maintain a county watershed improvement program pursuant to G.S. 139-41 or 139-41.1 and for these purposes may appropriate funds not otherwise limited as to use by law. A county watershed improvement program or project may also be financed pursuant to G.S. 153A-301, G.S. 153A-185 or by any other financing method available to counties for this purpose.

(b) A county may establish and maintain drainage projects and water resources development projects (as those projects are defined by G.S. 153A-301) and for these purposes may appropriate funds not otherwise limited as to use by law. A county drainage project or water resources development project may also be financed pursuant to G.S. 153A-301, G.S. 153A-185, or by any other financing method available to counties for this purpose. (1981, c. 251, s. 2; 1983, c. 321, ss. 5, 6.)

### **§ 153A-441. County surveyor.**

A county may appoint a person registered as a land surveyor pursuant to Chapter 89 as county surveyor. (Const., art. 7, s. 1; Rev., s. 4296; C. S., s. 1383; 1959, c. 1237, s. 1; 1973, c. 822, s. 1.)

**Editor's Note.** — Chapter 89, referred to in this section, was rewritten by Session Laws 1975, c. 681, s. 1, and has been recodified as Chapter 89C.

**§ 153A-442. Animal shelters.**

A county may establish, equip, operate, and maintain an animal shelter or may contribute to the support of an animal shelter, and for these purposes may appropriate funds not otherwise limited as to use by law. (1973, c. 822, s. 1.)

**§ 153A-443. Redesignation of site of "courthouse door," etc.**

If a county determines that the traditional location of the "courthouse," the "courthouse door," the "courthouse bulletin board" or the "courthouse steps" has become inappropriate or inconvenient for the doing of any act or the posting of any notice required by law to be done or posted at such a site, the county may by ordinance designate some appropriate or more convenient location for the site. The board of commissioners shall cause such an ordinance to be published at least once within 30 days after the day it is adopted and shall cause a copy of it to be posted for 60 days at the traditional location. (1973, c. 822, s. 1.)

**§ 153A-444. Parks and recreation.**

A county may establish parks and provide recreational programs pursuant to Chapter 160A, Article 18. (1973, c. 822, s. 1.)

**§ 153A-445. Miscellaneous powers found in Chapter 160A.**

(a) A county may take action under the following provisions of Chapter 160A:

- (1) Chapter 160A, Article 20, Part 1. — Joint Exercise of Powers.
- (2) Chapter 160A, Article 20, Part 2. — Regional Councils of Governments.
- (3) G.S. 160A-487. — Financial support for rescue squads.
- (4) G.S. 160A-488. — Art galleries and museums.
- (5) G.S. 160A-492. — Human relations programs.
- (6) G.S. 160A-497. — Senior citizens programs.
- (7) G.S. 160A-489. — Auditoriums, coliseums, and convention and civic centers.
- (8) G.S. 160A-498. — Railroad corridor preservation.

(b) This section is for reference only, and the failure of any section of Chapter 160A to appear in this section does not affect the applicability of that section to counties. (1973, c. 822, s. 1; 1975, c. 19, s. 61; 1979, 2nd Sess., c. 1094, s. 3; 1981, c. 692, s. 3; 1989, c. 600, s. 6.)

**Cross References.** — As to authority of counties, cities and towns to appropriate money for payment to the North Carolina Association of County Commissioners and the North Carolina League of Municipalities for the purpose of financing a local government center in the City of Raleigh, see § 160A-495.

**Editor's Note.** — Session Laws 1979, 2nd Sess., c. 1094, which added subdivision (6) of subsection (a), provided in s. 6: "This act is

effective upon ratification. All contracts which would be permissible under this act which were entered into on or after April 20, 1979, are hereby validated." The act was ratified on June 17, 1980.

The preamble to Session Laws 1979, 2nd Sess., c. 1094, cited as the reason for the enactment the case of *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1979), requiring statutory authority for third-party contracts.

**§ 153A-446. County may offer reward for information as to persons damaging county property.**

The board of county commissioners is authorized to offer and pay rewards in an amount not exceeding five hundred dollars (\$500.00) for information leading to the arrest and conviction of any person who willfully defaces, damages or destroys, or commits acts of vandalism or larceny of any county property. The amount necessary to pay said rewards shall be an item in the current expense budget of the county. (1975, c. 258.)

**§ 153A-447. Certain counties may appropriate funds to Western North Carolina Development Association, Inc.**

(a) The board of county commissioners of the counties hereafter named are authorized to appropriate funds to the Western North Carolina Development Association, Inc., for the public good and welfare of said counties. The amount to be expended by each county shall be determined in the discretion of the board of commissioners.

(b) This section shall apply to the counties of Avery, Buncombe, Burke, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, McDowell, Macon, Madison, Mitchell, Polk, Rutherford, Swain, Transylvania, and Yancey. (1979, c. 674, ss. 1, 2.)

**§ 153A-448. Mountain ridge protection.**

Counties may enact and enforce mountain ridge protection ordinances pursuant to Article 14 of Chapter 113A of the General Statutes, and in such enactment and enforcement shall comply with all applicable provisions of Article 14 unless the county has removed itself from the coverage of Article 14 through the procedure provided by law. (1983, c. 676, s. 2.)

**§ 153A-449. Contracts with private entities.**

A county may contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the county is authorized by law to engage in. (1985, c. 271, s. 2.)

**§ 153A-450. Contracts for construction of satellite campuses of community colleges.**

(a) Boards of county commissioners may enter into contracts for the construction of satellite campuses of community colleges, to be located in their counties.

(b) The board of county commissioners of the county in which a satellite campus of a community college is to be constructed shall submit the plans for the satellite facility's construction to the board of trustees of the community college that will be operating the facility for its approval prior to entering into any contract for the construction of the satellite facility.

(c) A satellite facility may be used only as a satellite facility of the community college that operates it and for no other purpose except as approved by the board of trustees of the community college that has been assigned the county where the satellite facility is located as a service delivery area either by an act of the General Assembly or by the State Board of Community Colleges. (1985, c. 757, s. 148(b), (d), (e); 1987, c. 564, ss. 11, 12.)



## Chapter 154. County Surveyor.

§§ 154-1, 154-2: Repealed by Session Laws 1973, c. 822, s. 5.

**Cross References.** — For present provisions as to county surveyors, see § 153A-441.

**Editor's Note.** — Session Laws 1973, c. 822, ss. 9 through 12, provided:

“Sec. 9. No provision of this act is intended, nor may any be construed, to affect in any way a right or interest, public or private:

(a) Now vested or accrued, in whole or in part, the validity of which might be sustained or preserved by reference to a provision of law repealed by this act; or

(b) Derived from or which might be sustained or preserved in reliance upon, action (including the adoption of orders, resolutions, or ordinances) taken before the effective date of this act pursuant to or within the scope of a provision of law repealed by this act.

“Sec. 10. No law repealed, expressly or by

implication, before the effective date of this act and no law granting authority that has been exhausted before the effective date of this act is revived by:

(a) The repeal in this act of any act repealing such a law; or

(b) Any provision of this act that disclaims an intention to repeal or affect enumerated, designated, or described laws.

“Sec. 11. No provision of this act is intended, nor may any be construed, to impair the obligation of any bond, note, or coupon outstanding on the effective date of this act.

“Sec. 12. No action or proceeding of any nature (whether civil or criminal, judicial or administrative, or otherwise) pending at the effective date of this act is abated or otherwise affected by the adoption of this act.”

§ 154-3: Repealed by Session Laws 1969, c. 1003, s. 8.



**Chapter 155.**  
**County Treasurer.**

**§§ 155-1 through 155-8:** Repealed by Session Laws 1971, c. 780, s. 34.

**§ 155-9:** Repealed by Session Laws 1953, c. 973, s. 3.

**§§ 155-10 through 155-14:** Repealed by Session Laws 1971, c. 780, s.  
34.

**§ 155-15:** Repealed by Session Laws 1953, c. 973, s. 3.

**§§ 155-16 through 155-18:** Repealed by Session Laws 1971, c. 780.



## Chapter 156.

### Drainage.

#### SUBCHAPTER I. DRAINAGE BY INDIVIDUAL OWNERS.

##### Article 1.

##### Jurisdiction in Clerk of Superior Court.

##### Part 1. Petition by Individual Owner.

##### Sec.

- 156-1. Supplemental proceeding.
- 156-2. Petition filed; commissioners appointed.
- 156-3. Duty of commissioners.
- 156-4. Report and confirmation; easement acquired; exceptions.
- 156-5. Width of right-of-way for repairs.
- 156-6. Right of owner to fence; entry for repairs.
- 156-7. Earth for construction of dam; removal of dam.
- 156-8. Earth from canal removed or leveled.
- 156-9. No drain opened within 30 feet.
- 156-10. Right to drain into canal.
- 156-11. Expense of repairs apportioned.
- 156-12. Notice of making repairs.
- 156-13. Judgment against owner in default; lien.
- 156-14. Subsequent owners bound.
- 156-15. Amount of contribution for repair ascertained.
- 156-16. Petition by servient owner against dominant owner.
- 156-17. Commissioners to examine lands and make report.
- 156-18. Cost of repairs enforced by judgment.
- 156-19. Obstructing canal or ditch dug under agreement.
- 156-20. Right of dominant owner to repair.
- 156-21. Canal maintained for seven years presumed a necessity; drainage assessments declared liens.
- 156-22. Supplemental assessments to make up deficiency; vacancy appointments of assessment jurors.
- 156-23. Easement of drainage surrendered.
- 156-24. Obstructing drain cut by consent.
- 156-25. Protection of canals, ditches, and natural drains.

##### Part 2. Petition under Agreement for Construction.

- 156-26. Procedure upon agreement.
- 156-27. Recovery for benefits; payment of damages.
- 156-28. Notice to landowners; assessments made by viewers.
- 156-29. Report filed; appeal and jury trial.
- 156-30. Confirmation of report.
- 156-31. Payment in installments.

##### Article 2.

##### Jurisdiction in County Commissioners.

##### Sec.

- 156-32. Petition filed; board appointed; refusal to serve misdemeanor.
- 156-33. Duty of board; refusal to comply with their requirements misdemeanor.
- 156-34. Report filed.
- 156-35. Owners to keep ditch open.
- 156-36. Compensation of board.

#### SUBCHAPTER II. DRAINAGE BY CORPORATION.

##### Article 3.

##### Manner of Organization.

- 156-37. Petition filed in superior court.
- 156-38. Commissioners appointed; report required.
- 156-39. Surveyor employed.
- 156-40. Confirmation of report.
- 156-41. Proprietors become a corporation.
- 156-42. Organization; corporate name, officers and powers.
- 156-43. Incorporation of canal already constructed; commissioners; reports.

##### Article 4.

##### Rights and Liabilities in the Corporation.

- 156-44. Shares of stock annexed to land.
- 156-45. Shareholders to pay assessments.
- 156-46. Payment of dues entitles to use of canal.
- 156-47. Rights of infant owners protected.
- 156-48. Compensation for damage to lands.
- 156-49. Dissolution of corporation.
- 156-50. Laborer's lien for work on canal.
- 156-51. Penalty for nonpayment of assessments.
- 156-52. Corporation authorized to issue bonds.
- 156-53. Payment of bonds enforced.

#### SUBCHAPTER III. DRAINAGE DISTRICTS.

##### Article 5.

##### Establishment of Districts.

- 156-54. Jurisdiction to establish districts.
- 156-55. Venue; special proceedings.
- 156-56. Petition filed.
- 156-57. Bond filed and summons issued.
- 156-58. Publication in case of unknown owners.
- 156-59. Board of viewers appointed by clerk.
- 156-60. Attorney for petitioners.

Sec.

- 156-61. Estimate of expense and manner of payment; advancement of funds and repayment from assessments.
- 156-62. Examination of lands and preliminary report.
- 156-63. First hearing of preliminary report.
- 156-64. Notice of further hearing.
- 156-65. Further hearing, and district established.
- 156-66. Right of appeal.
- 156-67. Condemnation of land.
- 156-68. Complete survey ordered.
- 156-69. Nature of the survey; conservation and replacement of fish and wildlife habitat; structures to control and store water.
- 156-70. Assessment of damages.
- 156-70.1. When title deemed acquired for purpose of easements or rights-of-way; notice to landowner; claim for compensation; appeal.
- 156-71. Classification of lands and benefits.
- 156-72. Extension of time for report.
- 156-73. Final report filed; notice of hearing.
- 156-74. Adjudication upon final report.
- 156-75. Appeal from final hearing.
- 156-76. Compensation of board of viewers.
- 156-77. Account of expenses filed.
- 156-78. Drainage record.
- 156-78.1. Municipalities.

**Article 6.**

**Drainage Commissioners.**

- 156-79. Appointment and organization under original act.
- 156-80. Name of districts.
- 156-81. Appointment and organization under amended act.
- 156-81.1. Treasurer.
- 156-82. Validation of election of members of drainage commission.
- 156-82.1. Duties and powers of the board of drainage commissioners.
- 156-82.2. Appointment of drainage commissioners.
- 156-82.3. Validation of previous actions.

**Article 7.**

**Construction of Improvement.**

- 156-83. Superintendent of construction.
- 156-84. Letting contracts.
- 156-85. Monthly estimates for work and payments thereon; final payment.
- 156-86. Failure of contractors; reletting.
- 156-87. Right to enter upon lands; removal of timber.
- 156-88. Drainage across public or private ways.
- 156-89. Drainage across railroads; procedure.
- 156-90. Notice to railroad.

Sec.

- 156-91. Manner of construction across railroad.
- 156-92. Control and repairs by drainage commissioners.
- 156-93. Construction of lateral drains.

**Article 7A.**

**Maintenance.**

- 156-93.1. Maintenance assessments and contracts; engineering assistance, construction equipment, etc.; joint or consolidated maintenance operations; water-retardant structures; borrowing in anticipation of revenue.

**Article 7B.**

**Improvement, Renovation, Enlargement and Extension of Canals, Structures and Boundaries.**

- 156-93.2. Proceedings for improvement, renovation and extension of canals, structures and equipment.
- 156-93.3. Extension of boundaries.
- 156-93.4. Coordination of proceedings under §§ 156-93.2 and 156-93.3.
- 156-93.5. Assessments and bonds for improvement, renovation, enlargement and extension.
- 156-93.6. Rights-of-way and easements for existing districts.
- 156-93.7. Existing districts may act together to extend boundaries within watershed.

**Article 8.**

**Assessments and Bond Issue.**

- 156-94. Total cost for three years ascertained.
- 156-95. Assessment and payment; notice of bond issue.
- 156-96. Failure to pay deemed consent to bond issue.
- 156-97. Bonds issued.
- 156-97.1. Issuance of assessment anticipation notes.
- 156-98. Form of bonds and notes; excess assessment.
- 156-99. Application of funds; holder's remedy.
- 156-100. Sale of bonds.
- 156-100.1. Sale of assessment anticipation notes.
- 156-100.2. Payment of assessments which become liens after original bond issue.
- 156-100.3. Sinking fund.
- 156-101. Refunding bonds issued.
- 156-102. Drainage bonds received as deposits.
- 156-103. Assessment rolls prepared.
- 156-104. Application of amendatory provisions

- Sec. of certain sections; amendment or reformation of proceedings.
- 156-105. Assessment lien; collection; sale of land.
- 156-106. Assessment not collectible out of other property of delinquent.
- 156-107. Sheriff in good faith selling property for assessment not liable for irregularity.
- 156-108. Receipt books prepared.
- 156-109. Receipt books where lands in two or more counties.
- 156-110. Authority to collect arrears.
- 156-111. Sheriff to make monthly settlements; penalty.
- 156-112. Duty of treasurer to make payment; penalty.
- 156-113. Fees for collection and disbursement.
- 156-114. Conveyance of land; change in assessment roll; procedure.
- 156-115. Warranty in deed runs to purchaser who pays assessment.
- 156-116. Modification of assessments.
- 156-117. Subdistricts formed.
- 156-118 through 156-120. [Repealed.]
- 156-121. Redress to dissatisfied landowners.
- 156-122. Increase to extinguish debt.
- 156-123. Proceedings as for original bond issue.
- 156-124. No drainage assessments for original object may be levied on property when once paid in full.
- 156-124.1. [Repealed.]

**Article 9.**

**Adjustment of Delinquent Assessments.**

- 156-125. Adjustment by board of commissioners authorized.
- 156-126. Extension of adjusted installments.
- 156-127. Special fund set up; distribution of collections.
- 156-128. Approval of adjustments by Local Government Commission.
- 156-129. Amount of assessments limited; reassessments regulated.

**Article 10.**

**Reports of Officers.**

- Sec.
- 156-130. Drainage commissioners to make statements.
- 156-131. Annual report.
- 156-132. Penalty for failure.
- 156-133. Auditor appointed; duties; compensation.
- 156-134. Duties of the auditor.

**Article 11.**

**General Provisions.**

- 156-135. Construction of drainage law.
- 156-135.1. Investment of surplus funds.
- 156-136. Removal of officers.
- 156-137. Local drainage laws not affected.
- 156-138. Punishment for violating law as to drainage districts.
- 156-138.1. Acquisition and disposition of lands; lease to or from federal or State government or agency thereof.
- 156-138.2. Meaning of "majority of resident landowners" and "owners of three fifths of land area."
- 156-138.3. Notice.
- 156-138.4. Procedures to be followed in connection with drainage projects that involve channelization.

SUBCHAPTER IV. DRAINAGE BY COUNTIES.

**Article 12.**

**Protection of Public Health.**

- 156-139. Cleaning and draining of streams, etc., under supervision of governmental agencies.
- 156-140. Tax levy.
- 156-141. Article applicable to certain counties only.

SUBCHAPTER I. DRAINAGE BY INDIVIDUAL OWNERS.

ARTICLE 1.

*Jurisdiction in Clerk of Superior Court.*

Part 1. Petition by Individual Owner.

**§ 156-1. Supplemental proceeding.**

The proceedings initiated under this Chapter may be, to the extent practicable, supplemented by the procedures of Chapter 40A. (Code, s. 1324; Rev., s. 4028; C.S., s. 5260; 1981, c. 919, s. 23.)

**Local Modification.** — Alexander, Little River Drainage District: Pub. Loc. 1927, c. 484; Iredell: Pub. Loc. 1937, c. 591; Pasquotank: Pub. Loc. 1923, c. 181; Pub. Loc. 1927, c. 264; Pub. Loc. 1929, c. 471; Robeson: Pub. Loc. 1927, c. 197; Rowan: Pub. Loc. 1937, cc. 591, 592; Tyrrell: Pub. Loc. 1927, c. 336; city of Washington: Pr. 1921, c. 149.

**Editor's Note.** — Session Laws 1981, c. 919,

s. 23, effective January 1, 1982, rewrote this section, which formerly provided that the proceeding under this Subchapter should be as prescribed in Article 2 of the Chapter Eminent Domain.

**Legal Periodicals.** — For note on disposition of diffused surface waters in North Carolina, see 47 N.C.L. Rev. 205 (1968).

#### CASE NOTES

**As to the constitutionality of this Chapter,** see *Sanderlin v. Luken*, 152 N.C. 738, 68 S.E. 225 (1910); *Forehand v. Taylor*, 155 N.C. 353, 71 S.E. 433 (1911).

**This Chapter comes within the police power of the State.** *Winslow v. Winslow*, 95 N.C. 24 (1886). See also, *Porter v. Armstrong*, 139 N.C. 179, 51 S.E. 926, petition for rehearing dismissed, 137 N.C. 703, 51 S.E.2d 1036 (1905).

**Various Statutes Harmonized.** — While the various statutes for the drainage of swamp-lands in eastern North Carolina have not the same provisions in all respects, they have been collected and are to be found in this Chapter, and should be construed to harmonize, and constitute, with such variations, a system of drainage laws for the State. *Adams v. Joyner*, 147 N.C. 77, 60 S.E. 725 (1908); *Sawyer Canal Co. v. Keys*, 234 N.C. 360, 67 S.E.2d 259 (1951).

**Foundation of Right to Condemn.** — The right of the State to condemn land for drains rests on the same foundation as its right in cases of public roads, mills, railroads, school-houses, etc. *Norfleet v. Cromwell*, 70 N.C. 634 (1874).

**The right to drain through the banks of a natural watercourse** is exactly similar in character to the right to construct dykes or levees to keep their excessive waters from overflowing the adjacent lands, a right which has been recognized in the legislation of all countries from the most ancient times. *Sanderlin v. Luken*, 152 N.C. 738, 68 S.E. 225 (1910).

**Flexible Procedure Provided.** — The stat-

utes authorizing the creation, maintenance and improvements of drainage districts provide flexible procedure which may be modified and molded by decrees from time to time to promote the beneficial objects sought by the creation of the district, subject to the restrictions that there should be no material change nor any change that would impose additional costs upon landowners except to the extent of benefits to them. In re *Lyon Swamp Drainage & Levee Dist.*, 228 N.C. 248, 45 S.E.2d 130 (1947).

**The correct procedure to secure additional authority for proper maintenance and improvements** in a drainage district is by motion or petition in the original cause. In re *Lyon Swamp Drainage & Levee Dist.*, 228 N.C. 248, 45 S.E.2d 130 (1947).

**Power to Issue Bonds and Make Assessments Applicable Only to Section of District Benefited.** — Where proposed improvements and repairs will primarily benefit lands embraced in one section of a drainage district and would be of no substantial benefit to landowners in another section thereof, the drainage commissioners have power under statutory authority to issue bonds and make assessments applicable only to the section benefited. In re *Lyon Swamp Drainage & Levee Dist.*, 228 N.C. 248, 45 S.E.2d 130 (1947).

**Stated** in *Sawyer Canal Co. v. Keys*, 232 N.C. 664, 62 S.E.2d 67 (1950).

**Cited** in *Chappell v. Winslow*, 258 N.C. 617, 129 S.E.2d 101 (1963); *Taylor v. Askew*, 17 N.C. App. 620, 195 S.E.2d 316 (1973).

### § 156-2. Petition filed; commissioners appointed.

Any person owning pocosin, swamp, or flatlands, or owning lowlands subject to inundation, which cannot be conveniently drained or embanked so as to drain off or dam out the water from such lands, except by cutting a canal or ditch, or erecting a dam through or upon the lands of other persons, may by petition apply to the superior court of the county in which the lands sought to be drained or embanked or some part of such lands lie, setting forth the particular circumstances of the case, the situation of the land to be drained or embanked, to what outlet and through whose lands he desires to drain, or on what lands he would erect his dam, and who are the proprietors of such lands; whereupon a summons shall be served on each of the proprietors, and, on the hearing of the petition the court shall appoint three persons as commissioners,

who shall be duly sworn to do justice between the parties. (1795, c. 436, P.R.; 1852, c. 57, ss. 1, 2; R.C., c. 40, s. 1; Code, s. 1297; Rev., s. 3983; C.S., s. 5261.)

### CASE NOTES

**Clerk of the superior court has jurisdiction of a proceeding to obtain a right of drainage** over the land of an adjoining landowner and to assess damages, etc. *Durden v. Simmons*, 84 N.C. 555 (1881).

**This Chapter and the amendments thereto are the charts which should guide the commissioners**, and their decisions, findings and report should conform thereto. *Porter v. Armstrong*, 139 N.C. 179, 51 S.E. 926, petition for rehearing dismissed, 137 N.C. 703, 51 S.E. 1036 (1905).

**This Chapter applies only to artificial outlets made over the land of another** to reach a natural watercourse. *Mizell v. McGowan*, 129 N.C. 93, 39 S.E. 729 (1901).

**Readjustment.** — When the rights and duties of adjoining landowners as to drainage in a certain canal have been determined under this Chapter, and judgment entered, proceedings subsequently brought for the purpose of readjustment, owing to change of ownership and partition, etc., are in effect a motion in the cause, in which the judgment, unlike a final judgment, is not conclusive; and the cause can be brought forward from time to time, upon notice to the parties, and further decrees made to conform to the exigencies and changes which may arise. *Staton v. Staton*, 148 N.C. 490, 62 S.E. 596 (1908); *Sawyer Canal Co. v. Keys*, 234 N.C. 360, 67 S.E.2d 259 (1951).

**Joint Petition.** — Two or more separate proprietors cannot sustain a joint petition for a ditch to drain their lands, without alleging that a common ditch would drain the lands of all the petitioners. *Shaw v. Burfoot*, 53 N.C. 344 (1861).

**Landowner Must Be Made Party.** — An order by the county commissioners (now superior court) appointing appraisers to assess the value of the benefits and damages which would accrue to the owner of land on account of a certain canal sought to be cut through his land, upon the petition of other parties, filed under the provisions of this Chapter, is void, unless said landowner is made a party to the petition. *Gamble v. McCrady*, 75 N.C. 509 (1876).

**Where separate owners have derived their lands subject to a drainage system placed upon the entire tract** by the original owner, each one using the system must bear the costs of maintenance and repair required by the portion of the system on his own premises. *Lamb v. Lamb*, 177 N.C. 150, 98 S.E. 307 (1919).

**Water may not be diverted from its natural course so as to damage another, but it**

**may be increased and accelerated.** *Hocutt v. Wilmington & W.R.R.*, 124 N.C. 214, 32 S.E. 681 (1899); *Mizell v. McGowan*, 125 N.C. 439, 34 S.E. 538 (1899); *Lassiter v. Norfolk & C.R.R.*, 126 N.C. 509, 36 S.E. 48 (1900); *Mizell v. McGowan*, 129 N.C. 93, 39 S.E. 729 (1901); *Barcliff v. Norfolk S.R.R.*, 168 N.C. 268, 84 S.E. 290 (1915).

The owners of swamps, whose waters naturally flow into natural watercourses, may make such canals as are necessary to drain them of the water naturally flowing therein, although in doing so the flow of water in the natural watercourse is increased and accelerated so that the water is discharged on the land of an abutting owner. *Mizell v. McGowan*, 120 N.C. 134, 26 S.E. 783 (1897).

**Liability for Damages from Diversion.** — Where a person diverts water from a stream by cutting a channel from it, and at a point lower down the stream turns it back into the old channel, and by its own momentum it is carried on to the lands of an adjoining owner, he is liable for damages. *Briscoe v. Young*, 131 N.C. 386, 42 S.E. 893 (1902).

One is liable for damages caused to the lands of another by his diverting the natural flow of surface water thereto. *Roberts v. Baldwin*, 151 N.C. 407, 66 S.E. 346 (1909).

Surface waters should be drained so as to be carried off in the due course of nature. The upper proprietor is liable in damages to the land of the lower proprietor caused by water diverted by his ditches and not carried to a natural waterway. *Briscoe v. Parker*, 145 N.C. 14, 58 S.E. 443 (1907).

**Landowner's Remedies.** — When the lands of the lower proprietor are damaged by the improper drainage of the upper proprietor, he may elect to bring an action for damages or proceed under this and the following sections. *Briscoe v. Parker*, 145 N.C. 14, 58 S.E. 443 (1907).

**Artificial Waterway Constructed for Temporary Purposes.** — When an upper proprietor of lands constructs and maintains for his own use and advantage an artificial waterway or structure affecting the flow of water, without invading the rights of the lower proprietor, for a temporary purpose or a specific purpose which he may at any time abandon, the upper proprietor comes under no obligation to maintain the structure, though the incidental effect has been to confer a benefit on the lower tenant. *Lake Drummond Canal & Water Co. v. Burnham*, 147 N.C. 41, 60 S.E. 650 (1908).

**Setting Aside Former Judgment.** — If a former judgment in a similar proceeding has not been pleaded in an action for drainage of lands, as an estoppel or *res adjudicata*, before final judgment, the party relying thereon must move the court within one year to set the judgment aside for excusable mistake or inadvertence. *Adams v. Joyner*, 147 N.C. 77, 60 S.E. 725 (1908).

**As to jury questions**, see *Heirs at Law of Collins v. Heirs at Law of Haughton*, 26 N.C. 420 (1844).

**Appeal.** — An order in a drainage proceed-

ing directing matters proper for the determination of the commissioners to be referred to a jury is appealable. *Porter v. Armstrong*, 134 N.C. 447, 46 S.E. 997 (1904).

**Formerly the law required the appointment of disinterested freeholders as commissioners** in a proceeding to obtain a right of drainage over the lands of an adjoining landowner. *Durden v. Simmons*, 84 N.C. 555 (1881).

**Quoted** in *Sawyer Canal Co. v. Keys*, 232 N.C. 664, 62 S.E.2d 67 (1950).

**Cited** in *In re Atkinson-Clark Canal Co.*, 231 N.C. 131, 56 S.E.2d 442 (1949).

### § 156-3. Duty of commissioners.

The commissioners, or a majority of them, on a day of which each proprietor of land aforesaid is to be notified at least five days, shall meet on the premises and view the lands to be drained or embanked, and the lands through or on which the drain is to pass or the embankment to be erected, and shall determine and report whether the lands of the petitioner can be conveniently drained or embanked except through or on the lands of the defendants or some of them; and if they are of opinion that the same cannot be conveniently done except through or on such lands, they shall decide and determine the route of the canal, ditch, or embankment, the width thereof, and the depth or height, as the case may be, and the manner in which the same shall be cut or thrown up, considering all the circumstances of the case, and providing as far as possible for the effectual drainage or embankment of the water from the petitioner's land, and also securing the defendant's lands from inundation, and every other injury to which the same may be probably subjected by such canal, ditch, or embankment; and they shall assess, for each of the defendants, such damage as in their judgment will fully indemnify him for the use of his land in the mode proposed; but in assessing such damages, benefits shall be deducted. (1795, c. 436, P.R.; 1852, c. 57, ss. 1, 2; R.C., c. 40, s. 2; Code, s. 1298; Rev., s. 3984; C.S., s. 5262.)

#### CASE NOTES

**Effect of § 156-16.** — Section 156-16, concerning the drainage of lowlands, does not expressly repeal this section, but leaves in operation such of its provisions as are not repugnant to such section. *Worthington v. Coward*, 114 N.C. 289, 19 S.E. 154 (1894).

**Stated** in *Sawyer Canal Co. v. Keys*, 232 N.C. 664, 62 S.E.2d 67 (1950).

**Cited** in *Porter v. Armstrong*, 134 N.C. 447, 46 S.E. 997 (1904); *In re Atkinson-Clark Canal Co.*, 231 N.C. 131, 56 S.E.2d 442 (1949).

### § 156-4. Report and confirmation; easement acquired; exceptions.

The commissioners shall report in writing, under their hands, the whole matter to the court, which shall confirm the same, unless good cause be shown to the contrary; and on payment of the damages and cost of the proceedings the court shall order and decree that the petitioner may cut the canal or ditch, or raise the embankment in the manner reported and determined by the commissioners; and thereupon the petitioner shall be seized in fee simple of the easement aforesaid: Provided, that, without the consent of the proprietor, such canal, ditch, or embankment shall not be cut or raised through or on his yard or curtilage, nor be allowed when the same shall injure any mill, by cutting off or stopping the water flowing thereto; nor shall such dam be allowed so as to create a nuisance by stagnant water, or cut off the flow of useful springs

or necessary streams of water, or stop any ditches of such proprietor when there is no freshet. (1795, c. 436, s. 2, P.R.; 1835, c. 7; 1852, c. 57, ss. 1, 2; R.C., c. 40, s. 3; Code, s. 1299; Rev., s. 3985; C.S., s. 5263.)

#### CASE NOTES

**Conclusive Effect of Commissioners' Report.** — The report of commissioners appointed to condemn lands and assess damages for the purpose of drainage is, like the verdict of a jury, conclusive of the facts therein ascertained, until set aside. *Norfolk S.R.R. v. Ely*, 101 N.C. 8, 7 S.E. 476 (1888).

**Power of Judge to Set Aside Report.** — On appeal from the judgment of the clerk upon the report of commissioners appointed to lay off a ditch for drainage of lowlands, the judge could set aside the report either for cause or in his discretion, if in his opinion the ends of justice could be subserved by that course. *Worthington v. Coward*, 114 N.C. 289, 19 S.E. 154 (1894).

**Setting Aside of Commissioners' Report Not Reversed on Appeal.** — Where judge set aside commissioners' report because it did not comply with the statute, and further found as a fact in his order that two of the commissioners had been guilty of gross indiscretion, the Supreme Court would not reverse his order, whether the report conformed to the statute or not. *Porter v. Armstrong*, 139 N.C. 179, 51 S.E. 926, petition for rehearing denied, 137 N.C.

703, 51 S.E. 1036 (1905).

**Jury to Settle Issues of Fact.** — Upon an application to condemn lands for the purpose of drainage, the issue of fact raised by the pleadings should be framed and settled by a jury, and cannot be raised or considered upon exceptions to the report of the commissioners appointed to assess damages. *Norfolk S.R.R. v. Ely*, 101 N.C. 8, 7 S.E. 476 (1888).

**Acquisition of Title in Lands Condemned.** — Where, upon the petition of one or more parties, under this section, leave was granted by the county court to cut a canal across the land of another for the purposes of drainage, the petitioners and their assignees, upon the report of the jury provided for in the statute being confirmed, acquired not merely an easement, but title in fee to the land condemned. *Norfleet v. Cromwell*, 70 N.C. 634 (1874).

**Quoted in** *In re Atkinson-Clark Canal Co.*, 231 N.C. 131, 56 S.E.2d 442 (1949).

**Stated in** *Sawyer Canal Co. v. Keys*, 232 N.C. 664, 62 S.E.2d 67 (1950).

### § 156-5. Width of right-of-way for repairs.

The commissioners, when they may deem it necessary, shall designate the width of the land to be left on each side of the canal, ditch, or dam, to be used for the protection and reparation thereof, which land shall be altogether under the control and dominion of the owner of the canal, ditch, or dam, except as aforesaid: Provided, that in no case shall a greater width of land on both sides, inclusive of a dam, be taken than five times the base of such dam. (R.C., c. 40, s. 6; Code, s. 1302; Rev., s. 3985a; C.S., s. 5264.)

#### CASE NOTES

**Remand When Unnecessary Amount of Land Condemned.** — Where, upon appeal from the report of the commissioners, the jury found that the amount of land condemned by the commissioners for the purpose of the pro-

tection and reparation of the ditches was unnecessary, it was proper for the court to remand the cause, with directions to constitute another commission. *Winslow v. Winslow*, 95 N.C. 24 (1886).

### § 156-6. Right of owner to fence; entry for repairs.

Any proprietor, through or on whose land such canal or ditch may be cut or embankment raised, may put a fence or make paths across the same, provided the usefulness thereof be not impaired; and the owner of the canal, ditch, or dam, his heirs and assigns, shall at all times have free access to the same for the purpose of making and repairing them; doing thereby no unnecessary damage to the lands of the proprietors. (1795, c. 436, s. 2, P.R.; 1835, c. 7; 1852, c. 57, ss. 1, 2; R.C., c. 40, s. 4; Code, s. 1300; Rev., s. 3986; C.S., s. 5265.)

### § 156-7. Earth for construction of dam; removal of dam.

The earth necessary for the erection of a dam may be taken from either side of it, or wherever else the commissioners may designate and allow. And such dam may be removed by the proprietor of the land, his heirs or assigns, to any other part of his lands, and he may adjoin any dam of his own thereto, if allowed by the court on a petition and such proceedings therein as are provided in this Chapter, as far as the same may apply to his case: Provided always, that the usefulness of the dam will not be thereby impaired or endangered. (R.C., c. 40, s. 5; Code, s. 1301; Rev., s. 3987; C.S., s. 5266.)

### § 156-8. Earth from canal removed or leveled.

The earth excavated from the canal or ditch shall be removed away or leveled as nearly as may be with the surface of the adjacent land, unless the commissioners shall otherwise specially allow. (R.C., c. 40, s. 7; Code, s. 1303; Rev., s. 3988; C.S., s. 5267.)

### § 156-9. No drain opened within 30 feet.

The proprietor of any swamp or flatlands through which a canal or ditch passes shall not have a right to open or cut any drain within 30 feet thereof but by the consent of the owner. Such proprietor, however, and other persons may cut into such canal or ditch in the manner hereinafter provided. (R.C., c. 40, s. 8; Code, s. 1304; Rev., s. 3989; C.S., s. 5268.)

### § 156-10. Right to drain into canal.

Any person desirous of draining into the canal or ditch of another person as an outlet may do so in the manner hereinbefore provided, and in addition to the persons directed to be made parties, all others shall be parties through whose lands, canals, or ditches the water to be drained may pass till it shall have reached the furthest artificial outlet. And the privilege of cutting into such canal or ditch may be granted under the same rules and upon the same conditions and restrictions as are provided in respect to cutting the first canal or ditch: Provided, that no canal or ditch shall be allowed to be cut into another if thereby the safety or utility of the latter shall be impaired or endangered: Provided, further, that if such impairing and danger can be avoided by imposing on the petitioner duties or labor in the enlarging or deepening of such canal or ditch, or otherwise, the same may be done; but no absolute decree for cutting such second canal or ditch shall pass till the duties or work so imposed shall be performed and the effect thereof is seen, so as to enable the commissioners to determine the matter whether such second canal or ditch ought to be allowed or not: Provided, that any party to the proceeding may appeal from the judgment of the court rendered under this section to the superior court of the county, where a trial and determination of all issues raised in the pleadings shall be had as in other cases before a judge and jury. (R.C., c. 40, s. 9; Code, s. 1305; 1887, c. 222; Rev., s. 3990; C.S., s. 5269; 1973, c. 108, s. 94.)

#### CASE NOTES

**In a proceeding by plaintiff drainage corporation to levy assessments** against the lands of respondents for the proportionate part of the expense for making necessary improvements, upon allegations that such lands

drained into the corporation's canals and would be greatly benefited by the improvements, where it appeared that respondents' predecessor in title cut a large canal through his lands draining into the lands of the corporation, it

would be presumed that respondents' predecessor in title acquired the right to cut into the canal of plaintiff pursuant to the provisions of this section, and the petition would be considered as a motion in that cause for the proper adjudication of the rights of the parties. *Sawyer Canal Co. v. Keys*, 232 N.C. 664, 62 S.E.2d 67 (1950).

**Stated** in *Sawyer Canal Co. v. Keys*, 234 N.C. 360, 67 S.E.2d 259 (1951).

**Cited** in *Brooks v. Tucker*, 61 N.C. 309 (1867); In re *Atkinson-Clark Canal Co.*, 231 N.C. 131, 56 S.E.2d 442 (1949).

**§ 156-11. Expense of repairs apportioned.**

Besides the damages which the commissioners may assess against the petitioner for the privilege of cutting into such canal or ditch, they shall assess and apportion the labor which the petitioner and defendants shall severally contribute towards repairing the canal or ditch into or through which the petitioner drains the water from his lands, and report the same to court; which, when confirmed, shall stand as a judgment of the court against each of the parties, his executors and administrators, heirs and assigns. (R.C., c. 40, s. 10; Code, s. 1306; Rev., s. 3991; C.S., s. 5270.)

CASE NOTES

**Report Failing to Assess and Apportion Labor Fatally Defective.** — A commissioners' report under this section which fails to assess and apportion that part of the labor which is to be contributed by the defendants is fatally

defective. *Brooks v. Tucker*, 61 N.C. 309 (1867).

**Applied** in *Worthington v. Coward*, 114 N.C. 289, 19 S.E. 154 (1894).

**Quoted** in *Sawyer Canal Co. v. Keys*, 232 N.C. 664, 62 S.E.2d 67 (1950).

**§ 156-12. Notice of making repairs.**

Whenever the canals or ditches for the reparation of which more than one person shall be bound under the provisions of G.S. 156-11 shall need to be repaired, any of the persons so bound may notify the others thereof, and of the time he proposes to repair the same; and thereupon each of the persons shall jointly work on the same and contribute his proportion of labor till the same be repaired or the work cease by consent. (R.C., c. 40, s. 11; Code, s. 1307; Rev., s. 3992; C.S., s. 5271.)

CASE NOTES

**Stated** in *Sawyer Canal Co. v. Keys*, 232 N.C. 664, 62 S.E.2d 67 (1950).

**§ 156-13. Judgment against owner in default; lien.**

In case the person so notified shall make default, any of the others may perform his share of labor and recover against him the value thereof, on a notice to be issued for such default, in which shall be stated on oath made before the clerk the value of such labor, and unless good cause to the contrary be shown on the return of the notice, the court shall render judgment for the same with interest and costs; which judgment shall be a lien upon the lands from the date of the performance of the work. (R.C., c. 40, s. 12; Code, s. 1308; 1899, c. 396; Rev., s. 3993; C.S., s. 5272.)

CASE NOTES

**Right of Landowner to Notice and Hearing.** — Before any specific amount may be

adjudged against a landowner as a lien on his land, he is entitled to be heard, after notice, as

to whether the assessment made by the commissioners was unjust or oppressive. *Adams v. Joyner*, 147 N.C. 77, 60 S.E. 725 (1908).

**Quoted** in *Sawyer Canal Co. v. Keys*, 232

N.C. 664, 62 S.E.2d 67 (1950).

**Cited** in *Craft & Bergeson v. John L. Roper Lumber Co.*, 181 N.C. 29, 106 S.E. 138 (1921).

## § 156-14. Subsequent owners bound.

All persons to whom may descend, or who may otherwise own or occupy lands drained by any canal or ditch, for the privilege of cutting which any labor for repairing is assessed, shall contribute the same, and shall be bound therefor to all intents and purposes, and in the same manner and by the same judgment as the original party himself would be if he occupied the land. (R.C., c. 40, s. 13; Code, s. 1309; Rev., s. 3994; C.S., s. 5273.)

### CASE NOTES

**Applied** in *Norfleet v. Cromwell*, 70 N.C. 634 (1874); *Craft & Bergeson v. John L. Roper Lumber Co.*, 181 N.C. 29, 106 S.E. 138 (1921).

**Quoted** in *Sawyer Canal Co. v. Keys*, 232 N.C. 664, 62 S.E.2d 67 (1950).

## § 156-15. Amount of contribution for repair ascertained.

Whenever there shall be a dam, canal, or ditch, in the repairing and keeping up of which two or more persons shall be interested and receive actual benefit therefrom, and the duties and proportion of labor which each one ought to do and perform therefor shall not be fixed by agreement or by the mode already in this Subchapter provided for assessing and apportioning such labor, any of the parties may have the same assessed and apportioned by applying to a magistrate, who shall give all parties at least three days' notice, and shall summon two disinterested freeholders who, together with the magistrate, shall meet on the premises and assess the damages sustained by the applicant, whereupon the magistrate shall enter judgment in favor of the applicant for damages or for work done on such ditch or lands. (R.C., c. 40, s. 14; Code, s. 1310; 1889, c. 101; Rev., s. 3995; C.S., s. 5274; 1973, c. 108, s. 95.)

### CASE NOTES

**Constitutionality.** — This section is constitutional and valid. *Forehand v. Taylor*, 155 N.C. 353, 71 S.E. 433 (1911).

**A proceeding under this section is in effect a motion in the cause** which can be brought forward from time to time, upon notice to all the parties to be affected, for orders in the cause, to promote the objects of the proceeding, the whole matter remaining in the control of the court. *Staton v. Staton*, 148 N.C. 490, 62 S.E. 596 (1908); *Sawyer Canal Co. v. Keys*, 234 N.C. 360, 67 S.E.2d 259 (1951).

**Procedure for Enlarging or Deepening Canal.** — The method by which the user of a canal by prescriptive right may enlarge or deepen it with an apportionment of the costs is provided by this section. *Armstrong v. Spruill*, 182 N.C. 1, 108 S.E. 300 (1921).

**Liability for Damages.** — Where the users of a canal by prescriptive right enlarge the same, and thereby place water upon the lower

proprietor to his damage, they are liable therefor, and upon conflicting evidence, the issue should be submitted to the jury. *Armstrong v. Spruill*, 182 N.C. 1, 108 S.E. 300 (1921).

**Action Dismissed for Noncompliance with Statute Not Bar to Second Action.** — When damages were sought in an action before a justice of the peace (now magistrate) relating to drainage districts, etc., and the action was dismissed because there had been no contract or agreement between the parties and the requirements of the statute had not been met, the plaintiff was not thereby barred from proceeding to have the damages assessed and from bringing another action therefor, as the former judgment did not bar the second one. *Forehand v. Taylor*, 155 N.C. 353, 71 S.E. 433 (1911).

**Applied** in *Porter v. Durham*, 98 N.C. 320, 3 S.E. 832 (1887).

**Cited** in *Craft & Bergeson v. John L. Roper Lumber Co.*, 181 N.C. 29, 106 S.E. 138 (1921).

## § 156-16. Petition by servient owner against dominant owner.

Any person owning lands lying upon any creek, swamp, or other stream not navigable, which are subject to inundation and which cannot be conveniently drained or embanked on account of the volume of water flowing over the same from lands lying above, and by draining the same the lands above will be benefited and better drained, such person may by petition apply to the superior court of the county in which the lands sought to be drained or embanked, or some part of such lands, lie, setting forth the particular circumstances of the case, the valuation of the lands to be drained or embanked, and what other lands above would be benefited, and who are the proprietors of such lands; whereupon a summons shall be served upon each of the proprietors, who are not petitioners, requiring them to appear before the court at a time to be named in the summons, which shall not be less than 10 days from the service thereof, and upon such day the petition shall be heard and the court shall appoint three persons as commissioners, who shall, before entering upon the discharge of their duties, be sworn to do justice between the parties. (1889, c. 253; Rev., s. 4016; C.S., s. 5275.)

**Local Modification.** — Lenoir: 1891, c. 73; Rev., s. 4016.

### CASE NOTES

**Effect on § 156-3.** — This section does not repeal § 156-3, but leaves in operation such of its provisions as are not repugnant to it. *Worthington v. Coward*, 114 N.C. 289, 19 S.E. 154 (1894).

**For case holding that the procedure under this and the following sections is analogous to the general drainage law,** that the proceedings are regarded as being kept alive for further orders without being retained on the docket, and that in the case at issue the original assessment did not constitute a bar to the

motion to vacate and the assessment was properly set aside on the facts found, see *Spence v. Granger*, 204 N.C. 247, 167 S.E. 805 (1933).

**Judgment Not Set Aside.** — In an action brought for the drainage of lands under this and the following sections, the judgment upon motion thereafter would not be set aside merely upon the ground that a similar proceeding had been prosecuted to judgment between several of the parties. *Adams v. Joyner*, 147 N.C. 77, 60 S.E. 725 (1908).

## § 156-17. Commissioners to examine lands and make report.

The commissioners, or a majority of them, on a day of which each proprietor is to be notified at least five days, shall meet on the premises and view the land to be drained and the lands affected thereby, and shall determine and report whether the lands of the petitioner or petitioners ought to be drained exclusively by him or them, and if they are of the opinion that the same ought not to be drained exclusively at the expense of the petitioner or petitioners, they shall decide and determine the route of the canal, ditch, or embankment, the width thereof, and the depth and height, as the case may be, and the manner in which the same shall be cut or thrown up, considering all the circumstances of the case, and providing as far as possible for the effectual drainage of the petitioner's land, and the protection and benefit of the defendant's lands; and they shall apportion the labor to be done or assess the amount to be paid by each of the owners of the lands affected by such canal, ditch, or embankment, towards the construction and keeping the same in repair, and report the same to the court, which, when confirmed, shall stand as

a judgment of the court against each of the parties, his executors, administrators, heirs and assigns. (1889, c. 253, s. 2; Rev., s. 4017; C.S., s. 5276.)

**Local Modification.** — Beaufort, Lenoir: 1891, c. 73, s. 2; Rev., s. 4017; Pub. Loc. 1911, c. 545.

CASE NOTES

**Cost of Work Not Required to Be Set Out in Report.** — The cost of the work to be done in the drainage of lands is not required under this section, and cannot, for its uncertainty of amount, be set out in the report of the commis-

sioners appointed. It is a compliance with the statutes when the portion of the work to be done by the landowners is set out. *Adams v. Joyner*, 147 N.C. 77, 60 S.E. 725 (1908).

**§ 156-18. Cost of repairs enforced by judgment.**

Whenever any such ditch, canal, or embankment shall need repairs or cleaning out, and any of the parties interested therein refuse to perform the labor apportioned to them, or refuse to contribute the amount assessed against them, the same shall be enforced in the manner hereinbefore provided for the joint repair of canals and ditches. (1889, c. 253, s. 3; Rev., s. 4018; C.S., s. 5277.)

**§ 156-19. Obstructing canal or ditch dug under agreement.**

Where two or more persons have dug a canal or ditch along any natural drain or waterway under parol agreement, or otherwise, wherein all the parties shall have contributed to the digging thereof, if any servient or lower owner shall fill up or obstruct said canal or ditch without the consent of the higher owners and without providing other drainage for the higher lands, he shall be guilty of a Class 3 misdemeanor. (1899, c. 255; Rev., s. 3375; C.S., s. 5278; 1993, c. 539, s. 1070; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

**This section applies only where all the parties contributed under a valid agreement** to the lawful digging of a ditch or canal.

*Porter v. Armstrong*, 129 N.C. 101, 39 S.E. 799 (1901).

**§ 156-20. Right of dominant owner to repair.**

In the absence of any agreement for maintaining the efficiency of such ditch or canal, or should the servient owner neglect or refuse to clean out or aid in cleaning out the same through his lands, it shall be lawful for the dominant or higher owner, after giving three days' notice to the servient owner, to enter along such canal and not more than 12 feet therefrom and clean out or remove obstructions or accumulated debris therefrom at his own personal expense or without cost to the servient owner. (1899, c. 255, s. 2; Rev., s. 4025; C.S., s. 5279.)

CASE NOTES

**Where a person enlarges a canal on the lands of another, under a void proceeding, he is a trespasser**, and cannot claim credit for money spent thereon. *Porter v. Armstrong*, 129

N.C. 101, 39 S.E. 799 (1901).

Cited in *Elder v. Barnes*, 219 N.C. 411, 14 S.E.2d 249 (1941).

## § 156-21. Canal maintained for seven years presumed a necessity; drainage assessments declared liens.

After a canal has been dug along any natural depression or waterway and maintained for seven years, it shall be prima facie evidence of its necessity, and upon application to the clerk of the superior court of any landowner who is interested in maintaining the same, it shall be the duty of the clerk of the superior court to appoint and cause to be summoned three disinterested and discreet freeholders, who, after being duly sworn, shall go upon the lands drained or intended to be drained by such canal, and after carefully examining the same and hearing such testimony as may be introduced touching the question of cost of canal, the amount paid, and the advantages and disadvantages to be shared by each of the parties to the action, shall make their report in writing to the clerk of the superior court stating the facts and apportioning the cost of maintaining such canal among the parties to the action, and the cost of the action shall be divided in the same ratio; and their report when approved shall be properly registered by the clerk and the said report or reports shall, when filed in the office of the clerk of the superior court, be a lien upon each tract of land embraced in said report or reports to the extent of the proportionate part of the costs stipulated in said report or reports as a charge against same, and shall have the effect and force of a judgment thereon, and such judgments shall be subject to execution and collection as in cases of other judgments. (1899, c. 255, s. 3; Rev., s. 4026; 1917, c. 248, s. 1; C.S., s. 5280; 1931, c. 227, s. 1.)

### CASE NOTES

**Section to Be Construed to Carry Out Its Purposes.** — The provisions of this section are necessary for the cultivation and improvements of lowlands required to be drained, and should be construed to carry into effect its beneficent purposes, when practicable. *Ange & Forest v. Atlantic C.L.R.R.*, 159 N.C. 547, 75 S.E. 796 (1912).

**In Connection with Other Sections of this Chapter.** — This section should be construed in connection with the other sections of the Chapter relating to the drainage of lowlands. *Ange & Forest v. Atlantic C.L.R.R.*, 159 N.C. 547, 75 S.E. 796 (1912).

**“Ditch” and “Canal” Used Interchangeably.** — In the Chapter relating to the drainage of lowlands, the terms “ditch” and “canal” are used indiscriminately to designate an artificial drain. *Ange & Forest v. Atlantic C.L.R.R.*, 159 N.C. 547, 75 S.E. 796 (1912).

**Artificial Drain as “Canal.”** — An artificial drain in some places from 3 to 5 feet wide and from 2 to 5 feet deep, made for the purpose of cultivating and improving lowlands by draining them, is a “canal” within the meaning of this

section. *Ange & Forest v. Atlantic C.L.R.R.*, 159 N.C. 547, 75 S.E. 796 (1912).

**Contribution to Original Construction Not Prerequisite to Liability for Maintenance.** — It is not necessary that the owner of lands lying along a drainage canal, within the meaning of this section, shall have contributed to its original construction to make him liable to assessments for its maintenance under the provisions of the statute. *Ange & Forest v. Atlantic C.L.R.R.*, 159 N.C. 547, 75 S.E. 796 (1912).

**Liability of Railroad for Maintenance of Canal.** — While a railroad company may not be the absolute owner of lands in fee, it has the proprietorship and control of those constituting its rights-of-way; and when such lands are benefited by a canal which comes within the meaning of this section, the provision of the statute relative to the maintenance of the canal applies. *Ange & Forest v. Atlantic C.L.R.R.*, 159 N.C. 547, 75 S.E. 796 (1912).

**Applied in Craft & Bergeson v. John L. Roper Lumber Co.**, 181 N.C. 29, 106 S.E. 138 (1921).

### § 156-22. Supplemental assessments to make up deficiency; vacancy appointments of assessment jurors.

The freeholders, commissioners or jurors, appointed in any application or proceeding filed or instituted under G.S. 156-21 or any other section of Article 1 of this Chapter, are authorized and empowered during the establishment of and providing for the construction, maintenance and payment therefor, of such ditch, canal or drain, to make other and further assessments for the costs of establishment, construction and expense, when it shall be determined by the clerk of the court that the provisions in the former report for the payment thereof are insufficient, and that such supplementary reports shall be made on the same basis of an equitable and just proportion, as made in the former report, which report or reports shall be filed with the clerk of the superior court and have the same force and effect as the former or original report.

In case of death, resignation, removal or for any other cause there becomes a vacancy as to the freeholders, commissioners or jurors, appointed to carry out the provisions of the sections contained in this Chapter, the clerk of the superior court is authorized to fill such vacancy by the appointment of some disinterested freeholder in the county, and the said person so appointed to fill such vacancy shall qualify before the clerk of the superior court before entering upon his duties. (1931, c. 227, s. 2.)

**Local Modification.** — Duplin: 1931, c. 227, s. 2.

#### CASE NOTES

**Right of Interested Parties to Notice and Hearing.** — Where drainage assessments are levied against lands under this and related sections, either original assessments or additional assessments to cover unforeseen ex-

penses in the construction of the drainage ditch, the parties whose lands are assessed are entitled to notice and an opportunity to be heard. *Spence v. Granger*, 207 N.C. 19, 175 S.E. 824 (1934).

### § 156-23. Easement of drainage surrendered.

If any persons, or those claiming through or under them, who have cut any ditch or canal into which any other person has been permitted to drain land under any proceeding authorized in this Subchapter, shall desire to surrender their easement or right in such ditch or canal and be discharged from any judgment rendered and existing under such proceedings, such persons may on motion have such proceeding reinstated for hearing and file a petition therein setting forth such fact or any other grounds for relief thereunder, and upon proof satisfactory to the court that such petitioners have cut another ditch or canal which drains their lands formerly drained by the first ditch or canal, and have abandoned the use of it for any purpose of drainage, the court shall adjudge the easement or right of the petitioners surrendered and determined, and from that time the petitioners and their land shall forever be discharged and released from the judgment heretofore rendered in such former proceedings: Provided, however, that all parties then having an easement or right in such ditch or canal shall be served with notice of such petition 20 days before the hearing thereof. (1887, c. 222, s. 3; Rev., s. 4027; C.S., s. 5281.)

### § 156-24. Obstructing drain cut by consent.

If any person shall stop or in any way obstruct the passage of the water in any ditch or canal having been cut through lands of any person by consent of

the owner of said land, before giving the interested parties a reasonable time to comply with the mode of proceedings provided for the drainage of lowlands, he shall be guilty of a Class 3 misdemeanor. (1891, c. 434; Rev., s. 3376; C.S., s. 5282; 1993, c. 539, s. 1071; 1994, Ex. Sess., c. 24, s. 14(c).)

### **§ 156-25. Protection of canals, ditches, and natural drains.**

If any person shall fell any tree in any ditch, canal, or natural drainway of any farm, unless he shall remove the same and put such ditch, canal, or natural drainway in as good condition as it was before such tree was so felled; or if any person shall stop up or fill in such ditch, canal, or drainway and thereby obstruct the free passage of water along the said ditch, canal, or drainway, unless the said person shall first secure the written consent of the landowner, and those damaged by such obstruction in said ditch, canal, or drainway, or unless such person so filling in and stopping up such ditch, canal, or drainway shall, upon the demand of the person so damaged, clean out and put the said ditch, canal, or drainway in as good condition as the same was before such filling in and stopping up of the said ditch, canal, or drainway happened, he shall be guilty of a Class 3 misdemeanor. (1901, c. 478; Rev., s. 3382; C.S., s. 5283; 1993, c. 539, s. 1072; 1994, Ex. Sess., c. 24, s. 14(c).)

## Part 2. Petition under Agreement for Construction.

### **§ 156-26. Procedure upon agreement.**

(a) Agreement; Names Filed. — Whenever a majority of the landowners or the persons owning three fifths of all the lands in any well-defined swamp or lowlands shall, by a written agreement, agree to give a part of the land situated in such swamp or lowlands as compensation to any person, firm, or corporation who may propose to cut or dig any main drainway through such swamp or lowlands, or shall, by written agreement, contract with any person, firm or corporation to cut or dig any main drainway through such swamp or lowlands, then the person, firm, or corporation so proposing to cut or dig such main drainway shall file with the clerk of the superior court of the county, or, if there be two or more counties, with the clerk of the superior court of either county in or through which the proposed canal or drainway is to pass, the names of the landowners, with the approximate number of acres owned by each to be affected by the proposed drainway who have entered into the written agreement with the person, firm, or corporation, together with a brief outline of the proposed improvement, and in addition thereto shall file with the clerk the names and addresses, as far as can be ascertained, of the landowners, with the number of acres owned by each of them to be affected by the proposed drainway, who have not made any agreement with the person, firm, or corporation proposing to do the improvement.

(b) Notice. — Upon the filing of such names, it shall be the duty of the clerk to forthwith issue a notice which shall be served by the sheriff to all landowners who have not made any agreement to appear before him at a certain date, which date shall be not less than 10 and not more than 20 days from the service of such notice, or, in lieu of the personal service hereinabove required, it shall be sufficient for the clerk to publish in a newspaper published in the county once a week for four weeks a notice to all landowners who have not made any agreement to appear before him at a certain date, which date shall be not less than 30 days and not more than 40 days from the first publication of notice, at which time and place the landowners shall state their objections to the proposed improvement, and in addition thereto make an

estimate of the amount of damage that might be done to the land owned by each of them on account of the proposed drainway.

(c) Hearing; Viewers. — Upon the hearing it shall be the duty of the clerk of the superior court to forthwith appoint three disinterested persons, none of whom shall own land to be affected by such drainway, if requested by the person, firm, or corporation proposing to do the improvement, whose duty it shall be to familiarize themselves with the proposed improvement, view the premises of the landowners, estimating damages, and make an estimate themselves of the amount of damages that might accrue to the lands of each landowner filing objections on account of the proposed improvement, and report the same to the clerk of the superior court within 15 days from the date of their appointment.

(d) Report; Bond. — Immediately upon the filing of the reports the clerk of the superior court shall forthwith notify the person, firm, or corporation proposing to dig the drainway or canal of the estimated damages contained in the reports, and the person, firm, or corporation shall execute and deliver a bond in a surety company authorized to do business in the State of North Carolina in twice the sum total of the estimated amount of damages, which bond shall be payable to the clerk of the superior court and conditioned upon the payment to the landowners of the amount of damages that may be assessed in the manner hereinafter provided.

(e) Construction Authorized. — Upon the execution and delivery to the clerk of the said bond, the person, firm, or corporation so proposing to cut or dig such main drainway shall be and they are hereby authorized to proceed with the cutting or digging of the drainway through any lands in its proposed course, whether the owners of the land may have consented thereto or not, and the person, firm, or corporation so proposing to cut or dig the drainway shall have the proper and necessary right-of-way for that purpose and for all things incident thereto through any lands or timbers situated in such swamp or lowlands. (1917, c. 273, s. 1; C.S., s. 5284; 1969, c. 1046.)

**Editor's Note.** — The provisions of this and the following sections under this Article supplant those of Session Laws 1915, Chapter 141. Session Laws 1915, Chapter 141 was held unconstitutional and void in *Lang v. Carolina*

*Land & Dev. Co.*, 169 N.C. 662, 86 S.E. 599 (1915), as a taking of private property without providing for just compensation to the private owners of lands whose consent had not been given.

#### CASE NOTES

**Withdrawal of Petitioners.** — Upon the return day set by the clerk of the court for the hearing of the landowners in a proposed drainage district, it may be shown by those opposed to the petition that some of those who signed the petition desired to withdraw, and that after

eliminating their names the petitioners would not represent a majority of the landowners in the district, or of persons owning three fifths of the lands, as the statute requires. *Armstrong v. Beaman*, 181 N.C. 11, 105 S.E. 879 (1921).

#### OPINIONS OF ATTORNEY GENERAL

**As to exemption of housing authority from fees**, see opinion of Attorney General to

the Honorable F. Crane, Commissioner of Labor, 41 N.C.A.G. 303 (1971).

### § 156-27. Recovery for benefits; payment of damages.

After the drainway herein provided for shall be completed the person, firm, or corporation cutting or digging the same shall be entitled to recover of the landowners owning that part of the land with reference to which no contract for compensating those cutting or digging the drainway may have been made,

an amount equal to the benefits to accrue to such lands by reason of the drainway, and shall be required by the clerk of the superior court to pay to any landowner the amount of damages in excess of benefits which may be done to the land to be determined in the manner hereinafter provided: Provided, that the recovery from any owner of the land shall be limited to the benefits to accrue to that land owned by such person, and situated in such swamp or lowlands or adjacent thereto; and provided further, that the amount to be so recovered as herein provided for until fully paid shall be and constitute a lien upon such land, the lien to be in force regardless of who may own the land at the time the amount to be recovered as compensation for digging or cutting the drainway shall be determined. (1917, c. 273, s. 2; C.S., s. 5285.)

### § 156-28. Notice to landowners; assessments made by viewers.

After the completion of the main drainway, upon the application of the person, firm, or corporation, or their heirs or assigns, digging or cutting the same, the clerk of the superior court of the county in which any land through which the drainway may pass is situated shall issue a notice to be served by the sheriff upon any person who may have failed to agree with the person, firm, or corporation digging or cutting such drainway, upon a compensation to be paid by the landowner for the digging or cutting of such drainway, notifying the landowner that on a certain day, which shall be named in the notice and not less than 20 days from the date of the issuing of the notice, the clerk of the superior court will appoint three competent and disinterested persons, one of whom may be a surveyor, and none of whom shall own land to be affected by the drainway, to view the land so drained and for which no compensation for the drainage may have been agreed upon as aforesaid, and report to the clerk of the superior court what amount shall be paid therefor by the various landowners who may have failed to arrange for and agree upon the compensation for the drainage as aforesaid, and the amount of damages in cases where the damages have exceeded the benefits, which shall be paid to the landowners by the person, firm, or corporation cutting or digging such canal or drainway. In making the appointment of the viewers the clerk of the superior court shall hear any objections which may be advanced by those interested to any of the persons the clerk may consider to be appointed as viewers, but the clerk shall name those whom he considers best qualified. (1917, c. 273, s. 3; C.S., s. 5286.)

### § 156-29. Report filed; appeal and jury trial.

A report signed by two of the persons appointed as viewers shall be entered by the clerk as the report of the viewers. Any landowner affected by the report, and the person, firm, or corporation digging or cutting the drainway, has the right of appeal and the right to have any issue arising upon the report tried by a jury, provided exceptions shall be filed to the report within 20 days after the filing of the report with the clerk, in which exceptions so filed may be a demand for a jury trial. If a jury trial is demanded, the clerk shall transfer the proceedings to the civil-issue docket, and it shall be heard as other civil actions. If no jury trial is demanded, the clerk shall hear the parties upon the exceptions filed, and appeal may be had as in special proceedings except as modified by this section, but no jury trial may be had unless demanded as provided in this section. (1917, c. 273, s. 4; C.S., s. 5287; 1999-216, s. 17.)

**Cross References.** — As to appeal in special proceedings, see §§ 1-272 through 1-276 [see now § 1-301.1 et seq.].

**Effect of Amendments.** — Session Laws 1999-216, s. 17, effective January 1, 2000, and applicable to all orders or judgments subject to

this act that are entered on or after that date, rewrote the section.

**CASE NOTES**

**Jurisdiction of Superior Court.** — The superior court, upon certification of the opinion of the Supreme Court, has jurisdiction to retain the cause for hearing upon the appeal from the clerk's order, this section providing that appeals from the clerk in drainage assessment proceedings shall be the same as in special proceedings, and § 1-276 [see now § 1-301.1 et

seq.] giving the superior court jurisdiction to hear and determine all matters in controversy upon appeal from the clerk in special proceedings. *Spence v. Granger*, 207 N.C. 19, 175 S.E. 824 (1934). See also, *Flat Swamp, Lock's Creek & Evan's Creek Canal Co. v. McAlister*, 74 N.C. 159 (1876).

**§ 156-30. Confirmation of report.**

Unless an appeal is taken, the clerk of superior court shall confirm the report of the viewers. If exceptions are filed and no jury trial is demanded, the clerk shall hear the exceptions and enter judgment as in other special proceedings. If the report is confirmed by the clerk because no exceptions or demand for a jury trial is filed, the judgment of confirmation is the judgment of the court. Any judgment entered against the person, firm, or corporation cutting or digging the drainway is a judgment against the person, firm, or corporation and against the surety on the bond required by G.S. 156-26. (1917, c. 273, s. 5; C.S., s. 5288; 1999-216, s. 18.)

**Effect of Amendments.** — Session Laws 1999-216, s. 18, effective January 1, 2000, and applicable to all orders or judgments subject to

this act that are entered on or after that date, rewrote the section.

**§ 156-31. Payment in installments.**

The amount to be recovered from any person as compensation for digging or cutting the drainway after the amount shall be definitely determined as herein provided for, shall be payable in five equal annual installments, the first payable one year from the filing of the report of the viewers with the clerk of the superior court, and one payment on the same day of each year thereafter until the full amount be paid. The amount to be recovered from the person, firm, or corporation cutting or digging the drainway, on account of any damages in excess of benefits to the lands of any landowner, shall be payable in one installment which shall be due and payable one year from the filing of the report of the viewers with the clerk of the superior court. (1917, c. 273, s. 6; C. S., s. 5289.)

**ARTICLE 2.**

*Jurisdiction in County Commissioners.*

**§ 156-32. Petition filed; board appointed; refusal to serve misdemeanor.**

Upon the petition of three citizens in any county to the county commissioners, petitioning for the draining of any creek, swamp, or branch, either upon the plea of health or to promote and advance the agricultural interest of the farmers who may own lands lying on such creek, swamp, or branch petitioned to be drained, the county commissioners shall within 10 days after the filing of

such petition order the county surveyor to summon three disinterested freeholders, good and lawful men of intelligence and discretion, who shall constitute a board, and the county surveyor shall be the chairman of such board; and the chairman shall give all persons who may be interested in having such creek, swamp, or branch drained three days' notice of the time and place of the meeting of the board: Provided, the petitioners shall deposit with the county treasurer the sum of twenty-five dollars (\$25.00) for the payment of current expenses not otherwise provided for in this Article. Any person duly summoned by the county surveyor to act as a commissioner for the drainage of any such creek, swamp, or branch, who shall refuse to serve, shall be guilty of a Class 3 misdemeanor. (1887, c. 267; Rev., ss. 3379, 4011; C.S., s. 5290; 1993, c. 539, s. 1073; 1994, Ex. Sess., c. 24, s. 14(c).)

**Local Modification.** — Hyde: 1901, c. 166.

### **§ 156-33. Duty of board; refusal to comply with their requirements misdemeanor.**

The board provided for in G.S. 156-32 shall meet at the call of the chairman and shall proceed to inspect and examine the lands as described in the petition to be drained, and the board shall have power to summon witnesses, administer oaths, and take testimony, and if the board decides that the lands specified in the petition shall be drained, either upon the plea of health or for the benefit of the farms lying on or contiguous to such watercourse, then the board shall select a place at which the ditch shall be begun. They shall also decide the depth and width of the ditch to be dug, and shall proceed to survey, locate, lay off, and mark the course of the ditch, and the board shall assign to the landowners the amount of the labor to be performed and the amount of money to be paid for the purpose of defraying the necessary expenses by each landowner in proportion to the amount of lands drained or pro rata benefits received by the drainage of such lands, and the board shall specify the time in which the work so assigned shall be completed: Provided, no one shall be required to commence on the work assigned to him until the person next below him shall have completed his work in accordance with the specifications of the board. If any person shall refuse to comply with any of the requirements of the board he shall be guilty of a Class 1 misdemeanor. (1887, c. 267, ss. 2, 7; Rev., ss. 3377, 4012; C.S., s. 5291; 1993, c. 539, s. 1074; 1994, Ex. Sess., c. 24, s. 14(c).)

### **§ 156-34. Report filed.**

The board shall make a written report to the county commissioners showing all the acts and decisions of the board as to the length, depth, and width of the ditch, the names of all the owners of the lands that will be drained, and the amount of work to be performed and the amount of money to be paid by each person benefited by such drainage. But in case the board determines that the lands described in the petition shall not be drained, then the expenses of the board shall be paid out of the funds deposited with the county treasurer by the petitioners. (1887, c. 267, s. 3; Rev., s. 4013; C.S., s. 5292.)

### **§ 156-35. Owners to keep ditch open.**

All persons whose lands shall be drained under the provisions of this Article shall keep the ditch on their lands clear of all rafts of logs, brush, or any trash that will obstruct the flow of water through the ditch. (1887, c. 267, s. 4; Rev., s. 4014; C.S., s. 5293.)

## § 156-36. Compensation of board.

The compensation of the board shall be as follows: The county surveyor shall receive three dollars (\$3.00) per day and the other members shall receive one dollar and fifty cents (\$1.50) per day while engaged in the duties imposed in this Chapter. (1887, c. 267, s. 5; Rev., s. 4015; C.S., s. 5294.)

## SUBCHAPTER II. DRAINAGE BY CORPORATION.

### ARTICLE 3.

#### *Manner of Organization.*

## § 156-37. Petition filed in superior court.

Any proprietor in fee of swamplands, which cannot be drained except by cutting a canal through the lands of another or other proprietor in fee, situated at a lower level and which would also be materially benefited by the cutting of such canal, who desires that such canal be cut on the terms on which it is hereinafter allowed, may apply by petition, setting forth the facts, to the superior court of the county in which any of the lands through which the canal will pass may lie. (1868-9, c. 164, s. 2; Code, s. 1311; Rev., s. 3996; C.S., s. 5295.)

### CASE NOTES

**Evidence Held Insufficient to Show Establishment of Drainage Corporation.** — Where petitioners showed only the granting of an easement in response to a petition by an individual to be allowed to drain into an existing canal on the lands of another under the provisions of §§ 156-2, 156-3 and 156-10, such evidence was insufficient to show the establishment of a drainage corporation under this section. In re Atkinson-Clark Canal Co., 231 N.C. 131, 56 S.E.2d 442 (1949).

**Burden of Proof Where Drainage Assess-**

**ment Challenged.** — When the validity of a drainage assessment is challenged, the burden is upon the drainage district or corporation to show that it was created in substantial compliance with the applicable statutes and that the assessments were levied pursuant to and in compliance with the statutory provisions. In re Atkinson-Clark Canal Co., 231 N.C. 131, 56 S.E.2d 442 (1949).

**Stated** in Sawyer Canal Co. v. Keys, 232 N.C. 664, 62 S.E.2d 67 (1950).

## § 156-38. Commissioners appointed; report required.

On the establishment by the petitioner of his allegations, the court shall appoint three persons as commissioners who, having been duly sworn, shall examine the premises and inquire and report:

- (1) Whether the lands of the petitioner can be conveniently drained otherwise than through those of some other person.
- (2) Through the lands of what other persons a canal to drain the lands of the petitioner would properly pass, considering the interests of all concerned.
- (3) A description of the several pieces of lands through which the canal would pass, and the present values of such portions of the pieces of lands as would be benefited by it, and the reasons for arriving at the conclusion as to the benefit.
- (4) The route and plan of the canal, including its breadth, depth, and slope, as nearly as they can be calculated, with all other particulars necessary for calculating its cost.
- (5) The probable cost of the canal and of a road on its bank, and of such other work, if any, as may be necessary for its profitable use.

- (6) The proportion of the benefit (after a deduction of all damages) which each proprietor would receive by the proposed canal and a road on its bank if deemed necessary and in which each ought, in equity and justice, to pay toward their construction and permanent support.
- (7) With their report they shall return a map explaining, as accurately as may be, the various matters required to be stated in their report. (1868-9, c. 164, s. 3; Code, s. 1312; Rev., s. 3997; C.S., s. 5296.)

#### CASE NOTES

**Constitutionality of Assessments.** — An assessment made under the provisions of this Subchapter is constitutional and valid. *Middle Canal Co. v. Whitley*, 172 N.C. 100, 90 S.E. 1 (1916).

**Collateral Attack on Assessment.** — In an action to enforce payment of an assessment, when the assessment does not appear to be void on its face, it may not be collaterally attacked by defendant landowner. *Middle Canal Co. v. Whitley*, 172 N.C. 100, 90 S.E. 1 (1916).

**Confirmation of Report as to Those Not Objecting.** — Report of the commissioners, assessing persons for benefits accruing to their lands from the operations of plaintiff canal company, should have been confirmed by the court as to those defendants who did not object; but as to those who did object, the court should have proceeded to try the issues involved in the controversy. *Lock's Creek Canal Co. v.*

*McKeithan*, 89 N.C. 52 (1883).

**Right of Landowners to Notice.** — Landowners whose interests might be affected under proceedings under the provisions of this Chapter are entitled to notice. *Gamble v. McCrady*, 75 N.C. 509 (1876).

**Notice Held Sufficient.** — It was immaterial whether or not landowner had notice of a meeting at which a committee was appointed to assess the lands in the district and determine the amount of each assessment, when the assessment was accordingly made, and was duly ratified and confirmed at a subsequent meeting regularly called and held in accordance with the statute, of which he had notice. *Middle Canal Co. v. Whitley*, 172 N.C. 100, 90 S.E. 1 (1916).

**Cited in** *In re Atkinson-Clark Canal Co.*, 231 N.C. 131, 56 S.E.2d 442 (1949).

### § 156-39. Surveyor employed.

The commissioner may employ a surveyor to prepare the map required to accompany their report. (1868-9, c. 164, s. 4; Code, s. 1313; Rev., s. 3998; C.S., s. 5297.)

### § 156-40. Confirmation of report.

If it appear that the lands on the lower level will be increased in value twenty-five percent (25%) or upwards by the proposed improvement, within one year after the completion thereof, and that the cost of making such improvement will not exceed three fourths of the present estimated value of the land to be benefited, and that the proprietors of at least one half in value of the land to be affected consent to the improvement, the court may confirm such report, either in full or with such modifications therein as shall be just and equitable. (1868-9, c. 164, s. 5; Code, s. 1314; Rev., s. 3999; C.S., s. 5298.)

#### CASE NOTES

**Prerequisites to Establishment of Drainage Corporation.** — In order to establish a drainage corporation, it is necessary that a petition in conformity with § 156-37 be filed, that commissioners be appointed and that they file a report in conformity with § 156-38, and

that there be an adjudication and confirmation of the report. It is only after such confirmation that the corporation may be declared to exist and may proceed to organize and levy assessments. *In re Atkinson-Clark Canal Co.*, 231 N.C. 131, 56 S.E.2d 442 (1949).

### § 156-41. Proprietors become a corporation.

Upon a final adjudication, confirming the report, the proprietors of the several pieces of land adjudged to be benefited by the improvement shall be declared a corporation, of which the capital stock shall be double the estimated cost of the improvements, and in which the several owners of the land adjudged to be benefited shall be corporators, holding shares of stock in the proportions in which they are adjudged liable for the expense of making and keeping up the improvement. (1868-9, c. 164, s. 6; Code, s. 1315; Rev., s. 4000; C.S., s. 5299.)

#### CASE NOTES

**Cited** in *In re Atkinson-Clark Canal Co.*, 231 N.C. 131, 56 S.E.2d 442 (1949).

### § 156-42. Organization; corporate name, officers and powers.

The clerk of the court of the county in which the proceeding is pending or any corporator, who is a petitioner, may call a meeting of the corporators, at which meeting the corporators shall choose a name for the corporation, unless the commissioners selected the name, elect a president, vice-president, secretary and treasurer, but said officers shall be chosen or elected from the corporators who are petitioners in the proceeding; and they shall also choose or elect a board of directors and they shall be chosen or elected from the corporators who are petitioners in the proceeding. The corporators shall also make all bylaws and regulations, not contrary to law, which may be necessary and proper for effecting the purpose of the corporation, but said duty may be delegated to the board of directors. They shall fix the number of shares of stock, and assign to each proprietor or corporator his proper number, but this duty and right may be delegated to and done by the board of directors. The board of directors shall have such powers as are generally given to directors under the corporation law of the State; and they shall assess the sums or amount which shall be paid by each proprietor or corporator in conformity with and in compliance with the report of the commissioners on which the corporation is based. When said assessments against said proprietors or corporators and their lands affected are duly certified to the clerk of the superior court of the county in which such proceeding was instituted, the same shall be passed upon by the clerk of court and when approved by the clerk, said assessments shall become judgments against the several proprietors, corporators and owners so assessed, and the same shall be liens on the lands of the owners or corporators against whom said assessments were made and judgments entered, subject only to taxes, but said judgments shall be judgments in rem only. The board of directors will also have power, if they deem it proper, to fix and prescribe the time, mode and manner of payment; and do such other things as are necessary for the construction, enlargement and keeping up or maintaining said canal and improvement. In every meeting of the corporators or stockholders, each proprietor or corporator shall have one vote for each share of stock owned by him. (1868-9, c. 164, s. 7; Code, s. 1316; Rev., s. 4001; C.S., s. 5300; 1939, c. 180, s. 1.)

#### CASE NOTES

**Cited** in *In re Atkinson-Clark Canal Co.*, 231 N.C. 131, 56 S.E.2d 442 (1949); *In re Atkinson-Clark Canal Co.*, 234 N.C. 374, 67 S.E.2d 276 (1951).

### § 156-43. Incorporation of canal already constructed; commissioners; reports.

Whenever the proprietors of any canal already cut shall desire to become incorporated, any number of the proprietors, not less than one third in number, may file their petition before the clerk of the superior court of the county in which the canal is located, or in either county, where the canal may be located in more than one county, setting forth the names of the proprietors, the length and size of the canal, the names of the owners of land draining in such canal, and the quantity of land tributary thereto. And upon filing the petition, summons shall issue to all parties having an easement in the canal, returnable as in other special proceedings; upon the return thereof, or upon a day fixed by the clerk for hearing same, all owners of the canal may become corporators therein, and upon failure of any to avail themselves of that right, they shall not be entitled to become corporators, except under such bylaws and regulations as such corporation shall make and declare. But those who fail to avail themselves of the benefit of this Subchapter shall not be deprived of their easement in the canal, but shall enjoy the same upon payment to the corporation of the assessment made upon them pro rata with the corporators; such assessment shall be made on the land tributary to the canal and apportioned pro rata to each owner thereof; it shall be made by the corporation on 10 days' notice to each owner of the land, under such rules and regulations as the bylaws may prescribe; but any person dissatisfied therewith shall have the right to appeal to a jury at the regular term of the superior court of the county, and the amount of damages assessed shall be a first lien on the land of the owner against whom judgment shall be rendered.

Upon the return date of the summons or on the hearing by the clerk as provided in this section, the clerk of the court may appoint three persons as commissioners, who having been duly sworn shall examine the premises and inquire and report:

- (1) The route and plan of the canal, including the breadth, depth and slope as nearly as they can be calculated, with all other particulars necessary for calculating the cost of enlarging and improving said canal.
- (2) The probable cost of the improvement and enlargement of said canal.
- (3) The proportion which each proprietor or corporator ought in equity and justice to pay toward the enlargement, improvement and permanent support and upkeep of said canal.
- (4) With their report they shall return a map explaining as accurately as may be, the various matters required and necessary in aid or explanation of their report.
- (5) The said report shall be heard and determined as other reports in special proceedings, and if approved by the clerk, such proprietors shall become a body corporate or a corporation.
- (6) A meeting of the corporators may be called by the clerk of court or by any corporator or proprietor who is a petitioner in the proceeding, and at such meeting a president, vice-president, secretary and treasurer shall be elected from the proprietors or corporators who are petitioners; and also a board of directors shall be elected from the proprietors or corporators who are petitioners in the proceeding.
- (7) The board of directors shall assess the sum or amount which shall be paid by each proprietor or corporator in conformity and compliance with the report of the commissioners on which the corporation was based. When said assessments against said proprietors or corporators and their lands affected are duly certified to the clerk of the superior court of the county in which said proceeding was pending and

instituted, the same shall be passed upon by the clerk of court, and when approved by the clerk, said assessments shall become judgments against the several proprietors or corporators so assessed, and the same shall be liens on the lands of the owners or corporators against whom said assessments were made and judgments entered, subject only to taxes, but said judgments shall be judgments in rem only. The board of directors will also, if they deem it proper, fix and prescribe the time, manner and mode of payment. (1889, c. 380; 1901, c. 670; Rev., s. 4008; C.S., s. 5301; 1939, c. 180, s. 2.)

#### CASE NOTES

**Statutory provisions determine the property liable to drainage assessment.** Hence, to constitute a valid assessment the particular land against which it is levied must come within the meaning of this section. In re Westover Canal, 230 N.C. 91, 52 S.E.2d 225 (1949).

**Assessment to Be Levied Only on Property Benefited.** — The general rule is well settled that a special assessment for the purpose of drainage can be levied only upon property benefited by the improvement. It is said that the legal theory underlying drainage assessments is one of benefit increasing the value of the land and justifying its assessment. In re Westover Canal, 230 N.C. 91, 52 S.E.2d 225 (1949).

**Relief Where Tract Not Benefited by Inclusion in District.** — Where it clearly appears that a canal will neither drain a particular tract of land nor render it more accessible, there is no valid reason for including it in the district, and if it is nevertheless arbitrarily made a part thereof, the owner may obtain relief. In re Westover Canal, 230 N.C. 91, 52 S.E.2d 225 (1949).

**Meaning of "Land Tributary to the Canal".** — As used in this section, the phrases "land tributary thereto" and "land tributary to the canal" mean land from which water drains or flows into the canal. In re Westover Canal, 230 N.C. 91, 52 S.E.2d 225 (1949).

**Burden of Proof on Appeal.** — This section gives to any person dissatisfied with an assessment the right to appeal to a jury at a regular term of the superior court of the county. In such event, it would seem that the authority undertaking to establish the assessment would still have the burden of proving the provisions of the statute essential to the creation of a valid assessment. It may be that the order of the clerk of the superior court approving and confirming the assessment as proposed by the commissioners and the board of directors of the corporation creates a prima facie case. But a prima facie case, or prima facie evidence, does not change the burden of proof. In re Westover Canal, 230 N.C. 91, 52 S.E.2d 225 (1949).

In order to constitute a valid drainage assess-

ment, it is necessary that the land assessed drain or flow into the canal, and therefore on appeal to the superior court on a landowner's exceptions to the order of the clerk confirming assessments as proposed by the commissioners, the drainage district has the burden of proving the number of acres of land owned by the exceptor which drain into the canal, and what amount said land should be assessed per acre. The fact that the exceptor first introduced evidence, presumably on the theory that the order of the clerk made out a prima facie case, does not alter the rule as to the burden of proof. In re Westover Canal, 230 N.C. 91, 52 S.E.2d 225 (1949).

**Finality of Judgment of Clerk of Superior Court.** — A judgment entered by a clerk of the superior court in a special proceeding under this section will stand as a judgment of the court, if not excepted to and reversed or modified on appeal, as allowed by law. In re Atkinson-Clark Canal Co., 234 N.C. 374, 67 S.E.2d 276 (1951).

Where the clerk's decision was erroneous, and the petitioner undertook to appeal therefrom, but the appeal was dismissed in the superior court, and notice of appeal was given to the Supreme Court, but the appeal was not perfected, the judgment of the clerk of the superior court was as final and effective as if no appeal therefrom had been attempted. In re Atkinson-Clark Canal Co., 234 N.C. 374, 67 S.E.2d 276 (1951).

**In an action to compel corporate defendant to purchase property from plaintiffs in accordance with purchase contract,** where defendant alleged that a judgment creating a canal corporation created a lien on the subject property which constituted an encumbrance unsatisfactory to it and rendered plaintiffs' title unmarketable, the trial court erred in directing a verdict in defendant's favor on this ground, since the judgment creating a canal corporation was not entered into evidence at trial; there was no indication in the record on appeal that the trial court took judicial notice of the judgment; a copy of the judgment was not included in the record on appeal; and there was thus no evidence of a canal constituting an

encumbrance on the subject property. *Waters v. North Carolina Phosphate Corp.*, 50 N.C. App. 252, 273 S.E.2d 517; cert. denied, 302 N.C. 402, 279 S.E.2d 357 (1981).

#### ARTICLE 4.

### *Rights and Liabilities in the Corporation.*

#### § 156-44. Shares of stock annexed to land.

The ownership of the shares of stock is indissolubly annexed to the ownership of the pieces of land adjudged to be benefited by the improvement; and such shares, or a part thereof proportionate to the area of such land that may descend or be conveyed for any longer time than three years, shall, upon such descent or conveyance, descend and pass with the land, even although such shares be not mentioned in the deed of conveyance, and although their transfer be forbidden by such deed so that every owner of such land in possession, except a tenant for a term of years, not exceeding three, and every owner in reversion or remainder after a term not exceeding three years, shall, during his ownership, be entitled to all the rights and privileges and be subject to all the obligations and burdens of a corporator. Every attempted sale of shares otherwise than as annexed to the land shall be void. (1868-9, c. 164, s. 8; Code, s. 1317; Rev., s. 4002; C.S., s. 5302.)

#### CASE NOTES

**Stated** in *Sawyer Canal Co. v. Keys*, 232 N.C. 664, 62 S.E.2d 67 (1950).

#### § 156-45. Shareholders to pay assessments.

Every corporator shall be bound to obey the lawful bylaws of the company, and pay all dues lawfully assessed on him: Provided, he shall in no case pay more than his proportion of the expenses as fixed by this Subchapter; and such dues may be collected in the corporate name in any court having jurisdiction; and every assessment duly docketed in the county where the land to be affected lies shall be a lien on the lands of the debtor which are connected with the corporation from the date of such docketing. (1868-9, c. 164, s. 9; Code, s. 1318; Rev., s. 4003; C.S., s. 5303.)

**Cross References.** — As to collection of assessments out of other property of delinquent, see § 156-106.

#### CASE NOTES

**An assessment made upon landowners constitutes a lien** upon the lands therein and is enforceable by proceedings in rem in a court having equitable jurisdiction. Personal judgment against the defendant may not be had, as in actions arising ex contractu. *Middle Canal Co. v. Whitley*, 172 N.C. 100, 90 S.E. 1 (1916); *Long Creek Drainage Dist. v. Huffstetler*, 173 N.C. 523, 92 S.E. 368 (1917).

**Which Is Enforceable by Execution.** — Assessments made in accordance with the statute become liens on the lands when properly

certified by the officers of the corporation and docketed in the office of the superior court of the proper county; and executions may issue directing that such lands be sold to pay the assessments and the costs. *Middle Canal Co. v. Whitley*, 172 N.C. 100, 90 S.E. 1 (1916).

**A justice of the peace (now magistrate) had no jurisdiction over actions to enforce payment of such assessments**, and such actions would be dismissed upon motion to nonsuit when brought in a justice's court. *Middle Canal Co. v. Whitley*, 172 N.C. 100, 90 S.E.

1 (1916); Long Creek Drainage Dist. v. Huffstetler, 173 N.C. 523, 92 S.E. 368 (1917).

**Review of Assessments by Certiorari.** — The courts will review by writ of certiorari the action of the drainage corporation in making illegal assessments and enjoin such assessments as are absolutely void upon their face.

Middle-Canal Co. v. Whitley, 172 N.C. 100, 90 S.E. 1 (1916).

**An assessment that does not appear to be void on its face cannot be attacked collaterally.** Middle Canal Co. v. Whitley, 172 N.C. 100, 90 S.E. 1 (1916).

### § 156-46. Payment of dues entitles to use of canal.

Every corporator paying his dues legally assessed without regard to the number of his shares, shall be entitled to the full and free use of the canal for drainage and navigation, and of the road for passage and transportation. Bylaws may be made to regulate these rights, but not so as to produce an inequality. (1868-9, c. 164, s. 10; Code, s. 1319; Rev., s. 4004; C.S., s. 5304.)

### § 156-47. Rights of infant owners protected.

If any proprietor whose lands are adjudged to be benefited by a canal shall be an infant, no process shall be issued against him during his minority, or within 12 months thereafter, to enforce payments of any assessment, and he may, at any time within such 12 months, apply to have any order, judgment, or decree made against him set aside as to him. If the infant or his guardian shall, during his minority, and the 12 months next thereafter, pay the dues assessed on him, he shall have all the rights and privileges of corporator, to be exercised through his guardian. If the infant shall fail to pay, he shall not have any such rights, but if no action to set aside the judgment of the court creating the corporation shall have been brought by him as aforesaid, or upon the decision of such action against him, he shall be entitled to receive his proper share of stock and to possess all the rights and be bound by all the liabilities of a corporator, including a liability for assessments made during his minority, but not for interest on such, nor for any penalty for their prior nonpayment. (1868-9, c. 164, s. 11; Code, s. 1320; Rev., s. 4005; C.S., s. 5305.)

### § 156-48. Compensation for damage to lands.

If any proprietor of lands shall be damaged by any improvement proposed, the commissioners shall so report, and he shall be entitled to be compensated as may be just by the proprietor whose lands are benefited in proportion to the benefit to them respectively; but in estimating such damages the benefit shall be deducted, and such proprietor shall be entitled to all the rights and privileges of a corporator as respects the use of the improvement, but shall not be entitled to a vote, or be bound for the assessment. (1868-9, c. 164, s. 12; Code, s. 1321; Rev., s. 4006; C.S., s. 5306.)

### § 156-49. Dissolution of corporation.

If, from any cause, the canal or other improvement shall become or shall prove to be valueless, any corporator may apply as is provided in other cases of special proceedings, and the court may dissolve the corporation created in connection with it. (1868-9, c. 164, s. 13; Code, s. 1322; Rev., s. 4007; C.S., s. 5307.)

### § 156-50. Laborer's lien for work on canal.

Whenever work or repair shall be done on such canal and any of the parties owning lands liable to be assessed for such work or repairs shall fail or refuse

to pay the amount assessed upon their land, then and in that event the laborers performing such work shall have a lien upon such land to the extent of the amount assessed against the same by the corporation, and such lien may be enforced in the same manner as provided by the laws of this State for the enforcement of laborers' lien. (1899, c. 600, s. 2; Rev., s. 4009; C.S., s. 5308.)

### § 156-51. Penalty for nonpayment of assessments.

Whenever any person whose lands have been adjudged liable to contribute to the maintenance or repair of such canal shall fail or refuse to pay the amount assessed against his land for such maintenance or repair for 30 days after such payment has been demanded by the company, then the company may give such person notice in writing of its intention to cut off his right of drainage into the canal, and if such person shall still neglect and refuse to pay such assessment for 30 days after such notice, then the company may proceed to so obstruct and dam up the ditches of such delinquent as will effectually prevent his draining in the canal. (1899, c. 600, s. 3; Rev., s. 4010; C.S., s. 5309.)

#### CASE NOTES

**Applicability of Section.** — The provisions of this section providing for a penalty for nonpayment of assessments relate only to the remedy available where incorporators fail and refuse to pay assessments duly levied. *Sawyer Canal Co. v. Keys*, 232 N.C. 664, 62 S.E.2d 67 (1950).

In a proceeding by drainage corporations to have lands of respondents assessed for improvements, upon allegations that respondents were not members of the corporation but that nevertheless their lands drained into the canals and would be materially benefited by the

improvements, it was held that respondents' contention that the sole remedy of petitioners was under the provisions of this section to construct dams to prevent water from draining from respondents' lands into the canals was untenable, since the provisions of this section were inapplicable to such proceeding, being applicable solely as a remedy where incorporators fail and refuse to pay assessments duly levied. *Sawyer Canal Co. v. Keys*, 232 N.C. 664, 62 S.E.2d 67 (1950).

**Cited** in *Sawyer Canal Co. v. Keys*, 234 N.C. 360, 67 S.E.2d 259 (1951).

### § 156-52. Corporation authorized to issue bonds.

The corporations organized under this Subchapter are authorized to issue bonds to such an amount and in such denomination as they may elect, payable at such times as may be provided, and to sell the same at not less than par, the proceeds of the sale of such bonds to be used for the payment of the costs of survey and construction and maintenance of the canal. The bonds shall constitute a lien upon the lands drained or improved by the canal as described in the reports of the commissioners. (1908, c. 75, s. 1; C.S., s. 5310.)

### § 156-53. Payment of bonds enforced.

Upon default of the payment of the interest or principal of such bonds, the holders of the bonds of the corporations organized under this Subchapter shall have a right to enforce the lien created by G.S. 156-52 by civil actions in the superior courts of the State. (1908, c. 75, s. 2; C.S., s. 5311.)

## SUBCHAPTER III. DRAINAGE DISTRICTS.

## ARTICLE 5.

*Establishment of Districts.***§ 156-54. Jurisdiction to establish districts.**

The clerk of the superior court of any county in the State of North Carolina shall have jurisdiction, power and authority to establish levee or drainage districts either wholly or partly located in his county, and which shall constitute a political subdivision of the State, and to locate and establish levees, drains or canals, and cause to be constructed, straightened, widened or deepened, any ditch, drain or watercourse, and to build levees or embankments and erect tidal gates and pumping plants for the purpose of draining and reclaiming wet, swamp or overflowed land; and it is hereby declared that the drainage of swamplands and the drainage of surface water from agricultural lands and the reclamation of tidal marshes shall be considered a public use and benefit and conducive to the public health, convenience and welfare, and that the districts heretofore and hereafter created under the law shall be and constitute political subdivisions of the State, with authority to provide by law to levy taxes and assessments for the construction and maintenance of said public works. (1909, c. 442, s. 1; C.S., s. 5312; 1921, c. 7.)

**Cross References.** — As to construction of this Subchapter, see § 156-135. As to application to the State Soil and Water Conservation Commission for grants for nonfederal costs relating to certain small watershed projects authorized under federal law, see § 139-53 et seq.

**Editor's Note.** — For act relating to Scuppernon Drainage District in Washington County, see Session Laws 1947, c. 934.

**Legal Periodicals.** — For note on disposition of diffused surface waters in North Carolina, see 47 N.C.L. Rev. 205 (1968).

## CASE NOTES

**Constitutionality.** — This and the following sections of this Subchapter are constitutional. *Sanderlin v. Luken*, 152 N.C. 738, 68 S.E. 225 (1910); *In re Big Cold Water Creek Drainage Dist.*, 162 N.C. 127, 78 S.E. 14 (1913); *Shelton v. White*, 163 N.C. 90, 79 S.E. 427 (1913); *Banks v. Lane*, 170 N.C. 14, 86 S.E. 713 (1915), petition for rehearing denied, 171 N.C. 505, 88 S.E. 754 (1916); *Lower Creek Drainage Comm'rs v. Mitchell*, 170 N.C. 324, 87 S.E. 112 (1915); *Beaufort County Lumber Co. v. Drainage Comm'rs*, 174 N.C. 647, 94 S.E. 457 (1917).

**Vested Rights Not Affected by 1921 Act.** — The proceeding in forming a drainage district under the original act was judicial and not administrative, and the 1921 amendment could not affect vested rights of landowners acquired under orders, judgments or decrees made in pursuance of the powers conferred by the original act. *Broadhurst v. Board of Comm'rs*, 195 N.C. 439, 142 S.E. 477 (1928).

Where the rights of landowners in the Mattamuskeet Drainage District were determined in a court having jurisdiction as to assessments in proportion to the benefits con-

ferred, they were not affected by the subsequent amendment of 1921, for such would be to impair the vested rights of those whose property had been assessed by the final judgment. *O'Neal v. Mann*, 193 N.C. 153, 136 S.E. 379 (1927).

**The drainage act, with its various amendments, is a statewide public statute.** *Nesbit v. Kafer*, 222 N.C. 48, 21 S.E.2d 903 (1942).

**Public Purposes of Subchapter Recognized.** — This Subchapter, authorizing the establishment of certain levee or drainage districts, which presents a scheme for the drainage of lowlands in which the public of the locality is generally interested, which is at once comprehensive, adequate and efficient, and in which the rights of all persons to be affected have been fully considered and protected, is not objectionable on the ground that it is for the benefit of private landowners and not for public purposes. *Sanderlin v. Luken*, 152 N.C. 738, 68 S.E. 225 (1910).

**This Subchapter adopts a system for the cooperation of landowners in the drain-**

**age of lands** by forming drainage districts, which are to become quasi-public corporations, for the purpose of improving the health of the district and the fertility of the lands, under which the lands are assessed in proportion to the benefits derived and an organization is effected in each district to execute and maintain a system of drainage. In re Big Cold Water Creek Drainage Dist., 162 N.C. 127, 78 S.E. 14 (1913).

**Basis of Legislative Authority.** — The authority of the legislature to provide for the creation of levee and drainage districts is based upon the police power, the right of eminent domain and the taxing power. Shelton v. White, 163 N.C. 90, 79 S.E. 427 (1913).

The drainage of swamps and of surface water from agricultural lands in a drainage district is of public benefit and conducive to the public health, etc., thus falling within the police power; and proceedings thereunder are in the exercise of the right of eminent domain. Taylor v. Richardson, 176 N.C. 217, 96 S.E. 1027 (1918).

**Clerk's Authority Not a Delegation of Legislative Power.** — The authority and powers conferred by this Subchapter upon the clerk of the court do not constitute a delegation of legislative power and duty to the judicial department of the State prohibited by the Constitution, the powers and duties conferred being of a judicial nature in relation to the prescribed proceedings to be instituted for the establishment of drainage districts. Sanderlin v. Luken, 152 N.C. 738, 68 S.E. 225 (1910).

**Drainage districts created pursuant to this Subchapter are quasi-municipal corporations.** In re Albemarle Drainage Dist., Beaufort County No. 5, 255 N.C. 338, 121 S.E.2d 599 (1961).

**And Can Alter Their Boundaries Only as Permitted by Statute.** — Municipal or quasi-municipal corporations created and having their boundaries fixed by statutory formula can alter their boundaries only as permitted by statute. In re Albemarle Drainage Dist., Beaufort County No. 5, 255 N.C. 338, 121 S.E.2d 599 (1961).

**Drainage District Subject to Open Meetings Requirements.** — As a political subdivision of the state, organized pursuant to the provisions of this section with quasi-judicial and administrative authority, plaintiff drainage district was subject to the open meetings requirements of § 143-318.10. Northampton County Drainage Dist. No. 1 v. Bailey, 92 N.C. App. 68, 373 S.E.2d 560 (1988), modified on other grounds, 326 N.C. 742, 392 S.E.2d 352 (1990).

**Pendency of Proceedings as Notice as to All Lands in District.** — The pendency of a proceeding to lay off a drainage district under the provisions of the act is notice as to all the

lands embraced in the district. Newby & White v. Board of Drainage Comm'rs, 163 N.C. 24, 79 S.E. 266 (1913).

**Map Held Sufficient Notice to Subsequent Purchasers.** — Where, in a proceeding in Beaufort County, a drainage district comprising lands in both Beaufort and Craven Counties was duly created and organized under this and the following sections, and assessment rolls, showing assessments against each tract of land in the district, were made and filed in each county, such assessments, as they became due, constituted liens upon the lands within the district to which they related, and it was error for the court to dismiss an action in the nature of a mortgage foreclosure, for the collection of such drainage assessments against lands in Craven County, even where the assessment rolls for Craven County had been removed and there was left in that county no other record relating to the drainage district except a map on which were shown the boundaries of the several tracts of land within the district in Craven County, as the map itself was sufficient notice to a subsequent purchaser of the proceedings, including the assessment rolls filed in Beaufort County. Nesbit v. Kafer, 222 N.C. 48, 21 S.E.2d 903 (1942).

**Validity of a district laid off according to the drainage acts cannot be collaterally attacked.** Newby & White v. Board of Drainage Comm'rs, 163 N.C. 24, 79 S.E. 266 (1913); Banks v. Lane, 170 N.C. 14, 86 S.E. 713 (1915), petition for rehearing denied, 171 N.C. 505, 88 S.E. 754 (1916).

**Proceedings Upheld.** — Proceedings for the establishment of a drainage district under this Article, and bonds to be issued therefor, would not be held as defective because further steps were not taken for several years after they had been commenced, the court holding that they were still pending, and because of the fact that the engineer and viewers did not file a profile map showing the surface of the ground, bottom grades, etc., at the time of the final report, as required by § 156-69, where this was later done upon order of the board of drainage commissioners, and otherwise the provisions of the statutes had been strictly followed. Oden v. Bell, 185 N.C. 403, 117 S.E. 340 (1923).

**As to right of receiver to intervene and become party to suit in federal court,** see Board of Drainage Comm'rs v. Lafayette Southside Bank, 27 F.2d 286 (4th Cir. 1928).

**As to construction of drainage act for Mattamuskeet Lake,** see Carter v. Board of Drainage Comm'rs, 156 N.C. 183, 72 S.E. 380 (1911).

**Cited in Northampton County Drainage Dist. Number One v. Bailey,** 326 N.C. 742, 392 S.E.2d 352 (1990).

§ 156-55. Venue; special proceedings.

When the lands proposed to be drained and created into a drainage district are located in two or more counties, the clerk of the superior court of either county has the jurisdiction conferred by this Subchapter. Venue is in that county in which the petition is first filed. The law and the rules regulating special proceedings apply in the proceeding, except as modified by this Subchapter. The proceedings may be ex parte or adversary. (1909, c. 42, ss. 2, 38; C.S., s. 5313; 1999-216, s. 19.)

**Effect of Amendments.** — Session Laws 1999-216, s. 19, effective January 1, 2000, and applicable to all orders or judgments subject to

this act that are entered on or after that date, rewrote the section.

CASE NOTES

**Proceedings to form a drainage district under this Subchapter are regarded as proceedings in rem.** Staton v. Staton, 148 N.C. 490, 62 S.E. 596 (1908); Banks v. Lane,

170 N.C. 14, 86 S.E. 713 (1915), petition for rehearing denied, 171 N.C. 505, 88 S.E. 754 (1916); Taylor v. Richardson, 176 N.C. 217, 96 S.E. 1027 (1918).

§ 156-56. Petition filed.

A petition signed by a majority of the resident landowners in a proposed drainage district or by the owners of three fifths of all the land which will be affected or assessed for the expense of the proposed improvements may be filed in the office of the clerk of the superior court of any county in which a part of the lands is located, setting forth that any specific body or district of land in the county and adjoining counties, described in such a way as to convey an intelligent idea as to the location of such land, is subject to overflow or too wet for cultivation, and the public benefit or utility or the public health, convenience or welfare will be promoted by draining, ditching, or leveeing the same or by changing or improving the natural watercourses, and setting forth therein, as far as practicable, the starting point, route, and terminus and lateral branches, if necessary, of the proposed improvement.

The petition will also show whether or not the proposed drainage is for the reclamation of lands not then fit for cultivation or for the improvement of land already under cultivation. It shall also state that, if a reclamation district is proposed to be established, such lands so reclaimed will be of such value as to justify the reclamation. (1909, c. 442, s. 2; C.S., s. 5314; 1921, c. 76; Pub. Loc. 1923, c. 88, s. 2; 1925, c. 85; 1927, c. 98.)

**Local Modification.** — Edgecombe: 1937, c. 278; 1939, c. 7; Halifax: 1939, c. 227; Hertford: 1939, c. 371; Iredell: 1925, c. 144; Nash: 1939, c. 376; Northampton: 1939, c. 227; Pitt: 1925, c.

205; Robeson: 1925, c. 144; Rowan: 1925, c. 144.

**Cross References.** — For distinction between reclamation districts and improvement districts, see § 156-62(5).

CASE NOTES

**This is a flexible proceeding,** and is to be modified and molded by decrees from time to time to promote the objects of the proceeding. Adams v. Joyner, 147 N.C. 77, 60 S.E. 725 (1908); Staton v. Staton, 148 N.C. 490, 62 S.E. 596 (1908); In re Lyon Swamp Drainage Dist., 175 N.C. 270, 95 S.E. 485 (1918).

**Assent of Statutory Number of Owners**

**Sufficient.** — It is not necessary that every owner of land within a drainage district should have assented to its formation when the statutory number thereof have done so. Taylor v. Richardson, 176 N.C. 217, 96 S.E. 1027 (1918).

**Property Must Be Described.** — One of the essentials of the proceeding is that the property sought to be charged shall be identi-

fied by description in the proceedings. *Dover Lumber Co. v. Board of Comm'rs*, 173 N.C. 117, 91 S.E. 714 (1917).

**Applied** in *In re Drainage of Ahoskie Creek*,

257 N.C. 337, 125 S.E.2d 908 (1962).

**Stated** in *In re Albemarle Drainage Dist., Beaufort County No. 5*, 255 N.C. 338, 121 S.E.2d 599 (1961).

## § 156-57. Bond filed and summons issued.

Upon filing with the petition a bond for the amount of fifty dollars (\$50.00) per mile for each mile of the ditch or proposed improvement, signed by two or more sureties or by some lawful and authorized surety company, to be approved by the clerk of superior court, conditioned for the payment of all costs and expenses incurred in the proceeding in case the court does not grant the prayer of the petition, the clerk, shall at any time thereafter, issue summons to be served on all the defendant landowners, who have not joined in the petition and whose lands are included in the proposed drainage district. The summons may be served by publication as to any defendant who cannot be personally served as provided by law.

The attorney for the petitioners shall certify to the clerk of the superior court, prior to the hearing on the final report of the board of viewers, that due diligence has been used to determine the names of all landowners within the area of the proposed drainage district; and, that summons has been issued for such landowners, so determined, and served either by personal service or by publication for all known and unknown landowners, insofar as could be determined by due diligence. (1909, c. 442, s. 2; C.S., s. 5315; 1967, c. 621.)

**Cross References.** — See Local Modification under § 156-56.

### CASE NOTES

**Notice of Summons to Be Given to All Affected Parties.** — The drainage laws of North Carolina have been largely copied from the acts in Indiana and Illinois, and following the construction of these acts for the long period of time the acts have been in force, it is essential that notice of summons in all such proceedings be given to all parties who will be affected thereby. *Dover Lumber Co. v. Board of Comm'rs*, 173 N.C. 117, 91 S.E. 714 (1917).

**Requirement That Summons Be Served on Landowners Mandatory.** — This section is mandatory in requiring a "summons to be served on all the defendant landowners who have not joined in the petition and whose lands are included in the proposed drainage district." *Dover Lumber Co. v. Board of Comm'rs*, 173 N.C. 117, 91 S.E. 714 (1917).

**What Notice Is Sufficient.** — It would interfere with a much-needed public development if, as a prerequisite thereto, and before a final order could be made, all defects of title and mortgages or liens that might be claimed had to be looked up and adjudicated. It is sufficient that summons is served upon the parties in possession under an apparent legal title, and that before final adjudication notice is given in the manner prescribed, in order that parties claiming liens by mortgage or otherwise, or title

to the land adversely to those in possession, should have opportunity to come in and oppose confirmation of the final report. *Banks v. Lane*, 170 N.C. 14, 86 S.E. 713 (1915), petition for rehearing denied, 171 N.C. 505, 88 S.E. 754 (1916). See also, *Drainage Comm'rs v. East Carolina Home & Farm Ass'n*, 165 N.C. 697, 81 S.E. 947 (1914).

**Subsequent Notification.** — The proceedings for forming a drainage district are in rem; and where a valid statute has been complied with therein, and it appears that an owner has not been served with process, it is admissible to notify him, in possession, nunc pro tunc, and to have the lands therein assessed. *Taylor v. Richardson*, 176 N.C. 217, 96 S.E. 1027 (1918).

**Effect of Failure to Serve Summons.** — Where a landowner having an interest, within the meaning of the statute, has not been served, and it does not appear that he was an apparent party, an order laying an assessment on his property is void, the proceedings as they relate to him are a nullity, and the assessment may be restrained. *Dover Lumber Co. v. Board of Comm'rs*, 173 N.C. 117, 91 S.E. 714 (1917), distinguishing *Banks v. Lane*, 170 N.C. 14, 86 S.E. 713 (1915), petition for rehearing denied, 171 N.C. 505, 88 S.E. 754 (1916), holding a mortgagee not a necessary party.

**The statute requires only landowners to be made parties in drainage proceedings.**

Dover Lumber Co. v. Board of Comm'rs, 173 N.C. 117, 91 S.E. 714 (1917).

## § 156-58. Publication in case of unknown owners.

If, at the time of the filing of the petition, or at any time subsequent thereto, it shall be made to appear to the court by affidavit or otherwise that the names of the owners of the whole or any share of any tracts of land are unknown, and cannot after due diligence be ascertained by the petitioners, the court shall order a notice in the nature of a summons to be given to all such persons by a publication of the petition, or of the substance thereof, and describing generally the tracts of land as to which the owners are unknown, with the order of the court thereon, in some newspaper published in the county wherein the land is located, or in some other county if no newspaper shall be published in the first-named county, which newspaper shall be designated in the order of the court, and a copy of such publication shall be also posted in at least three conspicuous places within the boundaries of the proposed district, and at the courthouse door of the county. Such publication in a newspaper and by posting shall be made for a period of four weeks. After the time of publication shall have expired, if no person claiming and asserting title to the tracts of land and entitled to notice shall appear, the court in its discretion may appoint some disinterested person to represent the unknown owners of such lands, and thereupon the court shall assume jurisdiction of the tracts of land and shall adjudicate as to such lands to the same extent as if the true owners were present and represented, and shall proceed against the land itself. If at any time during the pendency of the drainage proceeding the true owners of the lands shall appear in person, they may be made parties defendant of their own motion and without the necessity of personal service, and shall thereafter be considered as parties to the proceeding; but they shall have no right to except to or appeal from any order or judgment theretofore rendered, as to which the time for filing exceptions on notice shall have expired. (1911, c. 67, s. 1; C.S., s. 5316; 1953, c. 675, s. 25.)

### CASE NOTES

**Owners Failing to Oppose Proceeding Are Bound Thereby.** — By virtue of the notice required by this section, the owners of land have the opportunity to intervene and assert any right they might have to oppose the proceeding, if deemed contrary to their interest. Not having done so, they are bound by the judgment under which bonds were issued. *Banks v. Lane*, 170 N.C. 14, 86 S.E. 713 (1915), petition for rehearing denied, 171 N.C. 505, 88 S.E. 754 (1916).

**As Is Mortgagee.** — In proceedings to form a drainage district under this statute, notice by publication is given of the filing of the report in

the office of the clerk of the superior court, which is open to inspection to the landowner or other interested person, and a mortgagee of lands who does not intervene and assert his rights to oppose the proceedings is bound by the final judgment. *Banks v. Lane*, 170 N.C. 14, 86 S.E. 713 (1915), petition for rehearing denied, 171 N.C. 505, 88 S.E. 754 (1916).

**Presumption of Regularity of Judgment.**

— Where publication in accordance with this section has been made, every presumption is in favor of the regularity of the judgment. *Taylor v. Richardson*, 176 N.C. 217, 96 S.E. 1027 (1918).

## § 156-59. Board of viewers appointed by clerk.

The clerk shall, on the filing of petition and bond, appoint a disinterested and competent civil and drainage engineer and two resident freeholders of the county or counties in which the lands are located as a board of viewers to examine the lands described in the petition and make a preliminary report thereon. The drainage engineer shall be appointed upon the recommendation

of the Department of Environment and Natural Resources; and no member of the board of viewers so appointed shall own any land within the boundaries of the proposed district. In the selection of the two members of the board of viewers, other than the engineer, the clerk before making the appointment shall make careful inquiry into the character and qualifications of the proposed members, to the end that the members so appointed shall possess the necessary character, capacity, fitness, and impartiality for the discharge of their important duties. (1909, c. 442, s. 2; 1917, c. 152, s. 1; C.S., s. 5317; 1961, c. 614, s. 4; c. 1198; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1989, c. 727, s. 218(157); 1997-443, s. 11A.123.)

**Cross References.** — See Local Modification under § 156-56.

#### CASE NOTES

**Applied** in *In re Drainage of Ahoskie Creek*, 257 N.C. 337, 125 S.E.2d 908 (1962).

### § 156-60. Attorney for petitioners.

The petitioners shall select some learned attorney or attorneys to represent them, who shall prosecute the drainage proceeding and advise with the petitioners and board of viewers, and shall agree upon the compensation for his professional services up to the time when the district shall be established and the board of drainage commissioners elected, or as nearly so as the same may be approximated. If the petitioners are unable to agree upon the selection of an attorney or attorneys, the selection may be made by the clerk of the court. The foregoing provision shall not interfere with the right of any individual petitioner in the selection of an attorney to represent his individual interests if he shall deem the same desirable or necessary. (1917, c. 152, s. 1; C.S., s. 5318.)

### § 156-61. Estimate of expense and manner of payment; advancement of funds and repayment from assessments.

The clerk may make an estimate of the aggregate sum of money which shall appear to be necessary to pay all the expenses incident to the performance of the duties by the board of viewers, including the compensation of the drainage engineer and his necessary assistants, and also including the sum for the compensation of the attorney for the district, and such court costs as may probably accrue, which estimates shall embrace the period of services up to and including the establishment of the drainage district and the selection and appointment of the board of drainage commissioners. The clerk shall then estimate the number of acres of land owned or represented by the petitioners, as nearly so as may be practicable without actual survey, and shall assess each acre so represented a level rate per acre, to the end that such assessment will realize the sum of money which he has estimated as necessary to pay all necessary costs of the drainage proceeding up to the time of the appointment of the drainage commissioners, as above provided. The assessment above provided for which has been or may hereafter be levied shall constitute a first and paramount lien, second only to State and county taxes, upon the lands so assessed, and shall be collected in the same manner and by the same officers as county taxes are collected. The board of viewers, including the drainage engineer, shall not be required to enter upon the further discharge of their duties until the amount so estimated and assessed shall be paid in cash to the

clerk of the court, which shall be retained by him as a court fund, and for which he shall be liable in his official capacity, and he shall be authorized to disburse the same in the prosecution of the drainage proceeding. Unless all the assessments shall be paid within a time to be fixed by the court, which may be extended from time to time, no further proceedings shall be had, and the proceeding shall be dismissed at the cost of the petitioners. If the entire sum so estimated and assessed shall not be paid to the clerk within the time limited, the amounts so paid shall be refunded to the petitioners pro rata after paying the necessary costs accrued. Nothing herein contained shall prevent one or more of the petitioners from subscribing and paying any sum in addition to their assessment in order to make up any deficiency arising from the delinquency of one or more of the petitioners. When the sum of money so estimated shall be paid, the board of viewers shall proceed with the discharge of their duties, and in all other respects the proceeding shall be prosecuted according to the law. After the district shall have been established and the board of drainage commissioners appointed, it shall be the duty of the board of drainage commissioners to refund to each of the petitioners the amount so paid by them as above provided, out of the first moneys which shall come into the hands of the board from the sale of bonds or otherwise, and the same shall be included in ascertaining the total cost of improvement.

In lieu of the procedures set forth in the preceding paragraph, the board of county commissioners may advance funds, or any part thereof, for the purposes set forth in the preceding paragraph. Such advances shall be made to a county official designated by the commissioners, and shall be disbursed upon such terms as the county commissioners may direct. If the district shall be organized, the funds advanced shall be repaid from assessments thereafter levied. (1917, c. 152, s. 1; C.S., s. 5319; 1941, c. 342; 1961, c. 614, s. 6; c. 662.)

### **§ 156-62. Examination of lands and preliminary report.**

The board of viewers shall proceed to examine the land described in the petition, and other land if necessary to locate properly such improvement or improvements as are petitioned for, along the route described in the petition, or any other route answering the same purpose if found more practicable or feasible, and may make surveys such as may be necessary to determine the boundaries and elevation of the several parts of the district, and shall make and return to the clerk of the superior court within 30 days, unless the time shall be extended by the court, a written report, which shall set forth:

- (1) Whether the proposed drainage is practicable or not.
- (2) Whether it will benefit the public health or any public highway or be conducive to the general welfare of the community.
- (3) Whether the improvement proposed will benefit the lands sought to be benefited.
- (4) Whether or not all the lands that are benefited are included in the proposed drainage district.
- (5) Whether or not the district proposed to be formed is to be a reclamation district or an improvement district. A reclamation district is defined to be a district organized principally for reclaiming lands not already under cultivation. An improvement district is defined to be a district organized principally for the improvement of lands then under cultivation. The board of viewers shall further report, if the district is a reclamation district within the above definition, whether or not the proposed drainage would be justified by the additional value for agricultural purposes given to land so drained.

They shall also file with this report a map of the proposed drainage district, showing the location of the ditch or ditches or other improvement to be

constructed and the lands that will be affected thereby, and such other information as they may have collected that will tend to show the correctness of their findings. (1909, c. 442, s. 3; C.S., s. 5320; 1927, c. 98, s. 2.)

#### CASE NOTES

**Applied** in In re Drainage of Ahoskie Creek, Beaufort County No. 5, 255 N.C. 338, 121 257 N.C. 337, 125 S.E.2d 908 (1962). S.E.2d 599 (1961).

**Stated** in In re Albemarle Drainage Dist.,

### § 156-63. First hearing of preliminary report.

The clerk of the superior court shall consider this report. If the viewers report that the drainage is not practicable or that it will not benefit the public health or any public highway or be conducive to the general welfare of the community, and the court shall approve such findings, the petition shall be dismissed at the cost of the petitioners, and such petition shall likewise be dismissed at the cost of the petitioners if it is sought to set up a reclamation district and the viewers report that the cost of reclaiming the land would be so great as not to justify the expense of draining it. Such petition or proceeding may again be instituted by the same or additional landowners at any time after six months, upon proper allegations that conditions have changed or that material facts were omitted or overlooked. If the viewers report that the drainage is practicable and that it will benefit the public health or any public highway or be conducive to the general welfare of the community, and the court shall so find, then the court shall fix a day when the report will be further heard and considered. (1909, c. 442, s. 4; C.S., s. 5321; 1927, c. 98, s. 3.)

#### CASE NOTES

**As to setting of date for objections by clerk**, see Shelton v. White, 163 N.C. 90, 79 S.E. 427 (1913). **Applied** in In re Drainage of Ahoskie Creek, 257 N.C. 337, 125 S.E.2d 908 (1962).

### § 156-64. Notice of further hearing.

If the petition is entertained by the court, notice shall be given by publication once a week for at least two consecutive weeks in some newspaper of general circulation within the county or counties, if one shall be published in such counties, and also by posting a written or printed notice at the door of the courthouse and at five conspicuous places within the drainage district, that on the date set, naming the day, the court will consider and pass upon the report of the viewers. At least 15 days shall intervene between the date of the publication and the posting of the notices and the date set for the hearing. (1909, c. 442, s. 5; C.S., s. 5322; 1963, c. 767, s. 1.)

#### CASE NOTES

**Applied** in In re Drainage of Ahoskie Creek, Beaufort County No. 5, 255 N.C. 338, 121 257 N.C. 337, 125 S.E.2d 908 (1962). S.E.2d 599 (1961).

**Stated** in In re Albemarle Drainage Dist.,

### § 156-65. Further hearing, and district established.

At the date appointed for the hearing the court shall hear and determine any objections that may be offered to the report of the viewers. If it appear that

there is any land within the proposed levee or drainage district that will not be affected by the leveeing or drainage thereof, such lands shall be excluded and the names of the owners withdrawn from such proceeding; and if it shall be shown that there is any land not within the proposed district that will be affected by the construction of the proposed levee or drain, the boundary of the district shall be so changed as to include such land, and such additional landowners shall be made parties plaintiff or defendant, respectively, and summons shall issue accordingly, as hereinbefore provided. After such change in the boundary is made, the sufficiency of the petition shall be verified, to determine whether or not it conforms to the requirements hereinbefore provided. The efficiency of the drainage or levees may also be determined, and if it appears that the location of any levee or drain can be changed so as to make it more effective, or that other branches or spurs should be constructed, or that any branch or spur projected may be eliminated or other changes made that will tend to increase the benefits of the proposed work, such modification and changes shall be made by the board. The engineer and the other two viewers may attend this meeting and give any information or evidence that may be sought to verify and substantiate their report. If necessary, the petition, as amended, shall be referred by the court to the engineer and two viewers for further report. The above facts having been determined to the satisfaction of the court, and the boundaries of the proposed district so determined, it shall declare the establishment of the drainage or levee district, which shall be designated by a name or number, for the object and purpose as herein set forth.

If any lands shall be excluded from the district because of the court having found that such lands will not be affected or benefited, and the names of the owners of such lands have been withdrawn from such proceeding, but such lands are so situated as necessarily to be located within the outer boundaries of the district, such fact shall not prevent the establishment of the district, and such lands shall not be assessed for any drainage tax; but this shall not prevent the district from acquiring a right-of-way across such lands for constructing a canal or ditch or for any other necessary purpose authorized by law.

The court shall further determine, if it is sought to establish a reclamation district, whether or not the increased value of the particular land should be so great as to justify the cost and expenses of its reclaiming. (1909, c. 442, s. 6; 1911, c. 67, s. 2; C.S., s. 5323; 1927, c. 98, s. 4.)

#### CASE NOTES

**Reason for Conferring Power to Include Lands of Opposing Owners.** — It is because of the benefits which accrue to the public from the establishment of a drainage district under the statute that power conferred thereby upon the court to include lands of owners who are unwilling to sign the petition or who oppose the establishment of the district is sustained. *O'Neal v. Mann*, 193 N.C. 153, 136 S.E. 379 (1927).

**What Issues May Be Raised by Minority Landowner.** — A minority landowner included in a proposed drainage district to be laid out may not contest the formation of the district, but may only raise the issue as to his benefits therefrom. *Shelton v. White*, 163 N.C. 90, 79 S.E. 427 (1913).

**Right of Signer of Original Petition to**

**Object.** — Upon the report of the viewers at the final hearing in proceedings to lay off a drainage district, one who signed the original petition and may have ascertained from the information contained in the report, contrary to his previous opinion, that the cost of the improvements and damages would amount to more than the benefits to his land, may then file his objections, and the same procedure is then open to him as if he had not signed the petition. *Shelton v. White*, 163 N.C. 90, 79 S.E. 427 (1913).

**Boundaries Must Include All Lands Benefited.** — The court has no authority to decree the establishment of a drainage district which does not include within its boundaries all lands benefited by the work to be done. It must enlarge the boundaries to include all such land.

In re Albemarle Drainage Dist., Beaufort County No. 5, 255 N.C. 338, 121 S.E.2d 599 (1961).

**A smaller drainage district may be laid off within the boundaries of a larger one,** theretofore organized, the purposes of each

harmonizing with the purposes of the other. Drainage Comm'rs v. East Carolina Home & Farm Ass'n, 165 N.C. 697, 81 S.E. 947 (1914).

**Applied** in In re Drainage of Ahoskie Creek, 257 N.C. 337, 125 S.E.2d 908 (1962).

## § 156-66. Right of appeal.

Any person owning lands within the drainage or levee district which he thinks will not be benefited by the improvement and should not be included in the district may appeal from the decision of the court to the superior court of such county, in termtime, by filing an appeal, accompanied by a bond conditioned for the payment of the costs if the appeal should be decided against him, for such sum as the court may require, not exceeding two hundred dollars (\$200.00), signed by two or more solvent sureties or in some approved surety company to be approved by the court. (1909, c. 442, s. 8; C.S., s. 5324.)

**Cross References.** — As to appeal from final hearing, see § 156-75.

### CASE NOTES

**Appeal as Notice to Purchaser of Bonds.** — Where the owner of land in a drainage district has duly excepted under this section and again under § 156-75 and has appealed, the purchaser of bonds issued by the district takes with notice of the rights of the complaining party so excepting, and acquires the bonds subject thereto. Drainage Dist. No. 1 v. Parks, 170 N.C. 435, 87 S.E. 229 (1917).

**Proceedings upon Appeal.** — A petition for the establishment of a drainage district by a majority of the resident landowners or by the owners of three fifths of the land therein, approved by the report of the viewers and affirmed by the clerk, permits a majority owner to raise only the issue of fact for the jury to determine as to the benefit to his lands; and should the jury find in favor of the objector, he is not entitled as a matter of right to have his land excluded, but it is for the judge to decide whether this may be done without injury to the district, and if not, he may order that such land be retained upon payment of damages to be awarded by the jury, as in condemnation of lands; all other matters embodied in the report are subject to approval by the clerk, and review

by the judge without the intervention of a jury, being questions of fact. Shelton v. White, 163 N.C. 90, 79 S.E. 427 (1913).

**Challenge upon Issuance of Additional Bonds Not Permitted After Failure to Appeal.** — Appeals are separately provided for under this section when the drainage district has been laid off, and under § 156-75 when the final act is passed upon; and where the complaining owner of land in the district has not entered an exception under either of these two sections, as the statute provides, and bonds have been duly issued on the lands of the district for drainage purposes, and thereafter application has been made by the commissioners for the issuance of additional bonds, in the further proceedings he may not be permitted to go back and challenge the formation of the district and the classification and assessments already made by attacking the reports of the engineers and viewers, and withdraw a large part of his lands from the district theretofore formed. Drainage Dist. No. 1 v. Parks, 170 N.C. 435, 87 S.E. 229 (1917).

**Cited** in In re Drainage of Ahoskie Creek, 257 N.C. 337, 125 S.E.2d 908 (1962).

## § 156-67. Condemnation of land.

If it shall be necessary to acquire a right-of-way or an outlet over and through lands not affected by the drainage, and the same cannot be acquired by purchase, then and in such event the power of eminent domain is hereby conferred, and the same may be condemned. The owners of the land proposed to be condemned may be made parties defendant in the manner of an ancillary proceeding, and the procedure shall be, to the extent practicable, supplemented by the provisions of Chapter 40A Eminent Domain and such damages as may be awarded as compensation shall be paid by the board of drainage

commissioners out of the first funds which shall be available from the proceeds of sale of bonds or otherwise. (1909, c. 442, s. 7; C.S., s. 5325; 1981, c. 919, s. 24.)

### **§ 156-68. Complete survey ordered.**

After the district is established the court shall refer the report of the engineer and viewers back to them to make a complete survey, plans, and specifications for the drains or levees or other improvements, and fix a time when the engineer and viewers shall complete and file their report, not exceeding 60 days. (1909, c. 442, s. 9; C.S., s. 5326.)

### **§ 156-69. Nature of the survey; conservation and replacement of fish and wildlife habitat; structures to control and store water.**

The engineer and viewers shall have power to employ such assistants as may be necessary to make a complete survey of the drainage district, and shall enter upon the ground and make a survey of the main drain or drains and all its laterals. The line of each ditch, drain, or levee shall be plainly and substantially marked on the ground. The course and distance of each ditch shall be carefully noted and sufficient notes made, so that it may be accurately plotted and mapped. A line of levels shall be run for the entire work and sufficient data secured from which accurate profiles and plans may be made. Frequent bench marks shall be established among the line, on permanent objects, and their elevation recorded in the field books. If it is deemed expedient by the engineer and viewers, other levels may be run to determine the fall from one part of the district to another. If an old watercourse ditch, or channel is being widened, deepened, or straightened, it shall be accurately cross-sectioned so as to compute the number of cubic yards saved by the use of such old channel. A drainage map of the district shall then be completed, showing the location of the ditch or ditches and other improvements and the boundary, as closely as may be determined by the records, of the lands owned by each individual landowner within the district. The location of any railroads or public highways and the boundary of any incorporated towns or villages within the district shall be shown on the map. There shall also be prepared to accompany this map a profile of each levee, drain, or watercourse, showing the surface of the ground, the bottom or grade of the proposed improvement, and the number of cubic yards of excavation or fill in each mile or fraction thereof, and the total yards in the proposed improvement and the estimated cost thereof, and plans and specifications, and the cost of any other work required to be done.

The board of viewers shall consider the effect of the proposed improvements upon the habitat of fish and wildlife, and the laws and regulations of the Commission for Health Services. Their report shall include their recommendations and the estimated cost thereof, as to the conservation and replacement of fish and wildlife habitat, if they shall determine such shall be damaged or displaced by the proposed improvement. The board, to determine their recommendations, may consult governmental agencies, wildlife associations, individuals, or such other sources as they may deem desirable, to assist them in their considerations of and recommendations relating to, the conservation and replacement of fish and wildlife habitat.

The board of viewers shall consider the need for and feasibility of, the construction of structures which will do one or more of the following:

- (1) Control the flow of water,
- (2) Impound or store water and,

- (3) Provide areas for conservation and replacement of fish and wildlife habitat.

If structures are recommended for any one or more of said purposes, their report shall include:

- (1) Specifications therefor.
- (2) Location thereof together with the description of the area of land needed for the purpose of said structure, i.e., water storage or impoundment, or fish and wildlife habitat.
- (3) Estimate of cost thereof.

The report of the board of viewers shall set forth, in regard to the foregoing, the following information:

- (1) The areas of land needed for construction and maintenance of:
  - a. The canals and drainage system.
  - b. Structures to:
    1. To control the water,
    2. Impound or store water and,
    3. To conserve and replace fish and wildlife habitat.

- (2) Upon whose land such areas are located.

- (3) The area of land necessary to be acquired from each landowner.

The map accompanying the report shall have shown thereon, the location of the areas of land needed for the construction and maintenance of the following:

- (1) The canal and drainage system.
- (2) Structures to:
  - a. Control the flow of water,
  - b. Impound or store the water,
  - c. Conserve and replace fish and wildlife habitat.

The board of viewers may, in its discretion, agree with the Soil Conservation Service of the Department of Agriculture or any agency of the government of the United States or of the State of North Carolina whereby such agency will furnish all or a part of the service necessary to obtain the information set forth in the preceding paragraph and in G.S. 156-68.

The board of viewers may accept such information as furnished by such agencies and include such information in their final report to the clerk.

The board of viewers and engineers of the district may use control or semicontrol, mosaic aerial photographs or other sources and stereoscopic or other methods, generally used and deemed acceptable by civil and drainage engineers for the purpose of obtaining the information required in this section and in lieu of a detailed ground survey. In the event a detailed ground survey is not made, only those ground markings need be made as the board of viewers deem necessary. The location of the proposed canals must be shown on the ground prior to actual construction. (1909, c. 442, s. 10; C.S., s. 5327; 1959, c. 597, s. 1; 1961, c. 614, ss. 5, 9; 1965, c. 1143, s. 1; 1973, c. 476, s. 128.)

#### CASE NOTES

**Applied in** *In re Drainage of Ahoskie Creek*,  
257 N.C. 337, 125 S.E.2d 908 (1962).

### § 156-70. Assessment of damages.

It shall be the further duty of the engineer and viewers to assess the damages claimed by anyone that are justly right and due to him for land taken or for inconvenience imposed because of the construction of the improvement, or for any other legal damages sustained. Such damages shall be considered separate and apart from any benefit the land would receive because of the proposed work, and shall be paid by the board of drainage commissioners when

funds shall come into their hands. (1909, c. 442, s. 11; 1915, c. 238; 1917, c. 152, s. 16; C.S., s. 5328.)

#### CASE NOTES

**Pendency of a proceeding to lay off a drainage district under the statute is notice** as to all the lands embraced in the district, and the grantees thereof are bound by statutory requirements as to the procedure to recover damages to the lands, as were their grantors who were parties to the proceedings and who owned the lands at the time thereof. *Newby & White v. Board of Drainage Comm'rs*, 163 N.C. 24, 79 S.E. 266 (1913).

**Inclusion of Damages to Timber.** — While under the drainage acts no assessments for benefits can be made against the owner of timber interests, only the land itself being liable, the owner of the land and of timber within the district, by the provision of the statute, when made a party to the proceedings and duly notified, is required to present his claim for the entire injury, inclusive of that to his timber, and the damages to the timber should thus be included and allowed in the final judgment in the proceedings. *Beaufort County Lumber Co. v. Drainage Comm'rs*, 174 N.C. 647, 94 S.E. 457 (1917).

**When Independent Action for Damages May Be Maintained.** — The principles that conclude parties to proceedings in the formation of drainage districts under the statute by final judgment from a recovery of damages to their lands applies to such as may have accrued in the laying out and establishment of the district under the procedure prescribed, and

does not prevent an injured proprietor, within or without the district, from maintaining an independent action to recover damages caused by an unauthorized and substantial departure from the scheme and plan established by the decrees and orders in the cause, nor where the damage complained of is attributable to the negligence of the company or its officers or agents in carrying out the proposed work. *Spencer v. Wills*, 179 N.C. 175, 102 S.E. 275 (1920).

**Permanent Damages Held Recoverable.** — Where the whole of plaintiff's land was originally included in a drainage district to be established under the statutory provisions, but the final judgment so restricted and modified the survey, plat and boundaries as to exclude all except a comparatively small portion of the land, but the preliminary survey showed that a canal would go through the land included as well as through the land, or a large part thereof, excluded by the final judgment, and there was no evidence that ancillary proceedings for this outside land by condemnation had been resorted to, the plaintiff, in his independent action, could elect to recover the permanent damages caused to his land. *Sawyer v. Camden Run Drainage Dist.*, 179 N.C. 182, 102 S.E. 273 (1920).

**Applied in** *In re Drainage of Ahoskie Creek*, 257 N.C. 337, 125 S.E.2d 908 (1962).

### § 156-70.1. When title deemed acquired for purpose of easements or rights-of-way; notice to landowner; claim for compensation; appeal.

The district shall be deemed to have acquired title for the purpose of easements or rights-of-way to those areas of land identified in the final report of the board of viewers and as shown on the map accompanying said report, at the time said final report is confirmed by the clerk of the superior court.

The board of viewers shall cause notice as to the area or areas of land involved, to be given to each landowner so affected, which notice shall be in writing and mailed to the last known address of the landowner at least seven days prior to the hearing on the final report as provided by G.S. 156-73.

If the landowner desires compensation for the land areas so acquired by the district, claim for the value of the same shall be submitted to the board of viewers on or before the time of the adjudication upon the final report as provided for by G.S. 156-74.

If the board of viewers shall approve the claim, the amount so approved shall be added to the total cost of the district as estimated in said final report and this shall be done by amendment to the final report submitted to the clerk of the superior court on or before the adjudication provided for in G.S. 156-74.

If the board of viewers shall not approve said claim, the clerk of the superior court shall consider the claim and determine what in his opinion is a fair value and the amount so determined shall be shown in the said final report as amended and confirmed by said adjudication. The landowner or the drainage district may appeal from the decision of the clerk of the superior court, to the superior court, upon the question of the value of the land taken and such value shall be determined by a jury. The procedure for the appeal shall be in accordance with the provision of G.S. 156-75. (1959, c. 597, s. 2; c. 1085; 1965, c. 1143, s. 2.)

#### CASE NOTES

**Applied** in *Taylor v. Askew*, 17 N.C. App. 620, 195 S.E.2d 316 (1973).

### § 156-71. Classification of lands and benefits.

It shall be the further duty of the engineer and viewers to personally examine the land in the district and classify it with reference to the benefit it will receive from the construction of the levee, ditch, drain, or watercourse or other improvement. In the case of drainage, the degree of wetness on the land, its proximity to the ditch or a natural outlet, and the fertility of the soil shall be considered in determining the amount of benefit it will receive by the construction of the ditch. The land benefited shall be separated in five classes. The land receiving the highest benefit shall be marked "Class A"; that receiving the next highest benefit, "Class B"; that receiving the next highest benefit, "Class C"; that receiving the next highest benefit, "Class D," and that receiving the smallest benefit, "Class E." The holdings of any one landowner need not be all in one class, but the number of acres in each class shall be ascertained, though its boundary need not be marked on the ground or shown on the map. The total number of acres owned by one person in each class and the total number of acres benefited shall be determined. The total number of acres of each class in the entire district shall be obtained and presented in tabulated form. The scale of assessment upon the several classes of land returned by the engineer and viewers shall be in the ratio of five, four, three, two, and one; that is to say, as often as five mills per acre is assessed against the land in "Class A," four mills per acre shall be assessed against the land in "Class B," three mills per acre in "Class C," two mills per acre in "Class D," and one mill per acre in "Class E." This shall form the basis of the assessment of benefits to the lands for drainage purposes. In any district lands may be included which are not benefited for the agriculture or crop production, or slightly so, but which will receive benefit by improvement in health conditions, and as to such lands the engineer and viewers may assess each tract of land without regard to the ratio and at such a sum per acre as will fairly represent the benefit of such lands. Villages or towns or parts thereof and small parcels of land located outside thereof and used primarily for residence or other specific purposes, and which require drainage, may also be included in any drainage district which by reason of their improved conditions and the limited area in each parcel under individual ownership, it is impracticable to fairly assess the benefits to each separated parcel of land by the ratio herein provided, and as to such parcels of land the engineer and viewers may assess each parcel of land without regard to the ratio and at a higher rate per acre respectively by reason of the greater benefits. If the streets or other property owned by any incorporated town or village are likewise benefited by such drainage works, the corporation may be assessed in proportion to such benefits, which assessment shall constitute a liability against the corporation and may be enforced as provided by law.

The board of viewers may determine that some areas of the district will receive more benefits than other areas and if such is determined, the varying benefits shall be reflected in the manner of classification of benefits to each area and the tracts of land therein. (1909, c. 442, s. 12; C.S., s. 5329; 1923, c. 217, s. 1; 1961, c. 614, s. 7.)

**Cross References.** — As to application of this section, see § 156-104.

#### CASE NOTES

**Discretion of Commissioners as to Classification Under Local Act.** — The legislature, in authorizing the establishment of a drainage district, may very largely commit to the commissioners the exercise of their judgment as to what should be done in carrying out the general provisions specified by the statute; and the special act of the legislature creating the Gaston County Drainage Commission, c. 427, Public-Local Laws of 1911, thus construed, does not relieve a landowner therein from pay-

ing his authorized assessments for benefits solely because the commission failed to strictly and literally divide the lands into the number of classes therein set out. *Mitchem v. Gaston County Drainage Comm'n*, 182 N.C. 511, 109 S.E. 551 (1921).

**Applied in** *In re Drainage of Ahoskie Creek*, 257 N.C. 337, 125 S.E.2d 908 (1962).

**Stated in** *In re Albemarle Drainage Dist.*, Beaufort County No. 5, 255 N.C. 338, 121 S.E.2d 599 (1961).

#### § 156-72. Extension of time for report.

In case the work is delayed by high water, sickness, or any other good cause, and the report is not completed at the time fixed by the court, the engineer and viewers shall appear before the court and state in writing the cause of such failure and ask for sufficient time in which to complete the work, and the court shall set another date by which the report shall be completed and filed. (1909, c. 442, s. 14; C.S., s. 5330.)

#### § 156-73. Final report filed; notice of hearing.

When the final report is completed and filed it shall be examined by the court, and if it is found to be in due form and in accordance with the law it shall be accepted, and if not in due form it may be referred back to the engineer and viewers, with instructions to secure further information, to be reported at a subsequent date to be fixed by the court. When the report is fully completed and accepted by the court a date not less than 20 days thereafter shall be fixed by the court for the final hearing upon the report, and notice thereof shall be given by publication in a newspaper of general circulation in the county and by posting a written or printed notice on the door of the courthouse and at five conspicuous places throughout the district, such publication to be made once a week for at least three consecutive weeks before the final hearing. During this time a copy of the report shall be on file in the office of the clerk of the superior court, and shall be open to the inspection of any landowner or other persons interested within the district. (1909, c. 442, s. 15; C.S., s. 5331; 1959, c. 807, ss. 1, 2; 1963, c. 767, s. 2.)

#### CASE NOTES

**Newspaper Publication Held Unnecessary.** — It was not fatal to the validity of bonds issued by a drainage district that the notice of the time of hearing objections to the final report was not published in some newspaper of gen-

eral circulation in the county, when it appeared that no newspaper was published therein or elsewhere which had a general circulation in the county, and that the landowners affected had actual and ample notice of such time and

raised no objection. Board of Drainage Comm'rs  
v. Brett Eng'r Co., 165 N.C. 37, 80 S.E. 897  
(1914).

### § 156-74. Adjudication upon final report.

At the date set for hearing any landowner may appear in person or by counsel and file his objection in writing to the report of the viewers; and it shall be the duty of the court to carefully review the report of the viewers and the objections filed thereto, and make such changes as are necessary to render substantial and equal justice to all the landowners in the district. If, in the opinion of the court, the cost of construction, together with the amount of damages assessed, is not greater than the benefits that will accrue to the land affected, the court shall confirm the report of the viewers. If, however, the court finds that the cost of construction, together with the damages assessed, is greater than the resulting benefit that will accrue to the lands affected, the court shall dismiss the proceedings at the cost of the petitioners, and the sureties upon the bond so filed by them shall be liable for such costs. Provided, that the Department of Environment and Natural Resources may remit and release to the petitioners the costs expended by the board on account of the engineer and his assistants. The court may from time to time collect from the petitioners such amounts as may be necessary to pay costs accruing, other than costs of the engineer and his assistants, such amounts to be repaid from the special tax hereby authorized.

The court shall, at the time of consideration of said report, determine whether:

- (1) The petitioners constitute a majority of the resident landowners, whose lands are adjudged to be benefited by the proposed construction work as shown in the final report of the board of viewers and finally approved by the court; or
- (2) The petitioners own three fifths of the land area which is adjudged to be benefited by the proposed construction work as shown in the final report of the board of viewers and finally approved by the court.

If the petitioners do not constitute either a majority of the resident landowners or own three fifths of the land as set out in subdivisions (1) or (2) above, then the proceedings shall be dismissed. (1909, c. 442, s. 16; 1915, c. 238, s. 2; 1917, c. 152, s. 16; C.S., s. 5332; 1925, c. 122, s. 4; 1959, c. 1312, s. 1; 1961, c. 1198; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1989, c. 727, s. 218(158); 1997-443, s. 11A.123.)

#### CASE NOTES

**Final Decree as Adjudication That Benefits Exceed Burdens.** — A final decree in proceedings to lay off a statutory drainage district is an adjudication that the benefits to the land within the district are more than the burdens assessed against it for such purpose. *Banks v. Lane*, 170 N.C. 14, 86 S.E. 713 (1915), petition for rehearing denied, 171 N.C. 505, 88 S.E. 754 (1916).

**Failure to Object as Waiver.** — The question as to whether an owner of land within a drainage district has realized the benefits anticipated is eliminated when the district is established upon the report; and where such owner remains silent or makes no objection or

exception at the proper time as to the proceedings of the board, his silence is a waiver of any right he may have had therein, and an independent remedy by injunction is not open to him. *Mitchem v. Gaston County Drainage Comm'n*, 182 N.C. 511, 109 S.E. 551 (1921).

Where a drainage district has been duly laid off in conformity with the statute, and a landowner therein has not excepted to either the preliminary or final report, he may not, after appointment of the commissioners, be heard to complain that the benefits he is to receive are not as great as those he had contemplated. *Griffin v. Board of Comm'rs*, 169 N.C. 642, 86 S.E. 575 (1915).

## § 156-75. Appeal from final hearing.

Any landowner, party petitioner, or the drainage district may, within 10 days after the entry of an order or judgment by the clerk upon the report of the board of viewers, appeal to the superior court in session time or in chambers. The procedures for taking appeal are as provided in Article 27A of Chapter 1 of the General Statutes, except as provided otherwise by this Subchapter. In an appeal to the superior court taken under this section or any other section or provision of the drainage laws of the State, general or local, the appeal has precedence in consideration and trial by the court. If other issues also have precedence in the superior court under existing law, the court, in its discretion, determines the order in which they are heard. (1909, c. 442, s. 17; 1911, c. 67, s. 3; C.S., s. 5333; 1923, c. 217, s. 2; 1969, c. 192, s. 1; 1973, c. 108, s. 96; 1999-216, s. 20.)

**Cross References.** — As to right of appeal, see § 156-66. As to application of this section, see § 156-104.

**Effect of Amendments.** — Session Laws

1999-216, s. 20, effective January 1, 2000, and applicable to all orders or judgments subject to this act that are entered on or after that date, rewrote the section.

### CASE NOTES

**Construction of Section.** — This section, providing for an appeal upon exception to the final report by an owner of lands in a drainage district laid off under the provisions of the statute, necessarily refers to the formation of the district and the assessments of the lands embraced in it. *Wayne County Drainage Dist. No. 1 v. Parks*, 170 N.C. 435, 87 S.E. 229 (1917).

**Appeal Only upon Exceptions Filed Below.** — An appeal from the final order of the clerk in establishing a drainage district under this section is heard only upon the exceptions thereto filed as to issues of law or fact. *In re Big Cold Water Drainage Dist.*, 162 N.C. 127, 78 S.E. 14 (1913); *Shelton v. White*, 163 N.C. 90, 79 S.E. 427 (1913).

**It is sufficient that the clerk has found as a fact that the allegations set out in the petition are true**, if these allegations are

sufficient, and distinctly and clearly made. *In re Big Cold Water Drainage Dist.*, 162 N.C. 127, 78 S.E. 14 (1913).

**Where, by consent of the parties to an action, the court has ordered a referee for hearing and determining "all matters in controversy,"** and the controversy has arisen upon exceptions taken by a landowner to the final report on the plan and assessments made in forming a drainage district, by this section, the complaining party may not successfully except to the authority of the referee in passing upon questions therein arising which have been referred to him. *Wayne County Drainage Dist. No. 1 v. Parks*, 170 N.C. 435, 87 S.E. 229 (1917).

**Cited in** *In re Drainage of Ahoskie Creek*, 257 N.C. 337, 125 S.E.2d 908 (1962); *In re Drainage of Ahoskie Creek*, 261 N.C. 407, 134 S.E.2d 642 (1964).

## § 156-76. Compensation of board of viewers.

The compensation of the engineer, including his necessary assistants, rodmen, and laborers, and also the compensation of the viewers, shall be fixed by the clerk. In fixing such compensation, particularly of the drainage engineer, the clerk shall confer fully with the Department of Environment and Natural Resources and with the petitioners. The compensation to be paid the two members of the board of viewers, other than the engineer, shall be in such amount per day as may be fixed by the clerk of the superior court for the time actually employed in the discharge of their duties, and in addition any actual and necessary expenses of travel and subsistence while in the actual discharge of their duties, an itemized report of which shall be submitted and verified. (1909, c. 442, s. 36; 1917, c. 152, ss. 1, 2; C.S., s. 5334; 1925, c. 122, s. 4; 1959, c. 288; 1961, c. 1198; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1989, c. 727, s. 218(159); 1997-443, s. 11A.123.)

## § 156-77. Account of expenses filed.

The engineer and viewers shall keep an accurate account and report to the court the name and number of days each person was employed on the survey and the kind of work he was doing, and any expenses that may have been incurred in going to and from the work, and the cost of any supplies or material that may have been used in making the survey. (1909, c. 442, s. 13; C.S., s. 5335.)

## § 156-78. Drainage record.

The clerk of the superior court shall provide a suitable book, to be known as the "Drainage Record," in which he shall transcribe every petition, motion, order, report, judgment, or finding of the board in every drainage transaction that may come before it, in such a manner as to make a complete and continuous record of the case. Copies of all the maps and profiles are to be furnished by the engineer and marked by the clerk "official copies," which shall be kept on file by him in his office, and one other copy shall be pasted or otherwise attached to his record book. (1909, c. 442, s. 18; C.S., s. 5336.)

### CASE NOTES

**Waiver by Failure to Object to Proceedings Noted in Record Book.** — Upon the filing of the final report by the viewers, etc., in a proceeding to establish a drainage district under the provisions of the statute, a record is required by the statute to be kept in a book for the purpose, giving all those interested in the

proceedings notice of all that has been done materially affecting them; and when they have timely failed to make objection, they have lost their right to object by the delay. *Griffin v. Board of Comm'rs*, 169 N.C. 642, 86 S.E. 575 (1915).

## § 156-78.1. Municipalities.

(a) Any municipality may participate in drainage district works or projects upon mutually agreeable terms relating to such matters as the construction, financing, maintenance and operation thereof.

(b) Any municipality may contribute funds toward the construction, maintenance and operation of drainage district works or projects, to the extent that such works or projects:

- (1) Provide a source of municipal water supply for the municipality, or protect an existing source of such supply, enhance its quality or increase its dependable capacity or quantity, or implement or facilitate the disposal of sewage of the municipality; or
- (2) Protect against or alleviate the effects of floodwater or sediment damages affecting, or provide drainage benefits for property owned by the municipality or its inhabitants.

(c) Municipal expenditures for the aforesaid purposes are declared to be for necessary expenses. Municipalities may enter continuing contracts, some portion or all of which may be performed in an ensuing year, agreeing to make periodic payments in ensuing fiscal years to drainage districts in consideration of benefits set forth in subsection (b) (2) of this section, but no such contract may be entered into unless sufficient funds have been appropriated to meet any amount to be paid under the contract in the fiscal year in which the contract is made. The municipal governing body shall, in the budget ordinance of each ensuing fiscal year during which any such contract is in effect, appropriate sufficient funds to meet the amount to be paid under the contract in such ensuing fiscal year. The statement required by G.S. 160-411.1 to be printed, written or typewritten on all contracts, agreements, or requisitions

requiring the payment of moneys shall be placèd on such a continuing contract only if sufficient funds have been appropriated to meet the amount to be paid under the contract in the fiscal year in which the contract is made.

(d) The provisions of this section are permissive. If a municipality does not participate in accordance with the provisions of this section, then the other provisions of Subchapter III shall apply and be followed. (1961, c. 614, s. 10.)

**Cross References.** — As to property taxes to provide for drainage projects or programs, see § 160A-209.

**Editor's Note.** — Section 160-411.1, referred to in this section, was repealed by Session Laws 1971, c. 780, s. 13. See now § 159-28.

## ARTICLE 6.

### *Drainage Commissioners.*

#### § 156-79. Appointment and organization under original act.

After the drainage district has been declared established, as aforesaid, and the survey and plan therefor approved, the court shall appoint three persons, in the manner set forth in G.S. 156-81, who shall be designated as the board of drainage commissioners. Any vacancy thereafter occurring shall be filled by the clerk or clerks of the superior court in the manner set forth in G.S. 156-81. Such three drainage commissioners, when so appointed, shall be immediately created a body corporate under the name and style of "The Board of Drainage Commissioners of \_\_\_\_\_ District," with the right to hold property and convey the same, to sue and be sued, and shall possess such other powers as usually pertain to corporations. They shall organize by electing from among their number a chairman and a vice-chairman. They shall also elect a secretary, either within or without their body. Such board of drainage commissioners shall adopt a seal, which they may alter at pleasure. The board of drainage commissioners shall have and possess such powers as are herein granted. (1909, c. 442, s. 19; 1917, c. 152, s. 17; C.S., s. 5337; 1947, c. 273; 1963, c. 767, s. 3; 1989 (Reg. Sess., 1990), c. 959, s. 2.)

**Local Modification.** — Columbus, Chadburn Drainage District: 1939, c. 70; 1953, c. 1020; Hyde, Mattamuskeet Lake District: 1909, c. 509; Pub. Loc. 1927, c. 407; Iredell,

Davidson Creek Drainage District: 1933, c. 466; Pitt County Drainage District: 1979, c. 817. See also the note headed "Local Modification" under § 156-56.

#### CASE NOTES

**Individual Acts of Officials Not Binding on District.** — A drainage district is a corporation, and as any other corporation, public or private, it cannot be bound by the acts of its officials or agents acting separately or individually. *Davenport v. Pitt County Drainage Dist.* No. 2, 220 N.C. 237, 17 S.E.2d 1 (1941).

**A drainage district is not authorized to enter into a contract that would give special or particular rights or claims to one landowner** in the drainage district that are

not enjoyed by all landowners similarly situated. *Davenport v. Pitt County Drainage Dist.* No. 2, 220 N.C. 237, 17 S.E.2d 1 (1941).

**As to appointment of commissioners for a particular drainage district established under special act,** see *State ex rel. Mann v. Gibbs*, 156 N.C. 44, 72 S.E. 82 (1911).

**Cited in** *Northampton County Drainage Dist. Number One v. Bailey*, 326 N.C. 742, 392 S.E.2d 352 (1990).

### § 156-80. Name of districts.

The name of such drainage district shall constitute a part of its corporate name; for illustration, the board of drainage commissioners of Mecklenburg Drainage District, No. 1. In the naming of a drainage district the clerk of the court, notwithstanding the name given in the petition, shall so change the name as to make it conform to the county within which the district, or the main portion of the district, is located, and such district shall also be designated by number, the number to indicate the number of districts petitioned for in the county. For illustration, the first district organized in Mecklenburg County would be Mecklenburg County Drainage District, No. 1; the name of the second would be Mecklenburg County Drainage District, No. 2; the fifth one organized would be Mecklenburg County Drainage District, No. 5: Provided, that so much of this section as provides for numbering the districts in each county shall not apply to districts in which bonds have been issued and sold prior to the fifth day of March, 1917. (1909, c. 442, s. 19; 1917, c. 152, s. 17; C.S., s. 5338.)

### § 156-81. Appointment and organization under amended act.

#### (a) Method of Appointment. —

The manner of appointment shall be as follows:

- (1) If the drainage district shall lie solely within one county, the clerk of superior court for such county shall appoint such commissioners.
- (2) If the said district shall lie in more than one county, then such commissioners shall be appointed by unanimous action of the clerks of court for the counties wherein any part of such district lies.

(b) Organization. — Immediately after the appointment of the board of drainage commissioners, the clerk of the court of the county wherein such drainage proceeding is pending shall notify each of the commissioners in writing to appear at a certain time and place within the district and organize. The clerk or clerks of court, as the case may be, shall appoint one of the three members as chairman of the board of drainage commissioners, and in doing so he or they shall consider carefully and impartially the respective qualifications of each of the members for the position.

(c) Term of Office. — The term of service of the members of the board of drainage commissioners so appointed shall begin upon their appointment. Where all three commissioners are appointed at once, one commissioner shall serve for one year, one for two years, and the other for three years, the term to be computed from the first day of October following their organization. The members so serving for one, two, and three years, respectively, shall be unanimously designated by the clerk or clerks of the court. Thereafter each member shall be appointed for three years. The clerk of the court for the county wherein the proceeding is pending shall record in the drainage record the date of appointment, the members appointed, and the beginning and expiration of their term of office.

(d) Vacancies Filled. — If a vacancy shall occur in the office of any commissioner by death, resignation, or otherwise, the remaining two members are to discharge the necessary duties of the board until the vacancy shall be filled; and if the vacancy shall be in the office of chairman or secretary, the two remaining members may elect a secretary, and the clerk or clerks, as the case may be, shall appoint one of the two remaining members to act as chairman to hold until the vacancy in the board shall be filled. The clerk of the county wherein the proceeding is pending shall keep a similar record of any appointment to fill vacancies. The person appointed to fill the vacancy shall be

appointed in the manner set forth in subsection (a) of this section and shall serve until the expiration of the term of his predecessor. The secretary of the board of drainage commissioners shall promptly notify the appropriate clerk or clerks of the superior court of any vacancy in the board.

(e) Failure to Appoint. — If for any reason the clerk or clerks of the court shall fail to provide for the appointment of drainage commissioners prior to the expiration of a term, the incumbents shall continue to hold their office as commissioners until their successors are appointed and qualified. The term of office of boards of drainage commissioners heretofore elected and appointed shall expire immediately upon the appointment of new commissioners pursuant to subsection (a) of this section.

(f) Meetings. — The board shall meet once each month at a stated time and place during the progress of drainage construction, and more often if necessary. After the drainage work is completed, or at any time, the chairman shall have the power to call special meetings of the board at a certain time and place. The chairman shall also call a meeting at any time upon the written request of the owners of a majority in area of the land in the district.

(g) Compensation. — The chairman of the board of drainage commissioners shall receive compensation and allowances as fixed by the clerk of the superior court. In fixing such compensation and allowances, the clerk shall give due consideration to the duties and responsibilities imposed upon the chairman of the board. The other members of the board shall receive a per diem not to exceed twenty-five dollars (\$25.00) a day, while engaged in attendance upon meetings of the board, or in the discharge of duties imposed by the board. The secretary of the board shall receive such compensation and expense allowances as may be determined by the board.

The chairman and members of the board of drainage commissioners shall also receive their actual travel and subsistence expenses while engaged in attendance upon meetings of the board, or in the discharge of duties imposed by the board. The compensation and expense allowances as herein set out shall be paid from the assessments made annually for the purpose of maintaining the canals of the drainage district, or from any other funds of the district.

(h) Application of Section. — The provisions of this section shall apply to all drainage districts now or hereafter existing in this State, without regard to the date of organization.

(i) Repealed by Session Laws 1989 (Regular Session, 1990), c. 959, s. 3. (1917, c. 152, s. 5; 1919, cc. 109, 217; C.S., s. 5339; 1947, c. 935; 1949, c. 956, ss. 1-3; 1957, c. 912, s. 1; 1975, c. 494; 1989 (Reg. Sess., 1990), c. 959, s. 3.)

**Local Modification.** — Hyde, Pitt: 1935, c. 469, s. (4a); 1939, c. 350; Pitt, Mattamuskeet Drainage District: C.S. 5339; Drainage District No. 1: 1965, c. 746, s. 1.

CASE NOTES

**Unconstitutional Delegation of Legislative Powers.** — Discretion provided by subsections (a) and (i) of this section to the clerks of superior court to determine whether drainage commissioners should be elected or appointed is an unconstitutional delegation of legislative powers. *Northampton County Drainage Dist. Number One v. Bailey*, 326 N.C. 742, 392 S.E.2d 352 (1990).

**Where one of three drainage commissioners dies, the two surviving commissioners have authority**, until the election and qualification of their successors, to levy an additional assessment against the lands of the

district necessary to discharge the obligations of the district. *Peoples Loan & Sav. Bank v. King*, 212 N.C. 349, 193 S.E. 663 (1937).

**Landowners in Drainage District Prohibited from Voting Deprived of Equal Protection of the Laws.** — Where some landowners who lived in a drainage district could vote for the clerk who appointed the commissioners of the drainage district and some landowners could not, the defendant nonvoters had been deprived of a fundamental right; furthermore, plaintiff drainage district failed to show that the classification of voters in this case was necessary to promote a compelling government-

tal interest; therefore, defendants were deprived equal protection of the laws in violation of N.C. Const., Art. I, § 19. Northampton

County Drainage Dist. Number One v. Bailey, 326 N.C. 742, 392 S.E.2d 352 (1990).

### § 156-81.1. Treasurer.

The appointing authority as determined by G.S. 156-81 shall appoint a treasurer for the drainage district for a term not to exceed 12 months. The treasurer so appointed may be a member of the board of commissioners of the district or some other person deemed competent, and shall furnish bond as may be required by the said clerk of the superior court. The treasurer shall continue in office until a successor has been appointed and qualified.

All references in Subchapter III of Chapter 156 of the General Statutes of North Carolina, to "treasurer" or "county treasurer" or "county auditor" are hereby amended to refer exclusively to the treasurer appointed as hereinbefore provided. (1963, c. 767, s. 4; 1989 (Reg. Sess., 1990), c. 959, s. 6.)

**Local Modification.** — Hyde: 1967, c. 1010.

### § 156-82. Validation of election of members of drainage commission.

All irregularities caused by failure of any officer whose duty it was to provide for the election of a member or members of board of drainage commissioners of any drainage district, or the failure of any candidate to make a deposit as may be required by law, shall not invalidate such election where the following facts appear affirmatively:

- (1) That said election was held at the time and place prescribed by law.
- (2) That a ballot box was provided for the ballots cast for drainage commissioner.
- (3) That the ballots were canvassed and the results declared by the judge of the general election.
- (4) That the candidate receiving the greatest number of votes was declared elected.
- (5) That no candidate for election as a member of board of drainage commissioners made any deposit as prescribed by law.
- (6) That the candidate receiving the majority votes at said election has already qualified and is acting as such drainage commissioner.

This section shall not apply to any election contested before March 9, 1921. (1921, c. 210; C.S., s. 5339(a).)

### § 156-82.1. Duties and powers of the board of drainage commissioners.

(a) The board of drainage commissioners shall proceed with the levying of assessments, issuance of bonds and construction of canals, water retardant structures and other improvements and acquisition of equipment as approved by the court in the adjudication upon the final report of the board of viewers, either in the creation of the district or in subsequent proceedings authorized by Article 7B.

(b) The commissioners shall maintain the canals, water retardant structures, and all other improvements and equipment of the district.

(c) The commissioners, with the approval of the clerk of the superior court, may use surplus funds in such manner as they deem best for (i) the maintenance of the improvements, (ii) construction or enlargement of canals and water retardant structures, or other improvements or equipment, (iii)

replacement or acquisition of equipment or structures, and (iv) for payment of any or all operating expenses including salaries, fees and costs of court.

The term "surplus funds" is defined to mean any funds remaining after the payment of those items set forth specifically in the certificate of assessment, as well as funds provided in said certificate for maintenance and contingencies, and also, shall include maintenance and any other funds which the said commissioners may have on hand and which are not necessary for the payment of the bonds and interest thereon which have been issued by the said district.

(d) The board of commissioners may agree, or contract, with any agency of the government of the United States or of North Carolina for such engineering or other services as may be provided by such agency.

(e) The board of commissioners may, in its discretion, release areas taken for rights-of-way if it determines, after the construction of the canals, that such are not needed for the purpose of the district. The release must be approved by the clerk of the superior court and such release shall be filed in the proceedings by virtue of which the district was created.

(f) The board of drainage commissioners shall have all the duties and powers as set forth and imposed upon them by the various sections of this Subchapter and all others which are necessary to promote the purposes of the district.

(g) The board of commissioners may authorize the use of stored or impounded water for recreational purposes. They may acquire title, by gift or purchase, but not by condemnation, of land to be used in conjunction with the stored and impounded water, for the development of recreational facilities.

The said commissioners are not authorized to use funds obtained from assessments upon the lands within the drainage district, for the purposes of the acquisition and development of recreational facilities. They are authorized to issue revenue bonds or notes, for the acquisition of land and construction and development of recreational facilities. The funds received from the use of the said recreational facilities, may be pledged for the payment of said revenue bonds and notes.

The terms and conditions of the issuance and payment of the said revenue bonds or notes, must be approved by the clerk of the superior court who has jurisdiction of the said drainage district.

The commissioners are authorized to enter into a contract with persons, association of persons or municipal or private corporations, for the operation of recreational facilities, owned by the drainage district. The contract may be entered into by negotiation or by award to the highest bidder at a public rental to be advertised as directed by the clerk of the superior court. The terms of the contract must be approved by the clerk of the superior court who has jurisdiction of the said drainage district.

(h) The commissioners may enter into a contract with a municipality or other nonprofit organizations, for the joint use of a facility for the impoundment or storage of water. The contract must be approved by the clerk of the superior court who has jurisdiction of the drainage district.

(i) All improvements constructed and acquired under the provisions of this Subchapter shall be under the control and supervision of the board of drainage commissioners. It shall be their duty to keep all improvements in good repair. (1961, c. 614, s. 2; 1965, c. 1143, s. 3.)

## § 156-82.2. Appointment of drainage commissioners.

Notwithstanding any other provision of law (including, where applicable, any special acts or local modification of general law), the General Assembly hereby appoints all sitting drainage district commissioners and drainage commission treasurers, as of the date of ratification of this section, as

commissioners, officers, and treasurers of their respective districts. Said commissioners, officers, and treasurers shall continue in office until such time as appointments shall be made as provided in G.S. 156-81 and G.S. 156-81.1, which appointments shall be made by the clerk or clerks of the superior court not later than January 1, 1991. (1989 (Reg. Sess., 1990), c. 959, s. 1.)

### § 156-82.3. Validation of previous actions.

(a) All expenditures heretofore incurred, and all actions heretofore taken, by a drainage district for purposes authorized by this Chapter are hereby validated notwithstanding any defect in the selection of any or all of its commissioners or any other defect.

(b) The provisions of this section are expressly made applicable to any and all bonds and other financial obligations of any such district. No action based on the alleged invalidity of the assessments heretofore made or of any such bonds or other obligations of a district shall lie after January 1, 1991, to enjoin or contest the enforceability of any such assessment, bond, or other obligation. (1989 (Reg. Sess., 1990), c. 959, s. 5.)

## ARTICLE 7.

### *Construction of Improvement.*

### § 156-83. Superintendent of construction.

The board of drainage commissioners shall appoint a competent drainage engineer of good repute as superintendent of construction. Such superintendent of construction shall furnish a copy of his monthly and final estimates to the Department of Environment and Natural Resources, in addition to other copies herein provided which shall be filed and preserved. In the event of the death, resignation, or removal of the superintendent of construction, his successor shall be appointed in the same manner.

The board of drainage commissioners may, in its discretion, agree with the Soil Conservation Service of the Department of Agriculture or any agency of the government of the United States or of North Carolina whereby such agency may furnish the service required of the superintendent of construction. If this is done by the board, any reference in this Chapter to the superintendent of construction and/or his duties shall include or be exercised by the said agency subject to the approval of the board of commissioners. (1909, c. 442, s. 20; C.S., s. 5340; 1923, c. 217, s. 3; 1925, c. 122, s. 5; 1959, c. 597, s. 3; 1961, c. 1198; 1963, c. 767, s. 5; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1989, c. 727, s. 218(160); 1997-443, s. 11A.123.)

**Local Modification.** — Hyde: 1957, c. 714.

**Cross References.** — As to application of this section, see § 156-104.

### § 156-84. Letting contracts.

The board of drainage commissioners shall cause notice to be given of the letting of the contract. The notice shall be posted at the courthouse door in the county wherein the district was organized. Notice shall be posted no less than 15 days prior to the opening of the bids and shall be published at least once a week for two consecutive weeks immediately prior to the opening of the bids, in some newspaper published in the county wherein such improvement is located, if such there be, and such additional publication elsewhere as they

may deem expedient, of the time and place of letting the work of construction of such improvement, and in such notice they shall specify the approximate amount of work to be done and the time fixed for the completion thereof; and on the date appointed for the letting they, together with the superintendent of construction, shall convene and let to the lowest responsible bidder, either as a whole or in sections, as they may deem most advantageous for the district, the proposed work. No bid shall be entertained that exceeds the estimated cost, except for good and satisfactory reasons it shall be shown that the original estimate was erroneous. They shall have the right to reject all bids and advertise again the work, if in their judgment the interest of the district will be subserved by doing so. The successful bidder shall be required to enter into a contract with the board of drainage commissioners and to execute a bond for the faithful performance of such contract, with sufficient sureties, in favor of the board of drainage commissioners for the use and benefit of the levee or drainage district, in an amount equal to no less than 25 nor more than one hundred per centum (100%) of the estimated cost of the work awarded to him. In canvassing bids and letting the contract, the superintendent of construction shall act only in an advisory capacity to the board of drainage commissioners. The contract shall be based on the plans and specifications submitted by the viewers in their final report as confirmed by the court, the original of which shall remain on file in the office of the clerk of the superior court and shall be open to the inspection of all prospective bidders. All bids shall be sealed and shall not be opened except under the authority of the board of drainage commissioners and on the day theretofore appointed for opening the bids. The drainage commissioners shall have power to correct errors and modify the details of the report of the engineer and viewers if, in their judgment, they can increase the efficiency of the drainage plan and afford better drainage to the lands in the district without increasing the estimated cost submitted by the engineer and viewers and confirmed by the court. (1909, c. 442, s. 21; 1911, c. 67, s. 4; C.S., s. 5341; 1959, c. 806; 1963, c. 767, s. 6.)

#### CASE NOTES

##### **Discretionary Power of Commissioners.**

— This section directs that the levee or drainage commissioners shall convene with the superintendent of construction and let the work contemplated to the “lowest responsible bidder,” thereby conferring a discretionary power in adjudging the responsibility of the bidder, in all respects, with which the courts will not interfere in the absence of undue influence or a procurement by fraud. *Sanderlin v. Luken*, 152 N.C. 738, 68 S.E. 225 (1910).

##### **Acceptance of Work by Commissioners.**

— The acceptance of the work of the contractors as a compliance on their part with the contract is a judicial act of the board of commissioners

and cannot be questioned except for fraud or collusion, and then only to make the commissioners personally and individually liable. *Craven v. Board of Comm’rs*, 176 N.C. 531, 97 S.E. 470 (1918).

**Only Minor Changes in Report Authorized.** — The authority given by this section to correct errors and modify the details of the report contemplates only such minor changes of detail as may occur in carrying out the plans, etc., specified in the final report and not a substantial departure therefrom. *Griffin v. Board of Comm’rs*, 169 N.C. 642, 86 S.E. 575 (1915).

#### **§ 156-85. Monthly estimates for work and payments thereon; final payment.**

The superintendent in charge of construction shall make monthly estimates of the amount of work done, and furnish one copy to the contractor and file the other with the secretary of the board of drainage commissioners; and the commissioners shall, within five days after the filing of such estimate, meet and direct the secretary to draw a warrant in favor of such contractor for

ninety per centum (90%) of the work done, according to the specifications and contracts; and upon the presentation of such warrant, properly signed by the chairman and secretary, to the treasurer of the drainage fund, he shall pay the amount due thereon. When the work is fully completed and accepted by the superintendent he shall make an estimate for the whole amount due, including the amounts withheld on the previous monthly estimates, which shall be paid from the drainage fund as before provided. (1909, c. 442, s. 22; C.S., s. 5342.)

### § 156-86. Failure of contractors; reletting.

If any contractor to whom such work has been let shall fail to perform the same according to the terms specified in his contract, action may be had in behalf of the board of drainage commissioners against such contractor and his bond in the superior court for damages sustained by the levee or drainage district, and recovery made against such contractor and his sureties. In such an event the work shall be advertised and relet in the same manner as the original letting. (1909, c. 442, s. 23; 1911, c. 67, s. 5; C.S., s. 5343.)

### § 156-87. Right to enter upon lands; removal of timber.

In the construction of the work the contractor shall have the right to enter upon the lands necessary for this purpose and the right to remove private or public bridges or fences and to cross private lands in going to or from the work. In case the right-of-way of the improvement is through timber the owner thereof shall have the right to remove it, if he so desires, before the work of construction begins, and in case it is not removed by the landowner it shall become the property of the contractor and may be removed by him. (1909, c. 442, s. 24; C.S., s. 5344.)

#### CASE NOTES

**Constitutionality.** — Objection that this section constitutes an unconstitutional taking of the owner's timber, giving it to the contractor without compensation, cannot be maintained. *Beaufort County Lumber Co. v. Drainage Comm'rs*, 174 N.C. 647, 94 S.E. 457 (1917).

**Purpose of Section.** — The drainage acts

contemplate that all damages to the owner of lands shall be assessed, including the taking of his timber necessary to carry out its plans, this section being designed to give the owner of the timber the privilege of taking such timber if he so elects. *Beaufort County Lumber Co. v. Drainage Comm'rs*, 174 N.C. 647, 94 S.E. 457 (1917).

#### OPINIONS OF ATTORNEY GENERAL

**Time for Removal of Timber.** — Provision in this section that the owner of timber shall have the right to remove it "before the work of construction begins" means when work is be-

gun on a particular landowner's tract. See opinion of Attorney General to Colonel Paul S. Denison, Army Corps of Engineers, 40 N.C.A.G. 197 (1969).

### § 156-88. Drainage across public or private ways.

Where any public ditch, drain or watercourse established under the provisions of this Subchapter crosses or, in the opinion of the board of viewers, should cross a public highway under the supervision of the Department of Transportation the actual cost of constructing the same across the highway shall be paid for from the funds of the drainage district, and it shall be the duty of the Department of Transportation, upon notice from the court, to show cause why it should not be required to repair or remove any old bridge and/or build any new bridge to provide the minimum drainage space determined by the court; whereupon the court shall hear all evidence pertaining thereto and shall

determine whether the Department of Transportation shall be required to do such work, and whether at its own expense or whether the cost thereof should be prorated between the Department of Transportation and the drainage district. Either party shall have the right of appeal from the clerk to the superior court and thence to the appellate division, and should the court be of the opinion that the cost should be prorated then the percentage apportioned to each shall be determined by a jury.

Whenever the Department of Transportation is required to repair or remove any old bridge and/or build any new bridge as hereinbefore provided, the same may be done in such manner and according to such specifications as it deems best, and no assessment shall be charged the Department of Transportation for any benefits to the highway affected by the drain under the same, and such bridge shall thereafter be maintained by and at the expense of the Department of Transportation.

Where any public ditch, drain, or watercourse established under the provisions of this Subchapter crosses a public highway or road, not under the supervision of the Department of Transportation, the actual cost of constructing the same across the highway or removing old bridges or building new ones shall be paid for from the funds of the drainage district. Whenever any highway within the levee or drainage district shall be beneficially affected by the construction of any improvement or improvements in such district it shall be the duty of the viewers appointed to classify the land, to give in their report the amount of benefit to such highway, and notice shall be given by the clerk of the superior court to the commissioners of the county where the road is located, of the amount of such assessment, and the county commissioners shall have the right to appear before the court and file objections, the same as any landowner. When it shall become necessary for the drainage commissioners to repair any bridge or construct a new bridge across a public highway or road not under the supervision of the Department of Transportation, by reason of enlarging any watercourse, or of excavating any canal intersecting such highway, such bridge shall thereafter be maintained by and at the expense of the official board or authority which by law is required to maintain such highway so intersected.

Where any public canal established under the provisions of the general drainage law shall intersect any private road or cartway the actual cost of constructing a bridge across such canal at such intersection shall be paid for from the funds of the drainage district and constructed under the supervision of the board of drainage commissioners, but the bridge shall thereafter be maintained by and at the expense of the owners of the land exercising the use and control of the private roads; provided, if the private road shall be converted into a public highway the maintenance of the bridge shall devolve upon the Department of Transportation or such other authority as by law shall be required to maintain public highways and bridges. (1909, c. 442, s. 25; 1911, c. 67, s. 6; 1917, c. 152, s. 6; C.S., s. 5345; 1947, c. 1022; 1953, c. 675, s. 26; 1957, c. 65, s. 11; 1969, c. 44, s. 78; 1973, c. 507, s. 5; 1977, c. 464, s. 34.)

### **§ 156-89. Drainage across railroads; procedure.**

Whenever the engineer and the viewers in charge shall make a survey for the purpose of locating a public levee or drainage district or changing a natural watercourse, and the same would cross the right-of-way of any railroad company, it shall be the duty of the owner in charge of the work to notify the railroad company, by serving written notice upon the agent of such company or its lessee or receiver, that they will meet the company at the place where the proposed ditch, drain, or watercourse crosses the right-of-way of such company, the notice fixing the time of such meeting, which shall not be less than 10 days

after the service of the same, for the purpose of conferring with the railroad company with relation to the place where and the manner in which such improvement shall cross such right-of-way. When the time fixed for such conference shall arrive, unless for good cause more time is agreed upon, it shall be the duty of the viewers in charge and the railroad company to agree, if possible, upon the place where and the manner and method in which such improvement shall cross such right-of-way. If the viewers in charge and the railroad company cannot agree, or if the railroad company shall fail, neglect, or refuse to confer with the viewers, they shall determine the place and manner of crossing the right-of-way of the railroad company, and shall specify the number and size of openings required, and the damages, if any, to the railroad company, and so specify in their report. The fact that the railroad company is required by the construction of the improvement to build a new bridge or culvert or to enlarge or strengthen an old one shall not be considered as damages to the railroad company. The engineer and viewers shall also assess the benefits that will accrue to the right-of-way, roadbed, and other property of the company by affording better drainage or a better outlet for drainage, but no benefits shall be assessed because of the increase in business that may come to the road because of the construction of the improvement. The benefits shall be assessed as a fixed sum, determined solely by the physical benefit that its property will receive by the construction of the improvement, and it shall be reported by the viewers as a special assessment, due personally from the railroad company as a special assessment; it may be collected in the manner of an ordinary debt in any court having jurisdiction. (1909, c. 442, s. 26; C.S., s. 5346.)

#### CASE NOTES

**Mandamus Against County Commissioners Upheld.** — A judgment in proceedings seeking mandamus against county commissioners to compel them to pay an assessment of a drainage district for benefit to the public roads therein, that the defendants pay the same, with interest and costs, out of the first

moneys coming into their hands and not otherwise appropriated, was valid and not in violation of the Constitution or statutes relating to taxation. Cabarrus County Drainage Dist. No. 2 v. Board of Comm'rs, 174 N.C. 738, 94 S.E. 530 (1917).

### § 156-90. Notice to railroad.

The clerk of the superior court shall have notice served upon the railroad company of the time and place of the meeting to hear and determine the final report of the engineer and viewers, and the railroad company shall have the right to file objections to the report and to appeal from the findings of the board of commissioners in the same manner as any landowner. But such an appeal shall not delay or defeat the construction of the improvement. (1909, c. 442, s. 27; C.S., s. 5347.)

### § 156-91. Manner of construction across railroad.

(a) **Duty of Railroad.** — After the contract is let and the actual construction is commenced, if the work is being done with a floating dredge, the superintendent in charge of construction shall notify the railroad company of the probable time at which the contractor will be ready to enter upon the right-of-way of such railroad and construct the work thereon. It shall be the duty of the railroad to send a representative to view the ground with the superintendent of construction and arrange the exact time at which such work can be most conveniently done. At the time agreed upon the railroad company shall remove its rails, ties, stringers, and such other obstructions as may be

necessary to permit the dredge to excavate the channel across its right-of-way. The work shall be so planned and conducted as to interfere in the least possible manner with the business of the railroad.

(b) Utilities Commission to Settle. — If the superintendent of construction and the railroad company shall not be able to agree as to the exact time at which such work can be done, including the time of beginning and the time to be consumed in such work, either party may give written notice thereof to the chairman of the Utilities Commission of the State, and thereupon the Utilities Commission shall cause an investigation to be made, and, after hearing both parties, shall fix the time of beginning such work and the time to be consumed in the work of construction, and the final determination of the Utilities Commission thereon shall be binding upon the superintendent of construction representing the district and the railroad company, and the work shall be done in such time as may be fixed by the Utilities Commission.

(c) Penalty for Delay. — In case the railroad company refuses and fails to remove its track and allow the dredge to construct the work on its right-of-way, it shall be held as delaying the construction of the improvement, and such company shall be liable to a penalty of twenty-five dollars (\$25.00) per day for each day of delay, to be collected by the board of drainage commissioners for the benefit of the drainage district as in the case of other penalties. Such a penalty may be collected in any court having jurisdiction, and shall inure to the benefit of the drainage district.

(d) Payment of Expense. — Within 30 days after the work is completed an itemized bill for actual expenses incurred by the railroad company for opening its tracks shall be made and presented to the superintendent of construction of the drainage improvement. Such bill, however, shall not include the cost of putting in a new bridge or strengthening or enlarging an old one. The superintendent of construction shall audit this bill and, if found correct, approve the same and file it with the secretary of the board of drainage commissioners. The commissioners shall deduct from this bill the cost of the excavation done by the dredge on the right-of-way of the railroad company at the contract price, and pay the difference, if any, to the railroad company. (1909, c. 442, s. 28; 1911, c. 67, s. 7; C.S., s. 5348; 1933, c. 134, s. 8; 1941, c. 97, s. 1.)

## § 156-92. Control and repairs by drainage commissioners.

Whenever any improvement constructed under this Subchapter is completed it shall be under the control and supervision of the board of drainage commissioners. It shall be the duty of the board to keep the levee, ditch, drain, or watercourse in good repair, and for this purpose they may levy an assessment on the lands benefited by the maintenance or repair of such improvement in the same manner and in the same proportion as the original assessments were made, and the fund that is collected shall be used for repairing and maintaining the ditch, drain, or watercourse in perfect order: Provided, however, that if any repairs are made necessary by the act or negligence of the owner of any land through which such improvement is constructed or by the act or negligence of his agent or employee, or if the same is caused by the cattle, hogs, or other stock of such owner, employee, or agent, then the cost thereof shall be assessed and levied against the lands of the owner alone, to be collected by proper suit instituted by the drainage commissioners. It shall be unlawful for any person to injure or damage or obstruct or build any bridge, fence, or floodgate in such a way as to injure or damage any levee, ditch, drain, or watercourse constructed or improved under the provisions of this Subchapter, and any person causing such injury shall be guilty of a Class 3 misdemeanor, and upon conviction thereof may only be fined in any sum not exceeding twice the damage or injury done or caused. (1909, c. 442, s. 29; C.S., s. 5349; 1947, c. 982, s. 1; 1993, c. 539, s. 1075; 1994, Ex. Sess., c. 24, s. 14(c).)

**Cross References.** — As to improvement, renovation, etc., of canals, structures and boundaries, see § 156-93.2 et seq.

#### CASE NOTES

**Amendment by Implication.** — Public Laws 1923, c. 231, which added former § 156-118 and § 156-123, had the effect of amending this section. This section authorizes the drainage commissioners to levy an assessment upon the lands in the district for the purpose of keeping up the drainage. The amending statutes provided that the commissioners could issue bonds instead of levying an assessment. In re Perquimans County Drainage Dist. No. Four, 254 N.C. 155, 118 S.E.2d 431 (1961), decided prior to the repeal of §§ 156-118 through 156-120.

**Assessments Authorized on Properties Benefited by Repairs.** — It is the duty of the commissioners to keep the drains and works of the districts in good repair. For this purpose they are authorized to levy assessments on the properties within the district benefited by the repairs. In re Albemarle Drainage Dist., Beaufort County No. 5, 255 N.C. 338, 121 S.E.2d 599 (1961).

**Provision Limiting Assessments.** — A provision in the petition limiting the amount of assessments to be made on lands within a drainage district being formed under the provisions of the statute, which was not inserted in

the final judgment rendered in due course, could not at a subsequent term be supplied by amendment, being also contrary to the statutory provisions and invalid. Mann v. Mann, 176 N.C. 353, 97 S.E. 175 (1918).

**Under the statute creating the Mattamuskeet Drainage District, control thereof, after its completion, is continued in the board of drainage commissioners** for the purpose of its maintenance, and authority is given it to levy assessments therefor on the lands benefited in the same manner and in the same proportion as the "original assessments" were made, and collected by the same officers as those by whom the State and county taxes are collected. It was held that the term "original assessments" refers to those made for construction work on bonds issued therefor, and the assessments for maintenance should be collected by the sheriff of the county for the purpose of maintenance, as taxes for general county purposes are to be collected by him. Drainage Comm'rs of Mattamuskeet Dist. v. Davis, 182 N.C. 140, 108 S.E. 506 (1921).

**Cited in Robeson County Drainage Dist. No. 4 v. Bullard, 229 N.C. 633, 50 S.E.2d 742 (1948).**

### § 156-93. Construction of lateral drains.

The owner of any land that has been assessed for the cost of the construction of any ditch, drain, or watercourse, as herein provided, shall have the right to use the ditch, drain, or watercourse as an outlet for lateral drains from such land; and if the land be of such elevation that the owner cannot secure proper drainage through and over his own land, or if the land is separated from the ditch, drain, or watercourse by the land of another or others, and the owner thereof shall be unable to agree with such others as to the terms and conditions on which he may enter their lands and construct the drain or ditch, he may file his ancillary petition in such pending proceeding to the court, and the procedure shall be as now provided by law. (1909, c. 442, s. 30; 1915, c. 43, s. 1; 1917, c. 152, s. 3; C.S., s. 5350.)

#### ARTICLE 7A.

#### *Maintenance.*

### § 156-93.1. Maintenance assessments and contracts; engineering assistance, construction equipment, etc.; joint or consolidated maintenance operations; water-retardant structures; borrowing in anticipation of revenue.

(a) The board of drainage commissioners may annually levy maintenance

assessments in the same ratio as the existing classification of the lands within the district. The amount of these assessments shall be determined by the board of drainage commissioners of the district. The proceeds of these assessments shall be used for the purpose of maintaining canals of the drainage district in an efficient operating condition and for the necessary operating expenses of the district. Notice of the meeting at which the board of drainage commissioners determines the amount of the annual levy shall be mailed to the owners, as shown on the county tax records, of all property subject to assessment, or shall be published once a week for two successive calendar weeks in a newspaper having general circulation in the area. The notice shall be sent or published not more than 30 days nor less than 10 days prior to the meeting, and shall state the time, place, and purposes of the meeting. Any interested person has the right to be heard at the meeting prior to the drainage commissioners taking any action on the proposed assessment. In the event that any interested and aggrieved party disagrees with the said assessment, he may, within 20 days of the mailing of the notice of the assessment, file with the clerk for the county wherein the proceeding is pending, a notice specifically setting forth his objection. The Secretary of the District shall file in the records of the proceeding a certification setting forth the date of the mailing of the notice of the annual maintenance assessments. The clerk shall thereupon notify the senior resident superior court judge of such district who shall set the objection down for hearing at the earliest possible time. The court shall hear the matter upon the objections duly set forth in the notice of objection.

The board of drainage commissioners shall have the authority to employ engineering assistance, construction equipment, superintendents and operators for the equipment necessary for the efficient maintenance of the canals, or the maintenance may be done by private contract made after due advertisement as required for the original construction work.

(b) The board of drainage commissioners of a drainage district may join with the commissioners of one or more districts for the purpose of employing engineering assistance, equipment, superintendents and equipment operators for the maintenance of the canals in the several districts desiring to coordinate their maintenance operations and the drainage districts desiring to coordinate a common maintenance force may have a common office with the necessary employees for the furtherance of the joint operations for maintenance. The districts may coordinate their work without regard to county lines.

(c) The board of commissioners of a drainage district may, individually or jointly with the commissioners of other drainage districts, purchase, lease, rent, sell, or otherwise dispose of at public or private sale, equipment for the original construction or maintenance of the canals in the individual or joint districts or the said drainage districts may make contracts with private construction firms for the maintenance and construction of their canals. Contracts made with private construction companies are to be advertised as provided for the contract for the original construction of the canals.

The drainage districts may use the equipment owned by them for the purpose of maintenance of the canals and the construction of extensions to the system of canals in the individual or several drainage districts.

(d) The drainage districts desiring to consolidate their maintenance services and equipment may set up a board composed of one member from each district for the purpose of control and use of the personnel and equipment employed on a joint basis, and in all matters coming before the joint board, the representative of each district shall have a voting strength equal to the proportionate acreage of his drainage district as compared with the total acreage of the combined districts.

(e) The collection of the annual maintenance assessments shall be made by the county tax collector. The board of county commissioners of the county in

which a drainage district is located shall upon the request of the board of drainage commissioners of the said district cause to be shown on the tax statement or notice issued by the county to its taxpayers the amount due the drainage district by the landowners in the same manner as other special assessments are shown thereon. This amount shall be collected by the county tax collector in the same manner as county taxes and deposited to the credit of the district in which the land is located.

(f) The provisions for maintenance as set forth in this Article and elsewhere in this Subchapter III shall include water-retardant structures and the operation of such.

(g) The board of commissioners may borrow money in anticipation of revenue from maintenance assessments, as hereinbefore provided for, from which assessments the loan shall be repaid. The amount which the commissioners may borrow shall not be limited to the revenues anticipated for any one year. The terms and provisions of such loan shall be approved by the clerk of the superior court which approval shall be requested in the form of a petition and order in the proceeding by virtue of which the district was organized. The proceeds of said loan shall be used only for purposes set forth in Article 7A of Chapter 156. (1949, c. 1216; 1959, c. 597, s. 4; 1961, c. 614, s. 8; 1989 (Reg. Sess., 1990), c. 959, s. 4; 1991, c. 634, s. 1.)

**Local Modification.** — Beaufort: 1963, c. 142.

#### CASE NOTES

**The land clause of the Constitution of North Carolina** is violated insofar as § 156-138.3 dispenses with notice and an opportunity to be heard before imposing maintenance assessments on landowners within the drainage district; the imposition of these assessments was not a matter of mathematical computation,

but rather, it involved some discretion on the part of the commissioners. *Northampton County Drainage Dist. Number One v. Bailey*, 326 N.C. 742, 392 S.E.2d 352 (1990).

**Quoted** in *In re Perquimans County Drainage Dist. No. Four*, 254 N.C. 155, 118 S.E.2d 431 (1961).

#### ARTICLE 7B.

### *Improvement, Renovation, Enlargement and Extension of Canals, Structures and Boundaries.*

#### **§ 156-93.2. Proceedings for improvement, renovation and extension of canals, structures and equipment.**

The board of commissioners may construct, renovate, improve, enlarge and extend the drainage systems and water-retardant structures and any equipment of the district, by complying with the following provisions:

- (1) The commissioners shall file with the clerk of the superior court in the county in which the district was organized, a petition which sets forth the need for the improvements requested and a general description of the proposed improvements.
- (2) Upon the filing of the petition, the clerk shall then appoint a board of viewers with the same composition and qualifications as is required by G.S. 156-59. He shall direct the board of viewers to consider the proposals of the board of commissioners and report to him (i) whether or not the improvement proposed will benefit the lands sought to be benefited and (ii) whether or not the proposed improvement is practicable.

The board of viewers shall make their report to the clerk within 30 days after their appointment unless the time shall be extended by the court upon the showing of a meritorious cause for the extension.

- (3)a. If the board of viewers shall report (i) that none of the improvement proposed will benefit the lands sought to be benefited, or (ii) that it is not practicable, the petition of the board of commissioners shall be dismissed and shall not be submitted again within six months thereafter.
- b. If the board of viewers shall report (i) that part or all the improvement proposed will benefit the lands sought to be benefited and (ii) the proposed improvement is practicable, then the clerk shall fix a time and place for a hearing upon said report. The said hearing shall be no less than 20, nor more than 30, days after the filing of said report.
- (4) Notice of said hearing shall be given as follows:
- a. Posting and publication:
1. Posting at the courthouse door of the county in which the proceeding is pending;
  2. Posting at five conspicuous places within the district;
  3. The notice shall be posted at least 20 days prior to said hearing;
  4. Publication in a newspaper with general circulation within the area once a week for three successive weeks.
- b. Contents:
1. The notice shall state the time and place for the hearing;
  2. Describe in general terms the improvements proposed;
  3. That the court will consider and adjudicate the report of the board of viewers.
- (5) At the date appointed for the hearing the clerk shall hear and determine any objections that may be offered to the said report. The clerk may make such modifications and changes which tend to increase the benefits of the proposed work or improvement.
- (6)a. If the clerk shall adjudicate that (i) none of the improvements proposed will benefit any of the lands sought to be benefited or (ii) that none of the improvements are practicable, he shall dismiss the proceedings and the petition shall not be submitted again within six months thereafter.
- b. If the clerk shall approve the said report, he shall then direct the board of viewers to prepare a further and detailed report which shall include the following:
1. Specific plans and profiles together with estimates of the cost of the work recommended by the said board of viewers and an estimate of all other costs including those incurred by the board of viewers;
  2. If directed by the clerk, a new property map of the district which shall show thereon the general location of each tract of land which will be benefited by the proposed work;
  3. A statement showing the classification of benefits to be received by the several tracts of lands. This classification shall be determined and shown in the same manner as is provided for in G.S. 156-71. The board of viewers may adopt the original classification. Only those lands to be benefited by the proposed work shall be classified for assessment.

The board of viewers shall have, insofar as applicable, the same powers and duties as relate to the final report as are required and provided in Article 5 by G.S. 156-69, 156-70, 156-70.1 and 156-71.

The board of viewers shall make their report to the clerk within 60 days after their appointment. The clerk may extend this time upon the showing of meritorious cause for the extension.

The expense of the board of viewers, their assistants, and all costs incurred by them shall be paid from any surplus funds of the district, as defined in this Subchapter, or if such are not sufficient, by the same means of financing as are available for such purposes when the district is originally organized. The estimate of the expenditures shall be shown in its report and all amounts of money expended shall be reimbursed when funds are available.

- (7) Upon the filing of the said report, the clerk shall fix a time and a place for a hearing thereupon.
- (8) The notice of the hearing upon said report shall be given in the same manner as required for the notice of the proposed work as required by the preceding subdivision (4) which relates to the preliminary hearing.

Also, a notice of said hearing shall be mailed at least 10 days prior to the hearing, to those landowners as their names appear upon the statement of classification of benefits filed with the report of the board of viewers and whose names and addresses are shown on the tax scrolls of the county wherein their land is situated. The attorneys for, or commissioners of, the district shall use due diligence to determine the said names and addresses from the tax scrolls.

The filing with the clerk of the superior court of a certificate by the attorney for, or the commissioners of, the district, that due diligence has been used to obtain the names and addresses from the tax scrolls and that notice has been mailed to those persons at the address shown, shall be sufficient showing that this provision has been complied with. The certificate shall state the names, addresses and dates to whom such notice was mailed.

- (9) At the date set for the hearing any landowner may appear in person, or by counsel, and file his objections in writing to the report of the board of viewers. It shall be the duty of the clerk to carefully review the report of the board of viewers and the objections filed thereto and make such changes as are necessary to render substantial and equal justice to all landowners in the district.

If the clerk shall adjudicate that the benefits which will accrue to the lands affected are greater than the cost of the improvements, the report of the board of viewers shall be confirmed. The clerk shall then direct the commissioners of the district to proceed with the improvements as approved.

If, however, the clerk finds that the cost of the improvements is greater than the resulting benefits that will accrue to the lands affected, the clerk shall dismiss the proceedings.

- (10) Any landowner, party petitioner, or the drainage district may, within 10 days after the entry of the order or judgment by the clerk upon the report of the board of viewers, appeal to the superior court in session time or in chambers. The procedures for taking appeal under Article 27A of Chapter 1 of the General Statutes apply, except as provided otherwise by this Subchapter. All of the terms and provisions of G.S. 156-75 apply to the appeal. (1961, c. 614, s. 1; 1969, c. 192, s. 2; 1999-216, s. 21.)

**Effect of Amendments.** — Session Laws 1999-216, s. 21, effective January 1, 2000, and applicable to all orders or judgments subject to this act that are entered on or after that date, rewrote subdivision (10).

## CASE NOTES

**Purpose of Article.** — The legislature, when it enacted Subchapter III, authorizing the establishment of drainage districts, made no provision for an alteration and enlargement of the boundaries subsequent to the date of creation, for the simple reason that the boundaries as finally determined had to include all lands benefited by the improvement, and the lands so benefited were required to be assessed for the benefits accruing, and hence no assessment could be levied either for original construction or for cost of maintenance on lands

beyond the boundaries. However, the 1961 legislature, recognizing that lands not originally expected to receive benefit from works to be performed by a drainage district might, by changing conditions and the modification or enlargement and maintenance of the drains, receive benefits from work subsequently proposed to be done, made provision for the enlargement of the boundaries of drainage districts. In re Albemarle Drainage Dist., Beaufort County No. 5, 255 N.C. 338, 121 S.E.2d 599 (1961).

### § 156-93.3. Extension of boundaries.

The boundaries of a drainage district may be extended upon compliance with the requirements and procedures as follows:

- (1) The request for extension shall be made by the board of commissioners of the district, in the form of a petition in the name of the drainage district, to the clerk of the superior court of the county wherein the district was originally organized. The proceeding may be ex parte or adversary.
- (2) The area proposed to be included within the boundaries of the district must be either:
  - a. Located upstream and adjacent to the existing boundary of the district and must have as its only source of drainage either:
    1. The canals of the district; or
    2. Natural or artificial drain ways which empty into or are benefited by the canals of the district; and
    3. Must be within the watershed of the existing district; or
  - b. Adjacent to the existing boundary of the district and have a common outfall with the existing district.
- (3)a. In the event the area meets the requirements of (2)a, it shall only be necessary for the petition to be filed by the board of commissioners of the district.
- b. In the event the area meets the requirement of (2)b of this section, the owners of fifty percent (50%) or more of the land area which it is proposed to include or forty percent (40%) or more of the resident landowners who will be benefited within such area, must join with and be petitioners with the commissioners of the existing district, asking for the extension of boundaries and inclusion of land within the existing district.

Should the area proposed to be included within the boundary of the enlarged district embrace one or more existing drainage districts, the commissioners of any such district or districts may join in a petition to the court asking for the extension of boundaries of the existing district.

The joinder in the petition by the commissioners of such drainage district in the name of the district shall have the effect of including in the petition all of the land within said existing drainage district to the same extent as if the petition had been signed individually by each landowner of the district. The total acreage in such district or districts shall be included as land in the petition in determining whether or not the requirements under this section have been complied with.

- (4) Upon filing of the petition for extension of the boundaries, the clerk of the superior court shall appoint a board of viewers with the same composition and qualifications as is required by G.S. 156-59. The board of viewers shall examine the area proposed to be included within the boundaries of the district to determine whether or not, in their opinion, it is feasible and equitable to include said area within the boundaries of the district, and report their finding to the court. The report must be made within 30 days after the appointment of said board of viewers. The time for filing said report may be extended by the clerk upon a showing of a meritorious cause for the extension.
- (5) If the board of viewers shall report that the proposed extension of boundary is not feasible or equitable, the petition shall be dismissed and shall not be submitted again until after six months from date of dismissal.
- (6)a. If the board of viewers shall report that the proposed extension of boundary is feasible and equitable, then the clerk of the superior court shall order the board of viewers to make a further and detailed report which shall include a map of the area that is proposed to be annexed which shall show:
  1. Boundaries of the existing district;
  2. Boundaries of the proposed extension;
  3. A general location of each individual tract of land which will be benefited.
- b. In the event no additional work is proposed, the board of viewers shall report the following:
  1. The allocation of benefits derived from the existing canals, structures or other improvements, between the existing district and the area to be included within the boundaries of the existing district, which shall be a percentage figure and shall be the major factor for the determination of the requirements set forth in the succeeding paragraphs 2 and 3;
  2. The amount of money, if any, which the owners of the land to be included within the district should pay for the use of the canals, structures or other improvements of the district;
  3. The percent of the cost of maintenance and operating expenses which the owners of the land to be included, should pay;
  4. Classification of the additional lands as to benefits derived from the existing canals, structures or other improvements of the district which shall be in accordance with the provisions of G.S. 156-71. The area of the existing district shall not be classified, unless directed by the clerk of the superior court;
  5. The names and addresses of the landowners within the areas proposed to be included insofar as may be determined from the tax records of the county;
  6. Such other information as may be appropriate or as may be directed by the clerk of the superior court.
- c. In the event additional work is proposed, the report of the board of viewers shall also contain the information required in G.S. 156-93.2, as it applies to the final report of the board of viewers.
- (7) The board of viewers shall file their detailed or final report within 60 days after their appointment. The time for filing of said report may be extended by the clerk upon a showing of meritorious cause for the extension.
- (8) Upon the filing of said report those landowners in the area to be included who are not parties to the proceedings and who do not desire to sign the petition, shall be made parties defendant. Summons shall

be served upon the defendants in the manner required for special proceedings. There shall be attached to and served with the summons, in lieu of a copy of the petition or final report, a statement which shall set forth (i) the purpose of the proceedings and (ii) that the report of the board of viewers is on file in the office of the clerk of the superior court and may be examined by persons interested.

- (9) The attorney for, or the commissioners of, the district shall use due diligence to give notice to every landowner within the area proposed to be included, who has not signed the petition asking for such extension of boundaries and/or the proposed improvements.

The filing of a certificate by the attorney for, or the commissioners of, the district that due diligence has been used to notify each of said defendant landowners shown by the report of the board of viewers, either by personal service or by publication, shall be sufficient showing of compliance with this provision. The certificate shall contain the names of such landowners served personally, the date of service and the names of those served by publication and the date of service by publication.

- (10) Upon filing of said certificate the clerk shall fix a time and place for a hearing upon said report, which date shall be no less than 20 days after filing of said certificate.

- (11) Notice of said hearing shall be given as follows:

a. Posting and publication:

1. Posting at the courthouse door of the county in which the proceeding is pending;
2. Posting at five conspicuous places in the district and in the area to be included;
3. The notice shall be posted at least 20 days prior to the said hearing;
4. Publication in a newspaper with general circulation within the area once a week for three successive weeks;
5. Mailing a copy of the notice to those persons for whom an address is shown in the certificate filed by the attorney for, or commissioners of, the district.

b. Contents:

1. The notice shall state the time and place for the hearing;
2. Describe in general terms the area proposed to be included and work proposed, if any;
3. That the court will consider and adjudicate the report of the board of viewers.

- (12) At the date set for hearing any landowner may appear in person or by counsel and file his objection in writing to the report of the board of viewers. It shall be the duty of the clerk to carefully review the report of the board of viewers and the objection filed thereto and make such changes as are necessary to render substantial and equal justice to all of the landowners and the existing district.

- (13) The clerk shall, after making adjustments in the report of the board of viewers, if any, determine:

- a. If the area(s) of land sought to be included, or any part thereof, is, or will be, benefited by the canals, structures or other improvements of the district.
- b. If such area(s) should equitably be included within the boundary of the district because of the benefits received or to be received from the district.
- c. If the requirements of the preceding subdivision (3)b, if applicable, are met.

If the clerk shall determine that all of the three preceding requirements are met, he shall direct that the area(s) of land to be included within the boundaries of the district, in accordance with the provisions of the report of the board of viewers, as approved.

(14) If the clerk shall determine either:

- a. That no part of the area proposed to be included is or will be benefited by the canals, structures or other improvements of the district and equitably should not be included within the boundaries of the district; or
- b. That the requirements of the preceding subdivision (3)a or b, whichever is applicable, have not been complied with; he shall dismiss the proceeding.

(15) Any landowner, party petitioner, or the drainage district may, within 10 days after the entry of an order or judgment by the clerk upon the report of the board of viewers, appeal to the superior court in session time or in chambers. The procedures for taking appeal under Article 27A of Chapter 1 of the General Statutes apply, except as provided otherwise by this Subchapter. All of the terms and provisions of G.S. 156-75 apply to the appeal.

(16) The duties and powers of the board of commissioners as to those lands included within the district by the current proceedings shall be the same as to those in the original proceeding. (1961, c. 614, s. 1; 1965, c. 1143, s. 4; 1969, c. 192, s. 3; cc. 440, 1002; 1999-216, s. 22.)

**Effect of Amendments.** — Session Laws 1999-216, s. 22, effective January 1, 2000, and applicable to all orders or judgments subject to

this act that are entered on or after that date, rewrote subdivision (15).

#### **§ 156-93.4. Coordination of proceedings under §§ 156-93.2 and 156-93.3.**

In the event a proceeding shall be instituted as provided for in G.S. 156-93.2 and shall also include the extension of boundaries, as provided for in G.S. 156-93.3, the provisions of G.S. 156-93.2 and 156-93.3 shall be coordinated and if there shall be any conflict as to procedure, that provided for in G.S. 156-93.3 shall be followed. (1961, c. 614, s. 1.)

#### **§ 156-93.5. Assessments and bonds for improvement, renovation, enlargement and extension.**

The board of drainage commissioners shall, for the purposes set forth in this Article, levy the necessary assessments and may issue bonds or other debentures for the purpose of providing funds for the construction or acquisition of any of the improvements or works authorized by this Article. The time and manner of levying assessments and the issuance of bonds or other debentures and the terms thereof shall be the same as provided for in Article 8 of Subchapter III. (1961, c. 614, s. 1.)

#### **§ 156-93.6. Rights-of-way and easements for existing districts.**

All drainage districts heretofore created shall be deemed to own an easement or right-of-way in and to those lands upon which there are existing canals and spoil banks.

Whenever the proposed repairs, maintenance or other improvements make it necessary for the drainage district to acquire additional land for easements

or right-of-way, the procedure to secure the same shall be in accordance with G.S. 156-70.1. (1961, c. 614, s. 1.)

#### CASE NOTES

**Applied** in *Taylor v. Askew*, 17 N.C. App. 620, 195 S.E.2d 316 (1973).

### § 156-93.7. Existing districts may act together to extend boundaries within watershed.

If there shall be more than one drainage district in a drainage basin, or watershed, the board of drainage commissioners of any of the districts may initiate or join separately or collectively with the commissioners of one or more of other drainage districts, in the drainage basin or watershed, and/or with the owners of land within the drainage basin, whose lands are not included within an existing drainage district in a petition to the court, asking for the creation of a larger drainage district, or the extension of boundaries of one of the existing districts.

The joinder in the petition by the commissioners of an existing drainage district, acting in the name of the district, shall have the effect of including all of the land assessed within the drainage district, in the petition asking for the creation of the larger drainage district or the extension of boundaries of an existing district. The total area of assessed land, within the existing drainage district shall be included, as land in the petition, in determining whether or not the requirement of G.S. 156-93.3(3)b have been fulfilled.

The provisions of this section shall apply in proceedings provided for in G.S. 156-93.2 and 156-93.3. (1961, c. 614, s. 1; 1965, c. 1143, s. 5.)

#### ARTICLE 8.

#### *Assessments and Bond Issue.*

### § 156-94. Total cost for three years ascertained.

After the classification of lands and the ratio of assessments of the different classes to be made thereon has been confirmed by the court, the board of drainage commissioners shall ascertain the total cost of the improvement, including damages awarded to be paid to owners of land, all costs and incidental expenses, and also including an amount sufficient to pay the necessary expenses of maintaining the improvement for a period of three years after the completion of the work of construction, not exceeding ten per centum (10%) of the estimated actual cost of constructing the drainage works or the contract price thereof if such contract has not been awarded, and after deducting therefrom any special assessments made against any railroad or highway, and, thereupon, the board of drainage commissioners, under the hand of the chairman and secretary of the board, shall certify to the clerk of the superior court the total cost, ascertained as aforesaid; and the certificate shall be forthwith recorded in the drainage record and open to inspection of any landowner in the district. (1909, c. 442, s. 31; 1911, c. 67, s. 8; C.S., s. 5351; 1923, c. 217, s. 4.)

**Cross References.** — As to application of this section, see § 156-104.

## § 156-95. Assessment and payment; notice of bond issue.

If the total cost of the improvement is less than an average of twenty-five cents (25¢) per acre on all the land in the district, the board of drainage commissioners shall forthwith assess the lands in the district therefor, in accordance with their classification, and said assessment shall be collected in one installment, by the same officer and in the same manner as State and county taxes are collected, and payable at the same time. In case the total cost exceeds an average of twenty-five cents (25¢) per acre on all lands in the district, the board of drainage commissioners shall give notice for three weeks by publication in some newspaper published in a county in which the district, or some part thereof, is situated, if there be any such newspaper, and also by posting a written or printed notice at the door of the courthouse and at five conspicuous places in the district, reciting that they propose to issue bonds for the payment of the total cost of the improvement, giving the amount of bonds to be issued, the rate of interest that they are to bear, and the time when payable. Any landowner in the district not wanting to pay interest on the bonds may, within 15 days after the publication of such notice, pay to the county treasurer the full amount for which his land is liable, to be ascertained from the classification sheet and the certificate of the board showing the total cost of the improvement, and have his lands released from liability to be assessed for the improvement; but such land shall continue liable for any future assessment for maintenance or for any increased assessment authorized under the law. (1909, c. 442, s. 32; 1911, c. 67, s. 9; C.S., s. 5352.)

### CASE NOTES

**Assessments Are Not "Taxes."** — Assessments made for the maintenance of a drainage district, incorporated under the provisions of the statute, are not "taxes," even though they may be so incorrectly denominated therein; they are only assessments made for the special benefits to the land within the district, and are not imposed for the purpose of general revenue. *Drainage Comm'rs v. Davis*, 182 N.C. 140, 108 S.E. 506 (1921).

**Drainage district assessments are not taxes.** *Northampton County Drainage Dist. Number One v. Bailey*, 326 N.C. 742, 392 S.E.2d 352 (1990).

**Assessments upon lands in a drainage district are liens in rem**, resting upon the lands, into whosoever hands they may be at the time they accrue, and do not come within the terms of a warranty against encumbrances by deed. *Taylor v. Commissioners of Moseley Creek Drainage Dist.*, 176 N.C. 217, 96 S.E. 1027 (1918).

**Grantee of Timber Interest Not Liable for Assessment.** — A conveyance of the timber, under the usual deed, providing for its cutting and removal from the land within a stated period, is regarded as a severance thereof from the land, and the grantee in the deed is not liable for an assessment for drainage purposes laid thereon. *Dover Lumber Co. v. Board of Comm'rs*, 173 N.C. 117, 91 S.E. 714 (1917).

**No owner is responsible for other owners by reason of their failure to pay**, except

through the method of assessment provided by the statute. *Carter v. Board of Drainage Comm'rs*, 156 N.C. 183, 72 S.E. 380 (1911).

**Liability for Additional Assessments.** — The land of the owner who has paid his assessments, as provided by this section, is subject to additional assessments, the lands in the district being liable until the original bond issue for making the improvements or indebtedness incurred therefor is paid in full. *Virginia-Carolina Joint Stock Land Bank v. Watt*, 207 N.C. 577, 178 S.E. 228 (1935).

**Power of Courts to Enjoin Collection of Assessments.** — The courts, in proper instances, have the power to interfere and stay amounts assessed against the owner of lands within an established drainage district, when it appears that the commissioners, in carrying out the ministerial duties imposed on them, endeavored to collect from him a sum in excess of their own assessment, or that they had made out the rolls in utter disregard of the classifications and ratio of assessments established by the final report, or that they had made such changes in the plans and specifications thereof as to exceed their powers and to work substantial wrong and hardship upon the landowner, if he was not guilty of laches and had not unduly delayed asserting his rights. *Griffin v. Board of Comm'rs*, 169 N.C. 642, 86 S.E. 575 (1915).

Where a drainage district has been fully and lawfully established in accordance with the statute, the commissioners have been duly ap-

pointed, and bonds have been issued in furtherance of the scheme, an injunction restraining the collection of the assessment against the landowners therein, at the suit of one of them, will not issue, as against the interest of the holder of the bonds, unless it clearly appears that the commissioners have substantially departed, to the injury of the claimant, from the scheme set forth in the final report of the viewers, etc. *Griffin v. Board of Comm'rs*, 169 N.C. 642, 86 S.E. 575 (1915).

**Purchaser Takes with Notice of Assessments.** — The purchaser of lands within a drainage district formed under the provisions of this Chapter is fixed by the statute with notice of the assessments and the time thereof, whether a resident of another state or not. *Pate v. Banks*, 178 N.C. 139, 100 S.E. 251 (1919).

**Presumption as to Notice.** — The presumption is in favor of the regularity of the official proceedings of the commissioners of a drainage district, and applies to landowners within the district as to the sufficiency of notice of a meeting duly had to assess such owners

according to benefits received from the improvements therein. *Mitchem v. Gaston County Drainage Comm'n*, 182 N.C. 511, 109 S.E. 551 (1921).

**Waiver of Notice.** — Where the owner of land in a drainage district, formed under the provisions of the statute, appears at a meeting of the commissioners held for the purpose and is silent, making no objection or exception to the assessment imposed upon his land, the question as to whether he had been sufficiently served with notice of the meeting becomes immaterial, his appearance being construed as a waiver thereof, or rather as dispensing with formal notice, and he cannot collaterally, by injunction, restrain the collection of these assessments by sheriff's sale. This also applies to his grantee who knew that the lands were situate within the district and subject to the assessments. *Mitchem v. Gaston County Drainage Comm'n*, 182 N.C. 511, 109 S.E. 551 (1921).

**Cited** in Board of Drainage Comm'rs v. *Jarvis*, 211 N.C. 690, 191 S.E. 514 (1937).

## § 156-96. Failure to pay deemed consent to bond issue.

Every person owning land in the district who shall fail to pay to the treasurer the full amount for which his land is liable, as aforesaid, within the time above specified, shall be deemed as consenting to the issuance of drainage bonds, and in consideration of the right to pay his proportion in installments, he hereby waives his rights of defense to the payment of any assessments which may be levied for the payment of bonds, because of any irregularity, illegality, or defect in the proceedings prior to this time, except in case of an appeal, as hereinbefore provided, which is not affected by this waiver. The term "person" as used in this Subchapter includes any firm, company, or corporation. (1909, c. 442, s. 33; 1911, c. 67, s. 10; C.S., s. 5353; 1963, c. 767, s. 4.)

### CASE NOTES

**Cited** in Board of Drainage Comm'rs v. *Jarvis*, 211 N.C. 690, 191 S.E. 514 (1937).

## § 156-97. Bonds issued.

At the expiration of 15 days after publication of notice of bond issue the board of drainage commissioners may issue bonds of the drainage district for an amount equal to the total cost of the improvement, less such amounts as shall have been paid in in cash to the treasurer. Bonds issued by the board of drainage commissioners shall comply with the following provisions:

- (1) The bonds shall be serial bonds;
- (2) The denomination of the bonds shall be not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000);
- (3) The interest upon said bonds shall not be more than fourteen percent (14%) per annum, from the date of issue and payable semiannually;
- (4) The first annual installment of principal shall fall due not less than three years nor more than six years after the date of the bonds;
- (5) Each annual installment of principal shall be not less than two percent (2%) nor more than ten percent (10%) of the total bonds authorized;

- (6) If the total amount of bonds to be issued does not exceed ten percent (10%) of the total amount of the assessment, the board of commissioners may, in their discretion, not issue any bonds and in lieu thereof issue assessment anticipation bonds which shall mature over a period of not less than four nor more than 10 years and shall be payable in equal annual installments. The interest rate on said assessment anticipation bonds shall not be more than fourteen percent (14%) per annum;
- (7) The board of commissioners may issue bond anticipation note or notes to be redeemed and paid upon the sale and delivery of bonds herein provided for. If such bond anticipation note or notes are issued, at the discretion of the commissioners, such may be done after the bonds have been sold and prior to the printing and delivery of said bonds and must be paid from the proceeds of said bonds when delivered. (1909, c. 442, s. 34; 1911, c. 67, s. 11; 1917, c. 152, s. 12; C.S., s. 5354; 1923, c. 217, s. 5; 1955, c. 1340; 1957, c. 1410, s. 1; 1961, c. 601, s. 1; 1963, c. 767, s. 4; 1969, c. 878; 1985, c. 136, ss. 1, 2.)

**Cross References.** — As to application of this section, see § 156-104.

#### CASE NOTES

**Bond Issue Upheld Despite Interest of Clerk Appointing Commissioners.** — An issue of bonds by a drainage commission was not void by reason of the fact that the clerk of the court who appointed the commissioners owned an interest in a tract of land within the drainage district, as such an interest was too

minute and was not directly the subject matter of the litigation. *White v. Lane*, 153 N.C. 14, 68 S.E. 895 (1910).

**Cited** in *Board of Comm'rs v. Gaines*, 221 N.C. 324, 20 S.E.2d 377 (1942); *In re Albemarle Drainage Dist.*, Beaufort County No. 5, 255 N.C. 338, 121 S.E.2d 599 (1961).

### § 156-97.1. Issuance of assessment anticipation notes.

In lieu of the bonds provided for in G.S. 156-97, the board of drainage commissioners may issue assessment anticipation notes of the district for an amount not to exceed the assessment levied by the commissioners and approved by the clerk of the superior court, less such amounts as shall have been paid in in cash to the treasurer. It shall be optional with the board of drainage commissioners in issuing assessment anticipation notes to issue serial notes in any denominations bearing not more than fourteen percent (14%) interest from the date of issue, payable semiannually. The first annual installment of principal shall be due not less than one year nor more than two years after date thereof, and each annual installment of principal shall not be less than two percent (2%) nor more than twenty-five percent (25%) of the total amount of notes authorized and issued.

Such assessment anticipation notes, when issued, shall have the same force and effect of bonds issued under the provisions of this Article and shall be collectible in the same manner.

The commissioners may issue either serial notes or an amortized note. (1957, c. 912, s. 2; 1961, c. 601, s. 3; 1963, c. 767, ss. 4, 7; 1985, c. 136, s. 3.)

### § 156-98. Form of bonds and notes; excess assessment.

All bonds and notes authorized and issued shall be signed by the chairman and secretary of the board of drainage commissioners and the corporate seal of the district affixed thereto, and the interest coupons shall be authenticated by the facsimile signature of the secretary, and both the principal and interest

coupons shall be payable at some bank or trust company to be designated by the board of drainage commissioners and incorporated in the body of the bond. The form of the bond shall be authorized by the board of drainage commissioners or by the board and the purchaser of the bonds jointly, at the option of the board.

All bonds of reclamation districts shall have that fact noted upon the face of the bond, either by stamping or printing the same thereon. All bonds of improvement districts shall also have that fact noted upon their face.

For the purpose of meeting any possible deficit in the collection of annual drainage assessments or any deficit arising out of unforeseen contingencies there shall be levied, assessed and collected during each year when either the interest or principal or both interest and principal on the outstanding bonds shall be due, an assessment as will yield ten percent (10%) more than the total of interest and principal due in such years; that is to say, for every one hundred dollars (\$100.00) of principal and interest, or either, due in any one year, there shall be levied, assessed and collected a sufficient drainage assessment to yield one hundred and ten dollars (\$110.00) for such year. When this excess of drainage tax so levied, assessed and collected shall accumulate so that the aggregate surplus in the hands of the treasurer of the district shall amount to more than fifteen percent (15%) of the total principal of the bonds of the district outstanding and unpaid, then such surplus above fifteen percent (15%) thereof may be available for expenditure by the board of drainage commissioners in the maintenance and upkeep of the drainage work in such district in the manner provided by law: After all the drainage assessments have been collected except the last assessment, if the surplus which has accumulated amounts to more than five percent (5%) of the total issue of bonds of the district, then and in such event the board of drainage commissioners may in their discretion apply such excess above five percent (5%) toward the reduction of the total amount embraced in the last assessment, reducing the same pro rata as to each tract of land embraced in the district, and having regard to the classification, to the end that such reduction shall be fairly and justly made. As to such surplus as shall accumulate in the hands of the treasurer of the district over and above all obligations of the district which may be due, the treasurer is hereby directed to deposit same in some solvent bank or banks at the highest rate of interest obtainable therefor, and the said treasurer shall be authorized, if he deems it necessary, to demand satisfactory security for such deposits; but the said treasurer shall reserve the right to demand a repayment at any time upon giving not exceeding 30 days' notice thereof. Whereas the proceeds of the first drainage assessment may not be collected and in the hands of the treasurer of the district prior to the maturity of the first and second semiannual installments of interest upon the issue of bonds, the treasurer of the district is hereby directed to pay the interest coupons first maturing and also the interest coupons next maturing, if necessary, out of funds in his hands for the purpose of maintaining the improvement for the period of three years after the completion of the work or construction. As a surplus fund with the treasurer arising out of the annual additional assessment of ten per centum (10%) shall accumulate in any one year in excess of fifteen per centum (15%) of the total principal of the bonds of the district outstanding and unpaid, as herein provided, the treasurer shall transfer in each of such years such surplus fund to the fund for maintaining the improvement after completion, as a reimbursement of the fund formerly withdrawn therefrom for the payment of the first and second installments of interest coupons until such reimbursement shall be fully made. The treasurer shall thereafter keep separate accounts of the proceeds of such additional ten percent (10%) assessment remaining each year after the payment of all maturing obligations, and also a separate account of the funds provided for maintaining the improvement for the period of three

years after completion of improvement and all payments therefrom and reimbursements thereto. (1917, c. 152, s. 13; C.S., s. 5355; 1923, c. 217, s. 6; 1927, c. 98, s. 5; 1961, c. 601, s. 2.)

**Cross References.** — As to application of this section, see § 156-104.

#### CASE NOTES

**Quoted in** In re Perquimans County Drainage Dist. No. Four, 254 N.C. 155, 118 S.E.2d 431 (1961).

**Cited in** Robeson County Drainage Dist. No. 4 v. Bullard, 229 N.C. 633, 50 S.E.2d 742 (1948).

### § 156-99. Application of funds; holder's remedy.

The commissioners of the district may sell the bonds or notes of the district for not less than par and devote the proceeds to the payment of the work as it progresses and to the payment of the other expenses of the district provided for in this Subchapter. The proceeds from the sale of the said bonds or notes shall be for the exclusive use of the levee or drainage district specified therein. A copy of said bonds or notes shall be recorded in the drainage record. If serial bonds or notes are issued it shall only be necessary to record the first numbered bond or note, with a statement showing the serial numbers, the amount and the due dates of principal and interest.

There shall be set out specifically in the drainage record of said proceeding, a description of the lands embraced in the district for which the tax or assessment has not been paid in full, and which is subject to the lien of the said obligations. A reference to the tract number on the map of the district as recorded in the drainage proceedings or in the office of the register of deeds is sufficient description.

If any installment of principal or interest represented by the bonds and notes shall not be paid at the time and in the manner when the same shall become due and payable, and such default shall continue for a period of six months, the holders of such bonds or notes upon which default has been made may have a right of action against the drainage district or the board of drainage commissioners of the district, its officers, including the tax collector and treasurer, directing the levying of a tax or special assessment as herein provided, and the collection of same, in such sum as may be necessary to meet any unpaid installments of principal and interest and costs of action; and such other remedies are hereby vested in the holders of such bonds or notes in default, as may be authorized by law and the right of action is hereby vested in the holders if such bonds or notes upon which default has been made, authorizing them to institute suit against any officer on his official bond for failure to perform any duty imposed by the provisions of this Subchapter.

The official bond for the tax collector and treasurer shall be liable for the faithful performance of the duties herein assigned them. Such bond may be increased by the board of county commissioners. (1909, c. 442, s. 34; 1911, c. 67, s. 11; c. 205; C.S., s. 5356; 1923, c. 217, s. 7; 1963, c. 767, s. 8.)

### § 156-100. Sale of bonds.

In making the sale of drainage bonds the board of drainage commissioners shall prepare a notice of such sale containing the usual and appropriate information regarding the terms and provisions of the bonds, and shall publish the same for at least a period of two weeks in at least one paper of general circulation published within the State and in at least one other newspaper of

large circulation among the buyers of bonds, in which they shall invite sealed bids from prospective purchasers to be opened on a certain day, and may require a cash deposit to accompany all bids, and shall reserve the right to reject any and all bids. In such notice the commissioners may hold in reserve information as to the date when the first installment of principal shall fall due, the annual installments of principal to be paid, the number of years within which the serial bonds are to be paid, the form of the bonds, and the name of the bank or trust company at which the interest coupons and the installments of principal are to be made payable, and shall state that the information and data so withheld may subsequently be agreed upon between the drainage commissioners and the purchaser of the bonds; or the board of drainage commissioners in their advertisement asking bids may make optional propositions in the respects above recited, inviting bids as to each kind of bond so proposed. The board of drainage commissioners shall accept the highest bona fide bid for such bonds and issue and sell the same accordingly, provided the highest bid shall equal or exceed the par value of the bonds with any accrued interest thereon. If no satisfactory bid shall be received, the board of drainage commissioners may readvertise the bonds for sale in the manner above provided, or they may accept any private bid for the bonds at not less than their par value, with any accrued interest thereon. The board of drainage commissioners shall in good faith make diligent effort to sell the bonds at a price not less than their par value, with accrued interest. Bonds of any drainage district heretofore sold or contracted to be sold by the Local Government Commission in the manner provided by the Local Government Act, either alone or in conjunction with the board of drainage commissioners, shall be deemed to have been lawfully sold or contracted to be sold. (1909, c. 442, s. 34; 1911, c. 67, s. 11; 1917, c. 152, s. 15; C.S., s. 5357; 1941, c. 142.)

**Local Modification.** — Brunswick, Columbus: 1929, c. 299.

**Cross References.** — As to application of this section, see § 156-104.

#### CASE NOTES

**The remedy provided by statute to the holders of drainage bonds to enforce payment of their obligations** is by action against the drainage district and its commissioners and the tax collector and treasurer to compel these officers to perform their legal duties in pursuing the statutory procedure for the collection and application of drainage assessments, which remedy is adequate and exclusive, and the holder of past-due bonds may not maintain an action against the owner of land within the district to enforce the lien of delinquent drainage assessments against the land. *Wilkinson v. Boomer*, 217 N.C. 217, 7 S.E.2d 491 (1940).

**Service by Publication Held Insufficient.** — Where, in an action to foreclose a tax lien, service of process on "bondholders, lien

holders or other persons having or claiming some interest in the land" was had by publication, but the publication made no reference to any drainage district, drainage assessment, liens or bonds or bondholders of any drainage district, the publication was held insufficient to give the court jurisdiction of the holders of bonds of the drainage district in which the lands or any part of them lay, and the judgment therein could not preclude the bondholders from exercising their remedy under prescribed conditions to have the drainage district levy additional assessments against the lands for the purpose of paying the drainage bonds. *Board of Comm'rs v. Gaines*, 221 N.C. 324, 20 S.E.2d 377 (1942).

#### § 156-100.1. Sale of assessment anticipation notes.

Should assessment anticipation notes be issued by a drainage district under the provisions of G.S. 156-97.1, the board of drainage commissioners may accept any private bid for said assessment anticipation notes at not less than their par value, with accrued interest thereon without the necessity of

advertising the sale hereof as is provided for in the sale of bonds under the provisions of G.S. 156-100. (1957, c. 912, s. 3.)

### **§ 156-100.2. Payment of assessments which become liens after original bond issue.**

Payment of assessments not included in the original bond or note issue shall be financed in the following manner:

- (1) In the event of appeal from the order of the clerk of superior court approving the final report of the board of viewers, the assessment approved by the appellate court shall be due and payable 30 days from the entry of the final order in said appeal.
- (2) In the event land should be included within the district for any other reason, the assessment thereon shall be due and payable 30 days after the date of the agreement or court order by which said land is included.
- (3) In the event the assessments referred to in the preceding subdivisions (1) and (2) are not paid at the expiration of the said 30-day period, then the commissioners may provide for installment payments of said assessment upon such terms as may be approved by the clerk of the superior court who has jurisdiction of the said drainage proceeding.

The commissioners of the district may issue bonds or notes for an amount equal to the total of the installment payments, upon terms as approved by the clerk of the superior court. The lien of the assessment, the rights of the bond or note holder, and all other liabilities and rights shall be the same as prescribed in this Subchapter III for other bonds and notes of the district. (1963, c. 767, s. 9.)

### **§ 156-100.3. Sinking fund.**

The commissioners of the drainage district may establish a sinking fund to be used to pay bonds and notes issued by the district. The terms and conditions by which the said sinking fund is established shall be approved by the clerk of the superior court who has jurisdiction of said district. (1963, c. 767, s. 10.)

### **§ 156-101. Refunding bonds issued.**

In any case where the board of drainage commissioners of any drainage district have issued or may issue bonds for the purpose of constructing or completing the drainage works in such district, the payment of which at maturity would in the judgment of the board of drainage commissioners be an unreasonable burden on the owners of the lands in such district assessed for the payment of such bonds and interest, or if it shall appear for other good and substantial reasons that the welfare of the district and the owners of lands therein would be promoted thereby, the board of drainage commissioners shall have the power to refund such bonds, or any part thereof, and issue new bonds equal to the amount of bonds outstanding and unpaid, or any part thereof. The new or refunding bonds shall bear a rate of interest not exceeding six percent (6%) payable semiannually, and shall be divided into such annual installments not exceeding ten percent (10%) and not less than five percent (5%) of the outstanding bonds so refunded. The new assessments shall be levied and collected with which to pay the principal and interest on the bonds in the manner provided by law. The first installment of principal on the bonds so refunded may be made payable at a certain date in the future not exceeding six years from the date of the refunding bonds, and in the meantime annual assessments shall be levied and collected for the payment of the interest. (1917, c. 152, s. 14; C.S., s. 5358.)

## § 156-102. Drainage bonds received as deposits.

The State Treasurer is authorized to receive drainage bonds issued by drainage districts in North Carolina as deposits from banks, insurance companies, and other corporations required by law to make deposits with the State Treasurer: Provided, that the Attorney General shall have approved the form of such bonds. (1917, c. 152, s. 7; C.S., s. 5359.)

**Local Modification.** — Edgecombe, Pitt:  
1937, c. 334.

## § 156-103. Assessment rolls prepared.

The board of drainage commissioners shall immediately prepare the assessment rolls or drainage tax lists, giving thereon the names of the owners of land in the district and a brief description of the several tracts of land assessed and the amount of assessment against each tract of land. The first of these assessment rolls shall be due and payable on the first Monday in September following the date of such bonds, and shall provide funds sufficient for the payment of interest on such bonds for one year. The second assessment roll shall make like provision for the payment of the interest for one year. Annual assessment rolls shall thereafter provide funds sufficient to meet the interest for one year on the issue of bonds outstanding. During the year previous to maturity of any annual installment due upon the principal of said bonds there shall be an assessment roll sufficient to provide funds for the payment of both the interest for one year and for the payment of the annual installment due upon the principal of the bonds. Such annual assessments shall be made from year to year to provide funds to meet the interest for one year and the annual installment of the principal due upon the bonds outstanding, until the whole principal due upon the outstanding bonds and the interest thereon shall be fully paid. In making up such assessment rolls there shall be included ten percent (10%) additional as provided in G.S. 156-98. Each of the assessment rolls shall specify the time when collectible and be numbered in their order, and the amounts assessed against the several tracts of land shall be in accordance with the benefits received, as shown by the classification and ratio of assessments made by the viewers. These assessment rolls shall be signed by the chairman of the board of drainage commissioners and by the secretary of the board. There shall be four copies of each of the assessment rolls, one of which shall be filed with the drainage record, one shall be filed with the chairman of the board of drainage commissioners, who shall carefully preserve the same, one shall be preserved by the clerk of the court, without change or mutilation, for the purposes of reference or comparison, and one shall be delivered to the sheriff, or other county tax collector, after the clerk of the superior court has appended thereto an order directing the collection of such assessments, and the assessments, shall thereupon have the force and effect of a judgment as in the case of State and county taxes. If the drainage commission which has assessed the lands of a drainage district prior to March 11, 1919, shall file the aforesaid four copies of assessment rolls within six months from April 1, 1919, the filing of such assessment rolls shall have the same legal effect as if filed strictly in accordance with this section immediately after the preparation of such assessment rolls. The State having authorized the creation of drainage districts and having delegated thereto the power to levy a valid tax in furtherance of the public purposes thereof, it is hereby declared that drainage districts heretofore or hereafter organized under existing law or any subsequent amendments thereto are created for a public use and are political subdivisions of the State. (1911, c. 67, s. 12; 1917, c. 152, s. 9; 1919, c. 282, s. 1; C.S., s. 5360; 1921, c. 7; 1923, c. 217, s. 8.)

**Cross References.** — As to application of this section, see § 156-104.

#### CASE NOTES

**The assessment arises upon completion of the assessment rolls.** *Nesbit v. Kafer*, 222 N.C. 48, 21 S.E.2d 903 (1942).

**Cited in** *Board of Comm'rs v. Gaines*, 221

N.C. 324, 20 S.E.2d 377 (1942); *Robeson County Drainage Dist. No. 4 v. Bullard*, 229 N.C. 633, 50 S.E.2d 742 (1948).

### § 156-104. Application of amendatory provisions of certain sections; amendment or reformation of proceedings.

All the provisions of Chapter 217 of the Public Laws of 1923 amendatory of G.S. 156-71, 156-75, 156-83, 156-94, 156-97, 156-98, 156-99 and 156-103 shall apply to all drainage districts which shall hereafter be organized, and also to all districts where proceedings for the organization thereof have been instituted and are now pending and where the bonds have not been actually issued, sold, and delivered to the purchaser thereof. If it shall be necessary to amend or reform any of the pleadings or orders made by the court or any action taken by the board of drainage commissioners in any drainage proceedings instituted and pending before March 6, 1923, full authority is granted to make any such amendments, to the end that the said drainage proceedings shall conform with the provisions hereof. (1923, c. 217, s. 9; C.S., s. 5360(a).)

**Local Modification.** — *Hyde*: 1923, c. 217, s. 10; C.S., s. 5360(a).

### § 156-105. Assessment lien; collection; sale of land.

The assessments shall constitute a first and paramount lien, second only to State and county taxes, upon the lands assessed for the payment of the bonds and interest thereon as they become due, and shall be collected in the same manner and by the same officers as the State and county taxes are collected. The assessments shall be due and payable on the first Monday in September each year, and if the same shall not be paid in full by the thirty-first day of December following, it shall be the duty of the sheriff or tax collector to sell the lands so delinquent. The sale of lands for failure to pay such assessments shall be made at the courthouse door of the county in which the lands are situated, between the hours of 10 o'clock in the forenoon and four o'clock in the afternoon of any date except Sunday or another legal holiday, which may be designated by the board of drainage commissioners. After any such sale date has been designated by the board of drainage commissioners, if for any necessary cause the sale cannot be made on that date, the sale may be continued from day to day for not exceeding four days, or the lands may be readvertised and sold on any day which the board of drainage commissioners may or shall designate during the same hours and without any order being obtained therefor during the same calendar year. Nothing in this section shall be construed to require any order from any court for any sale or resale held hereunder. The existing general tax law in force when sales are made for delinquent assessments shall have application in redeeming lands so sold; and in all other respects, except as herein or otherwise modified or amended, the existing law as to the collection of State and county taxes shall apply to the collection of such drainage assessments. No bid at any sale shall be received unless sufficient in amount to discharge all the drainage assessments and other charges due by

the delinquent lands or owner thereof, together with all costs and expenses of sale. If no sufficient bid be received, the board of drainage commissioners of the district shall be deemed the purchaser in its corporate capacity at a sum sufficient to pay all assessments which are due and costs as above stated, and shall be entitled to receive a certificate of purchase and deed in the manner provided by law for purchasers at tax sales. The board of drainage commissioners shall only be required to pay to the sheriff the costs and expenses of sale before receiving a certificate of purchase. The board of drainage commissioners of the district in their corporate capacity shall be in like position and have the same rights and be subject to the same duties as the purchaser of lands at any tax sale under the general law. If the board of drainage commissioners shall have been the purchaser of lands so sold, the amount paid in redemption by the owner, or any person having an estate therein or lien thereon, shall include the sum bid therefor plus the penalty. The board of drainage commissioners shall pay to the sheriff or tax collector the amount representing their bid at the sale of said lands before they shall be entitled to receive a deed therefor, which the sheriff shall pay to the treasurer of the drainage district in the same manner as other funds received by him. The board of drainage commissioners, after acquiring a deed for said lands, may hold the same as an asset of the district, and shall be liable for the payment of all drainage assessments and State and county taxes accruing after the sale at which the district was a bidder, and in all respects be deemed the owner of said lands and subject to the same privileges and liabilities as any other landowner, including the right to convey the said lands for a consideration and pay the proceeds of said sale to the treasurer of the district, which may be distributed by the drainage commissioners for the benefit of the district in the same manner as other district funds.

If any sheriff or tax collector failed for any reason to collect drainage assessments upon lands in any drainage districts due in 1917, or any subsequent years, and further failed to make valid sales of the lands so delinquent in the payment of such assessments, then and in such event the existing sheriff or tax collector is hereby authorized and directed to proceed to collect such unpaid drainage assessments, with interest thereon from the dates when such assessments respectively became due, and in default of payment being made he is further authorized to make sales of such lands as may be in default at any time hereafter, at the times and in the manner authorized by law as amended herein; and the purchaser at said sales shall acquire title to such lands in the manner provided by law. If the sheriff or tax collector in office at the time such assessments were in default has since died or gone out of office, the powers herein given shall be exercised by the existing sheriff or tax collector.

The 1931 amendment to this section shall have the same force and effect from and after April 13, 1931, as if it had been ratified and enacted prior to the first day of January, 1929, and no sale of drainage lands held under the provisions of section 5361 shall be deemed or declared void by reason of the fact that they may not have been held on the day specified in section 5361 of the Consolidated Statutes prior to this amendment. (1911, c. 67, s. 12; 1917, c. 152, s. 9; C.S., s. 5361; Pub. Loc. 1923, c. 88, ss. 3, 4, 5; 1931, c. 273.)

**Local Modification.** — Franklin, Hyde, Nash, Wilson: Pub. Loc. 1923, c. 88.

#### CASE NOTES

**Due Process of Law Not Denied.** — The statute under which a drainage district is formed does not deny the district due process of law by providing for the collection and security

of the assessments as other county taxes are collected, kept, etc. Commissioners of Robeson County v. Lewis, 174 N.C. 528, 94 S.E. 8 (1917).

**Assessments upon lands in a drainage district are a lien in rem** on the lands of the owner for the payment of the bonds issued by the district in accordance with the statute, the district being a geographical quasi-public corporation, and the benefits annually accruing to the advantage of successive owners. Such assessments are due and payable at stated intervals. Pate v. Banks, 178 N.C. 139, 100 S.E. 251 (1919).

The legislature intended that the assessments as shown on the assessment rolls which the board of drainage commissioners is required to prepare immediately upon the sale of the bonds become liens as they become due, affecting all of the lands on the assessment rolls, which relate to the entire district for the entire period over which the payment of the assessments is spread. Nesbit v. Kafer, 222 N.C. 48, 21 S.E.2d 903 (1942).

**And Not a Debt of the Landowner.** — The lien of the charges for drainage is not a debt of the owner of the land therein, but is a charge solely upon the land, and accrues, *pari passu*, with the benefits as they shall accrue thereafter. They are not liens until they successfully fall due, and are presumed to be paid out of the increased productiveness and other benefits as they accrue from time to time. These assessments are to be levied from time to time to pay, not the indebtedness of the owner of any tract, but to pay the bonded indebtedness of the district, in that they are exactly like bonds issued by the township, county or State for public benefits and which become liens on property in futuro only to the extent of the taxes falling due each year to pay the interest, and such part of the principal as may become due. One who purchases land in a township, county or State cannot complain that these successive tax liens will, from time to time, be collectible out of his realty. Whether he knew of the existence of such indebtedness or not makes no difference. They are not encumbrances within the sense of the warranty clause of a deed. The assessment in a drainage district to take the water off the land is simply an annual tax for that purpose. Pate v. Banks, 178 N.C. 139, 100 S.E. 251 (1919).

**And Do Not Fall Within a Warranty Against Encumbrances Until Due and Payable.** — Liens on lands within a statutory drainage district for assessment charges for its maintenance and upkeep do not fall within a warranty or covenant against encumbrances contained in a deed until they are due and

payable. Branch v. Saunders, 195 N.C. 176, 141 S.E. 583 (1928).

**Priority of Assessments over Mortgage.** — The assessments on lands for a bond issue have a prior lien to a mortgage executed thereon prior to the formation of said district. Drainage Comm'rs of Washington County Dist. No. 4 v. Eastern Home & Farm Ass'n, 165 N.C. 697, 81 S.E. 947 (1914).

**Failure to Levy Annual Assessments No Bar to Later Collection.** — This section provides that assessments shall be collected "in the same manner and by the same officers as the state and county taxes are collected," and § 105-394(3) provides that "[t]he failure to list, appraise, or assess any property for taxation or to levy any tax within the time prescribed by law" is an immaterial irregularity that does not affect the validity of the assessment; therefore, plaintiff drainage district's failure to levy annual assessments for 1974 and 1983 by the first Monday in September of those years did not bar later collection of the assessments. Northampton County Drainage Dist. No. 1 v. Bailey, 92 N.C. App. 68, 373 S.E.2d 560 (1988), *rev'd in part and aff'd in part*, 326 N.C. 742, 392 S.E.2d 352 (1990).

**The drainage assessments collected are public funds** although they are to be used solely for the purpose of paying principal and interest on drainage bonds. Wilkinson v. Boomer, 217 N.C. 217, 7 S.E.2d 491 (1940).

This and the following sections impress the moneys derived from the assessments as public money of the county, to be kept in the depository designated under the statute for such funds, although the funds in question are devoted to a particular or defined use. Commissioners of Robeson County v. Lewis, 174 N.C. 528, 94 S.E. 8 (1917).

**Remedy for Collection Is Adequate.** — It is provided by this section that drainage assessments shall be collected in the same manner as taxes are collected. Such liens may be collected by sale of the land by the sheriff, with issue of certificates of sale, with right in the holder of the certificates to foreclose in due time, or by foreclosure of the lien in a suit instituted by the district or the holder of a tax deed or certificate, in the nature of an action to foreclose a mortgage. This remedy for the collection of such assessments is adequate. Wilkinson v. Boomer, 217 N.C. 217, 7 S.E.2d 491 (1940).

**A receiver cannot intervene** in a bank's action against the board on the ground that he has the right under this section to collect payments. Board of Drainage Comm'rs v. Lafayette Southside Bank, 27 F.2d 286 (4th Cir. 1928).

### § 156-106. Assessment not collectible out of other property of delinquent.

Only the land assessed in the drainage proceeding shall be liable for the drainage tax or assessment, and no other property of the landowner shall or may be sold for said drainage tax or assessment: Provided, that this section shall not apply to any drainage bond sold and delivered prior to March 7, 1927, or to any litigation pending at that time. (1919, c. 282, s. 2; C.S., s. 5362; 1927, c. 139.)

**Local Modification.** — Cumberland, Robeson: 1927, c. 139, s. 11/2.

### § 156-107. Sheriff in good faith selling property for assessment not liable for irregularity.

The sheriff who executes upon property for the collection of drainage assessments under the provisions of this Article shall not be liable either civilly or criminally if he shall sell such property in good faith, even though such sale is irregular or for any cause illegal. (1919, c. 282, s. 4; C.S., s. 5363.)

### § 156-108. Receipt books prepared.

The clerk of the superior court in each county where one or more drainage districts have been established shall be required to have prepared annually during the month of August a form of receipt, with appropriate stubs attached and properly bound, for the drainage assessments due on each tract of land as recited in the assessment rolls. This bound book of tax receipts or bills shall be indorsed "Drainage assessments of the (here give the name of the district) for the county of \_\_\_\_\_, delivered to the sheriff or tax collector as of the first Monday in September, \_\_\_\_\_, for collection as required by law," and the same indorsement shall be printed at the top of each tax bill or blank receipt. Each tax bill or blank receipt shall contain a blank space for the name of the owner of the property, the amount of the annual drainage tax, the amount of maintenance tax, if any, and a receipt at the bottom of the same, followed by a blank line for the signature of the tax collector. This bound book of tax bills or receipts, with the blanks duly filled in, shall be delivered to the sheriff or tax collector on the first Monday of September of each year. The necessary cost of printing and binding such book of tax bills or receipts and the filling in of the same shall be a proper charge against such drainage district and shall be paid by the board of drainage commissioners. (1917, c. 152, s. 9; 1919, c. 208, s. 2; C.S., s. 5364; 1999-456, s. 59.)

**Effect of Amendments.** — Session Laws 1999-456, s. 59, effective January 1, 2000, deleted "19" from the date line in the form in this section.

#### CASE NOTES

**Stated** in *Nesbit v. Kafer*, 222 N.C. 48, 21 S.E.2d 903 (1942).

### § 156-109. Receipt books where lands in two or more counties.

Where any drainage district which has been established contains lands located in a county or counties other than the county in which the district was

established, the clerk of the superior court of the county in which the district was established shall have prepared annually during the month of August a form of tax bills or receipts, with appropriate stubs attached, covering all the lands in the drainage district located in such other county or counties, and in the form herein provided for the county in which the district has been established, and have the same substantially bound in book form. He shall also fill in the blanks of such tax receipts ready for the signature of the collector. On a page in such bound book after the tax bills or receipts there shall be appended an order directed to the sheriff or tax collector in the county in which such lands are located, which shall be in substantially the following form: State of North Carolina — County of \_\_\_\_\_. The Sheriff or Tax Collector of \_\_\_\_\_ County: This is to certify that the foregoing tax bills or blank receipts embrace the drainage assessments made on certain lands in the county of \_\_\_\_\_, which are located in and are a part of (here insert the name of the drainage district), which district was established in the county of \_\_\_\_\_. These assessments are due on the first Monday of September, \_\_\_\_\_, and must be paid and collected within the time required by law. You will make monthly settlements of your collections with the treasurer of \_\_\_\_\_ County, being the county in which the district was established, and in all other respects you will discharge your duties as sheriff or tax collector as required by law. In witness whereof, I have hereunto set my hand and official seal, this \_\_\_\_\_ day of \_\_\_\_\_;

\_\_\_\_\_  
 Clerk Superior Court \_\_\_\_\_ County.

Thereupon such drainage assessments in such county shall have the force and effect of a judgment upon the lands so assessed, as in the case of State and county taxes, and shall in all other respects be as valid assessments as those levied upon lands in the county in which the district was established. The auditor for drainage districts herein authorized shall also examine the records and accounts of the sheriff of such county. In the establishment and administration of the drainage districts the clerk of the superior court, the treasurer, and the chairman of the board of drainage commissioners shall have jurisdiction over the lands and the collection of drainage assessments in the county or counties other than the county in which the district was established to the same extent as in the county where such district was established: Provided, that in those counties which do not have a county treasurer, then the auditor provided for in this Subchapter shall perform the duties required by this section for the county treasurer. (1917, c. 152, s. 11; C.S., s. 5365; 1963, c. 767, s. 4; 1999-456, s. 59.)

**Editor's Note.** — Section 156-81.1, as enacted by Session Laws 1963, c. 767, s. 4, provided that all references in Subchapter III of this Chapter to "treasurer", "county treasurer" or "county auditor" were amended to refer exclusively to the treasurer appointed as provided in that section. Pursuant to § 156-81.1, the word "county" has been deleted preceding "treasurer"

near the beginning of the third sentence of the last paragraph of this section. However, there was no practicable method of changing the proviso at the end of this section to give effect to § 156-81.1.

**Effect of Amendments.** — Session Laws 1999-456, s. 59, effective January 1, 2000, twice deleted "19" from the date lines in the form.

**CASE NOTES**

**The first sentence of the second paragraph must be read in connection with the provisions of § 156-105** that "the assessments shall constitute a first and paramount lien, second only to State and county taxes

upon the lands assessed for the payment of bonds and interest thereon as they become due, and shall be collected in the same manner and by the same officers as State and county taxes are collected;" when so considered, it is clear

that this section is not in conflict with § 156-105, but is intended to implement collection of the assessment by the sheriff. *Nesbit v. Kafer*, 222 N.C. 48, 21 S.E.2d 903 (1942).

### § 156-110. Authority to collect arrears.

If any sheriff or tax collector was authorized to collect drainage assessments in any year prior to 1917, and failed to collect any part of such drainage assessments, and is now out of office, or is still holding the office of sheriff or tax collector, then and in such event such sheriff or tax collector, regardless of the expiration of his term of office, is hereby authorized and directed to proceed to the collection of such unpaid drainage assessments, and in default of payment being made, he is further authorized to make sales of such lands as may be in default at the times and in the manner authorized by law during the year 1917, 1918 or 1919. (1917, c. 152, s. 9; C.S., s. 5366.)

### § 156-111. Sheriff to make monthly settlements; penalty.

The sheriff or tax collector shall be required to make settlements with the treasurer on the first day of each month of all collections of drainage assessments for the preceding month, and to pay over to the treasurer the money so collected, for which the treasurer shall execute an appropriate receipt, to the end that the treasurer may have funds in hand to meet the payments of the interest and principal due upon the outstanding bonds as they mature. If any sheriff or tax collector shall fail to comply with the law for the collection of drainage assessments, or in making payments thereof to the treasurer as provided by law, he shall be guilty of a Class 1 misdemeanor and he shall likewise be liable in a civil action for all damages which may accrue either to the board of drainage commissioners or to the holder of the bonds, to either or both of whom a right of action is given. (1911, c. 67, s. 12; 1917, c. 152, s. 9; C.S., s. 5367; 1963, c. 767, s. 4; 1993, c. 539, s. 1076; 1994, Ex. Sess., c. 24, s. 14(c).)

### § 156-112. Duty of treasurer to make payment; penalty.

It shall be the duty of the treasurer, and without any previous order from the board of drainage commissioners, to provide and pay the installments of interest at the time and place as evidenced by the coupons attached to the bonds, and also to pay the annual installments of the principal due on the bonds at the time and place as evidenced by the bonds. The treasurer shall be guilty of a Class 1 misdemeanor if he shall willfully fail to make prompt payments of the interest and principal of the bonds, and he shall likewise be liable in a civil action for all damages which may accrue either to the board of drainage commissioners or to the holder of such bonds, to either or both of whom a right of action is hereby given. (1911, c. 67, s. 12; C.S., s. 5368; 1963, c. 767, s. 4; 1993, c. 539, s. 1077; 1994, Ex. Sess., c. 24, s. 14(c).)

#### CASE NOTES

**Effect of Local Act Abolishing Office of County Treasurer.** — Chapter 46, Public-Local Laws 1917, abolished the office of county treasurer of Robeson County and substituted therefor a depository and financial agent, to perform the duties of treasurer in disbursement of the county funds. The act further provided that the sheriff, as such, or ex officio treasurer, should turn over all moneys of the

county to such depository. It was held that moneys derived from assessments of a drainage district, being county funds, should be deposited, as the statute directed, with the depository lawfully designated. *Commissioners of Robeson County v. Lewis*, 174 N.C. 528, 94 S.E. 8 (1917). As to treasurers of drainage districts, see now § 156-81.1.

### § 156-113. Fees for collection and disbursement.

The fee allowed the sheriff or tax collector for collecting the drainage tax as hereinbefore prescribed shall be two percent (2%) of the amount collected, and the fee allowed the treasurer for disbursing the revenue obtained from the sale of drainage bonds shall be one percent (1%) of the amount disbursed: Provided, that no fee shall be allowed the sheriff or tax collector or treasurer for collecting or receiving the revenue obtained from the sale of the bonds hereinbefore provided for, nor for disbursing the revenue raised or paying off such bonds; provided, that where the sheriff, tax collector or treasurer is on a salary basis, the fees herein set out shall not be charged. (1911, c. 67, s. 13; C.S., s. 5369; 1925, c. 271, s. 1; 1957, c. 562; 1963, c. 767, s. 4.)

**Local Modification.** — Pitt: 1925, c. 271, s. 2.

#### CASE NOTES

**Construction of Sections in Pari Materia.** — The relevant sections of the various statutes upon the subject of the collection of assessments on lands in drainage districts by sheriffs and tax collectors and their compensation therefor, being in *pari materia*, should be construed together by the courts in ascertaining the legislative intent. *Drainage Comm'rs v. Davis of Mattamuskeet Dist.*, 182 N.C. 140, 108 S.E. 506 (1921).

**Sheriff's Compensation Restricted.** — The bringing forward of s. 13, c. 67, Public Laws 1911, in this section, providing that 2 percent shall be allowed sheriffs "for collecting the drainage assessments as hereinbefore prescribed," is a legislative construction of the prior law, and was intended to restrict the

compensation of the sheriff to 2 percent of the amount of the assessments in drainage districts collected by him, and not to allow him a commission of 5 percent as in case of taxes collected for general governmental purposes. *Drainage Comm'rs v. Davis of Mattamuskeet Dist.*, 182 N.C. 140, 108 S.E. 506 (1921).

**Compensation of Treasurer.** — This section, dealing with the compensation to be allowed the county treasurer (now the treasurer of the drainage district) for disbursing the revenue obtained from the sale of the bonds of a drainage district provides but one compensation for all services. *Board of Drainage Comm'rs v. Credle*, 182 N.C. 442, 109 S.E. 88 (1921).

### § 156-114. Conveyance of land; change in assessment roll; procedure.

(a) **Status of Land Fixed.** — The boundaries of lands as surveyed and mapped, the ownership thereof, and the classification and assessment thereof as appears in the final report and map and upon the assessment roll, shall be and remain as of the time when the district was established and the final report of the board of viewers was approved by the court. No conveyance or devise of land or devolution by inheritance after the petition has been filed or the owner thereof has been served with the original summons, either by personal service or by publication, shall affect the status or liability of such land as a part of such drainage district, except as herein provided.

(b) **Conveyance before Final Report.** — If the owner of any lands included in such district shall, after the filing of the petition, and after being served with the original summons and before the approval of the final report, convey the whole or any part of such lands, or the title thereto shall be otherwise changed, then and in such event the grantor and grantee or new owner, or either, may file a petition in an ancillary proceeding before the clerk of the superior court setting forth the facts, with a description of the lands conveyed either in part or the entire body of land, together with a description of the land excepted and not conveyed. If the grantor or grantee or new owner, in whole or in part, file such petition, the other not so joining shall be served with notice of same. The

clerk may require the petitioner to attach to the petition a map showing the boundaries of the entire body of land as it appears in the record of the proceedings, and also showing the part conveyed. If the ownership of such land has been changed by devise or inheritance, or any joint ownership has been changed by partition, such new owner may file a petition as herein provided. Such petition shall conclude with a prayer that the grantee or new owner be made a party to the proceeding. The court after a hearing may make the grantee or new owner a party to the drainage proceeding and shall certify to the engineer and viewers a description of the land so conveyed or held by the new owner, with directions to verify the boundaries and to classify the land to the same extent as if the grantee was the original party. Any part of such lands not so conveyed shall be and remain a part of the district.

(c) Conveyance after District Established. — After the district shall be established, the lands classified, the final report approved, and the assessment roll filed, no conveyance of any land in the district shall affect or change the existing status or liability of such land as to assessment charges or otherwise, except in the manner herein defined. When the title and ownership of any tract of land embraced in the district have been changed or vested in others by grant, devise, or inheritance, or by partition between joint owners, subsequent to the establishment of the district, the assessment roll may be amended in the following manner: The grantor and grantee, or the new owners, may file a petition with the chairman of the board of drainage commissioners alleging that the ownership of the land has changed, and the manner thereof, in whole or in part. If the whole body of land as appears in the final report or on the assessment roll has changed ownership, a general description consistent with such final report and map shall be sufficient. If the ownership of the body of land has changed only as to part thereof, the petition shall contain a description of the part thereof claimed by the new owners, and the number of acres and the classifications, or the several classes if it be in more than one class, and also a description of that part of the land the title to which remains in the original owner, with the number of acres and with the classification and the several classes if it contains more than one class of land. The petition shall so describe the land and the number of acres in each class as to that part of which the ownership has changed as to maintain the number of acres originally assessed, and the class or classes in which the same has been assessed, and the chairman of the board of drainage commissioners may require the petitioners to have the lands surveyed, and submit a map if the same shall be necessary.

(d) Duty of Chairman of Drainage Commissioners and Clerk. — The chairman of the board of drainage commissioners shall present this petition to the clerk of the superior court at any time thereafter, not later than the first Monday in July following. It shall be the duty of the clerk to examine and verify the facts set forth in the petition, and particularly to determine if the number of acres assessed and the classes thereof against the new owners added to the number of acres and the classes assessed against that part of the land, the title to which has not changed, shall equal the total number of acres and the classes so assessed as appear against such entire body of land in the final report and assessment roll. If the clerk shall be so satisfied, he shall enter an order or decree changing the original assessment roll, or the assessment roll as theretofore amended, by adding the name of the new owner with the number of acres assessed in each class, and by amending the number of acres assessed and the classes thereof against the original owner as appears on the original assessment roll or assessment roll as theretofore amended. It shall be the duty of the clerk after such order to make such changes in the assessment roll. It shall be the duty of the clerk of the superior court in making changes in the original assessment roll from time to time to observe and maintain the total

number of acres in each class, to the end that the revenue produced from the annual assessment shall not be thereby diminished. The chairman of the board of drainage commissioners, instead of presenting to the clerk of the court each petition of landowners separately, may combine a number of petitions and present the same to the court at one and the same time. The first Monday in July in each year is hereby set apart as a special day on which petitions for changing the assessment roll may be submitted, at which time the clerk shall hear all petitions not theretofore submitted.

(e) Failure of Chairman of Board to Act. — If the chairman of the board of drainage commissioners shall fail to act when any petition shall be submitted to him as herein provided, or the chairman or any member of the board shall fail to discharge any duty imposed by this section or any other provision of the general drainage law, it is hereby made the duty of the clerk of the superior court, either independently or upon the request of any landowner in the district, to cite such chairman or member to appear before him upon a certain day and show cause why he should not be removed from office, and unless good cause be shown, it shall be the duty of the clerk to remove the chairman or any member of the board of drainage commissioners and to certify his action, to the end that another member may be elected according to law. If the failure of the chairman or any member of the board of drainage commissioners to discharge such duty shall be willful, he shall be guilty of a Class 1 misdemeanor.

(f) When Owner May File Petition with Clerk. — If the grantor and grantee, or all those claiming to have acquired title to any body of land on the assessment roll and whose assessment will be affected, cannot agree upon joinder in a petition to the chairman of the board of drainage commissioners, or if the said chairman fails within a reasonable time to discharge his duty by presenting the petition to the court, then either party interested in the tract of land as it appears on the assessment roll may file a petition with the clerk of the superior court setting forth the facts as to the change in ownership and title of such land, with the description of the entire tract of land and the number of acres in each class, together with a description of that part of the land as to which the ownership has changed, with the number of acres in each class, and pray the court to order that the assessment roll be amended in accordance with the title and interest of the several owners. At the time of filing the petition a summons shall issue to the other parties interested in the tract of land to show cause, on a day certain, why the prayer of the petition should not be granted. Upon the return day the clerk of the court shall hear all the evidence, find the facts, and enter up a judgment directing the appropriate amendment to the assessment roll. It shall be the duty of the clerk to amend the assessment roll in accordance with his judgment.

(g) Effect of Change in Assessment Roll. — No judgment or amendment of the assessment roll shall be valid unless the number of acres and the classes assessed against the original and new owners shall equal the area and classification as contained in the tract of land as it appears on the original assessment roll. This petition may be presented to the court at any time, but the first Monday in July in each year is hereby designated as the day upon which all petitions for amendments to the assessment roll may be submitted. Any amendments to the assessment roll ordered after the last day of August in each year shall not become effective until the first day of September the following year, and the assessment roll as it appears on the first day of September of each year shall constitute the assessment roll to be delivered to the sheriff on the first Monday in September, and he shall collect the drainage assessments as they appear thereon without regard to any changes in title or ownership or any changes in the assessment roll made by the court after the thirty-first day of August. All amendments sought to be made to the assessment roll shall have reference to the assessment roll as it appears at the time

the amendment is sought, which shall be either the original assessment roll or as amended; but it shall be the duty of the clerk of the superior court to examine frequently the assessment roll as amended, and before the same shall be further amended, and make certain that the aggregate number of acres in each class as appeared on the original assessment roll shall not be reduced, nor the aggregate annual assessments reduced. Any amendments ordered shall be made on the assessment roll and become due in the following September, and on all subsequent assessment rolls which have not become due or collectible.

(h) Clerk to Prepare New Assessment Rolls. — It shall be the duty of the chairman and the secretary of the board of drainage commissioners of the district to render to the clerk of the court any clerical assistance involved in changes in the assessment rolls, but the primary duty and responsibility in making such amendments shall remain with the clerk of the superior court, and he shall be held liable for any error or omission which may work a loss to the district or the bondholders. If such amendments to the assessment rolls shall make necessary the preparation of new assessment rolls, the clerk of the superior court shall be required to prepare such new assessment rolls with the clerical assistance of the chairman and secretary of the board of drainage commissioners, and such new assessment rolls shall be signed by the chairman and secretary of the board of drainage commissioners and by the clerk of the superior court before delivery to the sheriff or tax collector as required upon the original assessment rolls. The original assessment rolls shall be preserved by the clerk of the court among his records for future reference.

(i) Number of Copies. — In the event it shall be necessary to prepare new assessment rolls, the clerk shall prepare four copies, one copy for the drainage record, another for the sheriff or tax collector, another for the chairman of the board of drainage commissioners, and the other for filing and preserving among the records, and which fourth copy shall never be mutilated or interlined, but shall be preserved in its original form for reference. As to all drainage districts heretofore established, the clerk of the court shall prepare an additional copy of all the original assessment rolls for the several years the lands in such districts are assessed and securely preserve the same, at least until all outstanding bonds of the district shall be paid, to the end that they may always be accessible for reference and comparison. It shall not be necessary hereafter to deliver to the sheriff or tax collector a copy of the assessment roll for the current year in which assessments are due and payable, but the copy provided for him may remain among the records of the clerk of the court for safekeeping and reference by him.

(j) Costs Determined. — As compensation to the clerk of the court for the performance of duties imposed herein, he shall be paid such sum by the board of drainage commissioners of such drainage district as they may deem fair and adequate, and the same is hereby declared a proper charge against said district, but no additional compensation shall be paid to the clerk in those counties where he receives a salary in lieu of fees. Any costs which may accrue in amendments to the assessment rolls shall be adjudged against the parties in interest, in the discretion of the clerk, and such costs shall be paid before the amendment shall become effective. As to all petitions which shall be filed and submitted to the court on the first Monday in July, no costs shall be paid or adjudged against any party in those counties where the clerk and sheriff receive a salary in lieu of fees.

(k) Chairman Represents Board. — As to all petitions filed with the chairman of the board of drainage commissioners, or as to the discharge of any duty by the chairman required of him under the general drainage law, he shall be presumed to act for the board, and the chairman shall do all things necessary to protect and maintain the interests of the drainage district. If the chairman shall be or become a landowner in the drainage district and may

desire an amendment to the assessment rolls, he may file his petition before any other member of the board, or file the same directly with the clerk of the superior court.

(l) Application of Section. — The provisions of this section shall apply to landowners in districts heretofore established and to drainage proceedings heretofore instituted to the same extent as to drainage proceedings hereafter instituted and established. (1917, c. 152, s. 4; 1919, c. 208, s. 1; C.S., s. 5370; 1993, c. 539, s. 1078; 1994, Ex. Sess., c. 24, s. 14(c).)

### § 156-115. Warranty in deed runs to purchaser who pays assessment.

Where the land assessed by drainage commissioners under the provisions of this Article has been purchased since the making of the assessment by a purchaser for value without notice under a deed of general warranty, and said purchaser pays to the sheriff the amount of said drainage assessment, which is a lien on the land purchased, then such purchaser who pays the said drainage assessment shall have a right of action against the warrantor of his title under the covenant of general warranty contained in his deed for the recovery of the amount paid. (1919, c. 282, s. 3; C.S., s. 5371.)

#### CASE NOTES

**Section Does Not Refer to Future Assessments.** — An assessment matured and due, under the decisions, would constitute “a lien on the land purchased,” but this section does not refer to future assessments not due at the time the land was purchased. *Branch v. Saunders*, 195 N.C. 176, 141 S.E. 583 (1928).

**Liens Not Within Warranty Against En-**

**cumbrances Until Due and Payable.** — Liens on lands within a statutory drainage district for assessment charges for its maintenance and upkeep do not fall within a warranty or covenant against encumbrances contained in a deed until they are due and payable. *Branch v. Saunders*, 195 N.C. 176, 141 S.E. 583 (1928).

### § 156-116. Modification of assessments.

(a) Relevy. — Where the court has confirmed an assessment for the construction of any public levee, ditch, or drain, and such assessment has been modified by the court of superior jurisdiction, but for some unforeseen cause it cannot be collected, the board of drainage commissioners shall have power to change or modify the assessment as originally confirmed to conform to the judgment of the superior court and to cover any deficit that may have been caused by the order of court or unforeseen occurrence. The relevy shall be made for the additional sum required, in the same ratio on the lands benefited as the original assessment was made.

(b) Upon Sale of Land for Assessments. — If any person, or any number of persons, claiming to have title to any tract or tracts of land subject to assessment or drainage tax shall fail to pay any annual assessment levied against such lands, and the sheriff or tax collector shall be compelled to sell such lands under the law for the purpose of making such collection, the net proceeds of such sale shall be paid to the treasurer, to be held by him and disbursed for the purpose of paying the current assessment and future annual assessments so far as the proceeds may be sufficient. When the fund in the custody of the treasurer shall be exhausted in the payment of annual assessments against such lands, or there shall not be a sufficient sum to pay the next annual assessment, the treasurer shall immediately give written notice to that effect to the chairman of the board of drainage commissioners of the district, and also to the clerk of the superior court, whereupon the board of drainage commissioners shall institute an investigation of such tract or tracts

of land to determine the market value, and if they shall find that the market value is not equal to all the future annual assessments to cover its share of installments of principal and interest on the outstanding bonds, they shall proceed, with the approval of the clerk of the superior court, to make new reassessment rolls on all the remaining lands in the district and increase the sum in sufficient sums to equal the deficit thereby created and such new assessment rolls shall constitute the future assessment rolls until changed according to law, and shall be certified to the tax collector as herein provided in lieu of the former assessment rolls. However, the tract or tracts of land which have been so sold by the tax collector shall continue on the assessment roll in the name of the new owner, but reassessed upon the new basis, and the drainage tax collected at the same time and in the same manner as other lands as long as such lands may have sufficient market value out of which to collect the annual drainage tax, and when such lands shall cease to have such value, or shall be abandoned by the person claiming title thereto, the drainage commissioners may omit the same from the assessment roll with the approval of the clerk of the superior court, but such lands may in the same manner at any time in the future be restored to the assessment rolls.

(c) Surplus Funds. — If the funds in the hands of the treasurer at any time, arising under this section or in any other manner, shall be greater than is necessary to pay the annual installments of principal and interest, or the annual cost of maintenance of the drainage works, or both, such surplus shall be held by the treasurer for future disbursement for other purposes as herein provided or subject to the order of the board of drainage commissioners.

(d) Insufficient Funds. — If there shall be any impairment or destruction of the drainage works by any unforeseen cause or occurrence not anticipated, during the period of construction by the contractor, the contractor shall nevertheless repair and complete the works according to the contract and specifications and shall be liable therefor and also his sureties on his bond; but if the contractor shall make default and if there shall be a failure to collect all resulting damages from such contractor and the sureties upon his bond, and it shall thereby be necessary to raise a greater sum of money to complete the drainage works in accordance with the plans, or if for any other unavoidable cause it shall be necessary to raise a greater sum to complete such drainage works, the board of drainage commissioners, having first obtained the approval of the clerk of the superior court, shall prepare new assessment rolls upon all the lands in the district upon the original basis of classification of benefits and increase the same in sufficient sums to equal the deficit thereby created, and the same shall constitute the new assessment rolls until changed according to law, and shall be certified to the tax collector as herein provided.

(e) Additional Bonds Issued. — If for any of the causes hereinbefore recited in this section, or for any other cause, a sum of money greater than the proceeds of sale of the drainage bonds shall become necessary to complete the drainage system, and the board of drainage commissioners shall determine that the amount to be raised is greater than can be realized from the collection of one annual assessment upon the lands in the district without imposing an undue burden upon the lands, or if it is advisable or necessary to raise the money more expeditiously, then and under such conditions additional bonds may be issued in such aggregate sum as may be necessary.

(f) Manner of Issue. — The proceedings for the issue of such additional bonds shall be substantially as follows: The board of drainage commissioners shall file their petition with the clerk of the superior court, setting forth all the facts which require the expenditure of more money and the issue of additional bonds to complete the drainage system, which shall be accompanied by the recommendation of the drainage engineer who was one of the original viewers, or some other expert drainage engineer selected by the drainage commission-

ers; whereupon the court shall issue a notice to all the owners of land within the district reciting the substance of the petition and directing each to appear before the court on a day certain, not less than 20 days after the service upon all the parties, and to show cause, if any they have, why the additional bonds should not be authorized, which notice shall be served personally on each such landowner by reading the same, and by leaving a copy, and if the same cannot be personally served, then it shall be served in the manner authorized by law. Any landowner may file an answer denying any material allegation in the petition or setting forth any valid objection to same before the return day thereof.

Upon the day when the notice is returnable, or on such day as to which the same may have been continued, the court shall proceed to hear the petition and answers. If the court shall find that the allegations of the petition are true, and that the issue of additional bonds is advisable or necessary, the court shall make an appropriate order authorizing and directing the issue of such additional bonds, fixing the amount of such issue, the date of same, the time when the interest and principal shall be payable, and all other matters necessary and appropriate in the premises. Any landowner may appeal from the order of the clerk of the superior court, and on such appeal only the issues raised in the answer shall be considered, and such appeal and the further procedure thereon shall be as prescribed in special proceedings, except as modified by this Subchapter.

After the court shall have ordered the additional issue of bonds, the further procedure as to the assessment rolls, the levying and collecting of the drainage taxes, the disbursement of the revenue therefrom for the payment of such bonds and interest thereon, and all further procedure shall be the same as required for the establishment of drainage districts. The additional bonds issued shall not exceed twenty-five percent (25%) of the total amount originally issued. The additional issue of bonds shall bear six percent (6%) interest per annum and may be made payable in 10 annual installments, or in lesser number of annual installments as nearly equal as may be, as recommended by the board of drainage commissioners and approved by the court. (1909, c. 442, s. 35; 1911, c. 67, s. 15; C.S., s. 5372; 1963, c. 767, s. 4.)

#### CASE NOTES

**The disposition of funds of a drainage district is a matter of statutory regulation** in North Carolina. *In re Perquimans County Drainage Dist. No. Four*, 254 N.C. 155, 118 S.E.2d 431 (1961).

**Distribution of Surplus to Owners.** — Where a drainage district of a county has assessed the property owners therein for improvements, and after completing the same there is a surplus in the hands of the county treasurer, the board of drainage commissioners, upon the exercise of a sound discretion and in good faith, may determine that the fund on hand is not necessary for further disbursements for the benefit of the district, according to the plan adopted, and may distribute the same proportionately among those assessed in accordance with law, especially when such owners have thereto agreed. *Foil v. Board of Drainage Comm'rs*, 192 N.C. 652, 135 S.E. 781 (1926).

**Transaction Held Invalid Under Public-**

**Local Law.** — Where, under the provisions of a public-local law, a drainage district could lend its money derived from its assessments until required for use in payment of the principal and interest on its bonds maturing serially for a period of 10 years, and the statute provided for a depository for these funds, the drainage commissioners could not contract with a different bank to deposit the funds there, in consideration of such bank buying at par a certain issue of such bonds that could not otherwise have been sold, except below par; nor could the transaction, contemplating a period of 10 years, be construed as a loan to the bank as authorized by the statute. Regarded either as a deposit of the funds or a loan thereof, the transaction was void. *Commissioners of Robeson County v. Lewis*, 174 N.C. 528, 94 S.E. 8 (1917).

**Cited in** *Robeson County Drainage Dist. No. 4 v. Bullard*, 229 N.C. 633, 50 S.E.2d 742 (1948).

### § 156-117. Subdistricts formed.

Subdistricts may be formed by owners of land in main districts theretofore established in the manner provided for the organization of main districts. Such subdistricts shall have the right to use the ditches or canals of the main districts for outlets. The formation of subdistricts shall not operate to release the lands in any subdistrict from the payment of any assessment or levy made prior to the formation of such subdistricts, nor from any assessment which may thereafter be made for the completion and maintenance of the canals in main districts, or for the payment of the principal and interest on any indebtedness incurred by the main district, nor shall it give the subdistrict any claim on the funds of such main district for its local use. It shall be the duty of the drainage commissioners of the main district to control all matters pertaining to the main district drainage. Drainage commissioners for the subdistricts shall have authority and control over all matters pertaining to drainage within their respective subdistricts, except such work as belongs exclusively to the main district. (1917, c. 152, s. 8; C.S., s. 5373.)

§§ 156-118 through 156-120: Repealed by Session Laws 1961, c. 614, s. 11.

### § 156-121. Redress to dissatisfied landowners.

Anyone owning land which has been reclassified by the board of viewers who is dissatisfied with their classification shall have the same redress as has heretofore been provided where divisions of classification have been made by a petition to the clerk or otherwise. (1923, c. 231, s. 4; C.S., s. 5373(d).)

### § 156-122. Increase to extinguish debt.

If in the opinion of the board of drainage commissioners it would help the sale of the maintenance or improvement bonds, or they would deem it necessary under the provision of G.S. 156-101, they may, with the approval of the clerk of the superior court, add to the amount estimated by the board of viewers a sufficient amount to pay off all outstanding obligations of the district, leaving this their only bond issue. (1923, c. 231, s. 5; C.S., s. 5373(e).)

### § 156-123. Proceedings as for original bond issue.

The compensation of the board of viewers and their assistants, together with all other expenses in connection with this bond issue, shall be paid in the same manner, the duties and power of the clerk, and the duties and power of the board of drainage commissioners, the bonds shall be advertised and sold, divided into such annual installments, bear such a rate of interest, the landowners shall be given the same notices and the same rights to pay cash, the contract shall be let and supervised, and contractor paid the same, as if this was the original bond issue. (1923, c. 231, s. 6; C.S., s. 5373(f).)

#### CASE NOTES

As to effect of this section and former § 156-118 or § 156-92, see *In re Perquimans County Drainage Dist. No. Four*, 254 N.C. 155, 118 S.E.2d 431 (1961), decided prior to the repeal of §§ 156-118 through 156-120.

**§ 156-124. No drainage assessments for original object may be levied on property when once paid in full.**

Whenever any assessment has been made or may be made by any drainage district formed under the laws of the State of North Carolina upon any lands in said district, either for construction or maintenance of its system of drainage or for any other purpose, and the particular assessment made against any particular piece of property has been paid or shall be hereafter paid in full, then and in that event no other or further assessment may be made upon said land for the purpose of providing money for the purpose for which the original assessment was made. (1933, c. 504; 1935, c. 469, s. 5.)

**Local Modification.** — Mecklenburg: 1933, c. 504; 1935, c. 469.

**CASE NOTES**

**This section does not apply to bonds issued prior to its effective date,** or affect the right of the holders of such bonds under prescribed conditions to require the levying and collection of special assessments for the purpose of paying the bonds. *Board of Comm'rs v. Gaines*, 221 N.C. 324, 20 S.E.2d 377 (1942).

**Additional Assessments to Pay Judgment Rendered Prior to Effective Date.** —

This section does not affect the liability of lands within a drainage district for additional assessments necessary to pay a judgment against the district rendered prior to the effective date of this section for improvements theretofore made by the district. *Virginia-Carolina Joint Stock Land Bank v. Watt*, 207 N.C. 577, 178 S.E. 228 (1935).

**§ 156-124.1:** Repealed by Session Laws 1961, c. 614, s. 11.

**ARTICLE 9.**

*Adjustment of Delinquent Assessments.*

**§ 156-125. Adjustment by board of commissioners authorized.**

The board of commissioners of any drainage district may, in connection with the issuance of bonds for the purpose of refunding outstanding bonds of the district, and in addition to preparing a new assessment roll, for the payment of principal and interest of such refunding bonds, and when the bonds so refunded constitute all of the bonds of the district for which an assessment has been made against property therein, adjust the uncollected delinquent installments of the assessment made upon property in the district, for the payment of principal and interest of the bonds so refunded and for other purposes authorized by law before said bonds were refunded. The adjustment of such delinquent assessments may include reduction of the principal amount of the delinquent installments, not exceeding fifty per centum (50%) thereof, to which reduced installments shall be added interest computed thereon, at a rate not less than the rate of interest of the refunding bonds, from the date of delinquency of said installments to the date of the refunding bonds, and shall include any costs legally incurred for the collection of the same; the date of delinquency shall be deemed to be the first day of December following the date upon which each of said installments became due: Provided, however, all delinquent installments of such assessment shall be adjusted on the same basis and by the same method. (1935, c. 469, s. 1.)

### § 156-126. Extension of adjusted installments.

Upon adjustment of delinquent installments of any assessment as provided herein, the payment of all delinquent installments so adjusted may be extended over a period not exceeding the life of the issue of refunding bonds, but in no event over a period exceeding 20 years. Such extension shall be made by the preparation of assessment rolls, which shall provide for the payment of installments so adjusted in equal annual installments which shall become due annually on September 1, in accordance with the original assessment, and shall bear interest at the rate of four per centum (4%) per annum from December 1 following their due date until paid. Such assessment rolls shall be prepared and filed with the sheriff and the clerk of superior court and receipts shall be prepared and the same shall be collected in the same manner as other assessments of the district. (1935, c. 469, s. 2.)

### § 156-127. Special fund set up; distribution of collections.

The collection of assessments adjusted under this Article and of interest accrued under G.S. 156-126 shall be set aside in a fund and shall be applied as follows: One third of such collections may be used solely for operating and administrative expenses of the district, but the remaining two thirds thereof shall be reserved as additional security for the payment of the refunding bonds, or for the purchase and retirement of such refunding bonds, at prices not exceeding par and accrued interest. (1935, c. 469, s. 3.)

### § 156-128. Approval of adjustments by Local Government Commission.

Any adjustments of delinquent assessments under the provisions of this Article shall be effective only upon approval of the Local Government Commission. (1935, c. 469, s. 4.)

### § 156-129. Amount of assessments limited; reassessments regulated.

The assessments made under this Article shall in no instance, and against no piece of property, be greater in amount than that percent which the percent assessment authorized by this Article bears to the unpaid original assessment upon each piece or tract of property within the district. In no instance, either under this Article or any other law, shall any reassessment be made upon any piece of property for the purpose of providing money for the same purpose for which the original assessment was made, when the original assessment upon said property has been paid, or shall be paid prior to such general reassessment, nor to the extent that the original assessment has been paid. (1935, c. 469, s. 4(b).)

## ARTICLE 10.

### *Reports of Officers.*

### § 156-130. Drainage commissioners to make statements.

It shall be the duty of the commissioners of all drainage districts in the State of North Carolina organized under the provisions of the laws thereof to file with the clerk of the superior court in the county where such district is

organized a monthly statement or account during the course of construction of canals for the district, showing the receipts and expenditures of all funds coming into their hands belonging to such drainage district for the period of one month prior to the day on which the same is filed, and also to post a copy of such statement or account at the courthouse door in the county. After the construction of the canals has been concluded and the drainage commissioners have only to maintain the canals, said drainage commissioners shall only be required to file and post the annual statement required in G.S. 156-131. Such statement or account shall be certified by the chairman of the board of commissioners of each drainage district and shall be attested by the secretary thereof, and a copy thereof shall be filed and kept as a part of the minutes of the district. (1917, c. 72, s. 1; C.S., s. 5374; 1927, c. 98, s. 6.)

### **§ 156-131. Annual report.**

At the end of each fiscal year the board of commissioners of all drainage districts in the State of North Carolina shall file with the clerk of the superior court in the county where the district is organized a verified itemized statement of receipts and expenditures of all funds belonging to the district during the fiscal year just closed. (1917, c. 72, s. 2; C.S., s. 5375; 1957, c. 1410, s. 2.)

### **§ 156-132. Penalty for failure.**

Any board of commissioners of any drainage district in the State, and each of the members thereof, which shall fail or refuse to file the statements or accounts, as provided in G.S. 156-130 and 156-131, shall be deemed guilty of a Class 1 misdemeanor. (1917, c. 72, s. 3; C.S., s. 5376; 1957, c. 1410, s. 3; 1993, c. 539, s. 1079; 1994, Ex. Sess., c. 24, s. 14(c).)

### **§ 156-133. Auditor appointed; duties; compensation.**

The clerk of the superior court for the county where the district was organized, shall annually appoint an intelligent and competent person of sufficient experience, as auditor for each drainage district which levies current assessments or which has accumulated funds. The same person may be auditor of more than one drainage district. The auditor shall annually report to the court as to financial affairs of the drainage district. The auditor may prepare all financial reports required by the drainage law to be made to the court by the commissioners of the drainage district. The compensation of the auditor shall be fixed by the said clerk of the superior court, and shall be paid out of the general, or operating, fund of the district. (1917, c. 152, s. 10; 1919, c. 208, s. 3; C.S., s. 5377; 1959, c. 420; 1963, c. 767, s. 11.)

### **§ 156-134. Duties of the auditor.**

The auditor for the drainage district will be required to examine the assessment roll and the records and accounts of the sheriff or tax collector as to the assessment roll which went into his hands on the previous first Monday in September and for all previous years as to which the records and accounts of the sheriff or tax collector have not been audited.

The auditor shall for each of such years make a report as to each drainage district, showing the total amount of drainage assessments due for each year, the amount collected by the sheriff up to the fifteenth day of May of the following year, the names of the owners of land, and a brief description of the lands on which the drainage assessments have not been paid, and the total

amount of unpaid drainage assessments, with any further data or information which the auditor may regard as pertinent.

If the lands in the district lie in other counties, the auditor for the county in which the district was established shall also examine the records of the sheriff or tax collector for such other counties.

The auditor shall also examine the books of the treasurer for similar years, and he shall report the amount of drainage assessments paid to the treasurer by the sheriff or tax collector for each year, and the amounts paid out by the treasurer during such years, and for what purposes paid. It shall be the duty of the sheriff and treasurer to permit the auditor to examine their official books and records and to furnish all necessary information, and to assist the auditor in the discharge of his duties.

The auditor shall make a report to the board of county commissioners on or before the first Monday in July following his appointment, and he shall deliver a duplicate of such report to the chairman of the board of drainage commissioners of each drainage district established in the county.

If the sheriff has not collected all of the drainage assessments, or has not paid over all collections to the treasurer, or if the treasurer has not made disbursements of the drainage funds as required by law, or has not in his hands the funds not so disbursed by him, it shall be the duty of the auditor to so report, and to prepare two certified copies of his report, one of which shall be delivered to the judge holding a session of superior court in the county following the first Monday in July, and a copy to the district attorney of the prosecutorial district as defined in G.S. 7A-60 in which the county is located, and it shall be the duty of such district attorney to examine carefully such report and to institute such action, civil or criminal, against the sheriff or tax collector or the treasurer, as the facts contained in the report may justify, or as may be required by law. (1917, c. 152, s. 10; C.S., s. 5378; 1963, c. 767, s. 4; 1973, c. 47, s. 2; c. 108, s. 97; 1987 (Reg. Sess., 1988), c. 1037, s. 124.)

## ARTICLE 11.

### *General Provisions.*

#### **§ 156-135. Construction of drainage law.**

The provisions of this Subchapter shall be liberally construed to promote the leveeing, ditching, draining, and reclamation of wet and overflowed lands. The collection of the assessment shall not be defeated, where the proper notices have been given, by reason of any defect in the proceedings occurring prior to the order of the court confirming the final report of the viewers; but such order or orders shall be conclusive and final that all prior proceedings were regular and according to law, unless they were appealed from. If on appeal the court shall deem it just and proper to release any person or to modify his assessment or liability, it shall in no manner affect the rights and legality of any person other than the appellant, and the failure to appeal from the order of the court within the time specified shall be a waiver of any illegality in the proceedings, and the remedies provided for in this Subchapter shall exclude all other remedies. (1909, c. 442, s. 37; C.S., s. 5379.)

#### CASE NOTES

**Liberal Construction of Drainage Laws.**  
— The drainage laws apply to the whole State, and by the express provision of this section they should be liberally construed to promote the

leveeing, ditching, draining and reclamation of wet and overflowed lands. Board of Drainage Comm'rs of Parkville Drainage Dist. No. 1 v. Brett Eng'r Co., 165 N.C. 37, 80 S.E. 897 (1914).

**Provision that the collection of assessments shall not be defeated, etc., is absolutely necessary** if the public are to be protected in their purchase of the bonds put upon the market. It is to be presumed that when the court has rendered such final judgment and the bonds are issued there will be no interference with the collection of the assessments to pay

the bondholders, but that all controversies were thrashed out and settled before such final judgment. *Banks v. Lane*, 171 N.C. 505, 88 S.E. 754 (1916).

**Formation of a district is not subject to collateral attack.** *Board of Drainage Comm'rs v. Lafayette Southside Bank*, 27 F.2d 286 (4th Cir. 1928).

**§ 156-135.1. Investment of surplus funds.**

Any drainage district organized under the provisions of Subchapter III of Chapter 156 of the General Statutes and the governing authority of same is hereby authorized and empowered to invest any surplus funds or any funds not needed for the immediate use of the district in United States bonds or any securities or type of investment in which guardians, executors, administrators and others acting in a fiduciary capacity are authorized to make investments by virtue of Article 1 of Chapter 36 of the General Statutes as amended. (1951, c. 1058, s. 1.)

**Editor's Note.** — Article 1 of Chapter 36, referred to in this section, was repealed by Session Laws 1977, c. 502, s. 1. For present

provisions covering the subject matter of the repealed article, see Article 1 of Chapter 36A.

**CASE NOTES**

**Cited in** *In re Perquimans County Drainage District No. Four*, 254 N.C. 155, 118 S.E.2d 431 (1961).

**§ 156-136. Removal of officers.**

Any engineer, viewer, superintendent of construction or other person appointed under this Chapter may be removed by the court, upon petition, for corruption, negligence of duties, or other good and satisfactory cause shown. (1909, c. 442, s. 38; C.S., s. 5380.)

**§ 156-137. Local drainage laws not affected.**

This Subchapter shall not repeal or change any local drainage laws already enacted. (1909, c. 442, s. 381/2; C.S., s. 5381.)

**CASE NOTES**

**Where a special local statute for the formation and operation of a drainage district is complete in itself** in all its details, a general law expressing itself applicable to all such drainage districts in the State, adding further duties and making the failure of the

commissioners to file certain reports an indictable offense, will not be construed to apply unless special reference is made to the special local act. *State v. Gettys*, 181 N.C. 580, 107 S.E. 307 (1921).

**§ 156-138. Punishment for violating law as to drainage districts.**

If any person shall violate any of the provisions of law in reference to drainage districts as provided in this Chapter, or shall leave any log, brush, trash, or other thing where it is liable to wash into an adjacent stream and

obstruct the flow of water or cut any tree so as to fall in a stream, or place any other obstruction in a stream in a drainage district, he shall be fined not more than fifty dollars (\$50.00) or imprisoned not more than 30 days. (1905, c. 541, ss. 7, 9; Rev., s. 3378; C.S., s. 5382.)

### **§ 156-138.1. Acquisition and disposition of lands; lease to or from federal or State government or agency thereof.**

The district may acquire any lands necessary or convenient to enable it to accomplish the purposes for which the district was established. If the lands cannot be acquired by agreement as to the purchase price, then the power of eminent domain is hereby conferred and the lands may be condemned by the procedure set out in G.S. 156-67 and Chapter 40A of the General Statutes. The land so acquired may be used in a manner and for the purposes the commissioners of the district deem best. If, in the opinion of the drainage commission of the district the lands should be sold, leased or rented, the board may do so, subject to the approval of the clerk of the superior court.

The commissioners of the district may, in their discretion, convey or lease to the State or federal governments, or any of their agencies, with or without consideration, any properties, real or personal, belonging to the district, if in their opinion it is necessary to enable the district to receive State or federal funds available to the district. The terms of a conveyance or lease shall be subject to the approval of the clerk of the superior court of the county in which the district was established.

The commissioners of the district may lease from the State or federal governments any real or personal property needed by the district to enable it to efficiently operate and maintain the district for the purposes for which it was established. The terms of a lease shall be subject to the approval of the clerk of the superior court of the county in which the district was established. (1957, c. 539; 2001-487, s. 38(h).)

**Effect of Amendments.** — Session Laws 2001-487, s. 38(h), effective December 16, 2001, made stylistic changes throughout the section; in the first paragraph, substituted “any lands” for “such lands as may be” in the first sentence, deleted “and in such event” following “then” and substituted “Chapter 40A” for “Article 2, Chapter 40” in the second sentence, and substituted “the purposes the commissioners of the district

deem best” for “such purposes as the commissioners of the district may deem best” in the third sentence; substituted “may, in their discretion, convey” for “are hereby authorized and empowered, in their discretion, to convey” in the second paragraph; and in the third paragraph, substituted “may lease” for “are authorized and empowered to lease” and deleted “as may be” preceding “needed.”

### **§ 156-138.2. Meaning of “majority of resident landowners” and “owners of three fifths of land area.”**

Wherever in this Subchapter reference is made to a “majority of resident landowners” or “owners of three fifths of the land area,” such reference shall be deemed to refer only to lands alleged in a petition or adjudged by the court to be benefited by the proposed construction work. (1959, c. 1312, s. 2.)

### **§ 156-138.3. Notice.**

Unless specifically required by the provisions of this Subchapter, it is not necessary to give notice to any landowner of a motion made to, or order rendered by the clerk of the superior court or the judge of the superior court relating to the affairs of the district, financial or otherwise, except when an assessment is proposed to be made upon his land and then such notice shall be

given as is required by the provisions of this Subchapter. This provision for notice of assessment shall not apply to assessments for annual maintenance expenses, which are provided for in this Subchapter, and specifically in Article 7A and G.S. 156-92. (1961, c. 614, s. 3.)

#### CASE NOTES

**The land clause of the Constitution of North Carolina** is violated insofar as this section dispenses with notice and an opportunity to be heard before imposing maintenance assessments on landowners within the drainage district; the imposition of assessments was not a matter of mathematical computation, but rather, it involved some discretion on the part of the commissioners. *Northampton County Drainage Dist. Number One v. Bailey*, 326 N.C.

742, 392 S.E.2d 352 (1990).

**This section violates the law of the land clause** of the Constitution of North Carolina insofar as it dispenses with notice and an opportunity to be heard before imposing maintenance assessments on landowners within the drainage district. *Northampton County Drainage Dist. Number One v. Bailey*, 326 N.C. 742, 392 S.E.2d 352 (1990).

### § 156-138.4. Procedures to be followed in connection with drainage projects that involve channelization.

Every drainage project that involves channelization shall be subject to the procedures set forth in G.S. 139-47. (1971, c. 1138, s. 4.)

**Editor's Note.** — Section 139-47, referred to in this section, was repealed by Session Laws 1993, c. 391, s. 31, effective July 19, 1993.

## SUBCHAPTER IV. DRAINAGE BY COUNTIES.

### ARTICLE 12.

#### *Protection of Public Health.*

### § 156-139. Cleaning and draining of streams, etc., under supervision of governmental agencies.

When the board of commissioners of any county subject to the provisions of this Article shall, by resolution duly adopted, find as facts: (i) that the cleaning out and draining of any portion of any nonnavigable stream, creek or swamp area in such county is necessary and/or desirable to protect and promote the health of the citizens of such county, and (ii) that the agricultural benefits which the lands along such stream or area might receive from such cleaning out and draining would be so negligible as not to justify the levying of any special assessments against such lands on account thereof, it may order, provide for, and accomplish the cleaning out and draining of such portion of such stream, creek or swamp area by, through, and under the supervision and jurisdiction of, the health department, or any sanitary committee, or any drainage commission, or other governmental agency or department of such county. (1943, c. 553, s. 1.)

**Legal Periodicals.** — For comment on this section and §§ 156-140 and 156-141, see 21 N.C.L. Rev. 352 (1943).

**§ 156-140. Tax levy.**

In order to carry out and accomplish the objects and purposes of this Article, the board of commissioners of any such county may annually levy and collect a countywide tax not exceeding two cents (2¢) upon each one hundred dollars (\$100.00) in value of the taxable property in such county. (1943, c. 553, s. 2.)

**§ 156-141. Article applicable to certain counties only.**

This Article shall apply only to those counties which may have a population in excess of 100,000 persons. (1943, c. 553, s. 3.)

## Chapter 157.

### Housing Authorities and Projects.

#### Article 1.

##### Housing Authorities Law.

- Sec.
- 157-1. Title of Article.
  - 157-2. Finding and declaration of necessity.
  - 157-3. Definitions.
  - 157-4. Notice, hearing and creation of authority; cancellation of certificate of incorporation.
    - 157-4.1. Alternative organization.
    - 157-4.2. Authority budgeting and accounting systems as a part of city or county budgeting and accounting systems.
  - 157-5. Appointment, qualifications and tenure of commissioners.
  - 157-6. Duty of authority.
  - 157-7. Interested commissioners or employees.
  - 157-8. Removal of commissioners.
  - 157-9. Powers of authority.
    - 157-9.1. Moderate income.
    - 157-9.2. Additional powers.
    - 157-9.3. Mixed income projects owned or operated by authorities.
    - 157-9.4. Multi-family rental housing projects.
  - 157-10. Cooperation of authorities.
  - 157-11. Eminent domain.
  - 157-12. Acquisition of land for government.
  - 157-13. Zoning and building laws.
  - 157-14. Types of bonds authority may issue.
  - 157-15. Form and sale of bonds.
  - 157-16. Provisions of bonds, trust indentures, and mortgages.
  - 157-17. Power to mortgage when project financed with governmental aid.
    - 157-17.1. Approval of mortgages by Local Government Commission; considerations; rules and regulations.
  - 157-18. Remedies of an obligee of authority.
  - 157-19. Additional remedies conferrable by mortgage or trust indenture.
  - 157-20. Remedies cumulative.
  - 157-21. Limitations on remedies of obligee.
  - 157-22. Title obtained at foreclosure sale subject to agreement with government.
  - 157-23. Contracts with federal government.
  - 157-24. Security for funds deposited by authorities.
  - 157-25. Housing bonds, legal investments and security.
  - 157-26. Tax exemptions.
    - 157-26.1. Exemption from real estate licensure requirements.
  - 157-27. Reports.
  - 157-28. Restriction on right of eminent domain; right of appeal preserved;

#### Sec.

- investigation by Utilities Commission.
- 157-29. Rentals; tenant selections; and summary ejections.
  - 157-29.1. Fraudulent misrepresentation.
- 157-30. Creation and establishment validated.
- 157-31. Contracts, agreements, etc., validated.
- 157-32. Proceedings for issuance, etc., of bonds and notes validated.
  - 157-32.1. Other validation of creation, etc.
  - 157-32.2. Other validation of contracts, agreements, etc.
  - 157-32.3. Other validation of bonds and notes.
  - 157-32.4. Further validation of contracts, agreements, etc.
- 157-33. Notice, hearing and creation of authority for a county.
- 157-34. Commissioners and powers of authority for a county.
- 157-35. Creation of regional housing authority.
- 157-36. Commissioners of regional housing authority.
- 157-37. Powers of regional housing authority.
- 157-38. Rural housing projects.
- 157-39. Housing applications by farmers.
  - 157-39.1. Area of operation of city, county and regional housing authorities.
  - 157-39.2. Increasing area of operation of regional housing authority.
  - 157-39.3. Decreasing area of operation of regional housing authority.
  - 157-39.4. Requirements of public hearings.
  - 157-39.5. Consolidated housing authority.
  - 157-39.6. Findings required for authority to operate in municipality.
  - 157-39.7. Meetings and residence of commissioners.
  - 157-39.8. Agreement to sell as security for obligations to federal government.

#### Article 2.

##### Municipal Cooperation and Aid.

- 157-40. Finding and declaration of necessity.
- 157-41. Definitions.
- 157-42. Conveyance, lease or agreement in aid of housing project.
- 157-43. Advances and donations by the city and municipality.
- 157-44. Action of city or municipality by resolution.
- 157-45. Restrictions on exercise of right of eminent domain; duties of Utilities Commission; investigation of projects.
- 157-46. Purpose of Article.
- 157-47. Supplemental nature of Article.

**Article 3.****Eminent Domain.**

Sec.

- 157-48. Finding and declaration of necessity.  
 157-49. Housing project.  
 157-50. Eminent domain for housing projects.  
 157-51. [Repealed.]

**Article 4.****National Defense Housing Projects.**

- 157-52. Purpose of Article.  
 157-53. Definitions.  
 157-54. Rights, powers, etc., of housing authorities relative to national defense projects.  
 157-55. Cooperation with federal government; sale to same.  
 157-56. Cooperation of State public bodies in developing projects.  
 157-57. Obligations issued for projects made

Sec.

- legal investments; security for public deposits.  
 157-58. Bonds, notes, etc., issued heretofore, validated.  
 157-59. Further declaration of powers granted housing authorities.  
 157-60. Powers conferred by Article supplemental.  
 157-61 through 157-65. [Reserved.]

**Article 5.****Indian Housing Authority.**

- 157-66. Authority created.  
 157-67. Powers of Authority; applicability of certain laws; powers of Governor and Commission of Indian Affairs.  
 157-68. Commissioners of Authority.  
 157-69. Area of operation.  
 157-70. Rentals and tenant selection in accordance with § 157-29.

**ARTICLE 1.***Housing Authorities Law.***§ 157-1. Title of Article.**

This Article may be referred to as the Housing Authorities Law. (1935, c. 456, s. 1.)

**Legal Periodicals.** — For comment on this Article, see 19 N.C.L. Rev. 484 (1941).

For comment on the public purpose doctrine, see 3 Wake Forest Intra. L. Rev. 37 (1967).

For comment on eviction in public housing, see 4 Wake Forest Intra. L. Rev. 112 (1968).

For comment, "Urban Planning and Land Use Regulation: The Need for Consistency," see 14 Wake Forest L. Rev. 81 (1978).

For note, "New Developments for Federally Subsidized Housing Tenants in North Carolina," see 64 N.C.L. Rev. 1455 (1986).

**CASE NOTES**

**Constitutionality.** — This Article is a constitutional exercise of a legislative power. *Wells v. Housing Auth.*, 213 N.C. 744, 197 S.E. 693 (1938).

A housing authority created under this Article is not invested with legislative and supreme judicial powers, and therefore its creation does not violate the constitutional provision that such powers be and remain separate and distinct. *Cox v. Kinston*, 217 N.C. 391, 8 S.E.2d 252 (1940).

**Purpose of Article.** — The State cannot enact laws, and cities and towns cannot pass effective ordinances, forbidding disease, vice and crime to enter into the slums of overcrowded areas, there defeating every purpose for which civilized government exists and spreading influences detrimental to law and order; but experience has shown that this re-

sult can be more effectively brought about by the removal of physical surroundings conducive to these conditions. This is the objective of this Article and the means by which it is intended to accomplish it. *Martin v. North Carolina Hous. Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

**Slum Clearance as Public Purpose.** — "Slum clearance" to rehabilitate crowded and congested areas in cities and towns where conditions conducive to disease and public disorder exist is a public purpose, for which the legislature may create municipal corporations, and housing authorities established under this and the following sections are for such governmental purpose. *Wells v. Housing Auth.*, 213 N.C. 744, 197 S.E. 693 (1938); *In re Housing Auth.*, 233 N.C. 649, 65 S.E.2d 761 (1951).

The State does not engage in a private enterprise when it undertakes a project of slum

clearance. *Martin v. North Carolina Hous. Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

**A housing authority organized under this Article is created for a public purpose** and exercises an essential governmental function. Briefly stated, its public purpose is the elimination or rehabilitation of unsafe and unsanitary dwelling units in crowded and congested areas and the construction of housing projects to provide safe and sanitary dwelling units for rental to persons of low income. *Martin v. North Carolina Hous. Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

**Article Relates to Health and Sanitation.** — This Article, authorizing the creation of municipal housing authorities, is a statute relating to health and sanitation. *State v. Alverson*, 254 N.C. 204, 118 S.E.2d 408 (1961).

**Hearing Requirements Before Eviction.** — Hearing to be afforded tenants of public housing before determination to evict them requires: (1) timely and adequate notice detailing the reasons for a proposed termination, (2) an opportunity on the part of the tenant to confront and cross-examine adverse witnesses, (3) the right of a tenant to be represented by counsel, provided by him to delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination and generally to safeguard his interests, (4) a decision, based on evidence adduced at the hearing, in which the reasons for decision and the evidence relied on are set forth, and (5) an impartial decision maker. *Caulder v. Durham Hous. Auth.*, 433 F.2d 998 (4th Cir. 1970), cert. denied, 401 U.S. 1003, 91 S. Ct. 1228, 28 L. Ed. 2d 539 (1971).

**The public duty doctrine did not apply to the defendant Housing Authority because it was properly classified as a local government agency**, despite its existence as a municipal corporation, for the following reasons: Pursuant to § 157-4, a housing authority is created by local government; the city council and its members are appointed by the mayor; the language in several provisions within Chapter 157 clearly distinguishes between housing authorities and state agencies; § 157-26 labels housing authorities as "local government agencies" and exempts them from taxation "to the same extent as a unit of local government;" and the Housing Authorities Law which creates the North Carolina Indian Housing Authority states: "It is the intent of the General Assembly that the North Carolina Indian Housing Authority not be treated as a State agency for any purpose, but rather that it be treated as a housing authority as set out above." *Huntley v. Pandya*, 139 N.C. App. 624, 534 S.E.2d 238 (2000), cert. denied, 353 N.C. 263, 546 S.E.2d 98 (2000).

**Applied** in *Housing Auth. v. Wooten*, 257 N.C. 358, 126 S.E.2d 101 (1962); *Housing Auth. v. Farabee*, 17 N.C. App. 431, 194 S.E.2d 553 (1973).

**Cited** in *In re Housing Auth.*, 235 N.C. 463, 70 S.E.2d 500 (1952); *State ex rel. East Lenoir San. Dist. v. City of Lenoir*, 249 N.C. 96, 105 S.E.2d 411 (1958); *Redevelopment Comm'n v. Guilford County*, 1 N.C. App. 512, 162 S.E.2d 108 (1968).

## § 157-2. Finding and declaration of necessity.

(a) It is hereby declared that unsanitary or unsafe dwelling accommodations exist in urban and rural areas throughout the State and that such unsafe or unsanitary conditions arise from overcrowding and concentration of population, the obsolete and poor condition of the buildings, improper planning, excessive land coverage, lack of proper light, air and space, unsanitary design and arrangement, lack of proper sanitary facilities, and the existence of conditions which endanger life or property by fire and other causes; that in such urban and rural areas many persons of low income are forced to reside in unsanitary or unsafe dwelling accommodations; that in such urban and rural areas there is a lack of safe or sanitary dwelling accommodations available to all the inhabitants thereof and that consequently many persons of low income are forced to occupy overcrowded and congested dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens of the State and impair economic values; that these conditions cannot be remedied by the ordinary operation of private enterprise; that the clearance, replanning and reconstruction of such areas and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired; that it is in the public interest that work on such projects be

instituted as soon as possible; and that the necessity for the provisions hereinafter enacted is hereby declared as a matter of legislative determination to be in the public interest.

(b) It is hereby further declared that there is a serious shortage of decent, safe and sanitary housing in North Carolina that can be afforded by persons and families of moderate income; that it is in the best interest of the State to encourage programs to provide housing for such persons without imposing on them undue financial hardship; and that in undertaking such programs a housing authority is promoting the health, welfare and prosperity of all citizens of the State and is serving a public purpose for the benefit of the general public. (1985, c. 456, s. 2; 1938, Ex. Sess., c. 2, s. 14; 1941, c. 78, s. 2; 1987, c. 464, s. 1.)

**Legal Periodicals.** — For comment on the 1941 amendment to this section, see 19 N.C.L. Rev. 481 (1941).

For note on retaliatory evictions and housing code enforcement, see 49 N.C.L. Rev. 569 (1971).

### CASE NOTES

**Legislative Purpose.** — The legislature authorized the creation of housing authorities as a means of protecting low-income citizens from unsafe or unsanitary conditions in urban or rural areas. *Powell v. Eastern Carolina Regional Hous. Auth.*, 251 N.C. 812, 112 S.E.2d 386 (1960).

**Due Process in Eviction Procedure.** — Both governmental and individual interests are furthered by affording due process in the eviction procedure. *Caulder v. Durham Hous. Auth.*, 433 F.2d 998 (4th Cir. 1970), cert. denied, 401 U.S. 1003, 91 S. Ct. 1228, 28 L. Ed. 2d 539 (1971).

**Suit Against Party Named in Lease.** — The law of this State allows the housing authority to sue in summary ejectment the party whose name alone is on the lease. *Maxton Hous. Auth. v. McLean*, 70 N.C. App. 550, 320 S.E.2d 322 (1984), reversed on other grounds, 313 N.C. 277, 328 S.E.2d 290 (1985).

**Eviction of Tenant for Failure to Pay Rent.** — In order to evict a tenant occupying public housing for persons with low incomes for failure to pay rent as called for in the lease, there must be a finding of fault on the part of the tenant in failing to make the rental payment. Upon a showing by the Authority that the rental payment has not been made as required by the lease, it is presumed that the

failure to pay the rent is good cause for eviction. The burden there-upon shifts to the tenant to produce evidence to prove a lack of fault on his part in failing to make the rental payment. *Maxton Hous. Auth. v. McLean*, 313 N.C. 277, 328 S.E.2d 290 (1985).

**Good cause was not shown for termination of lease**, where Authority proved the failure of tenant to make rental payments and water and sewer payment, thus raising a presumption that good cause existed to terminate the lease, but by uncontroverted evidence rebutted the presumption by proving the lack of fault on her part in failing to make these payments, showing that initially, no rent was required of tenant and her two children, that the rent in question was based upon the income of husband when he moved into the apartment after marrying defendant, that tenant still had no income herself, and that husband refused to pay the rent and then lost his job. *Maxton Hous. Auth. v. McLean*, 313 N.C. 277, 328 S.E.2d 290 (1985).

**Applied** in *Housing Auth. v. Montgomery*, 55 N.C. App. 422, 286 S.E.2d 114 (1982).

**Stated** in *State v. Alverson*, 254 N.C. 204, 118 S.E.2d 408 (1961).

**Cited** in *Mallard v. Eastern Carolina Regional Hous. Auth.*, 221 N.C. 334, 20 S.E.2d 281 (1942).

## § 157-3. Definitions.

The following terms, wherever used or referred to in this Article shall have the following respective meanings, unless a different meaning clearly appears from the context:

- (1) "Authority" or "housing authority" shall mean a public body and a body corporate and politic organized in accordance with the provisions of this Article for the purposes, with the powers and subject to the restrictions hereinafter set forth.

- (2) "Bonds" shall mean any bonds, interim certificates, notes, debentures, obligations, or other evidences of indebtedness issued pursuant to this Article.
- (3) "City" shall mean any city or town having a population of more than 500 inhabitants according to the last federal census or any revision or amendment thereto.
- (4) "City clerk" and "mayor" shall mean the clerk and mayor, respectively, of the city or the officers thereof charged with the duties customarily imposed on the clerk and mayor respectively.
- (5) "Commissioner" shall mean one of the members of an authority appointed in accordance with the provisions of this Article.
- (6) "Community facilities" shall include real and personal property, and buildings and equipment for recreational or social assemblies, for educational, health or welfare purposes and necessary utilities, when designed primarily for the benefit and use of the housing authority and/or the occupants of the dwelling accommodation.
- (7) "Contract" shall mean any agreement of an authority with or for the benefit of an obligee whether contained in a resolution, trust indenture, mortgage, lease, bond or other instrument.
- (8) "Council" shall mean the legislative body, council, board of commissioners, board of trustees, or other body charged with governing the city.
- (9) "Farmers of low income" shall mean persons or families who at the time of their admission to occupancy in a dwelling of the authority:
  - a. Live under unsafe or unsanitary housing conditions;
  - b. Derive their principal income from operating or working upon a farm; and
  - c. Had an aggregate average annual net income for the three years preceding their admission that was less than the amount that shall be determined by the authority to be necessary, within its area of operation, to enable them, without financial assistance, to obtain decent, safe and sanitary housing, without overcrowding.
- (10) "Federal government" shall include the United States of America, the Federal Emergency Administration of Public Works or any agency, instrumentality, corporate or otherwise, of the United States of America.
- (11) "Government" shall include the State and federal governments and any subdivision, agency or instrumentality, corporate or otherwise, of either of them.
- (12) "Housing project" shall include all real and personal property, buildings and improvements, stores, offices, lands for farming and gardening, and community facilities acquired or constructed or to be acquired or constructed pursuant to a single plan or undertaking:
  - a. To demolish, clear, remove, alter or repair unsanitary or unsafe housing; and/or
  - b. To provide safe and sanitary dwelling accommodations for persons of low income, or moderate income, or low and moderate income; and/or
  - c. To provide safe and sanitary housing for persons of low income, through payment of rent subsidies from any source; and/or
  - d. To provide grants, loans, interest supplements and other programs of financial assistance (including rent subsidies in furtherance of a program of home ownership) to persons of low income, or moderate income, or low and moderate income, so that such persons may become owners of their own housing or rehabilitate their own housing; and/or

- e. To provide grants, loans, interest supplements and other programs of financial assistance to public or private developers of housing for persons of low income, or moderate income, or low and moderate income.

“Housing project” also includes any project that provides housing for persons of other than low or moderate income, as long as at least twenty percent (20%) of the units in the project are set aside for the exclusive use of persons of low income.

The term “housing project” may also be applied to the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, reconstruction, alteration and repair of the improvements and all other work in connection therewith.

- (13) “Mortgage” shall include deeds of trust, mortgages, building and loan contracts or other instruments conveying real or personal property as security for bonds and conferring a right to foreclose and cause a sale thereof.
- (14) “Municipality” shall mean any city, town, incorporated village or other municipality in the State.
- (15) “Obligee of the authority” or “obligee” shall include any bondholder, trustee or trustees for any bondholders, any lessor demising property to the authority used in connection with a housing project or any assignee or assignees of such lessor’s interest or any part thereof, and the United States of America, when it is a party to any contract with the authority.
- (15a) “Persons of low income” means persons in households the annual income of which, adjusted for family size, is not more than sixty percent (60%) of the local area median family income as defined by the most recent figures published by the U.S. Department of Housing and Urban Development.
- (15b) “Persons of moderate income” means persons deemed by the authority to require the assistance made available pursuant to this Chapter on account of insufficient personal or family income taking into consideration, without limitation, (i) the amount of the total income of such persons and families available for housing needs, (ii) the size of the person’s family, (iii) the cost and condition of housing facilities available, and (iv) the eligibility of such persons and families for federal housing assistance of any type predicated upon a moderate or low and moderate income basis.
- (16) “Real property” shall include lands, lands under water, structures, and any and all easements, franchises and incorporeal hereditaments and every estate and right therein, legal and equitable, including terms for years and liens by way of judgment, mortgage or otherwise.
- (17) “State” shall mean the State of North Carolina.
- (18) “Trust indenture” shall include instruments pledging the revenues of real or personal properties but not conveying such properties or conferring a right to foreclose and cause a sale thereof. (1935, c. 456, s. 3; 1938, Ex. Sess., c. 2, s. 14; 1941, c. 78, s. 2; 1943, c. 636, s. 1; 1959, cc. 321, 641, 1281; 1961, c. 200, s. 1; 1977, c. 924; 1987, c. 464, ss. 2, 3.)

**Editor’s Note.** — Session Laws 1943, c. 636, which amended this section as well as §§ 157-4, 157-10, 157-33, 157-35, 157-36 and 157-37, and added §§ 157-39.1 through 157-39.8, provided in s. 9: “The powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law. Nothing

contained in this act shall affect the term of office of any commissioner of a housing authority heretofore appointed under the housing authorities law. The enactment of this act shall not be construed to render invalid any action or proceeding had or taken for the creation or establishment of a housing authority pursuant

to laws in existence prior to the enactment of this act.”

#### CASE NOTES

**A housing authority created hereunder is a municipal corporation** created for a public governmental purpose, and such authority is invested with a governmental function. *Cox v. Kinston*, 217 N.C. 391, 8 S.E.2d 252 (1940).

**The public duty doctrine did not apply to the defendant Housing Authority because it was properly classified as a local government agency**, despite its existence as a municipal corporation, for the following reasons: Pursuant to § 157-4, a housing authority is created by local government; the city council and its members are appointed by the mayor; the language in several provisions within Chapter 157 clearly distinguishes between

housing authorities and state agencies; § 157-26 labels housing authorities as “local government agencies” and exempts them from taxation “to the same extent as a unit of local government;” and the Housing Authorities Law which creates the North Carolina Indian Housing Authority states: “It is the intent of the General Assembly that the North Carolina Indian Housing Authority not be treated as a State agency for any purpose, but rather that it be treated as a housing authority as set out above.” *Huntley v. Pandya*, 139 N.C. App. 624, 534 S.E.2d 238 (2000), cert. denied, 353 N.C. 263, 546 S.E.2d 98 (2000).

**Quoted in** *In re Housing Auth.*, 233 N.C. 649, 65 S.E.2d 761 (1951).

### § 157-4. Notice, hearing and creation of authority; cancellation of certificate of incorporation.

Any 25 residents of a city and of the area within 10 miles from the territorial boundaries thereof may file a petition with the city clerk setting forth that there is a need for an authority to function in the city and said surrounding area. Upon the filing of such a petition the city clerk shall give notice of the time, place and purposes of a public hearing at which the council will determine the need for an authority in the city and said surrounding area. Such notice shall be given at the city’s expense by publishing a notice, at least 10 days preceding the day on which the hearing is to be held, in a newspaper having a general circulation in the city and said surrounding area, or, if there be no such newspaper, by posting such notice in at least three public places within the city, at least 10 days preceding the day on which the hearing is to be held.

Upon the date fixed for said hearing held upon notice as provided herein, an opportunity to be heard shall be granted to all residents and taxpayers of the city and said surrounding area and to all other interested persons. After such a hearing, the council shall determine:

- (1) Whether insanitary or unsafe inhabited dwelling accommodations exist in the city and said surrounding area, and/or
- (2) Whether there is a lack of safe or sanitary dwelling accommodations in the city and said surrounding area available for all the inhabitants thereof.

In determining whether dwelling accommodations are unsafe or insanitary, the council shall take into consideration the following: the physical condition and age of the buildings; the degree of overcrowding; the percentage of land coverage; the light and air available to the inhabitants of such dwelling accommodations; the size and arrangement of the rooms; the sanitary facilities; and the extent to which conditions exist in such buildings which endanger life or property by fire or other causes.

If it shall determine that either or both of the above enumerated conditions exist, the council shall adopt a resolution so finding (which need not go into any detail other than the mere finding) and shall cause notice of such determination to be given to the mayor who shall thereupon appoint, as hereinafter provided, not less than five nor more than nine commissioners to act as an

authority. Said commission shall be a public body and a body corporate and politic upon the completion of the taking of the following proceedings:

The commissioners shall present to the Secretary of State an application signed by them, which shall set forth (without any detail other than the mere recital):

- (1) That a notice has been given and public hearing has been held as aforesaid, that the council made the aforesaid determination after such hearing, and that the mayor has appointed them as commissioners;
- (2) The name and official residence of each of the commissioners, together with a certified copy of the appointment evidencing their right to office, the date and place of induction into and taking oath of office, and that they desire the housing authority to become a public body and a body corporate and politic under this Article;
- (3) The term of office of each of the commissioners;
- (4) The name which is proposed for the corporation; and
- (5) The location of the principal office of the proposed corporation.

The application shall be subscribed and sworn to by each of said commissioners before an officer authorized by the laws of the State to take and certify oaths, who shall certify upon the application that he personally knows the commissioners and knows them to be the officers as asserted in the application, and that each subscribed and swore thereto in the officer's presence. The Secretary of State shall examine the application and if he finds that the name proposed for the corporation is not identical with that of a person or of any other corporation of this State or so nearly similar as to lead to confusion and uncertainty he shall receive and file it and shall record it in an appropriate book of record in his office.

When the application has been made, filed and recorded, as herein provided, the authority shall constitute a public body and a body corporate and politic under the name proposed in the application; the Secretary of State shall make and issue to the said commissioners a certificate of incorporation pursuant to this Article, under the seal of the State, and shall record the same with the application.

If the council, after a hearing as aforesaid, shall determine that neither of the above enumerated conditions exist, it shall adopt a resolution denying the petition. After three months shall have expired from the date of the denial of any such petitions, subsequent petitions may be filed as aforesaid and new hearings and determinations made thereon.

In any suit, action or proceeding involving the validity or enforcement of or relating to any contract of the authority, the authority shall be conclusively deemed to have been established in accordance with the provisions of this Article upon proof of the issuance of the aforesaid certificate by the Secretary of State. A copy of such certificate, duly certified by the Secretary of State, shall be admissible in evidence in any such suit, action or proceeding, and shall be conclusive proof of the filing and contents thereof.

The Secretary of State is authorized and empowered to revoke or to cancel a certificate of incorporation previously issued to an authority or housing authority upon filing in his office a petition and resolution of the council and a petition and resolution of the authority and its members requesting such revocation or cancellation and when the Secretary of State is satisfied that no indebtedness has been incurred or property acquired by said housing authority. (1935, c. 456, s. 4; 1943, c. 636, s. 7; 1961, c. 987; 1971, c. 362, s. 1; c. 599.)

**Local Modification.** — City of Durham: 1971, c. 575.

**Editor's Note.** — Session Laws 1943, c. 636, which amended this section as well as §§ 157-

3, 157-10, 157-33, 157-35, 157-36 and 157-37, and added §§ 157-39.1 through 157-39.8, provided in s. 9: "The powers conferred by this act shall be in addition and supplemental to the

powers conferred by any other law. Nothing contained in this act shall affect the term of office of any commissioner of a housing authority heretofore appointed under the housing authorities law. The enactment of this act shall

not be construed to render invalid any action or proceeding had or taken for the creation or establishment of a housing authority pursuant to laws in existence prior to the enactment of this act."

#### CASE NOTES

**Justification for Housing Authority to Be Determined by Municipality.** — Existence or nonexistence of facts within its corporate limits justifying the creation of a housing authority is for the determination of the municipal corporation, which duty is political and not judicial, and in proceedings to enjoin the activities of a housing authority the court does not have authority to hear evidence in regard to the existence of the facts upon which the creation of the housing authority was predicated. *Cox v. Kinston*, 217 N.C. 391, 8 S.E.2d 252 (1940).

**No Unconstitutional Delegation in Authorizing Municipality to Determine Necessity for Authority.** — The provision of this section investing each municipal corporation with the power to determine for itself the existence or nonexistence of facts necessary for the creation of a housing authority to perform a proper municipal governmental function within its limits is not an unconstitutional delegation of legislative authority. *Cox v. Kinston*, 217 N.C. 391, 8 S.E.2d 252 (1940).

**A rural housing authority duly created is a municipal corporation** created for a public purpose and realty acquired by such authority is exempt from taxation. *Mallard v. Eastern Carolina Regional Hous. Auth.*, 221 N.C. 334, 20 S.E.2d 281 (1942).

**Publication of notice is not required for**

**creation of a rural housing authority** under this section. *Mallard v. Eastern Carolina Regional Hous. Auth.*, 221 N.C. 334, 20 S.E.2d 281 (1942).

**The public duty doctrine did not apply to the defendant Housing Authority because it was properly classified as a local government agency**, despite its existence as a municipal corporation, for the following reasons: Pursuant to § 157-4, a housing authority is created by local government; the city council and its members are appointed by the mayor; the language in several provisions within Chapter 157 clearly distinguishes between housing authorities and state agencies; § 157-26 labels housing authorities as "local government agencies" and exempts them from taxation "to the same extent as a unit of local government;" and the Housing Authorities Law which creates the North Carolina Indian Housing Authority states: "It is the intent of the General Assembly that the North Carolina Indian Housing Authority not be treated as a State agency for any purpose, but rather that it be treated as a housing authority as set out above." *Huntley v. Pandya*, 139 N.C. App. 624, 534 S.E.2d 238 (2000), cert. denied, 353 N.C. 263, 546 S.E.2d 98 (2000).

**Cited in** *Sides v. Cabarrus Mem. Hosp.*, 22 N.C. App. 117, 205 S.E.2d 784 (1974).

### § 157-4.1. Alternative organization.

(a) In lieu of creating a housing authority as authorized herein, the council of any city may, if it deems wise, either designate a redevelopment commission created under the provisions of Chapter 160 of the General Statutes to exercise the powers, duties, and responsibilities of a housing authority as prescribed herein, or may itself exercise such powers, duties, and responsibilities. Any such designation shall be by passage of a resolution adopted in accordance with the procedure and pursuant to the finding specified in the first and second paragraphs of G.S. 157-4. In the event the council of any city designates itself to exercise the powers, duties, and responsibilities of a housing authority, then where any act, proceeding, or approval is required to be done, recommended, or approved both by a housing authority and by the council of the city, then the performance, recommendation, or approval thereof once by the council of the city shall be sufficient to make such performance, recommendation, or approval valid and legal. In the event the council of the city designates itself to exercise the powers, duties, and responsibilities of a housing authority, it may assign the administration of the housing programs, projects, and policies to any existing or new department of the city.

(b) The council of any city which has prior to July 1, 1969, created, or which may hereafter create, a housing authority may, in its discretion, by resolution

abolish such housing authority, such abolition to be effective on a day set in such resolution not less than 90 days after its adoption. Upon the adoption of such a resolution, the housing authority of the city is hereby authorized and directed to take such actions and to execute such documents as will carry into effect the provisions and the intent of the resolution, and as will effectively transfer its authority, responsibilities, obligations, personnel, and property, both real and personal, to the city. Any city which abolishes a housing authority pursuant to this subsection may, at any time subsequent to such abolition or concurrently therewith, exercise the authority granted by subsection (a) of this section.

On the day set in the resolution of the council:

- (1) The housing authority shall cease to exist as a body politic and corporate and as a public body;
- (2) All property, real and personal and mixed, belonging to the housing authority shall vest in, belong to, and be the property of the city;
- (3) All judgments, liens, rights of liens, and causes of action of any nature in favor of the housing authority shall remain, vest in, and inure to the benefit of the city;
- (4) All rentals, taxes, assessments, and any other funds, charges or fees, owing to the housing authority shall be owed to and collected by the city;
- (5) Any actions, suits, and proceedings, pending against, or having been instituted by the housing authority shall not be abated by such abolition, but all such actions, suits, and proceedings shall be continued and completed in the same manner as if abolition had not occurred, and the city shall be a party to all such actions, suits, and proceedings in the place and stead if the housing authority and shall pay or cause to be paid any judgments rendered against the housing authority in any such actions, suits, or proceedings, and no new process need be served in any such action, suit, or proceeding;
- (6) All obligations of the housing authority, including outstanding indebtedness, shall be assumed by the city, and all such obligations and outstanding indebtedness shall be constituted obligations and indebtedness of the city;
- (7) All ordinances, rules, regulations and policies of the housing authority shall continue in full force and effect until repealed or amended by the council of the city.

(c) Where the governing body of any municipality has in its discretion, by resolution abolished a housing authority, pursuant to subsection (b) above, the governing body of such municipality may, at any time subsequent to the passage of a resolution abolishing a housing authority, or concurrently therewith, by the passage of a resolution adopted in accordance with the procedures and pursuant to the finding specified in G.S. 157-4.1, designate an existing redevelopment commission created pursuant to Article 37 of Chapter 160 of the General Statutes, to exercise the powers, duties, and responsibilities of a housing authority. Where the governing body of any municipality designates, pursuant to this subsection, an existing redevelopment commission created pursuant to Article 37 of Chapter 160 of the General Statutes to exercise the powers, duties, and responsibilities of a housing authority, on the day set in the resolution of the governing body passed pursuant to subsection (b) of this section, or pursuant to subsection (c) of this section:

- (1) The housing authority shall cease to exist as a body politic and corporate and as a public body;
- (2) All property, real and personal and mixed, belonging to the housing authority or to the municipality as hereinabove provided in subsections (a) or (b), shall vest in, belong to, and be the property of the existing redevelopment commission of the municipality;

- (3) All judgments, liens, rights of liens, and causes of action of any nature in favor of the housing authority or in favor of the municipality as hereinabove provided in subsections (a) or (b), shall remain, vest in, and inure to the benefit of the existing redevelopment commission of the municipality;
- (4) All rentals, taxes, assessments, and any other funds, charges, or fees owing to the housing authority or owing to the municipality as hereinabove provided in subsections (a) or (b), shall be owed to and collected by the existing redevelopment commission of the municipality;
- (5) Any actions, suits, and proceedings pending against or having been instituted by the housing authority or the municipality, or to which the municipality has become a party as hereinabove provided in subsections (a) or (b), shall not be abated by such abolition but all such actions, suits, and proceedings shall be continued and completed in the same manner as if abolition had not occurred, and the existing redevelopment commission of the municipality shall be a party to all such actions, suits, and proceedings in the place and stead of the housing authority or the municipality, and shall pay or cause to be paid any judgments rendered in such actions, suits, or proceedings, and no new processes need be served in such action, suit, or proceeding;
- (6) All obligations of the housing authority or the municipality as hereinabove provided in subsections (a) or (b), including outstanding indebtedness, shall be assumed by the existing redevelopment commission of the municipality; and all such obligations and outstanding indebtedness shall be constituted obligations and indebtedness of the existing redevelopment commission of the municipality;
- (7) All ordinances, rules, regulations, and policies of the housing authority or the municipality as hereinabove provided in subsections (a) or (b), shall continue in full force and effect until repealed and amended by the existing redevelopment commission of the municipality.

(d) A redevelopment commission designated by the governing body of any municipality to exercise the powers, duties and responsibilities of a housing authority shall, when exercising the same, do so in accordance with Chapter 157 of the General Statutes. Otherwise the redevelopment commission shall continue to exercise the powers, duties and responsibilities of a redevelopment commission in accordance with Article 37 of Chapter 160 of the General Statutes. (1969, c. 1217, s. 2; 1971, c. 116, ss. 3, 4.)

**Editor's Note.** — Article 37 of Chapter 160, renumbered Article 22 of Chapter 160A by referred to in this section, was transferred and Session Laws 1973, c. 426.

### **§ 157-4.2. Authority budgeting and accounting systems as a part of city or county budgeting and accounting systems.**

The council of a city or the board of commissioners of a county may by resolution provide that the budgeting and accounting systems of the city's or county's housing authority (or, if the city's redevelopment commission is exercising the powers, duties, and responsibilities of a housing authority, the budgeting and accounting systems of the redevelopment commission) shall be an integral part of the budgeting and accounting systems of the city or county. If such a resolution is adopted:

- (1) For purposes of the Local Government Budget and Fiscal Control Act, the authority (or commission) shall not be considered a "public

authority,” as that phrase is defined in G.S. 159-7(b), but rather shall be considered a department or agency of the city or county. The operations of the authority (or commission) shall be budgeted and accounted for as if the operations were those of a public enterprise of the city or county.

- (2) The budget of the authority (or commission) shall be prepared and submitted in the same manner and according to the same procedures as are the budgets of other departments and agencies of the city or county; and the budget ordinance of the city or county shall provide for the operations of the authority (or commission).
- (3) The budget officer and finance officer of the city or county shall administer and control that portion of the city or county budget ordinance relating to the operations of the authority (or commission). (1971, c. 780, s. 37.1; 1973, c. 474, s. 29.)

### **§ 157-5. Appointment, qualifications and tenure of commissioners.**

(a) An authority shall consist of not less than five nor more than eleven commissioners appointed by the mayor and the mayor shall designate the first chair. No commissioner may be a city official. At least one of the commissioners appointed shall be a person who is directly assisted by the public housing authority. However, there shall be no requirement to appoint such a person if the authority: (i) operates less than 300 public housing units, (ii) provides reasonable notice to the resident advisory board of the opportunity for at least one person who is directly assisted by the authority to serve as a commissioner, and (iii) within a reasonable time after receipt of the notice by the resident advisory board, has not been notified of the intention of any such person to serve. The mayor shall appoint the person directly assisted by the authority unless the authority's rules require that the person be elected by other persons who are directly assisted by the authority. If the commissioner directly assisted by the public housing authority ceases to receive such assistance, the commissioner's office shall be abolished and another person who is directly assisted by the public housing authority shall be appointed by the mayor.

(b) No commissioner who is also a person directly assisted by the public housing authority shall be qualified to vote on matters affecting his or her official conduct or matters affecting his or her own individual tenancy, as distinguished from matters affecting tenants in general. No more than one third of the members of any housing authority commission shall be tenants of the authority or recipients of housing assistance through any program operated by the authority.

(c) The council may at any time by resolution or ordinance increase or decrease the membership of an authority, within the limitations herein prescribed.

(d) The mayor shall designate overlapping terms of not less than one nor more than five years for the commissioners first appointed. Thereafter, the term of office shall be five years. A commissioner shall hold office until his or her successor has been appointed and has qualified. Vacancies shall be filled for the unexpired term. A majority of the commissioners shall constitute a quorum. The mayor shall file with the city clerk a certificate of the appointment or reappointment of any commissioner and such certificate shall be conclusive evidence of the due and proper appointment of such commissioner. A commissioner shall receive no compensation for his or her services but he or she shall be entitled to the necessary expenses including traveling expenses incurred in the discharge of his or her duties.

(e) When the office of the first chair of the authority becomes vacant, the authority shall select a chair from among its members. An authority shall

select from among its members a vice-chair, and it may employ a secretary (who shall be executive director), technical experts and such other officers, agents, and employees, permanent and temporary, as it may require, and shall determine their qualifications, duties, and compensation. An authority may call upon the corporation counsel or chief law officer of the city for such legal services as it may require or it may employ its own counsel and legal staff. An authority may delegate to one or more of its agents or employees such powers or duties as it may deem proper. (1935, c. 456, s. 5; 1971, c. 362, ss. 2-5; 1981, c. 864; 1999-146, s. 1.)

**Local Modification.** — City of Charlotte: 1989 (Reg. Sess., 1990), c. 835 (Applicable to terms of office commencing on or after July 3, 1990); city of Durham: 1971, c. 575; city of

Greensboro: 1971, c. 573; city of Washington: 1993 (Reg. Sess., 1994), c. 693, s. 1; city of Wilson: 1953, c. 664.

### § 157-6. Duty of authority.

The authority shall be under a statutory duty to comply or to cause compliance strictly with all provisions of this Article and the laws of the State and in addition thereto, with each and every term, provision and covenant in any contract of the authority on its part to be kept or performed. (1935, c. 456, s. 6; 1997-455, s. 1.)

**Local Modification.** — City of Washington: 1995 (Reg. Sess., 1996), c. 615 (Reg. Sess., 1996), c. 615, s. 1; Washington

Housing Authority: 1995 (Reg. Sess., 1996), c. 615, s. 1.

### § 157-7. Interested commissioners or employees.

No commissioner or employee of an authority shall acquire any interest direct or indirect in any housing project or in any property included or planned to be included in any project, nor shall he have any interest direct or indirect in any contract or proposed contract for materials or services to be furnished or used in connection with any housing project. If any commissioner or employee of an authority owns or controls an interest direct or indirect in any property included or planned to be included in any housing project, he shall immediately disclose the same in writing to the authority and such disclosure shall be entered upon the minutes of the authority. Failure to so disclose such interest shall constitute misconduct in office. (1935, c. 456, s. 7.)

### § 157-8. Removal of commissioners.

The mayor may remove a commissioner for inefficiency or neglect of duty or misconduct in office, but only after the commissioner shall have been given a copy of the charges against him (which may be made by the mayor) at least 10 days prior to the hearing thereon and had an opportunity to be heard in person or by counsel.

Any obligee of the authority may file with the mayor written charges that the authority is violating willfully any law of the State or any term, provision or covenant in any contract to which the authority is a party. The mayor shall give each of the commissioners a copy of such charges at least 10 days prior to the hearing thereon and an opportunity to be heard in person or by counsel and shall within 15 days after receipt of such charges remove any commissioners of the authority who shall have been found to have acquiesced in any such willful violation.

A commissioner shall be deemed to have acquiesced in a willful violation by the authority of a law of this State or of any term, provision or covenant

contained in a contract to which the authority is a party, if, before a hearing is held on the charges against him, he shall not have filed a written statement with the authority of his objections to, or lack of participation in, such violation.

In the event of the removal of any commissioner, the mayor shall file in the office of the city clerk a record of the proceedings together with the charges made against the commissioners and the findings thereon. (1935, c. 456, s. 8.)

**Local Modification.** — City of Durham:  
1971, c. 575.

## § 157-9. Powers of authority.

(a) An authority shall constitute a public body and a body corporate and politic, exercising public powers, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this Article, including the following powers in addition to others herein granted:

To investigate into living, dwelling and housing conditions and into the means and methods of improving such conditions; to determine where unsafe, or insanitary dwelling or housing conditions exist; to study and make recommendations concerning the plan of any city or municipality located within its boundaries in relation to the problem of clearing, replanning and reconstruction of areas in which unsafe or insanitary dwelling or housing conditions exist, and the providing of dwelling accommodations for persons of low income, and to cooperate with any city municipal or regional planning agency; to prepare, carry out and operate housing projects; to approve, assist, and cooperate with, as its instrumentality, a nonprofit corporation in providing financing by the issuance by such nonprofit corporation's obligations (which obligations shall not be or be deemed to be indebtedness of a housing authority) for one or more housing projects, pursuant to the United States Housing Act of 1937, as amended, and applicable regulations thereunder, specifically including, but not limited to, programs to make construction and other loans to developers or owners of residential housing, and to acquire, operate or manage such a housing project, and to administer federal housing assistance subsidy payments for such projects; to provide for the construction, reconstruction, improvement, alteration or repair of any housing project or any part thereof; to take over by purchase, lease or otherwise any housing project located within its boundaries undertaken by any government, or by any city or municipality located in whole or in part within its boundaries; to manage as agent of any city or municipality located in whole or in part within its boundaries any housing project constructed or owned by such city; to act as agent for the federal government in connection with the acquisition, construction, operation and/or management of a housing project or any part thereof; to arrange with any city or municipality located in whole or in part within its boundaries or with a government for the furnishing, planning, replanning, installing, opening or closing of streets, roads, roadways, alleys, sidewalks or other places or facilities or for the acquisition by such city, municipality, or government of property, options or property rights or for the furnishing of property or services in connection with a project; to arrange with the State, its subdivisions and agencies, and any county, city or municipality of the State, to the extent that it is within the scope of each of their respective functions, (i) to cause the services customarily provided by each of them to be rendered for the benefit of such housing authority and/or the occupants of any housing projects and (ii) to provide and maintain parks and sewage, water and other facilities adjacent to or in connection with housing projects and (iii) to change the city or municipality map, to plan, replan, zone or rezone any part of the city or municipality;

to lease or rent any of the dwelling or other accommodations or any of the lands, buildings, structures or facilities embraced in any housing project and to establish and revise the rents or charges therefor; to enter upon any building or property in order to conduct investigations or to make surveys or soundings; to purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise, or otherwise any property real or personal or any interest therein from any person, firm, corporation, city, municipality, or government; to acquire by eminent domain any real property, including improvements and fixtures thereon; to sell, exchange, transfer, assign, or pledge any property real or personal or any interest therein to any person, firm, corporation, municipality, city, or government; to own, hold, clear and improve property; to insure or provide for the insurance of the property or operations of the authority against such risks as the authority may deem advisable; to procure insurance or guarantees from a federal government of the payment of any debts or parts thereof secured by mortgages made or held by the authority on any property included in any housing project; to borrow money upon its bonds, notes, debentures or other evidences of indebtedness and to secure the same by pledges of its revenues, and by mortgages upon property held or to be held by it, or in any other manner; in connection with any loan, to agree to limitations upon its right to dispose of any housing project or part thereof or to undertake additional housing projects; in connection with any loan by a government, to agree to limitations upon the exercise of any powers conferred upon the authority by this Article; to invest any funds held in reserves or sinking funds, or any funds not required for immediate disbursement, in property or securities in which savings banks may legally invest funds subject to their control; to sue and be sued; to have a seal and to alter the same at pleasure; to have perpetual succession; to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority; to make and from time to time amend and repeal bylaws, rules and regulations not inconsistent with this Article, to carry into effect the powers and purposes of the authority; to conduct examinations and investigations and to hear testimony and take proof under oath at public or private hearings on any matter material for its information; to issue subpoenas requiring the attendance of witnesses or the production of books and papers and to issue commissions for the examination of witnesses who are out of the State or unable to attend before the authority, or excused from attendance; and to make available to such agencies, boards or commissions as are charged with the duty of abating or requiring the correction of nuisances or like conditions, or of demolishing unsafe or insanitary structures within its territorial limits, its findings and recommendations with regard to any building or property where conditions exist which are dangerous to the public health, morals, safety or welfare. Any of the investigations or examinations provided for in this Article may be conducted by the authority or by a committee appointed by it, consisting of one or more commissioners, or by counsel, or by an officer or employee specially authorized by the authority to conduct it. Any commissioner, counsel for the authority, or any person designated by it to conduct an investigation or examination shall have power to administer oaths, take affidavits and issue subpoenas or commissions. An authority may exercise any or all of the powers herein conferred upon it, either generally or with respect to any specific housing project or projects, through or by an agent or agents which it may designate, including any corporation or corporations which are or shall be formed under the laws of this State, and for such purposes an authority may cause one or more corporations to be formed under the laws of this State or may acquire the capital stock of any corporation or corporations. Any corporate agent, (i) all of the stock of which shall be owned by the authority or its nominee or nominees or (ii) the board of directors of which shall be elected or

appointed by the authority or is composed of the commissioners of the authority or (iii) which is otherwise subject to the control of the authority or the governmental entity which created the authority, may to the extent permitted by law exercise any of the powers conferred upon the authority herein. In addition to all of the other powers herein conferred upon it, an authority may do all things necessary and convenient to carry out the powers expressly given in this Article. No provisions with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to an authority unless the legislature shall specifically so state.

(b) Notwithstanding anything to the contrary contained in this Article or in any other provision of law an authority may include in any contract let in connection with a project, stipulations requiring that the contractor and any subcontractors comply with requirements as to minimum wages and maximum hours of labor, and comply with any conditions which the federal government may have attached to its financial aid of the project.

(c) To the extent not inconsistent with the Constitution or statutes of this State or the United States, an authority may adopt and enforce rules governing the lawful entry of guests and visitors to its properties, including the visitors and guests of its tenants. Prior to adopting such rules, an authority shall make reasonable efforts to consult with or obtain comments from its tenants or their representatives. Persons who enter or remain on the property of an authority in violation of such rules shall be subject to prosecution as applicable under G.S. 14-159.12 or G.S. 14-159.13. (1935, c. 456, s. 9; 1939, c. 150; 1977, c. 784, s. 1; 1979, c. 690, s. 1; c. 805; 1995, c. 520, s. 2.)

#### CASE NOTES

**Authorities created pursuant to §§ 157-2, 157-4, 157-33, and 157-35 are public bodies** exercising public powers. Hence, they are sometimes called municipal corporations. *Powell v. Eastern Carolina Regional Hous. Auth.*, 251 N.C. 812, 112 S.E.2d 386 (1960).

**No Delegation of Legislative Functions.** — The fact that an administrative board or

municipal corporation is authorized to investigate and determine the existence or nonexistence of facts upon which depend the application of the law it is charged with administering is not a delegation of legislative functions. *Cox v. Kinston*, 217 N.C. 391, 8 S.E.2d 252 (1940).

**Applied** in *Housing Auth. v. Montgomery*, 55 N.C. App. 422, 286 S.E.2d 114 (1982).

### § 157-9.1. Moderate income.

(a) Whenever the words “low income” appear in this Chapter, they shall be construed to mean “low and moderate income.”

(b) This section applies only to the housing authority of the largest city in a county which has two or more cities with a population of 60,000 or over, according to the most recent decennial federal census.

(c) This section shall apply only to existing, non-federally subsidized structures.

(d) Notwithstanding the provisions of subsections (b) and (c), subsection (a) of this section applies to all counties with an area of 250 square miles or less, and a population of more than 100,000 according to the most recent decennial federal census, and applies to all cities within such counties. (1983, c. 769, s. 1; 1985 (Reg. Sess., 1986), c. 1004, s. 1.)

### § 157-9.2. Additional powers.

(a) The findings and purposes set forth in the first three paragraphs of G.S. 122A-2 and in G.S. 122A-5.4(a) are hereby restated and incorporated herein by reference, except that for purposes of incorporating such findings and purposes

herein, the phrases "North Carolina Housing Finance Agency" and "Agency" shall read "authority" and the word "Chapter" shall read "Section".

(b) Words and phrases used in this section and not otherwise defined in this Chapter shall be defined as provided in Chapter 122A of the General Statutes, except that for purposes of incorporating such definitions into this section, the phrases "North Carolina Housing Finance Agency" and "Agency" shall read "authority" and the "Chapter" shall read "Section".

(c) An authority shall have all of the powers necessary or convenient to carry out and effectuate the purposes and provisions of this section, including, without limiting the generality of the foregoing, the power:

- (1) To make or participate in the making of mortgage loans to sponsors of residential housing; provided, however, that such loans shall be made only upon the determination by the authority that mortgage loans are not otherwise available wholly or in part from public or private lenders upon equivalent terms and conditions;
- (2) To make or participate in the making of mortgage loans to persons and families of lower income and persons and families of moderate income for residential housing; provided, however, that such loans shall be made only upon the determination by the authority that mortgage loans are not otherwise available wholly or in part from public or private lenders upon equivalent terms and conditions;
- (3) To make loans to mortgage lenders on terms and conditions requiring the proceeds thereof to be used by such mortgage lenders to originate new mortgage loans to (i) sponsors of residential housing for persons and families of lower income and persons and families of moderate income and (ii) persons and families of lower income and persons and families of moderate income for residential housing. The loans to mortgage lenders and the loans to be made by such mortgage lenders shall be made on such applicable terms and conditions as are set forth in rules and regulations of the authority or otherwise established by the authority; provided, however, that loans shall be made by such mortgage lenders only upon the determination by the authority that such financing is not otherwise available, wholly or in part, from public or private lenders upon equivalent terms and conditions;
- (4) To collect and pay reasonable fees and charges in connection with making, purchasing and servicing of its loans, notes, bonds, commitments and other evidences of indebtedness; and
- (5) To borrow money to carry out and effectuate its corporate purposes and to issue its obligations as evidence of any such borrowing.

(d) Notwithstanding the provisions of G.S. 157-17.1, the approval of the Local Government Commission shall not be necessary for the issuance of bonds or the incurrence of indebtedness pursuant to this section, and the provisions of the Local Government Finance Act shall not be applicable with respect to bonds issued or indebtedness incurred pursuant to this section. Provided further that notwithstanding any other provision of State law or local ordinance, the approval of the governing body of the county or city in which the housing authority is located shall be necessary for the issuance of bonds or the incurrence of indebtedness pursuant to this section.

(e) This section applies only to housing authorities in any county with an area of 250 square miles or less and a population of more than 100,000 according to the most recent decennial federal census, and applies to all housing authorities of all cities within such counties.

(f) Not later than 30 days prior to making its determination, pursuant to subsections (c)(1), (2) or (3) of this section, that mortgage loans are not otherwise available wholly or in part from public or private lenders upon equivalent terms and conditions, an authority shall give written notice of a

proposed financing, including the proposed terms and conditions of the mortgage loans to be made, to the North Carolina Housing Finance Agency. Within 20 days following receipt of such notice, the North Carolina Housing Finance Agency shall respond, in writing, to the authority, and provide the authority with any terms and conditions of mortgage loans which the Agency can make available and which the Agency believes are reasonably relevant to said determination. (1987, c. 423, s. 1.)

### § 157-9.3. Mixed income projects owned or operated by authorities.

If an authority is the owner or operator of a housing project that includes units for persons of other than low or moderate income, the operating expenses of that project (or of all such projects, together, owned or operated by the authority) shall be met entirely from rents from the project (or projects) together with any rent subsidies provided to low income tenants in the project (or projects). No rent subsidy may be provided to any tenant who is not a person of low income, and no rent subsidy may be paid from bond proceeds. (1987, c. 464, s. 4.)

### § 157-9.4. Multi-family rental housing projects.

(a) If an authority owns, operates, or provides financial assistance to a multi-family rental housing project, at least twenty percent (20%) of the units in the project shall be set aside for the exclusive use of persons of low income. An authority may group projects being developed concurrently in order to meet the requirement of this subsection.

(b) If an authority provides financial assistance to a multi-family rental housing project, the authority shall establish, as a condition of the assistance, requirements and procedures that insure that all units initially set aside for the exclusive use of persons of low income continue to be so used for at least 15 years after the initial date on which at least fifty percent (50%) of the units in the project are occupied. (1987, c. 464, s. 4.1.)

### § 157-10. Cooperation of authorities.

Any two or more authorities may join or cooperate with one another in the exercise, either jointly or otherwise, of any or all of their powers for the purpose of financing (including the issuance of bonds, notes or other obligations and giving security therefor), planning, undertaking, owning, constructing, operating or contracting with respect to a housing project or projects located within the boundaries of any one or more of said authorities. For such purpose an authority may by resolution prescribe and authorize any other housing authority or authorities, so joining or cooperating with it, to act on behalf with respect to any or all of such powers. Any authorities joining or cooperating with one another may by resolutions appoint from among the commissioners of such authorities an executive committee with full power to act on behalf of such authorities with respect to any or all of their powers, as prescribed by resolutions of such authorities. (1935, c. 456, s. 10; 1943, c. 636, s. 2.)

**Editor's Note.** — Session Laws 1943, c. 636, which amended this section as well as §§ 157-3, 157-4, 157-33, 157-35, 157-36 and 157-37, and added §§ 157-39.2 through 157-39.8, provided in s. 9: "The powers conferred by this act shall be in addition and supplemental to the

powers conferred by any other law. Nothing contained in this act shall affect the term of office of any commissioner of a housing authority heretofore appointed under the housing authorities law. The enactment of this act shall not be construed to render invalid any action or

proceeding had or taken for the creation or establishment of a housing authority pursuant to laws in existence prior to the enactment of this act.”

### § 157-11. Eminent domain.

The authority shall have the right to acquire by eminent domain any real property, including fixtures and improvements, which it may deem necessary to carry out the purposes of this Article after the adoption by it of a resolution declaring that the acquisition of the property described therein is in the public interest and necessary for public use. The authority may exercise the power of eminent domain pursuant to the provisions of Chapter 40A.

Property already devoted to a public use may be acquired, provided, that no property belonging to any city or municipality or to any government may be acquired without its consent and that no property belonging to a public utility corporation may be acquired without the approval of the commission or other officer or tribunal, if any there be, having regulatory power over such corporation. (1935, c. 456, s. 11; 1981, c. 919, s. 25.)

**Cross References.** — As to exercise of eminent domain for housing projects generally, see § 157-48, et seq.

**Legal Periodicals.** — For article urging

revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

#### CASE NOTES

**A housing authority has wide discretion in the selection and location of a site for a housing project.** It is not required to select a site in a slum area as the site for a low-rent housing project; and the fact that a few isolated properties in an area to be taken and dismantled are above the average standard of slum properties, or that some few desirable homes would be taken, does not affect the public

character of the condemnation proceeding. *Martin v. North Carolina Hous. Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

**As to adoption of proper resolution as prerequisite to exercise of eminent domain,** see *In re Housing Auth.*, 233 N.C. 649, 65 S.E.2d 761 (1951).

**Applied** in *Housing Auth. v. Montgomery*, 55 N.C. App. 422, 286 S.E.2d 114 (1982).

### § 157-12. Acquisition of land for government.

The authority may acquire by purchase or by the exercise of its power of eminent domain, as aforesaid, any property real or personal for any housing project being constructed or operated by a government. The authority upon such terms and conditions, with or without consideration, as it shall determine, may convey title or deliver possession of such property so acquired or purchased to such government for use in connection with such housing project. (1935, c. 456, s. 12.)

### § 157-13. Zoning and building laws.

All housing projects of an authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the housing project is situated. (1935, c. 456, s. 13.)

**Legal Periodicals.** — For article, “Zoning for Direct Social Control,” see 1982 *Duke L.J.* 761.

## CASE NOTES

**A town council may not violate at will the regulations it has established for its own procedure;** it must comply with the provisions of the applicable ordinance. This requirement is necessary in order to accord due process and equal protection to applicants and to refute charges that any denial is an arbitrary

discrimination against the property owner. *Piney Mt. Neighborhood Ass'n v. Town of Chapel Hill*, 63 N.C. App. 244, 304 S.E.2d 251 (1983).

**Applied** in *Philbrook v. Chapel Hill Hous. Auth.*, 269 N.C. 598, 153 S.E.2d 153 (1967).

### § 157-14. Types of bonds authority may issue.

An authority shall have power to issue bonds from time to time in its discretion for any of its corporate purposes. An authority shall also have power to issue or exchange refunding bonds for the purpose of paying, retiring, extending or renewing bonds previously issued by it. An authority may issue such types of bonds as it may determine, including (without limiting the generality of the foregoing) bonds on which the principal and interest are payable from income and revenues of the authority and from grants or contributions from the federal government or other source. Such income and revenues securing the bonds may be:

- (1) Exclusively the income and revenues of the housing project financed in whole or in part with the proceeds of such bonds;
- (2) Exclusively the income and revenues of certain designated housing projects, whether or not they are financed in whole or in part with the proceeds of such bonds; or
- (3) The income and revenues of the authority generally.

Any such bonds may be additionally secured by a pledge of any income or revenues of the authority, or a mortgage of any housing project, projects or other property of the authority.

Neither the commissioners of an authority nor any person executing the bonds shall be liable personally on the bonds by reason of the issuance thereof. The bonds and other obligations of an authority (and such bonds and obligations shall so state in their face) shall not be a debt of any city or municipality and neither the State nor any such city or municipality shall be liable thereon, nor in any event shall such bonds or obligations be payable out of any funds or properties other than those of said authority. The bonds shall not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation of the laws of the State. Bonds may be issued under this Article notwithstanding any debt or other limitation prescribed in any statute.

This Article without reference to other statutes of the State shall constitute full and complete authority for the authorization, issuance, delivery and sale of bonds hereunder and such authorization, issuance, delivery and sale shall not be subject to any conditions, restrictions or limitations imposed by any other law whether general, special or local. (1935, c. 456, s. 14; 1939, c. 150, s. 2.)

**Legal Periodicals.** — For symposium on municipal finance, see 1976 *Duke L.J.* 1051.

## CASE NOTES

**A city or town is not liable on the bonds of a housing authority within its territory,** as it is expressly provided that neither the State nor the city or town shall be liable, and the authority is not an agency of the city or

town so as to contravene this express statutory provision. *Wells v. Housing Auth.*, 213 N.C. 744, 197 S.E. 693 (1938).

**Quoted** in *Martin v. North Carolina Hous. Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

**§ 157-15. Form and sale of bonds.**

The bonds of the authority shall be authorized by its resolution and shall be issued in one or more series and shall bear such date or dates, mature at such time or times, not exceeding 60 years from their respective dates, bear interest at such rate or rates, be in such denominations (which may be made interchangeable), be in such form, either coupon or registered, carry such registration privileges, be executed in such manner, be payable in such medium of payment, at such place or places, and be subject to such terms of redemption (with or without premium) as such resolution or its trust indenture or mortgage may provide.

The bonds may be sold at public or private sale; provided, however, that no public sale shall be held unless notice thereof is published once at least 10 days prior to such sale in a newspaper having a general circulation in the city in which the authority is located and in a financial newspaper published in the City of New York, New York, or in the City of Chicago, Illinois. The bonds may be sold at such price or prices as the authority shall determine.

Pending the authorization, preparation, execution or delivery of definitive bonds, the authority may issue interim certificates, or other temporary obligations, to the purchaser of such bonds. Such interim certificates, or other temporary obligations, shall be in such form, contain such terms, conditions and provisions, bear such date or dates, and evidence such agreements relating to their discharge or payment or the delivery of definitive bonds as the authority may by resolution, trust indenture or mortgage determine.

In case any of the officers whose signatures appear on any bonds or coupons shall cease to be such officers before the delivery of such bonds, such signatures shall, nevertheless, be valid and sufficient for all purposes, the same as if they had remained in office until such delivery.

The authority shall have power out of any funds available therefor to purchase any bonds issued by it at a price not more than the principal amount thereof and the accrued interest; provided, however, that bonds payable exclusively from the revenues of a designated project or projects shall be purchased out of any such revenues available therefor. All funds so purchased shall be cancelled. This paragraph shall not apply to the redemption of bonds.

Any provision of any law to the contrary notwithstanding, any bonds, interim certificates, or other obligations issued pursuant to this Article shall be fully negotiable. (1935, c. 456, s. 15; 1971, c. 87, s. 1; 1977, c. 784, s. 2.)

**§ 157-16. Provisions of bonds, trust indentures, and mortgages.**

In connection with the issuance of bonds and/or the incurring of any obligation under a lease and in order to secure the payment of such bonds and/or obligations, the authority shall have power:

- (1) To pledge by resolution, trust indenture, mortgage, or other contract, all or any part of its rents, fees, or revenues.
- (2) To covenant against mortgaging all or any part of its property, real or personal, then owned or thereafter acquired, or against permitting or suffering any lien thereon.
- (3) To covenant with respect to limitations on its right to sell, lease or otherwise dispose of any housing project or any part thereof, or with respect to limitations on its right to undertake additional housing projects.
- (4) To covenant against pledging all or any part of its rents, fees and revenues to which its right then exists or the right to which may thereafter come into existence or against permitting or suffering any lien thereon.

- (5) To provide for the release of property, rents, fees and revenues from any pledge or mortgage, and to reserve rights and powers in, or the right to dispose of, property which is subject to a pledge or mortgage.
- (6) To covenant as to the bonds to be issued pursuant to any resolution, trust indenture, mortgage or other instrument and as to the issuance of such bonds in escrow or otherwise, and as to the use and disposition of the proceeds thereof.
- (7) To covenant as to what other, or additional debt, may be incurred by it.
- (8) To provide for the terms, form, registration, exchange, execution and authentication of bonds.
- (9) To provide for the replacement of lost, destroyed or mutilated bonds.
- (10) To covenant that the authority warrants the title to the premises.
- (11) To covenant as to the rents and fees to be charged, the amount (calculated as may be determined) to be raised each year or other period of time by rents, fees, and other revenues and as to the use and disposition to be made thereof.
- (12) To covenant as to the use of any or all of its property, real or personal.
- (13) To create or to authorize the creation of special funds in which there shall be segregated
  - a. The proceeds of any loan and/or grant;
  - b. All of the rents, fees and revenues of any housing project or projects or parts thereof;
  - c. Any moneys held for the payment of the costs of operation and maintenance of any such housing projects or as a reserve for the meeting of contingencies in the operation and maintenance thereof;
  - d. Any moneys held for the payment of the principal and interest on its bonds or the sums due under its leases and/or as a reserve for such payments; and
  - e. Any moneys held for any other reserves or contingencies; and to covenant as to the use and disposal of the moneys held in such funds.
- (14) To redeem the bonds, and to covenant for their redemption and to provide the terms and conditions thereof.
- (15) To covenant against extending the time for the payment of its bonds or interest thereon, directly or indirectly, by any means or in any manner.
- (16) To prescribe the procedure, if any, by which the terms of any contract with bondholders may be amended or abrogated, the amount of bonds the holders of which must consent thereto and the manner in which such consent may be given.
- (17) To covenant as to the maintenance of its property, the replacement thereof, the insurance to be carried thereon and the use and disposition of insurance moneys.
- (18) To vest in an obligee of the authority the right, in the event of the failure of the authority to observe or perform any covenant on its part to be kept or performed, to cure any such default and to advance any moneys necessary for such purpose, and the moneys so advanced may be made an additional obligation of the authority with such interest, security and priority as may be provided in any trust indenture, mortgage, lease or contract of the authority with reference thereto.
- (19) To covenant and prescribe as to the events of default and terms and conditions upon which any or all of its bonds shall become or may be declared due before maturity and as to the terms and conditions upon which such declaration and its consequences may be waived.
- (20) To covenant as to the right, liabilities, powers and duties arising upon the breach by it of any covenant, condition, or obligation.

- (21) To covenant to surrender possession of all or any part of any housing project or projects upon the happening of an event of default (as defined in the contract) and to vest in an obligee the right without judicial proceedings to take possession and to use, operate, manage and control such housing projects or any part thereof, and to collect and receive all rents, fees and revenues arising therefrom in the same manner as the authority itself might do and to dispose of the moneys collected in accordance with the agreement of the authority with such obligee.
- (22) To vest in a trustee or trustees the right to enforce any covenant made to secure, to pay, or in relation to the bonds, to provide for the powers and duties of such trustee or trustees, to limit liabilities thereof and to provide the terms and conditions upon which the trustee or trustees or the holders of bonds or any proportion of them may enforce any such covenant.
- (23) To make covenants other than in addition to the covenants herein expressly authorized, of like or different character.
- (24) To execute all instruments necessary or convenient in the exercise of the powers herein granted or in the performance of its covenants or duties, which may contain such covenants and provisions, in addition to those above specified as the government or any purchaser of the bonds of the authority may reasonably require.
- (25) To make such covenants and to do any and all such acts and things as may be necessary or convenient or desirable in order to secure its bonds, or in the absolute discretion of the authority tend to make the bonds more marketable; notwithstanding that such covenants, acts or things may not be enumerated herein; it being the intention hereof to give the authority power to do all things in the issuance of bonds, in the provisions for their security that are not inconsistent with the Constitution of the State and no consent or approval of any judge or court shall be required thereof. (1935, c. 456, s. 16; 1979, c. 690, ss. 2, 3.)

### **§ 157-17. Power to mortgage when project financed with governmental aid.**

In connection with the interim or permanent financing of any project to be permanently financed in whole or in part by a government, or the permanent financing of which is to be secured by a pledge of a government commitment for rental assistance payments, the authority shall also have the power, subject to the consent or approval of any government providing such financing or making such commitment for rental assistance payments, to mortgage all or any part of its property, real or personal, then owned or thereafter acquired, and thereby:

- (1) To vest in a government the right, upon the happening of an event of default (as defined in such mortgage), to foreclose such mortgage through judicial proceedings or through the exercise of a power of sale without judicial proceedings, so long as a government shall be the holder of any of the bonds secured by such mortgage.
- (2) To vest in a trustee or trustees the right, upon the happening of an event of default (as defined in such mortgage), to foreclose such mortgage through judicial proceedings or through the exercise of a power of sale without judicial proceedings.
- (3) To vest in other obligees the right to foreclose such mortgage by judicial proceedings.
- (4) To vest in an obligee, including a government, the right in foreclosing any mortgage as aforesaid, to foreclose such mortgage as to all or such

part or parts of the property covered thereby as such obligee (in its absolute discretion) shall elect; the institution, prosecution and conclusion of any such foreclosure proceedings and/or the sale of any such parts of the mortgaged property shall not affect in any manner or to any extent the lien of the mortgage on the parts of the mortgaged property not included in such proceedings or not sold as aforesaid. (1935, c. 456, s. 17; 1977, c. 784, s. 3.)

### **§ 157-17.1. Approval of mortgages by Local Government Commission; considerations; rules and regulations.**

(a) With the exception of mortgages under G.S. 157-17, no housing authority may execute any mortgage authorized by this Chapter without the approval of the Local Government Commission.

(b) The Local Government Commission shall consider, in any application by a housing authority for approval of a mortgage, the following issues:

- (1) The value of the property, and any other secured indebtedness upon the property;
- (2) The ability of the authority to repay the indebtedness secured by the mortgage;
- (3) Any other issues it deems necessary to insure the financial soundness of the housing authority.

(c) The Local Government Commission shall adopt rules and regulations to implement this section. (1979, c. 690, s. 5.)

### **§ 157-18. Remedies of an obligee of authority.**

An obligee of the authority shall have the right in addition to all other rights which may be conferred on such obligee subject only to any contractual restrictions binding upon such obligee:

- (1) By mandamus, suit, action or proceeding in law or equity (all of which may be joined in one action) to compel the authority, and the commissioners, officers, agents or employees thereof to perform each and every term, provision and covenant contained in any contract of the authority, and to require the carrying out of any or all covenants and agreements of the authority and the fulfillment of all duties imposed upon the authority by this Article.
- (2) By suit, action or proceeding in equity to enjoin any acts or things which may be unlawful, or the violation of any of the rights of such obligee of the authority.
- (3) By suit, action or proceeding in any court of competent jurisdiction to cause possession of any housing project or any part thereof to be surrendered to any obligee having the right to such possession pursuant to any contract of the authority. (1935, c. 456, s. 18.)

### **§ 157-19. Additional remedies conferrable by mortgage or trust indenture.**

Any authority shall have power by its trust indenture, mortgage, lease or other contract to confer upon any obligee holding or representing a specified amount in bonds, lease or other obligations the right upon the happening of an "event of default" as defined in such instrument:

- (1) By suit, action or proceeding in any court of competent jurisdiction to obtain the appointment of a receiver of any housing project of the authority or any part or parts thereof. If such receiver be appointed,

he may enter and take possession of such housing project or any part or parts thereof and operate and maintain same, and collect and receive all fees, rents, revenues, or other charges thereafter arising therefrom in the same manner as the authority itself might do and shall keep such moneys in a separate account or accounts and apply the same in accordance with the obligations of the authority as the court shall direct.

- (2) By suit, action or proceeding in any court of competent jurisdiction to require the authority and the commissioners thereof to account as if it and they were the trustees of an express trust. (1935, c. 456, s. 19.)

### **§ 157-20. Remedies cumulative.**

All the rights and remedies hereinabove conferred shall be cumulative and in addition to all other rights and remedies that may be conferred upon such obligee of the authority by law or by any contract with the authority. (1935, c. 456, s. 20.)

### **§ 157-21. Limitations on remedies of obligee.**

All property of the authority shall be exempt from levy and sale by virtue of an execution, and no execution shall issue against the same. No judgment against the authority shall be a charge or lien against its property, real or personal. The provisions of this section shall not apply to or limit the right of obligees of any mortgage of the authority provided for in G.S. 157-17, after foreclosure sale thereunder, to obtain a judgment or decree for any deficiency due on the indebtedness secured thereby and to issue execution on the credit of the authority. Such deficiency judgment or decree shall be a lien and charge upon the property of the authority, which may be levied on and sold by virtue of an execution or other judicial process for the purpose of satisfying such deficiency judgment or decree. (1935, c. 456, s. 21; 1979, c. 690, s. 4.)

### **§ 157-22. Title obtained at foreclosure sale subject to agreement with government.**

Notwithstanding anything in this Article to the contrary, any purchaser or purchasers at a sale of real or personal property of the authority whether pursuant to any foreclosure of a mortgage, pursuant to judicial process or otherwise, shall obtain title subject to any contract between the authority and a government relating to the supervision by a government of the operation and maintenance of such property and the construction of improvements thereon. (1935, c. 456, s. 22.)

### **§ 157-23. Contracts with federal government.**

In addition to the powers conferred upon the authority by other provisions of this Article, the authority is empowered to borrow money and/or accept grants from the federal government for or in aid of the construction of any housing project which such authority is authorized by this Article to undertake, to take over any land acquired by the federal government for the construction of a housing project, to take over or lease or manage any housing project constructed or owned by the federal government, and to these ends, to enter into such contracts, mortgages, trust indentures, leases or other agreements as the federal government may require including agreements that the federal government shall have the right to supervise and approve the construction, maintenance and operation of such housing project. It is the purpose and

intent of this Article to authorize every authority to do any and all things necessary to secure the financial aid and the cooperation of the federal government in the construction, maintenance and operation of any housing project which the authority is empowered by this Article to undertake. (1935, c. 456, s. 23.)

### § 157-24. Security for funds deposited by authorities.

The authority may by resolution provide that

- (1) All moneys deposited by it shall be secured by obligations of the United States or of the State of a market value equal at all times to the amount of such deposits or
- (2) By any securities in which savings banks may legally invest funds within their control or
- (3) By an undertaking with such sureties as shall be approved by the authority faithfully to keep and pay over upon the order of the authority any such deposits and agreed interest thereon, and all banks and trust companies are authorized to give any such security for such deposits. (1935, c. 456, s. 24.)

### § 157-25. Housing bonds, legal investments and security.

The State and all public officers, municipal corporations, political subdivisions, and public bodies, all banks, bankers, trust companies, savings banks and institutions, building and loan associations, savings and loan associations, investment companies and other persons carrying on a banking business, all insurance companies, insurance associations, and other persons carrying on an insurance business, and all executors, administrators, guardians, trustees and other fiduciaries may legally invest any sinking funds, moneys or other funds belonging to them or within their control in any bonds issued by a housing authority established (or hereafter established) pursuant to this Article or issued by any public housing authority or agency in the United States, when such bonds are secured by a pledge of annual contributions to be paid by the United States government or any agency thereof, or bonds which may be issued notwithstanding any other limitations of this Chapter, by a not-for-profit corporate agency of a housing authority secured by rentals payable pursuant to section 23 of the United States Housing Act of 1937, as amended, or by rental assistance payments under any other section of said act, as amended, and any such bonds shall be authorized security for all public deposits and shall be fully negotiable in this State; it being the purpose of this Article to authorize any persons, firms, corporations, associations, political subdivisions, bodies and officers, public or private, to use any funds owned or controlled by them, including (but not limited to) sinking, insurance, investment, retirement, compensation, pension and trust funds, and funds held on deposit, for the purchase of any such bonds and that any such bonds shall be authorized security for all public deposits and shall be fully negotiable in this State: Provided, however, that nothing contained in this Article shall be construed as relieving any person, firm or corporation from any duty of exercising reasonable care in selecting securities. (1935, c. 456, s. 25; 1941, c. 78, s. 3; 1971, c. 1161; 1977, c. 784, s. 4.)

### § 157-26. Tax exemptions.

An authority is a local government agency and is exempt from taxation to the same extent as a unit of local government. Property owned by an authority is exempt from taxation in accordance with Article V, § 2 of the North Carolina

Constitution. Bonds and other obligations issued by an authority or its corporate agent authorized by this Article to exercise its powers are declared to be issued for a public purpose and to be public instrumentalities. These obligations are exempt from all State, county, and municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, excluding inheritance and gift taxes, income taxes on the gain from the transfer of the obligations, and franchise taxes. The interest on the obligations is not subject to taxation as income. (1935, c. 456, s. 26; 1953, c. 907; 1973, c. 695, s. 7; 1977, c. 784, s. 5; 1995, c. 46, s. 17.)

**Legal Periodicals.** — For brief comment on the 1953 amendment to this section, see 31 N.C.L. Rev. 442 (1953).

#### CASE NOTES

**Property of Authority Exempt from Ad Valorem Taxation.** — Since a housing authority created under § 157-1, et seq. is a municipal corporation created for a public, governmental purpose, its property is exempt from State, county and municipal taxation. *Well's v. Housing Auth.*, 213 N.C. 744, 197 S.E. 693 (1938).

**Collection of Sales Tax from Housing Authority Not Constitutionally Prohibited.** — Neither the Constitution of this State nor the Constitution and laws of the United States prohibit the collection of a sales tax on purchases of tangible personal property made by a housing authority duly created, organized and existing under and by virtue of this Article. *Housing Auth. v. Johnson*, 261 N.C. 76, 134 S.E.2d 121 (1964).

**And Authority Is Not Entitled to Refund of Sales Taxes.** — A housing authority created pursuant to the provisions of this Article is a municipal corporation but is not an incorporated city or town, and is not entitled to the refund of sales taxes paid on purchases of tangible personal property pursuant to the provisions of § 105-164.14(c). *Housing Auth. v. Johnson*, 261 N.C. 76, 134 S.E.2d 121 (1964).

A municipal corporation or public agency created, organized and existing under and by virtue of the laws of this State, particularly this Article, is not a charitable organization within

the meaning of the refund provisions of § 105-164.14(b). *Housing Auth. v. Johnson*, 261 N.C. 76, 134 S.E.2d 121 (1964).

**The public duty doctrine did not apply to the defendant Housing Authority because it was properly classified as a local government agency,** despite its existence as a municipal corporation, for the following reasons: Pursuant to § 157-4, a housing authority is created by local government; the city council and its members are appointed by the mayor; the language in several provisions within Chapter 157 clearly distinguishes between housing authorities and state agencies; § 157-26 labels housing authorities as "local government agencies" and exempts them from taxation "to the same extent as a unit of local government;" and the Housing Authorities Law which creates the North Carolina Indian Housing Authority states: "It is the intent of the General Assembly that the North Carolina Indian Housing Authority not be treated as a State agency for any purpose, but rather that it be treated as a housing authority as set out above." *Huntley v. Pandya*, 139 N.C. App. 624, 534 S.E.2d 238 (2000), cert. denied, 353 N.C. 263, 546 S.E.2d 98 (2000).

**Quoted** in *Martin v. North Carolina Hous. Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

### § 157-26.1. Exemption from real estate licensure requirements.

The authority and the regular salaried employees of the authority shall be exempt from the requirements of Chapter 93A of the General Statutes as provided in G.S. 93A-2(c)(8). (1999-409, s. 2.)

### § 157-27. Reports.

The authority shall at least once a year file with the mayor of the city a report of its activities for the preceding year, and shall make any recommen-

dations with reference to any additional legislation or other action that may be necessary in order to carry out the purposes of this Article. (1935, c. 456, s. 27.)

**Local Modification.** — City of Durham:  
1971, c. 575.

### § 157-28. Restriction on right of eminent domain; right of appeal preserved; investigation by Utilities Commission.

Notwithstanding any finding of public convenience and necessity, either in general or specific, by the terms of this Article, the right of eminent domain shall not be exercised unless and until a certificate of public convenience and necessity for such project has been issued by the Utilities Commission of North Carolina, and the proceedings leading up to the issuing of such certificate of public convenience and necessity, and the right to appeal therefrom shall be as now provided by law and said rights are hereby expressly reserved to all interested parties in said proceedings. In addition to the powers now granted by law to the Utilities Commission of North Carolina, the said Utilities Commission is hereby vested with full power and authority to investigate and examine all projects set up or attempted to be set up under the provisions of this Article and determine the question of the public convenience and necessity for said project. (1935, c. 456, s. 28.)

#### CASE NOTES

**Cited in** *In re Housing Auth.*, 233 N.C. 649, 65 S.E.2d 761 (1951); *Hous. Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970); *Martin v. North Carolina* (1970).

### § 157-29. Rentals; tenant selections; and summary ejections.

(a) It is hereby declared to be the policy of this State that each housing authority shall manage and operate its housing projects in an efficient manner so as to enable it to fix the cost of dwelling accommodations for persons of low income at the lowest possible rates consistent with its providing decent, safe, and sanitary dwelling accommodations. No housing authority may construct or operate its housing projects so as to provide revenues for other activities of the city.

(b) In the operation or management of housing projects, or portions of projects, for persons of low income, an authority shall at all times observe the following duties with respect to rentals and tenant selection:

(1) It may rent or lease dwelling accommodations set aside for persons of low income only to persons who lack the amount of income that is necessary (as determined by the housing authority undertaking the project) to enable them, without financial assistance, to live in decent, safe, and sanitary dwellings, without overcrowding; and

(2) It may rent or lease dwelling accommodations to persons of low income only at rentals within the financial reach of such persons.

(c) An authority may terminate or refuse to renew a rental agreement for a serious or repeated violation of a material term of the rental agreement such as (i) failure to make payments due under the rental agreement, if such payments were properly and promptly calculated according to applicable HUD regulation, whether or not such failure was the fault of the tenant, (ii) failure to fulfill the tenant obligations set forth in 24 C.F.R. Section 966.4(f) or other applicable provisions of federal law as they may be amended from time to time,

or (iii) other good cause. Except in the case of failure to make payments due under a rental agreement, fault on the part of a tenant may be considered in determining whether good cause exists to terminate a rental agreement.

(d) The receipt or acceptance of rent by an authority, with or without knowledge of a prior default or failure by the tenant under a rental agreement, shall not constitute a waiver of that default or failure unless (i) the authority expressly agrees to such waiver in writing, or (ii) within 120 days after obtaining knowledge of the default or failure, the authority fails either to notify the tenant that a violation of the rental agreement has occurred or to exercise one of the authority's remedies for such violation.

(e) In any summary ejectment action wherein a housing authority alleges that a tenant's lease has been terminated because the tenant, a household member, or a guest has engaged in a criminal activity that threatens the health and safety of others or the peaceful enjoyment of the premises by others, or has engaged in activity involving illegal drugs, as defined in 24 C.F.R. § 966.4, the housing authority may bring an action under Article 7 of Chapter 42 of the General Statutes. (1939, c. 150; 1985, c. 741, s. 2; 1987, c. 464, s. 5; 1989, c. 272; 1995, c. 520, s. 1; 1997-473, s. 1.)

**Legal Periodicals.** — For note, "New Developments for Federally Subsidized Housing Ten-

ants in North Carolina," see 64 N.C.L. Rev. 1455 (1986).

CASE NOTES

**Preference Favoring Landowners Who Convey Property.** — Agreement of a rural housing authority giving priority in occupancy of its dwelling units to those landowners or their tenants, sharecroppers or farm wage hands who convey property to the authority, provided that they come within the definition of families of low income, is not unlawful discrimination in favor of such class. *Mallard v. East-*

*ern Carolina Regional Hous. Auth.*, 221 N.C. 334, 20 S.E.2d 281 (1942).

**When tenant's annual net income exceeds prescribed limit, he must move to other dwelling accommodations.** *Martin v. North Carolina Hous. Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

**Cited in** *Charlotte Hous. Auth. v. Patterson*, 120 N.C. App. 552, 464 S.E.2d 68 (1995).

§ 157-29.1. **Fraudulent misrepresentation.**

(a) Any person whether provider or recipient, or person representing himself as such, who willfully and knowingly and with intent to deceive makes a false statement or representation or who willfully and knowingly and with intent to deceive fails to disclose a material fact and as a result of making a false statement or representation or failing to disclose a material fact obtains, for himself or another person, attempts to obtain for himself or another person, or continues to receive housing assistance in the amount or value of not more than four hundred dollars (\$400.00) is guilty of a Class 1 misdemeanor.

(b) Any person whether provider or recipient, or person representing himself as such, who willfully and knowingly and with intent to deceive makes a false statement or representation or who willfully and knowingly and with intent to deceive fails to disclose a material fact and as a result of making a false statement or representation or failing to disclose a material fact obtains, for himself or another person, or continues to receive housing assistance in the amount or value of more than four hundred dollars (\$400.00) is guilty of a Class I felony.

(c) As used in this section the word "person" means person, association, consortium, body politic, partnership, or other group, entity, or organization. (1985, c. 741, s. 1; 1993, c. 539, s. 1080; 1994, Ex. Sess., c. 24, s. 14(c).)

**Legal Periodicals.** — For note, “New Developments for Federally Subsidized Housing Tenants in North Carolina,” see 64 N.C.L. Rev. 1455 (1986).

### § 157-30. Creation and establishment validated.

The creation and establishment of housing authorities under the provisions of Chapter 456, Public Laws of 1935, as amended by Chapter 2, Public Laws of 1938, Extra Session, and as further amended by Chapter 150, Public Laws of 1939, and any additional amendments thereto, known as the Housing Authorities Law [G.S. 157-1 et seq.], together with all proceedings, acts and things heretofore undertaken, performed or done with reference thereto, are hereby validated, ratified, confirmed, approved and declared legal in all respects, notwithstanding any want of statutory authority or any defect or irregularity therein. (1939, c. 118, s. 1; 1941, c. 62, s. 1.)

**Cross References.** — For additional validation provision relating to the creation, establishment and organization of housing authorities, see § 157-32.1.

**Legal Periodicals.** — For comment on the 1941 act, see 19 N.C.L. Rev. 484 (1941).

### § 157-31. Contracts, agreements, etc., validated.

All contracts, agreements, obligations and undertakings of such housing authorities heretofore entered into relating to financing or aiding in the development, construction, maintenance or operation of any housing project or projects or to obtaining aid therefor from the United States Housing Authority, including (without limiting the generality of the foregoing) loan and annual contributions contracts and leases with the United States Housing Authority, agreements with municipalities or other public bodies (including those which are pledged or authorized to be pledged for the protection of the holders of any notes or bonds issued by such housing authorities or which are otherwise made a part of the contract with such holders of notes or bonds) relating to cooperation and contributions in aid of housing projects, payments (if any) in lieu of taxes, furnishing of municipal services and facilities, and the elimination of unsafe and insanitary dwellings, and contracts for the construction of housing projects, together with all proceedings, acts and things heretofore undertaken, performed or done with reference thereto, are hereby validated, ratified, confirmed, approved and declared legal in all respects, notwithstanding any want of statutory authority or any defect or irregularity therein. (1939, c. 118, s. 2; 1941, c. 62, s. 2.)

**Cross References.** — For additional validation provision relating to contracts, agreements, etc., see § 157-32.2.

### § 157-32. Proceedings for issuance, etc., of bonds and notes validated.

All proceedings, acts and things heretofore undertaken, performed or done in or for the authorization, issuance, execution and delivery of notes and bonds by housing authorities for the purpose of financing or aiding in the development or construction of a housing project or projects, and all notes and bonds heretofore issued by housing authorities are hereby validated, ratified, confirmed, approved and declared legal in all respects, notwithstanding any want of statutory authority or any defect or irregularity therein. (1939, c. 118, s. 3; 1941, c. 62, s. 3.)

**Cross References.** — For additional validation provision relating to bonds and notes, see § 157-32.3.

### § 157-32.1. Other validation of creation, etc.

The creation, establishment and organization of housing authorities under the provisions of the Housing Authorities Law (Chapter 456, Public Laws of 1935, as amended, codified as G.S. 157-1 et seq.), together with all proceedings, acts and things heretofore undertaken or done with reference thereto, are hereby validated and declared legal in all respects. (1943, c. 89, s. 1.)

**Editor's Note.** — This section and §§ 157-32.2 and 157-32.3, validating housing authorities created under § 157-1 et seq., together with certain acts done in connection therewith, are similar to §§ 157-30 through 157-32. The

words “notwithstanding any want of statutory authority or any defect or irregularity therein,” appearing at the end of §§ 157-30 through 157-32, do not appear in the other sections and they differ slightly in other particulars.

### § 157-32.2. Other validation of contracts, agreements, etc.

All contracts, agreements and undertakings of such housing authorities heretofore entered into relating to financing, or aiding in the development or operation of any housing projects, including (without limiting the generality of the foregoing) loan and annual contributions contracts, agency contracts and leases, agreements with municipalities or other public bodies (including those which are pledged or authorized to be pledged for the protection of the holders of any notes or bonds issued by such housing authorities or which are otherwise made a part of the contract with such holders of notes or bonds) relating to cooperation in aid of housing projects, payments to public bodies in the State, furnishing of municipal services and facilities and the elimination of unsafe and insanitary dwellings, and contracts for the construction of housing projects, together with all proceedings, acts and things heretofore undertaken or done with reference thereto, are hereby validated and declared legal in all respects. (1943, c. 89, s. 2.)

**Editor's Note.** — This section and §§ 157-32.1 and 157-32.3, validating housing authorities created under § 157-1 et seq., together with certain acts done in connection therewith, are similar to §§ 157-30 through 157-32. The

words “notwithstanding any want of statutory authority or any defect or irregularity therein,” appearing at the end of §§ 157-30 through 157-32, do not appear in the other sections and they differ slightly in other particulars.

### § 157-32.3. Other validation of bonds and notes.

All proceedings, acts and things heretofore undertaken or done in or for the authorization, issuance, execution and delivery of notes and bonds by housing authorities for the purpose of financing or aiding in the development or construction of a housing project or projects, and all notes and bonds heretofore issued by housing authorities are hereby validated and declared legal in all respects. (1943, c. 89, s. 3.)

**Editor's Note.** — This section and §§ 157-32.1 and 157-32.2, validating housing authorities created under § 157-1 et seq., together with certain acts done in connection therewith, are similar to §§ 157-30 through 157-32. The

words “notwithstanding any want of statutory authority or any defect or irregularity therein,” appearing at the end of §§ 157-30 through 157-32, do not appear in the other sections and they differ slightly in other particulars.

### **§ 157-32.4. Further validation of contracts, agreements, etc.**

All contracts or agreements of housing authorities heretofore entered into with the federal government or its agencies, and with municipalities or others relating to financial assistance for housing projects in which it was required that loans or advances shall bear an interest rate in excess of six per centum (6%) per annum, or in which a municipality or others had agreed to pay funds equal to the interest in excess of six per centum (6%) per annum are hereby validated, ratified, confirmed, approved and declared legal with respect to the payment of interest in excess of six per centum (6%), and all things done or performed in reference thereto. The housing authorities are hereby authorized to assume the full obligation of the municipalities under the contracts or agreements with reference to interest in excess of six per centum (6%), and to reimburse any municipality which has made any interest payment under such contracts or agreements. (1971, c. 87, s. 2.)

### **§ 157-33. Notice, hearing and creation of authority for a county.**

Any 25 residents of a county may file a petition with the clerk of the board of county commissioners setting forth that there is a need for an authority to function in the county. Upon the filing of such a petition such clerk shall give notice of the time, place and purposes of a public hearing at which the board of county commissioners will determine the need for an authority in the county. Such notice shall be given at the county's expense by publishing a notice, at least 10 days preceding the day on which the hearing is to be held, in a newspaper having a general circulation in the county or, if there be no such newspaper, by posting such a notice in at least three public places within the county, at least 10 days preceding the day on which the hearing is to be held.

Upon the date fixed for said hearing to be held upon notice as provided herein, an opportunity to be heard shall be granted to all residents and taxpayers of the county and to all other interested persons. After such a hearing, the board of county commissioners shall determine (i) whether insanitary or unsafe inhabited dwelling accommodations exist in the county and/or (ii) whether there is a lack of safe or sanitary dwelling accommodations in the county available for all the inhabitants thereof. In determining whether dwelling accommodations are unsafe or insanitary, the board of county commissioners shall take into consideration the following: the physical condition and age of the buildings; the degree of overcrowding; the percentage of the land coverage; the light and air available to the inhabitants of such dwelling accommodations; the size and arrangement of the rooms; the sanitary facilities; and the extent to which conditions exist in such buildings which endanger life or property by fire or other causes.

If it shall determine that either or both of the above enumerated conditions exist, the board of county commissioners shall adopt a resolution so finding (which need not go into any detail other than the mere finding) and shall thereupon either (i) determine that the board of county commissioners shall itself constitute and act ex officio as an authority or (ii) appoint, as hereinafter provided, not less than five nor more than nine commissioners to act as an authority. Said authority shall be a public body and a body corporate and politic upon the completion of the taking of the following proceedings:

The commissioners shall present to the Secretary of State an application signed by them, which shall set forth (without any detail other than the mere recital)

- (1) That a notice has been given and public hearing has been held as aforesaid, that the board of county commissioners made the aforesaid

determination after such hearing and appointed them as commissioners;

- (2) The name, and official residence of each of the commissioners, together with a certified copy of the appointment evidencing their right to office, the date and place of induction into and taking oath of office, and that they desire the housing authority to become a public body and a body corporate and politic under this Article;
- (3) The term of office of each of the commissioners, except where the authority consists of the board of county commissioners ex officio;
- (4) The name which is proposed for the corporation; and
- (5) The location of the principal office of the proposed corporation.

The application shall be subscribed and sworn to by each of said commissioners before an officer authorized by the laws of the State to take and certify oaths, who shall certify upon the application that he personally knows the commissioners and knows them to be the officers as asserted in the application, and that each subscribed and swore thereto in the officer's presence. The Secretary of State shall examine the application and if he finds that the name proposed for the corporation is not identical with that of a person or of any other corporation of this State or so nearly similar as to lead to confusion and uncertainty he shall receive and file it and shall record it in an appropriate book of record in his office.

When the application has been made, filed and recorded, as herein provided, the authority shall constitute a public body and a body corporate and politic under the name proposed in the application; the Secretary of State shall make and issue to the said commissioners, a certificate of incorporation pursuant to this Article, under the seal of the State, and shall record the same with the application.

If the board of county commissioners, after a hearing as aforesaid, shall determine that neither of the above enumerated conditions exist, it shall adopt a resolution denying the petition. After three months shall have expired from the date of the denial of any such petitions, subsequent petitions may be filed as aforesaid and new hearings and determinations made thereon.

In any suit, action or proceeding involving the validity or enforcement of, or relating to any contract of the authority, the authority shall be conclusively deemed to have been established in accordance with the provisions of this Article upon proof of the issuance of the aforesaid certificate by the Secretary of State. A copy of such certificate, duly certified by the Secretary of State, shall be admissible in evidence in any such suit, action or proceeding, and shall be conclusive proof of the filing and contents thereof. (1941, c. 78, s. 4; 1943, c. 636, s. 7; 1969, c. 785, s. 1; 1981, c. 21, s. 1.)

**Editor's Note.** — Session Laws 1943, c. 636, which amended this section as well as §§ 157-3, 157-4, 157-10, 157-35, 157-36 and 157-37, and added §§ 157-39.1 through 157-39.8, provided in s. 9: "The powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law. Nothing contained in this act shall affect the term of

office of any commissioner of a housing authority heretofore appointed under the housing authorities law. The enactment of this act shall not be construed to render invalid any action or proceeding had or taken for the creation or establishment of a housing authority pursuant to laws in existence prior to the enactment of this act."

## § 157-34. Commissioners and powers of authority for a county.

The commissioners of a housing authority created for a county may be appointed and removed by the board of county commissioners of the county in the same manner as the commissioners of a housing authority created for a city may be appointed and removed by the mayor; provided, that the board of

county commissioners may determine in the case of any authority for its county that the board of county commissioners itself shall constitute and act ex officio as the authority. The board of county commissioners may at any time by resolution or ordinance increase or decrease the membership of an authority, within the limitations prescribed in G.S. 157-33. Except as otherwise provided herein, each housing authority created for a county and the commissioners thereof shall have the same functions, rights, powers, duties and limitations provided for housing authorities created for cities and the commissioners of such housing authorities: Provided, that for such purposes the term "mayor" or "council" as used in the housing authorities law and any amendments thereto shall be construed as meaning "board of county commissioners," the term "city clerk" as used therein shall be construed as meaning "clerk of the board of county commissioners" and the term "city" as used therein shall be construed as meaning "county" unless a different meaning clearly appears from the context: Provided, further, that a housing authority created for a county shall not be subject to the limitations provided in subdivision (4) of G.S. 157-29 of the housing authorities law with respect to housing projects for farmers of low income. (1941, c. 78, s. 4; 1969, c. 785, s. 2; 1981, c. 21, s. 2.)

**Editor's Note.** — Subdivision (4) of § 157-29, referred to in the last sentence, which formerly specified a maximum income test for tenants in housing projects, no longer exists.

### § 157-35. Creation of regional housing authority.

If the board of county commissioners of each of two or more contiguous counties having an aggregate population of more than 60,000 by resolution declares that there is a need for one housing authority to be created for all of such counties to exercise powers and other functions herein prescribed for a housing authority in such counties, a public body corporate and politic to be known as a regional housing authority for all of such counties shall (after the commissioners thereof file an application with the Secretary of State as hereinafter provided) thereupon exist for and exercise its powers and other functions in such counties; and thereupon any housing authority created for any of such counties shall cease to exist except for the purpose of winding up its affairs and executing a deed to the regional housing authority as hereinafter provided: Provided, that the board of county commissioners shall not adopt a resolution as aforesaid if there is a county housing authority created for such county which has any bonds or notes outstanding unless first, all holders of such bonds and notes consent in writing to the substitution of such regional housing authority in lieu of such county housing authority on all such bonds and notes; and second, the commissioners of such county housing authority adopt a resolution consenting to the transfer of all the rights, contracts, obligations, and property, real and personal, of such county housing authority to such regional housing authority as hereinafter provided: Provided, further, that when the above conditions are complied with and such regional housing authority is created and authorized to exercise its powers and other functions, all rights, contracts, agreements, obligations, and property, real and personal, of such county housing authority shall be in the name of and vest in such regional housing authority, and all obligations of such county housing authority shall be the obligations of such regional housing authority and all rights and remedies of any person against such county housing authority may be asserted, enforced, and prosecuted against such regional housing authority to the same extent as they might have been asserted, enforced, and prosecuted against such county housing authority. When any real property of a county housing authority vests in a regional housing authority as provided above, the county housing authority shall execute a deed of such property to the regional

housing authority which thereupon shall file such deed in the office provided for the filing of deeds: Provided, that nothing contained in this sentence shall affect the vesting of property in the regional housing authority as provided above.

The board of county commissioners of each of two or more said contiguous counties shall by resolution declare that there is a need for one regional housing authority to be created for all of such counties to exercise powers and other functions herein prescribed in such counties, if such board of county commissioners finds (and only if it finds)

- (1) Insanitary or unsafe dwelling accommodations exist in the area of its respective county and/or there is a lack of safe or sanitary dwelling accommodations in the county available for all the inhabitants thereof and
- (2) That a regional housing authority for the proposed region would be a more efficient or economical administrative unit than a housing authority for an area having a smaller population to carry out the purposes of the housing authorities law and any amendments thereto, in such county.

In determining whether dwelling accommodations are unsafe or insanitary, the board of county commissioners shall take into consideration the following: the physical condition and age of the buildings; the degree of overcrowding; the percentage of land coverage; the light and air available to the inhabitants of such dwelling accommodations; the size and arrangement of the rooms; the sanitary facilities; and the extent to which conditions exist in such buildings which endanger life or property by fire or other causes.

If it shall determine that both (1) and (2) of the above enumerated conditions exist, the board of county commissioners shall adopt a resolution so finding (which need not go into any detail other than the mere finding). After the appointment, as hereinafter provided, of the commissioners to act as the regional housing authority, said authority shall be a public body and a body corporate and politic upon the completion of the taking of the following proceedings:

The commissioners shall present to the Secretary of State an application signed by them, which shall set forth (without any detail other than the mere recital)

- (1) That the boards of county commissioners made the aforesaid determination and that they have been appointed as commissioners;
- (2) The name, and official residence of each of the commissioners, together with a certified copy of the appointment evidencing their right to office, the date and place of induction into and taking oath of office, and that they desire the housing authority to become a public body and a body corporate and politic under this Article;
- (3) The term of office of each of the commissioners;
- (4) The name which is proposed for the corporation; and
- (5) The location of the principal office of the proposed corporation.

The application shall be subscribed and sworn to by each of said commissioners before an officer authorized by the laws of the State to take and certify oaths, who shall certify upon the application that he personally knows the commissioners and knows them to be the officers as asserted in the application, and that each subscribed and swore thereto in the officer's presence. The Secretary of State shall examine the application and if he finds that the name proposed for the corporation is not identical with that of a person or of any other corporation of this State or so nearly similar as to lead to confusion and uncertainty he shall receive and file it and shall record it in an appropriate book of record in his office.

When the application has been made, filed and recorded, as herein provided, the authority shall constitute a public body and a body corporate and politic

under the name proposed in the application; the Secretary of State shall make and issue to the said commissioners, a certificate of incorporation pursuant to this Article, under the seal of the State, and shall record the same with the application.

In any suit, action or proceeding involving the validity or enforcement of, or relating to any contract of the regional housing authority, the regional housing authority shall be conclusively deemed to have been established in accordance with the provisions of this Article upon proof of the issuance of the aforesaid certificate by the Secretary of State. A copy of such certificate, duly certified by the Secretary of State, shall be admissible in evidence in any such suit, action or proceeding, and shall be conclusive proof of the filing and contents thereof. (1941, c. 78, s. 4; 1943, c. 636, ss. 3, 7; 1998-217, s. 20.)

**Editor's Note.** — Session Laws 1943, c. 636, which amended this section as well as §§ 157-3, 157-4, 157-10, 157-33, 157-36 and 157-37, and added §§ 157-39.1 through 157-39.8, provided in s. 9: "The powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law. Nothing contained in this act shall affect the term of

office of any commissioner of a housing authority heretofore appointed under the housing authorities law. The enactment of this act shall not be construed to render invalid any action or proceeding had or taken for the creation or establishment of a housing authority pursuant to laws in existence prior to the enactment of this act."

### § 157-36. Commissioners of regional housing authority.

(a) The board of county commissioners of each county included in a regional housing authority shall appoint one person as a commissioner of such authority, and each such commissioner to be first appointed by the board of county commissioners of a county may be appointed at or after the time of the adoption of the resolution declaring the need for such regional housing authority or declaring the need for the inclusion of such county in the area of operation of such regional housing authority. When the area of operation of a regional housing authority is increased to include an additional county or counties as provided in this Article, the board of county commissioners of each such county shall thereupon appoint one additional person as a commissioner of the regional housing authority. The board of county commissioners of each county shall appoint the successor of the commissioner appointed by it.

(b) The commissioners of the regional housing authority shall appoint as a commissioner at least one person who is directly assisted by the authority unless the authority's rules require that the person be elected by other persons who are assisted by the authority. However, there shall be no requirement to appoint such a person if the authority: (i) operates less than 300 public housing units, (ii) provides reasonable notice to all resident advisory boards within the authority's area of operation of the opportunity for at least one person who is directly assisted by the authority to serve as a commissioner, and (iii) within a reasonable time after receipt of the notice by the resident advisory boards, has not been notified of the intention of any such person to serve. The commissioners of the regional housing authority shall appoint successors of the commissioner appointed by them and shall fill any vacancies. A certificate of the appointment signed by the chair of the commissioners of the regional housing authority shall be conclusive evidence of the due and proper selection of the commissioner. If the commissioner directly assisted by the regional housing authority ceases to receive such assistance, the commissioner's office shall be abolished and another person who is directly assisted by the regional housing authority shall be appointed by the commissioners of the regional housing authority.

(c) No commissioner who is also a person directly assisted by the regional housing authority shall be qualified to vote on matters affecting his or her

official conduct or matters affecting his or her own individual tenancy, as distinguished from matters affecting tenants in general.

(d) If any county is excluded from the area of operation of a regional housing authority, the office of the commissioner of such regional housing authority appointed by the board of county commissioners of such county shall be thereupon abolished. If the person appointed as a commissioner under subsection (b) of this section resides in a county that is excluded from the authority's area of operation, the office of that commissioner shall be abolished and another person residing within the authority's area of operation shall be appointed.

(e) A certificate of the appointment of any commissioner signed by the chair of the board of county commissioners (or the appointing officer) shall be conclusive evidence of the due and proper appointment of such commissioner.

(f) If the area of operation of a regional housing authority consists at any time of an even number of counties, except as provided in subsection (g) of this section, the Governor shall appoint one additional commissioner to such regional housing authority whose term of office shall be as herein provided for a commissioner of a regional housing authority, except that such term shall end at any earlier time that the area of operation of the regional housing authority shall be changed to consist of an odd number of counties. The Governor shall likewise appoint each person to succeed such additional commissioner. A certificate of the appointment of any such additional commissioner shall be signed by the Governor and filed with the Secretary of State. A copy of such certificate, duly certified by the Secretary of State, shall be conclusive evidence of the due and proper appointment of such additional commissioner.

(g) If the membership of the board of commissioners consists of an even number as a result of the appointment of a person who is directly assisted by the regional housing authority, the Governor shall appoint one additional commissioner to the authority whose term of office shall be as herein provided for a commissioner of an authority, except that such term shall end at any earlier time that the area of operation of the authority shall be changed to consist of an even number of counties. A certificate of the appointment shall be signed and filed as provided in subsection (f) of this section. The Governor shall appoint successors to the additional commissioner and shall fill any vacancies.

(h) The commissioners of a regional housing authority shall be appointed for terms of five years except that all vacancies shall be filled for the unexpired terms. Each commissioner shall hold office until his or her successor has been appointed and has qualified.

(i) For inefficiency or neglect of duty or misconduct in office, a commissioner of a regional housing authority may be removed by the appointing authority. The commissioner shall have been given a copy of the charges against him or her at least 10 days prior to the hearing thereon and shall have had an opportunity to be heard in person or by counsel.

(j) The commissioners appointed as aforesaid shall constitute the regional housing authority, and the powers of such authority shall be vested in such commissioners in office from time to time.

(k) The commissioners of a regional housing authority shall elect a chair from among the commissioners and shall have power to select or employ such other officers and employees as the regional housing authority may require. A majority of the commissioners of a regional housing authority shall constitute a quorum of such authority for the purpose of conducting its business and exercising its powers and for all other purposes. (1941, c. 78, s. 4; 1943, c. 636, s. 4; 1999-146, s. 2.)

**Editor's Note.** — Session Laws 1943, c. 636, which amended this section as well as §§ 157-3, 157-4, 157-10, 157-33, 157-35, and 157-37, and added §§ 157-39.1 through 157-39.8, provided in s. 9: "The powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law. Nothing contained in this act shall affect the term of

office of any commissioner of a housing authority heretofore appointed under the housing authorities law. The enactment of this act shall not be construed to render invalid any action or proceeding had or taken for the creation or establishment of a housing authority pursuant to laws in existence prior to the enactment of this act."

### § 157-37. Powers of regional housing authority.

Except as otherwise provided herein, a regional housing authority and the commissioners thereof shall, within the area of operation of such regional housing authority, have the same functions, rights, powers, duties and limitations provided for housing authorities created for cities or counties and the commissioners of such housing authorities: Provided, that for such purposes the term "mayor" or "council" as used in the Housing Authorities Law and any amendments thereto shall be construed as meaning "board of county commissioners," the term "city clerk" as used therein shall be construed as meaning "clerk of the board of county commissioners" and the term "city" as used therein shall be construed as meaning "county" unless a different meaning clearly appears from the context: Provided, further, that a regional housing authority shall not be subject to the limitations provided in subdivision (4) of G.S. 157-29 of the Housing Authorities Law with respect to housing projects for farmers of low income. Except as otherwise provided in this Article, all the provisions of law applicable to housing authorities created for counties and the commissioners of such authorities shall be applicable to regional housing authorities and the commissioners thereof. (1941, c. 78, s. 4; 1943, c. 636, s. 6.)

**Editor's Note.** — Session Laws 1943, c. 636, which amended this section as well as §§ 157-3, 157-4, 157-10, 157-33, 157-35, and 157-36, and added §§ 157-39.1 through 157-39.8, provided in s. 9: "The powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law. Nothing contained in this act shall affect the term of office of any commissioner of a housing authority heretofore appointed under the housing

authorities law. The enactment of this act shall not be construed to render invalid any action or proceeding had or taken for the creation or establishment of a housing authority pursuant to laws in existence prior to the enactment of this act."

Subdivision (4) of § 157-29, referred to in the first sentence, which formerly specified a maximum income test for tenants in housing projects, no longer exists.

### § 157-38. Rural housing projects.

Housing authorities created for counties and regional housing authorities are specifically empowered and authorized to borrow money, accept grants and exercise their other powers to provide housing for farmers of low income. In connection with such projects, such housing authorities may enter into such lease or purchase agreements, accept such conveyances and rent or sell dwellings forming part of such projects to or for farmers of low income, as such housing authority deems necessary in order to assure the achievement of the objectives of this Article. Such leases, agreements or conveyances may include such covenants as the housing authority deems appropriate regarding such dwellings and the tracts of land described in any such instrument, which covenants shall be deemed to run with the land where the housing authority deems it necessary and the parties to such instrument so stipulate. Nothing contained in this section shall be construed as limiting any other powers of any housing authority. (1941, c. 78, s. 4.)

**§ 157-39. Housing applications by farmers.**

The owner of any farm operated, or worked upon, by farmers of low income in need of safe and sanitary housing may file an application with a housing authority of a county or a regional housing authority requesting that it provide for a safe and sanitary dwelling or dwellings for occupancy by such farmers of low income. Such applications shall be received and examined by housing authorities in connection with the formulation of projects or programs to provide housing for farmers of low income. (1941, c. 78, s. 4.)

**§ 157-39.1. Area of operation of city, county and regional housing authorities.**

(a) The boundaries or area of operation of a housing authority created for a city shall include said city and the area within 10 miles from the territorial boundaries of said city, but in no event shall it include the whole or a part of any other city, except as otherwise provided herein. Notwithstanding the previous sentence, a housing authority created for a city may operate and perform any of its lawful functions within any other city that has a common boundary with a city creating an authority when requested to do so by resolution of the governing body of such other city. The area of operation or boundaries of a housing authority created for a county shall include all of the county for which it is created and the area of operation or boundaries of a regional housing authority shall include (except as otherwise provided elsewhere in this Article) all of the counties for which such regional housing authority is created and established: Provided, that a county or regional housing authority shall not undertake any housing project or projects within the boundaries of any city unless a resolution shall have been adopted by the governing body of such city (and also by any housing authority which shall have been theretofore established and authorized to exercise its powers in such city) declaring that there is a need for the county or regional housing authority to exercise its power within such city: Provided, that the jurisdiction of any rural housing authority to which the Secretary of State has heretofore issued a certificate of incorporation shall extend to within a distance of one mile of the town or city limits of any town or city having a population in excess of 500, located in any county now or hereafter constituting a part of the territory of such rural housing authority: Provided, further, that this provision shall not affect the jurisdiction of any city housing authority to which the Secretary of State has heretofore issued a certificate of incorporation. A housing authority created for a county may operate and perform any of its lawful functions anywhere within the municipal boundaries of any city located in whole or in part within the county for which it is created, when requested to do so by resolution of the governing body of such city.

(b) In any county in which a city housing authority has been established, but where there are portions of the county in which the city is located which are more than 10 miles from the territorial boundaries of the city, the city housing authority is authorized to operate in areas of the county beyond such limit, which are not within another city, upon the adoption of a joint resolution by the city council and the board of county commissioners. Such joint resolution must find that in such additional area, that insanitary or unsafe inhabited dwelling accommodations exist in such area or there is a shortage of safe or sanitary dwelling accommodations in such county available to persons of low income at rentals they can afford. A public hearing on such resolution need be held only by the board of county commissioners.

(c) A joint resolution adopted under subsection (b) of this section may, in lieu of the appointment provisions of G.S. 157-5, provide that the board of

commissioners of the housing authority shall be composed of nine members, with a number (not less than five) to be appointed by the mayor, and the remainder to be appointed by the board of county commissioners. Such housing authority commissioners shall be subject to removal by the appointing person or board under the procedural requirements of G.S. 157-8. (1943, c. 636, s. 5; 1961, c. 200, s. 2; 1979, 2nd Sess., c. 1108, ss. 1, 2; 1993, c. 458, s. 1.)

**Editor's Note.** — Session Laws 1943, c. 636, which added §§ 157-39.1 through 157-39.8, inclusive, and amended §§ 157-3, 157-4, 157-10, 157-33, 157-35, 157-36 and 157-37, provided in s. 9: "The powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law. Nothing contained in this act shall affect the term of office of any

commissioner of a housing authority heretofore appointed under the housing authorities law. The enactment of this act shall not be construed to render invalid any action or proceeding had or taken for the creation or establishment of a housing authority pursuant to laws in existence prior to the enactment of this act."

### § 157-39.2. Increasing area of operation of regional housing authority.

The area of operation or boundaries of a regional housing authority shall be increased from time to time to include one or more additional contiguous counties not already within a regional housing authority if the board of county commissioners of each of the counties then included in the area of operation of such regional housing authority, the commissioners of the regional housing authority and the board of county commissioners of each such additional county or counties each adopts a resolution declaring that there is a need for the inclusion of such additional county or counties in the area of operation of such regional housing authority. Upon the adoption of such resolutions, any county housing authority created for any such additional county shall cease to exist except for the purpose of winding up its affairs and executing a deed to the regional housing authority as hereinafter provided. Provided, however, that such resolutions shall not be adopted unless the commissioners of such county housing authority adopt a resolution consenting to the transfer of all the rights, contracts, bonds, and property, real and personal, of such county housing authority to such regional housing authority as hereinafter provided: Provided, further, that when the above condition is complied with and the area of operation of such regional housing authority is increased to include such additional county, as hereinabove provided, all rights, contracts, bonds, and property, real and personal, of such county housing authority shall be in the name of and vested in such regional housing authority, all contracts and bonds of such county housing authority shall be the contracts and bonds of such regional housing authority and all rights and remedies of any person against such county housing authority may be asserted, enforced, and prosecuted against such regional housing authority to the same extent as they might have been asserted, enforced, and prosecuted against such county housing authority.

When any real property of a county housing authority vests in a regional housing authority as provided above, the county housing authority shall execute a deed of such property to the regional housing authority which thereupon shall file such deed in the office provided for the filing of deeds: Provided, that nothing contained in this sentence shall affect the vesting of property in the regional housing authority as provided above.

The board of county commissioners of each of the counties in the regional housing authority, the commissioners of the regional housing authority and the board of county commissioners of each such additional county or counties shall by resolution declare that there is a need for the inclusion of such county or counties in the area of operation of the regional housing authority, only if:

- (1) The board of county commissioners of each such additional county or counties find that insanitary or unsafe inhabited dwelling accommodations exist in such county or there is a shortage of safe or sanitary dwelling accommodations in such county available to persons of low income at rentals they can afford, and
- (2) The board of county commissioners of each of the counties then included in the area of operation of the regional housing authority, the commissioners of the regional housing authority and the board of county commissioners of each such additional county or counties find that the regional housing authority would be a more efficient or economical administrative unit if the area of operation of the regional housing authority is increased to include such additional county or counties. (1943, c. 636, s. 5; 1971, c. 431, s. 1.)

**Editor's Note.** — Session Laws 1943, c. 636, which added §§ 157-39.1 through 157-39.8, inclusive, and amended §§ 157-3, 157-4, 157-10, 157-33, 157-35, 157-36 and 157-37, provided in s. 9: "The powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law. Nothing contained in this act shall affect the term of office of any

commissioner of a housing authority heretofore appointed under the housing authorities law. The enactment of this act shall not be construed to render invalid any action or proceeding had or taken for the creation or establishment of a housing authority pursuant to laws in existence prior to the enactment of this act."

### § 157-39.3. Decreasing area of operation of regional housing authority.

The area of operation or boundaries of a regional housing authority shall be decreased from time to time to exclude one or more counties from such area if the board of county commissioners of each of the counties in such area and the commissioners of the regional housing authority each adopt a resolution declaring that there is a need for excluding such county or counties from such area: Provided, that if such action decreases the area of operation of the regional housing authority to only one county, such authority shall thereupon constitute and become a housing authority for such county, in the same manner as though such authority were created, and constituted a public and corporate body for such county pursuant to other provisions of this housing authority law, and the commissioners of such authority shall be thereupon appointed as provided for the appointment of commissioners of a housing authority created for a county.

The board of county commissioners of each of the counties in the area of operation of the regional housing authority and the commissioners of the regional housing authority shall adopt a resolution declaring that there is a need for excluding a county or counties from such area only if:

- (1) Each such board of county commissioners of the counties to remain in the area of operation of the regional housing authority and the commissioners of the regional housing authority find that, because of facts arising or determined subsequent to the time when such area first included the county or counties to be excluded, the regional housing authority would be a more efficient or economical administrative unit if such county or counties were excluded from such area, and
- (2) The board of county commissioners of each county or counties to be excluded and the commissioners of the regional housing authority each also find that another housing authority for such county or counties would be a more efficient or economical administrative unit to function in such county or counties.

Nothing contained herein shall be construed as preventing a county or counties excluded from the area of operation of a regional housing authority, as provided above, from thereafter being included within the area of operation of any housing authority in accordance with this Article.

Any property held by a regional housing authority within a county or counties excluded from the area of operation of such authority as herein provided, shall, as soon as practicable after the exclusion of said county or counties, respectively, be disposed of by such authority in the public interest. (1943, c. 636, s. 5; 1971, c. 431, s. 2.)

**Editor's Note.** — Session Laws 1943, c. 636, which added §§ 157-39.1 through 157-39.8, inclusive, and amended §§ 157-3, 157-4, 157-10, 157-33, 157-35, 157-36 and 157-37, provided in s. 9: "The powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law. Nothing contained in this act shall affect the term of office of any

commissioner of a housing authority heretofore appointed under the housing authorities law. The enactment of this act shall not be construed to render invalid any action or proceeding had or taken for the creation or establishment of a housing authority pursuant to laws in existence prior to the enactment of this act."

### § 157-39.4. Requirements of public hearings.

The board of county commissioners of a county shall not adopt any resolution authorized by G.S. 157-35, 157-39.1, 157-39.2 or 157-39.3 unless a public hearing has first been held which shall conform (except as otherwise provided herein) to the requirements of this Housing Authorities Law for hearings to determine the need for a housing authority of a county: Provided, that such hearings may be held by the board of county commissioners without a petition therefor.

In connection with the issuance of bonds, a regional housing authority may covenant as to limitations on its right to adopt resolutions relating to the increase or decrease of its area of operation. (1943, c. 636, s. 5; 1979, 2nd Sess., c. 1108, s. 3.)

**Editor's Note.** — Session Laws 1943, c. 636, which added §§ 157-39.1 through 157-39.8, inclusive, and amended §§ 157-3, 157-4, 157-10, 157-33, 157-35, 157-36 and 157-37, provided in s. 9: "The powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law. Nothing contained in this act shall affect the term of office of any

commissioner of a housing authority heretofore appointed under the housing authorities law. The enactment of this act shall not be construed to render invalid any action or proceeding had or taken for the creation or establishment of a housing authority pursuant to laws in existence prior to the enactment of this act."

### § 157-39.5. Consolidated housing authority.

If the governing body of each of two or more municipalities (with a population of less than 500, but having an aggregate population of more than 500) by resolution declares that there is a need for one housing authority for all of such municipalities to exercise in such municipalities the powers and other functions prescribed for a housing authority, a public body corporate and politic to be known as a consolidated housing authority (with such corporate name as it selects) shall thereupon exist for all of such municipalities and exercise its powers and other functions within its area of operation (as herein defined), including the power to undertake projects therein; and thereupon any housing authority created for any of such municipalities shall cease to exist except for the purpose of winding up its affairs and executing a deed of its real property to the consolidated housing authority: Provided, that the creation of a consolidated housing authority and the finding of need therefor shall be subject to the same provisions and limitations of this Housing Authorities Law as are

applicable to the creation of a regional housing authority and that all of the provisions of this Housing Authorities Law applicable to regional housing authorities and the commissioners thereof shall be applicable to consolidated housing authorities and the commissioners thereof: Provided, further that the area of operation or boundaries of a consolidated housing authority shall include all of the territory within the boundaries of each municipality joining in the creation of such authority together with the territory within 10 miles of the boundaries of each such municipality, except that such area of operation may be changed to include or exclude any municipality or municipalities (with its aforesaid surrounding territory) in the same manner and under the same provisions as provided in this Article for changing the area of operation of a regional housing authority by including or excluding a contiguous county or counties: Provided, further, that for all such purposes the term "board of county commissioners" shall be construed as meaning "governing body" except in G.S. 157-36, where it shall be construed as meaning "mayor" or other executive head of the municipality, the term "county" shall be construed as meaning "municipality," the term "clerk" shall be construed as meaning "clerk of the municipality or officer with similar duties," the term "region" shall be construed as meaning "area of operation of the consolidated housing authority" and the terms "county housing authority" and "regional housing authority" shall be construed as meaning "housing authority of the city" and "consolidated housing authority," respectively, unless a different meaning clearly appears from the context.

The governing body of any such municipality for which a housing authority has not been created may adopt the above resolution if it first determines that there is a need for a housing authority to function in said municipality, which determination shall be made in the same manner and subject to the same conditions as the determination required by G.S. 157-4 for the creation of a housing authority for a city: Provided, that after notice given by the clerk (or officer with similar duties) of the municipality, the governing body of the municipality may, without a petition therefor, hold a hearing to determine the need for a housing authority to function therein.

Except as otherwise provided herein, a consolidated housing authority and the commissioners thereof shall, within the area of operation of such consolidated housing authority have the same functions, rights, powers, duties, privileges, immunities and limitations as those provided for housing authorities created for cities, counties, or groups of counties and the commissioners of such housing authorities, in the same manner as though all the provisions of law applicable to housing authorities created for cities, counties, or groups of counties were applicable to consolidated housing authorities. (1943, c. 636, s. 5; 1961, c. 200, s. 3; 1965, c. 431, s. 3.)

**Editor's Note.** — Session Laws 1943, c. 636, which added §§ 157-39.1 through 157-39.8, inclusive, and amended §§ 157-3, 157-4, 157-10, 157-33, 157-35, 157-36 and 157-37, provided in s. 9: "The powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law. Nothing contained in this act shall affect the term of office of any

commissioner of a housing authority heretofore appointed under the housing authorities law. The enactment of this act shall not be construed to render invalid any action or proceeding had or taken for the creation or establishment of a housing authority pursuant to laws in existence prior to the enactment of this act."

### **§ 157-39.6. Findings required for authority to operate in municipality.**

No governing body of a city or other municipality shall adopt a resolution as provided in G.S. 157-39.1 declaring that there is a need for a housing authority (other than a housing authority established by such municipality) to exercise

its powers within such municipality, unless a public hearing has first been held by such governing body and unless such governing body shall have found in substantially the following terms: (i) that insanitary or unsafe inhabited dwelling accommodations exist in such municipality or that there is a shortage of safe or sanitary dwelling accommodations in such municipality available to persons of low income at rentals they can afford; and (ii) that these conditions can be best remedied through the exercise of the aforesaid housing authority's powers within the territorial boundaries of such municipality: Provided, that such findings shall not have the effect of thereafter preventing such municipality from establishing a housing authority or joining in the creation of a consolidated housing authority or the increase of the area of operation of a consolidated housing authority. The clerk (or the officer with similar duties) of the city or other municipality shall give notice of the public hearing and such hearing shall be held in the manner provided in G.S. 157-4 for a public hearing by a council to determine the need for a housing authority in the city.

During the time that, pursuant to these findings, a housing authority has outstanding (or is under contract to issue) any evidences of indebtedness for a project within the city or other municipality, no other housing authority may undertake a project within such municipality without the consent of said housing authority which has such outstanding indebtedness or obligation. (1943, c. 636, s. 5.)

**Editor's Note.** — Session Laws 1943, c. 636, which added §§ 157-39.1 through 157-39.8, inclusive, and amended §§ 157-3, 157-4, 157-10, 157-33, 157-35, 157-36 and 157-37, provided in s. 9: "The powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law. Nothing contained in this act shall affect the term of office of any

commissioner of a housing authority heretofore appointed under the housing authorities law. The enactment of this act shall not be construed to render invalid any action or proceeding had or taken for the creation or establishment of a housing authority pursuant to laws in existence prior to the enactment of this act."

### § 157-39.7. Meetings and residence of commissioners.

Nothing contained in this Housing Authorities Law shall be construed to prevent meetings of the commissioners of a housing authority anywhere within the perimeter boundaries of the area of operation of the authority or within any additional area where the housing authority is authorized to undertake a housing project, nor to prevent the appointment of any person as a commissioner of the authority who resides within such boundaries or such additional area, and who is otherwise eligible for such appointment under this Housing Authorities Law. (1943, c. 636, s. 5.)

**Editor's Note.** — Session Laws 1943, c. 636, which added §§ 157-39.1 through 157-39.8, inclusive, and amended §§ 157-3, 157-4, 157-10, 157-33, 157-35, 157-36 and 157-37, provided in s. 9: "The powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law. Nothing contained in this act shall affect the term of office of any

commissioner of a housing authority heretofore appointed under the housing authorities law. The enactment of this act shall not be construed to render invalid any action or proceeding had or taken for the creation or establishment of a housing authority pursuant to laws in existence prior to the enactment of this act."

### § 157-39.8. Agreement to sell as security for obligations to federal government.

In any contract or amendatory or superseding contract for a loan and annual contributions heretofore or hereafter entered into between a housing authority and the federal government with respect to any housing project undertaken by

said housing authority, any such housing authority is authorized to make such covenants (including covenants with holders of bonds issued by such authority for purposes of the project involved), and to confer upon the federal government such rights and remedies, as said housing authority deems necessary to assure the fulfillment of the purposes for which the project was undertaken. In any such contract, the housing authority may, notwithstanding any other provisions of law, agree to sell and convey the project (including all lands appertaining thereto) to which such contract relates to the federal government upon the occurrence of such conditions, or upon such defaults on bonds for which any of the annual contributions provided in said contract are pledged, as may be prescribed in such contract, and at a price (which may include the assumption by the federal government of the payment, when due, of the principal of and interest on outstanding bonds of the housing authority issued for purposes of the project involved) determined as prescribed therein and upon such other terms and conditions as are therein provided. Any such housing authority is hereby authorized to enter into such supplementary contracts, and to execute such conveyances, as may be necessary to carry out the provisions hereof. Notwithstanding any other provisions of law, any contracts or supplementary contracts or conveyances made or executed pursuant to the provisions of this section shall not be or constitute a mortgage within the meaning or for the purposes of any of the laws of the State. (1943, c. 636, s. 5.)

**Editor's Note.** — Session Laws 1943, c. 636, which added §§ 157-39.1 through 157-39.8, inclusive, and amended §§ 157-3, 157-4, 157-10, 157-33, 157-35, 157-36 and 157-37, provided in s. 9: "The powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law. Nothing contained in this act shall affect the term of office of any

commissioner of a housing authority heretofore appointed under the housing authorities law. The enactment of this act shall not be construed to render invalid any action or proceeding had or taken for the creation or establishment of a housing authority pursuant to laws in existence prior to the enactment of this act."

## ARTICLE 2.

### *Municipal Cooperation and Aid.*

#### § 157-40. Finding and declaration of necessity.

It is hereby declared that insanitary or unsafe dwelling accommodations exist in various areas of the State, and that consequently many persons of low income are forced to reside in such dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens of the State and impair economic values; that the clearance, replanning and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which private property may be acquired; that it is in the public interest that work on such projects be instituted as soon as possible in order to relieve unemployment which now constitutes an emergency; and the necessity in the public interest for the provisions hereinafter enacted, is hereby declared as a matter of legislative determination. (1935, c. 408, s. 1.)

**Legal Periodicals.** — For analysis of this Article, see 13 N.C.L. Rev. 379 (1935).

## CASE NOTES

The housing authority of the City of Charlotte, acting in cooperation with the City of Charlotte, is subject to the provisions set forth in this section and subsequent sections in the Housing Authorities Law. In re Housing Auth., 233 N.C. 649, 65 S.E.2d 761 (1951).

### § 157-41. Definitions.

The following terms, whenever used or referred to in this Article, shall have the following respective meanings, unless a different meaning clearly appears from the context:

- (1) "City" shall mean any city or town of the State having a population of more than 500 inhabitants according to the last federal census or any revision or amendment thereto.
- (2) "Housing authority" shall mean any housing authority organized pursuant to the Housing Authorities Law of this State.
- (3) "Housing project" shall mean any undertaking (i) to demolish, clear, remove, alter or repair unsafe or insanitary housing, and/or (ii) to provide dwelling accommodations for persons of low income, and said term may also include such buildings and equipment for recreational or social assemblies for educational, health or welfare purposes, and such necessary utilities as are designed primarily for the benefit and use of the housing authority and/or the occupants of such dwelling accommodations.
- (4) "Municipality" shall mean any city, town or incorporated village of the State. (1935, c. 408, s. 2; 1961, c. 200, s. 4.)

## CASE NOTES

Quoted in In re Housing Auth., 233 N.C. 649, 65 S.E.2d 761 (1951).

### § 157-42. Conveyance, lease or agreement in aid of housing project.

For the purpose of aiding and cooperating in the planning, construction and operation of housing projects located within their respective territorial boundaries, the State, its subdivisions and agencies, and any county, city or municipality of the State may, upon such terms, with or without considerations as it may determine:

- (1) Dedicate, release, sell, convey, or lease any of its interest in any property, or grant easements, licenses or any other rights or privileges therein to a housing authority or the United States of America or any agency thereof;
- (2) Cause parks, playgrounds, recreational, community, educational, water, sewer or drainage facilities, or any other works, which it is otherwise empowered to undertake, to be furnished adjacent to or in connection with housing projects;
- (3) Furnish, dedicate, close, pave, install, grade, regrade, plan or replan streets, roads, roadways, alleys, sidewalks or other places, which it is otherwise empowered to undertake;
- (4) Plan or replan, zone, or rezone; make exceptions from building regulations and ordinances; any city or town also may change its map;
- (5) Cause services to be furnished to the housing authority of the character which it is otherwise empowered to furnish;

- (6) Enter into agreements with respect to the exercise by it of its powers relating to the repair, closing or demolition of unsafe, insanitary or unfit dwellings;
- (7) Enter into agreements (which may extend over any period, notwithstanding any provision or rule of law to the contrary) with a housing authority respecting action to be taken pursuant to any of the powers granted by this Article. Any law or statute to the contrary notwithstanding, any sale, conveyance, lease or agreement provided for in this section may be made by the State, a city, county, municipality, subdivision or agency of the State without appraisal, public notice, advertisement or public bidding.
- (8) With respect to any housing project which a housing authority has acquired or taken over from the United States of America or any agency thereof and which the housing authority by resolution has found and declared to have been constructed in a manner that will promote the public interest and afford necessary safety, sanitation and other protection, no city or county shall require any changes to be made in the housing project or the manner of its construction or take any other action relating to such construction. (1935, c. 408, s. 3; 1939, c. 137.)

**Cross References.** — As to authority of municipalities regarding repair, closing and demolition of unfit dwellings, see § 160A-441 et seq.

**Legal Periodicals.** — For comment on the public purpose doctrine, see 3 Wake Forest Intra. L. Rev. 37 (1967).

#### OPINIONS OF ATTORNEY GENERAL

**This Section Does Not Provide Authority to Municipalities to Use Tax or Nontax Money in Day-Care Centers and Federally**

**Subsidized Housing Projects.** — See opinion of Attorney General to Dale Shepherd, 42 N.C.A.G. 135 (1972).

### § 157-43. Advances and donations by the city and municipality.

The council or other governing body of the city included within the territorial boundaries of such authority is authorized to make an estimate of the amount of money necessary for the administrative expenses and overhead of the housing authority during the first year following the incorporation of such housing authority, and to appropriate such amount to the authority out of any moneys in the city treasury not appropriated to some other purposes, and to cause the moneys so appropriated to be paid the authority as a donation, and moneys so appropriated and paid to a housing authority by a city shall be deemed to be a necessary expense of such city. In addition thereto, the city and any municipality located in whole or in part within the boundaries of a housing authority shall have the power annually and from time to time to make donations or advances to the authority of such sums as the city or municipality in its discretion may determine. The authority, when it has money available therefor, shall reimburse the city or municipality for all advances by way of loan made to it. (1935, c. 408, s. 5.)

**Legal Periodicals.** — For comment on the public purpose doctrine, see 3 Wake Forest Intra. L. Rev. 37 (1967).

### § 157-44. Action of city or municipality by resolution.

Except as otherwise provided in this Article or by the Constitution of the State, all action authorized to be taken under this Article by the council or other governing body of any city or of any municipality may be by resolution adopted by a majority of all the members of its council or other governing body, which resolution may be adopted at the meeting of the council or other governing body at which such resolution is introduced and shall take effect immediately upon such adoption, and no such resolution need be published or posted. (1935, c. 408, s. 5.)

#### CASE NOTES

**Cited** in *Town of Spencer v. Town of E. Spencer*, 129 N.C. App. 751, 501 S.E.2d 367 (1998).

### § 157-45. Restrictions on exercise of right of eminent domain; duties of Utilities Commission; investigation of projects.

Notwithstanding any finding of public convenience and necessity, either in general or specific, by the terms of this Article, the right of eminent domain shall not be exercised unless and until a certificate of public convenience and necessity for such project has been issued by the Utilities Commission of North Carolina, and the proceedings leading up to the issuing of such certificate of public convenience and necessity, and the right to appeal therefrom shall be as now provided by law and said rights are hereby expressly reserved to all interested parties in said proceedings. In addition to the powers now granted by law to the Utilities Commission of North Carolina, the said Utilities Commission is hereby vested with full power and authority to investigate and examine all projects set up or attempted to be set up under the provisions of this Article and determine the question of public convenience and necessity for said project. (1935, c. 408, s. 6.)

**Cross References.** — As to proceedings before the Utilities Commission and appeal therefrom, see §§ 62-60 to 62-82.

#### CASE NOTES

**Cited** in *In re Housing Auth.*, 233 N.C. 649, 65 S.E.2d 761 (1951).

### § 157-46. Purpose of Article.

It is the purpose and intent of this Article that the State, its subdivisions and agencies, and any county, city or municipality of the State shall be authorized, and are hereby authorized, to do any and all things necessary to aid and cooperate in the planning, construction and operation of housing projects by the United States of America and by housing authorities. (1935, c. 408, s. 7.)

### § 157-47. Supplemental nature of Article.

The powers conferred by this Article shall be in addition and supplemental to the powers conferred by any other law. (1935, c. 408, s. 8.)

## ARTICLE 3.

*Eminent Domain.***§ 157-48. Finding and declaration of necessity.**

It is hereby declared that insanitary or unsafe dwelling accommodations exist in various areas of the State and that consequently many persons of low income are forced to reside in such dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens of the State and impair economic values; that the clearance, replanning and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which private property may be acquired; that it is in the public interest that work on such projects be instituted as soon as possible in order to relieve unemployment which now constitutes an emergency; and the necessity in the public interest for the provision hereinafter enacted, is hereby declared as a matter of legislative determination. (1935, c. 409, s. 1.)

## CASE NOTES

**Cited in** *In re Housing Auth.*, 233 N.C. 649, 65 S.E.2d 761 (1951).

**§ 157-49. Housing project.**

The term "housing project" whenever used in this Article shall mean any undertaking (i) to demolish, clear, remove, alter or repair unsafe or insanitary housing and/or (ii) to provide dwelling accommodations for persons of low income, and said term may also include such buildings and equipment for recreational or social assemblies for educational, health or welfare purposes, and such necessary utilities as are designed primarily for the benefit and use of the occupants of such dwelling accommodations. (1935, c. 409, s. 2.)

**§ 157-50. Eminent domain for housing projects.**

Any corporation which is an agency of the United States of America shall have the right to acquire by eminent domain any real property, including improvements and fixtures thereon, which it may deem necessary for a housing project being constructed, operated or aided by it or the United States of America. Any corporation borrowing money or receiving other financial assistance from the United States of America or any agency thereof for the purpose of financing the construction or operation of any housing project or projects, the operation of which will be subject to public supervision or regulation, shall have the right to acquire by eminent domain any real property, including fixtures and improvements thereon, which it may deem necessary for such project. A housing project shall be deemed to be subject to public supervision or regulation within the meaning of this Article if the rents to be charged by it are in any way subject to the supervision, regulation or approval of the United States of America, the State or any of their subdivisions or agencies, or by a housing authority, city, municipality or county, whether such right to supervise, regulate or approve be by virtue of any law, statute, contract or otherwise.

Any such corporate agency of the United States of America or any such corporation, upon the adoption of a resolution declaring that the acquisition of

the property described therein is in the public interest and necessary for public use, may exercise the power of eminent domain pursuant to the provisions of Chapter 40A. (1935, c. 409, s. 3; 1981, c. 919, s. 26.)

**Cross References.** — As to exercise of eminent domain by housing authorities, see § 157-11.

#### CASE NOTES

**Discretion of Housing Authority in Selection of Site.** — In determining what property is necessary for a public housing site, a broad discretion is vested by statute in housing authority commissioners, to whom the power of eminent domain is delegated. In re Housing Auth., 235 N.C. 463, 70 S.E.2d 500 (1952); Housing Auth. v. Wooten, 257 N.C. 358, 126 S.E.2d 101 (1962); Philbrook v. Chapel Hill Hous. Auth., 269 N.C. 598, 153 S.E.2d 153 (1967).

**Selection of Slum Area Site Not Required.** — In the selection of a location for a housing project as authorized under the Housing Authorities Law, the project may be built either in a slum area which has been cleared or upon other suitable site. The housing authority is given wide discretion in the selection and location of a site for such project. In re Housing Auth., 233 N.C. 649, 65 S.E.2d 761 (1951); Philbrook v. Chapel Hill Hous. Auth., 269 N.C. 598, 153 S.E.2d 153 (1967).

A housing authority has wide discretion in the selection and location of a site for a housing project. It is not required to select a site in a slum area as the site for a low-rent housing project. *Martin v. North Carolina Hous. Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

**Fact that a few isolated properties in an area may be taken and dismantled which are above the standard of slum properties, or that some few desirable homes will be taken,**

will not affect the public character of the condemnation proceeding. In re Housing Auth., 233 N.C. 649, 65 S.E.2d 761 (1951); *Martin v. North Carolina Hous. Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970).

**When Judicial Review of Authority's Site Selection Is Available.** — So extensive is the discretionary power of the housing commissioners that ordinarily the selection of a project site may only become an issuable question, determinable by the court, on allegations charging arbitrary or capricious conduct amounting to an abuse of discretion. However, allegations charging malice, fraud, or bad faith in the selection of a housing project site are not essential to confer the right of judicial review. It suffices to allege and show abuse of discretion. In re Housing Auth., 235 N.C. 463, 70 S.E.2d 500 (1952); *Philbrook v. Chapel Hill Hous. Auth.*, 269 N.C. 598, 153 S.E.2d 153 (1967).

**Testimony tending to show that other sites were available and suitable for a housing project is relevant and admissible as bearing directly on the question of whether the housing commissioners acted arbitrarily or capriciously in attempting to appropriate the proposed site.** In re Housing Auth., 235 N.C. 463, 70 S.E.2d 500 (1952).

**As to evidence showing arbitrary and capricious actions in selecting site,** see In re Housing Auth., 235 N.C. 463, 70 S.E.2d 500 (1952).

§ 157-51: Repealed by Session Laws 1983, c. 149.

#### ARTICLE 4.

### *National Defense Housing Projects.*

#### § 157-52. Purpose of Article.

It is hereby found and declared that the National Defense Program involves large increases in the military forces and personnel in this State, a great increase in the number of workers in already established manufacturing centers and the bringing of a large number of workers and their families to new centers of defense industries in the State; that there is an acute shortage of safe and sanitary dwellings available to such persons and their families in this State which impedes the National Defense Program; that it is imperative that

action be taken immediately to assure the availability of safe and sanitary dwellings for such persons to enable the rapid expansion of national defense activities in this State and to avoid a large labor turnover in defense industries which would seriously hamper their production; that the provisions hereinafter enacted are necessary to assure the availability of safe and sanitary dwellings for persons engaged in national defense activities which otherwise would not be provided at this time, and that such provisions are for the public use and purpose of facilitating the National Defense Program in this State. It is further declared to be the purpose of this Article to authorize housing authorities to do any and all things necessary or desirable to secure the financial aid of the federal government, or to cooperate with or act as agent of the federal government, in the expeditious development and the administration of projects to assure the availability when needed of safe and sanitary dwellings for persons engaged in national defense activities. (1941, c. 63, s. 1.)

### § 157-53. Definitions.

(a) "Administration," as used in this Article, shall mean any and all undertakings necessary for management, operation or maintenance, in connection with any project, and shall include the leasing of any project (in whole or in part) from the federal government.

(b) "Development" as used in this Article, shall mean any and all undertakings necessary for the planning, land acquisition, demolition, financing, construction or equipment in connection with a project (including the negotiation or award of contracts therefor), and shall include the acquisition of any project (in whole or in part) from the federal government.

(c) "Federal government," as used in this Article, shall mean the United States of America or any agency or instrumentality, corporate or otherwise, of the United States of America.

(d) "Housing authority," as used in this Article, shall mean any housing authority established or hereafter established pursuant to Article 1 of this Chapter.

(e) The development of a project shall be deemed to be "initiated," within the meaning of this Article, if a housing authority has issued any bonds, notes or other obligations with respect to financing the development of such project of the authority, or has contracted with the federal government with respect to the exercise of powers hereunder in the development of such project of the federal government for which an allocation of funds has been made prior to the termination of the present war.

(f) "Persons engaged in national defense activities," as used in this Article shall include: enlisted personnel in the armed services of the United States and employees of the Defense Department assigned to duty at armed forces reservations, posts or bases; and workers engaged or to be engaged in industries connected with and essential to the National Defense Program; and shall include the families of the aforesaid persons who are living with them.

(g) "Persons of low income," as used in this Article, shall mean persons or families who lack the amount of income which is necessary (as determined by the housing authority undertaking the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

(h) "State public body," as used in this Article, shall include the State, its subdivisions and agencies, and any county, city, town or incorporated village of the State. (1941, c. 63, s. 8; 1943, c. 90, s. 2; 1995, c. 379, s. 4.)

**Editor's Note.** — The “present war,” referred to in subsection (e) of this section, is World War II.

### **§ 157-54. Rights, powers, etc., of housing authorities relative to national defense projects.**

Any housing authority may undertake the development and administration of projects to assure the availability of safe and sanitary dwellings for persons engaged in national defense activities whom the housing authority determines would not otherwise be able to secure safe and sanitary dwellings within the vicinity thereof, but no housing authority shall initiate the development of any such project pursuant to this Article after the termination of the present war.

In the ownership, development or administration of such projects, a housing authority shall have all the rights, powers, privileges and immunities that such authority has under any provision of law relating to the ownership, development or administration of slum clearance and housing projects for persons of low income, in the same manner as though all the provisions of law applicable to slum clearance and housing projects for persons of low income were applicable to projects developed or administered to assure the availability of safe and sanitary dwellings for persons engaged in national defense activities as provided in this Article, and housing projects developed or administered hereunder shall constitute “housing projects” under Article 1 of this Chapter, as that term is used therein: Provided, that during the period (herein called the “national defense period”) that a housing authority finds (which finding shall be conclusive in any suit, action or proceeding) that within its authorized area of operation, or any part thereof, there is an acute shortage of safe and sanitary dwellings which impedes the National Defense Program in this State and that the necessary safe and sanitary dwellings would not otherwise be provided when needed for persons engaged in national defense activities, any project developed or administered by such housing authority (or by any housing authority cooperating with it) in such area pursuant to this Article, with the financial aid of the federal government (or as agent for the federal government as hereinafter provided), shall not be subject to the limitations provided in G.S. 157-29; and provided further, that, during the national defense period, a housing authority may make payments in such amounts as it finds necessary or desirable for any services, facilities, works, privileges or improvements furnished for or in connection with any such projects. After the national defense period, any such projects owned and administered by a housing authority shall be administered for the purposes and in accordance with the provisions of Article 1 of this Chapter. (1941, c. 63, s. 2; 1943, c. 90, s. 1.)

**Editor's Note.** — The “present war,” referred to at the end of the first paragraph of this section, is World War II.

### **§ 157-55. Cooperation with federal government; sale to same.**

A housing authority may exercise any or all of its powers for the purpose of cooperating with, or acting as agent for, the federal government in the development or administration of projects by the federal government to assure the availability of safe and sanitary dwellings for persons engaged in national defense activities and may undertake the development or administration of any such project for the federal government. In order to assure the availability

of safe and sanitary housing for persons engaged in national defense activities, a housing authority may sell (in whole or in part) to the federal government any housing projects developed for persons of low income but not yet occupied by such persons; such sale shall be at such price and upon such terms as the housing authority shall prescribe and shall include provision for the satisfaction of all debts and liabilities of the authority relating to such project. (1941, c. 63, s. 3.)

### **§ 157-56. Cooperation of State public bodies in developing projects.**

Any State public body shall have the same rights and powers to cooperate with housing authorities, or with the federal government, with respect to the development or administration of projects to assure the availability of safe and sanitary dwellings for persons engaged in national defense activities that such State public body has pursuant to Article 2 of this Chapter, for the purpose of assisting the development or administration of slum clearance or housing projects for persons of low income. (1941, c. 63, s. 4.)

### **§ 157-57. Obligations issued for projects made legal investments; security for public deposits.**

Bonds or other obligations issued by a housing authority for a project developed or administered pursuant to this Article shall be security for public deposits and legal investments to the same extent and for the same persons, institutions, associations, corporations, bodies and officers as bonds or other obligations issued pursuant to Article 1 of this Chapter for the development of a slum clearance or housing project for persons of low income. (1941, c. 63, s. 5.)

### **§ 157-58. Bonds, notes, etc., issued heretofore, validated.**

All bonds, notes, contracts, agreements and obligations of housing authorities heretofore issued or entered into relating to financing or undertaking (including cooperating with or acting as agent of the federal government in) the development or administration of any project to assure the availability of safe and sanitary dwellings for persons engaged in national defense activities, are hereby validated and declared legal in all respects, notwithstanding any defect or irregularity therein or any want of statutory authority. (1941, c. 63, s. 6.)

### **§ 157-59. Further declaration of powers granted housing authorities.**

This Article shall constitute an independent authorization for a housing authority to undertake the development or administration of projects to assure the availability of safe and sanitary dwellings for persons engaged in national defense activities as provided in this Article and for a housing authority to cooperate with, or act as agent for, the federal government in the development or administration of similar projects by the federal government. A housing authority may do any and all things necessary or desirable to cooperate with, or act as agent for, the federal government, or to secure financial aid, in the expeditious development or in the administration of projects to assure the availability of safe and sanitary dwellings for persons engaged in national defense activities and to effectuate the purposes of this Article. (1941, c. 63, s. 7.)

## § 157-60. Powers conferred by Article supplemental.

The powers conferred by this Article shall be in addition and supplemental to the powers conferred by any other law, and nothing contained herein shall be construed as limiting any other powers of a housing authority. (1941, c. 63, s. 9.)

### CASE NOTES

**Cited in** *In re Housing Auth.*, 235 N.C. 463, 70 S.E.2d 500 (1952).

§§ 157-61 through 157-65: Reserved for future codification purposes.

## ARTICLE 5.

### *Indian Housing Authority.*

## § 157-66. Authority created.

There is hereby created and established a public body corporate and politic to be known as the North Carolina Indian Housing Authority which shall be governed by the provisions of law controlling housing authorities as set out in this Chapter as well as other applicable provisions of the General Statutes. It is the intent of the General Assembly that the North Carolina Indian Housing Authority not be treated as a State agency for any purpose, but rather that it be treated as a housing authority as set out above. (1977, c. 1112, s. 1; 1989 (Reg. Sess., 1990), c. 1066, s. 15(b); 1993, c. 201, s. 1.)

**Editor's Note.** — Session Laws 1989 (Reg. Sess., 1990), c. 1066, which amended this section, in s. 15(a) provided: "The Director of the Office of Indian Housing has stated that if the North Carolina State Indian Housing Authority is a State agency, then it will be ineligible to receive more than \$1,000,000 per year in fed-

eral assistance. This section clarifies that the Authority is not a State agency."

**Legal Periodicals.** — For article on criminal jurisdiction on the North Carolina Cherokee Indian reservation, see 24 Wake Forest L. Rev. 335 (1989).

### CASE NOTES

**The public duty doctrine did not apply to the defendant Housing Authority because it was properly classified as a local government agency,** despite its existence as a municipal corporation, for the following reasons: Pursuant to § 157-4, a housing authority is created by local government; the city council and its members are appointed by the mayor; the language in several provisions within Chapter 157 clearly distinguishes between housing authorities and state agencies; § 157-26 labels housing authorities as "local govern-

ment agencies" and exempts them from taxation "to the same extent as a unit of local government;" and the Housing Authorities Law which creates the North Carolina Indian Housing Authority states: "It is the intent of the General Assembly that the North Carolina Indian Housing Authority not be treated as a State agency for any purpose, but rather that it be treated as a housing authority as set out above." *Huntley v. Pandya*, 139 N.C. App. 624, 534 S.E.2d 238 (2000), cert. denied, 353 N.C. 263, 546 S.E.2d 98 (2000).

### § 157-67. Powers of Authority; applicability of certain laws; powers of Governor and Commission of Indian Affairs.

The Indian Housing Authority, hereafter referred to as the Authority, shall exercise its powers to provide housing for Indians of low income. Except as otherwise provided in this Article, all the provisions of law applicable to housing authorities created for municipalities pursuant to Chapter 157 of the General Statutes shall be applicable to this Authority, unless a different meaning clearly appears from the context. The Governor and the Commission of Indian Affairs are hereby authorized to exercise all appointing and other powers with respect to this Authority that are vested pursuant to said Chapter 157 in the chief executive officer and governing body of a municipality. (1977, c. 1112, s. 2; 1993, c. 201, s. 1.)

### § 157-68. Commissioners of Authority.

The Authority shall consist of not less than five nor more than 16 commissioners (the number to be set by the North Carolina State Commission of Indian Affairs) who shall be appointed by the Governor, after receiving nominations from the North Carolina State Commission of Indian Affairs. For each vacancy, the Governor must appoint one person from a list of two eligible persons so nominated. Commissioners shall be selected from the major groups of North Carolina Indians that elect members to the North Carolina State Commission of Indian Affairs under G.S. 143B-407. No person shall be barred from serving as a commissioner because he is a tenant or home buyer in an Indian housing project. (1977, c. 1112, s. 3; 1987 (Reg. Sess., 1988), c. 1014; 1998-155, s. 2; 2001-318, s. 2.)

**Editor's Note.** — Session Laws 1987 (Reg. Sess., 1988), c. 1014, s. 2 provided that the act, which rewrote this section, was effective upon ratification (June 29, 1988), but would not affect the term of office of any current member of the North Carolina State Indian Housing Authority.

**Effect of Amendments.** — Session Laws 2001-318, s. 2, effective July 28, 2001, substituted "16 commissioners" for "15 commissioners" in the first sentence.

### § 157-69. Area of operation.

The area of operation of the Authority shall include the entire State: Provided, that the Authority shall not undertake any housing project or projects within the area of operation of any city, county or regional housing authority unless a resolution shall have been adopted by such city, county or regional housing authority declaring that there is a need for the Indian Housing Authority to exercise its powers within such city, county or regional housing authority's area of operation. (1977, c. 1112, s. 4; 1993, c. 201, s. 1.)

### § 157-70. Rentals and tenant selection in accordance with § 157-29.

Rentals and tenant selection in connection with projects of the Authority shall be in accordance with G.S. 157-29. (1977, c. 1112, s. 5; 1983 (Reg. Sess., 1984), c. 1068.)



## **Chapter 157A.**

### **Historic Properties Commissions.**

**§§ 157A-1 through 157A-13:** Transferred to §§ 160A-399.1 to 160A-399.13 by Session Laws 1973, c. 426, s. 62.



# Chapter 158.

## Local Development.

### Article 1.

#### Local Development Act of 1925.

Sec.

- 158-1 through 158-7. [Repealed.]
- 158-7.1. Local development.
- 158-7.2. Accounting for expenditures.
- 158-7.3. [Not in effect.]

### Article 2.

#### Economic Development Commissions.

- 158-8. Creation of municipal, county or regional commissions authorized; composition; joining or withdrawing from regional commissions.
- 158-8.1. Creation of Western North Carolina Regional Economic Development Commission.
- 158-8.2. Creation of Northeastern North Carolina Regional Economic Development Commission.
- 158-8.3. Creation of Southeastern North Carolina Regional Economic Development Commission.
- 158-8.4. Removal of commission members.
- 158-9. Organization of commission; rules and regulations; committees; meetings.
- 158-10. Staff and personnel; contracts for services.
- 158-11. Office and equipment.
- 158-12. Fiscal affairs generally; appropriations.
  - 158-12.1. Commission funds secured.
- 158-13. Powers and duties.
- 158-14. Regional planning and economic development commissions authorized.
- 158-15. Powers granted herein supplementary.

### Article 2A.

#### Multi-County Water Conservation and Infrastructure District.

- 158-15.1. Multi-County Water Conservation and Infrastructure District.
- 158-15.2 through 158-15.9. [Reserved.]

### Article 3.

#### Tax Elections for Industrial Development Purposes.

- 158-16. Board of commissioners may call tax election; rate and purposes of tax.

Sec.

- 158-17. Registration of voters; election under supervision of county board of elections.
- 158-18. Form of ballot; when ballots supplied; designation of ballot box.
- 158-19. Counting of ballots; canvassing, certifying and announcing results of elections.
- 158-20. Authorized tax rate.
- 158-21. Creation of industrial development commission; membership and terms of office; vacancies; meetings; selection of officers; bylaws and procedural rules and policies; authority of treasurer and required bond; subsidy or investment in business or industry forbidden.
- 158-22. Bureau set up under supervision and control of industrial development commission; furnishing county commissioners with proposed budget.
- 158-23. Board of county commissioners may function and carry out duties of industrial development commission.
- 158-24. Counties to which Article applies.
- 158-25 through 158-29. [Reserved.]

### Article 4.

#### Global TransPark Development Zone.

- 158-30. Title.
- 158-31. Purpose.
- 158-32. Definitions.
- 158-33. Creation of Global TransPark Development Zone.
  - 158-33.1. Addition of counties to Zone.
- 158-34. Territorial jurisdiction of Zone.
- 158-35. Commission membership, officers, compensation.
- 158-36. Voting.
- 158-37. Powers of the Zone.
- 158-38. Fiscal accountability.
- 158-39. Funds.
- 158-40. Tax exemption.
- 158-41. Withdrawal; termination.
- 158-42. Temporary Zone vehicle registration tax.

## ARTICLE 1.

*Local Development Act of 1925.*

**Local Modification.** — (As to Article 1) Pitt: 1989 (Reg. Sess., 1990), c. 847, s. 1.

§ **158-1:** Repealed by Session Laws 1973, c. 803, s. 37.

**Cross References.** — See now §§ 158-7.1 and 158-7.2.

§ **158-2:** Repealed by Session Laws 1973, c. 803, s. 38.

**Cross References.** — See now §§ 158-7.1 and 158-7.2.

§§ **158-3 through 158-7:** Repealed by Session Laws 1973, c. 803, ss. 39-43.

### § 158-7.1. Local development.

(a) Each county and city in this State is authorized to make appropriations for the purposes of aiding and encouraging the location of manufacturing enterprises, making industrial surveys and locating industrial and commercial plants in or near such city or in the county; encouraging the building of railroads or other purposes which, in the discretion of the governing body of the city or of the county commissioners of the county, will increase the population, taxable property, agricultural industries and business prospects of any city or county. These appropriations may be funded by the levy of property taxes pursuant to G.S. 153A-149 and 160A-209 and by the allocation of other revenues whose use is not otherwise restricted by law.

(b) A county or city may undertake the following specific economic development activities. (This listing is not intended to limit by implication or otherwise the grant of authority set out in subsection (a) of this section). The activities listed in this subsection may be funded by the levy of property taxes pursuant to G.S. 153A-149 and G.S. 160A-209 and by the allocation of other revenues whose use is not otherwise restricted by law.

- (1) A county or city may acquire and develop land for an industrial park, to be used for manufacturing, assembly, fabrication, processing, warehousing, research and development, office use, or similar industrial or commercial purposes. A county may acquire land anywhere in the county, including inside of cities, for an industrial park, while a city may acquire land anywhere in the county or counties in which it is located. A county or city may develop the land by installing utilities, drainage facilities, street and transportation facilities, street lighting, and similar facilities; may demolish or rehabilitate existing structures; and may prepare the site for industrial or commercial uses. A county or city may convey property located in an industrial park pursuant to subsection (d) of this section.
- (2) A county or city may acquire, assemble, and hold for resale property that is suitable for industrial or commercial use. A county may acquire such property anywhere in the county, including inside of cities, while

a city may acquire such property inside the city or, if the property will be used by a business that will provide jobs to city residents, anywhere in the county or counties in which it is located. A county or city may convey property acquired or assembled under this subdivision pursuant to subsection (d) of this section.

- (3) A county or city may acquire options for the acquisition of property that is suitable for industrial or commercial use. The county or city may assign such an option, following such procedures, for such consideration, and subject to such terms and conditions as the county or city deems desirable.
- (4) A county or city may acquire or construct one or more "shell buildings", which are structures of flexible design adaptable for use by a variety of industrial or commercial businesses. A county or city may convey or lease a shell building or space in a shell building pursuant to subsection (c) of this section.
- (5) A county or city may construct, extend or own utility facilities or may provide for or assist in the extension of utility services to be furnished to an industrial facility, whether the utility is publicly or privately owned.
- (6) A county or city may extend or may provide for or assist in the extension of water and sewer lines to industrial properties or facilities, whether the industrial property or facility is publicly or privately owned.
- (7) A county or city may engage in site preparation for industrial properties or facilities, whether the industrial property or facility is publicly or privately owned.

(c) Any appropriation or expenditure pursuant to subsection (b) of this section must be approved by the county or city governing body after a public hearing. The county or city shall publish notice of the public hearing at least 10 days before the hearing is held. If the appropriation or expenditure is for the acquisition of an interest in real property, the notice shall describe the interest to be acquired, the proposed acquisition cost of such interest, the governing body's intention to approve the acquisition, the source of funding for the acquisition and such other information needed to reasonably describe the acquisition. If the appropriation or expenditure is for the improvement of privately owned property by site preparation or by the extension of water and sewer lines to the property, the notice shall describe the improvements to be made, the proposed cost of making the improvements, the source of funding for the improvements, the public benefit to be derived from making the improvements, and any other information needed to reasonably describe the improvements and their purpose.

(d) A county or city may lease or convey interests in real property held or acquired pursuant to subsection (b) of this section in accordance with the procedures of this subsection. A county or city may convey or lease interests in property by private negotiation and may subject the property to such covenants, conditions, and restrictions as the county or city deems to be in the public interest or necessary to carry out the purposes of this section. Any such conveyance or lease must be approved by the county or city governing body, after a public hearing. The county or city shall publish notice of the public hearing at least 10 days before the hearing is held; the notice shall describe the interest to be conveyed or leased, the value of the interest, the proposed consideration for the conveyance or lease, and the governing body's intention to approve the conveyance or lease. Before such an interest may be conveyed, the county or city governing body shall determine the probable average hourly wage to be paid to workers by the business to be located at the property to be conveyed and the fair market value of the interest, subject to whatever

covenants, conditions, and restrictions the county or city proposes to subject it to. The consideration for the conveyance may not be less than the value so determined.

(d1) Repealed by Session Laws 1993, c. 497, s. 22.

(d2) In arriving at the amount of consideration that it receives, the Board may take into account prospective tax revenues from improvements to be constructed on the property, prospective sales tax revenues to be generated in the area, as well as any other prospective tax revenues or income coming to the county or city over the next 10 years as a result of the conveyance or lease provided the following conditions are met:

(1) The governing board of the county or city shall determine that the conveyance of the property will stimulate the local economy, promote business, and result in the creation of a substantial number of jobs in the county or city that pay at or above the median average wage in the county or, for a city, in the county where the city is located. A city that spans more than one county is considered to be located in the county where the greatest population of the city resides. For the purpose of this subdivision, the median average wage in a county is the median average wage for all insured industries in the county as computed by the Employment Security Commission for the most recent period for which data is available.

(2) The governing board of the county or city shall contractually bind the purchaser of the property to construct, within a specified period of time not to exceed five years, improvements on the property that will generate the tax revenue taken into account in arriving at the consideration. Upon failure to construct the improvements specified in the contract, the purchaser shall reconvey the property back to the county or city.

(e) All appropriations and expenditures pursuant to subsections (b) and (c) of this section shall be subject to the provisions of the Local Government Budget and Fiscal Control Acts of the North Carolina General Statutes, respectively, for cities and counties and shall be listed in the annual financial report the county or city submits to the Local Government Commission. The budget format for each such governing body shall make such disclosures in such detail as the Local Government Commission may by rule and regulation direct.

(f) At the end of each fiscal year, the total of the following for each county and city may not exceed one-half of one percent (0.5%) of the outstanding assessed property tax valuation for the county or city as of January 1 preceding the beginning of the fiscal year:

(1) The investment in property acquired at any time under subdivisions (b)(1) through (b)(4) of this section and owned at the end of the fiscal year.

(2) The amount expended during the fiscal year under subdivisions (b)(5) and (b)(7) of this section.

(3) The amount of tax revenue that was taken into account under subsection (d2) of this section and was expected to be received during the fiscal year.

The Local Government Commission shall review the annual financial reports filed by counties and cities to determine if any county or city has exceeded the limit set by this subsection. If the Commission finds that a county or city has exceeded this limit, it shall notify the county or city. A county or city that receives a notice from the Commission under this subsection must submit to the Commission for its review and approval any appropriation or expenditure the county or city proposes to make under this section during the next three fiscal years. The Commission shall not approve an appropriation or

expenditure that would cause a county or city to exceed the limit set by this subsection.

(g) Repealed by Session Laws 1989, c. 374, s. 1. (1973, c. 803, s. 37; 1985, c. 639, s. 1; 1985 (Reg. Sess., 1986), c. 846, s. 1; c. 848, s. 1; c. 858, s. 1; c. 911, s. 1; c. 921, s. 1; 1987, c. 577, s. 1.1; 1989, c. 374, s. 1; 1991, c. 598, s. 6; c. 659, ss. 1, 2; 1991 (Reg. Sess., 1992), c. 793, s. 1; c. 799, s. 1; c. 938, s. 1; 1993, c. 31, s. 1; c. 42, s. 1; c. 246, ss. 1(a), 1(b); c. 275, s. 2; c. 358, s. 13; c. 497, ss. 22, 24; c. 536, ss. 1, 4.)

**Local Modification.** — (As to Article 1) Burke: 1987 (Reg. Sess., 1988), c. 1002, s. 3.2; Chatham: 1993, c. 358, ss. 10-12; Clay: 1993, c. 520, s. 3; Davie: 1993, c. 536, s. 2; Duplin: 1991, c. 390; Henderson: 1993, c. 520, s. 3; (As to Article 1) Lenoir: 1987 (Reg. Sess., 1988), c. 1002, ss. 1-3; Mecklenburg: 1993, c. 174, s. 1; Rockingham: 1993, c. 536, s. 2; Transylvania: 1993, c. 520, s. 3; city of Brevard: 1993, c. 520, s. 3; city of Charlotte: 1993, c. 174, s. 1; (As to Article 1) city of Kinston: 1987 (Reg. Sess., 1990), c. 1002, ss. 1-3; (As to Article 1) city of Morganton: 1987 (Reg. Sess., 1988), c. 1002, s. 3.1; town of Mocksville: 1993, c. 536, s. 2; town of Pittsboro: 1993, c. 358, ss. 10-12; town of Silver City: 1993, c. 358, ss. 10-12; town of Wallace: 1998-40, s. 2.

**Editor's Note.** — Session Laws 1987, c. 577, s. 1 amended Session Laws 1985, c. 639, s. 4, as amended by Session Laws 1985 (Reg. Sess., 1986), cc. 846, 848, 849, 858, 874, 911, 916, 921, and Session Laws 1987, c. 203, which formerly made subsections (b) to (f) of this section applicable only to certain counties, municipalities and towns, to read solely: "This act shall become effective January 1, 1986." Furthermore, subsection (g), which was enacted by Session Laws 1987, c. 577, s. 1.1 and excepted Buncombe County and municipalities therein from the provisions of subsections (b) to (f) was repealed by Session Laws 1989, c. 374, s. 1. Thus subsections (b) to (d), (e) and (f) now have statewide application.

Session Laws 1993, c. 272, s. 2 and c. 520, s. 4 created local modifications to subsection (d1) applicable to the cities of Brevard and High Point and to Clay, Henderson, and Transylvania Counties. Subsection (d1) was repealed by Session Laws 1993, c. 497, s. 22 and c. 536, s. 4.

Session Laws 1993, c. 497, which amended this section, in s. 25 provides: "Liberal Construction. This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect these purposes."

Session Laws 1993, c. 497, which amended this section, in s. 29 provides that Sections 22, 23, and 24 do not affect appropriations or expenditures that are made by a county or city after the effective date of the act and were agreed to in writing by the county or city before the effective date of this agreement as part of an economic development. The act was effective upon ratification (July 23, 1993).

Session Laws 1993, c. 536, which amended this section, in s. 3 provides: "This act does not affect appropriations or expenditures that are made by a county or city after the effective date of this act and were agreed to in writing by the county or city before the effective date of this act as part of an economic development project."

#### CASE NOTES

**Constitutionality** — This section does not violate the public purpose clause of the North Carolina Constitution. *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996).

Under the expanded understanding of public purpose, even the most innovative activities this section permits are constitutional so long as they primarily benefit the public and not a private party. *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996).

**Public Purpose.** — An expenditure does not lose its public purpose merely because it involves a private actor; if an act will promote the welfare of a state or local government and its citizens, it is for a public purpose. *Maready v.*

*City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996).

**Promotion of General Economic Welfare.** — Sections 158-8 through 158-15, 160A-209(c), and 153A-149(c) clearly indicate that this section is a part of a comprehensive scheme of legislation dealing with economic development whereby the General Assembly is attempting to authorize exercise of the power of taxation for the perceived public purpose of promoting the general economic welfare of the citizens of North Carolina. *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996).

**Permissible Governmental Action.** — The activities this section authorizes are in

keeping with those accepted as within the scope of permissible governmental action. *Maready v.*

*City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996).

**OPINIONS OF ATTORNEY GENERAL**

**A business development investment grant program designed to offer tax rebates** for the purposes of “diversify[ing] the tax base, offer[ing] improved employment opportunities for the citizens” and “promot[ing] economic growth” may be permissible under this

section depending upon whether it primarily serves a public purpose. See opinion of Attorney General to Robert B. Smith, Jr., Smith and Gamblin, PLLC Attorneys at Law, 1997 N.C.A.G. 55 (8/29/97).

**§ 158-7.2. Accounting for expenditures.**

In the event funds appropriated for the purposes of this Article are turned over to any agency or organization other than the county or city for expenditure, no such expenditure shall be made until the county or city has approved the same, and all such expenditures shall be accounted for by the agency or organization at the end of the fiscal year for which they were appropriated. (1973, c. 803, s. 38.)

**§ 158-7.3:** Not in effect.

**Editor’s Note.** — A § 158-7.3 was enacted by Session Laws 1993, c. 497, s. 19, but was made effective upon certification of approval of an amendment to Article V of the Constitution of North Carolina relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue

financing bonds to be used to finance public activities associated with private economic development projects. This amendment was submitted to the people on November 2, 1993 and was defeated. The section, therefore, never took effect.

ARTICLE 2.

*Economic Development Commissions.*

**§ 158-8. Creation of municipal, county or regional commissions authorized; composition; joining or withdrawing from regional commissions.**

The governing body of any municipality or the board of county commissioners of any county may by resolution create an economic development commission for said municipality or county. The governing bodies of any two or more municipalities and/or counties may by joint resolution, adopted by separate vote of each governing body concerned, create a regional economic development commission. A municipal or county economic development commission shall consist of from three to nine members, named for terms and compensation (if any) fixed by its respective governing body. The membership, compensation (if any), and terms of a regional economic development commission, and the formula for its financial support, shall be fixed by the joint resolution creating the commission. Additional governmental units may join a regional commission with the consent of all existing members. Any governmental unit may withdraw from a regional commission on two years’ notice to the other members. The resolution creating a municipal, county, or regional economic development commission may be modified, amended, or repealed in the same manner as it was originally adopted. (1961, c. 722, s. 2.)

**Local Modification.** — Cherokee: 1973, c. 1406; Columbus: 1993 (Reg. Sess., 1994), c. 706, s. 1; Graham: 1973, c. 1406; Jackson: 1973, c. 1406; Nash: 1989, c. 697, s. 1; Swain: 1973, c. 1406; Union: 1993 (Reg. Sess., 1994), c. 706, s. 1.

**Editor's Note.** — Session Laws 2001-424, ss. 20.10(a) and (b), provide for the allocation of funds appropriated in Session Laws 2001-424 to the Department of Commerce for regional economic development commissions to the following commissions: Western North Carolina Regional Economic Development Commission, Research Triangle Regional Commission, Southeastern North Carolina Regional Economic Development Commission, Piedmont Triad Partnership, Northeastern North Carolina Regional Economic Development Commission, Global TransPark Development Commission, and Carolinas Partnership, Inc. A series of steps is set out for determining the allocation to each commission.

Session Laws 2001-424, ss. 20.11(a) and (b), provide: "(a) Each regional economic development commission receiving a grant-in-aid from the Department of Commerce shall:

"(1) By January 15, 2002, and more frequently as requested, report to the Joint Legislative Commission on Governmental Operations, the Fiscal Research Division, and the Department of Commerce the following information:

"a. State fiscal year 2000-2001 program activities, objectives, and accomplishments;

"b. State fiscal year 2000-2001 itemized expenditures and fund sources;

"c. State fiscal year 2001-2002 planned activities, objectives, and accomplishments as specified in subdivisions (b) (1) through (b)(6) of this section [s. 20.11(b)(1) to (b)(6) of Session Laws 2001-424] including actual results through December 31, 2001;

"d. State fiscal year 2001-2002 estimated itemized expenditures and fund sources including actual expenditures and fund sources through December 31, 2001.

"(2) By January 15, 2003, and more frequently as requested, report to the Joint Legislative Commission on Governmental Operations, the Fiscal Research Division, and the Department of Commerce the following information:

"a. State fiscal year 2001-2002 program ac-

tivities, objectives, and accomplishments;

"b. State fiscal year 2001-2002 itemized expenditures and fund sources;

"c. State fiscal year 2002-2003 planned activities, objectives, and accomplishments as specified in subdivisions (b)(1) through (b)(6) of this section [s. 20.11(b)(1) to (b)(6) of Session Laws 2001-424] including actual results through December 31, 2002;

"d. State fiscal year 2002-2003 estimated itemized expenditures and fund sources including actual expenditures and fund sources through December 31, 2002.

"(3) Provide to the Fiscal Research Division and the Department of Commerce a copy of its annual audited financial statement within 30 days of issuance of the statement.

"(b) Each regional economic development commission receiving a grant-in-aid from the Department of Commerce in each fiscal year of the 2001-2003 biennium shall by January 15 of each fiscal year report to the Department of Commerce the following information for the most recently completed fiscal year:

"(1) The number of and description of marketing outreach events including trade shows, recruitment missions, and related activities;

"(2) The number of jobs saved;

"(3) The amount of investment and number of jobs created by the direct efforts of a commission;

"(4) Initiatives undertaken to establish certified sites and shell buildings;

"(5) The number of referrals or leads handled that were generated by the Department of Commerce;

"(6) The number and listing of available sites and buildings within the region served by a commission;

"(7) A listing of major accomplishments."

Session Laws 2001-424, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2001'."

Session Laws 2001-424, s. 36.5 is a severability clause.

Session Laws 2001-424, s. 36.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2001-2003 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2001-2003 fiscal biennium."

**CASE NOTES**

**Contributions Held Due.** — Where, from 1971 through February, 1982, defendant county participated as a member in plaintiff regional council's activities, attending meetings and workshops and receiving the benefits of plaintiff's plans and services, and during this time

defendant made full payments of its proportionate share of plaintiff's budget as set forth in plaintiff's bylaws, and where, most significantly, defendant indicated in a letter of March 8, 1982, that the county board of commissioners unanimously voted to comply with the obliga-

tions incumbent on a withdrawing member, and furthermore, where defendant did not raise any material question of fact pertaining to plaintiff's request that defendant should be estopped from denying its obligation, grant of plaintiff's motion for summary judgment on its

complaint seeking contributions due from defendant would be affirmed. *Land-of-Sky Regional Council v. County of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985), cert. denied, 316 N.C. 553, 344 S.E.2d 7 (1986).

### § 158-8.1. Creation of Western North Carolina Regional Economic Development Commission.

(a) There is created the Western North Carolina Regional Economic Development Commission to serve Buncombe, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, McDowell, Macon, Madison, Polk, Rutherford, Swain, Transylvania, and Yancey Counties, and any other county assigned to the Commission by the Department of Commerce as authorized by law. The Commission shall be located administratively in the Department of Commerce but shall exercise its statutory powers and duties independently of the Department of Commerce. Funds appropriated for the Commission by the General Assembly shall be disbursed directly to the Commission at the beginning of each fiscal year.

(b) The Commission shall consist of 19 members appointed as follows:

- (1) Three members shall be appointed by the Governor;
- (2) Two members shall be appointed by the Lieutenant Governor;
- (3) Seven members shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121; and
- (4) Seven members shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121.

(c) The appointing authority shall designate two of the initial appointees pursuant to subdivision (b)(1), one of the initial appointees pursuant to subdivision (b)(2), two of the initial appointees pursuant to subdivision (b)(3), and two of the initial appointees pursuant to subdivision (b)(4) to serve for terms ending June 30, 1995; the remainder of the initial appointees shall serve for terms ending June 30, 1997. Their successors shall serve for four-year terms ending on June 30 quadrennially thereafter. The appointing authority shall designate the additional appointees under subsections (b3) and (b4) that were added to the Commission membership pursuant to an act of the 1995 General Assembly to serve for terms ending June 30, 1999.

Any appointment to fill a vacancy on the Commission shall be for the balance of the unexpired term. Vacancies in appointments made by the General Assembly shall be in accordance with G.S. 120-122.

(c1) The initial meeting shall be called by the Secretary of the Department of Commerce.

(d) Members of the Commission who are State employees shall receive travel expenses as provided in G.S. 138-6. Other Commission members shall receive per diem of one hundred dollars (\$100.00) a day for each day of service when the Commission meets and shall be reimbursed for travel and subsistence as provided in G.S. 138-5. The Commission may adopt policies authorizing additional per diem of one hundred dollars (\$100.00) a day for non-State employee members' additional days of service including Commission subcommittee meetings or other Commission activities, plus reimbursement for related travel and subsistence as provided in G.S. 138-5.

(e) In addition to the powers and duties granted to economic development commissions in this Article, the Western North Carolina Regional Economic Development Commission shall:

- (1) Survey Western North Carolina and determine the assets, liabilities, and resources that the region contributes to the economic development process.
- (2) Develop and evaluate alternatives for Western North Carolina economic development.
- (3) Develop a preferred economic development plan for the region and establish strategies for implementing the plan.
- (4) Coordinate activities with and enter into contracts with any nonprofit corporation created to assist the Commission in carrying out its powers and duties.
- (5) Repealed by Session Laws 1999-237, s. 16.5(a), effective July 1, 1999. (1993, c. 321, s. 309(a); c. 561, s. 17(a); 1993 (Reg. Sess., 1994), c. 769, ss. 28.7(j), 28.8(a), 28.8(b); 1995, c. 488, s. 49(a), (b); c. 507, s. 25.5(a); c. 509, ss. 103-105; 1999-237, s. 16.5(a).)

**Cross References.** — For note regarding the creation of a Regional Economic Development Commission Expansion Program and appropriation for allocation to regional economic development commissions, see the editor's note under § 158-8.

**Editor's Note.** — Session Laws 2001-491, s. 1, provides: "This act shall be known as 'The Studies Act of 2001.'"

Session Laws 2001-491, ss. 18.1 to 18.10, creates the National Heritage Area Designation Commission. The Commission is directed to seek designation as a National Heritage Area of the 23 county mountain region of North Carolina comprised of the counties designated to be served by the Western North Carolina Regional Economic Development Commission under G.S. 158-8.1: Alleghany, Ashe, Avery, Burke, Buncombe, Caldwell, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Madison, McDowell, Mitchell, Polk, Rutherford, Swain, Transylvania, Watauga, Wilkes, and Yancey. In ss. 18.1 and 18.2 the General Assembly makes the following findings:

"Section 18.1. The General Assembly finds that the following physical and cultural features in the mountain region of Western North Carolina are of national significance:

"(1) The Great Smoky Mountains National Park is the most visited national park in America.

"(2) The Blue Ridge Parkway is the nation's longest scenic highway.

"(3) The Joyce Kilmer Memorial Forest is the last remaining stand of virgin timber in the eastern United States.

"(4) The Linville Gorge wilderness area is the first wilderness in the eastern United States and the deepest gorge east of the Mississippi River.

"(5) Mount Mitchell is the highest mountain in the eastern United States.

"(6) The New River is the second oldest river in the world and was designated as an American Heritage River in 1998.

"(7) Fontana Dam is the highest dam in eastern America that was built by the Tennessee Valley Authority and is known as one of the country's greatest engineering feats in history.

"(8) Grandfather Mountain is the oldest mountain in the eastern United States, was designated as an International Biosphere Reserve by the United Nations, and is the only mountain that is privately owned.

"(9) The Cherokee Indian Qualla Boundary is the home of the Eastern Band of the Cherokee Indians, and the Trail of Tears is a National Heritage Trail.

"(10) Roan Mountain is the world's largest natural Catawba rhododendron garden.

"(11) The Appalachian Trail is the longest national hiking trail in the United States.

"(12) Whiteside Mountain has the highest cliffs of perpendicular bare rock east of the Rockies.

"(13) The Nantahala River is the most popular white-water rafting river in America.

"(14) The Biltmore Estate is America's largest private residence.

"(15) The Cradle of Forestry in America National Historic Site is the first forestry school in America.

"(16) The Cherohala Skyway is a National Scenic Byway.

"(17) The Carl Sandburg Home is a National Historic Site.

"Section 18.2. The General Assembly further finds that:

"(1) The National Park Service's definition of a National Heritage Area is a place designated by Congress where natural, cultural, historic, and scenic resources combine to form a cohesive, nationally distinctive landscape arising from patterns of human activity shaped by geography. These patterns make National Heritage Areas representative of the national experience through the physical features that remain and the traditions that have evolved in them. Continued use of the National Heritage Area by people whose traditions helped to

shape the landscape enhances their significance.

“(2) Designation by the United States Congress of the North Carolina Appalachian Heritage Area, the 23-county mountain region of Western North Carolina, as a National Heritage Area would recognize the nationally distinctive landscape of this area and the role of this distinctive landscape in defining the collective American cultural landscape. The natural, cultural, historic, and recreation resources in this 23-county region combine to form a cohesive, nationally distinctive landscape arising from patterns of human activity shaped by geography. These patterns make the mountain region of Western North Carolina representative of the national experience through the physical features that remain and the traditions that have evolved in the area. Continued use of this area by people whose traditions helped to shape the landscape enhances its significance.

“(3) Since 1916, the National Park Service has been the federal agency responsible for preserving nationally significant natural and historic resources for present and future generations.

“(4) The National Park Service provides technical expertise to assist in all stages of the process for seeking designation as a National Heritage Area.

“(5) Congress has designated 18 National Heritage Areas.

“(6) Residents, business interests, nonprofit organizations, and governments within the proposed National Heritage Area are interested and committed to completing the suitability and feasibility study that must be completed prior to Congress’s designating a National Heritage Area.

“(7) The National Heritage Area designation by the United States Congress for the 23-county mountain region of Western North Carolina would help to preserve and celebrate the uniqueness of this area and its defining landscape in North Carolina and offers the potential to ensure key educational and inspirational opportunities in perpetuity, without compromising traditional local control over, and use of, the landscape.”

Session Laws 2001-491, s. 18.9, provides that notwithstanding G.S. 158-8.1, the Western North Carolina Regional Economic Development Commission shall provide administrative and funding support to the National Heritage Area Designation Commission.

Session Laws 2001-491, s. 18.10, provides: “Notwithstanding G.S. 158-8.1, the Western North Carolina Regional Economic Development Commission shall develop a regional heritage tourism plan and shall present the plan to the 2002 Regular Session of the 2001 General Assembly no later than May 1, 2002.”

## § 158-8.2. Creation of Northeastern North Carolina Regional Economic Development Commission.

(a) There is created the Northeastern North Carolina Regional Economic Development Commission to facilitate economic development in Beaufort, Bertie, Camden, Chowan, Currituck, Dare, Gates, Halifax, Hertford, Hyde, Martin, Northampton, Pasquotank, Perquimans, Tyrrell, and Washington Counties, and any other county assigned to the Commission by the Department of Commerce as authorized by law. The Commission shall be located administratively in the Department of Commerce but shall exercise its statutory powers and duties independently of the Department of Commerce. Funds appropriated for the Commission by the General Assembly shall be disbursed directly to the Commission at the beginning of each fiscal year.

(b) The Commission shall consist of 18 appointed members and one ex officio member, as provided below. Each appointed member shall be an experienced business person who resides for most of the year in one or more of the counties that are members of the Commission.

- (1) Six members shall be appointed by the Governor.
- (2) Six members shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121.
- (3) Six members shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121.
- (4) The Secretary of Commerce, or a designee.
- (5) Repealed by Session Laws 1999-237, s. 16.6(a), effective July 1, 1999.

Any person appointed to the Commission who is also a county commissioner may hold that office in addition to the offices permitted by G.S. 128-1.1. The appointing authorities are encouraged to discuss and coordinate their appointments in an effort to ensure as many counties served by the Commission are represented among the membership of the Commission.

(c) All members shall serve staggered two-year terms ending on June 30 biennially.

(d) Any appointment to fill a vacancy on the Commission shall be for the balance of the unexpired term. Vacancies in appointments made by the General Assembly shall be in accordance with G.S. 120-122.

(d1) The initial meeting shall be called by the Secretary of the Department of Commerce. The Commission shall meet no less than quarterly.

(e) The Commission shall elect annually from among its membership a four-member executive committee consisting of a chair, a vice-chair, a secretary, and a treasurer. Members shall serve one-year terms on the executive committee. The executive committee shall meet no less than quarterly.

(f) In addition to the powers and duties granted to economic development commissions in this Article, the Northeastern North Carolina Regional Economic Development Commission shall:

- (1) Adopt and implement an economic development program, with the assistance of the economic development advisory board, as follows:
  - a. Survey northeastern North Carolina and determine the assets, liabilities, and resources that the region contributes to the economic development process;
  - b. Enhance economic development activities that use the area's natural resources;
  - c. Develop and evaluate alternatives for northeastern North Carolina economic development;
  - d. Develop a preferred economic development plan for the region and establish strategies for implementing the plan;
  - e. Conduct feasibility studies to determine the nature and placement of economic developments for maximum economic impact;
  - f. Identify potential sites for economic development; and
  - g. Carry out other activities to develop and promote economic development.

(2) Repealed by Session Laws 1999-237, s. 16.6(a), effective July 1, 1999.

(3) Coordinate activities with and enter into contracts with any nonprofit corporation created to assist the Commission in carrying out its powers and duties.

(4) Repealed by Session Laws 1999-237, s. 16.5(b), effective July 1, 1999.

(g) Within the limits of funds available, the Commission may hire and fix the compensation of any personnel necessary to its operations, contract with consultants for any services as it may require, and contract with the State of North Carolina or the federal government, or any agency or department thereof, for any services as may be provided by those agencies. The Commission shall hire an employee to serve as president and chief executive officer. The Commission may carry out the provisions of any contracts it may enter.

Within the limits of funds available, the Commission may lease, rent, purchase, or otherwise obtain suitable quarters and office space for its staff, and may lease, rent, or purchase necessary furniture, fixtures, and other equipment.

(h) Members of the Commission who are State employees shall receive travel expenses as provided in G.S. 138-6. Other Commission members shall receive per diem of one hundred dollars (\$100.00) a day for each day of service when the Commission meets and shall be reimbursed for travel and subsistence as provided in G.S. 138-5. (1993, c. 321, s. 309.1(a); c. 561, s. 17(b); 1993

(Reg. Sess., 1994), c. 769, ss. 28.7(k), 28.7(l), 28.8(c), 28.8(d), 28.9; 1995, c. 509, ss. 106-109; 1997-443, s. 11A.119(a); 1997-495, s. 87(a); 1999-237, ss. 16.5(b), 16.6(a).)

**Cross References.** — For note regarding the creation of a Regional Economic Development Commission Expansion Program and appropriation for allocation to regional economic development commissions, see the editor's note under § 158-8.

**Editor's Note.** — Session Laws 1999-237, s. 16.6(b), provides in part that the Northeastern North Carolina Regional Economic Development Commission shall make the transition from the former membership to the new membership as follows: (1) The present executive committee shall serve until a new committee is elected; (2) The Governor and the General Assembly shall make the appointments provided in G.S. 158-8.2(b)(1)-(3) for terms beginning July 1, 1999; (3) On the date the members of the

Commission appointed pursuant to this section take office, the terms of all current members of the Commission appointed before the effective date of this act expire.

Session Laws 1999-237, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvement Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.4 contains a severability clause.

#### OPINIONS OF ATTORNEY GENERAL

**North Carolina's Northeast Partnership is an "agency" within the meaning of § 132-1(a), and accordingly is fully subject to the Public Records Act;** the Northeastern North Carolina Regional Economic Development Commission from which it emerged is an agency located administratively in the North

Carolina Department of Commerce, although it has attempted to remove itself from the Department. See opinion of Attorney General to Melanie Thompson, Fiscal Manager, North Carolina's Northeast Partnership, 1999 N.C.A.G. 9 (3/9/99).

### § 158-8.3. Creation of Southeastern North Carolina Regional Economic Development Commission.

(a) There is created the Southeastern North Carolina Regional Economic Development Commission to serve Bladen, Brunswick, Columbus, Cumberland, Hoke, New Hanover, Pender, Richmond, Robeson, Sampson, and Scotland Counties, and any other county assigned to the Commission by the Department of Commerce as authorized by law. The Commission shall be located administratively in the Department of Commerce but shall exercise its statutory powers and duties independently of the Department of Commerce. Funds appropriated for the Commission by the General Assembly shall be disbursed directly to the Commission at the beginning of each fiscal year.

(b) The Commission shall consist of 15 members appointed as follows:

- (1) Three members shall be appointed by the Governor;
- (2) Two members shall be appointed by the Lieutenant Governor;
- (3) Five members shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121; and
- (4) Five members shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121.

(c) The appointing authority shall designate two of the initial appointees pursuant to subdivision (b)(1) of this section, one of the initial appointees pursuant to subdivision (b)(2) of this section, two of the initial appointees pursuant to subdivision (b)(3) of this section, and two of the initial appointees pursuant to subdivision (b)(4) of this section to serve for terms ending June 30,

1995; the remainder of the initial appointees shall serve for terms ending June 30, 1997. Their successors shall serve for four-year terms ending on June 30 quadrennially thereafter.

Any appointment to fill a vacancy on the Commission shall be for the balance of the unexpired term. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122.

(c1) The initial meeting shall be called by the Secretary of the Department of Commerce.

(d) Members of the Commission who are State employees shall receive travel expenses as provided in G.S. 138-6. Other Commission members shall receive per diem of one hundred dollars (\$100.00) a day for each day of service when the Commission meets and shall be reimbursed for travel and subsistence as provided in G.S. 138-5. The Commission may adopt policies authorizing additional per diem of one hundred dollars (\$100.00) a day for non-State employee members' additional days of service including Commission subcommittee meetings or other Commission activities, plus reimbursement for related travel and subsistence as provided in G.S. 138-5.

(e) In addition to the powers and duties granted to economic development commissions in this Article, the Southeastern North Carolina Regional Economic Development Commission shall:

- (1) Survey southeastern North Carolina and determine the assets, liabilities, and resources that the region contributes to the economic development process;
- (2) Develop and evaluate alternatives for southeastern North Carolina economic development;
- (3) Develop a preferred economic development plan for the region and establish strategies for implementing the plan; and
- (4) Coordinate activities with and enter into contracts with any nonprofit corporation created to assist the Commission in carrying out its powers and duties.
- (5) Repealed by Session Laws 1999-237, s. 16.5(c), effective July 1, 1999.

(f) Within the limits of funds available, the Commission may hire and fix the compensation of any personnel necessary to its operations, contract with consultants for any services as it may require, and contract with the State of North Carolina or the federal government, or any agency or department thereof, for any services as may be provided by those agencies. With the approval of any unit of local government, the Commission may contract to use officers, employees, agents, and facilities of the unit of local government. The Commission may carry out the provisions of any contracts it may enter.

Within the limits of funds available, the Commission may lease, rent, purchase, or otherwise obtain suitable quarters and office space for its staff, and may lease, rent, or purchase necessary furniture, fixtures, and other equipment. (1993, c. 321, s. 309.2(a); c. 561, s. 17(c); 1993 (Reg. Sess., 1994), c. 769, ss. 28.7(m), 28.8(e), 28.8(f); 1995, c. 509, ss. 110, 111; 1997-155, s. 1; 1999-237, s. 16.5(c).)

**Cross References.** — For note regarding the creation of a Regional Economic Development Commission Expansion Program and ap-

propriation for allocation to regional economic development commissions, see the editor's note under § 158-8.

## § 158-8.4. Removal of commission members.

A commission created under G.S. 158-8.1, 158-8.2, or 158-8.3 may, by majority vote, remove a member of the commission if that member does not attend at least eighty percent (80%) of the regularly scheduled meetings of the commission during any full year of service of that member on the board, except

that absences excused by the commission due to serious medical or family circumstances shall not be considered. If the commission votes to remove a member under this section, the vacancy will be filled in the same manner as the original appointment. (1997-495, s. 86.)

### **§ 158-9. Organization of commission; rules and regulations; committees; meetings.**

Upon its appointment, the economic development commission shall promptly meet and elect from among its members a chairman and such other officers as it may choose, for such terms as it shall prescribe in its rules and regulations. The commission shall adopt such rules and regulations not inconsistent herewith as it may deem necessary for the proper discharge of its duties. The chairman may appoint such committees as the work of the commission may require. The commission shall meet regularly, at least once every three months, at places and dates specified in the rules. Special meetings may be called as specified in the rules. (1961, c. 722, s. 2.)

### **§ 158-10. Staff and personnel; contracts for services.**

Within the limits of appropriated funds, the commission may hire and fix the compensation of any personnel necessary to its operations, contract with consultants for such services as it may require, and contract with the State of North Carolina or the federal government, or any agency or department thereof, for such services as may be provided by such agencies; and it is hereby empowered to carry out the provisions of such contracts as it may enter. (1961, c. 722, s. 2.)

### **§ 158-11. Office and equipment.**

Within the limits of appropriated funds, the commission may lease, rent, or purchase, or otherwise obtain suitable quarters and office space for its staff, and may lease, rent, or purchase necessary furniture, fixtures, and other equipment. (1961, c. 722, s. 2.)

### **§ 158-12. Fiscal affairs generally; appropriations.**

The commission may accept, receive, and disburse in furtherance of its functions any funds, grants, and services made available by the federal government and its agencies, the State government and its agencies, any municipalities or counties, and by private and civic sources.

Each municipality or county shall have authority to appropriate funds to any local or regional economic development commission which it may have created. These appropriations may be funded by levy of property taxes pursuant to G.S. 153A-149 and G.S. 160A-209 and by the allocation of other revenues whose use is not otherwise restricted by law. (1961, c. 722, s. 2; 1973, c. 803, s. 44; c. 1446, s. 26.)

#### **§ 158-12.1. Commission funds secured.**

The Western North Carolina Regional Economic Development Commission, Research Triangle Regional Commission, Southeastern North Carolina Regional Economic Development Commission, Piedmont Triad Partnership, Northeastern North Carolina Regional Economic Development Commission, Global TransPark Development Commission, and Carolinas Partnership, Inc., may deposit money at interest in any bank, savings and loan association, or

trust company in this State in the form of savings accounts, certificates of deposit, or such other forms of time deposits as may be approved for county governments. Investment deposits and money deposited in an official depository or deposited at interest shall be secured in the manner prescribed in G.S. 159-31(b). When deposits are secured in accordance with this section, no public officer or employee may be held liable for any losses sustained by an institution because of the default or insolvency of the depository. This section applies to the regional economic development commissions listed in this section only for as long as the commissions are receiving State funds. (2000-67, s. 14.9.)

**Editor's Note.** — Session Laws 2000-67, s. 28.5, made this section effective July 1, 2000.

Session Laws 2000-67, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2000'."

Session Laws 2000-67, s. 28.2, provides: "Except for statutory changes or other provisions

that clearly indicate an intention to have effects beyond the 2000-2001 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2000-2001 fiscal year."

Session Laws 2000-67, s. 28.4, contains a severability clause.

### § 158-13. Powers and duties.

Any economic development commission created pursuant to this Article shall:

- (1) Receive from any municipal, county, joint, or regional planning board or commission with jurisdiction within its area an economic development program for part or all of the area;
- (2) Formulate projects for carrying out such economic development program, through attraction of new industries, encouragement of existing industries, encouragement of agricultural development, encouragement of new business and industrial ventures by local as well as foreign capital, and other activities of a similar nature;
- (3) Conduct industrial surveys as needed, advertise in periodicals or other communications media, furnish advice and assistance to business and industrial prospects which may locate in its area, furnish advice and assistance to existing businesses and industries, furnish advice and assistance to persons seeking to establish new businesses or industries, and engage in related activities;
- (4) Encourage the formation of private business development corporations or associations which may carry out such projects as securing and preparing sites for industrial development, constructing industrial buildings, or rendering financial or managerial assistance to businesses and industries; furnish advice and assistance to such corporations or associations;
- (4a) Use grant funds to make loans for purposes permitted by the federal government, by the grant agreement and in furtherance of economic development; the economic development commission may delegate to another organization or agency the implementation of the grant's purposes, subject to approval by the federal agency involved and the commission's board of directors.
- (5) Carry on such other activities as may be necessary in the proper exercise of the functions described herein. (1961, c. 722, s. 2; 1979, c. 775.)

### § 158-14. Regional planning and economic development commissions authorized.

Any municipalities and/or counties desiring to exercise the powers granted by this Article may, at their option, create a regional planning and economic

development commission, which shall have and exercise all of the powers and duties granted to a regional economic development commission under this Article and in addition the powers and duties granted to a regional planning commission under Article 23 of Chapter 153. In the event that such a combined commission is created, it shall keep separate books of accounts for appropriations and expenditures made pursuant to this Article and for appropriations and expenditures made pursuant to Article 23 of Chapter 153. The financial limitations set forth in each such Article shall govern expenditures made pursuant to such Article. (1961, c. 722, s. 2; 1965, c. 431, s. 2.)

**Editor's Note.** — Article 23 of Chapter 153, section, was repealed by Session Laws 1973, c. 822. See now Article 19 of Chapter 153A.

### § 158-15. Powers granted herein supplementary.

The powers granted to counties and municipalities by this Article shall be deemed supplementary to any powers heretofore or hereafter granted by any general or local act for the same or similar purposes, and in any case where the provisions of this Article conflict with or are different from the provisions of any other act, the board of county commissioners or the municipal governing board may in its discretion proceed in accordance with the provisions of this Article or, as an alternative method, in accordance with the provisions of such other act. (1961, c. 722, s. 2.)

## ARTICLE 2A.

### *Multi-County Water Conservation and Infrastructure District.*

#### § 158-15.1. Multi-County Water Conservation and Infrastructure District.

(a) There is established the Multi-County Water Conservation and Infrastructure District, which is a public authority for the purpose of the Local Government Budget and Fiscal Control Act.

(b) The member counties of the Multi-County Water Conservation and Infrastructure District are Bertie, Caswell, Forsyth, Granville, Guilford, Halifax, Martin, Northampton, Person, Rockingham, Stokes, Surry, Vance, Warren, and Washington.

(c) The governing body of the Multi-County Water Conservation and Infrastructure District is the Multi-County Water Commission. One member of this Commission shall be appointed for a three-year term by the board of commissioners of each member county.

(d) All monies received by the State of North Carolina for sale of water under the Roanoke River Basin Compact, if enacted, shall be paid to the Multi-County Water Conservation and Infrastructure District.

(e) The District may accept for any of its purposes and functions any and all donations, grants of money, equipment, supplies, materials and services (conditional or otherwise) from any state or the United States or any subdivision or agency thereof, or interstate agency, or from any political subdivision of this State or any other state, or from any institution, person, firm or corporation, and may receive, utilize and dispose of the same. The nature, amount and condition, if any, attendant upon any donation or grant accepted pursuant to this subsection together with the identity of the donor or grantor, shall be detailed in the annual audit of the District.

(f) At times specified by the Multi-County Water Commission, net revenues after operating expenses of the District shall be paid to each of the fifteen

member counties according to the following formula: (i) one-half pro-rata based on the population located within the Roanoke River basin area of each member county; and (ii) one-half pro-rata based on the land area located within the Roanoke River Basin area of each county.

(g) Member counties may use funds received under this section for public purposes relating to infrastructure development, economic development, and water conservation.

(h) The Commission may adopt such rules as may be needful for operation of its affairs, and shall employ and terminate personnel as if it were a county. (1995, c. 507, s. 26.12; 1996, 2nd Ex. Sess., c. 18, s. 24.22(a); 1997-443, s. 15.48(a).)

**§§ 158-15.2 through 158-15.9:** Reserved for future codification purposes.

### ARTICLE 3.

#### *Tax Elections for Industrial Development Purposes.*

#### **§ 158-16. Board of commissioners may call tax election; rate and purposes of tax.**

The board of county commissioners in any county is authorized and empowered to call a special election to determine whether it be the will of the qualified voters of said county that they levy and cause to be collected annually, at the same time and in the same manner as the general county taxes are levied and collected, a special tax at a rate not to exceed five cents (5¢) on each one hundred dollars (\$100.00) valuation of property in said county, to be known as an "industrial development tax," the funds therefrom, if the levy be authorized by the voters of said county, to be used for the purpose of attracting new and diversified industries to said county, and for the encouragement of new business and industrial ventures by local as well as foreign capital, and for the purpose of aiding and encouraging the location of manufacturing enterprises, making industrial surveys and locating industrial plants in said county, and for the purpose of encouraging agricultural development in said county. (1959, c. 212, s. 1.)

**Local Modification.** — Mitchell: 1963, c. 157.

#### **§ 158-17. Registration of voters; election under supervision of county board of elections.**

There shall be no new registration of voters for such an election. Registration shall be open for registration of new voters in said county and registration of any and all legal residents of said county, who are or could legally be enfranchised as qualified voters for regular general elections, shall be carried out in accordance with the general election laws of the State of North Carolina as provided for local elections. Notice of such registration of new voters shall be published in a newspaper circulated in said county, once, not less than 55 days before and not more than 65 days before the election, stating the hours and days for registration. The special election, if called, shall be under the control and supervision of the county board of elections. (1959, c. 212, s. 1; 1993 (Reg. Sess., 1994), c. 762, s. 11.)

**§ 158-18. Form of ballot; when ballots supplied; designation of ballot box.**

The form of the question shall be substantially the words "For Industrial Development Tax," and "Against Industrial Development Tax," which alternates shall appear separated from each other on one ballot containing opposite, and to the left of each alternate, squares of appropriate size in one of which squares the voters may make a mark "X" to designate the voter's choice for or against such tax. Such ballot shall be printed on white paper and each polling place shall be supplied with a sufficient number of ballots not later than the day before the election. At such special election the election board shall cause to be placed at each voting precinct in said county a ballot box marked "Industrial Development Tax Election." (1959, c. 212, s. 1.)

**§ 158-19. Counting of ballots; canvassing, certifying and announcing results of elections.**

The duly appointed judges and other election officials who are named and fixed by the county board of elections shall count the ballots so cast in such election and the results of the election shall be officially canvassed, certified and announced by the proper officials of the board of elections, according to the manner of canvassing, certifying and announcing the elections held under the general election laws of the State. Except as herein otherwise provided, the registration and election herein provided for shall be conducted in accordance with the general election laws of the State as provided for local elections. (1959, c. 212, s. 1.)

**§ 158-20. Authorized tax rate.**

If a majority of those voting in such election favor the levying of such a tax, the board of commissioners of said county are authorized to levy a special tax at a rate not to exceed five cents (5¢) on each one hundred dollars (\$100.00) of assessed value of real and personal property taxable in said county, and the General Assembly does hereby give its special approval for the levy of such special tax. (1959, c. 212, s. 1.)

**Local Modification.** — Harnett: 1961, c. 560; Mitchell: 1963, cc. 157, 506; Person: 1961, c. 701; Tyrrell: 1961, c. 228.

**§ 158-21. Creation of industrial development commission; membership and terms of office; vacancies; meetings; selection of officers; bylaws and procedural rules and policies; authority of treasurer and required bond; subsidy or investment in business or industry forbidden.**

If the majority of the qualified voters voting in such election favor the levying of such a tax, then and in that event, the county commissioners may create a commission to be known as the "Industrial Development Commission" for said county. Such commission shall be composed of nine members. The terms of office of the members of the commission shall be three years, with the exception of the first two years' existence of the commission, in which three shall be appointed to serve for a period of one year, three for a period of two years, and three for a period of three years; thereafter, all members shall be

appointed for three years, and shall serve until their successors have been appointed and qualified. All appointments for unexpired terms resulting from resignation, death or other causes, shall be made by the county board of commissioners. The commission shall hold its first meeting within 30 days after its appointment as provided for in this Article, and the beginning date of all terms of office of the commissioners shall be the date on which the commission holds its first meeting. After the members of the commission shall have been appointed and at the time of the holding of the first meeting, they shall, by a majority vote, name and select from their membership their own chairman, vice-chairman, secretary and treasurer, and shall draw up and ratify their own bylaws and procedural rules and policies. The commission member who shall be named treasurer shall have supervision of all funds administered by the commission in any way whatsoever; shall sign and countersign all checks, drafts, bills of exchange, or any and all other negotiable instruments which shall properly be issued under his supervision; and shall furnish such surety bond as shall be designated by the board of county commissioners. No money, property or funds of the commission herein created shall be used directly or indirectly as a subsidy or investment in capital assets in any business, industry or business venture. (1959, c. 212, s. 1.)

**§ 158-22. Bureau set up under supervision and control of industrial development commission; furnishing county commissioners with proposed budget.**

Under the supervision and jurisdiction of the industrial development commission for said county there shall be set up a bureau, the purpose of which shall be as set forth in G.S. 158-16. The commission shall have charge of the activities of this bureau, full supervision of its operations, and full responsibility for its actions. The commission shall employ personnel for the bureau, supervise its purchases and expense accounts, and administer all the tax funds which shall be turned over to the commission by county authorities from the industrial development tax and any and all other funds which may come into its hands. The commission shall be empowered to lease, rent or purchase, or otherwise obtain suitable quarters and office space for an industrial development bureau, to lease, rent, or purchase necessary furniture, fixtures, and other equipment, to purchase advertising space in periodicals which may be selected for that purpose, and to otherwise engage in any and all activities which shall, in its discretion, promote the business and industrial development and general economic welfare of said county; and it shall have full power to exercise any and all other proper authority in connection with its duties and not expressly mentioned herein. Provided, that said commission shall provide the board of county commissioners 30 days prior to July 1 a proposed budget for the fiscal year commencing on July 1 and shall provide the board of county commissioners an audit by a certified public accountant within 60 days after the expiration of the fiscal year ending on June 30. (1959, c. 212, s. 1.)

**§ 158-23. Board of county commissioners may function and carry out duties of industrial development commission.**

Nothing herein shall prevent the board of county commissioners itself from functioning and carrying out the duties of the industrial development commission as provided for herein. (1959, c. 212, s. 1.)

## § 158-24. Counties to which Article applies.

The provisions of this Article shall apply only to the following counties: Alexander, Burke, Caswell, Chowan, Edgecombe, Franklin, Harnett, Haywood, Hertford, Mitchell, Northampton, Onslow, Pasquotank, Perquimans, Person, Polk, Rockingham, Rutherford, Tyrrell, Vance and Warren. (1959, c. 212, s. 2; 1961, cc. 208, 228, 339, 560, 683, 701, 1011, 1058; 1963, c. 157, s. 2; cc. 443, 504, 506, 613, 1101; 1965, cc. 189, 523, 622.)

§§ 158-25 through 158-29: Reserved for future codification purposes.

### ARTICLE 4.

#### *Global TransPark Development Zone.*

## § 158-30. Title.

This Article shall be known as the "Global TransPark Development Zone Act". (1993, c. 544, s. 1.)

## § 158-31. Purpose.

The purpose of this Article is to allow the following counties, which have the potential to derive direct economic benefits from the North Carolina Global TransPark, to create a special economic development district, to be known as the Global TransPark Development Zone: Carteret, Craven, Duplin, Edgecombe, Greene, Jones, Lenoir, Nash, Onslow, Pamlico, Pitt, Wayne, and Wilson.

The purpose of the Global TransPark Development Zone is to promote the development of the North Carolina Global TransPark and to promote and encourage economic development within the territorial jurisdiction of the Zone by fostering or sponsoring development projects to provide land, buildings, facilities, programs, information and data systems, and infrastructure requirements for business and industry in the North Carolina Global TransPark outside of the Global TransPark Complex, and elsewhere in the Zone. (1993, c. 544, s. 1; 1993 (Reg. Sess., 1994), c. 751, s. 1.)

## § 158-32. Definitions.

The following definitions apply in this Article:

- (1) Authority. — The North Carolina Air Cargo Airport Authority created under Chapter 63A of the General Statutes, doing business as the North Carolina Global TransPark Authority.
- (2) Commission. — The Global TransPark Development Commission, the governing body of the Global TransPark Development Zone.
- (3) Global TransPark Complex. — The approximately four to six thousand acre site designated by the Authority for a cargo airport and related facilities in Lenoir County. The site will contain a modern airport large enough to handle the largest aircraft and will be dedicated to the rapid movement of freight and passengers by air with intermodal connecting links with rail, highway, and water transportation facilities.
- (4) North Carolina Global TransPark. — A large area surrounding and including the Global TransPark Complex, which will contain commercial and industrial sites providing attractive locations for business and industry of differing sizes and varying kinds.

- (5) Unit of Local Government. — A local subdivision or unit of government or a local public corporate entity, including any type of special district or public authority.
- (6) Zone. — The Global TransPark Development Zone, an economic development district created pursuant to this Article. (1993, c. 544, s. 1.)

### § 158-33. Creation of Global TransPark Development Zone.

(a) Resolution to Create Zone. — Any three or more of the counties listed in G.S. 158-31 may create the Global TransPark Development Zone as provided in this section. In order to create the Zone, the governing bodies of the counties creating the Zone must first adopt, on or before October 1, 1993, substantially similar resolutions stating their intent to organize the Zone pursuant to this Article. Each resolution shall include articles of incorporation for the Zone which shall set forth the following:

- (1) The name of the Zone, which shall be the “Global TransPark Development Zone”.
- (2) A statement that the Zone is organized under this Article.
- (3) The names of the organizing counties known to the county adopting the resolution.

(b) Public Hearing. — Each resolution may be adopted only after a public hearing on the question, notice of which hearing has been given by publication at least once after July 25, 1993, and not less than 10 days before the date set for the hearing, in a newspaper having a general circulation in the county. The notice shall contain a brief statement of the substance of the proposed resolution, set forth the proposed articles of incorporation of the Zone, and state the time and place of the public hearing to be held on the resolution. No other publication or notice of the resolution is required.

(c) Incorporation of Zone. — Each county that adopts a resolution as provided in this section shall file a certified copy of the resolution with the Secretary of State on or before October 15, 1993, together with proof of publication of notice of the hearing on the resolution. Each resolution must contain the county clerk’s attestation that it was adopted by the board of commissioners. If the Secretary of State finds that the resolutions, including the articles of incorporation, conform to the provisions of this Article and that notices of the hearings were properly published, the Secretary of State shall file the resolutions and proofs of publication and shall issue a certificate of incorporation for the Zone under the seal of the State. The Secretary of State shall record the certificate of incorporation in an appropriate book of record in the Secretary of State’s office.

(d) Effect of Incorporation. — The issuance of the certificate of incorporation by the Secretary of State shall constitute the Global TransPark Development Zone a public body and body politic and corporate of the State. The certificate of incorporation shall be conclusive evidence that the Zone has been duly created and established under this Article. (1993, c. 544, s. 1.)

#### § 158-33.1. Addition of counties to Zone.

(a) Authority. — The Zone shall allow an eligible county to participate in the Zone as provided in this section. A county is eligible to participate in the Zone under this section if G.S. 158-31 authorizes the county to create the Zone, but the county failed to adopt a resolution stating its intent to create the Zone by the October 1, 1993, deadline set in G.S. 158-33(b).

(b) Application. — The governing body of an eligible county may apply to participate in the Zone under this section by adopting a resolution to

participate in the Zone. The resolution must comply with all the requirements of G.S. 158-33(a) and (b) except that it may be adopted at any time before October 1, 1994. After adopting the resolution, the county shall file a certified copy of the resolution with the Global TransPark Development Commission.

(c) Approval of Application. — Within one month after receipt of an application to join the Zone pursuant to this section, the Commission shall meet to consider the application. At the meeting, the Commission shall approve the application if all of the following conditions are met:

- (1) The applicant is an eligible county and has adopted a resolution that complies with subsection (b) of this section.
- (2) The applicant agrees to pay a fee equal to the initiation fee paid by each of the counties that originally created the Zone.
- (3) The applicant agrees to make monthly payments in lieu of taxes as provided in subsection (f) of this section.

(d) Commission Resolution. — After the Commission votes to add a county to the Zone, the Commission shall adopt a resolution that states its intent to add the county and includes amended articles of incorporation for the Zone which set forth the name of the county to be added to the Zone. The Commission shall file certified copies of this resolution with the Secretary of State.

(e) Effect of Amendment. — If the Secretary of State finds that the resolution conforms to the requirements of this Article, the Secretary of State shall file the resolution, issue an amended certificate of incorporation for the Zone including the additional county, and record the amended certificate of incorporation. The amended certificate of incorporation for the Zone shall become effective on the first day of the second month after it is issued. Upon the effective date of the amended certificate of incorporation for the Zone, the new county becomes a fully participating member of the Zone. If the Commission has levied a tax in the Zone pursuant to G.S. 158-42, that tax applies within the new county beginning on the date the amended certificate of incorporation becomes effective.

(f) Payments in Lieu of Taxes. — A county that participates in the Zone under this section is required to make monthly payments in lieu of taxes to the Zone after the expiration of the tax levied pursuant to G.S. 158-42. Each payment shall be equal to the estimated net amount of tax that would have been collected in the county under G.S. 158-42 for that month if the tax were still in effect. Each payment is due within 15 days after the end of the month in which it accrues. The county is required to make monthly payments for a period equal to the number of months that the county was not participating in the Zone while the tax was levied under G.S. 158-42. The requirement that a county make payments in lieu of taxes expires, however, on the effective date of a withdrawal from the Zone by the county. For the purposes of this Article, payments in lieu of taxes shall be considered proceeds of the tax levied in G.S. 158-42 collected in the county making the payment. (1993 (Reg. Sess., 1994), c. 751, s. 2.)

### **§ 158-34. Territorial jurisdiction of Zone.**

The territorial jurisdiction of the Zone created pursuant to this Article shall be coterminous with the boundaries of the counties participating in the Zone. (1993, c. 544, s. 1.)

### **§ 158-35. Commission membership, officers, compensation.**

(a) Commission Membership. — The governing body of the Zone is the Global TransPark Development Commission. The members of the Commission must be residents of the Zone and shall be appointed as follows:

- (1) The board of commissioners of each county participating in the Zone shall appoint three voting members, one of whom shall be a minority person as defined in G.S. 143-128.2(g)(2) and one of whom may be a member of the board of commissioners.
- (2) The Commission shall appoint at least three but no more than seven voting members. By the appointment of these members, the Commission shall ensure that the voting membership of the Commission includes at least seven women and seven members of a racial minority described in G.S. 143-128.2(g)(2). The Commission shall appoint the fewest number of members necessary to achieve these minimums.
- (3) Four nonvoting members shall be appointed as follows:
  - a. One appointed by the Chancellor of East Carolina University to represent the University.
  - b. One appointed by a majority vote of the presidents of the community colleges located in the Zone, to represent the community colleges.
  - c. One appointed by the chair of the State Ports Authority, to represent the sea ports of the State.
  - d. One member of the board of directors of the Global TransPark Foundation, Inc., appointed by that board.

(b) Terms. — Members of the Commission shall serve for staggered four-year terms. The members appointed by the Chancellor of East Carolina University and by the chair of the State Ports Authority shall serve an initial term of two years. The members appointed by the community colleges located in the Zone and by the board of directors of the Global TransPark Foundation, Inc., shall serve an initial term of four years. The Authority shall designate at least one-half of its appointees to serve an initial term of two years; its remaining appointees shall serve an initial term of four years. Each board of commissioners shall designate one of its appointees to serve an initial term of four years, one to serve an initial term of two years, and one to serve an initial term to be determined at the first meeting of the Commission. One-half of the appointees designated to serve an undetermined initial term shall serve an initial term of two years, as determined by lot at the first meeting of the Commission. The remainder of the appointees designated to serve an undetermined initial term shall serve an initial term of four years. Initial terms begin upon approval by the Secretary of State of the articles of incorporation.

(c) Removal; Vacancies. — A member of the Commission may be removed with or without cause by the appointing body. In addition, a majority of the Commission members may, by majority vote, remove a member of the Commission if that member does not attend at least three-quarters of the regularly scheduled meetings of the Commission during any consecutive 12-month period of service of that member on the Commission, except that absences excused by the Commission due to serious medical or family circumstances shall not be considered. If the Commission votes to remove a member under this subsection, the vacancy shall be filled in the same manner as the original appointment. Appointments to fill vacancies shall be made for the remainder of the unexpired term by the respective appointing authority. All members shall serve until their successors are appointed and qualified, unless removed from office.

(d) Dual Office Holding. — Service on the Commission may be in addition to any other office a person is entitled to hold.

(e) Officers. — The Commission shall annually elect from its membership a chairperson and a vice-chairperson, and shall annually elect a secretary and a treasurer. After the Commission has been duly organized and its officers elected as provided in this section, the secretary of the Commission shall certify to the Secretary of State the names and addresses of the officers as well as the address of the principal office of the Commission.

(f) Compensation. — The members of the Commission shall receive no compensation other than travel, subsistence, and reasonable per diem expenses determined by the Commission for attendance at Commission meetings and other official Zone functions. (1993, c. 544, s. 1; 1998-217, s. 48; 2001-424, ss. 20.13(a), (b); 2001-496, s. 3.5.)

**Editor’s Note.** — Session Laws 2001-424, s. 1.2, provides: “This act shall be known as the ‘Current Operations and Capital Improvements Appropriations Act of 2001.’”

Session Laws 2001-424, s. 36.5 is a severability clause.

Session Laws 2001-496, s. 13.1 is a severability clause.

**Effect of Amendments.** — Session Laws 2001-424, ss. 20.13(a) and (b), effective July 1, 2001, substituted “Commission” for “Authority”

in three places in subdivision (a)(2) and added the present second and third sentences of subsection (c).

Session Laws 2001-496, s. 3.5, effective January 1, 2002, and applicable to construction projects for which bids or proposals are solicited on or after that date, in subsection (a) of this section as amended by Session Laws 2001-424, s. 20.13(a), substituted “G.S. 143-128.2(g)(2)” for “G.S. 143-128(f)(2)” in subdivisions (a)(1) and (a)(2).

**§ 158-36. Voting.**

A majority of the Commission members shall constitute a quorum for the transaction of business. Each voting member of the Commission shall have one vote. The Commission may transact business only by majority vote of the voting members present and voting. (1993, c. 544, s. 1.)

**§ 158-37. Powers of the Zone.**

(a) The general powers of the Zone include the following:

- (1) The powers of a corporate body, including the power to sue and be sued and to adopt and use a common seal.
- (2) To adopt bylaws and resolutions in accordance with this Article for its organization and internal management.
- (3) To employ persons as necessary and to fix their compensation within the limit of available funds.
- (4) With the approval of the unit of local government’s chief administrative official, to use officers, employees, agents, and facilities of a unit of local government for purposes and upon terms agreed upon with the unit of local government.
- (5) To make contracts, deeds, leases with or without option to purchase, conveyances, and other instruments, including contracts with the United States, the State of North Carolina, and units of local government.
- (6) To acquire, lease as lessee with or without option to purchase, hold, own, and use any franchise or property or any interest in a franchise or property, within the limit of available funds.
- (7) To transfer, lease as lessor with or without option to purchase, exchange, or otherwise dispose of any franchise or property or any interest in a franchise or property, within the limit of available funds.
- (8) To surrender to the State of North Carolina any property no longer required by the Zone.

(b) The economic development powers of the Zone include the following, to the extent appropriate to carry out its purposes as provided in this Article:

- (1) To levy a temporary annual motor vehicle registration tax on vehicles with a tax situs within the Zone, as provided in G.S. 158-42.
- (2) To acquire, construct, improve, maintain, repair, operate, or administer any component part of a public infrastructure system or facility within the Zone, directly or by contract with a third party.

- (3) Except as otherwise provided in this Article, to exercise the powers granted to a local government for development by G.S. 158-7.1, except the power to levy a property tax.
- (4) To make grants and loans to support economic development projects authorized by this Article within the Zone.
- (5) Reserved.
- (6) To contract with units of local government within the Zone to administer the issuance of permits and approvals required of businesses.
- (7) To provide employee training programs to prepare workers for employment in the Zone.
- (8) To gather and maintain information of an economic, a business, or a commercial character that would be useful to businesses within the Zone.
- (9) To prepare specific site studies to assess the appropriateness of any area within the Zone for use or development by a business and to provide opportunities for businesses to examine sites.
- (10) To exercise the powers of a regional planning commission as provided in G.S. 153A-395 and the powers of a regional economic development commission as provided in Article 2 of this Chapter, but the Zone does not have the authority to establish land-use zoning in any county.
- (11) To carry out the purposes of a consolidation and governmental study commission as provided in Article 20 of Chapter 153A of the General Statutes.
- (12) To enter in a reasonable manner land, water, or premises within the Zone to make surveys, soundings, drillings, or examinations. Such an entry shall not constitute trespass, but the Zone shall be liable for actual damages resulting from such an entry.
- (13) To monitor and encourage the use of utility corridors adjacent to intrastate and interstate highways within the Zone that are four-lane, divided, limited-access highways.
- (14) To plan for and assist in the extension of natural gas within the Zone.
- (15) To assist in the placement of an information highway within the Zone.
- (16) To do all other things necessary or appropriate to carry out its purposes as provided in this Article. (1993, c. 544, s. 1; 1993 (Reg. Sess., 1994), c. 745, ss. 30, 31.)

### § 158-38. Fiscal accountability.

The Zone is a public authority subject to the provisions of Chapter 159 of the General Statutes. (1993, c. 544, s. 1.)

### § 158-39. Funds.

The establishment and operation of the Zone are governmental functions and constitute a public purpose. The State of North Carolina and any unit of local government may appropriate or otherwise provide funds to support the establishment and operation of the Zone. The State of North Carolina and any unit of local government may also dedicate, sell, convey, donate, or lease any of their interests in property to the Zone. The Zone may apply for grants from the State of North Carolina, the United States, or any department, agency, or instrumentality of the State or the United States. Any department of State government may allocate to the Zone any funds the use of which is not restricted by law. (1993, c. 544, s. 1.)

### § 158-40. Tax exemption.

Property owned by the Zone is exempt from taxation. This tax exemption does not apply to the lease, or other arrangement that amounts to a leasehold

interest, of Zone property to a private party, or to the income of the lessee, unless the property is leased solely for the purpose of the Zone, in which case the activities of the lessee are considered the activities of the Zone. (1993, c. 544, s. 1.)

### § 158-41. Withdrawal; termination.

(a) Withdrawal. — A county participating in the Zone may, by resolution, withdraw from the Zone. A resolution withdrawing from the Zone may not become effective before the end of the fiscal year in which it is adopted. Upon adoption of a resolution withdrawing from the Zone, the board of commissioners of the county shall provide a copy of the resolution to the Secretary of State, the Commission, the Authority, and every other county participating in the Zone. Withdrawal does not entitle a county to early distribution of its beneficial interest in Zone assets, but a county that has withdrawn retains its right to any distributions that may be made to participating counties pursuant to subsection (b) of this section on the same basis as if it had not withdrawn. For all other purposes, a county that has withdrawn from the Zone no longer participates in the Zone.

(b) Termination. — The Commission may dissolve the Zone and terminate its existence at any time. If the Zone is dissolved and terminated or is otherwise unable to expend the tax proceeds received pursuant to G.S. 158-42, the Commission shall liquidate the assets of the Zone to the extent possible and distribute all Zone assets to the counties of the Zone in proportion to the amount of tax collected in each county. The assets of the Zone that exceed the amount of tax collected by the counties and are attributable to an appropriation made to the Zone by the General Assembly shall revert to the General Fund and may not be distributed to the counties. A county may use funds distributed to it pursuant to this subsection only for economic development projects and infrastructure construction projects. In calculating the amount to be refunded to each county, the Zone shall first allocate amounts loaned and not yet repaid as follows:

- (1) Amounts loaned for a project in a county will be allocated to that county to the extent of its beneficial ownership of the principal of the trust account created under G.S. 158-42 and the county will become the owner of the right to repayment of the amount loaned to the extent of its beneficial ownership of the principal of the trust account created under G.S. 158-42.
- (2) Amounts not allocated pursuant to subdivision (1) shall be allocated among the remaining counties in proportion to the amount of tax collected in each county under G.S. 158-42, and the remaining counties shall become the owners of the right to repayment of the amounts loaned in proportion to the amount of tax collected in each county under G.S. 158-42.

Notes and other instruments representing the right to repayment shall, upon dissolution of the Zone, be held and collected by the State Treasurer, who shall disburse the collections to the counties as provided in this subsection.

The Commission shall distribute those assets that it is unable to liquidate among the Zone counties insofar as practical on an equitable basis, as determined by the Commission. Upon termination, the State of North Carolina shall succeed to any remaining rights, obligations, and liabilities of the Zone not assigned to the Zone counties. (1993, c. 544, s. 1.)

### § 158-42. Temporary Zone vehicle registration tax.

(a) Levy. — The Commission may, by resolution, after not less than 10 days' public notice and a public hearing, levy an annual registration tax of five

dollars (\$5.00) on motor vehicles with a tax situs within the Zone. A tax levied under this section is in addition to any other motor vehicle license or registration tax.

The tax applies to vehicles required to pay a tax under G.S. 20-88, except trailers, and G.S. 20-87(1), (2), (4), (5), (6), and (7). The tax situs of a motor vehicle for the purpose of this section is its ad valorem tax situs. If the vehicle is not subject to ad valorem tax, its tax situs for the purpose of this section is the ad valorem tax situs it would have if it were subject to ad valorem tax.

(b) **Effective Date; Expiration.** — The effective date of a tax levied under this section shall be no earlier than July 1, 1994. The effective date of a tax levied under this section must be the first day of a calendar month set by the Commission in the resolution levying the tax, and shall be no earlier than the first day of the third calendar month after the adoption of the resolution.

The authority of the Zone to levy a tax under this section expires five years after the effective date of the first tax levied under this section. A tax levied under this section expires when the Zone's authority to levy the tax expires. The expiration of the tax does not affect the rights or liabilities of the Zone, a taxpayer, or another person arising under this section before the expiration of the tax; nor does it affect the right to any refund or credit of a tax that would otherwise have been available under this section before the expiration of the tax.

(c) **Repeal of Tax.** — The Commission may, by resolution, repeal a tax levied under this section. The effective date of the repeal must be the first day of a calendar month set by the Commission in the resolution repealing the tax, and shall be no earlier than the first day of the third calendar month after the adoption of the resolution. Repeal of the tax does not affect the date the Zone's authority to levy the tax expires under subsection (b) of this section. Repeal of the tax does not affect the rights or liabilities of the Zone, a taxpayer, or another person arising under this section before the effective date of the repeal; nor does it affect the right to any refund or credit of a tax that would otherwise have been available under this section before the effective date of the repeal.

(d) **Administration.** — The Division of Motor Vehicles of the Department of Transportation shall collect and administer a tax levied under this section. Immediately after adopting a resolution levying or repealing a tax under this section, the Commission shall deliver a certified copy of the resolution to the Division of Motor Vehicles. If the Secretary of State issues an amended certificate of incorporation adding a county to the Zone pursuant to G.S. 158-33.1, the Commission shall deliver a certified copy of the amended certificate immediately to the Division of Motor Vehicles. If the Commission receives a resolution from a county withdrawing from the Zone pursuant to G.S. 158-41, the Commission shall deliver a certified copy of the resolution immediately to the Division of Motor Vehicles.

A tax levied under this section is due at the same time and subject to the same restrictions as the tax levied in G.S. 20-87 and G.S. 20-88. The tax shall be prorated in accordance with G.S. 20-95. The Commissioner of Motor Vehicles may adopt rules necessary to administer the tax.

(e) **Distribution of Tax Proceeds.** — The Commissioner of Motor Vehicles shall credit the proceeds of the tax levied under this section to a special account and distribute the net proceeds on a quarterly basis to the Zone. Interest on the special account shall be credited quarterly to the Highway Fund to reimburse the Division of Motor Vehicles for the cost of collecting and administering the tax. The Commissioner of Motor Vehicles shall provide the Zone with an accounting of the percentage of proceeds collected in each county of the Zone in each quarter.

(f) **Use of Tax Proceeds.** — The Zone may use the proceeds of the tax levied under this section only for economic development projects and infrastructure

construction projects that are within the territorial jurisdiction of the Zone but not within the Global TransPark Complex. The Zone shall use the tax proceeds only for public purposes authorized by this Article.

The Zone shall place fifteen percent (15%) of the tax proceeds distributed to it under this section in a general funds account and the remaining eighty-five percent (85%) in an interest-bearing trust account. Each county shall be the beneficial owner of a share of the principal of the trust account in proportion to the amount of tax proceeds collected in that county.

The Zone may not disburse the principal of the trust account except pursuant to a contract that provides that, within a reasonable time not to exceed 20 years, the Zone will recover or be repaid the amount disbursed. The Zone may, in its discretion, set reasonable terms and conditions for the repayment of the principal disbursed, including provisions for securing the debt and the payment of interest. (1993, c. 544, s. 1; 1993 (Reg. Sess., 1994), c. 751, s. 3; c. 761, s. 33; 1995, c. 465, s. 1.)

## Chapter 159.

### Local Government Finance.

#### SUBCHAPTER I. SHORT TITLE AND DEFINITIONS.

##### Article 1.

###### Short Title and Definitions.

Sec.

- 159-1. Short title and definitions.
- 159-2. Computation of time.

#### SUBCHAPTER II. LOCAL GOVERNMENT COMMISSION.

##### Article 2.

###### Local Government Commission.

- 159-3. Local Government Commission established.
- 159-4. Executive committee; appeal.
- 159-5. Secretary and staff of the Commission.
- 159-6. Fees of the Commission.

#### SUBCHAPTER III. BUDGETS AND FISCAL CONTROL.

##### Article 3.

###### The Local Government Budget and Fiscal Control Act.

###### Part 1. Budgets.

- 159-7. Short title; definitions; local acts superseded.
- 159-8. Annual balanced budget ordinance.
- 159-9. Budget officer.
- 159-10. Budget requests.
- 159-11. Preparation and submission of budget and budget message.
- 159-12. Filing and publication of the budget; budget hearings.
- 159-13. The budget ordinance; form, adoption, limitations, tax levy, filing.
  - 159-13.1. Financial plan for intragovernmental service funds.
  - 159-13.2. Project ordinances.
- 159-14. Trust and agency funds; budgets of special districts.
- 159-15. Amendments to the budget ordinance.
- 159-16. Interim budget.
- 159-17. Ordinance procedures not applicable to budget or project ordinance adoption.
  - 159-17.1. Vending facilities.

###### Part 2. Capital Reserve Funds.

- 159-18. Capital reserve funds.
- 159-19. Amendments.
- 159-20. Funding capital reserve funds.
- 159-21. Investment.

Sec.

- 159-22. Withdrawals.
- 159-23. [Reserved.]

###### Part 3. Fiscal Control.

- 159-24. Finance officer.
- 159-25. Duties of finance officer; dual signatures on checks; internal control procedures subject to Commission regulation.
- 159-26. Accounting system.
- 159-27. Distribution of tax collections among funds according to levy.
  - 159-27.1. Use of revenue bond project reimbursements; restrictions.
- 159-28. Budgetary accounting for appropriations.
  - 159-28.1. Facsimile signatures.
- 159-29. Fidelity bonds.
- 159-30. Investment of idle funds.
- 159-31. Selection of depository; deposits to be secured.
- 159-32. Daily deposits.
  - 159-32.1. Electronic payment.
- 159-33. Semiannual reports on status of deposits and investments.
  - 159-33.1. Semiannual reports of financial information.
- 159-34. Annual independent audit; rules and regulations.
- 159-35. Secretary of Local Government Commission to notify units of debt service obligations.
- 159-36. Failure of local government to levy debt service taxes or provide for payment of debt.
- 159-37. Reports on status of sinking funds.
- 159-38. Local units authorized to accept their bonds in payment of certain claims and judgments.

###### Part 4. Public Hospitals.

- 159-39. Special regulations pertaining to public hospitals.

###### Part 5. Nonprofit Corporations Receiving Public Funds.

- 159-40. Special regulations pertaining to nonprofit corporations receiving public funds.

###### Part 6. Joint Municipal Power Agencies and Joint Municipal Assistance Agencies.

- 159-41. Special regulations pertaining to joint municipal power agencies.

Part 7. Public Housing Authorities.

- Sec.  
159-42. Special regulations pertaining to public housing authorities.

SUBCHAPTER IV. LONG-TERM FINANCING.

**Article 4.**

**Local Government Bond Act.**

Part 1. Operation of Article.

- 159-43. Short title; legislative intent.  
159-44. Definitions.  
159-45. All general obligation bonds subject to Local Government Bond Act.  
159-46. Faith and credit pledged.  
159-47. Additional security for utility or public service enterprise bonds.  
159-48. For what purposes bonds may be issued.  
159-49. When a vote of the people is required.

Part 2. Procedure for Issuing Bonds.

- 159-50. Notice of intent to make application for issuance of voted bonds; objection by citizens and taxpayers.  
159-51. Application to Commission for approval of bond issue; preliminary conference; acceptance of application.  
159-52. Approval of application by Commission.  
159-53. Order approving or disapproving an application.  
159-54. The bond order.  
159-55. Sworn statement of debt; debt limitation.  
159-56. Publication of bond order as introduced.  
159-56.1. Certain proceedings ratified notwithstanding provisions of § 159-56.  
159-57. Hearing; passage of bond order.  
159-58. Publication of bond order as adopted.  
159-59. Limitation of action to set aside order.  
159-60. Petition for referendum on bond issue.  
159-61. Bond referenda; majority required; notice of referendum; form of ballot; canvass.  
159-62. Limitation on actions contesting validity of bond referenda.  
159-63. Repeal of bond orders.  
159-64. Within what time bonds may be issued.  
159-65. Resolution fixing the details of the bonds.  
159-66. Validation of former proceedings and actions.  
159-67. Procedures if a county votes to relocate the county seat.  
159-68 through 159-71. [Reserved.]

Part 3. Funding and Refunding Bonds.

- Sec.  
159-72. Purposes for which funding and refunding bonds may be issued; when such bonds may be issued.  
159-73. Financing or refinancing agreements.  
159-74. Test cases testing validity of funding or refunding bonds.  
159-75. Judgment validating issue; costs of the action.  
159-76. Validation of bonds and notes issued before March 26, 1931.  
159-77. Validation of all proceedings in connection with the authorization of bonds taken before April 28, 1975.  
159-78. Special obligation refunding bonds.  
159-79. Variable rate demand bonds and notes.

**Article 5.**

**Revenue Bonds.**

- 159-80. Short title; repeal of local acts.  
159-81. Definitions.  
159-82. Purpose.  
159-83. Powers.  
159-84. Authorization of revenue bonds.  
159-85. Application to Commission for approval of revenue bond issue; preliminary conference; acceptance of application.  
159-86. Approval of application by Commission.  
159-87. Order approving or denying the application.  
159-88. Adoption of revenue bond order.  
159-89. Special covenants.  
159-90. Limitations on details of bonds; additional provisions.  
159-91. Lien of revenue bonds.  
159-92. Status of revenue bonds under Uniform Commercial Code.  
159-93. Agreement of the State.  
159-94. Limited liability.  
159-95. Approval of State agencies.  
159-96. Limitation on extraterritorial operation of enterprises financed by revenue bonds.  
159-97. Taxes for supplementing revenue bond projects.  
159-98. [Reserved.]

**Article 5A.**

**Capital Appreciation Bonds.**

- 159-99. Issuance of capital appreciation bonds pursuant to The Local Government Bond Act.  
159-100. Issuance of capital appreciation bonds pursuant to The State and Local Government Revenue Bond Act.

## CH. 159. LOCAL GOVERNMENT FINANCE

### Article 6.

#### Economic Development Financing Act.

Sec.

- 159-101 through 159-114. [Not in effect.]
- 159-115 through 159-119. [Reserved.]

### Article 7.

#### Issuance and Sale of Bonds.

- 159-120. Definitions.
- 159-121. Coupon or registered bonds to be issued.
- 159-122. Maturities of bonds.
- 159-123. Sale of bonds by sealed bids; private sales.
- 159-124. Date of sale; notice of sale and blank proposal.
- 159-125. Bid instructions; bid deposit.
- 159-126. Rejection of bids.
- 159-127. Award of bonds.
- 159-128. Makeup and formal execution of bonds; temporary bonds.
- 159-129. Obligations of units certified by Commission.
- 159-130. Record of issues kept.
- 159-131. Contract for services to be approved by Commission.
- 159-132. State Treasurer to deliver bonds and remit proceeds.
- 159-133. Suit to enforce contract of sale.
- 159-134. Fiscal agents.
- 159-135. Application of proceeds.
- 159-136. Issuing unit to make and report debt service payments.
- 159-137. Lost, stolen, defaced, or destroyed bonds or notes.
- 159-138. Cancellation of bonds and notes.
- 159-139. Destruction of cancelled bonds, notes, and coupons.
- 159-140. Bonds or notes eligible for investment.
- 159-141. Terms and conditions of sale.
- 159-142 through 159-147. [Reserved.]

### Article 8.

#### Financing Agreements and Other Financing Arrangements.

- 159-148. Contracts subject to Article; exceptions.
- 159-149. Application to Local Government Commission for approval of contract.
- 159-150. Sworn statement of debt; debt limitation.
- 159-151. Approval of application by Commission.

Sec.

- 159-152. Order approving or denying the application.
- 159-153. Approval of other financing arrangements.
- 159-154 through 159-159. [Reserved.]

### Article 9.

#### Bond Anticipation, Tax, Revenue and Grant Anticipation Notes.

##### Part 1. Bond Anticipation Notes.

- 159-160. Definitions.
- 159-161. Bond anticipation notes.
- 159-162. Security of general obligation bond anticipation notes.
- 159-163. Security of revenue bond anticipation notes.
- 159-163.1. [Not in effect.]
- 159-164. Form of notes to be issued.
- 159-165. Sale and delivery of bond anticipation notes.
- 159-166, 159-167. [Reserved.]

##### Part 2. Tax, Revenue and Grant Anticipation Notes.

- 159-168. "Unit" defined.
- 159-169. Tax anticipation notes.
- 159-170. Revenue anticipation notes.
- 159-171. Grant anticipation notes.
- 159-172. Authorization and issuance of notes.
- 159-173 through 159-175. [Reserved.]

### Article 10.

#### Assistance for Defaulting Units in Refinancing Debt.

- 159-176. Commission to aid defaulting units in developing refinancing plans.
- 159-177. Power to require reports and approve budgets.
- 159-178. Duration of Commission's powers.
- 159-179, 159-180. [Reserved.]

### Article 11.

#### Enforcement of Chapter.

- 159-181. Enforcement of Chapter.
- 159-182. Offending officers and employees removed from office.
- 159-183 through 159-187. [Reserved.]

### Article 12.

#### Borrowing by Development Authorities Created by General Assembly.

- 159-188. Borrowing authority.

## SUBCHAPTER I. SHORT TITLE AND DEFINITIONS.

## ARTICLE 1.

*Short Title and Definitions.***§ 159-1. Short title and definitions.**

(a) This Chapter may be cited as “The Local Government Finance Act.”

(b) The words and phrases defined in this section have the meanings indicated when used in this Chapter, unless the context clearly requires another meaning, or unless the word or phrase is given a more restrictive meaning by definition in another Article herein.

- (1) “Chairman” means the chairman of the Local Government Commission.
- (2) “City” includes towns and incorporated villages.
- (3) “Clerk” means an officer or employee of a local government or public authority charged by law or direction of the governing board with the duty of keeping the minutes of board meetings and conserving records evidencing official actions of the board.
- (4) “Commission” means the Local Government Commission.
- (5) “Publish,” “publication,” and other forms of the word “publish” mean insertion in a newspaper qualified under G.S. 1-597 to publish legal advertisements.
- (6) “Secretary” means the secretary of the Local Government Commission.

(c) Words in the singular number include the plural, and in the plural include the singular. Words of the masculine gender include the feminine and the neuter, and when the sense so indicates, words of the neuter gender may refer to any gender. (1927, c. 81, s. 2; 1931, c. 60, s. 2; 1971, c. 780, s. 1.)

**Local Modification.** — (As to Chapter 159) Cabarrus Memorial Hospital: 1989 (Reg. Sess., 1990), c. 982.

**Editor’s Note.** — Many of the cases cited in the annotations to this Chapter were decided under former similar statutory provisions be-

fore the repeal in 1971 of former Chapter 159 and enactment of this Chapter.

**Legal Periodicals.** — For symposium on municipal finance, see 1976 Duke L.J. 1051 (1976).

## CASE NOTES

**Cited in** Cross v. Residential Support Servs., Inc., 123 N.C. App. 616, 473 S.E.2d 676 (1996), rev’d, 129 N.C. App. 374, 499 S.E.2d 771 (1998).

**§ 159-2. Computation of time.**

(a) Notwithstanding any other provisions of law, whenever in this Chapter an act is to be done within a given period of time, the period of time shall be computed according to the rules set out in this section.

(b) When an act is to be done within a given number of days before or after a given day, the period is computed by counting forward beginning with the day following the given day, or counting backward beginning with the day next before the given day. Saturdays, Sundays, and holidays are counted as any other day.

(c) The word “month” means 30 days, unless the words “calendar month” are used, in which case the number of days in the month may vary according to the calendar.

(d) The word “year” means the calendar year.

(e) The word “day,” when used to denote a period of time within which an act may be done, means a period of 24 hours beginning at 12:00 midnight.

(f) When a time of day is given, the time is local time in the City of Raleigh, North Carolina. (1971, c. 780, s. 1.)

SUBCHAPTER II. LOCAL GOVERNMENT COMMISSION.

ARTICLE 2.

*Local Government Commission.*

**§ 159-3. Local Government Commission established.**

(a) The Local Government Commission consists of nine members. The State Treasurer, the State Auditor, the Secretary of State, and the Secretary of Revenue each serve ex officio; the remaining five members are appointed to four-year terms as follows: three by the Governor, one by the General Assembly upon the recommendation of the President Pro Tempore in accordance with G.S. 120-121, and one by the General Assembly upon the recommendation of the Speaker of the House in accordance with G.S. 120-121. Of the three members appointed by the Governor, one shall be or have been the mayor or a member of the governing board of a city and one shall be or have been a member of a county board of commissioners. The State Treasurer is chairman ex officio of the Local Government Commission. Membership on the Commission is an office that may be held concurrently with one other office, as permitted by G.S. 128-1.1.

(b) The Commission shall meet at least quarterly in the City of Raleigh, and may hold special meetings at any time or place upon notice to each member given in person or by mail not later than the fifth day before the meeting. The notice need not state the purpose of the meeting.

Action of the Commission shall be taken by resolution adopted by majority vote of those present and voting. A majority of the Commission constitutes a quorum.

(c) The appointed members of the Commission are entitled to the per diem compensation and allowances prescribed by G.S. 138-5. All members are entitled to reimbursement for necessary travel and other expenses.

(d) The Commission may call upon the Attorney General for legal advice in relation to its powers and duties.

(e) The Local Government Commission shall operate as a division of the Department of the State Treasurer.

(f) The Commission may adopt rules and regulations to carry out its powers and duties. (1931, c. 60, s. 7; c. 296, s. 8; 1933, c. 31, s. 1; 1957, c. 541, s. 18; 1963, c. 1130; 1969, c. 445, s. 1; 1971, c. 780, s. 1; 1973, c. 474, s. 2; c. 476, s. 193; 1995, c. 490, s. 30(a).)

**Cross References.** — For section regarding useful life guidelines, see G.S. 115C-529. As to report on guaranteed energy savings contracts, see § 143-64.17G.

**State Government Reorganization.** — The Local Government Commission was trans-

ferred to the Department of State Treasurer by § 143A-33, enacted by Session Laws 1971, c. 864.

**Legal Periodicals.** — For symposium on municipal finance, see 1976 Duke L.J. 1051.

#### § 159-4. Executive committee; appeal.

(a) The State Auditor, the State Treasurer, the Secretary of State, and the Secretary of Revenue shall constitute the executive committee of the Local Government Commission. The executive committee is vested with all the powers of the Commission when it is not in session, except that the executive committee may not overrule, reverse, or disregard any action of the full Commission. Action of the executive committee shall be taken by resolution adopted by a majority of those present and voting. Any three members of the executive committee constitute a quorum. The chairman may call meetings of the executive committee at any time.

(b) Any member of the Commission or any person affected by an action of the executive committee may appeal to the full Commission by filing a request for review with the chairman within five days after the action is taken. Review of executive committee action by the full Commission shall be de novo. (1931, c. 60, ss. 8, 10; 1933, c. 31, s. 2; 1953, c. 675, s. 27; 1971, c. 780, s. 1; 1973, c. 476, s. 193.)

#### § 159-5. Secretary and staff of the Commission.

The chairman shall appoint a secretary of the Commission, and may appoint such other deputies and assistants as may be necessary, who shall be responsible to the chairman through the secretary. The secretary and his deputies and assistants shall have and may exercise any power that the chairman himself may exercise. All actions taken by the secretary, including the signing of any documents and papers provided for in this Chapter, shall be effective as though the chairman himself had taken such action or signed such documents or papers. (1931, c. 60, s. 7; c. 296, s. 8; 1933, c. 31, s. 1; 1957, c. 541, s. 18; 1963, c. 1130; 1969, c. 445, s. 1; 1971, c. 780, s. 1; 1983, c. 717, s. 91.)

#### § 159-6. Fees of the Commission.

(a) The Commission may charge and collect fees for services rendered and for all expenses incurred by the Commission in connection with approving or denying an application for an issue of other than general obligation bonds or notes, participating in the sale, award or delivery of such issue or carrying out any other of its powers and duties with respect to such issue or the issuer thereof, pursuant to the laws of the State of North Carolina.

(b) The Commission shall establish rules and regulations concerning the setting and collection of such fees. In establishing the amount of or method of determining such fees, the Commission shall take into account, among other things, the scope of its statutory responsibilities and the nature and extent of its services for such issue or issuer or class thereof.

(c) Such fees collected by the Commission shall be incorporated into the budget of the State Treasurer and shall be expended for costs incurred by the Commission in carrying out its statutory responsibilities in the issuance of revenue bonds.

(d) Apart from the above fees, the Commission is authorized to receive reimbursement for all expenses incurred in the sale or issuance of general obligation bonds and notes by assessing and collecting fees.

(e) In addition to any other fees authorized by this section, the Commission may charge and collect fees for services rendered and expenses incurred in reviewing and processing petitions of counties or cities concerning use of local sales and use tax revenue in accordance with G.S. 105-487(c). (1981 (Reg. Sess., 1982), c. 1175; 1983, c. 908, s. 2.)

## SUBCHAPTER III. BUDGETS AND FISCAL CONTROL.

## ARTICLE 3.

*The Local Government Budget and Fiscal Control Act.*

## Part 1. Budgets.

**§ 159-7. Short title; definitions; local acts superseded.**

(a) This Article may be cited as “The Local Government Budget and Fiscal Control Act.”

(b) The words and phrases defined in this section have the meanings indicated when used in this Article, unless the context clearly requires another meaning.

- (1) “Budget” is a proposed plan for raising and spending money for specified programs, functions, activities or objectives during a fiscal year.
- (2) “Budget ordinance” is the ordinance that levies taxes and appropriates revenues for specified purposes, functions, activities, or objectives during a fiscal year.
- (3) “Budget year” is the fiscal year for which a budget is proposed or a budget ordinance is adopted.
- (4) “Debt service” is the sum of money required to pay installments of principal and interest on bonds, notes, and other evidences of debt accruing within a fiscal year, to maintain sinking funds, and to pay installments on debt instruments issued pursuant to Chapter 159G of the General Statutes or Chapter 159I of the General Statutes accruing within a fiscal year.
- (5), (6) Repealed by Session Laws 1975, c. 514, s. 2.
- (7) “Fiscal year” is the annual period for the compilation of fiscal operations, as prescribed in G.S. 159-8(b).
- (8) “Fund” is a fiscal and accounting entity with a self-balancing set of accounts recording cash and other resources, together with all related liabilities and residual equities or balances, and changes therein, for the purpose of carrying on specific activities or attaining certain objectives in accordance with special regulations, restrictions, or limitations.
- (9) Repealed by Session Laws 1975, c. 514, s. 2.
- (10) “Public authority” is a municipal corporation (other than a unit of local government) that is not subject to the Executive Budget Act (Article 1 of Chapter 143 of the General Statutes) or a local governmental authority, board, commission, council, or agency that (i) is not a municipal corporation, (ii) is not subject to the Executive Budget Act, and (iii) operates on an area, regional, or multi-unit basis, and the budgeting and accounting systems of which are not fully a part of the budgeting and accounting systems of a unit of local government.
- (11) Repealed by Session Laws 1975, c. 514, s. 2.
- (12) “Sinking fund” means a fund held for the retirement of term bonds.
- (13) “Special district” is a unit of local government (other than a county, city, town, or incorporated village) that is created for the performance of limited governmental functions or for the operation of a particular utility or public service enterprises.
- (14) “Taxes” do not include special assessments.

(15) "Unit," "unit of local government," or "local government" is a municipal corporation that is not subject to the Executive Budget Act (Article 1 of Chapter 143 of the General Statutes) and that has the power to levy taxes, including a consolidated city-county, as defined by G.S. 160B-2(1), and all boards, agencies, commissions, authorities, and institutions thereof that are not municipal corporations.

(16) "Vending facilities" has the same meaning as it does in G.S. 143-12.1.

(c) It is the intent of the General Assembly by enactment of this Article to prescribe for local governments and public authorities a uniform system of budget adoption and administration and fiscal control. To this end and except as otherwise provided in this Article, all provisions of general laws, city charters, and local acts in effect as of July 1, 1973 and in conflict with the provisions of Part 1 or Part 3 of this Article are repealed. No general law, city charter, or local act enacted or taking effect after July 1, 1973, may be construed to modify, amend, or repeal any portion of Part 1 or Part 3 of this Article unless it expressly so provides by specific reference to the appropriate section.

(d) Except as expressly provided herein, this Article does not apply to school administrative units. The adoption and administration of budgets for the public school system and the management of the fiscal affairs of school administrative units are governed by the School Budget and Fiscal Control Act, Chapter 115, Article 9. However, this Article and the School Budget and Fiscal Control Act shall be construed together to the end that the administration of the fiscal affairs of counties and school administrative units may be most effectively and efficiently administered. (1927, c. 146, ss. 1, 2; 1955, c. 724; 1971, c. 780, s. 1; 1973, c. 474, ss. 3, 4; 1975, c. 437, s. 12; c. 514, s. 2; 1981, c. 685, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 173; 1987, c. 282, ss. 30, 31; c. 796, s. 3(1); 1989, c. 756, s. 3; 1995, c. 461, s. 9.)

**Local Modification.** — Scotland: 1979, c. 187; (As to Article 3) city of Gastonia: 1997-161; (As to Article 3) city of Northwest: 1993, c. 222, s. 3 (fiscal year 1993-94); town of Arlington: 2001-16, s. 6(b) (for fiscal year 2001-2002); (As to Article 3) town of Cedar Point: 1987 (Reg. Sess., 1988), c. 1005; town of Dobbins Heights: 1983, c. 658; town of Duck: 2001-394, s. 1 (for fiscal years 2001-2002, 2002-2003); (As to Article 3) town of Fairview: 2001-428, s. 2 (for fiscal year 2001-2002); town of Jonesville: 2001-16, s. 6(b) (for fiscal year 2001-2002); town of Leland: 1989, c. 564, s. 3; town of Lewisville: (As to Article 3) 1991, c. 116 s. 1; town of Midland: 2000-91, s. 2 (for fiscal year 2000-01); (As to Article 3) town of Millers Creek: 2001-45, s. 2 (for fiscal year 2000-2001); town of Mineral Springs: 1999-175, s. 1 (for fiscal years 1998-1999 and 1999-2000); (As to Article 3) town of Rimertown: 1999-284, s. 2; (As to Articles 3 and 19) town of St. James: 1999-241, s. 1; (As to Article 3) town of Sandy Creek: 1987 (Reg. Sess., 1988), c. 1007, s. 3; (As to Article 3) town

of Sandyfield: 1993 (Reg. Sess., 1994), c. 729, s. 3 (for fiscal year 1994-95); (As to Article 3) town of Santeetlah: 1987 (Reg. Sess., 1988), c. 1012; (As to Article 3) town of Sawmills: 1987, c. 648; town of Stokesdale: 1989, c. 488 s. 2; town of Whisett (As to Article 3): 1991, c. 684; (As to Article 3) village of Marvin: 1993 (Reg. Sess., 1994), c. 641, s. 2; (As to Article 3) village of St. Helena: 1987 (Reg. Sess., 1988), c. 942, s. 2; (As to Part 1 of Article 3) village of Wesley Chapel: 1998-43, s. 2 (for fiscal year 1998-99).

**Cross References.** — As to the Local Government Fiscal Information Act, see §§ 120-30.41 through 120-30.48.

**Editor's Note.** — Chapter 115, Article 9, referred to in subsection (d) of this section, was repealed by Session Laws 1975, c. 437, s. 1. For present provisions covering the repealed article, see §§ 115C-422 through 115C-452.

**Legal Periodicals.** — For symposium on municipal finance, see 1976 Duke L.J. 1051.

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

#### CASE NOTES

**Cited in** Hubbard v. County of Cumberland, 143 N.C. App. 149, 544 S.E.2d 587 (2001), cert. denied, 354 N.C. 69, — S.E.2d — (2001).

## OPINIONS OF ATTORNEY GENERAL

**A Single-County Mental Health Program Is a Public Authority.** — See opinion of Attorney General to Mr. Harlan E. Boyles, Local Government Commission, 44 N.C.A.G. 185 (1974).

**District health department has authority to operate public transit on fare paying basis,** without establishment of a Transporta-

tion Authority. Section 62-260(a)(1) specifically exempts political subdivisions of this State from regulation by the North Carolina Utilities Commission. See opinion of Attorney General to Mr. David D. King, Director of Division of Public Transportation, North Carolina Department of Transportation, 55 N.C.A.G. 76 (1986).

### § 159-8. Annual balanced budget ordinance.

(a) Each local government and public authority shall operate under an annual balanced budget ordinance adopted and administered in accordance with this Article. A budget ordinance is balanced when the sum of estimated net revenues and appropriated fund balances is equal to appropriations. Appropriated fund balance in any fund shall not exceed the sum of cash and investments minus the sum of liabilities, encumbrances, and deferred revenues arising from cash receipts, as those figures stand at the close of the fiscal year next preceding the budget year. It is the intent of this Article that, except for moneys expended pursuant to a project ordinance or accounted for in an intragovernmental service fund or a trust and agency fund excluded from the budget ordinance under G.S. 159-13(a), all moneys received and expended by a local government or public authority should be included in the budget ordinance. Therefore, notwithstanding any other provision of law, no local government or public authority may expend any moneys, regardless of their source (including moneys derived from bond proceeds, federal, state, or private grants or loans, or special assessments), except in accordance with a budget ordinance or project ordinance adopted under this Article or through an intragovernmental service fund or trust and agency fund properly excluded from the budget ordinance.

(b) The budget ordinance of a unit of local government shall cover a fiscal year beginning July 1 and ending June 30. The budget ordinance of a public authority shall cover a fiscal year beginning July 1 and ending June 30, except that the Local Government Commission, if it determines that a different fiscal year would facilitate the authority's financial operations, may enter an order permitting an authority to operate under a fiscal year other than from July 1 to June 30. If the Commission does permit an authority to operate under an altered fiscal year, the Commission's order shall also modify the budget calendar set forth in G.S. 159-10 through 159-13 so as to provide a new budget calendar for the altered fiscal year that will clearly enable the authority to comply with the intent of this Part. (1971, c. 780, s. 1; 1973, c. 474, s. 5; 1975, c. 514, s. 3; 1979, c. 402, s. 1; 1981, c. 685, s. 2.)

#### CASE NOTES

**Effect of Town Council Appropriating Funds Outside Its Authority.** — Where a town's resolution appropriating a certain percentage of its alcoholic beverage control revenue to county school board was outside the

authority of the town council, the town council could not be estopped from terminating the unauthorized payments without notice. *Watauga County Bd. of Educ. v. Town of Boone*, 106 N.C. App. 270, 416 S.E.2d 411 (1992).

### § 159-9. Budget officer.

Each local government and public authority shall appoint a budget officer to serve at the will of the governing board. In counties or cities having the

manager form of government, the county or city manager shall be the budget officer. Counties not having the manager form of government may impose the duties of budget officer upon the county finance officer or any other county officer or employee except the sheriff, or in counties having a population of more than 7,500, the register of deeds. Cities not having the manager form of government may impose the duties of budget officer on any city officer or employee, including the mayor if he agrees to undertake them. A public authority or special district may impose the duties of budget officer on the chairman or any member of its governing board or any other officer or employee. (1971, c. 780, s. 1; 1973, c. 474, s. 6.)

### § 159-10. Budget requests.

Before April 30 of each fiscal year (or an earlier date fixed by the budget officer), each department head shall transmit to the budget officer the budget requests and revenue estimates for his department for the budget year. The budget request shall be an estimate of the financial requirements of the department for the budget year, and shall be made in such form and detail, with such supporting information and justifications, as the budget officer may prescribe. The revenue estimate shall be an estimate of all revenues to be realized by department operations during the budget year. At the same time, the finance officer or department heads shall transmit to the budget officer a complete statement of the amount expended for each category of expenditure in the budget ordinance of the immediately preceding fiscal year, a complete statement of the amount estimated to be expended for each category of expenditure in the current year's budget ordinance by the end of the current fiscal year, the amount realized from each source of revenue during the immediately preceding fiscal year, and the amount estimated to be realized from each source of revenue by the end of the current fiscal year, and such other information and data on the fiscal operations of the local government or public authority as the budget officer may request. (1927, c. 146, s. 5; 1955, cc. 698, 724; 1971, c. 780, s. 1.)

#### CASE NOTES

**Quoted** in *Hubbard v. County of Cumberland*, 143 N.C. App. 149, 544 S.E.2d 587 (2001), cert. denied, 354 N.C. 69, — S.E.2d — (2001).

**Cited** in *In re Wesleyan Educ. Center*, 68 N.C. App. 742, 316 S.E.2d 87 (1984).

### § 159-11. Preparation and submission of budget and budget message.

(a) Upon receipt of the budget requests and revenue estimates and the financial information supplied by the finance officer and department heads, the budget officer shall prepare a budget for consideration by the governing board in such form and detail as may have been prescribed by the budget officer or the governing board. The budget shall comply in all respects with the limitations imposed by G.S. 159-13(b), and unless the governing board shall have authorized or requested submission of an unbalanced budget as provided in subsection (c) of this section, the budget shall be balanced.

(b) The budget, together with a budget message, shall be submitted to the governing board not later than June 1. The budget and budget message should, but need not, be submitted at a formal meeting of the board. The budget message should contain a concise explanation of the governmental goals fixed by the budget for the budget year, should explain important features of the

activities anticipated in the budget, should set forth the reasons for stated changes from the previous year in program goals, programs, and appropriation levels, and should explain any major changes in fiscal policy.

(c) The governing board may authorize or request the budget officer to submit a budget containing recommended appropriations in excess of estimated revenues. If this is done, the budget officer shall present the appropriations recommendations in a manner that will reveal for the governing board the nature of the activities supported by the expenditures that exceed estimated revenues.

(d) The budget officer shall include in the budget a proposed financial plan for each intragovernmental service fund, as required by G.S. 159-13.1, and information concerning capital projects and grant projects authorized or to be authorized by project ordinances, as required by G.S. 159-13.2. (1927, c. 146, s. 6; 1955, cc. 698, 724; 1969, c. 976, s. 1; 1971, c. 780, s. 1; 1975, c. 514, s. 4; 1979, c. 402, s. 2.)

### **§ 159-12. Filing and publication of the budget; budget hearings.**

(a) On the same day that he submits the budget to the governing board, the budget officer shall file a copy of it in the office of the clerk to the board where it shall remain available for public inspection until the budget ordinance is adopted. The clerk shall make a copy of the budget available to all news media in the county. He shall also publish a statement that the budget has been submitted to the governing board, and is available for public inspection in the office of the clerk to the board. The statement shall also give notice of the time and place of the budget hearing required by subsection (b) of this section.

(b) Before adopting the budget ordinance, the board shall hold a public hearing at which time any persons who wish to be heard on the budget may appear. (1927, c. 146, s. 7; 1955, cc. 698, 724; 1971, c. 780, s. 1.)

### **§ 159-13. The budget ordinance; form, adoption, limitations, tax levy, filing.**

(a) Not earlier than 10 days after the day the budget is presented to the board and not later than July 1, the governing board shall adopt a budget ordinance making appropriations and levying taxes for the budget year in such sums as the board may consider sufficient and proper, whether greater or less than the sums recommended in the budget. The budget ordinance shall authorize all financial transactions of the local government or public authority except

- (1) Those authorized by a project ordinance,
- (2) Those accounted for in an intragovernmental service fund for which a financial plan is prepared and approved, and
- (3) Those accounted for in a trust or agency fund established to account for moneys held by the local government or public authority as an agent or common-law trustee or to account for a retirement, pension, or similar employee benefit system.

The budget ordinance may be in any form that the board considers most efficient in enabling it to make the fiscal policy decisions embodied therein, but it shall make appropriations by department, function, or project and show revenues by major source.

(b) The following directions and limitations shall bind the governing board in adopting the budget ordinance:

- (1) The full amount estimated by the finance officer to be required for debt service during the budget year shall be appropriated.

- (2) The full amount of any deficit in each fund shall be appropriated.
- (3) A contingency appropriation shall not exceed five percent (5%) of the total of all other appropriations in the same fund, except there is no limit on contingency appropriations for public assistance programs required by Chapter 108A. Each expenditure to be charged against a contingency appropriation shall be authorized by resolution of the governing board, which resolution shall be deemed an amendment to the budget ordinance setting up an appropriation for the object of expenditure authorized. The governing board may authorize the budget officer to authorize expenditures from contingency appropriations subject to such limitations and procedures as it may prescribe. Any such expenditures shall be reported to the board at its next regular meeting and recorded in the minutes.
- (4) No appropriation may be made that would require the levy of a tax in excess of any constitutional or statutory limitation, or expenditures of revenues for purposes not permitted by law.
- (5) The total of all appropriations for purposes which require voter approval for expenditure of property tax funds under Article V, Sec. 2(5), of the Constitution shall not exceed the total of all estimated revenues other than the property tax (not including such revenues required by law to be spent for specific purposes) and property taxes levied for such purposes pursuant to a vote of the people.
- (6) The estimated percentage of collection of property taxes shall not be greater than the percentage of the levy actually realized in cash as of June 30 during the preceding fiscal year. For purposes of the calculation under this subdivision only, the levy for the registered motor vehicle tax under Article 22A of Chapter 105 of the General Statutes shall be based on the nine-month period ending March 31 of the preceding fiscal year, and the collections realized in cash with respect to this levy shall be based on the 12-month period ending June 30 of the preceding fiscal year.
- (7) Estimated revenues shall include only those revenues reasonably expected to be realized in the budget year, including amounts to be realized from collections of taxes levied in prior fiscal years.
- (8) Repealed by Session Laws 1975, c. 514, s. 6.
- (9) Appropriations made to a school administrative unit by a county may not be reduced after the budget ordinance is adopted, unless the board of education of the administrative unit agrees by resolution to a reduction, or unless a general reduction in county expenditures is required because of prevailing economic conditions.
- (10) Appropriations made to another fund from a fund established to account for property taxes levied pursuant to a vote of the people may not exceed the amount of revenues other than the property tax available to the fund, except for appropriations from such a fund to an appropriate account in a capital reserve fund.
- (11) Repealed by Session Laws 1975, c. 514, s. 6.
- (12) Repealed by Session Laws 1981, c. 685, s. 4.
- (13) No appropriation of the proceeds of a bond issue may be made from the capital project fund account established to account for the proceeds of the bond issue except (i) for the purpose for which the bonds were issued, (ii) to the appropriate debt service fund, or (iii) to an account within a capital reserve fund consistent with the purposes for which the bonds were issued. The total of other appropriations made to another fund from such a capital project fund account may not exceed the amount of revenues other than bond proceeds available to the account.

- (14) No appropriation may be made from a utility or public service enterprise fund to any other fund than the appropriate debt service fund unless the total of all other appropriations in the fund equal or exceed the amount that will be required during the fiscal year, as shown by the budget ordinance, to meet operating expenses, capital outlay, and debt service on outstanding utility or enterprise bonds or notes.
- (15) Sufficient funds to meet the amounts to be paid during the fiscal year under continuing contracts previously entered into shall be appropriated unless such contract reserves to the governing board the right to limit or not to make such appropriation.
- (16) The sum of estimated net revenues and appropriated fund balance in each fund shall be equal to appropriations in that fund. Appropriated fund balance in a fund shall not exceed the sum of cash and investments minus the sum of liabilities, encumbrances, and deferred revenues arising from cash receipts, as those figures stand at the close of the fiscal year next preceding the budget year.
- (17) No appropriations may be made from a county reappraisal reserve fund except for the purposes for which the fund was established.
- (18) No appropriation may be made from a service district fund to any other fund except (i) to the appropriate debt service fund or (ii) to an appropriate account in a capital reserve fund unless the district has been abolished.
- (19) No appropriation of the proceeds of a debt instrument may be made from the capital project fund account established to account for such proceeds except for the purpose for which such debt instrument was issued. The total of other appropriations made to another fund from such a capital project fund account may not exceed the amount of revenues other than debt instrument proceeds available to the account.

Notwithstanding subdivisions (9), (10), (12), (14), (17), or (18) of this subsection, any fund may contain an appropriation to another fund to cover the cost of (i) levying and collecting the taxes and other revenues allocated to the fund, and (ii) building maintenance and other general overhead and administrative expenses properly allocable to functions or activities financed from the fund.

(c) The budget ordinance of a local government shall levy taxes on property at rates that will produce the revenue necessary to balance appropriations and revenues, after taking into account the estimated percentage of the levy that will not be collected during the fiscal year. The budget ordinance of a public authority shall be balanced so that appropriations do not exceed revenues.

(d) The budget ordinance shall be entered in the minutes of the governing board and within five days after adoption copies thereof shall be filed with the finance officer, the budget officer, and the clerk to the governing board. (1927, c. 146, s. 8; 1955, cc. 698, 724; 1969, c. 976, s. 2; 1971, c. 780, s. 1; 1973, c. 474, ss. 7-9; c. 489, s. 3; 1975, c. 437, ss. 13, 14; c. 514, ss. 5, 6; 1981, c. 685, ss. 3-5, 10; 1987, c. 796, s. 3(2); 1989, c. 756, s. 2; 1999-261, s. 1; 2000-140, s. 80.)

**Editor's Note.** — Subdivision (b)(12), referred to in the last paragraph of subsection (b) of this section, was repealed by Session Laws 1981, c. 685, s. 4.

**Effect of Amendments.** — Session Laws

2000-140, s. 80, effective July 21, 2000, in subdivision (b)(6), substituted "Article 22A" for "Article 22C" and substituted "12-month" for "twelve month."

## CASE NOTES

**The statutory limitation on the legal right to transfer or allocate funds from one project to another is exceeded** only where a board used funds derived from the sale of school bonds for nonschool purposes. Since in the instant case all expenditures were for school purposes, the individual defendants, as members of the Board of Education or Board of Commissioners, were not acting outside the scope of their duties. *Moore v. Wykle*, 107 N.C.

App. 120, 419 S.E.2d 164, cert. denied, 332 N.C. 666, 424 S.E.2d 405 (1992).

**Applied** in *Hughey v. Cloninger*, 37 N.C. App. 107, 245 S.E.2d 543 (1978).

**Quoted** in *Hubbard v. County of Cumberland*, 143 N.C. App. 149, 544 S.E.2d 587 (2001), cert. denied, 354 N.C. 69, — S.E.2d — (2001).

**Cited** in *In re Wesleyan Educ. Center*, 68 N.C. App. 742, 316 S.E.2d 87 (1984).

### § 159-13.1. Financial plan for intragovernmental service funds.

(a) If a local government or public authority establishes and operates one or more intragovernmental service funds, it need not include such a fund in its budget ordinance. However, at the same time it adopts the budget ordinance, the governing board shall approve a balanced financial plan for each intragovernmental service fund. A financial plan is balanced when estimated expenditures do not exceed estimated revenues.

(b) The budget officer shall include in the budget he submits to the board, pursuant to G.S. 159-11, a proposed financial plan for each intragovernmental service fund to be operated during the budget year by the local government or public authority. The proposed financial plan shall be in such form and detail as prescribed by the budget officer or governing board.

(c) The approved financial plan shall be entered in the minutes of the governing board, as shall each amendment to the plan approved by the board. Within five days after approval, copies of the plan and copies of each amendment thereto shall be filed with the finance officer, the budget officer, and the clerk to the governing board.

(d) Any change in a financial plan must be approved by the governing board. (1975, c. 514, s. 7.)

### § 159-13.2. Project ordinances.

(a) Definitions. —

(1) In this section “capital project” means a project financed in whole or in part by the proceeds of bonds or notes or debt instruments or a project involving the construction or acquisition of a capital asset.

(2) “Grant project” means a project financed in whole or in part by revenues received from the federal and/or State government for operating or capital purposes as defined by the grant contract.

(b) Alternative Budget Methods. — A local government or public authority may, in its discretion, authorize and budget for a capital project or a grant project either in its annual budget ordinance or in a project ordinance adopted pursuant to this section. A project ordinance authorizes all appropriations necessary for the completion of the project and neither it nor any part of it need be readopted in any subsequent fiscal year. Neither a bond order nor an order authorizing any debt instrument constitutes a project ordinance.

(c) Adoption of Project Ordinances. — If a local government or public authority intends to authorize a capital project or a grant project by a project ordinance, it shall not begin the project until it has adopted a balanced project ordinance for the life of the project. A project ordinance is balanced when revenues estimated to be available for the project equal appropriations for the project. A project ordinance shall clearly identify the project and authorize its

undertaking, identify the revenues that will finance the project, and make the appropriations necessary to complete the project.

(d) Project Ordinance Filed. — Each project ordinance shall be entered in the minutes of the governing board. Within five days after adoption, copies of the ordinance shall be filed with the finance officer, the budget officer, and the clerk to the governing board.

(e) Amendment. — A project ordinance may be amended in any manner so long as it continues to fulfill all requirements of this section.

(f) Inclusion of Project Information in Budget. — Each year the budget officer shall include in the budget information in such detail as he or the governing board may require concerning each grant project or capital project (i) expected to be authorized by project ordinance during the budget year and (ii) authorized by previously adopted project ordinances which will have appropriations available for expenditure during the budget year. (1975, c. 514, s. 8; 1979, c. 402, s. 3; 1987, c. 796, s. 3(3), 3(4).)

### **§ 159-14. Trust and agency funds; budgets of special districts.**

(a) Budgets of Special Districts. — If the tax-levying power of a special district is by law exercised on its behalf by a county or city, and if the county or city governing board is vested by law with discretion as to what rate of tax it will levy on behalf of the special district, the governing board of the special district shall transmit to the governing board of the county or city on or before June 1 a request to levy taxes on its behalf for the budget year at a stated rate. The county or city governing board shall then determine what rate of tax it will approve, and shall so notify the district governing board not later than June 15. Failure of the county or city governing board to act on the district's request on or before June 15 and to so notify the district governing board by that date shall be deemed approval of the full rate requested by the district governing board. Upon receiving notification from the county or city governing board as to what rate of tax will be approved or after June 15 if no such notification is received, the district governing board shall complete its budget deliberations and shall adopt its budget ordinance.

If the tax-levying power of a special district is by law exercised on its behalf by a county or city, and if the county or city governing board has no discretion as to what rate of tax it will levy on behalf of the special district, the governing board of the district shall notify the city or county by June 15 of the rate of tax it wishes to have levied. If the district does not notify the county or city governing board on or before June 15 of the rate of tax it wishes to have levied, the county or city is not required to levy a tax for the district for the fiscal year.

If the taxes of a special district are collected on its behalf by a county or city, and if the county or city governing board has no power to approve the district tax levy, the district governing board shall adopt its budget ordinance not later than July 1 and on or before July 15 shall notify the county or city collecting its taxes of the rate of tax it has levied. If the district does not notify the county or city governing board on or before July 15 of the rate of tax it has levied, the county or city is not required to collect the district's taxes for the fiscal year.

(b) Transfers from Certain Trust and Agency Funds. — Except for transfers to the appropriate special district or public authority, a unit of local government may not transfer moneys from a fund established to account for taxes collected on behalf of a special district or from a fund established to account for special assessments collected on behalf of a public authority unless the special district or public authority has ceased to function. (1971, c. 780, s. 1; 1973, c. 474, ss. 10, 11; 1975, c. 514, s. 9.)

## § 159-15. Amendments to the budget ordinance.

Except as otherwise restricted by law, the governing board may amend the budget ordinance at any time after the ordinance's adoption in any manner, so long as the ordinance, as amended, continues to satisfy the requirements of G.S. 159-8 and 159-13. However, no amendment may increase or reduce a property tax levy or in any manner alter a property taxpayer's liability, unless the board is ordered to do so by a court of competent jurisdiction, or by a State agency having the power to compel the levy of taxes by the board.

The governing board by appropriate resolution or ordinance may authorize the budget officer to transfer moneys from one appropriation to another within the same fund subject to such limitations and procedures as it may prescribe. Any such transfers shall be reported to the governing board at its next regular meeting and shall be entered in the minutes. (1927, c. 146, s. 13; 1955, cc. 698, 724; 1971, c. 780, s. 1; 1973, c. 474, s. 12; 2001-308, s. 3.)

**Editor's Note.** — Session Laws 2001-308, s. 3, effective July 1, 2001, and pursuant to s. 4 of the act expiring October 1, 2001, read: "Except as otherwise restricted by law, the governing board may amend the budget ordinance at any time after the ordinance's adoption in any manner, so long as the ordinance, as amended, continues to satisfy the requirements of G.S. 159-8 and 159-13. However, except as otherwise provided in this section, no amendment may increase or reduce a property tax levy or in any manner alter a property taxpayer's liability, unless the board is ordered to do so by a court of competent jurisdiction, or by a State agency having the power to compel the levy of taxes by the board."

"If after July 1 the local government receives additional and unanticipated revenues, the governing body may amend the budget ordinance to reduce the property tax levy to account for the unanticipated revenues."

"The governing board by appropriate resolution or ordinance may authorize the budget officer to transfer moneys from one appropriation to another within the same fund subject to such limitations and procedures as it may prescribe. Any such transfers shall be reported to the governing board at its next regular meeting and shall be entered in the minutes."

The section is set out above as it read prior to the amendment by Session Laws 2001-308, s. 3.

## § 159-16. Interim budget.

In case the adoption of the budget ordinance is delayed until after July 1, the governing board shall make interim appropriations for the purpose of paying salaries, debt service payments, and the usual ordinary expenses of the local government or public authority for the interval between the beginning of the budget year and the adoption of the budget ordinance. Interim appropriations so made shall be charged to the proper appropriations in the budget ordinance. (1927, c. 146, s. 14; 1955, cc. 698, 724; 1971, c. 780, s. 1.)

## § 159-17. Ordinance procedures not applicable to budget or project ordinance adoption.

Notwithstanding the provisions of any city charter, general law, or local act:

- (1) Any action with respect to the adoption or amendment of the budget ordinance or any project ordinance may be taken at any regular or special meeting of the governing board by a simple majority of those present and voting, a quorum being present;
- (2) No action taken with respect to the adoption or amendment of the budget ordinance or any project ordinance need be published or is subject to any other procedural requirement governing the adoption of ordinances or resolutions by the governing board other than the procedures set out in this Article;
- (3) The adoption and amendment of the budget ordinance or any project ordinance and the levy of taxes in the budget ordinance are not subject

to the provisions of any city charter or local act concerning initiative or referendum.

During the period beginning with the submission of the budget to the governing board and ending with the adoption of the budget ordinance, the governing board may hold any special meetings that may be necessary to complete its work on the budget ordinance. Except for the notice requirements of G.S. 143-318.12, which continue to apply, no provision of law concerning the call of special meetings applies during that period so long as (i) each member of the board has actual notice of each special meeting called for the purpose of considering the budget, and (ii) no business other than consideration of the budget is taken up. This section does not allow the holding of closed meetings or executive sessions by any governing board otherwise prohibited by law from holding such a meeting or session, and may not be construed to do so.

No general law, city charter, or local act enacted or taking effect after July 1, 1973, may be construed to modify, amend, or repeal any portion of this section unless it expressly so provides by specific reference to this section. (1971, c. 780, s. 1; 1973, c. 474, s. 13; 1979, c. 402, ss. 4, 5; c. 655, s. 2.)

**Local Modification.** — Wilmington/New Hanover County Consolidated Government: 1987, c. 643; city of Wilmington: 1983, c. 367.

### § 159-17.1. Vending facilities.

Moneys received by a public authority, special district, or unit of local government on account of operation of vending facilities shall be deposited, budgeted, appropriated, and expended in accordance with the provisions of this Article. (1983 (Reg. Sess., 1984), c. 1034, s. 174.)

## Part 2. Capital Reserve Funds.

### § 159-18. Capital reserve funds.

Any local government or public authority may establish and maintain a capital reserve fund for any purposes for which it may issue bonds. A capital reserve fund shall be established by resolution or ordinance of the governing board which shall state (i) the purposes for which the fund is created, (ii) the approximate periods of time during which the moneys are to be accumulated for each purpose, (iii) the approximate amounts to be accumulated for each purpose, and (iv) the sources from which moneys for each purpose will be derived. (1943, c. 593, ss. 3, 5; 1957, c. 863, s. 1; 1967, c. 1189; 1971, c. 780, s. 1.)

**Legal Periodicals.** — For comment on former Article 10A of Chapter 153, corresponding to this Part, see 21 N.C.L. Rev. 357 (1943).

For symposium on municipal finance, see 1976 Duke L.J. 1051.

#### CASE NOTES

**Constitutionality of Former Statute.** — Former § 115-80.1, authorizing a county board of commissioners to levy an ad valorem tax for a county school capital reserve fund, to be used for the purpose of anticipating school capital outlays, was a valid exercise of legislative authority; the creation of such a fund is for a

“necessary expense” within the meaning of N.C. Const., Art. V, § 4(2), and does not require a vote of the people. *Yoder v. Board of Comm’rs*, 7 N.C. App. 712, 173 S.E.2d 529 (1970).

**Without the establishment of a capital reserve fund**, the requirements of former Article 10A of Chapter 153, corresponding to this

Part, never came into play. *Davis v. Iredell County*, 9 N.C. App. 381, 176 S.E.2d 361 (1970). *Wrightsville Beach*, 703 F. Supp. 1192 (E.D.N.C. 1988).

**Cited** in *South Shell Inv. v. Town of*

### § 159-19. Amendments.

The resolution or ordinance may be amended from time to time in the same manner in which it was adopted. Amendments may, among other provisions, authorize the use of moneys accumulated or to be accumulated in the fund for capital outlay purposes not originally stated. (1943, c. 593, s. 7; 1967, c. 1189; 1971, c. 780, s. 1; 1973, c. 474, s. 14.)

### § 159-20. Funding capital reserve funds.

Capital reserve funds may be funded by appropriations from any other fund consistent with the limitations imposed in G.S. 159-13(b). When moneys or investment securities, the use of which is restricted by law, come into a capital reserve fund, the identity of such moneys or investment securities shall be maintained by appropriate accounting entries. (1943, c. 593, s. 4; 1945, c. 464, s. 2; 1957, c. 863, s. 1; 1967, c. 1189; 1971, c. 780, s. 1; 1973, c. 474, s. 15.)

### § 159-21. Investment.

The cash balances, in whole or in part, of capital reserve funds may be deposited at interest or invested as provided by G.S. 159-30. (1957, c. 863, s. 1; 1967, c. 1189; 1971, c. 780, s. 1.)

### § 159-22. Withdrawals.

Withdrawals from a capital reserve fund may be authorized by resolution or ordinance of the governing board of the local government or public authority. No withdrawal may be authorized for any purpose not specified in the resolution or ordinance establishing the fund or in a resolution or ordinance amending it. The withdrawal resolution or ordinance shall authorize an appropriation from the capital reserve fund to an appropriate appropriation in one of the funds maintained pursuant to G.S. 159-13(a). No withdrawal may be made which would result in an appropriation for purposes for which an adequate balance of eligible moneys or investment securities is not then available in the capital reserve fund. (1943, c. 593, ss. 11, 16; 1945, c. 464, s. 2; 1949, c. 196, s. 3; 1957, c. 863, s. 1; 1967, c. 1189; 1971, c. 780, s. 1; 1973, c. 474, s. 16.)

§ 159-23: Reserved for future codification purposes.

## Part 3. Fiscal Control.

### § 159-24. Finance officer.

Each local government and public authority shall appoint a finance officer to hold office at the pleasure of the appointing board or official. The finance officer may be entitled "accountant," "treasurer," "finance director," "finance officer," or any other reasonably descriptive title. The duties of the finance officer may be imposed on the budget officer or any other officer or employee on whom the duties of budget officer may be imposed. (1971, c. 780, s. 1; 1973, c. 474, s. 17.)

**Local Modification.** — (As to Part 3) Durham: 1993 (Reg. Sess., 1994), c. 666, s. 1; (As to Part 3) city of Durham: 1993 (Reg. Sess., 1994), c. 616, s. 1.

**Cross References.** — As to the Local Government Fiscal Information Act, see §§ 120-30.41 through 120-30.48.

**§ 159-25. Duties of finance officer; dual signatures on checks; internal control procedures subject to Commission regulation.**

- (a) The finance officer shall have the following powers and duties:
  - (1) He shall keep the accounts of the local government or public authority in accordance with generally accepted principles of governmental accounting and the rules and regulations of the Commission.
  - (2) He shall disburse all funds of the local government or public authority in strict compliance with this Chapter, the budget ordinance, and each project ordinance and shall preaudit obligations and disbursements as required by this Chapter.
  - (3) As often as may be requested by the governing board or the manager, he shall prepare and file with the board a statement of the financial condition of the local government or public authority.
  - (4) He shall receive and deposit all moneys accruing to the local government or public authority, or supervise the receipt and deposit of money by other duly authorized officers or employees.
  - (5) He shall maintain all records concerning the bonded debt and other obligations of the local government or public authority, determine the amount of money that will be required for debt service or the payment of other obligations during each fiscal year, and maintain all sinking funds.
  - (6) He shall supervise the investment of idle funds of the local government or public authority.
  - (7) He shall perform such other duties as may be assigned to him by law, by the manager, budget officer, or governing board, or by rules and regulations of the Commission.

All references in other portions of the General Statutes, local acts, or city charters to county, city, special district, or public authority accountants, treasurers, or other officials performing any of the duties conferred by this section on the finance officer shall be deemed to refer to the finance officer.

(b) Except as otherwise provided by law, all checks or drafts on an official depository shall be signed by the finance officer or a properly designated deputy finance officer and countersigned by another official of the local government or public authority designated for this purpose by the governing board. If the board makes no other designation, the chairman of the board or chief executive officer of the local government or public authority shall countersign these checks and drafts. The governing board of a unit or authority may waive the requirements of this subsection if the board determines that the internal control procedures of the unit or authority will be satisfactory in the absence of dual signatures.

(c) The Local Government Commission has authority to issue rules and regulations having the force of law governing procedures for the receipt, deposit, investment, transfer, and disbursement of money and other assets by units of local government and public authorities, may inquire into and investigate the internal control procedures of a local government or public authority, and may require any modifications in internal control procedures which, in the opinion of the Commission, are necessary or desirable to prevent embezzlements or mishandling of public moneys. (1971, c. 780, s. 1; 1973, c. 474, ss. 18-20; 1975, c. 514, s. 10; 1987, c. 796, s. 3(5).)

## CASE NOTES

**Detailed Accounts to Be Kept.** — Under the provisions of the former County Fiscal Control Act, it was the duty of a county accountant to keep detailed accounts of appropriations and disbursements of county funds and to certify on each warrant or order drawn against the county that provision had been made for its payment and appropriation duly made or a bond or note duly authorized as required by the act. *Avery County v. Braswell*, 215 N.C. 270, 1 S.E.2d 864 (1939).

**Certification of Vouchers.** — The duties of a county accountant in certifying county vouchers under the former County Fiscal Control Act were special in character and were in addition to and not in substitution for the duties and functions of other county officers, and even if it were conceded that the signing of the voucher by the chairman of the county board was malfeasance, the accountant and his surety could not avoid liability on the ground that some other officer was guilty of negligence or malfeasance. *Avery County v. Braswell*, 215 N.C. 270, 1 S.E.2d 864 (1939).

**Summary judgment** was inappropriate on plaintiffs' claim that defendant county failed to comply with its duties under the budget ordinance where it was unclear from the record

whether the board continued to approve and appropriate in their budget ordinance each year the longevity pay plan originally proposed by the sheriff and adopted by the county in 1980. *Hubbard v. County of Cumberland*, 143 N.C. App. 149, 544 S.E.2d 587 (2001), cert. denied, 354 N.C. 69, — S.E.2d — (2001).

**Submission of Charges to Jury.** — Where the evidence showed that expenditures contained both valid and invalid items, the court properly submitted the charges of approving an invalid claim and failure to preaudit to the jury. *State v. Davis*, 48 N.C. App. 526, 269 S.E.2d 291, cert. denied and appeal dismissed, 301 N.C. 237, 283 S.E.2d 134 (1980).

**County Not Entitled to Sovereign Immunity.** — Defendant county has a statutory duty to provide the salaries to which it has committed itself in the enacted budget ordinance and may not, after having availed itself of the services provided by the law enforcement officers, claim sovereign immunity as a defense to its statutory and contractual commitment. *Hubbard v. County of Cumberland*, 143 N.C. App. 149, 544 S.E.2d 587 (2001), cert. denied, 354 N.C. 69, — S.E.2d — (2001).

**Applied** in *State v. Davis*, 45 N.C. App. 72, 262 S.E.2d 827 (1980).

## § 159-26. Accounting system.

(a) **System Required.** — Each local government or public authority shall establish and maintain an accounting system designed to show in detail its assets, liabilities, equities, revenues, and expenditures. The system shall also be designed to show appropriations and estimated revenues as established in the budget ordinance and each project ordinance as originally adopted and subsequently amended.

(b) **Funds Required.** — Each local government or public authority shall establish and maintain in its accounting system such of the following funds and ledgers as are applicable to it. The generic meaning of each type of fund or ledger listed below is that fixed by generally accepted accounting principles.

(1) **General fund.**

(2) **Special Revenue Funds.** — One or more separate funds shall be established for each of the following classes: (i) functions or activities financed in whole or in part by property taxes voted by the people, (ii) service districts established pursuant to the Municipal or County Service District Acts, and (iii) grant project ordinances. If more than one function is accounted for in a voted tax fund, or more than one district in a service district fund, or more than one grant project in a project fund, separate accounts shall be established in the appropriate fund for each function, district, or project.

(3) **Debt service funds.**

(4) **A Fund for Each Utility or Enterprise Owned or Operated by the Unit or Public Authority.** — If a water system and a sanitary sewerage system are operated as a consolidated system, one fund may be established and maintained for the consolidated system.

(5) **Internal service funds.**

- (6) Capital Project Funds. — Such a fund shall be established to account for the proceeds of each bond order or order authorizing any debt instrument and for all other resources used for the capital projects financed by the bond or debt instrument proceeds. A unit or public authority may account for two or more bond orders or orders authorizing any debt instrument in one capital projects fund, but the proceeds of each such order and the other revenues associated with that order shall be separately accounted for in the fund.
- (7) Trust and agency funds, including a fund for each special district, public authority, or school administrative unit whose taxes or special assessments are collected by the unit.
- (8) A ledger or group of accounts in which to record the details relating to the general fixed assets of the unit or public authority.
- (9) A ledger or group of accounts in which to record the details relating to the general obligation bonds and notes and other long-term obligations of the unit.

In addition, each unit or public authority shall establish and maintain any other funds required by other statutes or by State or federal regulations.

(c) Basis of Accounting. — Except as otherwise provided by regulation of the Commission, local governments and public authorities shall use the modified accrual basis of accounting in recording transactions.

(d) Encumbrance Systems. — Except as otherwise provided in this subsection, no local government or public authority is required to record or show encumbrances in its accounting system. Each city or town with a population over 10,000 and each county with a population over 50,000 shall maintain an accounting system that records and shows the encumbrances outstanding against each category of expenditure appropriated in its budget ordinance. Any other local government or any public authority may record and show encumbrances in its accounting system. In determining a unit's population, the most recent federal decennial census shall be used.

(e) Commission Regulations. — The Commission may prescribe rules and regulations having the force of law as to:

- (1) Features of accounting systems to be maintained by local governments and public authorities.
- (2) Bases of accounting, including identifying in detail the characteristics of a modified accrual basis, identifying what revenues are susceptible to accrual, and permitting or requiring use of a basis other than modified accrual in a fund that does not account for the receipt of a tax.
- (3) Definitions of terms not clearly defined in this Article.

The Commission may vary these rules and regulations according to any other criteria reasonably related to the purpose or complexity of the financial operations involved. (1971, c. 780, s. 1; 1975, c. 514, ss. 11, 16; 1979, c. 402, s. 6; 1981, c. 685, ss. 6, 7; 1987, c. 796, s. 3(6).)

### **§ 159-27. Distribution of tax collections among funds according to levy.**

(a) The finance officer shall distribute property tax collections among the appropriate funds, according to the budget ordinance, at least monthly.

(b) Taxes collected during the current fiscal year, that were levied in any one of the two immediately preceding fiscal years, shall be distributed to the appropriate funds according to the levy of the fiscal year in which they were levied. If any fund for which such taxes were levied is not being maintained in the current fiscal year, the proportionate share of the tax that would have been distributed to the discontinued fund shall be allocated (i) to the fund from

which the activity or function for which the tax was levied is then being financed, or (ii) to the general fund if the activity or function for which the tax was levied is no longer being performed.

(c) Taxes collected during the current fiscal year, that were levied in any prior fiscal year other than one of the two immediately preceding fiscal years, may be distributed in the discretion of the governing board either (i) to the general fund, or (ii) in accordance with subsection (b) of this section. This subsection shall not repeal any portion of a local act or city charter inconsistent herewith and in effect on July 1, 1973.

(d) This section applies to taxes levied by a unit of local government on behalf of another unit, including school administrative units. (1971, c. 780, s. 1; 1973, c. 474, s. 21; 1975, c. 437, s. 15.)

### **§ 159-27.1. Use of revenue bond project reimbursements; restrictions.**

The finance officer of a unit shall deposit any funds received by the unit as a reimbursement of a loan or advance made by the unit pursuant to G.S. 159-83(a)(8a) in the fund from which the unit originally derived the funds to make the loan or advance.

If the funds originally loaned or advanced were proceeds of a bond issue, any funds received as reimbursement shall be applied as required by this section. The funds shall be applied as provided in the instrument securing payment of the bond issue if the instrument contains applicable provisions. Otherwise, the funds shall be applied to either (i) the same general purposes as those for which the bond issue was authorized, or (ii) payment of debt service on the bond issue, including principal, interest, and premium, if any, upon redemption, or payment of the purchase price of bonds for retirement at not more than their face value and accrued interest. After all the bonds of the issue have been paid or satisfied in full, any funds received as reimbursement shall be deposited in the general fund of the unit and may be used for any general fund purpose. (1991, c. 508, s. 3; c. 761, s. 29.)

### **§ 159-28. Budgetary accounting for appropriations.**

(a) Incurring Obligations. — No obligation may be incurred in a program, function, or activity accounted for in a fund included in the budget ordinance unless the budget ordinance includes an appropriation authorizing the obligation and an unencumbered balance remains in the appropriation sufficient to pay in the current fiscal year the sums obligated by the transaction for the current fiscal year. No obligation may be incurred for a capital project or a grant project authorized by a project ordinance unless that project ordinance includes an appropriation authorizing the obligation and an unencumbered balance remains in the appropriation sufficient to pay the sums obligated by the transaction. If an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with this subsection. The certificate, which shall be signed by the finance officer or any deputy finance officer approved for this purpose by the governing board, shall take substantially the following form:

“This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.

\_\_\_\_\_  
(Signature of finance officer).”

Certificates in the form prescribed by G.S. 153-130 or 160-411 as those sections read on June 30, 1973, or by G.S. 159-28(b) as that section read on June 30,

1975, are sufficient until supplies of forms in existence on June 30, 1975, are exhausted.

An obligation incurred in violation of this subsection is invalid and may not be enforced. The finance officer shall establish procedures to assure compliance with this subsection.

(b) Disbursements. — When a bill, invoice, or other claim against a local government or public authority is presented, the finance officer shall either approve or disapprove the necessary disbursement. If the claim involves a program, function, or activity accounted for in a fund included in the budget ordinance or a capital project or a grant project authorized by a project ordinance, the finance officer may approve the claim only if

- (1) He determines the amount to be payable and
- (2) The budget ordinance or a project ordinance includes an appropriation authorizing the expenditure and either (i) an encumbrance has been previously created for the transaction or (ii) an unencumbered balance remains in the appropriation sufficient to pay the amount to be disbursed.

The finance officer may approve a bill, invoice, or other claim requiring disbursement from an intragovernmental service fund or trust or agency fund not included in the budget ordinance, only if the amount claimed is determined to be payable. A bill, invoice, or other claim may not be paid unless it has been approved by the finance officer or, under subsection (c) of this section, by the governing board. The finance officer shall establish procedures to assure compliance with this subsection.

(c) Governing Board Approval of Bills, Invoices, or Claims. — The governing board may, as permitted by this subsection, approve a bill, invoice, or other claim against the local government or public authority that has been disapproved by the finance officer. It may not approve a claim for which no appropriation appears in the budget ordinance or in a project ordinance, or for which the appropriation contains no encumbrance and the unencumbered balance is less than the amount to be paid. The governing board shall approve payment by formal resolution stating the board's reasons for allowing the bill, invoice, or other claim. The resolution shall be entered in the minutes together with the names of those voting in the affirmative. The chairman of the board or some other member designated for this purpose shall sign the certificate on the check or draft given in payment of the bill, invoice, or other claim. If payment results in a violation of law, each member of the board voting to allow payment is jointly and severally liable for the full amount of the check or draft given in payment.

(d) Payment. — A local government or public authority may not pay a bill, invoice, salary, or other claim except by a check or draft on an official depository or by a bank wire transfer from an official depository. Except as provided in this subsection each check or draft on an official depository shall bear on its face a certificate signed by the finance officer or a deputy finance officer approved for this purpose by the governing board (or signed by the chairman or some other member of the board pursuant to subsection (c) of this section). The certificate shall take substantially the following form:

“This disbursement has been approved as required by the Local Government Budget and Fiscal Control Act.

\_\_\_\_\_  
 (Signature of finance officer).”

Certificates in the form prescribed by G.S. 153-131 or 160-411.1 as those sections read on June 30, 1973, or by G.S. 159-28(a) as that section read on June 30, 1975, are sufficient until supplies in existence on June 30, 1975, are exhausted.

No certificate is required on payroll checks or drafts on an imprest account in an official depository, if the check or draft depositing the funds in the imprest account carried a signed certificate.

(e) Penalties. — If an officer or employee of a local government or public authority incurs an obligation or pays out or causes to be paid out any funds in violation of this section, he and the sureties on his official bond are liable for any sums so committed or disbursed. If the finance officer or any properly designated deputy finance officer gives a false certificate to any contract, agreement, purchase order, check, draft, or other document, he and the sureties on his official bond are liable for any sums illegally committed or disbursed thereby. (1971, c. 780, s. 1; 1973, c. 474, ss. 22, 23; 1975, c. 514, s. 12; 1979, c. 402, ss. 7, 8.)

**Editor's Note.** — Chapter 153, of which §§ 153-130 and 153-131, referred to in this section, were a part, and Chapter 160, of which

§§ 160-411 and 160-411.1, also referred to in this section, were a part, have been repealed. See now Chapters 153A and 160A.

### CASE NOTES

**Scope of Section.** — This section sets forth the requirements and obligations that must be met before a county may incur contractual obligations. *Cincinnati Thermal Spray, Inc. v. Pender County*, 101 N.C. App. 405, 399 S.E.2d 758 (1991).

**Failure to Show Existence of Certificate.** — Where plaintiff made no showing that the certificate of compliance by the county board of commissioners required by subsection (a) of this section authorizing construction of water and sewer existed, no valid contract was formed as a result of alleged discussions between plaintiff and employee of county with regard to provision of adequate water and sewer systems for plaintiff's proposed facility. *Cincinnati Thermal Spray, Inc. v. Pender County*, 101 N.C. App. 405, 399 S.E.2d 758 (1991).

Where the lease agreement entered between the plaintiff computer supplier and the defen-

dant county failed to comply with the pre-audit certificate requirements of this section, the court held that no valid contract was formed between the plaintiff and defendant county and that the county, therefore, had not waived its sovereign immunity to be sued. *Data Gen. Corp. v. County of Durham*, 143 N.C. App. 97, 545 S.E.2d 243 (2001).

**Later-Incurred Financial Obligation.** — Where an obligation incurred by a town did not result in a financial obligation in the year in which the subject contract was signed, the lack of a pre-audit certificate did not invalidate the town's contract. *Myers v. Town of Plymouth*, 135 N.C. App. 707, 522 S.E.2d 122 (1999).

**Applied** in *State v. Davis*, 45 N.C. App. 72, 262 S.E.2d 827 (1980); *Watauga County Bd. of Educ. v. Town of Boone*, 106 N.C. App. 270, 416 S.E.2d 411 (1992).

### § 159-28.1. Facsimile signatures.

The governing board of a local government or public authority may provide by appropriate resolution or ordinance for the use of facsimile signature machines, signature stamps, or similar devices in signing checks and drafts and in signing the preaudit certificate on contracts or purchase orders. The board shall charge the finance officer or some other bonded officer or employee with the custody of the necessary machines, stamps, plates, or other devices, and that person and the sureties on his official bond are liable for any illegal, improper, or unauthorized use of them. (1975, c. 514, s. 13.)

### § 159-29. Fidelity bonds.

(a) The finance officer shall give a true accounting and faithful performance bond with sufficient sureties in an amount to be fixed by the governing board, not less than ten thousand dollars (\$10,000) nor more than two hundred fifty thousand dollars (\$250,000). The premium on the bond shall be paid by the local government or public authority.

(b) Each officer, employee, or agent of a local government or public authority who handles or has in his custody more than one hundred dollars (\$100.00) of the unit's or public authority's funds at any time, or who handles or has access

to the inventories of the unit or public authority, shall, before being entitled to assume his duties, give a faithful performance bond with sufficient sureties payable to the local government or public authority. The governing board shall determine the amount of the bond, and the unit or public authority may pay the premium on the bond. Each bond, when approved by the governing board, shall be deposited with the clerk to the board.

If another statute requires an officer, employee, or agent to be bonded, this subsection does not require an additional bond for that officer, employee, or agent.

(c) A local government or public authority may adopt a system of blanket faithful performance bonding as an alternative to individual bonds. If such a system is adopted, statutory requirements of individual bonds, except for elected officials and for finance officers and tax collectors by whatever title known, do not apply to an officer, employee, or agent covered by the blanket bond. However, although an individual bond is required for an elected official, a tax collector, or finance officer, such an officer or elected official may also be included within the coverage of a blanket bond if the blanket bond protects against risks not protected against by the individual bond. (1971, c. 780, s. 1; 1975, c. 514, s. 14; 1987 (Reg. Sess., 1988), c. 975, s. 32.)

CASE NOTES

**As to approval of bond in smaller amount than required by former statute,** see *Ellis v. Brown*, 217 N.C. 787, 9 S.E.2d 467 (1940), decided under the former County Fiscal Control Act.

**Stated** in *Town of Scotland Neck v. Western Sur. Co.*, 301 N.C. 331, 271 S.E.2d 501 (1980).

**§ 159-30. Investment of idle funds.**

(a) A local government or public authority may deposit at interest or invest all or part of the cash balance of any fund. The finance officer shall manage investments subject to whatever restrictions and directions the governing board may impose. The finance officer shall have the power to purchase, sell, and exchange securities on behalf of the governing board. The investment program shall be so managed that investments and deposits can be converted into cash when needed.

(b) Moneys may be deposited at interest in any bank, savings and loan association, or trust company in this State in the form of certificates of deposit or such other forms of time deposit as the Commission may approve. Investment deposits, including investment deposits of a mutual fund for local government investment established under subdivision (c)(8) of this section, shall be secured as provided in G.S. 159-31(b).

(c) Moneys may be invested in the following classes of securities, and no others:

- (1) Obligations of the United States or obligations fully guaranteed both as to principal and interest by the United States.
- (2) Obligations of the Federal Financing Bank, the Federal Farm Credit Bank, the Bank for Cooperatives, the Federal Intermediate Credit Bank, the Federal Land Banks, the Federal Home Loan Banks, the Federal Home Loan Mortgage Corporation, Fannie Mae, the Government National Mortgage Association, the Federal Housing Administration, the Farmers Home Administration, the United States Postal Service.
- (3) Obligations of the State of North Carolina.
- (4) Bonds and notes of any North Carolina local government or public authority, subject to such restrictions as the secretary may impose.

- (5) Savings certificates issued by any savings and loan association organized under the laws of the State of North Carolina or by any federal savings and loan association having its principal office in North Carolina; provided that any principal amount of such certificate in excess of the amount insured by the federal government or any agency thereof, or by a mutual deposit guaranty association authorized by the Commissioner of Banks of the Department of Commerce of the State of North Carolina, be fully collateralized.
- (6) Prime quality commercial paper bearing the highest rating of at least one nationally recognized rating service and not bearing a rating below the highest by any nationally recognized rating service which rates the particular obligation.
- (7) Bills of exchange or time drafts drawn on and accepted by a commercial bank and eligible for use as collateral by member banks in borrowing from a federal reserve bank, provided that the accepting bank or its holding company is either (i) incorporated in the State of North Carolina or (ii) has outstanding publicly held obligations bearing the highest rating of at least one nationally recognized rating service and not bearing a rating below the highest by any nationally recognized rating service which rates the particular obligations.
- (8) Participating shares in a mutual fund for local government investment; provided that the investments of the fund are limited to those qualifying for investment under this subsection (c) and that said fund is certified by the Local Government Commission. The Local Government Commission shall have the authority to issue rules and regulations concerning the establishment and qualifications of any mutual fund for local government investment.
- (9) A commingled investment pool established and administered by the State Treasurer pursuant to G.S. 147-69.3.
- (10) A commingled investment pool established by interlocal agreement by two or more units of local government pursuant to G.S. 160A-460 through G.S. 160A-464, if the investments of the pool are limited to those qualifying for investment under this subsection (c).
- (11) Evidences of ownership of, or fractional undivided interests in, future interest and principal payments on either direct obligations of the United States government or obligations the principal of and the interest on which are guaranteed by the United States, which obligations are held by a bank or trust company organized and existing under the laws of the United States or any state in the capacity of custodian.
- (12) Repurchase agreements with respect to either direct obligations of the United States or obligations the principal of and the interest on which are guaranteed by the United States if entered into with a broker or dealer, as defined by the Securities Exchange Act of 1934, which is a dealer recognized as a primary dealer by a Federal Reserve Bank, or any commercial bank, trust company or national banking association, the deposits of which are insured by the Federal Deposit Insurance Corporation or any successor thereof if:
  - a. Such obligations that are subject to such repurchase agreement are delivered (in physical or in book entry form) to the local government or public authority, or any financial institution serving either as trustee for the local government or public authority or as fiscal agent for the local government or public authority or are supported by a safekeeping receipt issued by a depository satisfactory to the local government or public authority, provided that such repurchase agreement must provide that

the value of the underlying obligations shall be maintained at a current market value, calculated at least daily, of not less than one hundred percent (100%) of the repurchase price, and, provided further, that the financial institution serving either as trustee or as fiscal agent for the local government or public authority holding the obligations subject to the repurchase agreement hereunder or the depository issuing the safekeeping receipt shall not be the provider of the repurchase agreement;

- b. A valid and perfected first security interest in the obligations which are the subject of such repurchase agreement has been granted to the local government or public authority or its assignee or book entry procedures, conforming, to the extent practicable, with federal regulations and satisfactory to the local government or public authority have been established for the benefit of the local government or public authority or its assignee;
- c. Such securities are free and clear of any adverse third party claims; and
- d. Such repurchase agreement is in a form satisfactory to the local government or public authority.

- (13) In connection with funds held by or on behalf of a local government or public authority, which funds are subject to the arbitrage and rebate provisions of the Internal Revenue Code of 1986, as amended, participating shares in tax-exempt mutual funds, to the extent such participation, in whole or in part, is not subject to such rebate provisions, and taxable mutual funds, to the extent such fund provides services in connection with the calculation of arbitrage rebate requirements under federal income tax law; provided, the investments of any such fund are limited to those bearing one of the two highest ratings of at least one nationally recognized rating service and not bearing a rating below one of the two highest ratings by any nationally recognized rating service which rates the particular fund.

(d) Investment securities may be bought, sold, and traded by private negotiation, and local governments and public authorities may pay all incidental costs thereof and all reasonable costs of administering the investment and deposit program. Securities and deposit certificates shall be in the custody of the finance officer who shall be responsible for their safekeeping and for keeping accurate investment accounts and records.

(e) Interest earned on deposits and investments shall be credited to the fund whose cash is deposited or invested. Cash of several funds may be combined for deposit or investment if not otherwise prohibited by law; and when such joint deposits or investments are made, interest earned shall be prorated and credited to the various funds on the basis of the amounts thereof invested, figured according to an average periodic balance or some other sound accounting principle. Interest earned on the deposit or investment of bond funds shall be deemed a part of the bond proceeds.

(f) Registered securities acquired for investment may be released from registration and transferred by signature of the finance officer. (1957, c. 864, s. 1; 1967, c. 798, ss. 1, 2; 1969, c. 862; 1971, c. 780, s. 1; 1973, c. 474, ss. 24, 25; 1975, c. 481; 1977, c. 575; 1979, c. 717, s. 2; 1981, c. 445, ss. 1-3; 1983, c. 158, ss. 1, 2; 1987, c. 672, s. 1; 1989, c. 76, s. 31; c. 751, s. 7(46); 1991 (Reg. Sess., 1992), c. 959, s. 77; c. 1007, s. 40; 1993, c. 553, s. 55; 2001-193, s. 16; 2001-487, s. 14(o).)

**Local Modification.** — Durham: 1999-101, s. 3; Pitt: 1999-48, s. 1; city of Winston-Salem: 1989 (Reg. Sess., 1990), c. 1026; 1991 (Reg. Sess., 1992), c. 951; 1998-36, s. 2; Forsyth

Board of County Commissioners: 1998-44, s. 3.

**Cross References.** — As to investing sinking funds in bonds guaranteed by the United States, see § 53-44. As to investment by com-

munity colleges and technical institutes, see § 115D-58.6. As to the State Refunding Bond Act, see § 142-29.1, et seq.

**Editor's Note.** — Session Laws 1987, c. 672, s. 2 provided:

"The foregoing section of this act shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by any other laws, and shall not be regarded as in

derogation of any powers now existing."

**Effect of Amendments.** — Session Laws 2001-193, s. 16, effective July 1, 2001, substituted "Commissioner of Banks" for "Administrator of the Savings Institutions Division" in subdivision (c)(5).

Session Laws 2001-487, s. 14(o), effective December 16, 2001, substituted "Fannie Mae" for "the Federal National Mortgage Association" in subdivision (c)(2).

## § 159-31. Selection of depository; deposits to be secured.

(a) The governing board of each local government and public authority shall designate as its official depositories one or more banks, savings and loan associations, or trust companies in this State or, with the written permission of the secretary, a national bank located in another state. In addition, a unit or public authority, with the written permission of the secretary, may designate a state bank or trust company located in another state as an official depository for the purpose of acting as fiscal agent for the unit or public authority. The names and addresses of the depositories shall be reported to the secretary. It shall be unlawful for any public moneys to be deposited in any place, bank, or trust company other than an official depository, except as permitted by G.S. 159-30(b); however, public moneys may be deposited in official depositories in Negotiable Order of Withdrawal (NOW) accounts.

(b) The amount of funds on deposit in an official depository or deposited at interest pursuant to G.S. 159-30(b) shall be secured by deposit insurance, surety bonds, letters of credit issued by a Federal Home Loan Bank, or investment securities of such nature, in a sufficient amount to protect the local government or public authority on account of deposit of funds made therein, and in such manner, as may be prescribed by rule or regulation of the Local Government Commission. When deposits are secured in accordance with this subsection, no public officer or employee may be held liable for any losses sustained by a local government or public authority because of the default or insolvency of the depository. No security is required for the protection of funds remitted to and received by a bank, savings and loan association, or trust company acting as fiscal agent for the payment of principal and interest on bonds or notes, when the funds are remitted no more than 60 days prior to the maturity date. (1927, c. 146, s. 19; 1929, c. 37; 1931, c. 60, s. 32; c. 296, s. 7; 1935, c. 375, s. 1; 1939, c. 129, s. 1; c. 134; 1953, c. 675, s. 28; 1955, cc. 698, 724; 1971, c. 780, s. 1; 1973, c. 474, s. 26; 1979, c. 637, s. 1; 1981, c. 447, s. 2; 1983, c. 158, s. 3; 1999-74, s. 1.)

**Cross References.** — As to deposits by community colleges and technical institutes, see § 115D-58.7.

## § 159-32. Daily deposits.

Except as otherwise provided by law, all taxes and other moneys collected or received by an officer or employee of a local government or public authority shall be deposited in accordance with this section. Each officer and employee of a local government or public authority whose duty it is to collect or receive any taxes or other moneys shall deposit his collections and receipts daily. If the governing board gives its approval, deposits shall be required only when the moneys on hand amount to as much as two hundred fifty dollars (\$250.00), but

in any event a deposit shall be made on the last business day of the month. All deposits shall be made with the finance officer or in an official depository. Deposits in an official depository shall be immediately reported to the finance officer by means of a duplicate deposit ticket. The finance officer may at any time audit the accounts of any officer or employee collecting or receiving taxes or other moneys, and may prescribe the form and detail of these accounts. The accounts of such an officer or employee shall be audited at least annually. (1927, c. 146, s. 19; 1929, c. 37; 1939, c. 134; 1955, cc. 698, 724; 1971, c. 780, s. 1; 1973, c. 474, s. 27.)

**Local Modification.** — City of Greensboro: 1995, c. 79, s. 1; city of Winston-Salem: 1995 (Reg. Sess., 1996), c. 639, s. 1.

### § 159-32.1. Electronic payment.

A unit of local government, public hospital, or public authority may, in lieu of payment by cash or check, accept payment by electronic payment as defined in G.S. 147-86.20 for any tax, assessment, rate, fee, charge, rent, interest, penalty, or other receivable owed to it. A unit of local government, public hospital, or public authority may pay any negotiated discount, processing fee, transaction fee, or other charge imposed by a credit card, charge card, or debit card company, or by a third-party merchant bank, as a condition of contracting for the unit's or the authority's acceptance of electronic payment. A unit of local government, public hospital, or public authority may impose the fee or charge as a surcharge on the amount paid by the person using electronic payment. (1999-434, s. 5.)

**Editor's Note.** — Session Laws 1999, c. 434, s. 19, provides that the Secretary of Commerce shall implement policies and procedures to ensure "Best Value" Procurement, Solution-Based Procurement, and Government-Vendor Partnership.

Session Laws 1999, c. 434, s. 20, requires the Secretary of Commerce to develop and implement policies, procedures, and/or programs to ensure that personnel receive high quality training in the principles of "Best Value" Procurement, Solution-Based Procurement, Government-Vendor Partnership, contract administration, and project management.

Session Laws 1999, c. 434, s. 21, provides

that the Secretary of Commerce shall report to the Joint Select Committee on Information Technology on the implementation of this act on or before April 1, 2000.

Session Laws 1999, c. 434, s. 22, provides that the Joint Select Committee on Information Technology shall study the governance of State government-wide information technology management by the creation of a centralized agency responsible for all technology-related issues. An interim report may be made by the Committee to the 2000 Session of the General Assembly and a final report prior to the convening of the 2001 General Assembly.

### § 159-33. Semiannual reports on status of deposits and investments.

Each officer having custody of any funds of any local government or public authority shall report to the secretary of the Local Government Commission on January 1 and July 1 of each year (or such other dates as he may prescribe) the amounts of funds then in his custody, the amounts of deposits of such funds in depositories, and a list of all investment securities and time deposits held by the local government or public authority. In like manner, each bank or trust company acting as the official depository of any unit of local government or public authority may be required to report to the secretary a description of the surety bonds or investment securities securing such public deposits. If the secretary finds at any time that any funds of any unit or authority are not properly deposited or secured, or are invested in securities not eligible for

investment, he shall notify the officer or depository in charge of the funds of the failure to comply with law or applicable regulations of the Commission. Upon such notification, the officer or depository shall comply with the law or regulations within 30 days, except as to the sale of securities not eligible for investment which shall be sold within nine months at a price to be approved by the secretary. The Commission may extend the time for sale of ineligible securities, but no one extension may cover a period of more than one year. (1931, c. 60, s. 33; 1971, c. 780, s. 1; 1979, c. 637, s. 2.)

### **§ 159-33.1. Semiannual reports of financial information.**

The finance officer of each unit and public authority shall submit to the secretary on January 1 and July 1 of each year (or such other dates as the secretary may prescribe) a statement of financial information concerning the unit or public authority. The secretary may prescribe the information to be included in the statement and may prescribe the form of the statement. (1973, c. 474, s. 28.)

### **§ 159-34. Annual independent audit; rules and regulations.**

(a) Each unit of local government and public authority shall have its accounts audited as soon as possible after the close of each fiscal year by a certified public accountant or by an accountant certified by the Commission as qualified to audit local government accounts. When specified by the secretary, the audit shall evaluate the performance of a unit of local government or public authority with regard to compliance with all applicable federal and State agency regulations. This audit, combined with the audit of financial accounts, shall be deemed to be the single audit described by the "Federal Single Audit Act of 1984". The auditor shall be selected by and shall report directly to the governing board. The audit contract or agreement shall (i) be in writing, (ii) include the entire entity in the scope of the audit, except that an audit for purposes other than the annual audit required by this section should include an accurate description of the scope of the audit, (iii) require that a typewritten or printed report on the audit be prepared as set forth herein, (iv) include all of its terms and conditions, and (v) be submitted to the secretary for his approval as to form, terms, conditions, and compliance with the rules of the Commission. As a minimum, the required report shall include the financial statements prepared in accordance with generally accepted accounting principles, all disclosures in the public interest required by law, and the auditor's opinion and comments relating to financial statements. The audit shall be performed in conformity with generally accepted auditing standards. The finance officer shall file a copy of the audit report with the secretary, and shall submit all bills or claims for audit fees and costs to the secretary for his approval. Before giving his approval the secretary shall determine that the audit and audit report substantially conform to the requirements of this section. It shall be unlawful for any unit of local government or public authority to pay or permit the payment of such bills or claims without this approval. Each officer and employee of the local government or local public authority having custody of public money or responsibility for keeping records of public financial or fiscal affairs shall produce all books and records requested by the auditor and shall divulge such information relating to fiscal affairs as he may request. If any member of a governing board or any other public officer or employee shall conceal, falsify, or refuse to deliver or divulge any books, records, or information, with an attempt thereby to mislead the auditor or impede or interfere with the audit, he is guilty of a Class 1 misdemeanor.

(b) The Local Government Commission has authority to issue rules and regulations for the purpose of improving the quality of auditing and the quality and comparability of reporting pursuant to this section or any similar section of the General Statutes. The rules and regulations may consider the needs of the public for adequate information and the performance that the auditor has demonstrated in the past, and may be varied according to the size, purpose or function of the unit, or any other criteria reasonably related to the purpose or substance of the rules or regulation.

(c) Notwithstanding any other provision of law, except for Article 5A of Chapter 147 of the General Statutes pertaining to the State Auditor, all State departments and agencies shall rely upon the single audit accepted by the secretary as the basis for compliance with applicable federal and State regulations. All State departments and agencies which provide funds to local governments and public authorities shall provide the Commission with documents that the Commission finds are in the prescribed format describing standards of compliance and suggested audit procedures sufficient to give adequate direction to independent auditors retained by local governments and public authorities to conduct a single audit as required by this section. The secretary shall be responsible for the annual distribution of all such standards of compliance and suggested audit procedures proposed by State departments and agencies and any amendments thereto. Further, the Commission with the cooperation of all affected State departments and agencies shall be responsible for the following:

- (1) Procedures for the timely distribution of compliance standards developed by State departments and agencies, reviewed and approved by the Commission to auditors retained by local governments and public authorities.
- (2) Procedures for the distribution of single audits for local governments and public authorities such that they are available to all State departments and agencies which provide funds to local units.
- (3) The acceptance of single audits on behalf of all State departments and agencies; provided that, the secretary may subsequently revoke such acceptance for cause, whereupon affected State departments and agencies shall no longer rely upon such audit as the basis for compliance with applicable federal and State regulations. (1971, c. 780, s. 1; 1975, c. 514, s. 15; 1979, c. 402, s. 9; 1981, c. 685, ss. 8, 9; 1987, c. 287; 1993, c. 257, s. 20; c. 539, s. 1081; 1994, Ex. Sess., c. 24, s. 14(c); 2001-160, s. 1.)

**Local Modification.** — Dare (Special Leash Law District): 1989 (Reg. Sess., 1990), c. 963, s. 7.

**Effect of Amendments.** — Session Laws 2001-160, s. 1, effective May 31, 2001, in the

second sentence of subsection (c), substituted “that the Commission finds are in the” for “approved by the State Auditor in a”; and in subsection (c)(1), substituted “Commission” for “State Auditor.”

### § 159-35. Secretary of Local Government Commission to notify units of debt service obligations.

(a) The secretary shall mail to each local government and public authority not later than May 1 of each year a statement of its debt service obligations for the coming fiscal year, including sums to be paid into sinking funds.

(b) The secretary shall mail to each local government and public authority not later than 30 days prior to the due date of each installment of principal or interest on outstanding debt, a statement of the amount of principal and interest so payable, the due date, the place to which the payments should be

sent, and a summary of the legal penalties for failing to meet debt service obligations.

(c) The secretary shall mail to each unit of local government not later than 30 days prior to the due date of each payment due to the State under debt instruments issued pursuant to Chapter 159G of the General Statutes or Chapter 159I of the General Statutes a statement of the amount so payable, the due date, the amount of any moneys due to the unit of local government that will be withheld by the State and applied to the payment, the amount due to be paid by the unit of local government from local sources, the place to which payment should be sent, and a summary of the legal penalties for failing to honor the debt instrument according to its terms. Failure of the secretary timely to mail such statement or otherwise comply with the provisions of this subsection (c) shall not affect in any manner the obligation of a unit of local government to make payments to the State in accordance with any such debt instrument. (1931, c. 60, ss. 36, 37; 1971, c. 780, s. 1; 1987, c. 796, s. 3(7); 1989, c. 756, s. 4.)

### **§ 159-36. Failure of local government to levy debt service taxes or provide for payment of debt.**

(a) If any local government or public authority fails or refuses to levy taxes or allocate other revenues in an amount sufficient to meet all installments of principal and interest falling due on its debt during the budget year, or to adequately maintain its sinking funds, the Commission shall enter an order directing and commanding the governing board of the local government or public authority to enact a budget ordinance levying the necessary taxes or raising the necessary revenue by whatever means are legally available. If the governing board shall fail or refuse to comply with the Commission's order within 10 days, the order shall have the same legal force and effect as if the actions therein commanded had been taken by the governing board, and the appropriate officers and employees of the local government or public authority shall proceed to collect the tax levy or implement the plan for raising the revenue to the same extent as if such action had been authorized and directed by the governing board. Any officer, employee, or member of the governing board of any local government or public authority who willfully fails or refuses to implement an order of the Local Government Commission issued pursuant to this section forfeits his office or position.

(b) This section does not apply to contractual obligations undertaken by a unit of local government in a debt instrument issued pursuant to Chapter 159G of the General Statutes unless such debt instrument is secured by a pledge of the faith and credit of the unit of local government. (1971, c. 780, s. 1; 1987, c. 796, s. 3(8).)

### **§ 159-37. Reports on status of sinking funds.**

Each unit or public authority maintaining any sinking fund shall transmit to the secretary upon his request financial reports on the status of the fund and the means by which moneys are obtained for deposit therein. The secretary shall determine from this information whether the sinking funds are being properly maintained, and if he shall find that they are not, he shall order the unit to take such action as may be necessary to maintain the funds in accordance with law. (1931, c. 60, s. 31; 1971, c. 780, s. 1.)

### **§ 159-38. Local units authorized to accept their bonds in payment of certain claims and judgments.**

Any unit of local government or public authority may accept its own bonds, at par, in settlement of any claim or judgment that it may have against any

person, firm, corporation, or association due to funds held in an insolvent bank, trust company, or savings and loan association. (1933, c. 376; 1971, c. 780, s. 1.)

#### Part 4. Public Hospitals.

### § 159-39. Special regulations pertaining to public hospitals.

- (a) For the purposes of this Part, "public hospital" means any hospital that
- (1) Is operated by a county, city, hospital district, or hospital authority, or
  - (2) Is owned by a county, city, hospital district or hospital authority and operated by a nonprofit corporation or association, a majority of whose board of directors or trustees are appointed by the governing body of a county, city, hospital district, or hospital authority, or
  - (3) On whose behalf a county or city has issued and has outstanding general obligation or revenue bonds, or to which a county or city makes current appropriations (other than appropriations for the cost of medical care to prisoners or indigents).
- (b) Except as provided in this Part, none of the provisions of Parts 1, 2, and 3 of this Article apply to public hospitals.
- (c) Each public hospital shall operate under an annual balanced budget. A budget is balanced when the sum of appropriations is equal to the sum of estimated net revenues and appropriated fund balances.
- (d) The governing board of each public hospital shall appoint or designate a finance officer, who shall have the following powers and duties:
- (1) He shall prepare the annual budget for presentation to the governing board of the public hospital and shall administer the budget as approved by the board.
  - (2) He shall keep the accounts of the hospital in accordance with generally accepted principles of accounting.
  - (3) He shall prepare and file a statement of the financial condition of the hospital as revealed by its accounts upon the request of the hospital governing board or the governing board of any county, city, or other unit of local government that has issued on behalf of the hospital and has outstanding its general obligation or revenue bonds or makes current appropriations to the hospital (other than appropriations for the cost of medical care to prisoners or indigents).
  - (4) He shall receive and deposit all moneys accruing to the hospital, or supervise the receipt and deposit of money by other duly authorized officers or employees of the hospital.
  - (5) He shall supervise the investment of idle funds of the hospital.
  - (6) He shall maintain all records concerning the bonded debt of the hospital, if any, determine the amount of money that will be required for debt service during each fiscal year, and maintain all sinking funds, but shall not be responsible for records concerning the bonded debt of any county, city, or other unit of local government incurred on behalf of the hospital.
- (e) The Local Government Commission has authority to issue rules and regulations governing procedures for the receipt, deposit, investment, transfer, and disbursement of money and other assets by public hospitals, may inquire into and investigate the internal control procedures of a public hospital, and may require any modifications in internal control procedures which, in the opinion of the Commission, are necessary or desirable to prevent embezzlements, mishandling of funds, or continued operating deficits.
- (f) The accounting system of a public hospital shall be so designed that the true financial condition of the hospital can be determined therefrom at any

time. As soon as possible after the close of each fiscal year, the accounts shall be audited by a certified public accountant or by an accountant certified by the Local Government Commission as qualified to audit local government accounts. The auditor shall be selected by and shall report directly to the hospital governing board. The audit contract or agreement shall be in writing, shall include all its terms and conditions, and shall be submitted to the secretary of the Local Government Commission for his approval as to form, terms and conditions. The terms and conditions of the audit shall include the scope of the audit, and the requirement that upon completion of the examination the auditor shall prepare a written report embodying financial statements and his opinion and comments relating thereto. The finance officer shall file a copy of the audit with the secretary of the Local Government Commission and with the finance officer of any county, city, or other unit of local government that has issued on behalf of the hospital and has outstanding its general obligation or revenue bonds or makes current appropriations to the hospital (other than appropriations for the cost of medical care to prisoners or indigents).

(g) A public hospital may deposit or invest at interest all or part of its cash balance pursuant to G.S. 159-30.

(h) Public hospitals are subject to G.S. 159-31 with regard to selection of an official depository and security of deposits.

(i) Public hospitals are subject to G.S. 159-32 with regard to daily deposits.

(i1) Public hospitals may accept electronic payments pursuant to G.S. 159-32.1.

(j) Public hospitals are subject to G.S. 159-33 with regard to semiannual reports to the Local Government Commission on the status of deposits and investments.

(k) Any hospital district or hospital authority having outstanding general obligation or revenue bonds is subject to G.S. 159-35, 159-36, 159-37, and 159-38. (1973, c. 474, s. 28.1; c. 1215; 1999-434, s. 5.1.)

**Editor's Note.** — Session Laws 1999-377, s. 4, effective August 4, 1999, provides that any hospital continuing to operate under Article 2 of Chapter 131 of the General Statutes pursuant to Section 3 of Chapter 775 of the 1983 Session Laws shall be considered to be a "public hospital" within the meaning of G.S. 159-39 and to be a "unit of local government" within the meaning of G.S. 160A-20.

Session Laws 1999, c. 434, s. 19, provides that the Secretary of Commerce shall implement policies and procedures to ensure "Best Value" Procurement, Solution-Based Procurement, and Government-Vendor Partnership.

Session Laws 1999, c. 434, s. 20, requires the Secretary of Commerce to develop and implement policies, procedures, and/or programs to ensure that personnel receive high quality training in the principles of "Best Value" Procurement, Solution-Based Procurement, Gov-

ernment-Vendor Partnership, contract administration, and project management.

Session Laws 1999, c. 434, s. 21, provides that the Secretary of Commerce shall report to the Joint Select Committee on Information Technology on the implementation of this act on or before April 1, 2000.

Session Laws 1999, c. 434, s. 22, provides that the Joint Select Committee on Information Technology shall study the governance of State government-wide information technology management by the creation of a centralized agency responsible for all technology-related issues. An interim report may be made by the Committee to the 2000 Session of the General Assembly and a final report prior to the convening of the 2001 General Assembly.

**Effect of Amendments.** — Session Laws 1999-434, s. 5.1, effective August 10, 1999, added subsection (i1).

#### CASE NOTES

**Applied** in *National Medical Enters., Inc. v. Sandrock*, 72 N.C. App. 245, 324 S.E.2d 268 (1985).

**Quoted** in *Cohn v. Wilkes Gen. Hosp.*, 127 F.R.D. 117 (W.D.N.C. 1989).

**Cited** in *News & Observer Publishing Co. v. Wake County Hosp. Sys.*, 55 N.C. App. 1, 284 S.E.2d 542 (1981).

## Part 5. Nonprofit Corporations Receiving Public Funds.

### § 159-40. Special regulations pertaining to nonprofit corporations receiving public funds.

(a) If a city or county grants or appropriates one thousand dollars (\$1,000) or more in any fiscal year to a nonprofit corporation or organization, the city or county may require that the nonprofit corporation or organization have an audit performed for the fiscal year in which the funds are received and may require that the nonprofit corporation or organization file a copy of the audit report with the city or county.

(b) Any nonprofit corporation or organization which receives one thousand dollars (\$1,000) or more in State funds shall, at the request of the State Auditor, submit to an audit by the office of the State Auditor for the fiscal year in which such funds were received.

(c) Every nonprofit corporation or organization which has an audit performed pursuant to this section shall file a copy of the audit report with the office of the State Auditor.

(d) The provisions of this section shall not apply to sheltered workshops or to Adult Development Activity Programs or to private residential facilities for the mentally retarded and developmentally disabled or to Developmental Day Care Centers or to any nonprofit corporation or organization whose sole use of public funds is to provide hospital services or operate as a volunteer fire department, rescue squad, ambulance squad, or which operates as a junior college, college or university duly accredited by the southern regional accrediting association.

(e) Repealed by Session Laws 1979, c. 905. (1977, c. 687, s. 1; 1977, 2nd Sess., c. 1195, s. 1; 1979, c. 905.)

## Part 6. Joint Municipal Power Agencies and Joint Municipal Assistance Agencies.

### § 159-41. Special regulations pertaining to joint municipal power agencies.

(a) For the purposes of this Part, "joint agency" means a public body corporate and politic organized in accordance with the provisions of Chapter 159B, or the combination or recombination of any joint agencies so organized.

(b) Except as provided in this Part, none of the provisions of Article 3 of this Chapter shall apply to joint agencies. Whenever the provisions of this Part and the provisions of Chapter 159B of the General Statutes shall conflict, the provisions of Chapter 159B shall govern.

(c) Each joint agency shall operate under an annual balanced budget resolution adopted by the governing board and entered into the minutes. A budget is balanced when the sum of the appropriations is equal to the sum of estimated net revenues and appropriated fund balances. The budget resolution of a joint agency shall cover a fiscal year beginning January 1 and ending December 31, except that the Local Government Commission, if it determines that a different fiscal year would facilitate the agency's financial operations, may enter an order permitting an agency to operate under a fiscal year other than from January 1 to December 31.

(d) The following directions and limitations shall bind the governing board in adopting the budget resolution:

- (1) The full amount estimated by the finance officer to be required for debt service during the budget year shall be appropriated.

- (2) The full amount of any deficit in each fund shall be appropriated.
- (3) Sufficient funds to meet the amounts to be paid during the fiscal year under continuing contracts previously entered into shall be appropriated.
- (4) The sum of estimated net revenue and appropriated fund balance in each fund shall be equal to appropriations in that fund. Appropriated fund balances in a fund shall not exceed the sum of cash and investments minus the sum of liabilities, encumbrances, and deferred revenue, as those figures stand at the close of the fiscal year preceding the budget year.
- (e) The governing board of the joint agency may amend the budget resolution at any time after its adoption and may authorize its designated finance officer to transfer moneys from one appropriation to another, subject to such limitations and procedures as it may prescribe. All such transfers will be reported to the governing board or its executive committee at its next regular meeting and shall be entered in the minutes.
- (f) Joint agencies are subject to the following sections of Article 3 of this Chapter, to the same extent as a "public authority," provided, however, the term "budget ordinance" as used in such sections shall be interpreted for the purposes of this Part to mean the budget resolution of a joint agency:
  - (1) G.S. 159-9, provided, however, that the governing board of an agency may designate as budget officer someone other than a member of the governing board or an officer or employee of the agency.
  - (2) G.S. 159-12, provided, however, that the provision relating to making the budget available to the news media of a county shall not apply to a joint agency.
  - (3) G.S. 159-13.2.
  - (4) G.S. 159-16.
  - (5) G.S. 159-18.
  - (6) G.S. 159-19.
  - (7) G.S. 159-21.
  - (8) G.S. 159-22, provided, however, that the provision restricting transfers to funds maintained pursuant to G.S. 159-13(a) shall not apply to a joint agency.
  - (9) G.S. 159-24.
  - (10) G.S. 159-25.
  - (11) G.S. 159-26.
  - (12) G.S. 159-28.
  - (13) G.S. 159-28.1.
  - (14) G.S. 159-29.
  - (15) G.S. 159-30.
  - (16) G.S. 159-31.
  - (17) G.S. 159-32.
  - (18) G.S. 159-33.
  - (19) G.S. 159-33.1.
  - (20) G.S. 159-34.
  - (21) G.S. 159-36.
  - (22) G.S. 159-38. (1979, c. 685, s. 1.)

## Part 7. Public Housing Authorities.

### § 159-42. Special regulations pertaining to public housing authorities.

- (a) Definition. — As used in this Part, the term "housing authority" means any entity as defined in G.S. 157-3(1) that is not subject to G.S. 157-4.2.

(b) **Applicability.** — Except as provided in this Part, none of the provisions of Parts 1, 2, or 3 of this Article apply to housing authorities in compliance with this Part.

(c) **Annual Budget.** — Each housing authority shall operate under an annual budget. The budget shall take the form of estimated revenues plus fund balances available for the program, as defined by the U.S. Department of Housing and Urban Development regulations or their successors, that are equal to or greater than estimated expenditures. The proposed budget shall be available for public inspection in a manner consistent with G.S. 159-12(a). Before adopting the budget, the housing authority governing board shall hold a public hearing at which time any persons who wish to be heard on the budget may appear. The governing board shall cause notice of the public hearing to be published in a newspaper of general circulation in the area once a week for two consecutive weeks prior to the public hearing.

(d) **Project Ordinances.** — The annual budget shall not include those estimated revenues and expenditures accounted for in a project ordinance. A housing authority shall adopt a project ordinance, as defined by G.S. 159-13.2, for those programs which span two or more fiscal years. The form of the project ordinance shall be in accordance with the relevant funding agency guidelines for that project. The estimated revenues plus fund balances available for a project shall be equal to or greater than the estimated expenditures. The estimated revenues and expenditures related to approved projects for a fiscal year may be included in the annual budget on an informational basis.

(e) **Finance Officer.** — The housing authority governing board shall appoint or designate a finance officer with the following powers and duties:

- (1) Preparation of the annual budget for presentation to the governing board.
- (2) Administration of the approved budget.
- (3) Maintenance of the accounts and other financial records in accordance with generally accepted principles of accounting.
- (4) Preparation and filing of statements of the financial condition, at least annually and at other times as requested by the governing board.
- (5) Receipt and deposit, or supervision of the receipt and deposit, of all moneys accruing to the housing authority.
- (6) Supervision of the investment of the idle funds of the housing authority.
- (7) Maintenance of all records concerning the bonded debt of the housing authority, if any.
- (8) Maintenance of any sinking funds of the housing authority.

(f) **Accounting Procedures.** — A housing authority must comply with federal rules and regulations issued by the U.S. Department of Housing and Urban Development pertaining to procedures for the receipt, deposit, investment, transfer, and disbursement of money and other assets. The Commission may inquire into and investigate, with reasonable cause, the internal control procedures of a housing authority. The Commission may require any modifications in internal control procedures which, in the opinion of the Commission, are necessary or desirable to prevent embezzlement, mishandling of funds, or continued operating deficits.

(g) **Audits.** — The accounting system of a housing authority shall be so designed that the true financial condition of the housing authority can be determined at any time. As soon as possible after the close of each fiscal year, the accounts shall be independently audited by a certified public accountant. The auditor shall be selected by the housing authority governing board and shall report directly to that body. The audit contract or agreement shall be in writing and shall include all its terms and conditions. The terms and conditions of the audit shall include the scope of the audit and the requirement

that upon completion of the examination the auditor shall prepare a written report embodying the financial statements and the auditor's opinion and comments relating thereto. The finance officer shall file a copy of the audit with the Secretary of the Commission.

(h) Bonding of Employees. — The bonding requirements of G.S. 159-29 shall apply to the finance officer and those employees of the housing authority handling or having custody of more than one hundred dollars (\$100.00) at any one time or those employees who have access to the inventories of the housing authority.

(i) Investments. — A housing authority may deposit or invest, at interest, all or part of its cash balance pursuant to U.S. Department of Housing and Urban Development regulations.

(j) Official Depository. — Housing authorities shall comply with G.S. 159-31, except in those circumstances where the statute is in conflict with U.S. Department of Housing and Urban Development guidance, which shall control.

(k) Deposits and Payments. — Housing authorities shall comply with G.S. 159-32, 159-32.1, and 159-33. (2001-206, s. 1.)

**Editor's Note.** — Session Laws 2001-206, s. 3, made this section effective June 15, 2001, and applicable to the fiscal years of housing authorities beginning on or after October 1, 2001.

## SUBCHAPTER IV. LONG-TERM FINANCING.

### ARTICLE 4.

#### *Local Government Bond Act.*

#### Part 1. Operation of Article.

### § 159-43. Short title; legislative intent.

(a) This Article may be cited as "The Local Government Bond Act."

(b) It is the intent of the General Assembly by enactment of this Article to prescribe a uniform system of limitations upon and procedures for the exercise by all units of local government in North Carolina of the power to borrow money secured by a pledge of the taxing power. To this end, all provisions of special, local, or private acts in effect as of July 1, 1973, authorizing the issuance of bonds or notes secured by a pledge of the taxing power or prescribing procedures therefor are repealed. No special, local, or private act enacted or taking effect after July 1, 1973, may be construed to modify, amend, or repeal any portion of this Article unless it expressly so provides by specific reference to the appropriate section of this Article. (1971, c. 780, s. 1; 1973, c. 494, s. 2.)

**Cross References.** — As to the Local Government Fiscal Information Act, see §§ 120-30.41 through 120-30.48. As to issuance of capital appreciation bonds pursuant to The Local Government Bond Act, see § 159-99.

**Editor's Note.** — Session Laws 1987 (Reg. Sess., 1988), c. 882, s. 6 and Session Laws 1989, c. 90, provided that all actions and proceedings heretofore taken by units of local government

relating to the authorization of general obligation refunding bonds, secured by a pledge of the taxing power and issued pursuant to the Local Government Bond Act, and revenue refunding bonds, secured by a pledge of revenues and issued pursuant to The State and Local Government Revenue Bond Act, and the sale and delivery of all such bonds pursuant to Article 7, as amended, of Chapter 159 of the General

Statutes of North Carolina, in order to provide funds to purchase, at a discount, bonds of such units owned by the Farmers Home Administration, including without limitation, the introduction and adoption of bond orders, the holding of public hearings with respect to such bond orders, the passage of resolutions providing for

the issuance and the sale, both public and private, of such refunding bonds, and the delivery of any such refunding bonds were in all respects approved, ratified, validated, and confirmed.

**Legal Periodicals.** — For symposium on municipal finance, see 1976 Duke L.J. 1051.

#### CASE NOTES

**Provisions Governing General Obligation Bond Must Be Followed.** — When an ordinance regulating a public enterprise is adopted by a local government to finance the public enterprise, the procedures supplied in the General Statutes for adopting such an ordinance must likewise be followed; when a general obligation bond is issued by a local government, the provisions of this Chapter must be followed; and when a local government purchases equipment, the applicable statutes

regarding competitive bidding, where applicable, must likewise be followed. There is no statute or law that mandates notice and hearing requirements for ordinances requiring mandatory connections and fixing related connection charges and user fees. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Quoted** in *Peacock v. Shinn*, 139 N.C. App. 487, 533 S.E.2d 842 (2000), cert. denied, 353 N.C. 267, 546 S.E.2d 110 (2000).

### § 159-44. Definitions.

The words and phrases defined in this section shall have the meanings indicated when used in this Article, unless the context clearly requires another meaning:

- (1) "Finance officer" means the officer performing the duties of finance officer of a unit of local government pursuant to G.S. 159-24 of the Local Government Budget and Fiscal Control Act.
- (2) "Governing board" or "board" means the governing body of a unit of local government.
- (3) "Sinking fund" means a fund held for the retirement of term bonds.
- (4) "Unit," "unit of local government," or "local government" means counties; cities, towns, and incorporated villages; consolidated city-counties, as defined by G.S. 160B-2(1); sanitary districts; mosquito control districts; hospital districts; merged school administrative units described in G.S. 115C-513; metropolitan sewerage districts; metropolitan water districts; county water and sewer districts; regional public transportation authorities; and special airport districts.
- (5) "Utility or public service enterprise" includes:
  - a. Electric power transmission and distribution systems;
  - b. Water supply facilities and distribution systems;
  - c. Sewage collection and disposal systems;
  - d. Gas transmission and distribution systems;
  - e. Public transportation systems, including but not limited to bus lines, ferries, and mass transit systems;
  - f. Solid waste collection and disposal systems and facilities;
  - g. Cable television systems;
  - h. Off-street parking facilities and systems;
  - i. Public auditoriums, coliseums, stadiums and convention centers;
  - j. Airport;
  - k. Hospitals and other health-related facilities; and
  - l. Structural and natural stormwater and drainage systems of all types. (1971, c. 780, s. 1; 1973, c. 494, s. 3; 1977, c. 466, s. 2; 1979, c. 727, s. 2; 1989, c. 643, s. 3; c. 740, s. 3; 1991, c. 325, s. 4; 1995, c. 461, s. 10; 1997-456, s. 27.)

**Editor's Note.** — Session Laws 1991, c. 325, s. 9 interpreted the 1991 amendment to this section, which inserted “merged school administrative units described in G.S. 115C-513” in subdivision (4), by providing:

“Interpretation of Act.”

“(a) Additional method. The foregoing sections of this act shall be deemed to provide an additional and alternative method for the doing of things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing.

“(b) Statutory references. References in this act to specific sections or Chapters of the General Statutes are intended to be references to such sections as they may be amended from time to time by the General Assembly.

“(c) Liberal construction. This act, being necessary for the health and welfare of the people

of the State, shall be liberally construed to effect these purposes.

“(d) Inconsistent provisions. Insofar as the provisions of this act are inconsistent with the provisions of any general laws, this act shall be controlling.

“(e) Severability. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.”

Subdivisions (5)(i) through (5)(xii) of this section were renumbered as subdivisions (5)a. through (5)l. pursuant to Session Laws 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

## § 159-45. All general obligation bonds subject to Local Government Bond Act.

No unit of local government in this State shall have authority to enter into any contract or agreement, whether oral or written, whereby it borrows money and makes an express or implied pledge of its power to levy taxes as security for repayment of the loan, except by the issuance of its bonds in accordance with the limitations and procedures prescribed in this Article or by the issuance of its negotiable notes in accordance with the limitations and procedures prescribed in Article 9 of this Chapter or by the issuance of debt instruments in accordance with the limitations and procedures prescribed in Chapter 159G of the General Statutes. (1971, c. 780, s. 1; 1987, c. 796, s. 2(1).)

## § 159-46. Faith and credit pledged.

The faith and credit of the issuing unit are hereby pledged for the payment of the principal of and interest on all bonds issued under this Article and debt instruments secured by a pledge of its faith and credit in accordance with the limitations and procedures prescribed in Chapter 159G of the General Statutes according to their terms, and the power and obligation of the issuing unit to levy taxes and raise other revenues for the prompt payment of installments of principal and interest or for the maintenance of sinking funds shall be unrestricted as to rate or amount, notwithstanding any other provisions of law whether general, special, local, or private. (1971, c. 780, s. 1; 1987, c. 796, s. 2(2).)

**Cross References.** — For statute authorizing counties, with the approval of the Local

Government Commission, to avail themselves of the Federal Bankruptcy Act, see § 23-48.

### CASE NOTES

**Applicability.** — A fair reading of the language of this section and § 159-54 indicates that this Act applies to general obligation bonds which pledge the faith and credit of the county.

McNeill v. Harnett County, 327 N.C. 552, 398 S.E.2d 475 (1990).

**A tax must be levied only if revenue from other sources is inadequate to repay**

**the principal and interest on the bonds outstanding.** *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Authorization of Tax Distinguished from Approval of Order Imposing Tax.** — Where the ballot that the voters considered indicated that the voters were asked only to

authorize a tax rather than to approve an order imposing a tax, the County Commissioners were not compelled to impose a tax and were free, under these facts, to charge reasonable fees and charges to repay the bonds in lieu of the levy of a tax. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**§ 159-47. Additional security for utility or public service enterprise bonds.**

(a) The revenues of a utility or public service enterprise owned or leased by a unit of local government shall be applied in accordance with the following priorities:

- (1) First, to pay the operating, maintenance, and capital outlay expenses of the utility or enterprise.
- (2) Second, to pay when due the interest on and principal of outstanding bonds issued for capital projects that are or were a part of the utility or enterprise.
- (3) Third, for any other lawful purpose.

Notwithstanding the foregoing provisions, a county which owns or leases hospitals or other health-related facilities and has not issued any general obligation bonds during the period July 1, 1973, to July 1, 1974, for a capital project that is or was a part of such hospitals or other health-related facilities shall have the option of applying the revenues of such hospitals or other health-related facilities in accordance with a bond order adopted under the Local Government Revenue Bond Act.

(b) In the discretion of the governing board of the issuing unit, the bond order may pledge the revenues (or any portion of the revenues) of a utility or public service enterprise to the payment of the interest on and principal of bonds issued under this Article to finance capital projects that are to become a part of the utility or enterprise.

(c) In the discretion of the governing board of the issuing unit, a bond order authorizing the issuance of bonds under this Article to finance capital projects that are to become a part of a utility or public service enterprise owned or leased by the issuing unit may state that the revenues of the utility or enterprise may be pledged to the payment of the interest on and principal of the bonds if and to the extent that the governing board of the unit shall thereafter determine by resolution (prior to the issuance of the bonds), and that a tax sufficient to pay the principal of and interest on the bonds shall be annually levied and collected by the issuing unit on all taxable property within its taxing jurisdiction, but that in the event that any revenues of the utility or enterprise shall be pledged to the payment of the bonds, the tax may be reduced by the amount of utility or enterprise revenues available for the payment of the principal and interest. A pledge of utility or enterprise revenues pursuant to this subsection shall be made by resolution of the governing board of the issuing unit after the bond order is adopted and before bonds are issued thereunder.

(d) When a pledge of utility or enterprise revenues is made pursuant to this section, the issuing unit shall have, with respect to the utility or enterprise whose revenues are pledged, all of the powers set out in G.S. 159-83 and G.S. 159-89. (1971, c. 780, s. 1; 1973, c. 1326.)

**CASE NOTES**

**“Operating Expenses”.** — Payments by defendant city to the defendants, basketball team

and team owner, did not violate the priority of payments outlined in this section, because the

money constituted operating expenses which were appropriately paid first from the pool of Coliseum revenue. *Peacock v. Shinn*, 139 N.C. App. 487, 533 S.E.2d 842 (2000), cert. denied, 353 N.C. 267, 546 S.E.2d 110 (2000).

### § 159-48. For what purposes bonds may be issued.

(a) Each unit of local government is authorized to borrow money and issue its bonds under this Article in evidence thereof for any one or more of the following purposes:

- (1) To suppress riots, insurrections, or any extraordinary breach of law and order.
- (2) To supply an unforeseen deficiency in the revenue when taxes actually received or collected during the fiscal year fall below collection estimates made in the annual budget ordinance within the limits prescribed in G.S. 159-13.
- (3) To meet emergencies threatening the public health or safety, as conclusively determined in writing by the Governor.
- (4) To refund outstanding revenue bonds or revenue bond anticipation notes.
- (5) To refund outstanding general obligation bonds or general obligation bond anticipation notes.
- (6) To fund judgments for specified sums of money entered against the unit by a court of competent jurisdiction.
- (7) To fund valid, existing obligations of the unit not incurred by the borrowing of money.

(b) Each county and city is authorized to borrow money and issue its bonds under this Article in evidence thereof for the purpose of paying any capital costs of any one or more of the following:

- (1) Providing airport facilities, including without limitation related land, landing fields, runways, clear zones, lighting, navigational and signal systems, hangars, terminals, offices, shops, and parking facilities.
- (2) Providing armories for the North Carolina national guard.
- (3) Providing auditoriums, coliseums, arenas, stadiums, civic centers, convention centers, and facilities for exhibitions, athletic and cultural events, shows, and public gatherings.
- (4) Providing beach improvements, including without limitation jetties, seawalls, groins, moles, sand dunes, vegetation, additional sand, pumps and related equipment, and drainage channels, for the control of beach erosion and the improvement of beaches.
- (5) Providing cemeteries.
- (6) Providing facilities for fire fighting and prevention, including without limitation headquarters buildings, station buildings, training facilities, hydrants, alarm systems, and communications systems.
- (7) Providing hospital facilities, including without limitation general, tuberculosis, mental, chronic disease, and other types of hospitals and related facilities such as laboratories, outpatient departments, nurses' homes and training facilities, and central service facilities operated in connection with hospitals; facilities for the provision of public health services, including related facilities such as laboratories, clinics, and administrative offices; facilities specially designed for the diagnosis, treatment, education, training, or custodial care of the mentally retarded, including facilities for training specialists and sheltered workshops for the mentally retarded; nursing homes; and in connection with the foregoing, laundries, nurses', doctors', or interns' residences, administrative buildings, research facilities, maintenance, storage, and utility facilities, auditoriums, dining halls, food

service and preparation facilities, fire prevention facilities, mental and physical health care facilities, dental care facilities, nursing schools, mental teaching facilities, offices, parking facilities, and other supporting service structures.

- (8) Providing land for corporate purposes.
- (9) Providing facilities for law enforcement, including without limitation headquarters buildings, station buildings, jails and other confinement facilities, training facilities, alarm systems, and communications systems.
- (10) Providing library facilities, including without limitation fixed and mobile libraries.
- (11) Providing art galleries, museums, and art centers, and providing for historic properties.
- (12) Providing parking facilities, including on- and off-street parking, and in connection therewith any area or place for the parking and storing of automobiles and other vehicles open to public use, with or without charge, including without limitation meters, buildings, garages, driveways, and approaches.
- (13) Providing parks and recreation facilities, including without limitation land, athletic fields, parks, playgrounds, recreation centers, shelters, stadiums, arenas, permanent and temporary stands, golf courses, swimming pools, wading pools, marinas, and lighting.
- (14) Providing public building, including without limitation buildings housing courtrooms, other court facilities, and council rooms, office buildings, public markets, public comfort stations, warehouses, and yards.
- (15) Providing public vehicles, including without limitation those for law enforcement, fire fighting and prevention, sanitation, street paving and maintenance, safety and public health, and other corporate purposes.
- (16) Providing for redevelopment through the acquisition of land and the improvement thereof for assisting local redevelopment commissions.
- (17) Providing sanitary sewer systems, including without limitation community sewerage facilities for the collection, treatment, and disposal of sewage or septic tank systems and other on-site collection and disposal facilities or systems.
- (18) Providing solid waste disposal systems, including without limitation land for sanitary landfills, incinerators, and other structures and buildings.
- (19) Providing storm sewers and flood control facilities, including without limitation levees, dikes, diversionary channels, drains, catch basins, and other facilities for storm water drainage.
- (20) Providing voting machines.
- (21) Providing water systems, including without limitation facilities for the supply, storage, treatment, and distribution of water.
- (22) Providing for any other purpose for which it is authorized, by general laws uniformly applicable throughout the State, to raise or appropriate money, except for current expenses.
- (23) Providing public transportation facilities, including without limitation equipment for public transportation, buses, surface and below-ground railways, ferries, and garage facilities.
- (24) Providing industrial parks, land suitable for industrial or commercial purposes, shell buildings, in order to provide employment opportunities for citizens of the county or city.
- (25) Providing property to preserve a railroad corridor.

(c) Each county is authorized to borrow money and issue its bonds under this Article in evidence of the debt for the purpose of, in the case of subdivisions

(1) through (4b) of this subsection, paying any capital costs of any one or more of the purposes and, in the case of subdivisions (5) and (6) of this subsection, to finance the cost of the purpose:

- (1) Providing community college facilities, including without limitation buildings, plants, and other facilities, physical and vocational educational buildings and facilities, including in connection therewith classrooms, laboratories, libraries, auditoriums, administrative offices, student unions, dormitories, gymnasiums, athletic fields, cafeterias, utility plants, and garages.
- (2) Providing courthouses, including without limitation offices, meeting rooms, court facilities and rooms, and detention facilities.
- (3) Providing county homes for the indigent and infirm.
- (4) Providing school facilities, including without limitation schoolhouses, buildings, plants and other facilities, physical and vocational educational buildings and facilities, including in connection therewith classrooms, laboratories, libraries, auditoriums, administrative offices, gymnasiums, athletic fields, lunchrooms, utility plants, garages, and school buses and other necessary vehicles.
- (4a) Providing improvements to subdivision and residential streets pursuant to G.S. 153A-205.
- (4b) Providing land for present or future county corporate, open space, community college, and public school purposes.
- (5) Providing for the octennial revaluation of real property for taxation.
- (6) Providing housing projects for persons of low or moderate income, including construction or acquisition of projects to be owned by a county, redevelopment commission, or housing authority and the provision of loans, grants, interest supplements, and other programs of financial assistance to such persons. A housing project may provide housing for persons of other than low or moderate income if at least forty percent (40%) of the units in the project are exclusively reserved for persons of low or moderate income. No rent subsidy may be paid from bond proceeds.

(d) Each city is authorized to borrow money and issue its bonds under this Article in evidence thereof for the purpose of paying any capital costs of any one or more of the following:

- (1) Repealed by Session Laws 1977, c. 402, s. 2.
- (2) Providing cable television systems.
- (3) Providing electric systems, including without limitation facilities for the generation, transmission, and distribution of electric light and power.
- (4) Providing gas systems, including without limitation facilities for the production, storage, transmission and distribution of gas, where systems shall also include the purchase and/or lease of natural gas fields and natural gas reserves and the purchase of natural gas supplies, and where any parts of such systems may be located either within the State or without.
- (5) Providing streets and sidewalks, including without limitation bridges, viaducts, causeways, overpasses, underpasses, and alleys; paving, grading, resurfacing, and widening streets; sidewalks, curbs and gutters, culverts, and drains; traffic controls, signals, and markers; lighting; and grade crossings and the elimination thereof and grade separations.
- (6) Improving existing systems or facilities for the transmission or distribution of telephone services.
- (7) Providing housing projects for the benefit of persons of low income, or moderate income, or low and moderate income, including without

limitation (i) construction or acquisition of projects to be owned by a city, redevelopment commission or housing authority, and (ii) loans, grants, interest supplements and other programs of financial assistance to persons of low income, or moderate income, or low and moderate income, and developers of housing for persons of low income, or moderate income, or low and moderate income. A housing project may provide housing for persons of other than low or moderate income, as long as at least twenty percent (20%) of the units in the project are set aside for housing for the exclusive use of persons of low income. No rent subsidy may be paid from bond proceeds.

(e) Each sanitary district, mosquito control district, hospital district, merged school administrative unit described in G.S. 115C-513; metropolitan sewerage district, metropolitan water district, county water and sewer district, regional public transportation authority and special airport district is authorized to borrow money and issue its bonds under this Article in evidence thereof for the purpose of paying any capital costs of any one or more of the purposes for which it is authorized, by general laws uniformly applicable throughout the State, to raise or appropriate money, except for current expenses.

(f) For any of the purposes authorized by subsections (b), (c), (d), or (e) of this section, a unit may do any of the following that it considers necessary or convenient:

- (1) Acquire, construct, erect, provide, develop, install, furnish, and equip; and
- (2) Reconstruct, remodel, alter, renovate, replace, refurnish, and reequip; and
- (3) Enlarge, expand, and extend; and
- (4) Demolish, relocate, improve, grade, drain, landscape, pave, widen, and resurface.

(g) Bonds for two or more unrelated purposes, not of the same general class or character, shall not be authorized by the same bond order. However, bonds for any of the purposes listed in any subdivision of any subsection of this section shall be deemed to be for one purpose and may be authorized by the same bond order. In addition, nothing herein may be deemed to prohibit the combining of purposes from any of such paragraphs and the authorization of bonds therefor by the same bond order to the extent that the purposes are not unrelated.

(h) As used in this section, "capital costs" include, without limitation, the following:

- (1) The costs of doing any or all of the things mentioned in subsection (f) of this section; and
- (2) The costs of all property, both real and personal and both improved and unimproved, plants, works, appurtenances, structures, facilities, furnishings, machinery, equipment, vehicles, easements, water rights, franchises, and licenses used or useful in connection with the purpose authorized; and
- (3) The costs of demolishing or moving structures from land acquired and acquiring any lands to which such structures are to be moved; and
- (4) Financing charges, including estimated interest during construction and for six months thereafter; and
- (5) The costs of plans, specifications, studies and reports, surveys, and estimates of costs and revenues; and
- (6) The costs of bond printing and insurance; and
- (7) Administrative and legal expenses; and
- (8) Any other services, costs, and expenses necessary or incidental to the purpose authorized.

(i) This section does not authorize any unit to undertake any program, function, joint undertaking, or service not otherwise authorized by law. It is intended only to authorize the borrowing of money and the issuance of bonds within the limitations set out herein to finance programs, functions, joint undertakings, or services authorized by other portions of the General Statutes or by city charters. (1917, c. 138, s. 16; 1919, c. 178, s. 3(16); C.S., s. 2937; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 8; 1929, c. 171, s. 1; 1931, c. 60, ss. 48, 54; 1933, c. 259, ss. 1, 2; 1935, c. 302, ss. 1, 2; 1939, c. 231, ss. 1, 2(c); 1943, c. 13; 1945, c. 403; 1947, cc. 520, 931; 1949, c. 354; c. 766, s. 3; c. 1270; 1953, c. 1065, s. 1; 1957, c. 266, s. 1; c. 856, s. 1; c. 1098, s. 16; 1959, c. 525; c. 1250, s. 2; 1961, c. 293; c. 1001, s. 2; 1965, c. 307, s. 2; 1967, c. 987, s. 2; c. 1001, s. 1; 1971, c. 780, s. 1; 1973, c. 494, s. 4; c. 1037; 1975, c. 549, s. 1; c. 821, s. 1; 1977, c. 402, ss. 1, 2; c. 811; 1979, c. 619, s. 3; c. 624, s. 1; c. 727, s. 3; 1985, c. 639, s. 2; 1987, c. 464, s. 7; c. 564, s. 10; 1989, c. 600, s. 7; c. 740, s. 4; 1991, c. 325, s. 5; 1997-6, s. 19; 1999-366, s. 4; 1999-378, s. 1.)

**Cross References.** — As to property taxes to provide for drainage projects or programs, see § 160A-209.

**Editor's Note.** — Session Laws 1987, c. 577, s. 1 amended Session Laws 1985, c. 639, s. 4, as amended by Session Laws 1985 (Reg. Sess., 1986), cc. 846, 848, 849, 858, 874, 911, 916 and 921 and Session Laws 1987, c. 203, which formerly made subdivision (b)(24) of this section applicable only to certain counties, municipalities and towns, to read solely: "This act shall become effective January 1, 1986." Thus subdivision (b)(24) now has statewide application.

Session Laws 1991, c. 325, s. 9 interpreted the 1991 amendment to this section, which inserted "merged school administrative unit described in G.S. 115C-513" in subsection (e), by providing:

"Interpretation of Act."

"(a) Additional method. The foregoing sections of this act shall be deemed to provide an additional and alternative method for the doing of things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing.

"(b) Statutory references. References in this act to specific sections or Chapters of the General Statutes are intended to be references to such sections as they may be amended from time to time by the General Assembly.

"(c) Liberal construction. This act, being necessary for the health and welfare of the people of the State, shall be liberally construed to effect these purposes.

"(d) Inconsistent provisions. Insofar as the provisions of this act are inconsistent with the provisions of any general laws, this act shall be controlling.

"(e) Severability. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications

of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable."

An amendment to this section, which would have added a new subdivision (b)(26) regarding undertaking public activities in or for the benefit of a development financing district, by Session Laws 1993, c. 497, s. 3, was made effective upon certification of approval of an amendment to Article V of the Constitution of North Carolina relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue financing bonds to be used to finance public activities associated with private economic development projects. This amendment was submitted to the people on November 2, 1993 and was defeated. The amendment to this section, therefore, never took effect.

Session Laws 1999-366, s. 1, provides: "The General Assembly finds and declares that the purpose of this act is to provide authority for counties in North Carolina to provide funds for residential housing construction, new or rehabilitated, and to provide for the sale or rental of housing to persons and families of low and moderate income. The General Assembly finds and declares that there exists in counties in the State a serious shortage of decent, safe, and sanitary residential housing available at low prices or rentals to persons and families of low and moderate income. This shortage is inimical to the health, safety, welfare, and prosperity of all residents of the State and to the sound growth of North Carolina communities."

**Effect of Amendments.** — Session Laws 1999-366, s. 4, effective August 4, 1999, in subsection (c), substituted "subdivisions (5) and (6)" for "subdivision (5)" in the introductory language and added subdivision (c)(6).

Session Laws 1999-378, s. 1, effective August 4, 1999, substituted "(4b)" for "(4a)" in the introductory language of subsection (c) and added subdivision (c)(4b).

## CASE NOTES

**Editor's Note.** — *The cases cited below were decided under former statutory provisions similar to this section.*

**Constitutionality of Former § 153-77.** — Former § 153-77, specifying the purposes for which county bonds could be issued, was constitutional. *Evans v. Mecklenburg County*, 205 N.C. 560, 172 S.E. 323 (1934).

**Construction of County Water and Sewer Systems.** — The General Assembly may grant to a county the authority to issue bonds for the construction of water and sewer systems when "approved by a majority of those who shall vote thereon in any election held for such purpose," as required by N.C. Const., Art. V, § 4(2). *Ramsey v. Board of Comm'rs*, 246 N.C. 647, 100 S.E.2d 55 (1957).

**Erection and Maintenance of Municipal Public Hospital.** — The authority to issue valid bonds for the erection and maintenance of a public hospital with the approval of its voters was conferred on a municipality by former §§ 160-230 and 160-378, and where other relevant statutes had been duly followed, the bonds so issued were a valid obligation of the town issuing them, and their issuance would not be enjoined by the courts. *Burleson v. Board of Aldermen*, 200 N.C. 30, 156 S.E. 241 (1930).

**Erection of Schoolhouses and Purchase of Land for School Purposes by Counties.** — The counties of the State are authorized to

issue bonds and notes for the erection of schoolhouses and for the purchase of land necessary for school purposes, and to levy taxes for the payment of principal and interest on the same, not as municipal corporations, organized primarily for purposes of local government, but as administrative agencies of the State, employed by the General Assembly to discharge the duty imposed upon it by the Constitution to provide a state system of public schools. *Frazier v. Board of Comm'rs*, 194 N.C. 49, 138 S.E. 433 (1927); *Bridges v. City of Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1942).

**Indebtedness for teachers' salaries** was held to come within the purview of an earlier statute authorizing issuance of bonds for the funding or refunding of valid indebtedness. *Hampton v. Board of Educ.*, 195 N.C. 213, 141 S.E. 744 (1928).

**Validity of Refunding Bonds.** — Where a county under power conferred by special statute has borrowed money from time to time for the maintenance and equipment of its public schools, its bonds to refund the indebtedness so incurred are valid if issued in conformity with the provisions of the applicable statute. *Hartsfield v. Craven County*, 194 N.C. 358, 139 S.E. 698 (1927).

**Cited in** *South Shell Inv. v. Town of Wrightsville Beach*, 703 F. Supp. 1192 (E.D.N.C. 1988).

## § 159-49. When a vote of the people is required.

Bonds may be issued under this Article only if approved by a vote of the qualified voters of the issuing unit as provided in this Article, except that voter approval shall not be required for:

- (1) Bonds issued for any purpose authorized by G.S. 159-48(a)(1), (2), (3), or (5).
- (2) Bonds issued by a county, county water and sewer district created under Article 6 of Chapter 162A of the General Statutes, metropolitan water district created under Article 4 of Chapter 162A of the General Statutes, or city for any purpose authorized by G.S. 159-48(a)(4), (6), or (7) or G.S. 159-48(b), (c), (d), or (e) (except purposes authorized by G.S. 159-48(b)(3), (11), (16), (22), or (23) or by G.S. 159-48(d)(2)) in an aggregate principal sum not exceeding two thirds of the amount by which the outstanding indebtedness of the issuing county, county water and sewer district, metropolitan water district, or city has been reduced during the next preceding fiscal year.

Pursuant to Article V, Sec. 4(2) of the Constitution, the General Assembly hereby declares that the purposes authorized by G.S. 159-48(a)(4), (6), and (7) and by G.S. 159-48(b), (c), (d), and (e) (except purposes authorized by G.S. 159-48(b)(3), (11), (16), (22), or (23) or by G.S. 159-48(d)(2)) are purposes for which bonds may be issued without a vote of the people, to the extent of two thirds of the amount by which the outstanding indebtedness of the issuing county, county water and sewer district, metropolitan water district, or city was reduced in the last preceding fiscal year. (1971, c. 780, s. 1; 1973, c. 494, s. 5; 1977, c. 402, s. 3; 1989, c. 470.)

**Cross References.** — As to when an election is or is not required under the “necessary expense limitation” of N.C. Const., Art. V, § 4(2), see note to N.C. Const., Art. V, § 4.

## Part 2. Procedure for Issuing Bonds.

### § 159-50. Notice of intent to make application for issuance of voted bonds; objection by citizens and taxpayers.

When a unit of local government proposes to issue bonds that must be approved by a vote of the people, it shall first publish a notice of its intent to make application to the Commission for approval of the issue. The notice shall be published once not less than 10 days before the application is filed. The notice shall state (i) that the board intends to file an application with the Commission for approval of a bond issue, (ii) in brief and general terms the purpose of the proposed issue, (iii) the maximum amount of bonds to be issued, and (iv) that any citizen or taxpayer of the issuing unit may, within seven days after the date of the publication, file with the governing board and the Commission a statement of any objections he may have to the issue. The Commission may prescribe the form of the notice.

Any citizen or taxpayer of the issuing unit who objects to the proposed bond issue in whole or in part may, within seven days from the date of publication of the notice, file a written statement of his objections with the board and the Commission. The statement shall set forth each objection to the proposed bond issue and shall contain the name and address of the person filing it. The Commission shall consider the statement of objections along with the application and shall notify the objector and the board of its disposition of each objection.

Failure to comply with this section shall not affect the validity of any bonds otherwise issued in accordance with the law. This section shall not apply to bonds that need not be submitted to a vote of the people. (1953, c. 1121; 1971, c. 780, s. 1.)

**Legal Periodicals.** — For symposium on municipal finance, see 1976 Duke L.J. 1051.

### § 159-51. Application to Commission for approval of bond issue; preliminary conference; acceptance of application.

No bonds may be issued under this Article unless the issue is approved by the Local Government Commission. The governing board of the issuing unit shall file an application for Commission approval of the issue with the secretary of the Commission. If the issuing unit is a regional public transportation authority, the application must be accompanied by resolutions of the special tax board of that authority and of each of the boards of county commissioners of the counties organizing the authority approving of the application. The application shall state such facts and have attached to it such documents concerning the proposed bonds and the financial condition of the issuing unit as the secretary may require. The Commission may prescribe the form of the application.

Before he accepts the application, the secretary may require the governing board or its representatives to attend a preliminary conference to consider the proposed bond issue. If the issuing unit is a merged school administrative unit

described in G.S. 115C-513, each county in which the merged unit is located may attend the preliminary conference.

After an application in proper form has been filed, and after a preliminary conference if one is required, the secretary shall notify the unit in writing that the application has been filed and accepted for submission to the Commission. The secretary's statement shall be conclusive evidence that the unit has complied with this section. (1953, c. 1121; 1971, c. 780, s. 2; 1989, c. 740, s. 5; 1991, c. 325, s. 6; c. 666, s. 6.)

**Editor's Note.** — As to validation of certain proceedings not complying with former § 159-7, see Session Laws 1959, c. 318.

Session Laws 1991, c. 325, s. 9 interpreted the 1991 amendment to this section by c. 325, s. 6, which added the second sentence of the second paragraph, by providing:

“Interpretation of Act.”

“(a) Additional method. The foregoing sections of this act shall be deemed to provide an additional and alternative method for the doing of things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing.

“(b) Statutory references. References in this act to specific sections or Chapters of the Gen-

eral Statutes are intended to be references to such sections as they may be amended from time to time by the General Assembly.

“(c) Liberal construction. This act, being necessary for the health and welfare of the people of the State, shall be liberally construed to effect these purposes.

“(d) Inconsistent provisions. Insofar as the provisions of this act are inconsistent with the provisions of any general laws, this act shall be controlling.

“(e) Severability. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.”

#### CASE NOTES

**Cited** in *Wright v. County of Macon*, 64 N.C. App. 718, 308 S.E.2d 97 (1983).

### § 159-52. Approval of application by Commission.

(a) In determining whether a proposed bond issue shall be approved, the Commission may consider:

- (1) Whether the project to be financed from the proceeds of the bond issue is necessary or expedient.
- (2) The nature and amount of the outstanding debt of the issuing unit.
- (3) The unit's debt management procedures and policies.
- (4) The unit's tax and special assessments collection record.
- (5) The unit's compliance with the Local Government Budget and Fiscal Control Act.
- (6) Whether the unit is in default in any of its debt service obligations.
- (7) The unit's present tax rates, and the increase in tax rate, if any, necessary to service the proposed debt.
- (8) The unit's appraised and assessed value of property subject to taxation.
- (9) The ability of the unit to sustain the additional taxes necessary to service the debt.
- (10) The ability of the Commission to market the proposed bonds at reasonable interest rates.
- (11) If the proposed issue is for a utility or public service enterprise, the probable net revenues of the project to be financed and the extent to which the revenues of the utility or enterprise, after addition of the revenues of the project to be financed, will be sufficient to service the proposed debt.

- (12) Whether the amount of the proposed debt will be adequate to accomplish the purpose for which it is to be incurred.

The Commission may inquire into and give consideration to any other matters which it may believe to have a bearing on whether the issue should be approved.

(b) The Commission shall approve the application if, upon the information and evidence it receives, it finds and determines:

- (1) That the proposed bond issue is necessary or expedient.
- (2) That the amount proposed is adequate and not excessive for the proposed purpose of the issue.
- (3) That the unit's debt management procedures and policies are good, or that reasonable assurances have been given that its debt will henceforth be managed in strict compliance with law.
- (4) That the increase in taxes, if any, necessary to service the proposed debt will not be excessive.
- (5) That the proposed bonds can be marketed at reasonable rates of interest.

If the Commission tentatively decides to deny the application because it is of the opinion that any one or more of these conclusions cannot be supported from the information presented to it, it shall so notify the unit filing the application. If the unit so requests, the Commission shall hold a public hearing on the application at which time any interested persons shall be heard. The Commission may appoint a hearing officer to conduct the hearing, and to present a summary of the testimony and his recommendations for the Commission's consideration. (1931, c. 60, ss. 12, 13; 1971, c. 780, s. 1.)

### **§ 159-53. Order approving or disapproving an application.**

(a) After considering an application, and conducting a public hearing thereon if one is requested under G.S. 159-52(b), the Commission shall enter its order either approving or denying the application. An order approving an issue shall not be regarded as an approval of the legality of the bonds in any respect.

(b) If the Commission shall enter an order denying an application, the proceedings under this Subchapter shall be at an end. (1931, c. 60, s. 14; 1971, c. 780, s. 1.)

### **§ 159-54. The bond order.**

After or at the same time the application is filed and accepted for submission to the Commission, a bond order shall be introduced before the governing board of the issuing unit. The bond order shall state:

- (1) Briefly and generally and without specification of location or material of construction, the purpose for which the bonds are to be issued, but not more than one purpose may be stated. For funding or refunding bonds a brief description of the debt, judgment, or obligation to be funded or refunded shall be sufficient.
- (2) The maximum aggregate principal amount of the bonds.
- (3) That taxes will be levied in an amount sufficient to pay the principal and interest of the bonds.
- (4) The extent, if any, to which utility or enterprise revenues are, or may be, pledged to payment of interest on and principal of the bonds pursuant to G.S. 159-47.
- (5) That a sworn statement of debt has been filed with the clerk and is open to public inspection.

- (6) If the bonds are to be approved by the voters, that the bond order will take effect when approved by the voters.
- (7) If the bonds are issued pursuant to G.S. 159-48(a)(1), (2), (3), or (5), that the bond order will take effect upon its adoption. If the bonds are to be issued pursuant to G.S. 159-48(a)(4), (6), or (7) or G.S. 159-48(b), (c), or (d) and are not to be submitted to the voters, that the bond order will take effect 30 days after its publication following adoption, unless it is petitioned to a vote of the people as provided in G.S. 159-60, and that in that event the order will take effect when approved by the voters.

When the bond order is introduced, the board shall fix the time and place for a public hearing thereon. (1917, c. 138, s. 17; 1919, c. 178, s. 3(17); c. 285, s. 2; C.S., s. 2938; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 9; 1931, c. 60, ss. 49, 55; 1933, c. 259, ss. 1, 2; 1935, c. 302, ss. 1, 2; 1949, c. 497, ss. 1, 3; 1957, c. 856, s. 2; 1971, c. 780, s. 1; 1973, c. 494, s. 6.)

#### CASE NOTES

*Editor's Note.* — Many of the cases cited below were decided under former statutory provisions similar to this section.

**Applicability.** — A fair reading of the language of this section and § 159-54 indicates that this Act applies to general obligation bonds which pledge the faith and credit of the county. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**The bond order is the crucial foundation document which supports and explains the proposal** to be submitted, and material representations set out in the bond order ordinarily become essential elements of the proposition submitted to the voters. *Rider v. Lenoir County*, 236 N.C. 620, 73 S.E.2d 913 (1952).

**The courts are without authority to supply a deficiency in the bond order.** *Hall v. Commissioners of Duplin*, 195 N.C. 367, 142 S.E. 315 (1928).

**Stipulation in Bond Order as Limitation on Subsequent Official Acts.** — Where bond order contains a stipulation definitely fixing the maximum amount of county funds to be expended on a proposed project, such stipulation, treated as a compact, becomes a limitation upon subsequent official acts based on a favorable vote and may not be materially varied. *Rider v. Lenoir County*, 236 N.C. 620, 73 S.E.2d 913 (1952).

**Provision Becoming Part of Bonds.** — A provision set out in former § 159-46 and incorporated in an ordinance authorizing the issuance of bonds entered into and became an integral part of the bonds when issued, with contractual force and effect, which could not be impaired by subsequent legislation. *Nash v. Board of Comm'rs*, 211 N.C. 301, 190 S.E. 475 (1937).

**Ordinance authorizing a bond sale and calling a special election must state the purpose** in only brief and general terms. *Sykes*

*v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971).

**Use of Proceeds of Bonds Limited by Bond Order.** — Where a bond order approved by the voters of a county authorized the issuance of bonds in an aggregate amount to finance a new building or buildings to be used as a public hospital and the acquisition of a suitable site therefor, the use of the proceeds of the bonds was limited by the bond order, and the county could not use the surplus left after completing the project contemplated in the bond order toward the construction of a clinic in another municipality of the county. *Lewis v. Beaufort County*, 249 N.C. 628, 107 S.E.2d 77 (1959).

**No Substantial Deviation from Purpose Found.** — Where the manifest purpose for which a civic center bond issue was proposed was to revitalize the downtown area, with the civic center becoming the catalyst for other projects, and the site finally chosen by the city council remained in the downtown area, although at a distance of approximately four blocks from the site noted in speeches by public officials before the election, there was not a substantial deviation from the purpose for which the bonds were proposed. *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971).

Misrepresentations made as to the site of the civic center for construction of which a bond issue to be paid by taxes was proposed did not vitiate the question as submitted to the voters in the bond issue election. *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971).

**Use of Funds for Hospital "Buildings".** — Where the resolution of the county commissioners in submitting to a vote the question of issuing bonds for a public hospital used the word "buildings," and it was later found that a surplus would remain after the erection and equipment of the main hospital building, such surplus could be used for the purpose of erect-

ing on the hospital grounds a home for nurses, technicians and others engaged in essential employment incidental to the proper operation of the hospital. *Worley v. Johnston County*, 231 N.C. 592, 58 S.E.2d 99 (1950).

**Intent to Use Funds for Construction of Water and Sewer Lines in Annexed Areas.**

— Where there was no irregularity in the authorization of municipal bonds for its water and sewer systems, and in the city's notice of intent to annex certain areas it was stated that the city intended to use certain of the proceeds of the bonds for the construction of water and sewer lines in areas intended to be annexed, the fact that neither the bond ordinance nor the ballots used in the election at which the issuance of the bonds was approved disclosed such intent did not affect the validity of the bonds. *Upchurch v. City of Raleigh*, 252 N.C. 676, 114 S.E.2d 772 (1960).

**A bond order may contain several sections** and authorize the issue of bonds for different purposes. *Atkins v. McAden*, 229 N.C. 752, 51 S.E.2d 484 (1949).

**Bond order need not set out in detail estimates of cost and descriptions** of the particular projects for which the funds are proposed to be used, and their inclusion does not limit the allocation of the proceeds of the bonds, provided the use of the funds falls within the general purpose designated. *Atkins v. McAden*, 229 N.C. 752, 51 S.E.2d 484 (1949).

**Nor Specify That Public Funds Will Supplement Bond Moneys.** — Where public funds are to supplement bond moneys, it is not required that the bond order specify, or the voters be advised, that the proceeds of the proposed bond issue are to be used with, or in addition to, a sum of money on hand or otherwise available for the proposed improvement. *Rider v. Lenoir County*, 236 N.C. 620, 73 S.E.2d 913 (1952).

**But Where Order Stipulates Total Sum to Be Expended, Appropriation of Additional Sum Is Unauthorized.** — While a county may ordinarily expend unallocated nontax moneys for the public purpose of a

county hospital even in those instances in which a bond order for the hospital does not specify that the proceeds of the bonds are to be used together with such unallocated nontax moneys, where the bond order specifically specified that the total maximum amount to be expended by the county for the hospital was not to exceed \$465,000, the allocation of an additional supplemental appropriation of over \$138,000 out of nontax moneys on hand was a material variance from the compact as set forth in the bond order, and the county could be restrained in a proper suit from issuing the bonds and disbursing county funds in accordance with hospital plans predicated upon such increased appropriation. *Rider v. Lenoir County*, 236 N.C. 620, 73 S.E.2d 913 (1952).

**Amount and Manner of Assessment Against Each Abutting Owner Need Not Be Set Forth.**

— It is not required that a bond ordinance of a municipality set forth in express terms the proportion of the cost of the proposed improvements which has been, or is to be, assessed against the property of each owner abutting upon the streets to be improved, or the terms and method of making the payment, if the procedure follow the direction of the statutes relating to the subject. *Leak v. Town of Wadesboro*, 186 N.C. 683, 121 S.E. 12 (1923).

**A tax must be levied only if revenue from other sources is inadequate to repay the principal and interest on the bonds outstanding.** *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Repayment of Bonds by Charging Reasonable Fees.** — Where the ballot that the voters considered indicated that the voters were asked only to authorize a tax rather than to approve an order imposing a tax, the County Commissioners were not compelled to impose a tax and were free, under these facts, to charge reasonable fees and charges to repay the bonds in lieu of the levy of a tax. *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Cited in Citizens Ass'n for Reasonable Growth v. City of Washington**, 45 N.C. App. 7, 262 S.E.2d 343 (1980).

## § 159-55. Sworn statement of debt; debt limitation.

(a) After the bond order has been introduced and before the public hearing thereon, the finance officer (or some other officer designated by the governing board for this purpose) shall file with the clerk a statement showing the following:

- (1) The gross debt of the unit, excluding therefrom debt incurred or to be incurred in anticipation of the collection of taxes or other revenues or in anticipation of the sale of bonds other than funding and refunding bonds. The gross debt (after exclusions) is the sum of (i) outstanding debt evidenced by bonds, (ii) bonds authorized by orders introduced but not yet adopted, (iii) unissued bonds authorized by adopted orders, and (iv) outstanding debt not evidenced by bonds. However, for

purposes of the sworn statement of debt and the debt limitation, revenue bonds shall not be considered debt and such bonds shall not be included in gross debt nor deducted from gross debt.

- (2) The deductions to be made from gross debt in computing net debt. The following deductions are allowed:
  - a. Funding and refunding bonds authorized by orders introduced but not yet adopted.
  - b. Funding and refunding bonds authorized but not yet issued.
  - c. The amount of money held in sinking funds or otherwise for the payment of any part of the principal of gross debt other than debt incurred for water, gas, electric light or power purposes, or sanitary sewer purposes (to the extent that the bonds are deductible under subsection (b) of this section), or two or more of these purposes.
  - d. The amount of bonded debt included in gross debt and incurred, or to be incurred, for water, gas, or electric light or power purposes, or any two or more of these purposes.
  - e. The amount of bonded debt included in the gross debt and incurred, or to be incurred, for sanitary sewer system purposes to the extent that the debt is made deductible by subsection (b) of this section.
  - f. The amount of uncollected special assessments theretofore levied for local improvements for which any part of the gross debt (that is not otherwise deducted) was or is to be incurred, to the extent that the assessments will be applied, when collected, to the payment of any part of the gross debt.
  - g. The amount, as estimated by the governing board of the issuing unit or an officer designated by the board for this purpose, of special assessments to be levied for local improvements for which any part of the gross debt (that is not otherwise deducted) was or is to be incurred, to the extent that the special assessments, when collected, will be applied to the payment of any part of the gross debt.
- (3) The net debt of the issuing unit, being the difference between the gross debt and deductions.
- (4) The assessed value of property subject to taxation by the issuing unit, as revealed by the tax records and certified to the issuing unit by the assessor.
- (5) The percentage that the net debt bears to the assessed value of property subject to taxation by the issuing unit.

(b) Debt incurred or to be incurred for sanitary sewer system purposes is deductible from gross debt when the combined revenues of the water system and the sanitary sewer system (whether or not the water and sewer system are operated separately or as a consolidated system) were sufficient to pay all operating, capital outlay, and debt service expenditures attributable to both systems in each of the three complete fiscal years immediately preceding the date on which the sworn statement of debt is filed. For the purposes of this subsection, the "revenues" of a water system and a sanitary sewer system include:

- (1) Rates, fees, rentals, charges, and other receipts and income derived from or in connection with the system.
- (2) Fees, rents, or other charges collected from other offices, agencies, institutions, and departments of the issuing unit at rates not in excess of those charged to other consumers, customers, or users.
- (3) Appropriations from the fund balance of the prior fiscal year from the fund or funds established to account for the revenues and expendi-

tures of the water system or sewer system pursuant to G.S. 159-13(a) of the Local Government Budget and Fiscal Control Act.

Before the sworn statement of debt is filed, the secretary shall determine to what extent debt incurred or to be incurred for sanitary sewer system purposes qualifies for deduction from gross debt pursuant to this subsection, and shall give his certificate to that effect. The secretary's certificate shall be filed with and deemed a part of the sworn statement of debt. The secretary's certificate shall be conclusive in the absence of fraud.

(c) No bond order shall be adopted unless it appears from the sworn statement of debt filed in connection therewith that the net debt of the unit does not exceed eight percent (8%) of the assessed value of property subject to taxation by the issuing unit. This limitation shall not apply to:

- (1) Funding and refunding bonds.
- (2) Bonds issued for water, gas, or electric power purposes, or two or more of these purposes.
- (3) Bonds issued for sanitary sewer system purposes when the bonds are deductible pursuant to subsection (b) of this section.
- (4) Bonds issued for sanitary sewers, sewage disposal, or sewage purification plants when the construction of these facilities has been ordered by the Environmental Management Commission, which Commission is hereby authorized to make such an order, or by a court of competent jurisdiction.
- (5) Bonds or notes issued for erosion control purposes.
- (6) Bonds or notes issued for the purpose of erecting jetties or other protective works to prevent encroachment by the ocean, sounds, or other bodies of water. (1917, c. 138, s. 19; 1919, c. 178, s. 3(19); c. 285, s. 4; C.S., s. 2943; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, ss. 13, 14; c. 102, s. 1; 1931, c. 60, s. 51; 1933, c. 259, s. 1; c. 321; Ex. Sess. 1938, c. 3; 1955, c. 1045; 1959, c. 779, s. 10; 1967, c. 892, s. 4; 1969, c. 1092; 1971, c. 780, s. 1; 1973, c. 494, s. 7; c. 1262, s. 231; 1991, c. 11, ss. 2, 3; 1991 (Reg. Sess., 1992), c. 1007, s. 41.)

**Editor's Note.** — An amendment to subsection (a) of this section by Session Laws 1993, c. 497, s. 4, was made effective upon certification of approval of an amendment to Article V of the Constitution of North Carolina relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue financing bonds to be used to finance public activities associated with private economic development projects. This amendment was submitted to the people on November 2, 1993 and was defeated. The amendment to subsection (a) of this section, therefore, never took effect.

An earlier amendment to this section in Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 2, was made effective on certification of approval of a state constitutional amendment authorizing the enactment of laws dealing with transactions of the type contemplated by the act. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, was submitted to the people on Nov. 2, 1982, and was defeated. The amendment to this section, therefore, did not go into effect.

### CASE NOTES

**Editor's Note.** — *Most of the cases cited below were decided under former statutory provisions similar to this section.*

**Action Attacking Bond Order on Ground of Failure to File Statement.** — Where taxpayers instituted an action attacking a bond order passed by the board of county commissioners for failure of the commissioners to comply with the statute requiring the filing of a

true statement of the county debt, the attack upon the order was upon statutory as distinguished from constitutional grounds, and an action instituted more than 30 days after the first publication of the order could not be maintained. *Garrell v. Columbus County*, 215 N.C. 589, 2 S.E.2d 701 (1939).

**Bonds issued by a municipality for water and sewer systems** do not come within

the inhibition against incurring debt in excess of 8% of the assessed valuation (now 8% of the appraised value). *Lamb v. Randleman*, 206 N.C. 837, 175 S.E. 293 (1934).

**Bonds Including Amount of Special Assessments.** — Where a town has issued bonds for general street improvements under legislative authority, and includes the amount required for local improvements by assessment of

owners of lands abutting a particular street improved, it may charge off from the proceeds of the sale of the bonds the estimated amount to be realized by the special assessments. *Brown v. Town of Hillsboro*, 185 N.C. 368, 117 S.E. 41 (1923).

**Applied** in *Wright v. County of Macon*, 64 N.C. App. 718, 308 S.E.2d 97 (1983).

**§ 159-56. Publication of bond order as introduced.**

After the introduction of the bond order, the clerk shall publish it once with the following statement appended:

“The foregoing order has been introduced and a sworn statement of debt has been filed under the Local Government Bond Act showing the appraised value of the [issuing unit] to be \$ \_\_\_\_\_ and the net debt thereof, including the proposed bonds, to be \$ \_\_\_\_\_. A tax will [may] be levied to pay the principal of and interest on the bonds if they are issued. Anyone who wishes to be heard on the questions of the validity of the bond order and the advisability of issuing the bonds may appear at a public hearing or an adjournment thereof to be held at \_\_\_\_\_.

\_\_\_\_\_  
Clerk”

(1927, c. 81, s. 16; 1971, c. 780, s. 1.)

**CASE NOTES**

*Editor’s Note.* — *The case cited below was decided under former statutory provisions similar to this section.*

**The proper publication of the notices is mandatory**, and cannot be dispensed with. *Frazier v. Board of Comm’rs*, 194 N.C. 49, 138 S.E. 433 (1927).

**Sufficiency of Publication.** — Former statute requiring notice to taxpayers, etc., of an opportunity to be heard before a county could issue bonds for various purposes was sufficiently complied with if several orders of the

county commissioners were published in the same advertisement and a date and place, fixed for passing upon the objections made, if any, was separately placed in the publication, distinctly referring to each of the separate purposes. *Frazier v. Board of Comm’rs*, 194 N.C. 49, 138 S.E. 433 (1927).

Publication of one statement in connection with three orders was sufficient as a compliance with former statute, a statement for each order not being necessary. *Frazier v. Board of Comm’rs*, 194 N.C. 49, 138 S.E. 433 (1927).

**§ 159-56.1. Certain proceedings ratified notwithstanding provisions of § 159-56.**

All proceedings heretofore taken by the governing boards of units of local government in connection with the authorization of bonds are hereby ratified, approved, confirmed and in all respects validated, notwithstanding the provisions of G.S. 159-56; provided that the issuance of said bonds, the indebtedness to be incurred by the issuance thereof and the levy of a tax for the payment thereof shall have been approved at an election by a majority of the qualified voters of the unit voting thereon. (1973, c. 1172.)

**§ 159-57. Hearing; passage of bond order.**

On the date fixed for the public hearing, which shall be not earlier than six days after the date of publication of the bond order as introduced, the board shall hear anyone who may wish to be heard on the question of the validity of

the order or the advisability of issuing the bonds. The hearing may be adjourned from time to time.

After the hearing, (and on the same day as the hearing, if the board so desires) the board may pass the order as introduced, or as amended. No amendment may increase the amount of bonds to be issued, nor substantially change the purpose of the issue. If the board wishes to increase the amount of bonds to be issued, or to substantially change the purpose of the issue, a new proceeding under this Article is required.

The provisions of any city charter, general law, or local act to the contrary notwithstanding, a bond order may be introduced at any regular or special meeting of the governing board and adopted at any such meeting by a simple majority of those present and voting, a quorum being present, and need not be published or subjected to any procedural requirements governing the adoption of ordinances or resolutions by the governing board other than the procedures set out in this Subchapter. Bond orders shall not be subject to the provisions of any city charter or local act concerning initiative and referendum. (1927, c. 81, s. 17; 1953, c. 1065, s. 1; 1971, c. 780, s. 1.)

#### CASE NOTES

**Stated** in *Wright v. County of Macon*, 64 N.C. App. 718, 308 S.E.2d 97 (1983).

### § 159-58. Publication of bond order as adopted.

After adoption, the clerk shall publish the bond order once, with the following statement appended:

“The foregoing order was adopted on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, and is hereby published this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_. Any action or proceeding questioning the validity of the order must be begun within 30 days after the date of publication of this notice.

\_\_\_\_\_  
Clerk”

(1917, c. 138, s. 20; 1919, c. 49, s. 1; c. 178, s. 3(20); C.S., s. 2944; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 19; 1971, c. 780, s. 1; 1999-456, s. 59.)

**Effect of Amendments.** — Session Laws 1999-456, s. 59, effective January 1, 2000, twice deleted “19” from date lines in the form.

#### CASE NOTES

**Cited** in *Citizens Ass'n for Reasonable Growth v. City of Washington*, 45 N.C. App. 7, 262 S.E.2d 343 (1980).

### § 159-59. Limitation of action to set aside order.

Any action or proceeding in any court to set aside a bond order, or to obtain any other relief, upon the ground that the order is invalid, must be begun within 30 days after the date of publication of the bond order as adopted. After the expiration of this period of limitation, no right of action or defense based upon the invalidity of the order shall be asserted, nor shall the validity of the order be open to question in any court upon any ground whatever, except in an action or proceeding begun within the period of limitation prescribed in this

section. (1917, c. 138, s. 20; 1919, c. 49, s. 1; c. 178, s. 3(20); C.S., s. 2945; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 20; 1971, c. 780, s. 1.)

#### CASE NOTES

*Editor's Note.* — Many of the cases cited below were decided under former statutory provisions similar to this section.

**Right to Test Constitutionality of Bond Issue Not Affected.** — Former § 153-90, similar to this section, did not prevent a suit to determine the constitutionality of the bond issue. *Sessions v. Columbus County*, 214 N.C. 634, 200 S.E. 418 (1939).

When the proposed bond issue contravened the Constitution, the requirement of former § 153-90, similar to this section, that actions to restrain issuance of bonds by counties must be instituted within 30 days of the first publication of notice of the adoption of the bond resolution did not apply. *Sessions v. Columbus County*, 214 N.C. 634, 200 S.E. 418 (1939).

**Suit Alleging Violation of Statutory Restrictions on Amount of Bonds.** — Where a board of county commissioners, under ordinance duly passed and hearing thereon had, was about to issue bonds for the necessary purpose of erecting a jail, etc., contrary to the restrictions of the former County Finance Act limiting the amount of bonds, a suit to restrain the issuance of the bonds was required to be commenced within 30 days after the publication of the required notice and order, and a suit instituted after the time prescribed could not be maintained. The question whether former statute, similar to this section, was strictly one of limitation or a condition annexed to the cause

of action was immaterial. *Kirby v. Board of Comm'rs*, 198 N.C. 440, 152 S.E. 165 (1930).

**Suit Based on Failure to File True Statement of County Debt.** — Where taxpayers instituted an action attacking a bond order passed by the board of county commissioners on the ground that the commissioners had failed to comply with former § 153-84, requiring the filing of a true statement of the county debt, the attack upon the order was held to be upon statutory as distinguished from constitutional grounds, and an action instituted more than 30 days after the first publication of the order could not be maintained. *Garrell v. Columbus County*, 215 N.C. 589, 2 S.E.2d 701 (1939).

**Suit Based on Irregularities in Bond Order and Ballot.** — Action to enjoin issuance of hospital bonds and to restrain disbursement of county funds therefor on the ground of irregularities in the bond order and form of ballot was held precluded by former statutes similar to this section and § 159-62 because not instituted until after 30 days subsequent to the statement of the result of election. *Rider v. Lenoir County*, 236 N.C. 620, 73 S.E.2d 913 (1952).

**Applied** in *Citizens Ass'n for Reasonable Growth v. City of Washington*, 45 N.C. App. 7, 262 S.E.2d 343 (1980).

**Cited** in *Wright v. County of Macon*, 64 N.C. App. 718, 308 S.E.2d 97 (1983).

### § 159-60. Petition for referendum on bond issue.

A petition demanding that a bond order be submitted to the voters may be filed with the clerk within 30 days after the date of publication of the bond order as introduced. The petition shall be in writing, and shall be signed by a number of voters of the issuing unit equal to not less than ten percent (10%) of the total number of voters registered to vote in elections of the issuing unit according to the most recent figures certified by the State Board of Elections. The residence address of each signer shall be written after his signature. The petition need not contain the text of the order to which it refers, and need not be all on one sheet.

The clerk shall investigate the sufficiency of the petition and present it to the governing board, with a certificate stating the results of his investigation. The governing board, after hearing any taxpayer who may request to be heard, shall thereupon determine the sufficiency of the petition, and its determination shall be conclusive.

This section does not apply to bonds issued pursuant to G.S. 159-48(a)(1), (2), (3), or (5). (1917, c. 138, s. 21; 1919, c. 49, ss. 1, 2; c. 178, s. 3(21); C.S., s. 2947; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 20; c. 102, s. 2; 1971, c. 780, s. 1; 1973, c. 494, s. 8.)

## CASE NOTES

*Editor's Note.* — *The cases cited below were decided under former statutory provisions similar to this section.*

**Validity of Bond Order in Absence of Petition for Referendum.** — Where no petition was filed within the time prescribed, praying that a bond order duly passed by the board of commissioners of a county be submitted to the voters of the county, in accordance with the provisions of the former County Finance Act, the bond order was valid and effective, without the approval of the voters of the county. *Hemric v. Board of Comm'rs*, 206 N.C. 845, 175 S.E. 168 (1934).

**Approval of Voters Required Where Petition Filed.** — Where a petition was filed in accordance with statutory provisions, praying that a bond order duly passed by the board of commissioners of a county, authorizing and directing the issuance of bonds of the county for the purpose of procuring money for the pur-

chase, construction, improvement or equipment of schoolhouses required for the maintenance of a school in each of the districts of the county as required by the Constitution of the State, be submitted to the voters of the county, such bond order was not valid or effective until the same had been approved by the voters of the county as provided. *Hemric v. Board of Comm'rs*, 206 N.C. 845, 175 S.E. 168 (1934).

**Temporary Restraining Order Pending Determination of Sufficiency of Petition.**

— Where the taxpayers of a county filed suit under this section to restrain the issuance of bonds until authorized by the qualified voters of the county, and there was a controversy as to whether the signatures of the requisite 15% (now 10%) of qualified voters had been obtained to the petition, a temporary restraining order would be continued until the sufficiency of the petition could be determined. *Scruggs v. Rollins*, 207 N.C. 335, 177 S.E. 180 (1934).

## § 159-61. Bond referenda; majority required; notice of referendum; form of ballot; canvass.

(a) If a bond order is to take effect upon approval of the voters, the affirmative vote or a majority of those who vote thereon shall be required.

(b) The date of a bond referendum shall be fixed by the governing board, but shall not be more than one year after adoption of the bond order. The governing board may call a special referendum for the purpose of voting on a bond issue on any day, including the day of any regular or special election held for another purpose (unless the law under which the bond referendum or other election is held specifically prohibits submission of other questions at the same time). A special bond referendum may not be held within 30 days before or 10 days after a statewide primary, election, or referendum, or within 30 days before or 10 days after any other primary, election, or referendum to be held in the same unit holding the bond referendum and already validly called or scheduled by law at the time the bond referendum is called. The clerk shall mail or deliver a certified copy of the resolution calling a special bond referendum to the board of elections that is to conduct it within three days after the resolution is adopted, but failure to observe this requirement shall not in any manner affect the validity of the referendum or bonds issued pursuant thereto. Bond referenda shall be conducted by the board of elections conducting regular elections of the county, city, or special district. In fixing the date of a bond referendum, the governing board shall consult the board of elections in order that the referendum shall not unduly interfere with other elections already scheduled or in process. Several bond orders or other matters may be voted upon at the same referendum.

(c) The clerk shall publish a notice of the referendum at least twice. The first publication shall be not less than 14 days and the second publication not less than seven days before the last day on which voters may register for the referendum. The notice shall state the date of the referendum, the maximum amount of the proposed bonds, the purpose of the bonds, a statement that taxes will or may be levied for the payment thereof, and a statement as to the last day for registration for the referendum under the election laws then in effect.

(d) The form of the question as stated on the ballot shall be in substantially the following words:

“Shall the order authorizing \$ \_\_\_\_\_ bonds for (briefly stating the purpose) be approved?

[ ] YES  
[ ] NO”

(e) The board of elections shall canvass the referendum and certify the results to the governing board. The governing board shall then certify and declare the result of the referendum and shall publish a statement of the result once, with the following statement appended:

“Any action or proceeding challenging the regularity or validity of this bond referendum must be begun within 30 days after

\_\_\_\_\_  
(date of publication)

\_\_\_\_\_  
(title of governing board)”

The statement of results shall be filed in the clerk’s office and inserted in the minutes of the board. (1917, c. 138, s. 22; 1919, c. 178, s. 3(22); c. 291; C.S., s. 2948; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, ss. 22, 23, 25-27, 29; 1949, c. 497, ss. 2, 4; 1953, c. 1065, ss. 1, 2; 1971, c. 780, s. 1; 1973, c. 494, s. 9.)

**Editor’s Note.** — As to the publication of first notice and the closing of registration books for local elections held under G. S. 163-287 or this section on June 10, 1982, see Session Laws 1982, 2nd Ex. Sess., c. 3, s. 19.2.

Session Laws 1999-152, ss. 1 and 2, provides that bond referenda held by units of local government in connection with the authorization of bonds are hereby ratified, approved, con-

firmed, and in all respects validated, notwithstanding the provisions of G.S. 159-61(b), if the authorization of the bonds was approved at an election by a majority of the qualified voters of the unit voting thereon and notice of the referendum was published. This act applies to all bond referenda held by units of local government between April 1, 1997, and June 1, 1998.

CASE NOTES

**Editor’s Note.** — *Many of the cases cited below were decided under former statutory provisions similar to this section.*

**Validity of Elections Favored.** — It is the general rule that every reasonable presumption will be indulged in favor of the validity of elections, and the courts will uphold the validity of municipal bond elections unless clear grounds are shown for invalidating them. *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971).

**The result of an election as determined by the proper election officials shall stand until it shall be regularly contested** and reversed by a tribunal having jurisdiction for that purpose. The court will not permit itself to be substituted for the proper election officials in the first instance for the purpose of canvassing the returns from the officers holding the election and declaring the result thereof. *Garner v. Town of Newport*, 246 N.C. 449, 98 S.E.2d 505 (1957).

**Ordinance authorizing a bond sale and calling a special election must state the purpose** in only brief and general terms. *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971).

**Necessity of Notice.** — While, so far as the officers are concerned who are charged with the

duty of giving notice, the requirement as to notice is imperative, yet it will be regarded, otherwise, as directory, if the result would not be changed by a departure from the provisions of the statute. The law looks more to the substance than to the form, and if it appears that a clear majority of the qualified voters have cast their votes in favor of the proposition submitted to them, and that there has been a fair and full opportunity for all to vote, and that there has been no fraud, and the election is in all respects free from taint of any sort, so that no well founded suspicion can be cast upon it, it would be idle to say that this free and untrammelled expression of the popular will should be disregarded and set aside. *Hill v. Skinner*, 169 N.C. 405, 86 S.E. 351 (1915); *Board of Comm’rs v. C.M. Malone & Co.*, 179 N.C. 604, 103 S.E. 134 (1920).

**When Election Held.** — The requirement of former § 160-387, that a special bond election should not be held within one month before or after a regular municipal election, was mandatory, and the statutory period was to be computed by excluding the first and including the last day thereof as provided in § 1-593. *Adcock v. Town of Fuquay Springs*, 194 N.C. 423, 140 S.E. 24 (1927).

**The statute permits the use of a broad and general ballot in bond elections.** *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971).

**As to directory nature of former statute with regard to the form and language of the ballot,** see *Board of Comm'rs v. C.M. Malone & Co.*, 179 N.C. 604, 103 S.E. 134 (1920).

**Submission of More Than One Question or Proposal at Same Election.** — While former § 153-93 permitted the submission of more than one question or proposal in one and the same election, this contemplated questions authorized by law. *Parker v. Anson County*, 237 N.C. 78, 74 S.E.2d 338 (1953).

**Ballot Held to Comply with Statute.** — A ballot for a school bond election which stated the question submitted for approval or disapproval, followed by a brief statement of the purposes for which the proceeds of the proposed bonds were to be used and that a tax would be levied to pay the principal and interest on the bonds in event of approval, followed by the word "Yes" and the word "No" and a square opposite each, with instructions as to how the ballot should be marked, was held to comply with former § 153-96 and § 163-150, and the fact that the number of proposed projects necessarily resulted in a ballot somewhat longer than usual was not objectionable. *Parker v.*

*Anson County*, 237 N.C. 78, 74 S.E.2d 338 (1953).

**Misrepresentations made as to the site of a civic center,** for whose construction a bond issue to be paid by taxes was proposed, did not vitiate the question as submitted to the voters in the bond issue election. *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971).

**Publication of Returns.** — It is not necessary to the validity of an election that the returns be published, if it appears that no prejudice was sustained because of such failure. *Board of Comm'rs v. C.M. Malone & Co.*, 179 N.C. 604, 103 S.E. 134 (1920).

**Necessary Allegations in Suit to Restrain Issuance of Bonds for Irregularities in Election.** — In an action to restrain the issuance of bonds on the ground of irregularities in the bond election, a complaint which failed to allege that the officers appointed to hold the election had reported the results thereof to the governing body of the municipality and that the governing body had canvassed the returns and judicially determined the result, as required by former § 160-387, was demurrable. *Garner v. Town of Newport*, 246 N.C. 449, 98 S.E.2d 505 (1957).

**Cited in Citizens Ass'n for Reasonable Growth v. City of Washington**, 45 N.C. App. 7, 262 S.E.2d 343 (1980).

**§ 159-62. Limitation on actions contesting validity of bond referenda.**

Any action or proceeding in any court to set aside a bond referendum, or to obtain any other relief, upon the ground that the referendum is invalid or was irregularly conducted, must be begun within 30 days after the publication of the statement of the results of the referendum. After the expiration of this period of limitation, no right of action or defense based upon the invalidity of or any irregularity in the referendum shall be asserted, nor shall the validity of the referendum be open to question in any court upon any ground whatever, except in an action or proceeding begun within the period of limitation prescribed in this section. (1917, c. 138, s. 22; 1919, c. 178, s. 3(22); c. 291; C.S., s. 2948; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 30; 1949, c. 497, s. 4; 1953, c. 1065, s. 2; 1971, c. 780, s. 1.)

**Cross References.** — As to suits to restrain issuance of bonds, see note to § 159-59.

law on civil procedure, see 59 N.C.L. Rev. 1053 (1981).

**Legal Periodicals.** — For survey of 1980

**CASE NOTES**

**Untimely Claims Extinguished.** — This section provides that any claim not prosecuted within 30 days of the date of publication is extinguished. It is different from most statutes of limitation, since ordinarily a statute of limitation does not extinguish a claim but merely serves as a bar to the prosecution of the claim. *Citizens Ass'n for Reasonable Growth v. City of*

*Washington*, 45 N.C. App. 7, 262 S.E.2d 343, cert. denied, 300 N.C. 195, 269 S.E.2d 622 (1980).

**Statute Runs from First Publication.** — The statute of limitations of this section begins to run from the date of the first publication required by § 159-61, where the sufficiency of the first notice is not questioned. A city cannot

start the statute running anew by publishing the notice a second time. Citizens Ass'n for Reasonable Growth v. City of Washington, 45

N.C. App. 7, 262 S.E.2d 343, cert. denied, 300 N.C. 195, 269 S.E.2d 622 (1980).

§ 159-63. Repeal of bond orders.

A bond order may be repealed at any time before bonds or bond anticipation notes are issued thereunder. No referendum is required on the repeal of any bond order, nor is a petition for any such referendum permitted. (1971, c. 780, s. 1.)

§ 159-64. Within what time bonds may be issued.

Bonds may be issued under a bond order at any time within seven years after the bond order takes effect. Such period may be extended prior to the expiration of such period from seven years to 10 years as hereinafter provided. The board of the issuing unit shall file an application for Commission approval of such extension with the secretary of the Commission. The application shall state such facts and have attached to it such documents concerning such extension as the secretary may require. The Commission may prescribe the form of such application. In determining whether to approve such extension, the Commission may inquire into and give consideration to any matters which it believes may relate to such extension.

The Commission may enter an order approving a proposed extension of the maximum time period for issuing bonds under a bond order from seven to 10 years if, upon the basis of the information and evidence it receives, it finds and determines that governmental approvals relative to the purpose to be financed in whole or in part with the proceeds of the bonds cannot be obtained within seven years after the bond order has taken effect, that funds to be applied together with the proceeds of the bonds to finance the purpose for which the bonds are to be issued will not be available within seven years after the bond order has taken effect or that the proposed extension is necessary for other reasons that are not within the direct control of the issuing unit other than any order of any court. If the Commission enters an order denying such extension, then the proceedings under this section shall be at an end.

If the Commission enters an order approving a proposed extension of the maximum time period for issuing bonds under a bond order as provided in this section, then the board shall fix the time and place for a public hearing on such extension and the clerk shall publish such bond order once with the following statement appended:

“The foregoing order took effect on \_\_\_\_\_, \_\_\_\_\_.  
Anyone who wishes to be heard on the question of whether the maximum time period for issuing bonds under such order should be extended from seven years to 10 years after such date may appear at a public hearing or an adjournment thereof to be held at \_\_\_\_\_ (time)  
on \_\_\_\_\_ at \_\_\_\_\_  
(date) (place)

\_\_\_\_\_  
Clerk”

On the date fixed for such hearing, which shall be not earlier than six days after the date of publication of the bond order with appended statement as provided in this section, the board shall hear anyone who might wish to be heard on the question of whether the maximum time period for issuing bonds under the bond order should be extended from seven years to 10 years. The hearing may be adjourned from time to time.

After such hearing, the board may adopt an order providing that the maximum time period for issuing bonds under the bond order has been extended from seven to 10 years after the bond order has taken effect. Such order shall provide that it will take effect 30 days after its publication following adoption.

After adoption, the clerk shall publish once an order extending the maximum time period for issuing bonds under a bond order with the following statement appended:

“The foregoing order was adopted on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, and is hereby published this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_. Any action or proceeding questioning the validity of such order must be begun within 30 days after the date of publication of this notice.

\_\_\_\_\_  
Clerk”

Any action or proceeding in any court to set aside an order extending the maximum time period for issuing bonds under a bond order, or to obtain any other relief, upon the ground that such order is invalid, must be begun within 30 days after the date of publication of such order as adopted. After the expiration of this period of limitation, no right of action or defense based upon the invalidity of such order shall be asserted nor shall the validity of such order be open to question in any court upon any ground whatever, except in an action or proceeding begun within the period of limitation prescribed in this section.

When the issuance of bonds under any bond order is prevented or prohibited by any order of any court, the period of time within which bonds may be issued under the bond order in litigation shall be extended by the length of time elapsing between the date of institution of the action or proceeding and the date of its final disposition.

When the issuance of bonds under any bond order, to finance public improvements in an area to be annexed, is prevented or prohibited by reason of litigation respecting the annexation and the Local Government Commission shall certify to such effect, the period of time within which bonds may be issued under the bond order shall be extended by the length of time elapsing between the date of institution of the litigation and the date of its final disposition.

The General Assembly may at any time prior to the expiration of the maximum time period herein provided extend the time for issuing bonds under bond orders.

When any such extension is effected or granted pursuant to this section, no further approval of the voters shall be required. (1917, c. 138, s. 24; 1919, c. 178, s. 3(24); C.S., s. 2950; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81; s. 32; 1939, c. 231, ss. 1, 2(d); 1947, c. 510, ss. 1, 2; 1949, c. 190, ss. 1, 2; 1951, c. 439, ss. 1, 2; 1953, c. 693, ss. 1, 3; 1955, c. 704, ss. 1, 2; 1969, c. 99; 1971, c. 780, s. 1; 1975, c. 545, s. 1; 1977, 2nd Sess., c. 1219, s. 36; 1979, c. 444, s. 1.)

**Editor’s Note.** — Session Laws 1975, c. 545, s. 1, amended this section by substituting “seven years” for “five years” in the first sentence. Section 2 of the 1975 amendatory act provided: “The provisions of this act shall apply to bonds authorized by bond orders which took effect from January 1, 1971, through the effective date of this act [June 11, 1975] or which take effect hereafter.”

Session Laws 1975, c. 26, s. 1, amended this section by substituting “seven years” for “five years” in the first sentence. Session Laws 1975, c. 26, s. 2, provided that the act would apply only to bonds authorized during the period Jan.

1, 1970, through Dec. 31, 1970.

Session Laws 1975, c. 546, s. 1, amended this section by substituting “eight years” for “five years” in the first sentence. Session Laws 1975, c. 546, s. 2, provided that the act would apply only to bonds authorized during the period commencing March 1, 1968, and ending Dec. 31, 1969.

Session Laws 1987 (Reg. Sess., 1988), c. 1027, effective June 30, 1988, and applicable only to bonds authorized during the period January 1, 1981, through December 31, 1981, amended the first sentence of this section to read as follows: “Bonds may be issued under a bond order at

any time within ten years after the bond order takes effect." Section 3 of c. 1027 provided that all laws in conflict with the provisions of the act would be repealed.

Session Laws 1991 (Reg. Sess., 1992), c. 987, s. 1 provides: "All proceedings taken in 1991 by the governing board of any unit of local government in connection with the extension of the

period during which bonds may be issued pursuant to G.S. 159-64 are ratified, approved, confirmed, and in all respects validated if the governing board has adopted an order providing for the extension after a public hearing on the extension before the expiration of the period to be extended."

## § 159-65. Resolution fixing the details of the bonds.

After the bond order has been adopted, the board shall adopt a resolution fixing the details of the bonds. In fixing details of the bonds, the board is subject to these restrictions and directions:

- (1) The maturity dates shall not exceed the maximum periods of usefulness prescribed by the Commission pursuant to G.S. 159-122.
- (2) Bonds authorized by two or more bond orders may be consolidated into a single issue.
- (3) Bonds of each issue shall mature in annual installments, the first of which shall be payable not more than three years after the date of the bonds, and the last within the maximum maturity period prescribed by regulation of the Commission under G.S. 159-122.
- (4) No installment of any issue may be more than four times as great in amount as the smallest prior installment of the same issue.
- (5) Bonds of each issue may be issued from time to time in series with different provisions for each series. Each series shall be deemed a separate issue for the purposes of this section.
- (6) Any bond may be made payable on demand or tender for purchase as provided in G.S. 159-79, and any bond may be made subject to redemption prior to maturity, with or without premium, on such notice and at such time or times and with such redemption provisions as may be stated therein. When any such bond shall have been validly called for redemption and provision shall have been made for the payment of the principal thereof, any redemption premium, and the interest thereon accrued to the date of redemption, interest thereon shall cease.
- (7) The bonds may bear interest at such rate or rates, payable semiannually or otherwise, may be in such denominations, and may be made payable in such kind of money and in such place or places within or without the State of North Carolina, as the board may determine.

Subdivisions (3) and (4) of this section shall not apply to bonds purchased by a State or federal agency. Such subdivisions (3) and (4) also shall not apply to bonds the interest on which is or may be includable in gross income for purposes of federal income tax, provided that the dates on which such bonds shall be stated to mature shall be approved by the Commission and the Commission may require that the payment of all or any part of the principal of and interest and any premium on such bonds be provided for by mandatory redemption of principal prior to maturity, a sinking fund, a Credit Facility, as defined in G.S. 159-79, or such other means as may be satisfactory to the Commission. (1917, c. 138, s. 25; 1919, c. 178, s. 3(25); C.S., s. 2951; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1933, c. 259, s. 1; 1951, c. 440, s. 1; 1953, c. 1206, s. 3; 1969, c. 686; 1971, c. 780, s. 1; 1973, c. 494, s. 10; cc. 883, 995; 1987, c. 585, s. 2; c. 586.)

**Editor's Note.** — Session Laws 1987, c. 585, ss. 7 and 8 provided: "The foregoing sections of this act shall be deemed to provide an addi-

tional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to

powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing.

“Nothing in this act shall be construed to

impair the obligation of any bond, note or coupon issued under The Local Government Finance Act and outstanding on the effective date of this act.”

**§ 159-66. Validation of former proceedings and actions.**

(a) All proceedings and actions heretofore taken by the governing boards of units of local government and by the Local Government Commission to fix the details of bonds and to provide for the advertisement and sale thereof are hereby ratified, approved, confirmed and in all respects validated, notwithstanding the provisions of G.S. 159-65(4).

(b) This section shall apply to all bonds sold by the Local Government Commission between July 1, 1973, and February 18, 1974. (1973, c. 872, ss. 1, 2.)

**§ 159-67. Procedures if a county votes to relocate the county seat.**

Whenever the citizens of a county, by referendum, decide that the county’s county seat, along with the courthouse and other county buildings and agencies, should be relocated, the board of county commissioners of that county shall forthwith begin discussions with the Local Government Commission concerning financing of the relocation. If bonds are to be issued for the relocation, or a financing agreement entered into, the board of commissioners shall apply to the Local Government Commission no later than 10 months after the day of the referendum. If a bond election is necessary, it shall be held no later than 22 months after the day of the referendum. (1975, c. 324, s. 5.)

**Editor’s Note.** — This section was enacted by Session Laws 1975, c. 324, s. 5. The 1975 act appeared from its title to be a local act applica-

ble only to Brunswick County, and the provisions of the act other than s. 5 were expressly restricted to Brunswick County.

**§§ 159-68 through 159-71:** Reserved for future codification purposes.

**Part 3. Funding and Refunding Bonds.**

**§ 159-72. Purposes for which funding and refunding bonds may be issued; when such bonds may be issued.**

A unit of local government may issue funding and refunding bonds under this Article for the purposes listed in G.S. 159-48(a)(4), (5), (6), or (7). Funding bonds may be issued if the debt, judgment, or other obligation to be paid is payable at the time of the passage of the bond order or within one year thereafter. Refunding bonds may be issued at any time prior to the final maturity of the debt or obligation to be refunded. The proceeds from the sale of any refunding bonds shall be applied only as follows: either (i) to the immediate payment and retirement of the obligations being refunded or (ii) if not required for the immediate payment of the obligations being refunded such proceeds shall be deposited in trust to provide for the payment and retirement of the obligations being refunded, and to pay any expenses incurred in connection with such refunding, but provision may be made for the pledging and disposition of any amounts in excess of the amounts required for such purposes, including, without limitation, provision for the pledging of any such

excess to the payment of the principal of and interest on any issue or series of refunding bonds issued pursuant to G.S. 159-78. Money in any such trust fund may be invested in (i) direct obligations of the United States government, or (ii) obligations the principal of and interest on which are guaranteed by the United States government, or (iii) to the extent then permitted by law in obligations of any agency or instrumentality of the United States government, or (iv) in certificates of deposit issued by a bank or trust company located in the State of North Carolina if such certificates shall be secured by a pledge of any of said obligations described in (i), (ii), or (iii) above having an aggregate market value, exclusive of accrued interest, equal at least to the principal amount of the certificates so secured. Nothing herein shall be construed as a limitation on the duration of any deposit in trust for the retirement of obligations being refunded but which shall not have matured and which shall not be presently redeemable or, if presently redeemable, shall not have been called for redemption.

The principal amount of refunding bonds issued pursuant to this section, together with the principal amount of refunding bonds, if any, issued under G.S. 159-78 in conjunction with refunding bonds issued pursuant to this section, shall not exceed the amount set forth in G.S. 159-78.

Except as expressly modified in this Part, funding and refunding bonds issued under the provisions of this Part shall be subject to the limitations and procedures set out in Parts 1 and 2 of this Article. (1917, c. 138, s. 16; 1919, c. 178, s. 3(16); C.S., s. 2937; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 8; 1929, c. 171, s. 1; 1931, c. 60, ss. 48, 54; 1933, c. 257, ss. 2-4; c. 259, ss. 1, 2; 1935, c. 302, ss. 1, 2; c. 484; 1939, c. 231, ss. 1, 2(c), 4(b); 1941, c. 147; 1943, c. 13; 1945, c. 403; 1947, cc. 520, 931; 1949, c. 354; c. 766, s. 3; c. 1270; 1953, c. 1065, s. 1; 1957, c. 266, s. 1; c. 856, s. 1; c. 1098, s. 16; 1959, c. 525; c. 1250, s. 2; 1961, c. 293; c. 1001, s. 2; 1965, c. 307, s. 2; 1967, c. 987, s. 2; c. 1001, s. 1; 1971, c. 780, s. 1; 1973, c. 494, s. 11; 1977, c. 201, s. 1.)

**Legal Periodicals.** — For symposium on municipal finance, see 1976 Duke L.J. 1051.

#### CASE NOTES

**Editor's Note.** — *The cases cited below were decided under former statutory provisions similar to this section.*

**Constitution Does Not Require Election on Refunding Bonds.** — An ordinance authorizing the issuance of refunding bonds by a municipality need not be submitted to the voters. A municipal corporation does not contract a debt, within the meaning of N.C. Const., Art. V, § 4(2), when under statutory authority it issues bonds to refund bonds which at the date of the issuance of the funding bonds are valid and enforceable obligations of the municipality. *Bolich v. City of Winston-Salem*, 202 N.C. 786, 164 S.E. 361 (1932).

**Constitutionality.** — This section and § 159-78 allow municipalities to issue general obligation refunding bonds in an amount greater than the bonds to be refunded without a vote of the people, and do not violate N.C. Const., Art. V, § 4. *City of Concord v. All Owners of Taxable Property*, 330 N.C. 429, 410 S.E.2d 482 (1991).

**Ordinance provision that holders of pro-**

**posed refunding bonds should be subrogated to all rights and powers of holders of refunded bonds** was sanctioned by law; such provision would enter into and become an integral part of the bonds when issued, with contractual force and effect, and could not be impaired by subsequent legislation. *Bryson City Bank v. Town of Bryson City*, 213 N.C. 165, 195 S.E. 398 (1938).

**Statute Limiting Tax Rate of Municipality Held Inoperative Under Facts.** — Where defendant municipality proposed to issue refunding bonds to be exchanged for like amounts of the original bonds in the hands of the holders of the original indebtedness, the refunding bonds to be secured by all rights and powers of taxation which protected and formed a part of the obligation of the original bonds, it was held that the parties and the debt were the same and the transaction amounted in reality to an extension and renewal of the original bonds under legislative sanction, and an act of the legislature, passed after the issuance of the original bonds, limiting the tax rate of the

municipality was inoperative as to the refunding bonds when the limitation therein imposed would prevent the payment of the refunding bonds according to their tenor; the contention that even though the refunding bonds would not create a new debt, such debt would be

evidenced by a new contract, and that therefore the refunding bonds would be subject to the limitation of the statute enacted prior to the issuance of the refunding bonds was untenable. *Bryson City Bank v. Town of Bryson City*, 213 N.C. 165, 195 S.E. 398 (1938).

### § 159-73. Financing or refinancing agreements.

Each unit of local government is authorized to enter into agreements with the holders of its outstanding debts for the settlement, adjustment, funding, refunding, financing, or refinancing of the debt. Such an agreement may contain any provisions not inconsistent with law and before the unit may enter into it, it must be approved by the Commission. (1971, c. 780, s. 1.)

### § 159-74. Test cases testing validity of funding or refunding bonds.

At any time after the procedure for authorizing the issuance of funding or refunding bonds has been completed, but before the issuance of the bonds, the issuing unit may institute an action in the Superior Court Division of the General Court of Justice in the county in which all or any part of the unit lies, to determine the validity of the bonds and the validity of the means of payment provided therefor. The action shall be in rem, and shall be against all of the owners of taxable property within the unit and all citizens residing in the unit, but it shall not be necessary to name each such owner or citizen in the summons or complaint. Jurisdiction of all parties defendant shall be acquired by publication of a summons once a week for three successive weeks, and jurisdiction shall be complete within 20 days after the date of the last publication. Any interested party may intervene in the action. Except as otherwise provided by this section, the action shall be governed by the Rules of Civil Procedure. (1931, c. 186, ss. 4, 5; 1935, c. 290, ss. 1, 2; 1937, c. 80; 1971, c. 780, s. 1.)

**Editor's Note.** — The Rules of Civil Procedure, referred to in this section, are found in § 1A-1.

#### CASE NOTES

**Editor's Note.** — *The case cited below was decided under former statutory provisions similar to this section.*

**Constitutionality of Former Statutes.** — Former versions of §§ 159-52 to 159-56 were not unconstitutional either on the ground that they conferred nonjudicial functions on the superior courts or on the ground that they denied due process of law to taxpayers or citizens of a local governmental unit, in violation of the provisions of U.S. Const., Amend. XIV, or of Art. I, § 17, Const. 1868. *Castevens v. Stanly County*, 211 N.C. 642, 191 S.E. 739 (1937).

**Proceeding in Rem.** — The action authorized by former versions of §§ 159-52 to 159-56 was in the nature of a proceeding in rem, and was adversary both in form and in substance. These sections contemplated that issues both of law and of fact could be raised by pleadings

duly filed, and that such issues should be determined by the court. The court had no power by virtue of these sections to validate bonds which were for any reason invalid. It had power only to determine whether or not on the facts as found by the court and under the law applicable to such facts the bonds were valid. *Castevens v. Stanly County*, 211 N.C. 642, 191 S.E. 739 (1937).

**Service of Summons by Publication Sufficient.** — The contention that an owner of taxable property within the unit, or a citizen residing therein, may be deprived of his property, without due process of law, or contrary to the law of the land, by a decree or judgment in the action declaring or adjudging that bonds and the tax to be levied for their payment, are valid, because it is not required that his name shall appear in the summons or in the com-

plaint, or that the summons shall be served on him personally, cannot be sustained. The action is declared by statute to be in the nature of a proceeding in rem. In such case, all persons included within a well-defined class may be

made parties defendant, and service of summons by publication is sufficient, although such persons are not named in the summons. *Castevens v. Stanly County*, 211 N.C. 642, 191 S.E. 739 (1937).

### § 159-75. Judgment validating issue; costs of the action.

A final decree of the General Court of Justice validating funding or refunding bonds or the financing or refinancing agreement shall be conclusive as to the validity of the bonds or the agreement.

The costs of any action brought under G.S. 159-74 shall be borne by the issuing unit, including a reasonable attorney's fee for the attorney assigned by the court to defend the interests of the citizens and taxpayers in general. (1931, c. 186, ss. 6, 7; 1935, c. 290, s. 3; 1971, c. 780, s. 1; 1973, c. 494, s. 12.)

#### CASE NOTES

**Taxpayer Who Fails to Exercise Rights Without Grounds of Complaint.** — No decree or judgment adverse to a taxpayer's rights can be rendered in an action instituted and prosecuted by a taxing unit to have a proposed funding bond issue declared valid until every taxpayer and citizen of the unit has been lawfully served with summons, and until he has had ample opportunity to appear and file such pleadings as he may wish. If he has failed to

avail himself of his constitutional rights, which are fully protected by the statute, he has no just ground of complaint that the court will not hear him when he invokes its aid after the decree or judgment has been finally rendered, and others have relied upon its protection. *Castevens v. Stanly County*, 211 N.C. 642, 191 S.E. 739 (1937), decided under former version of § 159-54.

### § 159-76. Validation of bonds and notes issued before March 26, 1931.

All bonds and notes issued before March 26, 1931, for which the issuing unit received an amount of money not less than the face amount of the bonds or notes and the proceeds of which have been spent for public purposes, and all bonds and notes subsequently issued to refund all or any portion of those bonds or notes, are hereby validated notwithstanding any lack of statutory authority or failure to observe any statutory provisions concerning the issuance of the bonds or notes. This section shall not validate any bonds or notes, the proceeds of which have been lost because of the failure of a bank. (1931, c. 186, s. 2; 1971, c. 780, s. 1; 1973, c. 494, s. 13.)

### § 159-77. Validation of all proceedings in connection with the authorization of bonds taken before April 28, 1975.

All proceedings heretofore taken by the governing boards of units of local government in connection with the authorization of bonds are hereby ratified, approved, confirmed and in all respects validated, notwithstanding the provisions of G.S. 159-61(c); provided that the issuance of said bonds shall have been approved at an election by a majority of the qualified voters of the unit voting thereon and that notice of said referendum shall have been published. (1975, c. 178.)

### § 159-78. Special obligation refunding bonds.

In conjunction with the issuance of refunding bonds pursuant to G.S. 159-72 or G.S. 159-84 a unit of local government may issue a series of refunding bonds

which shall be payable from the excess of the amount required by a trust fund established pursuant to G.S. 159-72 or G.S. 159-84 to provide for the payment and retirement of the obligations being retired and the amount required to pay any expenses incurred in connection with such refunding to the extent such expenses are payable from said trust fund.

Such refunding bonds shall be special obligations of the municipality issuing them. The principal of and interest on such refunding bonds shall not be payable from the general funds of the municipality, nor shall they constitute a legal or equitable pledge, charge, lien, or encumbrance upon any of its property or upon any of its income, receipts, or revenues, except the trust fund established pursuant to G.S. 159-72 or G.S. 159-84 from which such refunding bonds are payable. Neither the credit nor the taxing power of the municipality is pledged for the payment of the principal or interest of such refunding bonds, and no holder of such refunding bonds has the right to compel the exercise of the taxing power of the municipality or the forfeiture of any of its property in connection with any default thereon. Every such refunding bond shall recite in substance that the principal of and interest on the bond is payable solely from the trust fund established for its payment and that the municipality is not obligated to pay the principal or interest except from such trust fund.

Any refunding bonds issued under this section shall be issued in compliance with the procedure set forth in Article 5 of this Chapter.

The principal amount of any issue of refunding bonds issued pursuant to G.S. 159-72 or G.S. 159-84, together with the principal amount of refunding bonds, if any, issued pursuant to this section in conjunction with a series of bonds issued under G.S. 159-72 or G.S. 159-84, shall not exceed the sum of the following: (i) the principal amount of the obligations being refinanced, (ii) applicable redemption premiums thereon, (iii) unpaid interest on such obligations to the date of delivery or exchange of the refunding bonds, (iv) in the event the proceeds from the sale of the refunding bonds are to be deposited in trust as provided by G.S. 159-72 or G.S. 159-84, interest to accrue on such obligations being refinanced from the date of delivery of the refunding bonds to the first or any subsequent available redemption date or dates selected, in its discretion, by the governing body of the unit of local government, or to the date or dates of maturity, whichever shall be determined by the governing body of the unit of local government to be most advantageous or necessary and (v) expenses, including bond discount, deemed by the governing body to be necessary for the issuance of the refunding bonds. (1977, c. 201, s. 2.)

#### CASE NOTES

**Constitutionality.** — Section 159-72 and this section allow municipalities to issue general obligation refunding bonds in an amount greater than the bonds to be refunded without a vote of the people, and do not violate N.C. Const., Art. V, § 4. *City of Concord v. All Owners of Taxable Property*, 330 N.C. 429, 410 S.E.2d 482 (1991).

**Restriction of Debt Amount.** — This section also restricts the amount of debt which may be incurred by the issuance of refunding bonds so that the proceeds from the refunding bonds may not exceed an amount necessary to pay an existing indebtedness. *City of Concord v. All Owners of Taxable Property*, 330 N.C. 429, 410 S.E.2d 482 (1991).

### § 159-79. Variable rate demand bonds and notes.

(a) Notwithstanding any provisions of this Chapter to the contrary, including particularly, but without limitation, the provisions of G.S. 159-65, G.S. 159-123 to G.S. 159-127, inclusive, G.S. 159-130, G.S. 159-138, G.S. 159-162, G.S. 159-164 and G.S. 159-172, a unit of local government, in fixing the details of general obligation bonds to be issued pursuant to this Article or general

obligation notes to be issued pursuant to Article 9 of this Chapter, may provide that such bonds or notes

- (1) May be made payable from time to time on demand or tender for purchase by the owner provided a Credit Facility supports such bonds or notes, unless the Commission specifically determines that a Credit Facility is not required upon a finding and determination by the Commission that the proposed bonds or notes will satisfy the conditions set forth in G.S. 159-52;
- (2) May be additionally supported by a Credit Facility;
- (3) May be made subject to redemption prior to maturity, with or without premium, on such notice, at such time or times, at such price or prices and with such other redemption provisions as may be stated in the resolution fixing the details of such bonds or notes or with such variations as may be permitted in connection with a Par Formula provided in such resolution;
- (4) May bear interest at a rate or rates that may vary as permitted pursuant to a Par Formula and for such period or periods of time, all as may be provided in such resolution; and
- (5) May be made the subject of a remarketing agreement whereby an attempt is made to remarket the bonds to new purchases prior to their presentment for payment to the provider of the Credit Facility or to the issuing unit.

(b) No Credit Facility, repayment agreement, Par Formula or remarketing agreement shall become effective without the approval of the Commission.

(c) As used in this section, the following terms shall have the following meanings:

- (1) "Credit Facility" means an agreement entered into by an issuing unit with a bank, savings and loan association or other banking institution, an insurance company, reinsurance company, surety company or other insurance institution, a corporation, investment banking firm or other investment institution, or any financial institution providing for prompt payment of all or any part of the principal (whether at maturity, presentment or tender for purchase, redemption or acceleration), redemption premium, if any, and interest on any bonds or notes payable on demand or tender by the owner issued in accordance with this section, in consideration of the issuing unit agreeing to repay the provider of such Credit Facility in accordance with the terms and provisions of a repayment agreement. A bank may include a foreign bank or branch or agency thereof the obligations of which bear the highest rating of at least one nationally-recognized rating service and do not bear a rating below the highest rating of any nationally-recognized rating service which rates such particular obligations.
- (2) "Par Formula" shall mean any provision or formula adopted by the issuing unit to provide for the adjustment, from time to time, of the interest rate or rates borne by any such bonds or notes so that the purchase price of such bonds or notes in the open market would be as close to par as possible.

(d) If the aggregate principal amount repayable by the issuing unit under a repayment agreement is in excess of the aggregate principal amount of bonds or notes secured by the related Credit Facility, whether as a result of the inclusion in the Credit Facility of a provision for the payment of interest for a limited period of time or the payment of a redemption premium or for any other reason, then the amount of unissued bonds or notes during the term of such repayment agreement shall not be less than the amount of such excess, unless the payment of such excess is otherwise provided for by agreement of the issuing unit subject to the approval of the Commission. In determining

whether or not to grant such approval, the Commission shall consider, in addition to such other factors it may deem relevant, the ability of the issuing unit to pay such excess from other sources without incurring additional indebtedness secured by a pledge of the faith and credit of the issuing unit or levying additional taxes and the adequacy of such other sources to accomplish such purpose.

(e) Any bonds or notes issued pursuant to this section may be sold by the Commission at public or private sale according to such procedures as the Commission may prescribe and at such prices as the Commission determines to be in the best interest of the issuing unit, subject to the approval of the governing board of the issuing unit or one or more persons designated by resolution of the governing board of the issuing unit to approve such prices. (1987, c. 585, s. 1.)

**Editor's Note.** — Session Laws 1987, c. 585, ss. 7 and 8 provided: "The foregoing sections of this act shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing.

"Nothing in this act shall be construed to impair the obligation of any bond, note or coupon issued under The Local Government Finance Act and outstanding on the effective date of this act."

An amendment to subsection (a) of this section by Session Laws 1993, c. 497, s. 5, was made effective upon certification of approval of an amendment to Article V of the Constitution of North Carolina relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue financing bonds to be used to finance public activities associated with private economic development projects. This amendment was submitted to the people on November 2, 1993 and was defeated. The amendment to subsection (a) of this section, therefore, never took effect.

## ARTICLE 5.

### *Revenue Bonds.*

#### § 159-80. Short title; repeal of local acts.

(a) This Article may be cited as "The State and Local Government Revenue Bond Act."

(b) It is the intent of the General Assembly by enactment of this Article to prescribe a uniform system of limitations upon and procedures for the exercise by all municipalities in North Carolina of the power to finance revenue bond projects through the issuance of revenue bonds and notes. To this end, all provisions of special, local, or private acts in effect as of July 1, 1973, authorizing the issuance of bonds or notes secured solely by the revenues of the projects for which the bonds or notes are issued or prescribing procedures therefor are repealed. No special, local or private act enacted or taking effect after July 1, 1973, may be construed to modify, amend, or repeal any portion of this Article unless it expressly so provides by specific reference to the appropriate section of this Article. It is further the intent of the General Assembly by enactment of this Article to provide an alternative and supplemental procedure for the exercise by the State of North Carolina of the power to finance revenue bond projects through the issuance of revenue bonds and notes. (1971, c. 780, s. 1; 1973, c. 494, s. 14; 1983, c. 554, ss. 1, 1.1.)

**Cross References.** — As to issuance of capital appreciation bonds pursuant to The State and Local Government Revenue Bond Act, see § 159-100.

**Editor's Note.** — Session Laws 1983, c. 554, which amended this section, in ss. 21 through 25 provided as follows:

"Sec. 21. The foregoing sections of this act

shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers not existing; provided, however, that the issuance of bonds and notes under the provisions of this act need not comply with the requirements of any other law applicable to the issuance of bonds or notes.

“Sec. 22. This act, being necessary for the health and welfare of the people of the State shall be liberally construed to effect the purposes thereof.

“Sec. 23. Insofar as the provisions of this act are inconsistent with the provisions of any general or special laws, or parts thereof, the provisions of this act shall be controlling.

“Sec. 24. Nothing in this act shall be construed to impair the obligation of any bond, note or coupon outstanding on the effective date of this act.

“Sec. 25. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.”

Session Laws 1987 (Reg. Sess., 1988), c. 882,

s. 6 and Session Laws 1989, c. 90 provided that all actions and proceedings heretofore taken by units of local government relating to the authorization of general obligation refunding bonds, secured by a pledge of the taxing power and issued pursuant to the Local Government Bond Act, and revenue refunding bonds, secured by a pledge of revenues and issued pursuant to The State and Local Government Revenue Bond Act, and the sale and delivery of all such bonds pursuant to Article 7, as amended, of Chapter 159 of the General Statutes of North Carolina, in order to provide funds to purchase, at a discount, bonds of such units owned by the Farmers Home Administration, including without limitation, the introduction and adoption of bond orders, the holding of public hearings with respect to such bond orders, the passage of resolutions providing for the issuance and the sale, both public and private, of such refunding bonds, and the delivery of any such refunding bonds were in all respects approved, ratified, validated, and confirmed.

**Legal Periodicals.** — For comment on the Revenue Bond Act of 1938, see 17 N.C.L. Rev. 370 (1939).

For comment on the public purpose doctrine, see 3 Wake Forest Intra. L. Rev. 37 (1967).

For symposium on municipal finance, see 1976 Duke L.J. 1051.

#### CASE NOTES

**Purpose of the Revenue Bond Act of 1938 was to permit municipalities to engage in nongovernmental activities** of a public nature by pledging the revenue derived from such undertakings to the payment of bonds issued in connection therewith. Thus the act avoided pledging the credit of the municipi-

pality to the payment of a debt, for by such arrangements no debt was incurred within the meaning of the Constitution. *Britt v. City of Wilmington*, 236 N.C. 446, 73 S.E.2d 289 (1952); *Keeter v. Town of Lake Lure*, 264 N.C. 252, 141 S.E.2d 634 (1965).

### § 159-81. Definitions.

The words and phrases defined in this section shall have the meanings indicated when used in this Article:

- (1) “Municipality” means a county, city, town, incorporated village, sanitary district, metropolitan sewerage district, metropolitan water district, county water and sewer district, water and sewer authority, hospital authority, hospital district, parking authority, special airport district, regional public transportation authority, regional transportation authority, regional natural gas district, regional sports authority, airport authority, joint agency created pursuant to Part 1 of Article 20 of Chapter 160A of the General Statutes, and joint agency authorized by agreement between two cities to operate an airport pursuant to G.S. 63-56, but not any other forms of local government.
- (2) “Revenue bond” means a bond issued by the State of North Carolina or a municipality pursuant to this Article.
- (3) “Revenue bond project” means any undertaking for the acquisition, construction, reconstruction, improvement, enlargement, betterment,

or extension of any one or combination of the revenue-producing utility or public service enterprise facilities or systems listed in this subdivision, to be financed through the issuance of revenue bonds, thereby providing funds to pay the costs of the undertaking or to reimburse funds loaned or advanced by or on the behalf of either the State or a municipality to pay the costs of the undertaking.

A revenue bond project shall be (i) owned or leased as lessee by the issuing unit or (ii) owned by one or more of the municipalities participating in an undertaking established pursuant to Part 1 of Article 20 of Chapter 160A of the General Statutes. If the revenue bond project is owned by one or more municipalities as provided in (ii) of this subdivision, any one or more of the participating municipalities may each be an issuing unit consistent with their agreement to establish a joint undertaking. In addition, any joint agency established by participating municipalities pursuant to Part 1 of Article 20 of Chapter 160A of the General Statutes may be an issuing unit without owning the revenue bond project or leasing it as lessee.

The cost of an undertaking may include all property, both real and personal and improved and unimproved, plants, works, appurtenances, machinery, equipment, easements, water rights, air rights, franchises, and licenses used or useful in connection with the undertaking; the cost of demolishing or moving structures from land acquired and the cost of acquiring any lands to which the structures are to be moved; financing charges; the cost of plans, specifications, surveys, and estimates of cost and revenues; administrative and legal expenses; and any other expense necessary or incident to the project.

The following facilities or systems may be revenue bond projects under this subdivision:

- a. Water systems or facilities, including all plants, works, instrumentalities and properties used or useful in obtaining, conserving, treating, and distributing water for domestic or industrial use, irrigation, sanitation, fire protection, or any other public or private use.
- b. Sewage disposal systems or facilities, including all plants, works, instrumentalities, and properties used or useful in the collection, treatment, purification, or disposal of sewage.
- c. Systems or facilities for the generation, production, transmission, or distribution of gas (natural, artificial, or mixed) or electric energy for lighting, heating, or power for public and private uses, where gas systems shall include the purchase and/or lease of natural gas fields and natural gas reserves and the purchase of natural gas supplies, and where any parts of such gas systems may be located either within the State or without.
- d. Systems, facilities and equipment for the collection, treatment, or disposal of solid waste.
- e. Public transportation systems, facilities, or equipment, including but not limited to bus, truck, ferry, and railroad terminals, depots, trackages, vehicles, and ferries, and mass transit systems.
- f. Public parking lots, areas, garages, and other vehicular parking structures and facilities.
- g. Aeronautical facilities, including but not limited to airports, terminals, and hangars.
- h. Marine facilities, including but not limited to marinas, basins, docks, dry docks, piers, marine railways, wharves, harbors, warehouses, and terminals.

- i. Hospitals and other health-related facilities.
  - j. Public auditoriums, gymnasiums, stadiums, and convention centers.
  - k. Recreational facilities.
  - l. Repealed by Session Laws 2001-474, s. 36, effective November 29, 2001.
  - m. Economic development projects, including the acquisition and development of industrial parks, the acquisition and resale of land suitable for industrial or commercial purposes, and the construction and lease or sale of shell buildings in order to provide employment opportunities for citizens of the municipality.
  - n. Facilities for the use of any agency or agencies of the government of the United States of America.
  - o. Structural and natural stormwater and drainage systems of all types.
- (4) "Revenues" include all moneys received by the State or a municipality from, in connection with, or as a result of its ownership or operation of a revenue bond project or a utility or public service enterprise facility or system of which a revenue bond project is a part, including (to the extent deemed advisable by the State or a municipality) moneys received from the United States of America, the State of North Carolina, or any agency of either, pursuant to an agreement with the State or a municipality, as the case may be, pertaining to the project. (Ex. Sess. 1938, c. 2, s. 2; 1939, c. 295; 1941, c. 207, s. 2; 1951, c. 703, s. 1; 1953, c. 901, ss. 4, 5; c. 922, s. 1; 1965, c. 997; 1969, c. 1118, s. 1; 1971, c. 780, s. 1; 1973, c. 494, s. 15; 1975, c. 821, s. 2; 1977, c. 466, s. 3; 1979, c. 727, s. 4; c. 791; 1983, c. 554, ss. 2-2.2; 1985, c. 639, s. 3; 1987 (Reg. Sess., 1988), c. 976, s. 1; 1989, c. 168, ss. 37, 38; c. 643, s. 4; c. 740, s. 2; c. 780, s. 2; 1991, c. 508, s. 1; 1995 (Reg. Sess., 1996), c. 644, s. 3; 1997-393, s. 3; 1997-426, s. 6; 2001-414, s. 48; 2001-474, ss. 36, 37.)

**Editor's Note.** — For provisions of ss. 21 through 25 of Session Laws 1983, c. 554, ss. 2 to 2.2 of which amended this section, see the Editor's Note under § 159-80.

Session Laws 1987, c. 577, s. 1 amended Session Laws 1985, c. 639, s. 4, as amended by Session Laws 1985 (Reg. Sess., 1986), cc. 846, 848, 849, 858, 874, 911, 916 and 921 and Session Laws 1987, c. 203, which formerly made subdivision (3)m of this section only applicable to certain counties, municipalities and towns, to read: "This act shall become effective January 1, 1986."

Session Laws 1987, c. 577, s. 1.2 added a new s. 3.1 to Session Laws 1985, c. 639, providing that s. 3 of that act, which added subdivision (3)m to this section, did not apply to Buncombe County or any municipality located within that county; however, Session Laws 1989, c. 374, s. 2, provided that Session Laws 1985, c. 639, s. 3.1, as added by Session Laws 1987, c. 577, s. 1.2, was repealed. Therefore subdivision 3(m) of this section now has statewide application; there is no longer an exception for Buncombe County and the municipalities therein.

Session Laws 1991, c. 508, s. 1, which added

"to be financed through the issuance of revenue bonds, thereby providing funds to pay the costs of the undertaking or to reimburse funds loaned or advanced by the State or a municipality to pay the costs of the undertaking;" to subdivision (3), became effective July 2, 1991, and is applicable to loans and advances made by a municipality on or after January 1, 1982.

Session Laws 1997-426, s. 10(a), (b), and (c), provide that, insofar as the provisions of that act are not consistent with the provisions of any other law, public or private, the provisions of that act shall be controlling; that references in that act to specific sections or Chapters of the General Statutes are intended to be references to such sections or Chapters as they may be amended from time to time by the General Assembly; and that that act, being necessary for the health and welfare of the people of the State, shall be liberally construed to effect the purposes thereof.

Session Laws 2001-414, s. 49, provides: "Section 47 of this act [which repealed G.S. 143B-221] does not derogate any existing powers." Section 48 of Session Laws 2001-414, which

amended this section, may have been intended rather than section 47.

**Effect of Amendments.** — Session Laws 2001-414, s. 48, effective September 14, 2001, in the first paragraph of subdivision (3), substituted “revenue-producing utility or public service enterprise facilities or systems listed in this subdivision” for “following revenue-producing utility or public service enterprise facilities or systems owned or leased as lessee by the issuing unit,” inserted “or on the behalf of either,” and deleted a colon at the end of that paragraph; inserted the second, third and fourth paragraphs of subdivision (3); and deleted a former final paragraph, which was similar to the present third paragraph.

Session Laws 2001-474, ss. 36 and 37, effective November 29, 2001, substituted “the” for “such” following “lands to which” in the third

paragraph of subdivision (3); deleted subdivision (3)l., which read: “In addition to the foregoing, in the case of the State of North Carolina, low-level radioactive waste facilities developed pursuant to Chapter 104G of the General Statutes, hazardous waste facilities developed pursuant to Chapter 130B of the General Statutes, and any other project authorized by the General Assembly”; and deleted the last sentence of subdivision (4), which read: “Revenues’ also include all moneys received by, or on behalf of, the North Carolina Low-Level Radioactive Waste Management Authority in connection with its financing of a low-level radioactive waste facility and all money received by, or on behalf of, the North Carolina Hazardous Waste Management Commission in connection with its financing of a hazardous waste facility.”

**CASE NOTES**

**A revenue-producing enterprise is manifestly one which produces revenue,** not necessarily one which produces profit or net

revenue. *George v. City of Asheville*, 80 F.2d 50, 103 A.L.R. 568 (4th Cir. 1935), decided under former § 160-397.

**§ 159-82. Purpose.**

The purpose of this Article is to establish a standard, uniform procedure for the financing by a municipality of revenue bond projects through the issuance of revenue bonds. Its provisions are intended to vest authority in and enable municipalities to secure and pay revenue bonds and the interest thereon solely out of revenues without pledging the faith and credit of the municipality. (1971, c. 780, s. 1; 1973, c. 494, s. 16.)

**§ 159-83. Powers.**

(a) In addition to the powers they may now or hereafter have, the State and each municipality shall have the following powers, subject to the provisions of this Article and of any revenue bond order or trust agreement securing revenue bonds:

- (1) To acquire by gift, purchase, or exercise of the power of eminent domain or to construct, reconstruct, improve, maintain, better, extend, and operate, one or more revenue bond projects or any portion thereof without regard to location within or without its boundaries, upon determination (i) in the case of the State, by the Council of State and (ii) in the case of a municipality, by resolution of the governing board that a location wholly or partially outside its boundaries is necessary and in the public interest.
- (2) To sell, exchange, transfer, assign or otherwise dispose of any revenue bond project or portion thereof or interest therein determined (i) in the case of the State, by the Council of State and (ii) in the case of a municipality, by resolution of the governing board not to be required for any public purpose.
- (3) To sell, furnish, and distribute the services, facilities, or commodities of revenue bond projects.
- (4) To enter into contracts with any person, firm, or corporation, public or private, on such terms (i) in the case of the State, as the Council of

- State and (ii) in the case of a municipality, as the governing board may determine, with respect to the acquisition, construction, reconstruction, extension, betterment, improvement, maintenance, or operation of revenue bond projects, or the sale, furnishing, or distribution of the services, facilities or commodities thereof.
- (5) To borrow money for the purpose of acquiring, constructing, reconstructing, extending, bettering, improving, or otherwise paying the cost of revenue bond projects, and to issue its revenue bonds or bond anticipation notes therefor, in the name of the State or a municipality, as the case may be, but no encumbrance, mortgage, or other pledge or real property of the State or a municipality may be created in any manner.
  - (6) To establish, maintain, revise, charge, and collect such rates, fees, rentals, tolls, or other charges, free of any control or regulation by the North Carolina Utilities Commission or any other regulatory body except as provided in G.S. 159-95 for the use, services, facilities, and commodities of or furnished by any revenue bond project, and to provide methods of collection of and penalties for nonpayment of such rates, fees, rentals, tolls, or other charges. The rates, fees, rentals, tolls and charges so fixed and charged shall be such as will produce revenues at least sufficient with any other available funds to meet the expense and maintenance and operation of and renewals and replacements to the revenue bond project, including reserves therefor, to pay when due the principal, interest, and redemption premiums (if any) on all revenue bonds or bond anticipation notes secured thereby, and to fulfill the terms of any agreements made by the State or the issuing municipality with the holders of revenue bonds issued to finance all or any portion of the cost of the project.
  - (7) To pledge all or part of any proceeds derived from the use of on-street parking meters to the payment of the cost of operating, maintaining, and improving parking facilities whether on-street or off-street, and the principal of and the interest on revenue bonds or bond anticipation notes issued for on-street or off-street parking facilities.
  - (8) To pledge to the payment of its revenue bonds or bond anticipation notes and interest thereon revenues from one or more revenue bond projects and any leases or agreements to secure such payment, including revenues from improvements, betterments, or extensions to such projects thereafter constructed or acquired as well as the revenues from existing systems, plants, works, instrumentalities, and properties of the projects to be improved, bettered, or extended.
  - (8a) In the case of any county, city, town, or incorporated village, to make loans or advances to a municipality to provide funds to the municipality to pay any costs of any revenue bond project. Funds received by a municipality in reimbursement of a loan or advance shall be distributed and restricted as provided in G.S. 159-27.1.
  - (9) To appropriate, apply, or expend for the following purposes the proceeds of its revenue bonds, notes issued in anticipation thereof, and revenues pledged under any resolution or order authorizing or securing the bonds: (i) to pay interest on the bonds or notes and the principal or redemption price thereof when due; (ii) to meet reserves and other requirements set forth in the bond order or trust agreement; (iii) to pay the costs of the revenue bond projects authorized in the bond order, reimburse funds loaned or advanced for the costs of these revenue bond projects in accordance with the bond order, and provide working capital for initial maintenance and operation until funds are available from revenues; (iv) to pay and discharge revenue

bonds and notes issued in anticipation thereof; (v) to pay and discharge general obligation bonds issued under Article 4 of this Chapter or under any act of the General Assembly, when the revenues of the project financed in whole or in part by the general obligation bonds will be pledged to the payment of the revenue bonds or notes.

- (10) To make and enforce rules and regulations governing the use, maintenance, and operation of revenue bond projects.
- (11) To accept gifts or grants of real or personal property, money, material, labor, or supplies for the acquisition, construction, reconstruction, extension, improvement, betterment, maintenance, or operation of any revenue bond project and to make and perform such agreements or contracts as may be necessary or convenient in connection with the procuring or acceptance of such gifts or grants.
- (12) To accept loans, grants, or contributions from, and to enter into contracts and cooperate with the United States of America, the State of North Carolina, or any agency thereof, with respect to any revenue bond project.
- (13) To enter on any lands, waters, and premises for the purpose of making surveys, borings, soundings, examinations, and other preliminary studies for constructing and operating any revenue bond project.
- (14) To retain and employ consultants and other persons on a contract basis for rendering professional, financial, or technical assistance and advice and to select and retain subject to approval of the Local Government Commission the financial consultants, underwriters and bond attorneys to be associated with the issuance of any bonds and to pay for services rendered by underwriters, financial consultants or bond attorneys out of the proceeds of any such issue with regard to which the services were performed.
- (15) Subject to any provisions of law requiring voter approval for the sale or lease of utility or enterprise systems, to lease to or from any person, firm, or corporation, public or private, all or part of any revenue bond project, upon such terms and conditions as and for such term of years, not in excess of 40 years, (i) in the case of the State, as the Council of State and (ii) in the case of a municipality, as the governing board may deem advisable to carry out the provisions of this Article, and to provide in such lease for the extension or renewal thereof and, if deemed advisable, for an option to purchase or otherwise lawfully acquire the project upon terms and conditions therein specified.
- (16) To execute such instruments and agreements and to do all things necessary or therein in the exercise of the powers herein granted, or in the performance of the covenants or duties of the State or a municipality, as the case may be, or to secure the payment of its revenue bonds.

(b) Any contract, agreement, lease, deed, covenant, or other instrument or document evidencing an agreement or covenant between bondholders or any public agency and the State or a municipality issuing revenue bonds with respect to any of the powers conferred in this section shall be approved by the commission.

(c) In addition to the powers they may now or hereafter have, the State and each municipality shall have the following powers, notwithstanding any provisions of this Article to the contrary, in connection with the development of new and existing seaports and airports:

- (1) To acquire, construct, own, own jointly with public and private parties, lease as lessee, mortgage, sell, lease as lessor, or otherwise dispose of lands and facilities and improvements, including undivided interests therein;

- (2) To finance and refinance for public and private parties seaport and airport facilities and improvements that relate to, develop, or further waterborne or airborne commerce and cargo and passenger traffic, including commercial, industrial, manufacturing, processing, mining, transportation, distribution, storage, marine, aviation, and environmental facilities and improvements;
- (3) To secure any such financing or refinancing by all or any portion of its revenues, income or assets or other available moneys associated with any of its seaport or airport facilities and with the facilities and improvements to be financed or refinanced, and by foreclosable liens on all or any part of its properties associated with any of its seaport or airport facilities and with the facilities and improvements to be financed or refinanced, but in no event to create a debt secured by a pledge of its faith and credit.

(d) In addition to the powers they may now or hereafter have, the State and each municipality shall have the following powers, notwithstanding any provisions of this Article or any other statute to the contrary, in connection with the development of facilities for the use of any agency or agencies of the government of the United States of America:

- (1) To acquire, construct, own jointly with public and private parties, lease as lessor or lessee, mortgage, sell, or otherwise dispose of lands, facilities and improvements, including undivided interests therein and to do so, regardless of the provisions of any other statute, on such terms (i) in the case of the State, as the Council of State and (ii) in the case of a municipality, as the governing board may deem advisable to carry out the provisions of this subsection;
- (2) To finance and refinance facilities and related improvements for the use of any agency of the government of the United States of America;
- (3) To secure any such financing or refinancing by all or any portion of the revenue, income or assets or other available monies associated with such facilities and improvements to be financed or refinanced, and by foreclosable liens on all or any part of the facilities and improvements to be financed or refinanced, but in no event to create a debt secured by a pledge of its faith and credit.

(e) Repealed by Session Laws 2001-174, s. 39, effective November 29, 2001. (Ex. Sess., 1938, c. 2, s. 3; 1951, c. 703, ss. 2, 3; 1953, c. 922, s. 2; 1969, c. 1118, s. 2; 1971, c. 780, s. 1; 1973, c. 494, s. 17; 1983, c. 554, ss. 3-4; 1985, c. 723, s. 2; 1985 (Reg. Sess., 1986), c. 795, s. 1; c. 933, s. 4; 1987 (Reg. Sess., 1988), c. 976, s. 2; 1989, c. 168, ss. 39, 40; 1991, c. 508, s. 2; 2001-474, ss. 38, 39.)

**Cross References.** — For constitutional amendment permitting the General Assembly to grant to the State and other public bodies in the State additional powers to develop new and existing seaports and airports, see N.C. Const., Art. V, § 13.

**Editor's Note.** — For provisions of ss. 21 through 25 of Session Laws 1983, c. 554, ss. 3 to 4 of which amended this section, see the Editor's Note under § 159-80.

Session Laws 1985 (Reg. Sess., 1986), c. 795, s. 1, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 933, s. 4, added subsection (c), effective upon their becoming effective an amendment to the North Carolina Constitution authorizing the General Assembly to enact laws dealing with the subject matter of the act. Session Laws 1985 (1986 Reg. Session), c. 933,

s. 1 proposed to add a new section to N.C. Const., Art. V, authorizing enactment of laws pertaining to seaport and airport facilities. The amendment proposed by c. 933 was ratified at the general election in November, 1986, and became effective November 25, 1986.

Session Laws 1985 (Reg. Sess., 1986), c. 795, ss. 2 through 4, provide:

"Sec. 2. This act shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing.

"Sec. 3. Nothing in this act shall be construed to impair the obligation of any bond, note, or coupon issued under the State and Local Gov-

ernment Revenue Bond Act and outstanding on the effective date of this act.

“Sec. 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.”

**Effect of Amendments.** — Session Laws 2001-474, ss. 38 and 39, effective November 29, 2001, deleted the last sentence of subdivision (a)(5), which read: “Notwithstanding the foregoing, the North Carolina Low-Level Radioactive Waste Management Authority may create an encumbrance, mortgage, or other pledge of real property of the Authority in connection

with its financing of a low-level radioactive waste facility and the North Carolina Hazardous Waste Management Commission may create an encumbrance, mortgage, or other pledge of real property of the Commission in connection with its financing of a hazardous waste facility.”; and repealed subsection (e), which read: “In the case of the State of North Carolina, any action to be taken by the Council of State pursuant to this section shall be taken (i) with respect to the issuance of revenue bonds by the North Carolina Low-Level Radioactive Waste Management Authority, by the governing board of the Authority and (ii) with respect to the issuance of revenue bonds by the North Carolina Hazardous Waste Management Commission, by the governing board of the Commission, and not by the Council of State.”

### CASE NOTES

**Power of Municipalities to Purchase Hydroelectric Systems by Sale of Revenue Bonds.** — The General Assembly by general enactment of the Revenue Bond Act of 1938 authorized municipalities to acquire by purchase revenue-producing properties of various kinds, including hydroelectric plants or systems or works or properties, and to finance such purchases with funds derived from the sale of

revenue bonds, payable solely out of the revenues from the undertaking. *Keeter v. Town of Lake Lure*, 264 N.C. 252, 141 S.E.2d 634 (1965), decided under former § 160-415.

**As to statute being integral part of local bond issue**, see *Keeter v. Town of Lake Lure*, 264 N.C. 252, 141 S.E.2d 634 (1965), decided under former § 160-415.

## § 159-84. Authorization of revenue bonds.

The State and each municipality is hereby authorized to issue its revenue bonds in such principal amount as may be necessary to provide sufficient moneys for the acquisition, construction, reconstruction, extension, betterment, improvement, or payment of the cost of one or more revenue bond projects, including engineering, inspection, legal and financial fees and costs, working capital, interest on the bonds or notes issued in anticipation thereof during construction and, if deemed advisable by the State or a municipality, as the case may be, for a period not exceeding two years after the estimated date of completion of construction, establishment of debt service reserves, and all other expenditures of the State or the municipality, as the case may be, incidental and necessary or convenient thereto.

Subject to agreements with the holders of its revenue bonds, the State or each municipality, as the case may be, may issue further revenue bonds and refund outstanding revenue bonds whether or not they have matured. Revenue bonds may be issued partly for the purpose of refunding outstanding revenue bonds and partly for any other purpose under this Article. Revenue bonds issued to refund outstanding revenue bonds shall be issued under this Article and not Article 4 of this Chapter or any other law.

Refunding bonds may be issued at any time prior to the final maturity of the debt or obligation to be refunded. The proceeds from the sale of any refunding bonds shall be applied only as follows: either, (i) to the immediate payment and retirement of the obligations being refunded or (ii) if not required for the immediate payment of the obligations being refunded such proceeds shall be deposited in trust to provide for the payment and retirement of the obligations being refunded, and to pay any expenses incurred in connection with such refunding, but provision may be made for the pledging and disposition of any

amounts in excess of the amounts required for such purposes, including, without limitation, provision for the pledging of any such excess to the payment of the principal of and interest on any issue or series or [of] refunding bonds issued pursuant to G.S. 159-78. Money in any such trust fund may be invested in (i) direct obligations of the United States government, or (ii) obligations the principal of and interest on which are guaranteed by the United States government, or (iii) to the extent then permitted by law in obligations of any agency or instrumentality of the United States government, (iv) certificates of deposit issued by a bank or trust company located in the State of North Carolina if such certificates shall be secured by a pledge of any of said obligations described in (i), (ii), or (iii) above having any aggregate market value, exclusive of accrued interest, equal at least to the principal amount of the certificates so secured. Nothing herein shall be construed as a limitation on the duration of any deposit in trust for the retirement of obligations being refunded but which shall not have matured and which shall not be presently redeemable or, if presently redeemable, shall not have been called for redemption.

The principal amount of refunding bonds issued pursuant to this section, together with the principal amount of refunding bonds, if any, issued under G.S. 159-78 in conjunction with refunding bonds issued pursuant to this section, shall not exceed the amount set forth in G.S. 159-78. (1953, c. 692; 1969, c. 1118, s. 4; 1971, c. 780, s. 1; 1977, c. 201, s. 3; 1983, c. 554, s. 5.)

**Editor's Note.** — For provisions of ss. 21 which amended this section, see the Editor's through 25 of Session Laws 1983, c. 554, s. 5 of note under § 159-80.

### **§ 159-85. Application to Commission for approval of revenue bond issue; preliminary conference; acceptance of application.**

(a) Neither the State nor a municipality may issue revenue bonds under this Article unless the issue is approved by the Commission. The State Treasurer or the governing board of the issuing municipality or its duly authorized agent, as the case may be, shall file an application for Commission approval of the issue with the secretary of the Commission. If the issuing municipality is a regional public transportation authority, the application must be accompanied by a resolution of the special tax board of that authority approving of the application. The application shall state such facts and have attached to it such documents concerning the proposed revenue bonds and the financial condition of the State or the issuing municipality, as the case may be, and its utilities and enterprises as the secretary may require. The Commission may prescribe the form of the application.

(b) Before he accepts the application, the secretary may require (i) in the case of the State, the State Treasurer or (ii) in the case of a municipality, the governing board or its representatives to attend a preliminary conference at which time the secretary and his deputies may informally discuss the proposed issue and the timing of the steps taken in issuing the bonds.

(c) After an application in proper form and order has been filed, and after a preliminary conference if one is required, the secretary shall notify the State Treasurer or the municipality, as the case may be, in writing that the application has been filed and accepted for submission to the Commission. The secretary's statement shall be conclusive evidence that the State or the municipality, as the case may be, has complied with this section.

(d) Repealed by Session Laws 2001-474, s. 39, effective November 29, 2001. (Ex. Sess. 1938, c. 2, s. 9; 1949, c. 1081; 1967, c. 555; 1969, c. 688, s. 2; 1971, c.

780, s. 1; 1973, c. 494, s. 18; 1983, c. 554, s. 6; 1989, c. 168, s. 41; c. 740, s. 6; 2001-474, s. 39.)

**Editor's Note.** — For provisions of ss. 21 through 25 of Session Laws 1983, c. 554, s. 6 of which amended this section, see the Editor's note under § 159-80.

**Effect of Amendments.** — Session Laws 2001-474, s. 39, effective November 29, 2001, deleted subsection (d), which read: "In the case of the State of North Carolina, any action to be taken by the Council of State pursuant to this section shall be taken (i) with respect to the issuance of revenue bonds by the North Carolina Low-Level Radioactive Waste Manage-

ment Authority, by the governing board of the Authority and (ii) with respect to the issuance of revenue bonds by the North Carolina Hazardous Waste Management Commission, by the governing board of the Commission, and not by the Council of State. Subsection (c) of this section shall not apply to the issuance of revenue bonds by North Carolina Low-Level Radioactive Waste Management Authority or by the North Carolina Hazardous Waste Management Commission."

**§ 159-86. Approval of application by Commission.**

(a) In determining whether a proposed revenue bond issue shall be approved, the Commission may consider:

- (1) Whether the project to be financed from the proceeds of the revenue bond issue is necessary or expedient.
- (2) Whether the proposed project is feasible.
- (3) The State's or the municipality's, as the case may be, debt management procedures and policies.
- (4) Whether the State or the municipality, as the case may be, is in default in any of its debt service obligations.
- (5) Whether the probable net revenues of the project to be financed will be sufficient to service the proposed revenue bonds.
- (6) The ability of the Commission to market the proposed revenue bonds at reasonable rates of interest.

The Commission may inquire into and give consideration to any other matters that it may believe to have a bearing on whether the issue should be approved.

(b) The Commission shall approve the application if, upon the information and evidence it receives, it finds and determines:

- (1) That the proposed revenue bond issue is necessary or expedient.
- (2) That the amount proposed is adequate and not excessive for the proposed purpose of the issue.
- (3) That the proposed project is feasible.
- (4) That the State's or the municipality's, as the case may be, debt management procedures and policies are good, or that reasonable assurances have been given that its debt will henceforth be managed in strict compliance with law.
- (5) That the proposed revenue bonds can be marketed at reasonable interest cost to the State or the municipality, as the case may be. (1971, c. 780, s. 1; 1983, c. 554, ss. 7, 8.)

**Editor's Note.** — For provisions of ss. 21 and 8 of which amended this section, see the through 25 of Session Laws 1983, c. 554, ss. 7 Editor's note under § 159-80.

**§ 159-87. Order approving or denying the application.**

(a) After considering an application the Commission shall enter its order either approving or denying the application. An order approving an issue shall not be regarded as an approval of the legality of the bonds in any respect.

(b) If the Commission enters an order denying the application, the proceedings under this Article shall be at an end. (1971, c. 780, s. 1.)

## § 159-88. Adoption of revenue bond order.

(a) At any time after the Commission approves an application for the issuance of revenue bonds, (i) in the case of the State, the Council of State and (ii) in the case of a municipality, the governing board of the municipality may adopt a revenue bond order pursuant to this Article.

(b) Notwithstanding the provisions of any city charter, general law, or local act, a revenue bond order may be introduced at any regular or special meeting of the governing board of a municipality and adopted at such a meeting by a simple majority of those present and voting, a quorum being present, and need not be published or subjected to any procedural requirements governing the adoption of ordinances or resolutions by the governing board other than the procedures set out in this Article. Revenue bond orders are not subject to the provisions of any city charter or legal act concerning initiative or referendum.

(c) Notwithstanding any other provision of this Article, no bond order authorizing the issuance of revenue bonds of the State shall be adopted by the Council of State until such time as the General Assembly shall have enacted legislation authorizing the undertaking of the revenue bond project to be financed and fixing the maximum aggregate principal amount of revenue bonds that shall be issued for such purpose, and such legislation shall have taken effect.

(d) Repealed by Session Laws 2001-474, s. 39, effective November 29, 2001. (1971, c. 780, s. 1; 1973, c. 494, s. 19; 1983, c. 554, s. 9; 1989, c. 168, s. 42; 2001-474, s. 39.)

**Editor's Note.** — For provisions of ss. 21 through 25 of Session Laws 1983, c. 554, s. 9 of which amended this section, see the Editor's note under § 159-80.

Session Laws 2000-81, ss. 1-8, effective July 5, 2000, authorizes the issuance of state revenue bonds, not to exceed \$40,000,000, to finance improvements to the water and sewer system for the Community of Butner and Camp Butner reservation. Specifically, the bonds are for paying the costs of acquisition, construction, reconstruction, improvement, enlargement, betterment, and extension of the water supply and distribution system and sewage collection and disposal system and certain costs of issuance of the bonds. The bonds are to be issued in compliance the State and Local Government Revenue Bond Act, pursuant to an order adopted by the Council of State under G.S. 159-88, and are to be sold by the Local Government Commission pursuant to the provisions of Article 7 of Chapter 159. The bonds are tax exempt, excepting estate, inheritance, or gift taxes, income taxes on the gain from transfer of securities, and franchise taxes. Section 7 of the act pro-

vides that the act is supplemental and additional to powers conferred by other laws. It, being necessary for the health and welfare of the people of the State, is to be liberally construed. Section 7(d) contains a severability clause.

**Effect of Amendments.** — Session Laws 2001-474, s. 39, effective November 29, 2001, repealed subsection (d), which read: " In the case of the State of North Carolina, any action to be taken by the Council of State pursuant to this section shall be taken (i) with respect to the issuance of revenue bonds by the North Carolina Low-Level Radioactive Waste Management Authority, by the governing board of the Authority and (ii) with respect to the issuance of revenue bonds by the North Carolina Hazardous Waste Management Commission, by the governing board of the Commission, and not by the Council of State. Subsection (c) of this section shall not apply to the issuance of revenue bonds by North Carolina Low-Level Radioactive Waste Management Authority or by the North Carolina Hazardous Waste Management Commission."

## § 159-89. Special covenants.

A revenue bond order or a trust agreement securing revenue bonds may contain covenants as to

- (1) The pledge of all or any part of revenues received or to be received from the undertaking to be financed by the bonds, or the utility or enterprise of which the undertaking is to become a part.

- (2) Rates, fees, rentals, tolls or other charges to be established, maintained, and collected, and the use and disposal of revenues, gifts, grants, and funds received or to be received.
- (3) The setting aside of debt service reserves and the regulation and disposition thereof.
- (4) The custody, collection, securing, investment, and payment of any moneys held for the payment of revenue bonds.
- (5) Limitations or restrictions on the purposes to which the proceeds of sale of revenue bonds then or thereafter to be issued may be applied.
- (6) Limitations or restrictions on the issuance of additional revenue bonds or notes; the terms upon which additional revenue bonds or notes may be issued and secured; or the refunding of outstanding or other revenue bonds.
- (7) The procedure, if any, by which the terms of any contract with bondholders may be amended or abrogated, the percentage of revenue bonds the bondholders of which must consent thereto, and the manner in which such consent may be given.
- (8) Events of default and the rights and liabilities arising thereupon, the terms and conditions upon which revenue bonds issued under this Article shall become or may be declared due before maturity, and the terms and conditions upon which such declaration and its consequences may be waived.
- (9) The preparation and maintenance of a budget with respect to the expenses of the State or a municipality, as the case may be, for the operation and maintenance of revenue bond projects.
- (10) The retention or employment of consulting engineers, independent auditors, and other technical consultants in connection with revenue bond projects.
- (11) Limitations on or the prohibition of free service by revenue bond projects to any person, firm, or corporation, public or private.
- (12) The acquisition and disposal of property for revenue bond projects.
- (13) Provisions for insurance and for accounting reports and the inspection and audit thereof.
- (14) The continuing operation and maintenance of the revenue bond project or the utility or enterprise of which it is to become a part. (Ex. Sess. 1938, c. 2, s. 6; 1971, c. 780, s. 1; 1983, c. 554, s. 10.)

**Editor's Note.** — For provisions of ss. 21 which amended this section, see the Editor's through 25 of Session Laws 1983, c. 554, s. 10 of note under § 159-80.

### **§ 159-90. Limitations on details of bonds; additional provisions.**

(a) In fixing the details of revenue bonds, the State or the issuing municipality, as the case may be, shall be subject to the following restrictions and directions:

- (1) The maturity dates may not exceed the maximum maturity periods prescribed by the Commission for general obligation bonds pursuant to G.S. 159-122. For bonds issued in reimbursement of a loan or advance, the maximum maturity period to be used in determining the maturity dates of the bonds shall be the maximum permissible period prescribed by the Commission for the original project for which the loan or advance was expended, calculated from the date the original project is completed.
- (2) Any bond may be made subject to redemption prior to maturity, including redemption on demand of the holder, with or without

premium, on such notice and at such time or times and with such redemption provisions as may be stated. When any such bond shall have been validly called for redemption and provision shall have been made for the payment of the principal thereof, any redemption premium, and the interest thereon accrued to the date of redemption, interest thereon shall cease.

- (3) The bonds may bear interest at such rate or rates, payable semiannually or otherwise, may be in such denominations, and may be payable in such kind of money and in such place or places within or without the State of North Carolina, as the State Treasurer or the issuing municipality, as the case may be, may determine.

(b) In addition to the foregoing provisions of this section, in fixing the details of revenue bonds the State or the issuing municipality, as the case may be, may provide that bonds

- (1) May be made payable from time to time on demand or tender for purchase by the owner provided a Credit Facility supports such bonds, unless the Commission specifically determines that a Credit Facility is not required upon a finding and determination by the Commission that the proposed bonds will satisfy the conditions set forth in G.S. 159-86(b);
- (2) May be additionally supported by a Credit Facility;
- (3) May be made subject to redemption prior to maturity, with or without premium, on such notice and at such time or times and with such redemption provisions as may be stated in the bond order or trust agreement or with such variations as may be permitted in connection with a Par Formula provided in such bond order or trust agreement;
- (4) May bear interest, notwithstanding the provisions of G.S. 159-125(a), at a rate or rates that may vary as permitted pursuant to a Par Formula and for such period or periods of time, all as may be provided in the bond order or trust agreement; and
- (5) May be made the subject of a remarketing agreement whereby an attempt is made to remarket the bonds to new purchasers prior to their presentment for payment to the provider of the Credit Facility or to the issuing municipality or the State.

No Credit Facility, repayment agreement, Par Formula or remarketing agreement shall become effective without the approval of the Commission.

As used in this subsection, the following terms shall have the following meanings:

“Credit Facility” means an agreement entered into by an issuing municipality or by the State Treasurer on behalf of the State with a bank, savings and loan association or other banking institution, an insurance company, reinsurance company, surety company or other insurance institution, a corporation, investment banker or other investment institution, or any financial institution providing for prompt payment of all or any part of the principal (whether at maturity, presentment for purchase, redemption or acceleration), redemption premium, if any, and interest on any bonds payable on demand or tender by the owner issued in accordance with this section, in consideration of the issuing municipality or the State agreeing to repay the provider of such Credit Facility in accordance with the terms and provisions of such repayment agreement, provided, that any such repayment agreement shall provide that the obligation of the issuing municipality or the State thereunder shall have only such sources of payment as are permitted for the payment of bonds issued under this Article.

“Par Formula” shall mean any provision or formula adopted by the issuing municipality or the State to provide for the adjustment, from time to time, of the interest rate or rates borne by any such bonds so that the purchase price

of such bonds in the open market would be as close to par as possible. (Ex. Sess. 1938, c. 2, s. 5; 1949, c. 1081; 1967, c. 100, s. 1; c. 711, s. 2; 1969, c. 688, s. 1; 1971, c. 780, s. 1; 1983, c. 554, s. 11; 1985, c. 265, s. 1; 1991, c. 508, s. 4.)

**Editor's Note.** — For provisions of ss. 21 through 25 of Session Laws 1983, c. 554, s. 11 of which amended this section, see the Editor's note under § 159-80.

Session Laws 1985, c. 265, ss. 3 to 5 provide:  
 "Sec. 3. The foregoing sections of this act shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing.

"Sec. 4. Nothing in this act shall be construed to impair the obligation of any bond, note or coupon outstanding on the effective date of this act.

"Sec. 5. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable."

### § 159-91. Lien of revenue bonds.

(a) All revenue bonds issued under this Article shall be equally and ratably secured by a pledge, charge, and lien upon revenues provided for in the bond order, without priority by reason of number, or of dates of bonds, execution or delivery, in accordance with the provisions of this Article and of the bond order; except that the State or a municipality may provide in a revenue bond order that revenue bonds issued pursuant thereto shall to the extent and in the manner prescribed in the order or agreement be subordinated and junior in standing, with respect to the payment of principal and interest and the security thereof, to any other revenue bonds.

(b) Any pledge made by the State or a municipality pursuant to this Article shall be valid and binding from the date of final passage of the bond order upon the issuance of any bonds or bond anticipation notes thereunder. The revenues, securities, and other moneys so pledged and then held or thereafter received by the State or a municipality, as the case may be, or any fiduciary shall immediately be subject to the lien of the pledge without any physical delivery thereof or further act, and the lien of the pledge shall be valid and binding as against all parties having claims of any kind in tort, contract, or otherwise against the State or a municipality, as the case may be, without regard to whether such parties have notice thereof. The bond order by which a pledge is created need not be filed or recorded in any manner other than as provided in this Chapter. (1971, c. 780, s. 1; 1983, c. 554, s. 12.)

**Editor's Note.** — For provisions of ss. 21 through 25 of Session Laws 1983, c. 554, s. 12 of

which amended this section, see the Editor's note under § 159-80.

### § 159-92. Status of revenue bonds under Uniform Commercial Code.

Whether or not the revenue bonds and interest coupons appertaining thereto are of such form and character as to be investment securities under Article 8 of the Uniform Commercial Code as enacted in this State, all revenue bonds represented by instruments and interest coupons appertaining thereto issued under this Article are hereby made investment securities within the meaning of and for all the purposes of Article 8 of the Uniform Commercial Code as enacted in this State, subject only to the provisions of the bonds pertaining to registration. (1971, c. 780, s. 1; 1983, c. 322, s. 3.)

**Editor's Note.** — The Uniform Commercial Code, referred to in this section, is found in Chapter 25 of the General Statutes.

### § 159-93. Agreement of the State.

The State of North Carolina does pledge to and agree with the holders of any revenue bonds or revenue bond anticipation notes heretofore or hereafter issued by the State or any municipality in this State that so long as any such bonds or notes are outstanding and unpaid the State will not limit or alter the rights vested in the State or the municipality at the time of issuance of the bonds or notes to establish, maintain, revise, charge, and collect such rates, fees, rentals, tolls, and other charges for the use, services, facilities, and commodities of or furnished by the revenue bond project in connection with which the bonds or notes, or bonds or notes refunded by the bonds or notes, were issued as shall produce revenues at least sufficient with other available funds to meet the expense of maintenance and operation of and renewal and replacements to such project, including reserves therefor, to pay when due the principal, interest, and redemption premiums (if any) of the bonds or notes, and to fulfill the terms of any agreements made with the bondholders or noteholders, nor will the State in any way impair the rights and remedies of the bondholders or noteholders until the bonds or notes and all costs and expenses in connection with any action or proceedings by or on behalf of the bondholders or noteholders, are fully paid, met, and discharged. (1971, c. 780, s. 1; 1973, c. 494, s. 20; 1983, c. 554, s. 13.)

**Editor's Note.** — For provisions of ss. 21 through 25 of Session Laws 1983, c. 554, s. 13 of which amended this section, see the Editor's note under § 159-80.

### § 159-94. Limited liability.

(a) Revenue bonds shall be special obligations of the State or the municipality issuing them. The principal of and interest on revenue bonds shall not be payable from the general funds of the State or the municipality, as the case may be, nor shall they constitute a legal or equitable pledge, charge, lien, or encumbrance upon any of its property or upon any of its income, receipts, or revenues, except the funds which are pledged under the bond order authorizing the bonds. Neither the credit nor the taxing power of the State or the municipality, as the case may be, are pledged for the payment of the principal or interest of revenue bonds, and no holder of revenue bonds has the right to compel the exercise of the taxing power by the State or the municipality, as the case may be, or the forfeiture of any of its property in connection with any default thereon. Every revenue bond shall recite in substance that the principal of and interest on the bond is payable solely from the revenues pledged to its payment and that the State or the municipality, as the case may be, is not obligated to pay the principal or interest except from such revenues.

(b) Repealed by Session Laws 2001-474, s. 39, effective November 29, 2001. (Ex. Sess. 1938, c. 2, s. 7; 1953, c. 922, s. 3; 1971, c. 780, s. 1; 1983, c. 554, s. 14; 1989, c. 168, s. 43; 2001-474, s. 39.)

**Editor's Note.** — For provisions of ss. 21 through 25 of Session Laws 1983, c. 554, s. 14 of which amended this section, see the Editor's note under § 159-80.

**Effect of Amendments.** — Session Laws 2001-474, s. 39, effective November 29, 2001, repealed subsection (b), which read: "The provisions of this section relating to a legal or

equitable pledge, charge, lien, or encumbrance upon real property or the forfeiture thereof shall not apply to revenue bonds issued by the North Carolina Low-Level Radioactive Waste Management Authority or by the North Carolina Hazardous Waste Management Commission."

## CASE NOTES

**Invocation of Taxing Power Not Provided For.** — Where defendant municipality, which owned and operated its own electric distributing system, proposed to issue bonds to obtain funds for the construction of a municipal hydroelectric generating plant to be operated separate and apart therefrom, and the resolution of the city authorizing the issuance of the bonds provided that they should be payable solely out of the revenues of the system, and the bonds themselves were to contain a like provision, such bonds were not a general indebted-

ness of the municipality and its taxing power could not be invoked to provide for their payment. Provision that the city, if it should voluntarily elect to take energy from its generating system for its own uses, should pay the cost of furnishing the energy so taken, which in no event should exceed a fair and reasonable charge therefor, did not indirectly provide for invocation of the taxing power for the payment of the bonds. *McGuinn v. City of High Point*, 217 N.C. 449, 8 S.E.2d 462, 128 A.L.R. 608 (1940), decided under former § 160-419.

### § 159-95. Approval of State agencies.

The general design and plan of any revenue bond project undertaken for water systems or facilities or sewage disposal systems or facilities shall be subject to the approval of the Commission for Health Services or the State Environmental Management Commission to the same extent that such projects would be if they were not financed by revenue bonds, and the provisions of the revenue bond order shall be consistent with any requirements imposed on the project by the Commission for Health Services or the State Environmental Management Commission. No revenue bond project for the acquisition or construction of systems or facilities for the generation, production, or transmission of gas or electric power may be undertaken by the State or a municipality unless the State or municipality, as the case may be, shall first obtain a certificate of convenience and necessity from the North Carolina Utilities Commission. (Ex. Sess. 1938, c. 2, s. 9; 1949, c. 1081; 1967, c. 555; 1969, c. 688, s. 2; 1971, c. 780, s. 1; 1973, c. 476, s. 128; c. 494, s. 21; c. 1262, s. 23; 1983, c. 554, s. 15.)

**Editor's Note.** — For provisions of ss. 21 through 25 of Session Laws 1983, c. 554, s. 15 of which amended this section, see the Editor's note under § 159-80.

### § 159-96. Limitation on extraterritorial operation of enterprises financed by revenue bonds.

(a) Each utility or public service enterprise listed in G.S. 159-81(3), if financed wholly or partially by revenue bonds issued under this Article, shall be owned or operated by the municipality for its own use and for the use of public and private consumers residing within its corporate limits or, in the case of a joint agency or undertaking established pursuant to Part 1 of Article 20 of Chapter 160A of the General Statutes, for the use of the municipalities that established the joint agency or undertaking and for the use of the public and private consumers residing within their corporate limits. A utility or public service enterprise financed wholly or partially by revenue bonds, when operated primarily for the municipality's own use and for users within its corporate limits or, in the case of two or more municipalities participating in a joint agency or undertaking, when operated primarily for the use of the municipalities that established the joint agency or undertaking, may be operated incidentally for users outside the corporate limits of either the issuing unit or a participating municipality. Provided, however, that revenue bonds may be issued for the purpose of financing in whole or in part mass transit systems, aeronautical facilities, marine facilities and systems, systems or facilities for the generation, production, transmission, or distribution of gas

(natural, artificial, or mixed), facilities and equipment for the collection, treatment or disposal of solid waste, notwithstanding that such systems, facilities or equipment may be operated for users outside the corporate limits of a municipality that is an issuing unit where the municipality finds that the systems, facilities, or equipment so financed would benefit the municipality or, in the case of two or more municipalities participating in a joint agency or undertaking, where the municipalities that are the issuing units find that the systems, facilities, or equipment so financed would benefit the municipalities that established the joint agency or undertaking.

Revenue bonds may not be issued for the purpose of financing in whole or in part systems or facilities for the transmission or distribution of gas (natural, artificial, or mixed) to users outside the corporate limits of a municipality to whom service is available or will be available within a reasonable time from a local distribution natural gas utility pursuant to a certificate of public convenience and necessity issued by the North Carolina Utilities Commission. A finding by the governing body of a municipality that is an issuing unit that the systems or facilities to be provided by the financing will not provide service to users to whom such service is available or will be available within a reasonable time from a local distribution natural gas utility shall be conclusive upon (i) the expiration of a 45 day period following the making of such finding, (ii) the mailing by the municipality of a copy of such notice within five days after the making of such finding to any local distribution company certificated to provide service to the area in which the facilities are to be located, and (iii) the absence of a written objection to such finding being mailed by any such certificated local distribution company to the municipality by not later than five days prior to the end of such 45 day period, all such mailings to be properly given or made if sent by United States registered mail, return receipt requested, postage prepaid. Time shall be computed pursuant to G.S. 1A-1, Rule 6(a).

(b) A revenue bond project financed wholly or partially by revenue bonds of the State may be located either within or without the State and, when operated primarily for the State's own use and for users within the State, may be operated incidentally for users outside the State.

(c) Repealed by Session Laws 2001-474, s. 39, effective November 29, 2001.

(d) Notwithstanding the provisions of subsections (a) and (b) of this section and G.S. 160A-312, municipalities may acquire sewage collection and disposal systems and water supply and distribution systems located within and without the corporate limits of such municipalities and finance such acquisition with revenue bonds. Further, municipalities may own, maintain and operate such acquired systems, enlarge and improve such acquired systems and finance the enlargement and improvement of such acquired systems with revenue bonds. This subsection applies only to acquisitions by municipalities financed by revenue bonds during the calendar year ending December 31, 1989. (1971, c. 780, s. 1; 1973, c. 1325; 1983, c. 554, s. 16; c. 795, s. 5; 1989, c. 168, s. 44; c. 263; 1991, c. 511, s. 1; 2001-414, s. 50; 2001-474, s. 39.)

**Editor's Note.** — For provisions of ss. 21 through 25 of Session Laws 1983, c. 554, s. 16 of which amended this section, see the Editor's note under § 159-80.

Session Laws 1983, c. 795, which rewrote the last sentence in the first paragraph, provides in s. 7: "Sections 5 and 6 of this act shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in

derogation of any powers now existing."

Session Laws 1991, c. 511, s. 2 provides that c. 511, which rewrote subsection (a), provides an additional and alternative method for accomplishing the things authorized thereby, is supplemental and additional to powers conferred by other laws, and is not in derogation of any powers now existing.

**Effect of Amendments.** — Session Laws 2001-414, s. 50, effective September 14, 2001, rewrote the first paragraph of subsection (a), and in the second paragraph of that subsection,

inserted "Revenue" at the beginning of the first sentence, and inserted "is an issuing unit that" in the second sentence.

Session Laws 2001-474, s. 39, effective November 29, 2001, repealed subsection (c), which read: "The provisions of subsection (b) of this

section shall not apply to the financing of any revenue bond project by the North Carolina Low-Level Radioactive Waste Management Authority or by the North Carolina Hazardous Waste Management Commission."

## § 159-97. Taxes for supplementing revenue bond projects.

(a) For the purpose of supplementing the revenues of a revenue bond project, as defined in this section, any county or city may covenant with, or may enter into an agreement with a municipality for the benefit of the holders of revenue bonds of the issuing municipality issued pursuant to this Article, whereby such county or city agrees to:

- (1) Levy for the life of all revenue bonds issued in connection with the revenue bond project an annual property tax not in excess of the rate set forth in the question submitted to voters as hereinafter provided, such levy to be based upon the operating supplement requirement, as defined in this section, or
- (2) Levy for the life of the revenue bonds in respect of which such tax is being levied an annual property tax not in excess of the rate required to pay the principal of and the interest on the aggregate principal amount of revenue bonds set forth in the question submitted to the voters as hereinafter provided, such levy to be based upon the debt service reserve supplement requirement, as defined in this section.

When any such covenant has been made or any such agreement has been entered into, the issuing municipality shall determine, and, in those instances in which the issuing municipality is not also the taxing county or city, the issuing municipality shall certify to the governing board of the taxing county or city, by not later than June 1 of each fiscal year the amount required, determined as hereinafter provided, to be raised by taxation by such county or city in the next fiscal year. The county or city is obligated to levy such tax only to the extent that an operating supplement requirement or a debt service reserve supplement requirement shall occur during the fiscal year preceding the fiscal year in which the tax is to be levied. In no event shall the county or city be required to levy a tax in excess of the rate required to be levied in accordance with the approval of the voters as provided in subsection (c). When any such tax is to be levied, the county or city shall include in its budget ordinance an appropriation to the issuing municipality or the appropriate fund, as the case may be, equal to the estimated yield of the tax levy, and shall pay such appropriation to the issuing municipality or transfer moneys to the appropriate fund in equal monthly installments unless another mutually satisfactory schedule of payments is agreed upon.

(b) A covenant made, or the pledge of an agreement entered into, by a county or city pursuant to this section shall be effected by the provisions of the revenue bond order or the trust agreement securing revenue bonds of the issuing municipality and where the issuing municipality is not also the taxing county or city a resolution of the county or city approving the appropriate provisions of the bond order or trust agreement relating to the pledge of the tax. If the taxing county or city is not the issuing municipality, it shall file an application for approval of the resolution with the secretary of the Commission in the manner provided in G.S. 159-149, and the Commission shall determine whether to approve the application as provided by G.S. 159-151 and 159-152; provided, however, that G.S. 159-148 and 159-150 shall have no application to this section.

(c) A covenant made, or agreement entered into, by a county or city pursuant to this section shall take effect only if approved by the affirmative

vote of a majority of those who vote thereon in a referendum held in the taxing county or city. The referendum shall be called and held as provided in G.S. 159-61, except that

- (1) The ballot proposition shall be in substantially one of the following forms:

*Operating Supplement Requirement:*

“Shall the (order or agreement) binding the (taxing county or city) to levy annually a tax on property not in excess of \_\_\_\_\_ cents on the one hundred dollars (\$100.00) value of property subject to taxation for the purpose of supplementing the revenues of (revenue bond project) in instances where the gross revenues of the project are estimated to be less than the estimated total costs of the (i) current operating expenses of the project, (ii) amount required to maintain the debt service reserve by repaying any withdrawals therefrom in respect of all outstanding bonds issued in connection with the project and (iii) debt service on all outstanding bonds issued in connection with the project, all as defined in such (order or agreement), the proceeds of such tax to be used for the payment of the current operating expenses of the project so long as any revenue bonds issued therefor remain outstanding and unpaid, be approved?

- Yes
- No”

*Debt Service Reserve Supplement Requirement:*

“Shall the (order or agreement) binding the (taxing county or city) to levy annually, without limitation as to rate or amount, a tax on property subject to taxation for the purpose of supplementing the revenues of (revenue bond project) for maintaining the debt service reserve required by said (order or agreement) in connection with the issuance of not in excess of \$ \_\_\_\_\_ revenue bonds of (the issuing municipality), so long as any of such revenue bonds remain outstanding and unpaid, be approved?

- Yes
- No”

and

- (2) The published statement of result shall have the following statement appended:

“Any action or proceeding challenging the regularity or validity of this supplemental tax referendum must be begun within 30 days after (date of publication).

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(title of governing board).”

(d) Any action or proceeding in any court to set aside a supplemental tax referendum held under this section, or to obtain any other relief, upon the ground that the referendum is invalid or was irregularly conducted, must be begun within 30 days after the publication of the statement of the result of the referendum. After the expiration of this period of limitation, no right of action or defense based upon the invalidity of or any irregularity in the referendum shall be asserted, nor shall the validity of the referendum be open to question in any court upon any ground whatever, except in an action or proceeding begun within the period of limitation prescribed in this subsection.

(e) An order or agreement submitted to and approved by the voters pursuant to this section may be repealed at any time before bonds are issued pursuant thereto.

(f) In instances where the taxing county or city is not the issuing municipality, such county or city may levy taxes as provided for in this section in respect of a revenue bond project located outside its corporate limits provided

that such county or city is entitled by law to appoint one or more members of the governing body of such municipality.

(g) For the purposes of this section,

- (1) A "revenue bond project" is limited, notwithstanding the provisions of G.S. 159-81, to (i) aeronautical facilities, including but not limited to airports, terminals and hangars, (ii) hospitals and other health-related facilities, and (iii) systems, facilities and equipment for the collection, treatment or disposal of solid waste within the meaning of said G.S. 159-81;
- (2) An "operating supplement requirement" occurs when, as set forth in the budget prepared by the issuing municipality in respect of the revenue bond project, the estimated cost in the next succeeding fiscal year of the (i) current operating expenses of the revenue bond project, (ii) amount required to maintain the debt service reserve by repaying any withdrawals therefrom in respect of all outstanding bonds issued in connection with the revenue bond project, and (iii) debt service on all outstanding bonds issued in connection with the revenue bond project, are in excess of the pledged revenues of the revenue bond project for such fiscal year as estimated by the issuing municipality, excluding taxes levied pursuant to this section; provided, however, that the amount of the operating supplement requirement shall not exceed the total amount of the current operating expenses of the revenue bond project mentioned in clause (i) above, and
- (3) A "debt service reserve supplement requirement" occurs when there have been withdrawn from the debt service reserve any moneys for the purpose of paying debt service on the bonds in respect of which the supplemental tax has been authorized by the voters; provided, however, that the amount of the debt service reserve supplement requirement shall not exceed the amount so withdrawn.

(h) Any covenant or agreement of a county or city made pursuant to this section, and the obligations assumed thereby, shall be excludable from the gross debt of the county or city for purposes of the statement of debt mentioned in G.S. 159-55.

(i) For the purposes of this section the terms county or city shall include a special airport district with respect to financing of aeronautical facilities. (1973, c. 786, s. 1; 1979, c. 727, s. 5; 1983, c. 795, s. 6.)

**Editor's Note.** — Session Laws 1983, c. 795, s. 7, provided: "Sections 5 and 6 of this act shall be deemed to provide an additional and alternative method for the doing of the things au-

thorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing."

§ 159-98: Reserved for future codification purposes.

ARTICLE 5A.

*Capital Appreciation Bonds.*

§ 159-99. **Issuance of capital appreciation bonds pursuant to The Local Government Bond Act.**

Local governmental units are hereby authorized to issue capital appreciation bonds pursuant to the provisions of The Local Government Bond Act and to the extent that the provisions of said act are inconsistent with the issuance of such bonds, such inconsistent provisions are hereby amended to the extent of such inconsistency so as to permit the issuance of such bonds. (1987, c. 650.)

## § 159-100. Issuance of capital appreciation bonds pursuant to The State and Local Government Revenue Bond Act.

The State and local governmental units are hereby authorized to issue capital appreciation bonds pursuant to the provisions of The State and Local Government Revenue Bond Act and to the extent that the provisions of said act are inconsistent with the issuance of such bonds, such inconsistent provisions are hereby amended to the extent of such inconsistency so as to permit the issuance of such bonds. (1987, c. 650.)

### ARTICLE 6.

#### *Economic Development Financing Act.*

§§ 159-101 through 159-114: Not in effect.

**Editor's Note.** — An Article 6 entitled “Economic Development Financing Act” was enacted by Session Laws 1993, c. 497, s. 2, but was made effective upon certification of approval of an amendment to Article V of the Constitution of North Carolina relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue financing bonds to be used to finance public activities associated with private economic development projects. Such an amendment was submitted to the people on November 2, 1993 and was defeated. This Article, therefore, never took effect.

An earlier Article 6, “Tax Increment Financing Act” was enacted by Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 1, but was made effective on certification of approval of an amendment to the state Constitution authorizing the enactment of general laws dealing with transactions of the type contemplated by the act. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, was submitted to the people on Nov. 2, 1982, and was defeated. The earlier Article 6, therefore, never took effect.

§§ 159-115 through 159-119: Reserved for future codification purposes.

### ARTICLE 7.

#### *Issuance and Sale of Bonds.*

## § 159-120. Definitions.

As used in this Article, unless the context clearly requires another meaning, the words “unit” or “issuing unit” mean “unit of local government” as defined in G.S. 159-44, “municipality” as defined in G.S. 159-81, and the State of North Carolina, and the words “governing body,” when used with respect to the State of North Carolina, mean the Council of State. (1973, c. 494, s. 30; 1981 (Reg. Sess., 1982), c. 1276, s. 3; 1983, c. 554, s. 17.)

**Editor's Note.** — An amendment to this section by Session Laws 1993, c. 497, s. 6, was made effective upon certification of approval of an amendment to Article V of the Constitution of North Carolina relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue financing bonds to be used to finance public

activities associated with private economic development projects. This amendment was submitted to the people on November 2, 1993 and was defeated. The amendment to this section, therefore, never took effect.

An earlier amendment to this section in Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 3, was made effective on certification of approval

of a state constitutional amendment authorizing the enactment of laws dealing with transactions of the type contemplated by the act. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, was submitted to the people on Nov. 2, 1982, and was defeated. The amendment to this section, therefore, did not go into effect.

For provisions of ss. 21 through 25 of Session Laws 1983, c. 554, which amended this section, see the Editor's Note under § 159-80.

Session Laws 1987 (Reg. Sess., 1988), c. 882, s. 6 provides: "All actions and proceedings heretofore taken by units of local government relating to the authorization of general obligation refunding bonds, secured by a pledge of the taxing power and issued pursuant to the Local Government Bond Act, and revenue refunding bonds, secured by a pledge of revenues and issued pursuant to The State and Local Government Revenue Bond Act, and the sale and delivery of all such bonds pursuant to Article 7, as amended, of Chapter 159 of the General Statutes of North Carolina, in order to provide funds to purchase, at a discount, bonds of such units owned by the Farmers Home Administration, including without limitation, the introduction and adoption of bond orders, the holding of public hearings with respect to such bond orders, the passage of resolutions providing for the issuance and the sale, both public and

private, of such refunding bonds, and the delivery of any such refunding bonds are hereby in all respects approved, ratified, validated, and confirmed."

Session Laws 1989, c. 90, effective May 5, 1989, provides: "All actions and proceedings heretofore taken since June 15, 1988, by units of local government relating to the authorization of general obligation refunding bonds, secured by a pledge of the taxing power and issued pursuant to The Local Government Bond Act, and revenue refunding bonds, secured by a pledge of revenues and issued pursuant to The State and Local Government Revenue Bond Act, and the sale and delivery of all such bonds pursuant to Article 7, as amended, of Chapter 159 of the General Statutes, in order to provide funds to purchase, at a discount, bonds of such units owned by the Farmers Home Administration, including without limitation, the introduction and adoption of bond orders, the holding of public hearings with respect to such bond orders, the passage of resolutions providing for the issuance and the sale, both public and private, of such refunding bonds, and the delivery of any such refunding bonds are hereby in all respects approved, ratified, validated, and confirmed."

**Legal Periodicals.** — For a symposium on municipal finance, see 1976 Duke L.J. 1051.

## § 159-121. Coupon or registered bonds to be issued.

Bonds may be issued as (i) coupon bonds payable to bearer, (ii) coupon bonds registrable as to principal only or as to both principal and interest, or (iii) bonds without coupons registered as to both principal and interest. Each issuing unit may appoint or designate a bond registrar who shall be charged with the duty of attending to the registration and the registration of transfer of bonds. (1917, c. 138, s. 29; 1919, c. 178, s. 3(29); C.S., s. 2955; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 36; 1971, c. 780, s. 1; 1973, c. 494, s. 22.)

## § 159-122. Maturities of bonds.

(a) Except as provided in this subsection, the last installment of each bond issue shall mature not later than the date of expiration of the period of usefulness of the capital project to be financed by the bond issue, computed from the date of the bonds. The last installment of a refunding bond issue issued pursuant to G.S. 159-48(a)(4) or (5) shall mature not later than either (i) the shortest period, but not more than 40 years, in which the debt to be refunded can be finally paid without making it unduly burdensome on the taxpayers of the issuing unit, as determined by the Commission, computed from the date of the bonds, or (ii) the end of the unexpired period of usefulness of the capital project financed by the debt to be refunded. The last installment of bonds issued pursuant to G.S. 159-48(a)(1), (2), (3), (6), or (7) shall mature not later than 10 years after the date of the bonds, as determined by the Commission. The last installment of bonds issued pursuant to G.S. 159-48(c)(5) shall mature not later than eight years after the date of the bonds, as determined by the Commission.

(b) The Commission shall by regulation establish the maximum period of usefulness of the capital projects for which units of local government may issue bonds, but no capital project may be assigned a period of usefulness in excess of 40 years.

(c) The determination of the Commission as to the classification of the capital projects for which a particular bond issue is authorized, and the Commission's determination of the maximum period of usefulness of the project, as evidenced by the secretary's certificate, shall be conclusive in any action or proceeding involving the validity of the bonds. (1917, c. 138, s. 18; 1919, c. 178, s. 3(18); C.S., s. 2942; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 11; 1929, c. 170; c. 171, s. 2; 1931, c. 60, ss. 50, 56; cc. 188, 301; 1933, c. 259, ss. 1, 2; 1953, c. 1065, s. 1; 1957, c. 266, s. 2; 1967, c. 987, s. 3; c. 1001, s. 2; c. 1086, ss. 1, 2, 4, 5; 1969, cc. 475, 834; 1971, c. 780, s. 1; 1973, c. 494, s. 23; 1981 (Reg. Sess., 1982), c. 1276, s. 4.)

**Editor's Note.** — An amendment to subsection (a) of this section by Session Laws 1993, c. 497, s. 7, was made effective upon certification of approval of an amendment to Article V of the Constitution of North Carolina relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue financing bonds to be used to finance public activities associated with private economic development projects. This amendment was submitted to the people on November 2, 1993 and was defeated. The amendment to subsection (a) of this section, therefore, never took effect.

An earlier amendment to this section in Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 4, was made effective on certification of approval of a state constitutional amendment authorizing the enactment of laws dealing with transactions of the type contemplated by the act. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, was submitted to the people on Nov. 2, 1982, and was defeated. The amendment to this section, therefore, did not go into effect.

## § 159-123. Sale of bonds by sealed bids; private sales.

(a) Bonds issued by units of local government shall be sold by the Local Government Commission after advertisement and upon sealed bids, except as otherwise authorized by subsection (b) of this section.

(b) The following classes of bonds may be sold at private sale:

- (1) Bonds that a State or federal agency has previously agreed to purchase.
- (2) Any bonds for which no legal bid is received within the time allowed for submission of bids.
- (3) Revenue bonds, including any refunding bonds issued pursuant to G.S. 159-84, and special obligation bonds issued pursuant to Chapter 159I of the General Statutes.
- (4) Refunding bonds issued pursuant to G.S. 159-78.
- (5) Refunding bonds issued pursuant to G.S. 159-72 if the Local Government Commission determines that a private sale is in the best interest of the issuing unit.
- (6) Bonds designated as qualified zone academy bonds pursuant to G.S. 115C-489.6, if the Local Government Commission determines that a private sale is in the best interest of the issuing unit.

(c) When the issuing unit wishes to have a private sale of bonds, the governing board of the issuing unit shall adopt and file with the Commission a resolution requesting that the bonds be sold at private sale without advertisement to any purchaser or purchasers thereof, at such prices as the Commission determines to be in the best interest of the issuing unit, subject to the approval of the governing board of the issuing unit or one or more persons designated by resolution of the governing board of the issuing unit to approve such prices. Upon receipt of a resolution requesting a private sale of bonds, the

Commission may offer them to any purchaser or purchasers without advertisement, and may sell them at any price the Commission deems in the best interest of the issuing unit, subject to the approval of the governing board of the issuing unit or the person or persons designated by resolution of the governing board of the issuing unit to approve such prices. For purposes of this subsection, any resolution of the governing board of the issuing unit which designates a person or persons to approve any price or prices shall also establish a minimum purchase price and a maximum interest rate or maximum interest cost and such other provisions relating to approval as it may determine. Notwithstanding any provisions of this Chapter to the contrary, general obligation bonds issued pursuant to Article 4 of this Chapter may be sold at private sale at not less than ninety-eight percent (98%) of the face value of the bonds plus one hundred percent (100%) of accrued interest.

(d) This section shall not apply to funding or refunding bonds when the governing board of the issuing unit and the holders of the debt to be funded or refunded have agreed to exchange the original obligations for new ones at the same or an adjusted rate of interest. This section also shall not apply to debt instruments that the State has previously agreed to purchase pursuant to Chapter 159G of the General Statutes.

(e) The issuing unit shall have the authority, subject to approval by the Commission, to select and retain the financial consultants, underwriters and bond attorneys to be associated with the bond issue. If the issuing unit shall affirmatively find that the underwriter, financial consultant or bond attorney selected and retained has adequately provided, in similar financial transactions, services of a nature and sophistication comparable to those required for the issuance and sale of the bonds in question and possesses the expertise necessary to perform the services required, approval of a financial consultant, underwriter or bond attorney shall not be withheld by the Commission solely for the reason that the underwriter, financial consultant or bond attorney has not had prior experience in the issuance and sale of a particular type, class or size of bond issue for which the underwriter, financial consultant or bond attorney is retained.

(f) The Commission shall not reject an application for approval of a bond issue because of the issuing units' selection of financial consultants, underwriters or bond attorneys so long as the selection is made in accordance with G.S. 159-123(e). Nothing herein shall limit or otherwise modify the role or powers of the Commission and its staff to review, approve, sell or participate in the sale of bonds pursuant to this Article. (1931, c. 60, ss. 17, 19; c. 296, s. 1; 1933, c. 258, s. 1; 1969, c. 943; 1971, c. 780, s. 1; 1977, c. 201, s. 4; 1985, c. 723, s. 1; 1987, c. 585, s. 3; c. 796, s. 4; 1989, c. 756, s. 5; 1991 (Reg. Sess., 1992), c. 1007, s. 43; 2000-69, s. 2.)

**Editor's Note.** — An amendment to subsection (b) of this section by Session Laws 1993, c. 497, s. 8, was made effective upon certification of approval of an amendment to Article V of the Constitution of North Carolina relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue financing bonds to be used to finance public activities associated with private economic development projects. This amendment was submitted to the people on November 2, 1993 and was defeated. The amendment to subsection (b) of this section, therefore, never took effect.

An earlier amendment to this section in Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 5,

was made effective on certification of approval of a state constitutional amendment authorizing the enactment of laws dealing with transactions of the type contemplated by the act. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, was submitted to the people on Nov. 2, 1982, and was defeated. The amendment to this section, therefore, did not go into effect.

Session Laws 1987, c. 585, which in s. 3 amended this section by rewriting subsection (c), in ss. 7 and 8 provides: "The foregoing sections of this act shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and addi-

tional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing.

“Nothing in this act shall be construed to impair the obligation of any bond, note or coupon issued under The Local Government Finance Act and outstanding on the effective date of this act.”

Session Laws 1989, c. 756, s. 9 provides: “This act shall be construed liberally to effectuate the legislative intent and the purposes as complete and independent authority for the performance of each and every act and thing authorized by this act, and all powers granted shall be broadly interpreted to effectuate the intent and purposes and not as a limitation of powers.”

Session Laws 2000-69, ss. 4(a)-(c), provide: “Interpretation of Act.”

“(a) Additional Method. This act provides an

additional and alternative method for the doing of the things it authorizes and is as supplemental and additional to powers conferred by other laws. Except as otherwise expressly provided, it does not derogate any powers now existing.”

“(b) Statutory References. References in this act to specific sections or Chapters of the General Statutes are intended to be references to those sections or Chapters as they may be amended from time to time by the General Assembly.”

“(c) Liberal Construction. This act, being necessary for the health and welfare of the people of the State, shall be liberally construed to effect its purposes.”

Session Laws 2000-69, s. 4(d) contains a severability clause.

**Effect of Amendments.** — Session Laws 2000-69, s. 2, effective June 30, 2000, added subdivision (b)(6).

## § 159-124. Date of sale; notice of sale and blank proposal.

The date of sale shall be fixed by the secretary in consultation with the issuing unit. Prior to the sale date, the secretary shall take such steps as are most likely, in his opinion, to give notice of the sale to all potential bidders within or without this State or the United States of America, taking into consideration the size and nature of the issue.

The secretary shall maintain a mailing list for notices of sale and blank proposals, and shall place thereon any person, firm, or corporation so requesting. Failure to send copies of notices and blank proposals to persons, firms, or corporations on the mailing list shall in no way affect the legality of the bonds.

The secretary shall prepare a notice of sale and blank proposal for bids for each bond issue required to be sold by sealed bids. The notice and blank proposal may be combined with such fiscal information as the secretary deems appropriate, and shall contain:

- (1) A statement that the bonds are to be sold upon sealed bids without auction.
- (2) The aggregate principal amount of the issue.
- (3) The time and place of sale, the time within which bids must be received, the place to which bids must be delivered, and the time and place at which bids will be opened, which place or places may be within or without this State or the United States of America.
- (4) Instructions for entering bids.
- (5) Instructions as to the amount of bid deposit required, the form in which it is to be made, and the effect of failure of the bidder to comply with the terms of his bid. (1931, c. 60, s. 17; c. 296, s. 1; 1933, c. 256, s. 1; 1969, c. 943; 1971, c. 780, s. 1; 1987, c. 585, ss. 4, 5.)

**Editor’s Note.** — Session Laws 1987, c. 585, which in ss. 4 and 5 amended this section, in ss. 7 and 8 provides: “The foregoing sections of this act shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be

regarded as in derogation of any powers now existing.

“Nothing in this act shall be construed to impair the obligation of any bond, note or coupon issued under The Local Government Finance Act and outstanding on the effective date of this act.”

### § 159-125. Bid instructions; bid deposit.

(a) Except for revenue bonds, no bid for less than the ninety-eight percent (98%) of the face value of the bonds plus one hundred percent (100%) of accrued interest may be entertained.

Different rates of interest may be bid for bonds maturing in different years, but different rates of interest may not be bid for bonds maturing in the same year.

(b) Each bid shall be accompanied by a bid deposit equal to two percent (2%) of the aggregate principal amount of the bond issue. The bid deposit shall be made in a form approved by the Commission, and shall secure the issuing unit against loss resulting from the bidder's failure to comply with the terms of his bid. This subsection shall not apply to bids entered by a State or federal agency.

(c) When a State or federal agency has agreed to purchase the bonds at a stated rate of interest unless more favorable bids are received, bids may be entertained from other purchasers for less than all of the bonds. (1931, c. 60, ss. 17, 19; c. 296, s. 1; 1933, c. 258, s. 1; 1969, c. 943; 1971, c. 780, s. 1; 1981 (Reg. Sess., 1982), c. 1276, s. 6; 1987, c. 585, s. 6.)

**Editor's Note.** — An amendment to subsection (a) of this section by Session Laws 1993, c. 497, s. 9, was made effective upon certification of approval of an amendment to Article V of the Constitution of North Carolina relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue financing bonds to be used to finance public activities associated with private economic development projects. This amendment was submitted to the people on November 2, 1993 and was defeated. The amendment to subsection (a) of this section, therefore, never took effect.

An earlier amendment to this section in Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 6, was made effective on certification of approval of a state constitutional amendment authorizing the enactment of laws dealing with trans-

actions of the type contemplated by the act. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, was submitted to the people on Nov. 2, 1982, and was defeated. The amendment to this section, therefore, did not go into effect.

Session Laws 1987, c. 585, ss. 7 and 8 provide: "The foregoing sections of this act shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing.

"Nothing in this act shall be construed to impair the obligation of any bond, note or coupon issued under The Local Government Finance Act and outstanding on the effective date of this act."

### § 159-126. Rejection of bids.

No legal bid may be rejected unless all bids are rejected. All bids shall be rejected upon objection to award by an authorized representative of the issuing unit. If bids have been rejected, another notice of sale shall be given and further bids invited. (1931, ch. 60, s. 18; 1935, c. 356, s. 1; 1939, c. 231, s. 3; 1971, c. 780, s. 1.)

### § 159-127. Award of bonds.

All bids received pursuant to a public sale shall be opened in public on a date and at a time and place to be specified in the notice of sale. The bond shall be awarded to the bidder offering to purchase the bonds at the lowest interest cost to the issuing unit. In calculating such interest cost, the amount of any premium bid shall be deducted from the aggregate amount of interest on the entire issue until maturity. (1931, c. 60, s. 18; 1935, c. 356, s. 1; 1939, c. 231, s. 3; 1971, c. 780, s. 1.)

## § 159-128. Makeup and formal execution of bonds; temporary bonds.

The governing board of the issuing unit shall determine the form and manner of execution of the bonds, including any interest coupons to be attached thereto. The board may also provide for the authentication of the bonds by a trustee or fiscal agent. The board may authorize the use of facsimile signatures and seals on the bonds and coupons, if any, but at least one manual signature (which may be the signature of the representative of the Commission to the Commission's certificate) must appear on each bond that is represented by an instrument. Delivery of bonds executed in accordance with the board's determination shall be valid notwithstanding any change in officers or in the seal of the issuing unit occurring after the original execution of the bonds.

Before definitive bonds are prepared, the unit may issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when they have been executed and are available for delivery. (1917, c. 138, s. 28; 1919, c. 178, s. 3(28); C.S., s. 2954; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 35; 1969, c. 29; 1971, c. 780, s. 1; 1983, c. 322, s. 4.)

## § 159-129. Obligations of units certified by Commission.

Each bond or bond anticipation note that is represented by an instrument shall bear on its face or reverse a certificate signed by the secretary of the Commission or an assistant designated by him that the issuance of the bond or note has been approved under the provisions of The Local Government Bond Act of The Local Government Revenue Bond Act. Such signature may be a manual or facsimile signature as the Commission may determine. Each bond or bond anticipation note that is not represented by an instrument shall be evidenced by a writing relating to such obligation, which writing shall identify such obligation or the issue of which it is part, bear such certificate and be on file with the Commission. The certificate shall be conclusive evidence that the requirements of this Subchapter have been observed, and no bond or note without the Commission's certificate or with respect to which a writing bearing such certificate has not been filed with the Commission shall be valid. (1931, c. 60, s. 22; c. 296, s. 2; 1971, c. 780, s. 1; 1973, c. 494, s. 24; 1981 (Reg. Sess., 1982), c. 1276, s. 7; 1983, c. 322, s. 5.)

**Editor's Note.** — An amendment to this section by Session Laws 1993, c. 497, s. 10, was made effective upon certification of approval of an amendment to Article V of the Constitution of North Carolina relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue financing bonds to be used to finance public activities associated with private economic development projects. This amendment was submitted to the people on November 2, 1993 and was defeated. The amendment to this section,

therefore, never took effect.

An earlier amendment to this section in Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 7, was made effective on certification of approval of a state constitutional amendment authorizing the enactment of laws dealing with transactions of the type contemplated by the act. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, was submitted to the people on Nov. 2, 1982, and was defeated. The amendment to this section, therefore, did not go into effect.

### CASE NOTES

**Year Debt Contracted.** — A county board of education's debt to the State Literary Fund was held to have been contracted during the fiscal year following that in which the county debt was reduced in accordance with N.C. Const., Art. V, § 4, even though the certificate of the

secretary of the Local Government Commission was not executed within that time, since the certificate of the Local Government Commission was a detail not required by statute to be performed within any time limit, and the county accepted the offer to lend before the

expiration of the fiscal year during which the increase in its indebtedness was permissible under the Constitution. Board of Educ. v. State

Bd. of Educ., 217 N.C. 90, 6 S.E.2d 833 (1940), decided under former version of § 159-18.

### § 159-130. Record of issues kept.

The secretary shall make a record of all bonds and notes issued under this Subchapter, showing the name of the issuing unit, the amount, date, the time fixed for payment of principal and interest, the rate of interest, the place at which the principal and interest will be payable, the denominations, the purpose of issuance, the name of the board in which is vested the authority and power to levy taxes or raise other revenues for the payment of the principal and interest thereof, and a reference to the law under which the bonds or notes were issued. The clerk of the issuing unit shall file with the secretary copies of all proceedings of the board in authorizing the bonds or notes, his certificate that they are correctly recorded in a bound book of the minutes and proceedings of the board, and a notation of the pages or other identification of the exact portion of the book in which the records appear. (1931, c. 60, s. 23; 1971, c. 780, s. 1; 1973, c. 494, s. 25.)

### § 159-131. Contract for services to be approved by Commission.

Any contract or agreement made by any unit with any person, firm, or corporation for services to be rendered in drafting forms of proceedings for a proposed bond issue or a proposed issue of notes shall be void unless approved by the Commission. Before giving its certificate to bonds or notes, the Commission shall satisfy itself by such evidence as it may deem sufficient, that no unapproved contract is in effect. This section shall not apply to contracts and agreements with attorneys-at-law licensed to practice before the courts of the State within which they have their residence or regular place of business so long as the contracts or agreements involve only legal services. (1931, c. 60, s. 24; 1971, c. 780, s. 1; 1973, c. 494, s. 26.)

### § 159-132. State Treasurer to deliver bonds and remit proceeds.

When the bonds are executed, they shall be delivered to the State Treasurer who shall deliver them to the order of the purchaser and collect the purchase price or proceeds. The Treasurer shall then pay from the proceeds any notes issued in anticipation of the sale of the bonds, deduct from the proceeds the Commission's expense in connection with the issue, and remit the net proceeds to the official depository of the unit after assurance that the deposit will be adequately secured as required by law. The proceeds of funding or refunding bonds may be deposited at the place of payment of the indebtedness to be refunded or funded for use solely in the payment of such indebtedness. The proceeds of revenue bonds shall be remitted to the trustee or other depository specified in the trust agreement or resolution securing them. (1931, c. 60, s. 25; 1935, c. 356, s. 2; 1971, c. 780, s. 1; 1981 (Reg. Sess., 1982), c. 1276, s. 8.)

**Editor's Note.** — An amendment to this section by Session Laws 1993, c. 497, s. 11, was made effective upon certification of approval of an amendment to Article V of the Constitution of North Carolina relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue

financing bonds to be used to finance public activities associated with private economic development projects. This amendment was submitted to the people on November 2, 1993 and was defeated. The amendment to this section, therefore, never took effect.

An earlier amendment to this section in Ses-

sion Laws 1981 (Reg. Sess., 1982), c. 1276, s. 8, was made effective on certification of approval of a state constitutional amendment authorizing the enactment of laws dealing with transactions of the type contemplated by the act.

Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, was submitted to the people on Nov. 2, 1982, and was defeated. The amendment to this section, therefore, did not go into effect.

### § 159-133. Suit to enforce contract of sale.

The Commission may enforce in any court of competent jurisdiction any contract or agreement made by the Commission for the sale of any bonds or notes of a unit. (1931, c. 60, s. 26; 1971, c. 780, s. 1; 1973, c. 494, s. 27.)

### § 159-134. Fiscal agents.

An issuing unit may employ a bank or trust company either within or without this State as fiscal agent for the payment of installments of principal and interest on the bonds, and for the destruction of paid or cancelled bonds and coupons, and may pay reasonable fees for this service not in excess of maximum rates to be fixed by regulation of the Commission. If an issuing unit employs another person as such fiscal agent or any other person for other services pursuant to the Registered Public Obligations Act of North Carolina, then it may pay reasonable fees for such services not in excess of maximum rates to be fixed by regulation of the Commission. (1971, c. 780, s. 1; 1983, c. 322, s. 6.)

### § 159-135. Application of proceeds.

After payment of any notes issued in anticipation of the sale of the bonds and after payment of the cost of preparing, marketing, and issuing the bonds, the proceeds of the sale of a bond issue shall be applied only to the purposes for which the issue was authorized. Any excess amount which for any reason is not needed for any such purpose shall be applied either (i) toward the purchase and retirement of bonds of that issue at not more than their face value and accrued interest, or (ii) toward payment of the earliest maturing installments of that issue, or (iii) in accordance with any trust agreement or resolution securing the bonds. (1917, c. 138, s. 31; 1919, c. 178, s. 3(31); C.S., s. 2957; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 38; 1971, c. 780, s. 1; 1973, c. 494, s. 28.)

**Cross References.** — As to authority to invest idle funds, see § 159-30.

#### CASE NOTES

**Editor's Note.** — *The cases cited below were decided under former statutory provisions similar to this section.*

**Law Authorizing Bond Issue Need Not Declare Proportion of Proceeds Applicable to Each Specific Purpose.** — A law authorizing a bond issue for various purposes which does not declare what proportion of the proceeds of the bonds shall be applied to each specific purpose is not void. Such matter may properly rest within the sound discretion of the municipal authorities. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

**"Corporate Purpose."** — A definition of

corporate purpose cannot be static. Changing conditions require that application of the limitations be tempered with due recognition of the existing situation, so that the purpose for which the public body was organized may be accomplished and enjoyment thereof by the public made possible. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

**Right to Transfer and Allocate Funds.** — Former § 153-107, relating to application of proceeds of county bonds, did not place a limitation upon the legal right to transfer or allocate funds from one project to another included within the general purpose for which the bonds

were issued. The inhibition contained in the statute was to prevent funds obtained for one general purpose from being transferred and used for another general purpose. For example, the statute prohibited the use of funds derived from the sale of bonds to erect, repair and equip school buildings from being used to erect or repair a courthouse or a county home or some similar project. *Atkins v. McAden*, 229 N.C. 752, 51 S.E.2d 484 (1949); *Mauldin v. McAden*, 234 N.C. 501, 67 S.E.2d 647 (1951).

While the municipality has a limited authority, under certain conditions, to transfer or allocate funds from one project to another included within the general purpose for which bonds are authorized, the transfer must be to a project included in the general purpose as stated in the bond resolution, and the funds may be diverted to the proposed purposes only in the event the municipality finds in good faith that conditions have so changed since the bonds were authorized that proceeds therefrom are no longer needed for the original purpose. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

**Effect of Including Specifics in Bond Order.** — A bond order is not required to set out in detail the estimates of cost and descriptions of the particular projects for which the funds are proposed to be used, and their inclusion does not limit the allocation of the proceeds of the bonds, provided the use of the funds falls within the general purpose designated. *Atkins v. McAden*, 229 N.C. 752, 51 S.E.2d 484 (1949).

**Immaterial or Temporary Changes Consistent with General Purpose Not Unlawful.** — While the law will not justify the use of the proceeds of a State or municipal bond issue for purposes other than those specified in the act authorizing the issue, it does not follow that immaterial or temporary changes consistent with the general purpose of the legislative act should be interpreted as unlawful diversions of public funds. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

**Such changes as are necessary under**

**existing conditions to accomplish the general purpose are not outlawed.** *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

**Minor Changes Are Expected If Conditions Change.** — Bond ordinances are passed authorizing indebtedness for certain stated purposes. When an authorizing vote is required, the bond money is earmarked for the stated purposes. However, in planning large permanent improvements the governing authorities look ahead to the future fulfillment of the construction plans. The authorities will inspect and examine the work as it progresses, and minor changes from time to time are expected if conditions change and unforeseen developments occur. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

**Emphasis Is Placed on Final Result to Be Accomplished.** — In construing statutory limitations upon the use of bond money for public improvements, emphasis is placed on the final result sought to be accomplished. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

**Erection of Consolidated School Instead of Remodeling Old School.** — Where a bond issue for the remodeling of the old school buildings in a county administrative unit was duly approved by the voters in an election, it was held that the board of county commissioners had the legal authority to allocate funds from this bond issue to the erection of a proposed consolidated high school, since this was not a change which involved any change of purpose for which the bonds were issued, but was only a change in the manner or method of accomplishing the original purpose. *Feezor v. Siceloff*, 232 N.C. 563, 61 S.E.2d 714 (1950).

**With respect to the use of bond money, the court will not interfere** with the exercise of discretionary powers of a municipal corporation unless its actions are so unreasonable and arbitrary as to amount to an abuse of discretion. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

## § 159-136. Issuing unit to make and report debt service payments.

The finance officer of each unit having outstanding bonds or notes shall remit the funds necessary for the payment of maturing installments of principal and interest on the bonds or notes to the fiscal agent or agreed upon place of payment in sufficient time for the payment thereof, together with the agreed upon fiscal agency fees, and shall at the same time report the payment to the secretary on forms to be provided by the Commission. (1931, c. 60, s. 27; 1971, c. 780, s. 1.)

### § 159-137. Lost, stolen, defaced, or destroyed bonds or notes.

(a) If lost, stolen, or completely destroyed, any bond, note, or coupon may be reissued in the same form and tenor upon the owner's furnishing to the satisfaction of the secretary and the issuing unit: (i) proof of ownership, (ii) proof of loss or destruction, (iii) a surety bond in twice the face amount of the bond or note and coupons, and (iv) payment of the cost of preparing and issuing the new bond, note, or coupons.

(b) If defaced or partially destroyed, any bond, note, or coupon may be reissued in the same form and tenor to the bearer or registered holder, at his expense, upon surrender of the defaced or partially destroyed bond, note, or coupon and on such other conditions as the Commission may prescribe. The Commission may also provide for authentication of defaced or partially destroyed bonds, notes, or coupons instead of reissuing them.

(c) Each new bond, note, or coupon issued under this section shall be signed by the officers of the issuing unit who are in office at the time, or by the State Treasurer if the unit no longer exists, and shall contain a recital to the effect that it is issued in exchange for or replacement of a certain bond, note, or coupon (describing it sufficiently to identify it) and is to be deemed a part of the same issue as the original bond, note, or coupon. (1935, c. 292, ss. 1, 2; 1939, c. 259; 1971, c. 780, s. 1.)

### § 159-138. Cancellation of bonds and notes.

Each bond or note and coupon shall be cancelled when (i) it is paid, or (ii) it is acquired by the issuing unit in any manner other than purchase for investment. A full report of the cancellation of all bonds, notes, and coupons shall be made to the secretary on forms provided by the Commission. (1931, c. 60, s. 27; 1939, c. 356; 1971, c. 780, s. 1.)

### § 159-139. Destruction of cancelled bonds, notes, and coupons.

All cancelled bonds, notes, and interest coupons of a unit may be destroyed in one of the following ways, in the discretion of the governing board:

- (1) Method 1. — The finance officer shall make an entry in a substantially bound book kept by him for the purpose of recording the destruction of bonds, notes, and coupons, showing
  - a. With respect to bonds and notes, the purpose of issuance, the date of issue, serial numbers (if any), denomination, maturity date, and total principal amount.
  - b. With respect to coupons, the purpose of issue and date of the bonds to which the coupons appertain, the maturity date of the coupons and, as to each maturity date, the denomination, quantity, and total amount of coupons.

After this entry has been made, the paid bonds, notes, and coupons shall be destroyed by either burning or shredding, in the presence of the mayor or chairman of the governing board, the finance officer, the unit's attorney, and the clerk to the governing board, or any three of them, each of whom shall certify under his hand in the book kept by the finance officer that he saw the bonds and coupons destroyed. Cancelled bonds, notes, or coupons shall not be destroyed until after one year from the date of payment.

- (2) Method 2. — The governing board may contract with the bank, trust company or other person acting as fiscal agent for a bond issue for the

destruction of bonds and interest coupons which have been cancelled by the fiscal agent. The contract shall require that the fiscal agent give the unit a written certificate of each destruction containing the same information required by Method 1 to be entered in the record of destroyed bonds and coupons. The certificates shall be filed among the permanent records of the finance officer's office. Cancelled bonds or coupons shall not be destroyed until one year from the date of payment.

The provisions of G.S. 121-5 and 132-3 shall not apply to paid bonds, notes, and coupons. The information required to be entered in a substantially bound book prior to destruction under either Method 1 or Method 2 may as an alternative, be shown by photocopying, microfilming or other similar method of recording the information by directly reproducing the cancelled documents. (1941, cc. 203, 293; 1961, c. 663, ss. 1, 2; 1963, c. 1173, ss. 1, 2; 1971, c. 780, s. 1; 1973, c. 494, s. 29; 1983, c. 322, ss. 7, 8.)

### § 159-140. Bonds or notes eligible for investment.

Subject to the provisions of G.S. 159-30, bonds or notes issued under the provisions of this Chapter are hereby made securities in which all public officers and public bodies of the State and its political subdivisions and agencies and all insurance companies, trust companies, investment companies, banks, savings banks, building and loan associations, savings and loan associations, credit unions, pension or retirement funds, other financial institutions engaged in business in the State, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. Such bonds or notes are hereby made securities which may properly and legally be deposited with and received by any State or municipal officer or any agency or political subdivision of the State for any purpose for which the deposit of bonds, notes or obligations of the State is now or may hereafter be authorized by law. (1977, c. 403.)

### § 159-141. Terms and conditions of sale.

Notwithstanding the foregoing, any bond of the State may be sold upon such terms and conditions, at such interest rate or rates, for such price and in such manner, either public or private, as the State Treasurer shall determine. (1983, c. 554, s. 18.)

**Editor's Note.** — For provisions of ss. 21 through 25 of Session Laws 1983, c. 554, s. 18 of which amended this section, see the Editor's Note under § 159-80.

§§ 159-142 through 159-147: Reserved for future codification purposes.

## ARTICLE 8.

### *Financing Agreements and Other Financing Arrangements.*

### § 159-148. Contracts subject to Article; exceptions.

(a) Except as provided in subsection (b) of this section, this Article applies to any contract, agreement, memorandum of understanding, and any other transaction having the force and effect of a contract (other than agreements made in connection with the issuance of revenue bonds, special obligation

bonds issued pursuant to Chapter 159I of the General Statutes, or of general obligation bonds additionally secured by a pledge of revenues) made or entered into by a unit of local government (as defined by G.S. 159-7(b) or, in the case of a special obligation bond, as defined in Chapter 159I of the General Statutes), relating to the lease, acquisition, or construction of capital assets, which contract does all of the following:

- (1) Extends for five or more years from the date of the contract, including periods that may be added to the original term through the exercise of options to renew or extend.
- (2) Obligates the unit to pay sums of money to another, without regard to whether the payee is a party to the contract.
- (3) Obligates the unit over the full term of the contract, including periods that may be added to the original term through the exercise of options to renew or extend:
  - a. For baseball park districts, to at least five hundred thousand dollars (\$500,000).
  - b. For housing authorities, to at least five hundred thousand dollars (\$500,000) or a sum equal to two thousand dollars (\$2,000) per housing unit owned and under active management by the housing authority, whichever is less.
  - c. For other units, to at least five hundred thousand dollars (\$500,000) or a sum equal to one-tenth of one percent ( $\frac{1}{10}$  of 1%) of the assessed value of property subject to taxation by the contracting unit, whichever is less.
- (4) Obligates the unit, expressly or by implication, to exercise its power to levy taxes either to make payments falling due under the contract, or to pay any judgment entered against the unit as a result of the unit's breach of the contract.

Contingent obligation shall be included in calculating the value of the contract. Several contracts that are all related to the same undertaking shall be deemed a single contract for the purposes of this Article. When several contracts are considered as a single contract, the term shall be that of the contract having the longest term, and the sums to fall due shall be the total of all sums to fall due under all single contracts in the group.

(b) This Article shall not apply to:

- (1) Contracts between a unit of local government and the State of North Carolina or the United States of America (or any agency of either) entered into as a condition to the making of grants or loans to the unit of local government.
- (2) Contracts for the purchase, lease, or lease with option to purchase of motor vehicles or voting machines.
- (3) Loan agreements entered into by a unit of local government pursuant to the North Carolina Solid Waste Management Loan Program, Chapter 159I of the General Statutes. (1971, c. 780, s. 1; 1973, c. 494, s. 31; 1989, c. 756, s. 6; 1991, c. 11, s. 4; 1997-380, s. 4; 1998-222, s. 1; 2001-206, s. 2; 2001-414, s. 52.)

**Editor's Note.** — Session Laws 1989, c. 756, s. 9 provides: "This act shall be construed liberally to effectuate the legislative intent and the purposes as complete and independent authority for the performance of each and every act and thing authorized by this act, and all powers granted shall be broadly interpreted to effectuate the intent and purposes and not as a limitation of powers."

**Effect of Amendments.** — Session Laws

2001-206, s. 2, effective June 15, 2001, in subsection (a), added "does all of the following" at the end of the introductory language, deleted "and" at the end of subdivisions (a)(1) and (a)(2), rewrote subdivision (a)(3), and made minor punctuation changes.

Session Laws 2001-414, s. 52, effective September 14, 2001, repealed Session Laws 1997-380, which had amended subdivision (a)(3) of this section.

**Legal Periodicals.** — For symposium on municipal finance, see 1976 Duke L.J. 1051.

### **§ 159-149. Application to Local Government Commission for approval of contract.**

A unit of local government may not enter into any contract subject to this Article unless it is approved by the Local Government Commission as evidenced by the secretary's certificate thereon. Any contract subject to this Article that does not bear the secretary's certificate thereon shall be void, and it shall be unlawful for any officer, employee, or agent of a unit of local government to make any payments of money thereunder. Before executing a contract subject to this Article, the governing board of the contracting unit shall file an application for Commission approval of the contract with the secretary of the Commission. The application shall state such facts and have attached to it such documents concerning the proposed contract and the financial condition of the contracting unit as the secretary may require. The Commission may prescribe the form of the application.

Before he accepts the application, the secretary may require the governing board or its representatives to attend a preliminary conference at which time the secretary and his deputies may informally discuss the proposed contract.

After an application in proper form and order has been filed, and after a preliminary conference if one is required, the secretary shall notify the unit in writing that the application has been filed and accepted for submission to the Commission. The secretary's statement shall be conclusive evidence that the unit has complied with this section. (1971, c. 780, s. 1.)

### **§ 159-150. Sworn statement of debt; debt limitation.**

After or at the time an application is filed under G.S. 159-149, the finance officer, or some other officer designated by the board, shall prepare, swear to, and file with the secretary and for public inspection in the office of the clerk to the board a statement of debt in the same form prescribed in G.S. 159-55 for statements of debt filed in connection with general obligation bond issues. The sums to be included in gross debt and the deductions therefrom to arrive at net debt shall be the same as prescribed in G.S. 159-55, except that sums to fall due under contracts subject to this Article shall be treated as if they were evidenced by general obligation bonds of the unit.

No contract subject to this Article may be executed if the net debt of the contracting unit, after execution of the contract, would exceed eight percent (8%) of the assessed value of property subject to taxation by the contracting unit. (1971, c. 780, s. 1; 1991, c. 11, s. 5.)

### **§ 159-151. Approval of application by Commission.**

(a) In determining whether a proposed contract shall be approved, the Commission may consider:

- (1) Whether the undertaking is necessary or expedient.
- (2) The nature and amount of the outstanding debt of the contracting unit.
- (3) The unit's debt management procedures and policies.
- (4) The unit's tax and special assessments collection record.
- (5) The unit's compliance with the Local Government Budget and Fiscal Control Act.
- (6) Whether the unit is in default in any of its debt service obligations.
- (7) The unit's present tax rates, and the increase in tax rate, if any, necessary to raise the sums to fall due under the proposed contract.

- (8) The unit's appraised and assessed value of property subject to taxation.
- (9) The ability of the unit to sustain the additional taxes necessary to perform the contract.
- (10) If the proposed contract is for utility or public service enterprise, the probable net revenues of the undertaking to be financed and the extent to which the revenues of the utility or enterprise, after addition of the revenues of the undertaking to be financed, will be sufficient to meet the sums to fall due under the proposed contract.
- (11) Whether the undertaking could be financed by a bond issue, and the reasons and justifications offered by the contracting unit for choosing this method of financing rather than a bond issue.

The Commission shall have authority to inquire into and to give consideration to any other matters that it may believe to have bearing on whether the contract should be approved.

(b) The Commission shall approve the application if, upon the information and evidence it receives, it finds and determines:

- (1) That the proposed contract is necessary or expedient.
- (2) That the contract, under the circumstances, is preferable to a bond issue for the same purpose.
- (3) That the sums to fall due under the contract are adequate and not excessive for its proposed purpose.
- (4) That the unit's debt management procedures and policies are good, or that reasonable assurances have been given that its debt will henceforth be managed in strict compliance with law.
- (5) That the increase in taxes, if any, necessary to meet the sums to fall due under the contract will not be excessive.
- (6) That the unit is not in default in any of its debt service obligations.

The Commission need not find all of these facts and conclusions if it concludes that (i) the proposed project is necessary and expedient, (ii) the proposed undertaking cannot be economically financed by a bond issue and (iii) the contract will not require an excessive increase in taxes.

If the Commission tentatively decides to deny the application because it cannot be supported from the information presented to it, it shall so notify the unit filing the information. If the unit so requests, the Commission shall hold a public hearing on the application at which time any interested persons shall be heard. The Commission may appoint a hearing officer to conduct the hearing and to present a summary of the testimony and his recommendation for the Commission's consideration. (1971, c. 780, s. 1; 1973, c. 494, s. 32.)

#### CASE NOTES

**Applied** in *Wayne County Citizens v. Wayne County Bd. of Comm'rs*, 328 N.C. 24, 399 S.E.2d 311 (1991).

### § 159-152. Order approving or denying the application.

(a) After considering an application, and conducting a public hearing thereon if one is requested under G.S. 159-151, the Commission shall enter its order either approving or denying the application. An order approving an application shall not be regarded as an approval of the legality of the contract in any respect.

(b) If the Commission enters an order denying an application, the proceedings under this Article shall be at an end. (1971, c. 780, s. 1.)

## § 159-153. Approval of other financing arrangements.

(a) Commission Approval Required. — Except as provided in subsection (b) of this section, approval by the Commission in accordance with this section is required before a unit of local government, or any public body, agency, or similar entity created by any action of a unit of local government, may do any of the following:

- (1) Incur indebtedness.
- (2) Enter into any similar type of financing arrangement.
- (3) Approve or otherwise participate in the incurrence of indebtedness or the entering into of a similar type of financing arrangement by another party on its behalf.

(a1) Commission Approval Required for Nonprofit Water Corporation Loans From the Clean Water Revolving Loan and Trust Fund. — In addition to the requirements of Chapter 159G of the General Statutes, approval by the Commission in accordance with this section is required before a nonprofit water corporation may be eligible to receive a revolving loan or grant under Chapter 159G of the General Statutes.

(b) Exceptions. — Approval by the Commission in accordance with this section is not required in any of the following cases:

- (1) Another law of this State already specifically requires Commission approval of the indebtedness or financing arrangement and the required approval is obtained in accordance with that law.
- (2) The indebtedness or financing arrangement is a contract entered into by a unit of local government pursuant to G.S. 160A-20 and is not subject to review by the Commission pursuant to G.S. 160A-20(e).
- (3) The indebtedness or financing arrangement is excepted from the review requirements of this Article because it does not meet the conditions of G.S. 159-148(a)(1) or (3) or because it is excluded pursuant to G.S. 159-148(b).

(c) Effect of Special Act. — No special, local, or private act shall be construed to create an exception from the review of the Commission required by this section unless the act explicitly excludes the review and approval of the Commission.

(d) Factors Considered. — The Commission may consider all of the following factors in determining whether to approve the incurrence of, entering into, approval of, or participation in any indebtedness or financing arrangement subject to approval pursuant to this section:

- (1) Whether the undertaking is necessary or expedient.
- (2) The nature and amount of the outstanding debt of the entity proposing to incur the indebtedness or enter the financing arrangement.
- (3) Whether the entity proposing to operate the facilities financed by the indebtedness or financing arrangement and the entity obligating itself under the indebtedness or financing arrangement have demonstrated or can demonstrate the financial responsibility and capability to fulfill their obligations with respect to the indebtedness or financing arrangement. In making this determination, the Commission may consider the operating entity's experience and financial position, the nature of the undertaking being financed, and any additional security such as insurance, guaranties, or property to be pledged to secure the indebtedness or financing arrangement.
- (4) Whether the proposed date and manner of sale of obligations will have an adverse effect upon any scheduled or anticipated sale of obligations by the State or any political subdivision or by any agency of either of them.
- (5) The local government unit's debt management procedures and policies.

- (6) The local government unit's compliance with the Local Government Budget and Fiscal Control Act.
- (7) Whether the local government unit is in default in any of its debt service obligations.

(e) Documentation. — To facilitate the review of the proposed indebtedness or financing arrangement by the Commission, the Secretary may require the unit or other entity to obtain and submit any financial data and information about the proposed indebtedness or financing arrangement and security for it, including any proposed prospectus or offering circular, the proposed financing arrangement and security document, and annual and other financial reports and statements of the obligated entity. Applications and other documents required by the Commission must be in the form prescribed by the Commission.

(f) Conditions for Approval. — If the Commission determines that all of the following conditions are met, the Commission shall approve the incurrence of the indebtedness, entering of the financing arrangement, or approval or other participation in the indebtedness or financing arrangement, by the unit of local government or the other entity referred to in subsection (a) of this section:

- (1) The amount of the indebtedness to be incurred or financed is not excessive for the purpose contemplated.
- (2) The entity that will operate the facilities financed by the indebtedness or financing arrangement and the entity obligating itself under the indebtedness or financing arrangement have demonstrated or can demonstrate the financial responsibility and capability to fulfill their obligations with respect to the indebtedness or financing arrangement.
- (3) The proposed date and manner of sale of obligations will not have an adverse effect upon any scheduled or anticipated sale of obligations by the State or any political subdivision or any agency of either of them. (1998-222, s. 2; 1999-213, s. 11.)

§§ 159-154 through 159-159: Reserved for future codification purposes.

## ARTICLE 9.

### *Bond Anticipation, Tax, Revenue and Grant Anticipation Notes.*

#### Part 1. Bond Anticipation Notes.

### § 159-160. Definitions.

As used in this Part, the words “unit” or “issuing unit” means “unit of local government” as defined in G.S. 159-44, “municipality” as defined in G.S. 159-81, and the State of North Carolina. (1973, c. 494, s. 36; 1981 (Reg. Sess., 1982), c. 1276, s. 9; 1983, c. 554, s. 19.)

**Editor's Note.** — An amendment to this section by Session Laws 1993, c. 497, s. 12, was made effective upon certification of approval of an amendment to Article V of the Constitution of North Carolina relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue financing bonds to be used to finance public

activities associated with private economic development projects. This amendment was submitted to the people on November 2, 1993 and was defeated. The amendment to this section, therefore, never took effect.

An earlier amendment to this section in Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 9, was made effective on certification of approval

of a state constitutional amendment authorizing the enactment of laws dealing with transactions of the type contemplated by the act. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, was submitted to the people on Nov. 2, 1982, and was defeated. The amendment to this section,

therefore, did not go into effect.

For provisions of ss. 21 through 25 of Session Laws 1983, c. 554, s. 19 of which amended this section, see the Editor's Note under § 159-80.

**Legal Periodicals.** — For symposium on municipal finance, see 1976 Duke L.J. 1051.

**§ 159-161. Bond anticipation notes.**

At any time after a bond order has taken effect and with the approval of the Commission, the issuing unit may borrow money for the purposes for which the bonds are to be issued, in anticipation of the receipt of the proceeds of the sale of the bonds, and within the maximum authorized amount of the bond issue. General obligation bond anticipation notes shall be payable not later than seven years after the time the bond order takes effect and shall not be renewed or extended beyond such time, except that, if the issuance of bonds under the bond order is extended by an order of the board of the issuing unit which takes effect pursuant to G.S. 159-64, the bond anticipation notes may be renewed and extended and shall be payable not later than 10 years after the time the bond order takes effect and that, if the issuance of bonds under the bond order is prevented or prohibited by any order of any court, the bond anticipation notes may be renewed or extended by the length of time elapsing between the date of institution of the action or proceeding and the date of its final disposition. Any extension of the time for issuing bonds under a bond order granted by act of the General Assembly pursuant to G.S. 159-64 shall also extend the time for issuing and paying notes under this section for the same period of time. (1917, c. 138, ss. 13, 14; 1919, c. 178, s. 3(13), (14); C.S., ss. 2934, 2935; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 39; 1931, c. 293; 1939, c. 231, s. 1; 1953, c. 693, ss. 2, 4; 1969, c. 687, s. 3; 1971, c. 780, s. 1; 1973, c. 494, s. 33; 1977, c. 404, s. 1; 1979, c. 444, s. 2.)

**Editor's Note.** — Session Laws 1977, c. 404, which substituted "seven years" for "five years" near the beginning of the second sentence, provided in s. 2: "The provisions of this act shall apply to general obligation bond anticipation

notes authorized by bond orders in effect on the date of this act or which shall take effect hereafter." The act was ratified May 18, 1977, and made effective on ratification.

**CASE NOTES**

**No valid bond anticipation note may be issued unless authority exists for the issuance of bonds** to provide funds to pay the

note. *Barbour v. Carteret County*, 255 N.C. 177, 120 S.E.2d 448 (1961), decided under former § 153-108.

**§ 159-162. Security of general obligation bond anticipation notes.**

The faith and credit of the issuing unit are hereby pledged for the payment of each note issued in anticipation of the sale of general obligation bonds according to its terms, and the power and obligation of the issuing unit to levy taxes and raise other revenues for the prompt payment of such notes shall be unrestricted as to rate or amount, notwithstanding any other provisions of law. The proceeds of each general obligation bond issue are also hereby pledged for the payment of any notes issued in anticipation of the sale thereof, and any such notes shall be retired from the proceeds of the bonds as the first priority. In the discretion of the governing board, notes issued in anticipation of the sale of general obligation bonds may be paid from current revenues or other funds

instead of from the bond proceeds, but if this is done, the bond order shall be amended to reduce the aggregate authorized principal amount by the amount of the bond anticipation notes and accrued interest thereon. Such an amendment need not be published and shall take effect upon its passage. (1971, c. 780, s. 1.)

### § 159-163. Security of revenue bond anticipation notes.

Notes issued in anticipation of the sale of revenue bonds are hereby declared special obligations of the issuing unit. Neither the credit nor the taxing power of the issuing unit may be pledged for the payment of notes issued in anticipation of the sale of revenue bonds, and no holder of a revenue bond anticipation note shall have the right to compel the exercise of the taxing power by the issuing unit or the forfeiture of any of its property in connection with any default thereon. Notes issued in anticipation of the sale of revenue bonds shall be secured, to the extent and as provided in the resolution authorizing the issuance of such notes, by a pledge, charge, and lien upon the proceeds of the revenue bonds in anticipation of the sale of which such notes are issued and upon the revenues securing such revenue bonds; provided, however, that such notes shall be payable as to both principal and interest from such revenues if not paid from the proceeds of such revenue bonds or otherwise paid. The provisions of G.S. 159-90(b) shall apply to revenue bond anticipation notes as well as to revenue bonds. (1971, c. 780, s. 1; 1979, c. 428; 1985, c. 265, s. 2.)

**Editor's Note.** — Session Laws 1985, c. 265, ss. 3 to 5 provide:

“Sec. 3. The foregoing sections of this act shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing.

“Sec. 4. Nothing in this act shall be construed to impair the obligation of any bond,

note or coupon outstanding on the effective date of this act.

“Sec. 5. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.”

#### § 159-163.1: Not in effect.

**Editor's Note.** — A § 159-163.1 was enacted by Session Laws 1993, c. 497, s. 13, but was made effective upon certification of approval of an amendment to Article V of the Constitution of North Carolina relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue financing bonds to be used to finance public activities associated with private economic development projects. This amendment was submitted to the people on November 2, 1993 and was defeated. The section, therefore, never took effect.

An earlier § 159-163.1 was enacted by Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 10, but was made effective on certification of approval of an amendment to the state Constitution authorizing the enactment of general laws dealing with transactions of the type contemplated by the act. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, was submitted to the people on Nov. 2, 1982, and was defeated. The section therefore never took effect.

### § 159-164. Form of notes to be issued.

Bond anticipation loans shall be evidenced by negotiable notes in bearer form or by certificated or uncertificated registered public obligations pursuant to the Registered Public Obligations Act. Such notes and certificated registered

public obligations are hereby declared to be investment securities within the meaning of Article 8 of the Uniform Commercial Code as enacted in this State. Bond anticipation notes may be renewed or extended from time to time, but not beyond the time period allowed in G.S. 159-161. The governing board may authorize the issuance of bond anticipation notes by resolution which shall fix the maximum aggregate principal amount of the notes and may authorize any officer to fix, within the limitations prescribed by the resolution, the rate of interest, the place or places of payment, and the denomination or denominations of the notes. The notes shall be signed with the manual or facsimile signatures of officers designated by the governing board for that purpose, but at least one manual signature must appear on each note (which may be the signature of the representative of the Commission to the Commission's certificate). The resolution shall specify the form and manner of execution of the notes. (1917, c. 138, ss. 13, 14; 1919, c. 178, s. 3(13), (14); C.S., ss. 2934, 2935; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 39; 1931, c. 293; 1939, c. 231, s. 1; 1953, c. 693, ss. 2, 4; 1969, c. 687, s. 3; 1971, c. 780, s. 1; 1973, c. 494, s. 34; 1983, c. 322, s. 9.)

**Editor's Note.** — The Uniform Commercial Code, referred to in this section, is found in Chapter 25 of the General Statutes.

### § 159-165. Sale and delivery of bond anticipation notes.

(a) Bond anticipation notes of a municipality, including special obligation bond anticipation notes issued pursuant to Chapter 159I of the General Statutes, shall be sold by the Commission at public or private sale according to such procedures as the Commission may prescribe. Bond anticipation notes of the State shall be sold by the State Treasurer at public or private sale, upon such terms and conditions, and according to such procedures as the State Treasurer may prescribe.

(b) When the bond anticipation notes are executed, they shall be delivered to the State Treasurer who shall deliver them to the order of the purchaser and collect the purchase price or proceeds. The Treasurer shall then deduct from the proceeds the Commission's expense in connection with the issue, and remit the net proceeds to the official depository of the unit after assurance that the deposit will be adequately secured as required by law. The net proceeds of revenue bond anticipation notes or special obligation bond anticipation notes shall be remitted to the trustee or other depository specified in the trust agreement or resolution securing them. If the notes have been issued to renew outstanding notes, the Treasurer, in lieu of collecting the purchase price or proceeds, may provide for the exchange of the newly issued notes for the notes to be renewed. (1917, c. 138, s. 14; 1919, c. 178, s. 3(14); C.S., s. 2935; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 39; 1931, c. 293; 1939, c. 231, s. 1; 1953, c. 693, s. 2; 1969, c. 687, s. 3; 1971, c. 780, s. 1; 1973, c. 494, s. 35; 1983, c. 554, s. 20; 1989, c. 756, s. 7.)

**Editor's Note.** — An amendment to subsection (b) of this section by Session Laws 1993, c. 497, s. 14, was made effective upon certification of approval of an amendment to Article V of the Constitution of North Carolina relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue financing bonds to be used to finance public activities associated with private economic development projects. This amendment

was submitted to the people on November 2, 1993 and was defeated. The amendment to subsection (b) of this section, therefore, never took effect.

An earlier amendment to this section in Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 11, was made effective on certification of approval of a state constitutional amendment authorizing the enactment of laws dealing with transactions of the type contemplated by the act.

Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, was submitted to the people on Nov. 2, 1982, and was defeated. The amendment to this section, therefore, did not go into effect.

For provisions of ss. 21 through 25 of Session Laws 1983, c. 554, which amended this section, see the Editor's Note under § 159-80.

Session Laws 1989, c. 756, s. 9 provides:

"This act shall be construed liberally to effectuate the legislative intent and the purposes as complete and independent authority for the performance of each and every act and thing authorized by this act, and all powers granted shall be broadly interpreted to effectuate the intent and purposes and not as a limitation of powers."

**§§ 159-166, 159-167:** Reserved for future codification purposes.

## Part 2. Tax, Revenue and Grant Anticipation Notes.

### § 159-168. "Unit" defined.

For purposes of this Part, "unit," "unit of local government," or "issuing unit" mean a "unit of local government" as defined by G.S. 159-7(b) and a "public authority" as defined by G.S. 159-7(b). (1973, c. 494, s. 40; 1975, c. 674, s. 2.)

**Legal Periodicals.** — For symposium on municipal finance, see 1976 Duke L.J. 1051.

### § 159-169. Tax anticipation notes.

(a) A unit of local government having the power to levy taxes is authorized to borrow money for the purpose of paying appropriations made for the current fiscal year in anticipation of the collection of taxes due and payable within the fiscal year, and to issue its negotiable notes in evidence thereof. A tax anticipation note shall mature not later than 30 days after the close of the fiscal year in which it is issued, and may not be renewed beyond that time.

(b) No tax anticipation loan shall be made if the amount thereof, together with the amount of tax anticipation notes authorized or outstanding on the date the loan is authorized, would exceed fifty percent (50%) of the amount of taxes uncollected as of the date of the proposed loan authorization, as certified in writing to the governing board by the chief financial officer of the issuing unit. Each tax anticipation note shall bear on its face or reverse the following certificate signed by the finance officer: "This note and all other tax anticipation notes of (issuing unit) authorized or outstanding as of (date) amount to fifty percent (50%) or less of the amount of taxes for the current fiscal year uncollected as of the above date." No tax anticipation note shall be valid without this certificate.

(c) The faith and credit of the issuing unit are hereby pledged for the payment of each tax anticipation note issued under this section according to its terms, and the power and obligation of the issuing unit to levy taxes and raise other revenues for the prompt payment of such notes shall be unrestricted as to rate or amount, notwithstanding any other provisions of law. (1917, c. 138, s. 12; 1919, c. 178, s. 3(12); 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 4; 1971, c. 780, s. 1; 1973, c. 494, s. 37.)

**Cross References.** — As to limitations upon the increase of public debt, see N.C. Const., Art. V, § 4.

## CASE NOTES

**City May Anticipate Collection of Taxes.** — Where the levy of taxes had been approved by the qualified voters of a city, the city, under former § 160-374, had the authority to borrow

money to pay judgments in anticipation of the collection of taxes validly levied for that purpose. *Hammond v. City of Charlotte*, 206 N.C. 604, 175 S.E. 148 (1934).

## § 159-170. Revenue anticipation notes.

(a) Authorization; Term. — A unit of local government or a nonprofit corporation or association operating or leasing a public hospital as defined in G.S. 159-39, is authorized to borrow money for the purpose of paying appropriations made or expenses budgeted or incurred for the current fiscal year in anticipation of the receipt of revenues, other than taxes, estimated in its budget to be realized or collected in cash during the fiscal year, and to issue its negotiable notes in evidence thereof. A nonprofit corporation or association operating or leasing a public hospital may only borrow money pursuant to this section if it is legally entitled to collect and pledge such revenues to the payment of the notes as provided in this section. A revenue anticipation note shall mature not later than 30 days after the close of the fiscal year in which it is issued, and may not be renewed beyond that time.

(b) Limit on Amount; Disclosure. — No revenue anticipation loan shall be made if the amount thereof, together with the amount of all revenue anticipation notes authorized or outstanding on the date the loan is authorized, would exceed eighty percent (80%) of the revenues of the issuing unit or the nonprofit corporation or association operating or leasing a public hospital, other than taxes, estimated in its budget to be realized or collected in cash during the fiscal year. Each revenue anticipation note shall bear on its face a statement to the effect that it is payable solely from budgeted nontax revenues of the issuing unit or the nonprofit corporation or association operating or leasing a public hospital and that the faith and credit of the issuing unit or, in the case of revenue anticipation notes issued by a nonprofit corporation or association operating or leasing a public hospital, the local government unit that owns the public hospital are not pledged for the payment of the note. Each note shall also bear on its face or reverse the following certificate signed by the finance officer: "This note and all other revenue anticipation notes of (issuer) authorized or outstanding as of (date) amount to eighty percent (80%) or less of the budgeted nontax revenues for the current fiscal year as of the above date." No revenue anticipation note shall be valid without this certificate.

(c) Faith and Credit Not Pledged. — Revenue anticipation notes issued under this section shall be special obligations of the issuing unit or the nonprofit corporation or association operating or leasing a public hospital. Neither the credit nor the taxing power of the issuing unit or, in the case of revenue anticipation notes issued by a nonprofit corporation or association operating or leasing a public hospital, the local government unit that owns the public hospital may be pledged for the payment of revenue anticipation notes. No holder of a revenue anticipation note shall have the right to compel the exercise of the taxing power by the issuing unit or, in the case of revenue anticipation notes issued by a nonprofit corporation or association operating or leasing a public hospital, the local government unit that owns the public hospital or the forfeiture of any of its property in connection with any default thereon.

(d) Any revenue anticipation notes issued by a nonprofit corporation or association operating or leasing a public hospital pursuant to this section are subject to the approval of the city, county, hospital district, or hospital authority which owns the hospital. Approval of the city, county, hospital

district, or hospital authority may be withheld only under one or more of the following circumstances:

- (1) The contract would cause the city, county, hospital district, or hospital authority to breach or violate any covenant in an existing financing instrument entered into by such entity.
- (2) The contract would restrict the ability of the city, county, hospital district, or hospital authority to incur anticipated bank eligible indebtedness under federal tax laws.
- (3) The entering into of the contract would have a material adverse impact on the credit ratings of the city, county, hospital district, or hospital authority or otherwise materially interfere with an anticipated financing by such entity. (1917, c. 138, s. 12; 1919, c. 178, s. 3(12); 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 4; 1971, c. 780, s. 1; 1973, c. 494, s. 38; 1999-386, s. 3.)

### § 159-171. Grant anticipation notes.

(a) A unit of local government is authorized to borrow money for the purpose of paying appropriations made for a capital project in anticipation of the receipt of moneys from grant commitments for such capital project from the State or the United States or any agencies of either, and to issue its negotiable notes in evidence thereof. Grant anticipation notes shall mature not later than 12 months after the estimated completion date of such capital project as determined by the governing body of the unit of local government and may be renewed from time to time, but no renewal shall mature later than 12 months after the estimated completion date of such capital project.

(b) No grant anticipation note may be issued if the amount thereof, together with the amount of all other notes authorized or issued in anticipation of the same grant commitment, shall exceed ninety percent (90%) of the unpaid amount of said grant commitment. Each note shall bear on its face a statement to the effect that it is payable solely from moneys received from a described grant and that the faith and credit of the issuing unit are not pledged for the payment thereof, and on its face or reverse the following certificate signed by the finance officer: "This note and all other grant anticipation notes of (issuing unit) authorized or outstanding as of (date) and issued or to be issued in anticipation of (describe grant commitment) amount to ninety percent (90%) or less of the unpaid amount of said grant commitment." No grant anticipation note shall be valid without this certificate.

(c) Grant anticipation notes issued under this section shall be special obligations of the issuing unit. Neither the credit nor the taxing power of the issuing unit may be pledged for the payment of grant anticipation notes, and no holder of such notes shall have the right to compel the exercise of the taxing power by the issuing unit or the forfeiture of any of its property in connection with any default thereon. (1975, c. 674, s. 1.)

### § 159-172. Authorization and issuance of notes.

(a) Notes issued under this Part shall be authorized by resolution of the governing board of the issuing unit. The resolution shall fix the maximum aggregate principal amount of notes to be issued thereunder, and may authorize any officer to fix, within the limitations prescribed by the resolution, the rate of interest, the place or places of payment, and the denomination or denominations of the notes. Notes that are represented by instruments shall be signed with the manual or facsimile signatures of the officers designated by the government board for that purpose, but at least one manual signature (which may be the signature of the representative of the Commission to the

Commission's certificate) must appear on each note that is represented by an instrument. Several notes may be issued under one authorization so long as the aggregate principal amount of notes outstanding at any one time does not exceed the limits of the authorization.

(b) Before any notes may be issued pursuant to this Part, they must be approved by the Commission. In determining whether to approve the issuance of notes, the Commission may consider (i) the reasonableness of the budget estimates of the taxes or other revenues in anticipation of which the tax or revenue anticipation notes are to be issued, (ii) the firm and binding character of the grant commitment in anticipation of which the grant anticipation notes are to be issued, (iii) whether the amount of the notes, together with the amount of other authorized or outstanding notes issued or to be issued in anticipation of the same taxes or other revenues or grant commitments, exceeds the limitations prescribed in G.S. 159-169, 159-170 or 159-171 as the case may be, and (iv) any other matters that the Commission considers to have a bearing on whether the issue should be approved. The Commission shall approve the issuance of the notes if, upon the information and evidence it receives, it finds and determines that (i) the issue is necessary and expedient, (ii) the budget estimates of the taxes or other revenues are reasonable or the grant commitment is firm and binding, and (iii) the amount of the notes, together with the amounts of other authorized or outstanding notes issued or to be issued in anticipation of the same taxes or other revenues or grant commitments do not exceed the appropriate limitations prescribed by this Part. An order approving an issue shall not be regarded as an approval of the legality of the notes in any respect.

(c) Notes issued under this Part shall be sold by the Commission at public or private sale according to such procedures as the Commission may prescribe. Each such note that is represented by an instrument shall bear on its face or reverse a certificate signed by the secretary of the Commission or an assistant designated by him that the issuance of the note has been approved under the provisions of The Local Government Finance Act. Such signature may be a manual or facsimile signature as the Commission may determine. Each note that is not represented by an instrument shall be evidenced by a writing relating to such note, which writing shall identify such note or the issue of which it is a part, bear such certificate and be on file with the Commission. The certificate shall be conclusive evidence that the requirements of this Part have been observed, and no note without the Commission's certificate or with respect to which a writing bearing such certificate has not been filed with the Commission shall be valid.

(d) When the notes are executed, they shall be delivered to the State Treasurer who shall deliver them to the order of the purchaser and collect the purchase price or proceeds. The Treasurer shall also collect from their purchaser the purchase price or proceeds of notes that are not represented by instruments. The Treasurer shall then deduct from the proceeds the Commission's expense in connection with the issue, and remit the net proceeds to the official depository of the unit after assurance that the deposit will be adequately secured as required by law. If the notes have been issued to renew outstanding notes, the Treasurer, in lieu of collecting the purchase price or proceeds, may provide for the exchange of the newly issued notes for the notes to be renewed. (1917, c. 138, s. 14; 1919, c. 178, s. 3(14); C.S., s. 2935; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1927, c. 81, s. 4; 1931, c. 293; 1939, c. 231, s. 1; 1971, c. 780, s. 1; 1973, c. 494, s. 39; 1975, c. 674, ss. 3-5; 1983, c. 322, ss. 10-12.)

§§ 159-173 through 159-175: Reserved for future codification purposes.

## ARTICLE 10.

### *Assistance for Defaulting Units in Refinancing Debt.*

#### § 159-176. Commission to aid defaulting units in developing refinancing plans.

If a unit of local government or municipality (as defined in G.S. 159-44 or 159-81) fails to pay any installment of principal or interest on its outstanding debt on or before the due date (whether the debt is evidenced by general obligation bonds, revenue bonds, bond anticipation notes, tax anticipation notes, or revenue anticipation notes) and remains in default for 90 days, the Commission may take such action as it deems advisable to investigate the unit's or municipality's fiscal affairs, consult with its governing board, and negotiate with its creditors in order to assist the unit or municipality in working out a plan for refinancing, adjusting, or compromising the debt. When a plan is developed that the Commission finds to be fair and equitable and reasonably within the ability of the unit or municipality to meet, the Commission shall enter an order finding that it is fair, equitable, and within the ability of the unit or municipality to meet. The Commission shall then advise the governing board to take the necessary steps to implement it. If the governing board declines or refuses to do so within 90 days after receiving the Commission's advice, the Commission may enter an order directing the governing board to implement the plan. When this order is entered, the members of the governing board and all officers and employees of the unit or municipality shall be under an affirmative duty to do all things necessary to implement the plan. The Commission may apply to the appropriate division of the General Court of Justice for a court order to the governing board and other officers and employees of the unit or municipality to enforce the Commission's order. (1935, c. 124, ss. 1, 2; 1971, c. 780, s. 1; 1973, c. 494, s. 41; 1981 (Reg. Sess., 1982), c. 1276, s. 12.)

**Cross References.** — For statute authorizing local units of the State to avail themselves of the Federal Bankruptcy Act, see § 23-48.

**Editor's Note.** — An amendment to this section by Session Laws 1993, c. 497, s. 15, was made effective upon certification of approval of an amendment to Article V of the Constitution of North Carolina relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue financing bonds to be used to finance public activities associated with private economic development projects. This amendment was submitted to the people on November 2, 1993 and

was defeated. The amendment to this section, therefore, never took effect.

An earlier amendment to this section in Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 12, was made effective on certification of approval of a state constitutional amendment authorizing the enactment of laws dealing with transactions of the type contemplated by the act. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, was submitted to the people on Nov. 2, 1982, and was defeated. The amendment to this section, therefore, did not go into effect.

#### § 159-177. Power to require reports and approve budgets.

When a refinancing plan has been put into effect pursuant to G.S. 159-176, the Commission shall have authority to require any periodic reports on the unit's or municipality's financial affairs (in addition to those otherwise required by law) that the secretary deems necessary, and to approve or reject the

unit's or municipality's annual budget ordinance. The governing board of the unit or municipality shall obtain the approval of the secretary before adopting the annual budget ordinance. If the Commission recommends modifications in the budget, the governing board shall be under an affirmative duty to make the modifications before adopting the budget ordinance. (1935, c. 124, ss. 3, 4; 1971, c. 780, s. 1; 1973, c. 494, ss. 41, 42.)

**Editor's Note.** — An amendment to this section in Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 12, was made effective on certification of approval of a state constitutional amendment authorizing the enactment of laws dealing with transactions of the type contem-

plated by the act. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, was submitted to the people on Nov. 2, 1982, and was defeated. The amendment to this section, therefore, did not go into effect.

### § 159-178. Duration of Commission's powers.

The power and authority granted to the Commission in this Article shall continue with respect to a defaulting unit of local government or municipality until the Commission is satisfied that the unit or municipality has performed or will perform the duties required of it in the refinancing plan, and until agreements made with the unit's or municipality's creditors have been performed in accordance with the plan. (1935, c. 124, s. 5; 1971, c. 780, s. 1; 1973, c. 494, s. 41; 1975, c. 19, s. 62.)

**Editor's Note.** — An amendment to this section in Session Laws 1981 (Reg. Sess., 1982), c. 1276, s. 12, was made effective on certification of approval of a state constitutional amendment authorizing the enactment of laws dealing with transactions of the type contem-

plated by the act. Such an amendment was proposed by Session Laws 1981 (Reg. Sess., 1982), c. 1247, was submitted to the people on Nov. 2, 1982, and was defeated. The amendment to this section, therefore, did not go into effect.

§§ 159-179, 159-180: Reserved for future codification purposes.

## ARTICLE 11.

### *Enforcement of Chapter.*

#### § 159-181. Enforcement of Chapter.

(a) If any finance officer, governing board member, or other officer or employee of any local government or public authority (as local government and public authority are defined in G.S. 159-7(b)) shall approve any claim or bill knowing it to be fraudulent, erroneous, or otherwise invalid, or make any written statement, give any certificate, issue any report, or utter any other document required by this Chapter, knowing that any portion of it is false, or shall willfully fail or refuse to perform any duty imposed upon him by this Chapter, he is guilty of a Class 3 misdemeanor and upon conviction shall only be fined not more than one thousand dollars (\$1,000) and forfeits his office, and shall be personally liable in a civil action for all damages suffered thereby by the unit or authority or the holders of any of its obligations.

(b) If any person embezzles any funds belonging to any local government or public authority, or appropriates to his own use any personal property having a value of more than fifty dollars (\$50.00) belonging to any local government or public authority, in addition to the crimes and punishment otherwise provided by law, upon conviction he forfeits his office or position and is forever thereafter barred from holding any office or place of trust or profit under the State of

North Carolina or any political subdivisions thereof until the disability is removed in the manner provided for restoration of citizenship in Chapter 13 of the General Statutes.

(c) The Local Government Commission shall have authority to impound the books and records of any unit of local government or public authority and assume full control of all its financial affairs (i) when the unit or authority defaults on any debt service payment or, in the opinion of the Commission, will default on a future debt service payment if the financial policies and practices of the unit or authority are not improved, or (ii) when the unit or authority persists, after notice and warning from the Commission, in willfully or negligently failing or refusing to comply with the provisions of this Chapter. When the Commission takes action under this section, the Commission is vested with all of the powers of the governing board as to the levy of taxes, expenditure of money, adoption of budgets, and all other financial powers conferred upon the governing board by law. This subsection (c) does not apply to contractual obligations undertaken by a unit of local government in a debt instrument issued pursuant to Chapter 159G of the General Statutes unless such debt instrument is secured by a pledge of the faith and credit of the unit of local government. (1971, c. 780, s. 1; 1973, c. 494, s. 43; 1987, c. 796, s. 5; 1993, c. 539, s. 108; 1994, Ex. Sess., c. 24, s. 14(c).)

**Legal Periodicals.** — For symposium on municipal finance, see 1976 Duke L.J. 1051.

#### CASE NOTES

**Foundation of Public Officers' Liability.** — The foundation of liability of public officers can be expressed as follows: However honest the defendants may be, the public has a right to be protected against the wrongful conduct of their servants, if there is carelessness amounting to a willful want of care in the discharge of their official duties, which injures the public. *State v. Davis*, 48 N.C. App. 526, 269 S.E.2d 291, cert. denied and appeal dismissed, 301 N.C. 237, 283 S.E.2d 134 (1980).

**The elements of approving a false claim** in violation of this section are (1) that defendant was a finance officer, other officer or employee of local government, (2) that in such capacity she approved a claim or bill, and (3) that at the time she approved the claim or bill she knew it was fraudulent, erroneous or otherwise invalid. *State v. Davis*, 48 N.C. App. 526, 269 S.E.2d 291, cert. denied and appeal dismissed, 301 N.C. 237, 283 S.E.2d 134 (1980).

**The elements of making a false report** in violation of this section are (1) that defendant was a finance officer, other officer or employee of local government, (2) that the written statement was required by rules and regulations established by the local government for the lawful disbursement of funds, and (3) that defendant made a written statement on a voucher knowing that a portion of it was false. *State v. Davis*, 48 N.C. App. 526, 269 S.E.2d

291, cert. denied and appeal dismissed, 301 N.C. 237, 283 S.E.2d 134 (1980).

**The State was not required to elect between offenses** of approving a false claim in violation of this section and making a false report, since the elements of the two charges were not the same. *State v. Davis*, 48 N.C. App. 526, 269 S.E.2d 291, cert. denied and appeal dismissed, 301 N.C. 237, 283 S.E.2d 134 (1980).

**Corrupt Intent Need Not Be Proved.** — In order for the State to prove official misconduct proscribed by this section, it is not necessary for the State to prove a corrupt intent or willful design to cheat and defraud the public. Every public officer is bound to perform the duties of his office faithfully, to use reasonable skill and diligence, and to act primarily for the benefit of the public. *State v. Davis*, 48 N.C. App. 526, 269 S.E.2d 291, cert. denied and appeal dismissed, 301 N.C. 237, 283 S.E.2d 134 (1980).

**Submission of Charges to Jury.** — Where the evidence showed that expenditures contained both valid and invalid items, the court properly submitted the charges of approving an invalid claim and failure to preaudit to the jury. *State v. Davis*, 48 N.C. App. 526, 269 S.E.2d 291, cert. denied and appeal dismissed, 301 N.C. 237, 283 S.E.2d 134 (1980).

**Applied** in *State v. Davis*, 45 N.C. App. 72, 262 S.E.2d 827 (1980).

### § 159-182. Offending officers and employees removed from office.

If an officer or employee of a local government or public authority persists, after notice and warning from the Commission, in failing or refusing to comply with any provision of this Chapter, he forfeits his office or employment. The Commission may enter an order suspending the offender from further performance of his office or employment after first giving him notice and an opportunity to be heard in his own defense, pending the outcome of quo warranto proceedings. Upon suspending a local officer or employee under this section, the Commission shall report the circumstances to the Attorney General who shall initiate quo warranto proceedings against the officer or employee in the General Court of Justice. If an officer or employee persists in performing any official act in violation of an order of the Commission suspending him from performance of his duties, the Commission may apply to the General Court of Justice for a restraining order and injunction. (1931, c. 60, s. 45; 1971, c. 780, s. 1; 1973, c. 494, s. 44.)

§§ 159-183 through 159-187: Reserved for future codification purposes.

## ARTICLE 12.

### *Borrowing by Development Authorities Created by General Assembly.*

### § 159-188. Borrowing authority.

A development authority created as a body corporate and politic by an act of the General Assembly, and having as its purpose to stimulate, foster, coordinate, plan, improve and encourage economic development in order to relieve poverty, dependency, chronic unemployment, underemployment and to promote the improvement and development of the economy of a county of the State, and whose members are appointed by the board of commissioners of such county, shall have authority to borrow money from an agency or instrumentality of the United States government and to execute and deliver obligations for the repayment thereof and to encumber its property for the purpose of securing any such obligation and to execute and deliver such mortgages, deeds of trust and other instruments as are necessary or proper for such purpose; provided, that such obligations shall be repayable only from the revenues of such authority.

Insofar as the provisions of this section are not consistent with the provisions of any other section or law, public or private, the provisions of this section shall be controlling. (1979, c. 512, ss. 1, 2.)

# READY REFERENCE INDEX

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## A

### **ADMINISTRATIVE PROCEDURE ACT.**

**Administrative hearings**, §§150B-22 to 150B-42.

**General provisions**, §§150B-1 to 150B-4.

**Judicial review**, §§150B-43 to 150B-52.

**Rule making**, §§150B-9 to 150B-21.1.

**Rules**, §§150B-18 to 150B-21.28.

Adoption, §§150B-21.1 to 150B-21.7.

General provisions, §§150B-18 to 150B-21.28.

Publication of code and register, §§150B-21.17 to 150B-21.25.

Review by commissioner, §§150B-21.8 to 150B-21.15.

## B

### **BUDGETS AND FISCAL CONTROL.**

**Local government budget and fiscal control act**, §§159-7 to 159-41.

## C

**CORONERS**, §§152-2 to 152-11.

### **COUNTIES.**

**Administration**, §§153A-76 to 153A-114.

#### **Assessments.**

Special assessment, §§153A-186 to 153A-206.

**Boundaries**, §§153A-17 to 153A-22.

**Consolidation and governmental study commissions**, §§153A-401 to 153A-405.

**County service districts; county research and production service districts**, §§153A-300 to 153A-317.

**Definitions and statutory construction**, §§153A-1 to 153A-5.

#### **Drainage.**

Protection of public health, §§156-139 to 156-141.

**Fire protection**, §§153A-233, 153A-234.

**Form of government**, §§153A-25 to 153A-64.

**Health and social services**, §§153A-247 to 153A-259.

**Law enforcement and confinement facilities**, §§153A-211 to 153A-230.5.

**Libraries**, §§153A-261 to 153A-272.

**Miscellaneous provisions**, §§153A-435 to 153A-450.

**Planning and regulation of development**, §§153A-321 to 153A-378.

Regional planning commissions, §§153A-391 to 153A-398.

#### **Powers.**

Corporate powers, §§153A-10 to 153A-15.

Delegation and exercise of the general police power, §§153A-121 to 153A-140.

**Property**, §§153A-159 to 153A-177.

**Public enterprises**, §§153A-274 to 153A-299.6.

**Regional solid waste management authorities**, §§153A-421 to 153A-432.

**Roads and bridges**, §§153A-238 to 153A-244.

#### **School property.**

Acquisition and improvement in certain counties, §§153A-158 to 153A-158.2.

**Taxation**, §§153A-146 to 153A-154.

**CURFEWS, §153A-142.**

**D**

**DRAINAGE.**

**Corporations.**

Manner of organization, §§156-37 to 156-43.  
Rights and liabilities, §§156-44 to 156-53.

**Counties.**

Protection of public health, §§156-139 to 156-141.

**Drainage districts.**

Assessments and bond issue, §§156-94 to 156-124.  
Adjustment of delinquent assessments, §§156-125 to 156-129.  
Construction of improvement, §§156-83 to 156-93.  
Drainage commissioners, §§156-79 to 156-82.3.  
Establishment, §§156-54 to 156-78.1.  
General provisions, §§156-135 to 156-138.4.  
Improvement, renovation, enlargement and extension of canals, structures and boundaries, §§156-93.2 to 156-93.7.  
Maintenance, §156-93.1.  
Reports of officers, §§156-130 to 156-134.

**Individual owners.**

Jurisdiction.  
Clerk of superior court, §§156-1 to 156-31.  
County commissioners, §§156-32 to 156-36.

**E**

**ECONOMIC DEVELOPMENT COMMISSIONS, §§158-8 to 158-8.4.**

**EDUCATION PROGRAMS IN RESIDENTIAL SCHOOLS, §§143B-146.1 to 143B-146.21.**

**EXECUTIVE ORGANIZATION ACT OF 1973.**

**Department of administration, §§143B-366 to 143B-426.39.**  
**Department of correction, §§143B-260 to 143B-273.19.**  
**Department of crime control and public safety, §§143B-473 to 143B-499.6.**  
**Department of cultural resources, §§143B-49 to 143B-133.1.**  
**Department of economic and community development, §§143B-427 to 143B-472.35.**  
**Department of environment, health and natural resources, §§143B-279.1 to 143B-336.1.**  
**Department of human resources, §§143B-136.1 to 143B-216.34.**  
**Department of revenue, §§143B-217 to 143B-221.**  
**Department of transportation, §§143B-345 to 143B-360.**  
**General provisions, §§143B-1 to 143B-30.4.**  
**Rules review commission, §§143B-30.1 to 143B-30.4.**

**H**

**HEARING-IMPAIRED CHILDREN.**

**State schools for hearing-impaired children, §§143B-216.40 to 143B-216.44.**

**HOUSING AUTHORITIES AND PROJECTS.**

**Eminent domain, §§157-48 to 157-50.**  
**Housing authorities law, §§157-1 to 157-39.8.**  
**Indians.**

State Indian housing authority, §§157-66 to 157-70.  
**Municipal cooperation and aid, §§157-40 to 157-47.**

**HOUSING AUTHORITIES AND PROJECTS —Cont'd**  
**National defense housing projects, §§157-52 to 157-60.**

**I**

**INFORMATION TECHNOLOGY RELATED STATE GOVERNMENT  
FUNCTIONS, §§143B-472.40 to 143B-472.67.**

**INTERNAL AUDITOR.**

**Office of the internal auditor, §§143B-216.50, 143B-216.51.**

**L**

**LOCAL DEVELOPMENT.**

**Economic development commissions, §§158-9 to 158-15.1.**

**Global transPark development zones, §§158-30 to 158-42.**

**Local development act of 1925, §§158-7.2, 158-7.3.**

**Tax elections for industrial development purposes, §§158-16 to 158-24.**

**LOCAL GOVERNMENT COMMISSION, §§159-3 to 159-6.**

**LOCAL GOVERNMENT FINANCE.**

**Economic development financing, §§159-101 to 159-114.**

**Local government budget and fiscal control act, §§159-7 to 159-41.**

**Long-term financing.**

Assistance for defaulting units in refinancing debt, §§159-176 to 159-178.

Bond anticipation, tax, revenue and grant anticipation notes, §§159-160 to 159-172.

Borrowing by development authorities created by general assembly, §159-188.

Capital appreciation bonds, §§159-99, 159-100.

Enforcement of provisions, §§159-181 to 159-182.

Financing agreements, §§159-148 to 159-153.

Issuance and sale of bonds, §§159-120 to 159-141.

Local government bond act, §§159-43 to 159-79.

Revenue bonds, §§159-80 to 159-97.

**Short title and definitions, §§159-1 to 159-2.**

**O**

**OFFICE OF THE INTERNAL AUDITOR, §§143B-216.50, 143B-216.51.**

**P**

**PRISONS AND PRISONERS.**

**Administrative remedy proceedings, §§148-118.1 to 148-118.9.**

**Compensation to persons erroneously convicted of felonies, §§148-82 to 148-84.**

**Farming out convicts, §§148-66 to 148-70.**

**Interstate corrections compact, §§148-119 to 148-121.**

**Labor of prisoners, §§148-26 to 148-49.**

**Paroles, §§148-50 to 148-64.**

Out-of-state parolee supervision, §§148-65.1 to 148-65.3.

**Records, statistics, research and planning, §§148-74 to 148-80.**

**Regulations, §§148-11 to 148-25.**

**State prison system.**

Organization and management, §§148-1 to 148-10.1.

**R**

**RULES REVIEW COMMISSION, §§143B-30.1 to 143B-30.4.**

**S**

**SCHOOLS FOR HEARING-IMPAIRED CHILDREN.**

**State schools for hearing-impaired children, §§143B-216.40 to 143B-216.44.**

**STATE DEPARTMENTS, INSTITUTIONS AND COMMISSIONS.**

**Advisory commission for state museum of natural history, §§143B-344.17 to 143B-344.21.**

**STATE FLAG, MOTTO AND COLORS, §§144-1 to 144-6.**

**STATE FLOWER, BIRD, TREE, ETC., §§145-1 to 145-17.**

**STATE GOVERNMENT FUNCTIONS.**

**Information technology related state government functions, §§143B-472.40 to 143B-472.67.**

**STATE LANDS.**

**Allocated state lands.**

Acquisitions, §§146-22 to 146-26.1.

Dispositions, §§146-27 to 146-30.

General provisions, §146-21.

Miscellaneous provisions, §§146-31 to 146-36.

**Conveyances.**

Form, §§146-74 to 146-78.

**Entries and grants.**

General provisions, §§146-37 to 146-39.

Grants, §§146-43 to 146-45.

Correction, §§146-46 to 146-60.1.

Vacation, §§146-61 to 146-63.

Surveys, §§146-40 to 146-42.

**General provisions, §§146-64 to 146-70.**

**Miscellaneous provisions, §146-83.**

**State land fund, §§146-71 to 146-73.**

**Title in state, §§146-79 to 146-82.**

**Unallocated state lands.**

Discovery and reclamation, §§146-16 to 146-17.1.

Dispositions, §§146-3 to 146-15.

General provisions, §§146-1, 146-2.

Miscellaneous provisions, §§146-18 to 146-20.1.

**STATE OFFICERS.**

**Annuities, §§147-9.2 to 147-9.4.**

**Auditor, §§147-64.1 to 147-64.14.**

**Business license information office, §§147-54.11 to 147-54.19.**

**Cash management, §§147-86.10 to 147-86.14.**

**Classification and general provisions, §§147-1 to 147-5.**

**Constitutional amendments publication commission, §§147-54.8 to 147-54.10.**

**District attorneys, §147-89.**

**Expenses, §§147-6 to 147-9.1.**

**Governor, §§147-10 to 147-33.**

Emergency war powers, §§147-33.1 to 147-33.6.

**Office of juvenile justice, §§147-33.30 to 147-33.71.**

**Secretary of revenue, §147-87.**

**Secretary of state, §§147-34 to 147-54.5.**

**STATE OFFICERS** —Cont'd

**Statewide accounts receivable program**, §§147-86.20 to 147-86.27.

**Treasurer**, §§147-65 to 147-86.1.

**STATE SONG AND TOAST**, §§149-1, 149-2.

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