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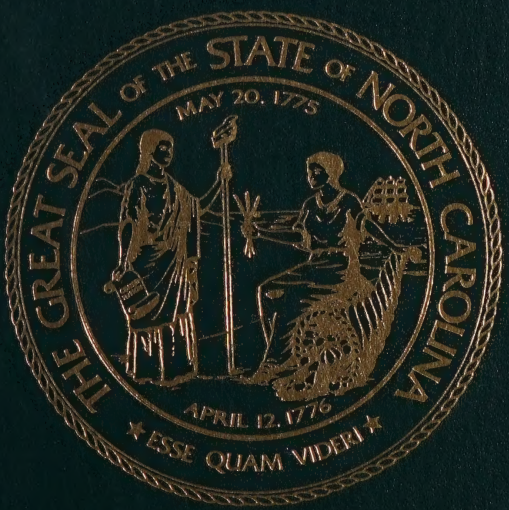

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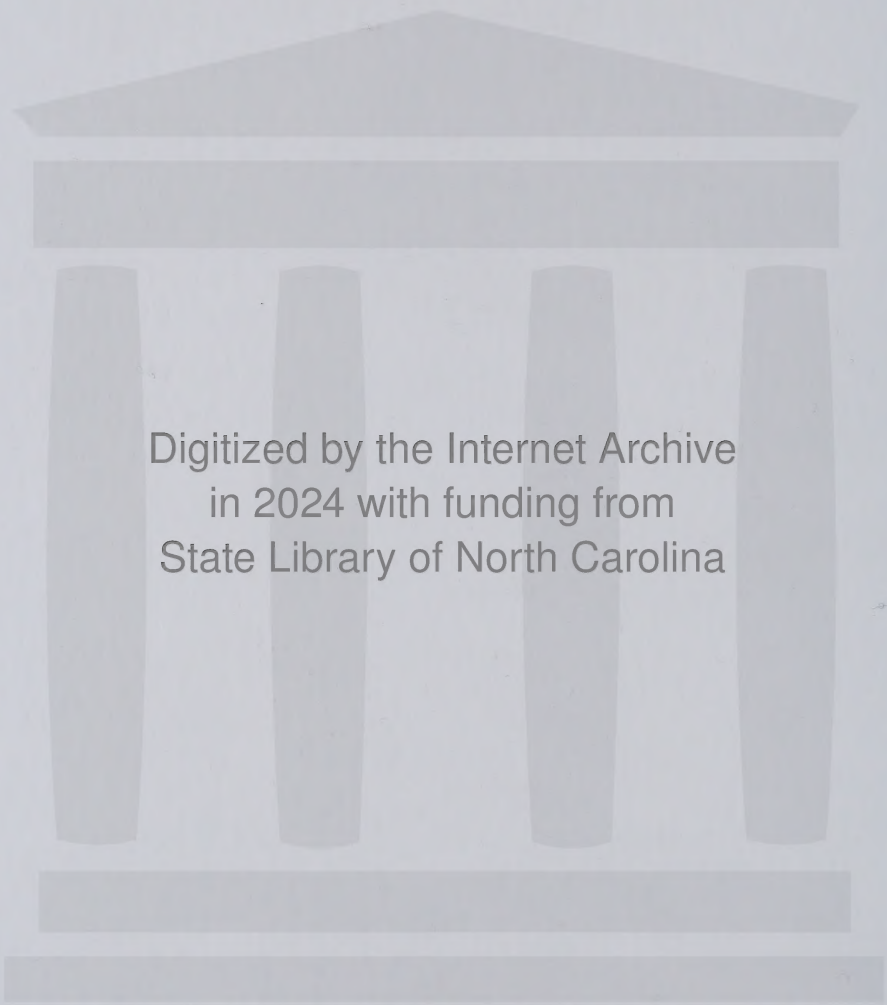

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GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

2002 INTERIM SUPPLEMENT

Volume 1

Chapters 1 to 115B

CONTAINING GENERAL LAWS OF NORTH CAROLINA
ENACTED BY THE GENERAL ASSEMBLY

Prepared under the Supervision of
THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA
by
The Editorial Staff of the Publishers

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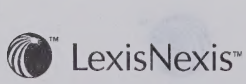

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Preface

This Volume contains the general laws of a permanent nature enacted by the General Assembly at the 2002 Extra Session and the 2002 Regular Session, which are within Chapters 2002-1 through 2002-190, 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.

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

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 2002 Extra Session and the 2002 Regular Session affecting Chapters 2002-1 through 2002-190.

Annotations:

This publication contains annotations taken from decisions of the North Carolina Supreme Court posted on LEXIS through August 16, 2002, decisions of the North Carolina Court of Appeals posted on LEXIS through September 17, 2002, and decisions of the appropriate federal courts posted through September 13, 2002. 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 80, no. 5, p. 1896.
Wake Forest Law Review through Volume 37, Pamphlet No. 2, p. 662.
Campbell Law Review through Volume 24, no. 2, p. 346.
Duke Law Journal through Volume 51, no. 6, p. 1857.
North Carolina Central Law Journal through Volume 24, no. 1, p. 180.
Opinions of the Attorney General.

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 of the General Statutes. 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 of the General Statutes 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 Revisal (1821,1827)
R.S.	Revised Statutes (1837)
R.C.	Revised Code (1854)
C.C.P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C.S.	Consolidated Statutes (1919, 1924)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

December 1, 2002

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 2002 Interim Supplement 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 1

VOLUME 2

VOLUME 3

VOLUME 4

VOLUME 5

VOLUME 6

VOLUME 7

VOLUME 8

VOLUME 9

VOLUME 10

VOLUME 11

VOLUME 12

VOLUME 13

The General Statutes of North Carolina
2002 Interim Supplement

Chapter 1.

Civil Procedure.

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

Article 9.

Prosecution Bonds.

Sec.
1-110. Suit as an indigent; counsel; suits filed pro se by prison inmates.

SUBCHAPTER X. EXECUTION.

Article 29A.

Judicial Sales.

Part 2. Procedure for Public Sales of Real and Personal Property.

1-339.25. Public sale; upset bid on real property; compliance bond.

Article 29B.

Execution Sales.

Part 2. Procedure for Sale.

Sec.
1-339.64. Upset bid on real property; compliance bond.

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

Article 43.

Nuisance and Other Wrongs.

1-539.2C. Damages for identity fraud.

SUBCHAPTER II. LIMITATIONS.

ARTICLE 3.

Limitations, General Provisions.

§ 1-15. Statute runs from accrual of action.

CASE NOTES

I. In General.
II. Malpractice.

I. IN GENERAL.

Dismissal Upheld. — The trial court properly dismissed action brought by doctors against accountants who had been engaged to advise them on business opportunities under G.S. 1A-1, Rule 12(b)(6), as doctors' complaint against accountants disclosed that its claims were either time-barred or lacked facts sufficient to state a claim for relief. Harrold v. Dowd, 149 N.C. App. 777, 561 S.E.2d 914, 2002 N.C. App. LEXIS 309 (2002).

II. MALPRACTICE.

Malpractice Claim Barred. — Causes of action by decedent's heirs against an attorney who drafted the decedent's will, codicil, and other documents, which transferred the decedent's property to a university, were subject to the three-year statute of limitations for legal malpractice despite the heirs' attempts to frame their suit as one for breach of fiduciary duty. Baars v. Campbell Univ., Inc., 148 N.C. App. 408, 558 S.E.2d 871, 2002 N.C. App. LEXIS 30 (2002), cert. denied, 355 N.C. 490, 563 S.E.2d 563 (2002).

§ 1-22. Death before limitation expires; action by or against personal representative or collector.

CASE NOTES

I. In General.
III. Claims Against Estate.

I. IN GENERAL.

If a personal representative is appointed to administer an estate before the expiration of the statute of limitations, G.S. 1-22 allows the time limit within which to file an action against the estate to be extended according to G.S. 28A-19-3. Shaw v. Mintz, — N.C. App. —, 564 S.E.2d 593, 2002 N.C. App. LEXIS 674 (2002).

G.S. 1-22 will allow the time limit within which to file an action against the estate to be extended according to G.S. 28A-19-3. Wright v. Smith, — N.C. App. —, 564 S.E.2d 613, 2002 N.C. App. LEXIS 681 (2002).

III. CLAIMS AGAINST ESTATE.

Action Not Barred. — Action filed on October 20, 2000, two days after qualification of deceased driver's personal representative, for personal injuries arising out of an automobile accident that occurred on June 27, 1997, was not barred by G.S. 1-52, where deceased died on November 7, 1997, at which time the three year limitations period had not yet expired, as under G.S. 28A-18-1 plaintiff's cause of action survived his death, and thus, pursuant to G.S. 1-22, plaintiff was permitted to commence a cause of action against deceased's personal representative, provided that either the action was brought within the time specified for the presentation of claims in G.S. 28A-19-3, or that notice of the claim upon which the action was based was presented to the personal representative within the time specified for the presentation of claims in G.S. 28A-19-3. The personal representative's failure to establish in the record that she complied with G.S. 28A-19-3(a) regarding general notice to creditors precluded her from relying upon the statute of limitations as a bar; moreover, under G.S. 28A-14-1(a), the absolute earliest "deadline" date which could have been specified by the personal representative in the general notice to creditors was January 18, 2001, three months from the day of the first publication or posting of such notice. Mabry v. Huneycutt, 149 N.C. App. 630, 562 S.E.2d 292, 2002 N.C. App. LEXIS 271 (2002).

ARTICLE 5.

Limitations, Other than Real Property.

§ 1-50. Six years.

CASE NOTES

I. In General.
IV. Defective Condition of Improvements to Real Property.

I. IN GENERAL.

Applied in Bryant v. Don Galloway Homes, Inc., 147 N.C. App. 655, 556 S.E.2d 597, 2001 N.C. App. LEXIS 1236 (2001).

IV. DEFECTIVE CONDITION OF IMPROVEMENTS TO REAL PROPERTY.

Purpose of Subdivision (5). —
Purpose of subdivision (a)(5) was to protect from liability those persons who made improvements to real property. Bryant v. Don Galloway Homes, Inc., 147 N.C. App. 655, 556 S.E.2d 597, 2001 N.C. App. LEXIS 1236 (2001).

Action Barred. —
Statute of repose for products liability claim was triggered upon the purchase by a drywaller of a synthetic stucco product for installation in a house, and the homebuyers' claims against the drywaller and the product's manufacturer, filed more than seven years later, were time barred; further, the statute of repose as to the homebuyers' claim against the drywaller was not tolled by the filing of a class action to which the homebuyers had previously been members; finally, the willful and wanton negligence exception to the real property statute of repose was not applicable because the contractor's and

drywaller's actions did not constitute willful and wanton negligence. Cacha v. Montaco, Inc., 147 N.C. App. 21, 554 S.E.2d 388, 2001 N.C. App. LEXIS 1065 (2001), cert. denied, 355 N.C. 284, 560 S.E.2d 797 (2002).

§ 1-52. Three years.

CASE NOTES

I. IN GENERAL.

Action for Permissive Waste Barred. — Three-year statute of limitations for permissive waste of property which was the subject of a life estate applied to nephew's claim against the decedent where the nephew was aware of the property deterioration seven years prior to the decedent's death but where the nephew did not bring the action until the date of the decedent's death. McCarver v. Blythe, 147 N.C. App. 496, 555 S.E.2d 680, 2001 N.C. App. LEXIS 1174 (2001).

Applied in BNT Co. v. Baker Precythe Dev. Co., — N.C. App. —, 564 S.E.2d 891, 2002 N.C. App. LEXIS 677 (2002), cert. denied, 356 N.C. 159, 569 S.E.2d 283 (2002).

Cited in Blair Concrete Servs., Inc. v. Van-Allen Steel Co., — N.C. App. —, 566 S.E.2d 766, 2002 N.C. App. LEXIS 869 (2002).

II. CONTRACTS.

D. Actions Held Barred.

Choice of Law. — In an advertising client's diversity action brought against the advertising company and its owners in federal court, the forum state's three-year statutes of limitations applied and barred the client's breach of contract, negligence, fraud, fraudulent inducement, and civil conspiracy claims. Eagle Nation, Inc. v. Market Force, Inc., 180 F. Supp. 2d 752, 2001 U.S. Dist. LEXIS 23699 (E.D.N.C. 2001).

Dismissal Upheld. — The trial court properly dismissed action brought by doctors against accountants who had been engaged to advise them on business opportunities under G.S. 1A-1, Rule 12(b)(6), as doctors' complaint against accountants disclosed that its claims were either time-barred or lacked facts sufficient to state a claim for relief. Harrold v. Dowd, 149 N.C. App. 777, 561 S.E.2d 914, 2002 N.C. App. LEXIS 309 (2002).

Asset Transfers. — Claims by decedent's heirs of undue influence on the part of the university, to which the decedent by will and inter vivos agreements transferred her assets, and on the part of the university's attorney and president, were barred by the three-year statute of limitations. Baars v. Campbell Univ., Inc., 148 N.C. App. 408, 558 S.E.2d 871, 2002 N.C. App. LEXIS 30 (2002), cert. denied, 355 N.C. 490, 563 S.E.2d 563 (2002).

E. Actions Not Barred.

Action Against Personal Representative. — Action filed on October 20, 2000, two days after qualification of deceased driver's personal representative, for personal injuries arising out of an automobile accident that occurred on June 27, 1997, was not barred by G.S. 1-52, where deceased died on November 7, 1997, at which time the three year limitations period had not yet expired, as under G.S. 28A-18-1 plaintiff's cause of action survived his death, and thus, pursuant to G.S. 1-22, plaintiff was permitted to commence a cause of action against deceased's personal representative, provided that either the action was brought within the time specified for the presentation of claims in G.S. 28A-19-3, or that notice of the claim upon which the action was based was presented to the personal representative within the time specified for the presentation of claims in G.S. 28A-19-3. The personal representative's failure to establish in the record that she complied with G.S. 28A-19-3(a) regarding general notice to creditors precluded her from relying upon the statute of limitations as a bar; moreover, under G.S. 28A-14-1(a), the absolute earliest "deadline" date which could have been specified by the personal representative in the general notice to creditors was January 18, 2001, three months from the day of the first publication or posting of such notice. Alford v. Catalytica Pharms., Inc., — N.C. App. —, 564 S.E.2d 267, 2002 N.C. App. LEXIS 587 (2002).

XI. FRAUD OR MISTAKE.

E. Actions Held Barred.

Transfer of Decedent's Assets. — Claims by decedent's heirs of undue influence on the part of the university, to which the decedent by will and inter vivos agreements transferred her assets, and on the part of the university's attorney and president, were barred by the three-year statute of limitations. Baars v. Campbell Univ., Inc., 148 N.C. App. 408, 558 S.E.2d 871, 2002 N.C. App. LEXIS 30 (2002), cert. denied, 355 N.C. 490, 563 S.E.2d 563 (2002).

XIII. ACCRUAL OF CAUSE OF ACTION FOR PERSONAL INJURY OR PROPERTY DAMAGE.

Date of Discovery Rule. —

As the home buyers' evidence raised at least an inference that their discovery of their home's defects occurred less than three years before they sued the sellers, the trial court erred in granting the sellers summary judgment on statute of limitations grounds. Everts v. Parkinson, 147 N.C. App. 315, 555 S.E.2d 667, 2001 N.C. App. LEXIS 1177 (2001).

Nephew's cause of action for permissive waste of property against decedent who had occupied the property accrued on the date when the nephew discovered the damage, which was seven years prior to the decedent's death; thus the action was barred by the applicable three-year statute of limitations. McCarver v. Blythe, 147 N.C. App. 496, 555 S.E.2d 680, 2001 N.C. App. LEXIS 1174 (2001).

XV. ASSAULT, BATTERY, AND FALSE IMPRISONMENT.

Intentional Misconduct by Employer. — Plaintiff employees' claim pursuant to Woodson v. Rowland, 329 N.C. 330, 407 S.E. 2d 222 (1991), alleging that their employer intentionally engaged in misconduct, incident to their injurious exposure to bromine, knowing that such conduct was substantially certain to cause serious injury or death to the employees, was barred by the one year statute of limitations in G.S. 1-54(3) as it read prior to amendment by Session Laws 2001-175, because the conduct alleged was equivalent to an intentional tort. Alford v. Catalytica Pharms., Inc., — N.C. App. —, 564 S.E.2d 267, 2002 N.C. App. LEXIS 587 (2002).

§ 1-54. One year.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in Alford v. Catalytica Pharms., Inc., — N.C. App. —, 564 S.E.2d 267, 2002 N.C. App. LEXIS 587 (2002).

Cited in Alford v. Catalytica Pharms., Inc., — N.C. App. —, 564 S.E.2d 267, 2002 N.C. App. LEXIS 587 (2002).

§ 1-54.1. Two months.

CASE NOTES

Cited in Hyatt v. Town of Lake Lure, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 16862 (W.D.N.C. Aug. 26, 2002).

ARTICLE 5A.

Limitations, Actions Not Otherwise Limited.

§ 1-56. All other actions, 10 years.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Baars v. Campbell Univ., Inc., 148 N.C. App. 408, 558 S.E.2d 871, 2002 N.C. App. LEXIS 30 (2002), cert. denied, 355 N.C. 490, 563 S.E.2d 563 (2002).

SUBCHAPTER III. PARTIES.

ARTICLE 6.

Parties.

§ 1-57. Real party in interest; grantees and assignees.

CASE NOTES

I. In General.

I. IN GENERAL.

Summary Judgment Held Improper. — Where original suit was brought against general contractor by homeowners who sought damages for alleged defects in stucco applied to their house, and in the settlement the general contractor's insurance carrier paid the homeowners, who in exchange dismissed the general contractor and assigned all rights they had to the insurance carrier, the insurance company, not the general contractor, was the real party in interest on the third-party complaint filed by the general contractor. However, the trial court should not have granted summary judgment in third-party defendants' favor on the third-party complaint until a reasonable time had passed for the insurance carrier to substitute itself for the general contractor, and should have refused to deal with the merits until the absent parties were brought into the action or should have corrected the defect itself. Land v. Tall House Bldg. Co., 150 N.C. App. 132, 563 S.E.2d 8, 2002 N.C. App. LEXIS 405 (2002).

SUBCHAPTER IIIA. JURISDICTION.

ARTICLE 6A.

Jurisdiction.

§ 1-75.4. Personal jurisdiction, grounds for generally.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in Burlington Indus. v. Yanoor Corp., 178 F. Supp. 2d 562, 2001 U.S. Dist. LEXIS 23842 (M.D.N.C. 2001); United States v. Coleman, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 23682 (E.D.N.C. July 26, 2001); Butler v. Butler, — N.C. App. —, 566 S.E.2d 707, 2002 N.C. App. LEXIS 858 (2002).

IV. CASES IN WHICH MINIMUM CONTACTS REQUIREMENT NOT MET.

The mere act of entering into a contract with a resident, etc.

Trial court did not have in personam jurisdiction over out-of-state corporation that purchased materials from an in-state supplier and

signed a promissory note to the supplier, since the materials were all made and delivered to the supplier from another state, the corporation was not active in the forum state, and the note, which contained only a choice of law clause for the forum state, was signed in the corporation's home state. Corbin Russwin, Inc. v. Alexander's Hdwe., Inc., 147 N.C. App. 722, 556 S.E.2d 592, 2001 N.C. App. LEXIS 1230 (2001).

VIII. LOCAL SERVICES, GOODS OR CONTRACTS.

Placement of Purchase Orders in State. — The exercise of personal jurisdiction over the defendant was proper since the defendant had substantial and sustained contacts with the forum that satisfied both North Carolina's long-arm statute and federal due process where, since April 1999, the defendant had placed 18 purchase orders in North Carolina with a company affiliated with the plaintiff and much of the equipment it purchased was also manufactured in North Carolina. Volvo Trademark Holding Aktiebolaget v. Nueces Farm Ctr., Inc., — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 17635 (W.D.N.C. Oct. 26, 2001).

§ 1-75.10. Proof of service of summons, defendant appearing in action.

CASE NOTES

Applied in Williamson v. Galloway Buick Co., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 13446 (M.D.N.C. July 8, 2002).

SUBCHAPTER IV. VENUE.

ARTICLE 7.

Venue.

§ 1-76. Where subject of action situated.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Conseco Fin. Servicing Corp. v. Dependable Hous., Inc., 150 N.C. App. 168, 564 S.E.2d 241, 2002 N.C. App. LEXIS 368 (2002).

§ 1-76.1. Where deficiency debtor resides or where loan was negotiated.

CASE NOTES

This section did not apply, etc. Trial court correctly denied debtors' motion, based on G.S. 1-76.1 and 1-83(1), to change the venue of a complaint alleging breach of contract, personal guaranty, and seeking possession of inventory securing a debt, because the inventory had not been sold at the time the complaint was filed, so the complaint was properly framed and was not actually seeking a deficiency judgment. Conseco Fin. Servicing Corp. v. Dependable Hous., Inc., 150 N.C. App. 168, 564 S.E.2d 241, 2002 N.C. App. LEXIS 368 (2002).

§ 1-77. Where cause of action arose.

CASE NOTES

III. Against Public Officers, etc.

III. AGAINST PUBLIC OFFICERS, ETC.

Hospital authority was a "public officer" under G.S. 1-77(2), and therefore the proper venue for an action against it alleging medical negligence was in the county where the action arose. Wells v. Cumberland County Hosp. Sys., — N.C. App. —, 564 S.E.2d 74, 2002 N.C. App. LEXIS 586 (2002).

§ 1-83. Change of venue.

CASE NOTES

II. Where County Designated Is Not Proper.

II. WHERE COUNTY DESIGNATED IS NOT PROPER.

Trial court correctly denied a debtor's motion to change venue, under G.S. 1-76.1 and 1-83(1), of a complaint alleging breach of contract, personal guaranty, and seeking possession of inventory securing a debt, because the inventory had not been sold at the time the complaint was filed, so the complaint was properly framed and was not actually seeking a deficiency judgment. Conseco Fin. Servicing Corp. v. Dependable Hous., Inc., 150 N.C. App. 168, 564 S.E.2d 241, 2002 N.C. App. LEXIS 368 (2002).

§ 1-87. Transcript of removal; subsequent proceedings; depositions.

CASE NOTES

Cited in Conseco Fin. Servicing Corp. v. Dependable Hous., Inc., 150 N.C. App. 168, 564 S.E.2d 241, 2002 N.C. App. LEXIS 368 (2002).

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

ARTICLE 9.

Prosecution Bonds.

§ 1-110. Suit as an indigent; counsel; suits filed pro se by prison inmates.

(a) Subject to the provisions of subsection (b) of this section with respect to prison inmates, any superior or district court judge or clerk of the superior court may authorize a person to sue as an indigent in their respective courts when the person makes affidavit that he or she is unable to advance the required court costs. The clerk of superior court shall authorize a person to sue as an indigent if the person makes the required affidavit and meets one or more of the following criteria:

(1) Receives food stamps.

(2) Receives Work First Family Assistance.

(3) Receives Supplemental Security Income (SSI).
(4) Is represented by a legal services organization that has as its primary purpose the furnishing of legal services to indigent persons.
(5) Is represented by private counsel working on the behalf of or under the auspices of a legal services organization under subdivision (4) of this section.
(6) Repealed by Session Laws 2002-126, s. 29A.6(d), effective October 1, 2002.

A superior or district court judge or clerk of superior court may authorize a person who does not meet one or more of these criteria to sue as an indigent if the person is unable to advance the required court costs. The court to which the summons is returnable may dismiss the case and charge the court costs to the person suing as an indigent if the allegations contained in the affidavit are determined to be untrue or if the court is satisfied that the action is frivolous or malicious.

(b) Whenever a motion to proceed as an indigent is filed pro se by an inmate in the custody of the Department of Correction, the motion to proceed as an indigent and the proposed complaint shall be presented to any superior court judge of the judicial district. This judge shall determine whether the complaint is frivolous. In the discretion of the court, a frivolous case may be dismissed by order. The clerk of superior court shall serve a copy of the order of dismissal upon the prison inmate. If the judge determines that the inmate may proceed as an indigent, service of process upon the defendant shall issue without further order of the court. (C.C.P., s. 72; 1868-9, c. 96, s. 2; Code, ss. 210, 211; Rev., ss. 451, 452; C.S., s. 494; 1971, c. 268, s. 4; 1993, c. 435, s. 1; 1995, c. 102, s. 1; 1995 (Reg. Sess., 1996), c. 591, s. 4; 1997-443, s. 12.22; 2002-126, s. 29A.6(d).)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 29A.6(d), effective October 1, 2002, repealed subdivision (a)(6).

ARTICLE 10.

Joint and Several Debtors.

§ 1-113. Defendants jointly or severally liable.

CASE NOTES

Cited in Piedmont Rebar, Inc. v. Sun Constr., Inc., — N.C. App. —, 564 S.E.2d 281, 2002 N.C. App. LEXIS 583 (2002).

SUBCHAPTER VIII. JUDGMENT.

ARTICLE 26.

Declaratory Judgments.

§ 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Malloy v. Cooper, 356 N.C. 113, 565 S.E.2d 76, 2002 N.C. LEXIS 543 (2002).

§ 1-254. Courts given power of construction of all instruments.

CASE NOTES

Cited in Malloy v. Cooper, 356 N.C. 113, 565 S.E.2d 76, 2002 N.C. LEXIS 543 (2002).

§ 1-257. Discretion of court.

CASE NOTES

Abuse of Discretion Not Found. — Trial court did not abuse its discretion in refusing to issue a declaratory judgment regarding the constitutionality of G.S. 90-270.15(a)(10) where it decided that further grounds for relief were unnecessary and would serve no useful purpose. Farber v. N.C. Psychology Bd., — N.C. App. —, 569 S.E.2d 287, 2002 N.C. App. LEXIS 1085 (2002).

§ 1-258. Review.

CASE NOTES

Review/Summary Judgment Standard. — On review of a declaratory judgment action, the appellate court applies the standards it would use when reviewing a trial court's denial of a motion for summary judgment. Medearis v. Trustees of Meyers Park Baptist Church, 148 N.C. App. 1, 558 S.E.2d 199, 2001 N.C. App. LEXIS 1265 (2001), cert. denied, 355 N.C. 493, 563 S.E.2d 190 (2002).

§ 1-260. Parties.

CASE NOTES

Who Are "Proper Parties". — It was not necessary that a town be a party to the actual controversy over the width of a town street for the town to be a proper party in a

declaratory judgment action seeking to obtain a determination of the width of the street; it was enough that the town's interest's would be affected by the outcome. Singleton v. Sunset Beach & Twin Lakes, Inc., 147 N.C. App. 736, 556 S.E.2d 657, 2001 N.C. App. LEXIS 1237 (2001).

SUBCHAPTER IX. APPEAL.

ARTICLE 27.

Appeal.

§ 1-277. Appeal from superior or district court judge.

CASE NOTES

I. In General.
V. Illustrative Cases.
A. Appellant Held Entitled to Appeal.
1. In General.

I. IN GENERAL.

Applied in Corbin Russwin, Inc. v. Alexander's Hdwe., Inc., 147 N.C. App. 722, 556 S.E.2d 592, 2001 N.C. App. LEXIS 1230 (2001); Boynton v. ESC Med. Sys., — N.C. App. —, 566 S.E.2d 730, 2002 N.C. App. LEXIS 873 (2002).

Cited in Darroch v. Lea, 150 N.C. App. 156, 563 S.E.2d 219, 2002 N.C. App. LEXIS 390 (2002); Fairfield Mt. Prop. Owners Ass'n v. Doolittle, 149 N.C. App. 486, 560 S.E.2d 604, 2002 N.C. App. LEXIS 189 (2002); Butler v. Butler, — N.C. App. —, 566 S.E.2d 707, 2002 N.C. App. LEXIS 858 (2002); Murphy v. First Union Capital Mkts. Corp., — N.C. App. —, 567 S.E.2d 189, 2002 N.C. App. LEXIS 865 (2002); Van Engen v. Que Scientific, Inc., — N.C. App. —, 567 S.E.2d 179, 2002 N.C. App. LEXIS 871 (2002); McDonald v. Skeen, — N.C. App. —, 567 S.E.2d 209, 2002 N.C. App. LEXIS 895 (2002).

V. ILLUSTRATIVE CASES.

A. Appellant Held Entitled to Appeal.

1. In General.

Preliminary injunction against defendant, pursuant to a covenant not to compete, etc.

Where a former employer sued a former employee for violating a covenant not to compete, the employee was entitled to interlocutory review of the trial court's decision to issue a preliminary injunction which, inter alia, prohibited the employee from working for the employer's competitors in North Carolina or South Carolina, as the injunction adversely affected the employee's substantial right to earn a living and to practice the employee's livelihood. Precision Walls, Inc. v. Servie, — N.C. App. —, 568 S.E.2d 267, 2002 N.C. App. LEXIS 980 (2002).

§ 1-294. Scope of stay; security limited for fiduciaries.

CASE NOTES

Protective Order Filed with Trial Court After Filing of Appeal Properly Denied. — Although trial court's duty to protect child's welfare continued pending the outcome of appeal of its custody order, the appeal deprived the trial court of jurisdiction to determine defendant mother's motion for a protective order, which was directly related to and would have

affected the custody order that was on appeal. Rosero v. Blake, 150 N.C. App. 250, 563 S.E.2d 248, 2002 N.C. App. LEXIS 509 (2002), cert. granted, 356 N.C. 166, — S.E.2d — (2002).

SUBCHAPTER X. EXECUTION.

ARTICLE 29A.

Judicial Sales.

Part 2. Procedure for Public Sales of Real and Personal Property.

§ 1-339.25. Public sale; upset bid on real property; compliance bond.

(a) An upset bid is an advanced, increased, or raised bid in a public sale by auction whereby a person offers to purchase real property theretofore sold for an amount exceeding the reported sale price or the last upset bid by a minimum of five percent (5%) thereof, but in any event with a minimum increase of seven hundred fifty dollars ($750.00). Subject to the provisions of subsection (b) of this section, an upset bid shall be made by delivering to the clerk of superior court, with whom the report of the sale or the last notice of upset bid was filed, a deposit in cash or by certified check or cashier's check satisfactory to the clerk in an amount greater than or equal to five percent (5%) of the amount of the upset bid but in no event less than seven hundred fifty dollars ($750.00). The deposit required by this section shall be filed with the clerk of the superior court with whom the report of sale or the last notice of upset bid was filed, by the close of normal business hours on the tenth day after the filing of the report of sale or the last notice of upset bid, and if the tenth day falls upon a Sunday or legal holiday or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made and the notice of upset bid may be filed on the day following when the office is open for the regular dispatch of its business. Except as provided in G.S. 1-339.27A and G.S. 1-339.30, there shall be no resales; however, there may be successive upset bids, each of which shall be followed by a period of 10 days for a further upset bid. If a timely motion for resale is filed under G.S. 1-339.27A, no upset bids may be filed while the motion is pending.

(b) The clerk of the superior court may require an upset bidder or the highest bidder at a resale held under G.S. 1-339.30 also to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk. The compliance bond shall be in the amount the clerk deems adequate, but in no case greater than the amount of the bid of the person being required to furnish the bond, less the amount of any required deposit. The compliance bond shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with the bid.

(c) Repealed by Session Laws 2001-271, s. 4, effective January 1, 2002. See editor's note for applicability.

(d) Repealed by Session Laws 2001-271, s. 4, effective January 1, 2002. See editor's note for applicability.

(d1) At the time that an upset bid on real property is submitted to the court as provided in subsection (a) of this section, together with a compliance bond if one is required, the upset bidder shall file with the clerk a notice of upset bid. The notice of upset bid shall:

(1) State the name, address, and telephone number of the upset bidder;
(2) Specify the amount of the upset bid;
(3) Provide that the sale shall remain open for a period of 10 days after the date on which the notice of upset bid is filed for the filing of additional upset bids as permitted by law; and
(4) Be signed by the upset bidder or the attorney or the agent of the upset bidder.

(d2) When an upset bid is made as provided in this section, the clerk shall notify the person holding the sale who shall thereafter mail a written notice of upset bid by first-class mail to the last known address of the last prior bidder and the current record owners of the property.

(d3) When an upset bid is made as provided in this section, the last prior bidder, regardless of how the bid was made, is released from any further obligation on account of the bid, and any deposit or bond provided by the last prior bidder shall be released.

(d4) Any person offering to purchase real property by upset bid as permitted in this Article is subject to and bound by the terms of the original notice of sale except as modified by court order or the provisions of this Article.

(d5) The clerk of superior court shall make all orders as may be just and necessary to safeguard the interests of all parties and may fix and determine all necessary procedural details with respect to upset bids in all instances in which this Article fails to make definite provisions as to that procedure.

(e) The provisions of this section do not apply to public sales of timber by sealed bid. (1949, c. 719, s. 1; 1963, c. 858; 1967, c. 979, s. 1; 1997-83, ss. 18, 19; 1997-119, s. 1; 1997-456, s. 28; 2001-271, s. 4; 2002-28, s. 1.)

Effect of Amendments. — Session Laws 2002-28, s. 1, effective July 22, 2002, deleted the last sentence of subsection (a), which read: "If an upset bid or a motion for resale under G.S. 1-339.27A is not filed within 10 days following a sale, resale, or prior upset bid, the rights of the parties to the sale or resale become fixed."

Article 29B.

Execution Sales.

Part 2. Procedure for Sale.

§ 1-339.64. Upset bid on real property; compliance bond.

(a) An upset bid is an advanced, increased, or raised bid whereby a person offers to purchase real property theretofore sold for an amount exceeding the reported sale price or last upset bid by a minimum of five percent (5%) thereof, but in any event with a minimum increase of seven hundred fifty dollars ($750.00). Subject to the provisions of subsection (b) of this section, an upset bid shall be made by delivering to the clerk of superior court, with whom the report of sale or the last notice of upset bid was filed, a deposit in cash or by certified check or cashier's check satisfactory to the clerk in an amount greater than or equal to five percent (5%) of the amount of the upset bid but in no event less than seven hundred fifty dollars ($750.00). The deposit required by this section shall be filed with the clerk of the superior court, with whom the report of sale or the last notice of upset bid was filed, by the close of normal business hours on the tenth day after the filing of the report of sale or the last notice of upset bid and if the tenth day falls upon a Sunday or legal holiday or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made and the notice of upset bid may be filed on

the day following when the office is open for the regular dispatch of its business. Except as provided in G.S. 1-339.66A and G.S. 1-339.69, there shall be no resales; however, there may be successive upset bids, each of which shall be followed by a period of 10 days for a further upset bid. If a timely motion for resale is filed under G.S. 1-339.66A, no upset bids may be filed while the motion is pending.

(b) The clerk of the superior court may require an upset bidder or the highest bidder at a resale held under G.S. 1-339.69 also to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk. The compliance bond shall be in the amount the clerk deems adequate, but in no case greater than the amount of the bid of the person being required to furnish the bond, less the amount of any required deposit. The compliance bond shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with the bid.

(c) Repealed by Session Laws 2001-271, s. 14, effective January 1, 2002. See editor's note for applicability.

(d) Repealed by Session Laws 2001-271, s. 14, effective January 1, 2002. See editor's note for applicability.

(e) At the time that an upset bid on real property is submitted to the court as provided in subsection (a) of this section, together with a compliance bond if one is required, the upset bidder shall file with the clerk a notice of upset bid. The notice of upset bid shall:

(1) State the name, address, and telephone number of the upset bidder;
(2) Specify the amount of the upset bid;
(3) Provide that the sale shall remain open for a period of 10 days after the date on which the notice of upset bid is filed for the filing of additional upset bids as permitted by law; and
(4) Be signed by the upset bidder or the attorney or the agent of the upset bidder.

(f) When an upset bid is made as provided in this section, the clerk shall notify the person holding the sale who shall thereafter mail a written notice of upset bid by first-class mail to the last known address of the last prior bidder and the current record owners of the property.

(g) When an upset bid is made as provided in this section, the last prior bidder, regardless of how the bid was made, is released from any further obligation on account of the bid, and any deposit or bond provided by the last prior bidder shall be released.

(h) Any person offering to purchase real property by upset bid as permitted in this Article is subject to and bound by the terms of the original notice of sale except as modified by a court order or the provisions of this Article.

(i) The clerk of superior court shall make all orders as may be just and necessary to safeguard the interests of all parties and may fix and determine all necessary procedural details with respect to upset bids in all instances in which this Article fails to make definite provisions as to that procedure. (1949, c. 719, s. 1; 1967, c. 979, s. 2; 1997-119, s. 2; 2001-271, s. 14; 2002-28, s. 2.)

Effect of Amendments. — Session Laws 2002-28, s. 1, effective July 22, 2002, deleted the last sentence of subsection (a), which read: "If an upset bid or a motion for resale under G.S. 1-339.66A is not filed within 10 days following a sale, resale, or prior upset bid, the rights of the parties to the sale or resale become fixed."

ARTICLE 31.

Supplemental Proceedings.

§ 1-352.1. Interrogatories to discover assets.

CASE NOTES

Applied in Composite Tech., Inc. v. Advanced Composite Structures, Inc., 150 N.C. App. 386, 563 S.E.2d 84, 2002 N.C. App. LEXIS 494 (2002).

§ 1-362. Debtor's property ordered sold.

CASE NOTES

Construction of Section. — Single debtor, who had no dependents, was not a "family" for purposes of G.S. 1-362 and, thus, could not claim the benefit of that state exemption in the debtor's Chapter 11 bankruptcy case. In re Connelly, 276 Bankr. 421, 2002 Bankr. LEXIS 562 (Bankr. W.D.N.C. 2002).

Construction in Context of Limited Liability Company Membership Interest. — Because the forced sale of a membership interest in a limited liability company to satisfy a debt would necessarily entail the transfer of a member's ownership interest to another, thus permitting the purchaser to become a member, forced sales of the type permitted in G.S. 1-362 are prohibited pursuant to G.S. 57C-3-03. Herring v. Keasler, — N.C. App. —, 563 S.E.2d 614, 2002 N.C. App. LEXIS 585 (2002).

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

ARTICLE 35.

Attachment.

Part 1. General Provisions.

§ 1-440.2. Actions in which attachment may be had.

CASE NOTES

Cited in Sara Lee Corp. v. Gregg, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 16019 (M.D.N.C. Aug. 15, 2002).

§ 1-440.3. Grounds for attachment.

CASE NOTES

Cited in Sara Lee Corp. v. Gregg, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 16019 (M.D.N.C. Aug. 15, 2002); Challenger Indus., Inc. v. 3-1, Inc., — N.C. App. —, 568 S.E.2d 274, 2002 N.C. App. LEXIS 974 (2002).

Part 2. Procedure to Secure Attachment.

§ 1-440.10. Bond for attachment.

CASE NOTES

Cited in Sara Lee Corp. v. Gregg, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 16019 (M.D.N.C. Aug. 15, 2002).

§ 1-440.11. Affidavit for attachment; amendment.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Sara Lee Corp. v. Gregg, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 16019 (M.D.N.C. Aug. 15, 2002).

Part 5. Miscellaneous Procedure Pending Final Judgment.

§ 1-440.36. Dissolution of the order of attachment.

CASE NOTES

Cited in Sara Lee Corp. v. Gregg, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 16019 (M.D.N.C. Aug. 15, 2002).

Part 6. Procedure after Judgment.

§ 1-440.46. When plaintiff prevails in principal action.

CASE NOTES

Cited in Sara Lee Corp. v. Gregg, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 16019 (M.D.N.C. Aug. 15, 2002).

Article 37.

Injunction.

§ 1-485. When preliminary injunction issued.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Applied in Staton v. Russell, — N.C. App. —, 565 S.E.2d 103, 2002 N.C. App. LEXIS 688 (2002).

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

ARTICLE 43.

Nuisance and Other Wrongs.

§ 1-538.2. Civil liability for larceny, shoplifting, theft by employee, embezzlement, and obtaining property by false pretense.

CASE NOTES

Civil Penalty Under the Statute Did Not Lead to Violation of Double Jeopardy Clause. — Where the attorney for the store from which defendant stole a pair of shoes demanded in a letter pursuant to G.S. 1-538.2 that defendant pay the owner of the store $200, and defendant paid the store owner $200, the payment by defendant of the $200 did not constitute a criminal sanction, and thus defendant's ensuing conviction for misdemeanor larceny did not violate the Double Jeopardy Clause. State v. Beckham, 148 N.C. App. 282, 558 S.E.2d 255, 2002 N.C. App. LEXIS 14 (2002).

§ 1-539.2C. Damages for identity fraud.

(a) Any person whose property or person is injured by reason of an act made unlawful by Article 19C of Chapter 14 of the General Statutes may sue for civil damages. Damages may be in an amount of up to five thousand dollars ($5,000) for each incident, or three times the amount of actual damages, whichever amount is greater. A person seeking damages as set forth in this section may also institute a civil action to enjoin and restrain future acts that would constitute a violation of this section. The court, in an action brought under this section, may award reasonable attorneys' fees to the prevailing party.

(b) If the identifying information of a deceased person is used in a manner made unlawful by Article 19C of Chapter 14 of the General Statutes, the deceased person's estate shall have the right to recover damages pursuant to subsection (a) of this section.

(c) The venue for any civil action brought under this section shall be the county in which the plaintiff resides or any county in which any part of the alleged violation of G.S. 14-113.20 or G.S. 14-113.20A took place, regardless of whether the defendant was ever actually present in that county. Civil actions under this section must be brought within three years from the date on which the identity of the wrongdoer was discovered or reasonably should have been discovered.

(d) Civil action under this section does not depend on whether or not a criminal prosecution has been or will be instituted under Article 19C of Chapter 14 of the General Statutes for the acts which are the subject of the civil action. The rights and remedies provided by this section are in addition to any other rights and remedies provided by law. (2002-175, s. 8.)

Editor's Note. — Session Laws 2002-175, s. 9, made this section effective December 1, 2002, and applicable to offenses committed on or after that date.

State Library Of North Carolina
Raleigh, N.C.

ARTICLE 43B.

Defense of Charitable Immunity Abolished; and Qualified Immunity for Volunteers.

§ 1-539.12. Immunity from civil liability for employers disclosing information.

Legal Periodicals. —

For survey, "Survey of Developments in North Carolina Law and the Fourth Circuit, 1999: Potential Violence to the Bottom Line — Expanding Employer Liability for Acts of Workplace Violence in North Carolina," see 79 N.C.L. Rev. 2053 (2000).

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

ARTICLE 45A.

Arbitration and Award.

§ 1-567.2. Arbitration agreements made valid, irrevocable and enforceable; scope.

CASE NOTES

A party waives arbitration when it engages in conduct inconsistent with arbitration which results in prejudice.

Home buyers impliedly waived their contractual right to compel arbitration when they took advantage of and benefitted from a discovery procedure without leave of the arbitrator, and because the contractor was prejudiced in time and cost spent, as well as a lack of reciprocal discovery. Douglas v. McVicker, — N.C. App. —, 564 S.E.2d 622, 2002 N.C. App. LEXIS 641 (2002).

§ 1-567.3. Proceedings to compel or stay arbitration.

CASE NOTES

Determination of Valid Arbitration Agreement Required. —

Where defendants, a bank and others, filed a motion seeking a stay of plaintiff stockholder's civil court proceedings against them on the ground that the parties had previously agreed to arbitrate the controversy at issue, and the stockholder, in response, denied the existence of the arbitration agreement, the trial court, pursuant to G.S. 1-567.3(a), committed reversible error by denying the motion for a stay without first determining whether the parties had an agreement to arbitrate. Barnhouse v. Am. Express Fin. Advisors, Inc., — N.C. App. —, 566 S.E.2d 130, 2002 N.C. App. LEXIS 778 (2002).

§ 1-567.8. Witnesses; subpoenas; depositions.

CASE NOTES

Applied in Douglas v. McVicker, — N.C. App. —, 564 S.E.2d 622, 2002 N.C. App. LEXIS 641 (2002).

Chapter 1A.

Rules of Civil Procedure.

Article 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Article 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Rule 3. Commencement of action.

CASE NOTES

I. IN GENERAL.

Extension of Time Granted for Settling Case on Appeal. — Although company's challenge to its disqualification from the food stamp program was timely under the state procedural rules, those rules directly conflicted with the federal statute that limited the government's waiver of immunity; under the Supremacy Clause, 7 U.S.C.S. 2023(a)'s limitations period had to prevail over the longer period allowed under N.C. R. Civ. P. 3(a). Henderson Fruit & Produce Co. v. United States, 181 F. Supp. 2d 566, 2001 U.S. Dist. LEXIS 23353 (E.D.N.C. 2001).

Rule 4. Process.

CASE NOTES

I. IN GENERAL.

Applied in Gibby v. Lindsey, 149 N.C. App. 470, 560 S.E.2d 589, 2002 N.C. App. LEXIS 216 (2002).

Cited in Piedmont Rebar, Inc. v. Sun Constr., Inc., — N.C. App. —, 564 S.E.2d 281, 2002 N.C. App. LEXIS 583 (2002).

II. PERSONAL SERVICE ON NATURAL PERSONS.

A. In General.

Absent valid service of process, etc. Where the employee failed to serve the individual employers with a copy of the summons and complaint, the trial court did not have personal jurisdiction over the individual employers, and thus the court's order setting aside a summary judgment was void ab initio and could be attacked at any time. Van Engen v. Que Scientific, Inc., — N.C. App. —, 567 S.E.2d 179, 2002 N.C. App. LEXIS 871 (2002).

C. Service by Registered or Certified Mail.

Service by Certified Mail on Prison Inmate. — In a proceeding for termination of paternal rights, certified mail return receipt and defendant father's filed petition showed sufficient compliance with the service of process

rules to raise a rebuttable presumption of valid service, which defendant did not rebut, where: (1) copies of the summons and complaint were sent by certified mail to the correctional institution where defendant was an inmate; (2) a certified receipt was signed and returned, presumably by a prison employee of suitable age and discretion authorized to sign the receipt on behalf of defendant; and (3) 18 days after service, defendant filed a petition for appointment of counsel. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202, 2002 N.C. App. LEXIS 364 (2002).

IV. SERVICE ON CORPORATIONS.

Service Held Invalid. — Appellate court found that service of process was not sufficient to give the trial court personal jurisdiction over defendant where service was by mailing a copy of the summons and complaint by regular mail rather than certified mail, and mailing of the summons and complaint occurred before the documents had been filed or signed by the Clerk of Court. Thomas & Howard Co. v. Trimark Catastrophe Servs., Inc., — N.C. App. —, 564 S.E.2d 569, 2002 N.C. App. LEXIS 684 (2002).

V. SERVICE BY PUBLICATION.

But where defendant had actual notice of the proceedings against him, he was not allowed to attack a default judgment as void on the grounds of lack of jurisdiction due to a failure to use due diligence to obtain personal service before service by publication. Creasman v. Creasman, — N.C. App. —, 566 S.E.2d 725, 2002 N.C. App. LEXIS 856 (2002).

OPINIONS OF ATTORNEY GENERAL

Qualification for Payroll Deductions by Employee Association. — In order to qualify for the privilege of payroll deductions an employee association must meet the following criteria: (1) the association must be domiciled in North Carolina, i.e., it must have a registered agent for service of process in the state and maintain an office in the state with a resident officer, director, managing agent or member of the governing body authorized to accept payment of the payroll deductions; (2) the association must have at least 2000 members; (3) the majority of the association's members must be employees of the state or public schools; and (4) an employee must authorize the deduction in writing. See opinion of Attorney General to Susan H. Ehringhaus, Vice Chancellor and General Counsel, University of North Carolina, 1999 N.C. AG LEXIS 34 (10/19/99).

Rule 5. Service and filing of pleadings and other papers.

CASE NOTES

Cited in Harrold v. Dowd, 149 N.C. App. 777, 561 S.E.2d 914, 2002 N.C. App. LEXIS 309 (2002).

Rule 6. Time.

(a) *Computation.* — In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, including rules, orders or statutes respecting publication of notices, the day of the act, event, default or publication after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) *Enlargement.* — When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made

before the expiration of the period originally prescribed or as extended by a previous order. Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect. Notwithstanding any other provisions of this rule, the parties may enter into binding stipulations without approval of the court enlarging the time, not to exceed in the aggregate 30 days, within which an act is required or allowed to be done under these rules, provided, however, that neither the court nor the parties may extend the time for taking any action under Rules 50(b), 52, 59(b), (d), (e), 60(b), except to the extent and under the conditions stated in them.

(c) *Unaffected by expiration of session.* — The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a session of court. The continued existence or expiration of a session of court in no way affects the power of a court to do any act or take any proceeding, but no issue of fact shall be submitted to a jury out of session.

(d) *For motions, affidavits.* — A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and except as otherwise provided in Rule 59(c), opposing affidavits shall be served at least two days before the hearing. If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require. For the purpose of this two-day requirement only, service shall mean personal delivery, facsimile transmission, or other means such that the party actually receives the affidavit within the required time.

(e) *Additional time after service by mail.* — Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(f) *Additional time for Address Confidentiality Program participants.* — Whenever a person participating in the Address Confidentiality Program established by Chapter 15C of the General Statutes has a legal right to act within a prescribed period of 10 days or less after the service of a notice or other paper upon the program participant, and the notice or paper is served upon the program participant by mail, five days shall be added to the prescribed period. (1967, c. 954, s. 1; 2000-127, s. 5; 2002-171, s. 2.)

Effect of Amendments. —
Session Laws 2002-171, s. 2, effective January 1, 2003, added subsection (f).

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Harrold v. Dowd, 149 N.C. App. 777, 561 S.E.2d 914, 2002 N.C. App. LEXIS 309 (2002).

ARTICLE 3.

Pleadings and Motions.

Rule 8. General rules of pleadings.

CASE NOTES

I. IN GENERAL.

Cited in Ausley v. Bishop, 150 N.C. App. 56, 564 S.E.2d 252, 2002 N.C. App. LEXIS 382 (2002); Orthodontic Ctrs. of Am., Inc. v. Hanachi, — N.C. App. —, 564 S.E.2d 573, 2002 N.C. App. LEXIS 683 (2002).

III. AFFIRMATIVE DEFENSES.

Waiver. — Where neither the defendants' original nor amended answer included an affirmative defense based upon G.S. 39-13.6, they waived this defense by failing to affirmatively assert *this defense.* Purchase Nursery, Inc. v. Edgerton, — N.C. App. —, 568 S.E.2d 904, 2002 N.C. App. LEXIS 1073 (2002).

Rule 9. Pleading special matters.

CASE NOTES

I. IN GENERAL.

Claim for Medical Malpractice Under Subsection (j) Not Appropriate. — Certification by an expert witness was not necessary for the patient's ordinary negligence claims, despite the fact that the hospital was a health care provider, since the hospital's independent duties owed to the patient could be judged by a reasonable person standard which did not require expert testimony at trial. Sharpe v. Worland, 147 N.C. App. 782, 557 S.E.2d 110, 2001 N.C. App. LEXIS 1252 (2001).

Applied in Becker v. Graber Bldrs., Inc., 149 N.C. App. 787, 561 S.E.2d 905, 2002 N.C. App. LEXIS 308 (2002).

Cited in Harrold v. Dowd, 149 N.C. App. 777, 561 S.E.2d 914, 2002 N.C. App. LEXIS 309 (2002); Ausley v. Bishop, 150 N.C. App. 56, 564 S.E.2d 252, 2002 N.C. App. LEXIS 382 (2002).

VII. PLEADING AND PRACTICE.

Medical malpractice complaint, etc. Once a party receives and exhausts the 120-day extension of time in order to comply with G.S. 1A-1, Rule 9(j)'s expert certification requirement, the party cannot amend a medical malpractice complaint to include expert certification. Expert review of a medical malpractice claim under G.S. 1A-1, Rule 9(j) must take place before the filing of the complaint. Thigpen v. Ngo, 355 N.C. 198, 558 S.E.2d 162, 2002 N.C. LEXIS 17 (2002).

VIII. TIME AND PLACE.

Reasonable Time to File Complaint After Statute Authorizing Extension to File Declared Unconstitutional. — Administratrix in a wrongful death action must be afforded a reasonable time to file her complaint after the statute (G.S. 1A-1, Rule 9(j)) which granted her an extension of time to obtain a certification and file her complaint was declared unconstitutional (in Anderson v. Assimos, — N.C. App. —, 553 S.E. 2d 63 (2001)). Best v. Wayne Mem. Hosp., 147 N.C. App. 628, 556 S.E.2d 629, 2001 N.C. App. LEXIS 1259 (2001).

Rule 11. Signing and verification of pleadings.

CASE NOTES

I. In General.

I. IN GENERAL.

Lack of Evidence. —

Trial court's award of sanctions was appropriate where plaintiff's verified complaint was not well grounded in fact, or based upon a reasonable inquiry; the complaint alleged then-existing direct competition, and ongoing misappropriation and disclosure of trade secrets, both of which were directly contradicted by deposition testimony. Static Control Components, Inc. v. Vogler, — N.C. App. —, 568 S.E.2d 305, 2002 N.C. App. LEXIS 978 (2002).

There are three separate and distinct issues to Rule 11, etc.

There are three parts to a Rule 11 analysis: (1) factual sufficiency; (2) legal sufficiency; and (3) improper purpose; a violation of any one of these requirements mandates the imposition of sanctions under Rule 11. Static Control Components, Inc. v. Vogler, — N.C. App. —, 568 S.E.2d 305, 2002 N.C. App. LEXIS 978 (2002).

Motion for Sanctions Was Timely. — Motion for sanctions was timely filed, as the impropriety of plaintiff's claims only came into focus during discovery, and the motion was filed after plaintiff refused to respond to a settlement inquiry made within weeks of the discovery of the absence of any factual basis to plaintiff's complaint. Static Control Components, Inc. v. Vogler, — N.C. App. —, 568 S.E.2d 305, 2002 N.C. App. LEXIS 978 (2002).

Failure to Participate in Arbitration in Good Faith. — Failure of defendant in auto accident case to appear at arbitration hearing, and lack of evidence regarding attorney's authority, resulted in conclusion that defendant failed to participate in arbitration hearing in good faith and meaningful manner; the failure or refusal to participate in an arbitration proceeding in a good faith and meaningful manner was subject to sanctions by the court on motion of a party, or report of the arbitrator. Bledsole v. Johnson, — N.C. App. —, 564 S.E.2d 902, 2002 N.C. App. LEXIS 652 (2002).

Remand for Findings and Conclusions. — A remand to the trial court was required so that the trial court could render findings and conclusions to support its denial of sanctions against plaintiff buyer under G.S. 1A-1, Rule 11 for making allegedly unsupported allegations in complaint regarding the closing value of a home which defendant seller built and sold to plaintiff, as plaintiff's own admissions during discovery indicated that plaintiff's statement regarding the home's value at closing was based on an unsupported estimate and was contrary to a lender's appraisal and to plaintiff's own belief as to value at the time of closing. Tucker v. The Blvd. at Piper Glen LLC, 150 N.C. App. 150, 564 S.E.2d 248, 2002 N.C. App. LEXIS 409 (2002).

Denial of Sanctions Upheld. — Motion brought by plaintiffs who sought sanctions under G.S. 1A-1, Rule 56(g) on the grounds that defendant filed an affidavit in support of summary judgment that was not based on his personal knowledge, because it used a phrase with which he was unacquainted, in bad faith, was not so unwarranted by existing case law as to merit sanctions under G.S. 1A-1, Rule 11. Johnson v. Harris, 149 N.C. App. 928, 563 S.E.2d 224, 2002 N.C. App. LEXIS 383 (2002).

Complaint Was Filed for An Improper Purpose. — Trial court did not err in concluding that the complaint was filed for the improper purpose of harassing defendant; plaintiff's chief executive officer admitted that defendant had not violated the non-competition agreement, as was alleged in the complaint, and that there was no evidence that defendant was unwilling to abide by the non-competition agreement. Static Control Components, Inc. v. Vogler, — N.C. App. —, 568 S.E.2d 305, 2002 N.C. App. LEXIS 978 (2002).

De Novo Review of Sanctions. —

On appeal, the trial court's decision whether to impose sanctions for a violation of Rule 11 is reviewable de novo as a legal issue. Static Control Components, Inc. v. Vogler, — N.C. App. —, 568 S.E.2d 305, 2002 N.C. App. LEXIS 978 (2002).

Rule 12. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on pleading.

CASE NOTES

I. In General.
II. Answers and Time Therefor.

I. IN GENERAL.

Applied in Singleton v. Sunset Beach & Twin Lakes, Inc., 147 N.C. App. 736, 556 S.E.2d 657, 2001 N.C. App. LEXIS 1237 (2001); Wood v. Guilford County, 355 N.C. 161, 558 S.E.2d 490, 2002 N.C. LEXIS 16 (2002); Holloman v. Harrelson, 149 N.C. App. 861, 561 S.E.2d 351, 2002 N.C. App. LEXIS 304 (2002), cert. denied, 355 N.C. 748, 565 S.E.2d 665 (2002); Becker v. Graber Bldrs., Inc., 149 N.C. App. 787, 561 S.E.2d 905, 2002 N.C. App. LEXIS 308 (2002); In re Hardesty, 150 N.C. App. 380, 563 S.E.2d 79, 2002 N.C. App. LEXIS 481 (2002); Alford v. Catalytica Pharms., Inc., — N.C. App. —, 564 S.E.2d 267, 2002 N.C. App. LEXIS 587 (2002); Hobby v. City of Durham, — N.C. App. —, 569 S.E.2d 1, 2002 N.C. App. LEXIS 982 (2002); Boyce & Isley, PLLC v. Cooper, — N.C. App. —, 568 S.E.2d 803, 2002 N.C. App. LEXIS 1088 (2002).

Cited in Baars v. Campbell Univ., Inc., 148 N.C. App. 408, 558 S.E.2d 871, 2002 N.C. App. LEXIS 30 (2002), cert. denied, 355 N.C. 490, 563 S.E.2d 563 (2002); Douglas v. McVicker, — N.C. App. —, 564 S.E.2d 622, 2002 N.C. App. LEXIS 641 (2002); Hatcher v. Harrah's NC Casino Co., — N.C. App. —, 565 S.E.2d 241, 2002 N.C. App. LEXIS 712 (July 2, 2002); Craig v. Faulkner, — N.C. App. —, 565 S.E.2d 733, 2002 N.C. App. LEXIS 743 (2002); ; Wilkerson v. Norfolk S. Ry., — N.C. App. —, 566 S.E.2d 104, 2002 N.C. App. LEXIS 744 (2002); Boney Publishers, Inc. v. Burlington City Council, — N.C. App. —, 566 S.E.2d 701, 2002 N.C. App. LEXIS 859 (2002); Steeves v. Scot. County Bd. of Health, — N.C. App. —, 567 S.E.2d 817, 2002 N.C. App. LEXIS 913 (2002); Seymour v. Lenoir County, — N.C. App. —, 567 S.E.2d 799, 2002 N.C. App. LEXIS 914 (2002); Boyce & Isley, PLLC v. Cooper, — N.C. App. —, 568 S.E.2d 803, 2002 N.C. App. LEXIS 1088 (2002).

II. ANSWERS AND TIME THEREFOR.

Commencement of Time for Filing. — Failure of owners of condemned land to comply with statutory judicial review requirements was sufficient cause to affirm denial of their counterclaims, where the time for filing their counterclaims commenced to run upon notice of final environmental impact statement by publication. DOT v. Blue, 147 N.C. App. 596, 556 S.E.2d 609, 2001 N.C. App. LEXIS 1235 (2001).

IV. SUBJECT MATTER JURISDICTION.

Standard of review on a motion to dismiss under G.S. 1A-1, Rule 12(b)(1) for lack of jurisdiction is de novo. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Termination Proceedings Involving American Indian. — Trial court had subject matter jurisdiction over termination of parental rights proceeding since the equivocal testimony of the father that he was an American Indian was insufficient to meet the father's burden to prove the applicability of the Indian Child Welfare Act, 25 U.S.C.S. § 1912(f). In re Williams, 149 N.C. App. 951, 563 S.E.2d 202, 2002 N.C. App. LEXIS 364 (2002).

Claim Against Officer of Bankrupt Corporation. — Trial court had subject matter jurisdiction to hear constructive fraud and unfair and deceptive practice claims asserted by a corporation that supplied lumber to another corporation that went bankrupt, against the former president of the bankrupt corporation, as the claims did not belong to the bankrupt corporation, the claims were not part of the bankruptcy estate, and the bankruptcy trustee had no authority to bring the claims. Keener Lumber Co. v. Perry, 149 N.C. App. 19, 560 S.E.2d 817, 2002 N.C. App. LEXIS 128 (2002).

Jurisdiction of Industrial Commission. — Trial court lacked subject matter jurisdiction over whether the insurance guaranty association was required by amendments to the Insurance Guaranty Association Act, G.S. 58-48-1 et seq., and the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., to defend and indemnify the workers' compensation claims against the insolvent insurers, as the industrial commission had jurisdiction over the matter; not only was the association an insurer under G.S. 58-48-35(a)(2) over which the industrial commission had jurisdiction, but also, under G.S. 97-91, the industrial commission had jurisdiction to hear all questions arising under the Workers' Compensation Act. N.C. Ins. Guar. Ass'n v. Int'l Paper Co., — N.C. App. —, 569 S.E.2d 285, 2002 N.C. App. LEXIS 1092 (2002).

Declaratory Judgment Action as to Criminal Statute. — Appellate court erred in finding that jurisdiction for a declaratory judgment action as to the constitutionality of a

criminal statute did not exist because the case presented an actual controversy between parties with adverse interests; furthermore, the claimant sufficiently alleged imminent prosecution and that the claimant stood to lose fundamental human rights and property interests if the criminal statute was enforced and was later determined to be unconstitutional. Malloy v. Cooper, 356 N.C. 113, 565 S.E.2d 76, 2002 N.C. LEXIS 543 (2002).

V. PERSONAL JURISDICTION.

Personal Jurisdiction Not Established. — Trial court did not err in granting a Florida resort's motion to dismiss claims arising out of injuries sustained at the resort; the injured person did not establish that North Carolina had personal jurisdiction over tortious acts allegedly committed in North Carolina by private investigator working on behalf of the resort, as the injured person did not raise an issue of fact as to the resort's retention of control over how the investigator investigated the accident. Wyatt v. Walt Disney World, Co., — N.C. App. —, 565 S.E.2d 705, 2002 N.C. App. LEXIS 726 (2002).

Jurisdiction over Incarcerated Father in Termination Proceeding. — Trial court properly asserted personal jurisdiction over a father, incarcerated in Pennsylvania, in a proceeding for termination of his parental rights over his 13 year old child, who resided in North Carolina, despite the father's lack of minimum contacts with North Carolina, where: (1) the father never had a custodial relationship with the child, nor did he have any significant personal or financial relationship with the child other than an occasional letter and a total of $125 in monies and gifts; (2) the relationship was unlikely to change in the future due to the father's lengthy incarceration and the child's unwillingness to see him; and (3) the father's only alternative for providing for care of the child was through the assistance of his parents, who had no relationship with the child, and even failed to attend the termination of parental rights hearing. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202, 2002 N.C. App. LEXIS 364 (2002).

VII. INSUFFICIENCY OF PROCESS.

Sufficient Compliance Shown. — In a proceeding for termination of paternal rights, certified mail return receipt and defendant father's filed petition showed sufficient compliance with the service of process rules to raise a rebuttable presumption of valid service, which defendant did not rebut, where: (1) copies of the summons and complaint were sent by certified mail to the correctional institution where defendant was an inmate; (2) a certified receipt was signed and returned, presumably by a prison employee of suitable age and discretion authorized to sign the receipt on behalf of defendant; and (3) 18 days after service, defendant filed a petition for appointment of counsel. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202, 2002 N.C. App. LEXIS 364 (2002).

IX. FAILURE TO STATE CLAIM.

A. In General.

Dismissal Upheld. — The trial court properly dismissed action brought by doctors against accountants who had been engaged to advise them on business opportunities under G.S. 1A-1, Rule 12(b)(6), as doctors' complaint against accountants disclosed that its claims were either time-barred or lacked facts sufficient to state a claim for relief. Harrold v. Dowd, 149 N.C. App. 777, 561 S.E.2d 914, 2002 N.C. App. LEXIS 309 (2002).

Standard of Review. — For a motion based on G.S. 1A-1, Rule 12(b)(6), the standard of review is whether, construing the complaint liberally, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Summary Judgment Not Precluded by Earlier Denial of Motion Under Subsection (b)(6). —

In a wrongful death action against a city and a railroad arising from a motorist's death after being struck by a train at a railroad crossing, after a trial court partially denied the city's motion to dismiss under Rule 12(b)(6) and 12(c), it was not precluded from granting the city's summary judgment motion. Wilkerson v. Norfolk S. Ry., — N.C. App. —, 566 S.E.2d 104, 2002 N.C. App. LEXIS 744 (2002).

And to Third-Party Complaints. — Where defendants/third-party plaintiffs, a car dealer and its agent, were sued for misrepresenting the condition of a car and filed a third-party complaint for contribution and indemnity against third-party defendant restorer, who repaired and then sold the car after it was involved in a collision, the trial court properly granted the restorer's N.C. R. Civ. P. 12(b)(6) motion to dismiss the third-party complaint for failure to state a claim upon which relief could be granted, as defendants failed to sufficiently allege that the restorer committed a tort against plaintiff buyers so as to render the restorer a joint tortfeasor. Bowman v. Alan Vester Ford Lincoln Mercury, — N.C. App. —, 566 S.E.2d 818, 2002 N.C. App. LEXIS 886 (2002).

X. FAILURE TO JOIN NECESSARY PARTY.

A dismissal under subsection (b)(7) is not considered to be on the merits and is without prejudice.

Trial court's order conditionally indicating that plaintiff homeowner association's tax refund action would be dismissed if certain necessary parties were not joined, erroneously indicated that such dismissal would be with prejudice; a dismissal for failure to join a necessary party, such as in response to a motion under N.C. R. Civ. P. 12(b)(7), was not a dismissal on the merits and could not be with prejudice. Fairfield Mt. Prop. Owners Ass'n v. Doolittle, 149 N.C. App. 486, 560 S.E.2d 604, 2002 N.C. App. LEXIS 189 (2002).

XI. MOTION FOR JUDGMENT ON THE PLEADINGS.

Grant of Motion Held Error. —

Motion for judgment on the pleadings was not favored, and should not have been granted unless it appeared to a certainty that the plaintiff was entitled to no relief under any state of facts which could have been proved in support of the claim; a trial court's dismissal was reversed where the complaint adequately alleged claims of breach of contract, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, constructive fraud, and unfair trade practices. Governor's Club, Inc. v. Governors Club Ltd. P'ship., — N.C. App. —, 567 S.E.2d 781, 2002 N.C. App. LEXIS 926 (2002).

XIII. MOTION TO STRIKE.

Affirmative Defense Allowed Because State Agency Waived Sovereign Immunity. — Trial court properly denied state transportation agency's motion to strike condemned landowners' affirmative defense of abuse of discretion since the state agency had waived sovereign immunity. DOT v. Blue, 147 N.C. App. 596, 556 S.E.2d 609, 2001 N.C. App. LEXIS 1235 (2001).

Rule 13. Counterclaim and crossclaim.

CASE NOTES

II. Counterclaims.

II. COUNTERCLAIMS.

To Be Compulsory, Counterclaim Must Exist When Pleading Is Served. — Under G.S. 1A-1, Rule 13(a), a party is required to plead as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; under this rule, a counterclaim is compulsory only when it is in existence at the time of the serving of the pleading. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Where a claim is not mature at the time of the filing of the action, failure to bring it as a counterclaim does not serve as a bar to subsequent litigation on that claim; even where the claim matures after the pleadings have been filed but during the pendency of the action, the pleader is not required to supplement the pleadings with a compulsory counterclaim. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Insurer failed to establish that unfair business practice claims presented in a subsequent action were compulsory counterclaims in a declaratory judgment action involving coverage because it failed to establish that the insured knew or reasonably should have known of all material facts necessary to assert all claims; the record supported the insured's claims that the facts which constituted the basis of the insured's claims were not fully known to the insured at the time the declaratory judgment action was filed, but rather, became clear to the insured throughout the pendency of that action. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Rule 15. Amended and supplemental pleadings.

CASE NOTES

I. In General.
II. Amendments to Conform to Evidence.

I. IN GENERAL.

Amendment Substituting or Adding Party. —

While G.S. 1A-1, Rule 15 permits the relation-back doctrine to extend periods for pursuing claims, it does not apply to parties. Estate of Fennell v. Stephenson, 354 N.C. 327, 554 S.E.2d 629, 2001 N.C. LEXIS 1096 (2001).

Trial court's denial of plaintiff's motion to amend upheld, etc.

Trial court's refusal to allow plaintiffs' last minute motion to amend their complaint for a second time on the date calendared for defendants' motion to dismiss did not constitute an abuse of discretion. Harrold v. Dowd, 149 N.C. App. 777, 561 S.E.2d 914, 2002 N.C. App. LEXIS 309 (2002).

Cited in Harrold v. Dowd, 149 N.C. App. 777, 561 S.E.2d 914, 2002 N.C. App. LEXIS 309 (2002); Ausley v. Bishop, 150 N.C. App. 56, 564 S.E.2d 252, 2002 N.C. App. LEXIS 382 (2002); Miller v. B.H.B. Enters., Inc., — N.C. App. —, 568 S.E.2d 219, 2002 N.C. App. LEXIS 960 (2002).

II. AMENDMENTS TO CONFORM TO EVIDENCE.

Amendment Denied Absent Notice and Consent by Opposing Party. — At the close of the evidence in the trial of a personal injury action, the injured party could not amend her complaint to state a claim for gross negligence because the opposing party had no notice of that claim, nor did he impliedly consent to it during the trial. Bass v. Johnson, 149 N.C. App. 152, 560 S.E.2d 841, 2002 N.C. App. LEXIS 134 (2002).

Allowance of Amendment Upheld. —

Trial court did not err in granting a plaintiff the remedy of a resulting trust even though it was not specifically requested in the complaint, since the complaint and the evidence presented at trial, as well as the motion to amend, served as notice to the defendant that a resulting trust was a possible remedy. Meekins v. Box, — N.C. App. —, 567 S.E.2d 422, 2002 N.C. App. LEXIS 925 (2002).

Article 4.

Parties.

Rule 17. Parties plaintiff and defendant; capacity.

CASE NOTES

II. Real Party in Interest.

II. REAL PARTY IN INTEREST.

Substitution of Real Party in Interest Required. — Where original suit was brought against general contractor by homeowners who sought damages for alleged defects in stucco applied to their house, and in the settlement the general contractor's insurance carrier paid the homeowners, who in exchange dismissed the general contractor and assigned all rights they had to the insurance carrier, the insurance company, not the general contractor, was the real party in interest on the third-party complaint filed by the general contractor. However, the trial court should not have granted summary judgment in third-party defendants' favor on the third-party complaint until a reasonable time had passed for the insurance carrier to substitute itself for the general contractor, and should have refused to deal with the merits until the absent parties were brought into the action or should have corrected the defect itself. Land v. Tall House Bldg. Co., 150 N.C. App. 132, 563 S.E.2d 8, 2002 N.C. App. LEXIS 405 (2002).

Rule 24. Intervention.

CASE NOTES

I. In General.

I. IN GENERAL.

Burden on Intervenor. — Intervenors did not satisfy the element of Rule 24(a)(2) requiring them to show their interests as they never asserted in their motion that their interests were inadequately represented; the intervenors' main argument was that they did not have to make such a showing, and they errone ously contended it was the gas company's burden to show that representation was adequate. Harvey Fertilizer & Gas Co. v. Pitt County, — N.C. App. —, 568 S.E.2d 923, 2002 N.C. App. LEXIS 1084 (2002).

Intervention Timely. — Trial court did not abuse its discretion in granting a prisoner's motion to intervene in a proceeding brought by other prisoners, since the motion was timely filed two months after class certification was denied in the other prisoners' suit, and the motion to intervene was filed before any hearing on the merits of the action. Hamilton v. Freeman, 147 N.C. App. 195, 554 S.E.2d 856, 2001 N.C. App. LEXIS 1147 (2001), cert. denied, 355 N.C. 285, 560 S.E.2d 802 (2002).

The de novo standard is expressly adopted when reviewing Rule 24(a)(2) decisions. Harvey Fertilizer & Gas Co. v. Pitt County, — N.C. App. —, 568 S.E.2d 923, 2002 N.C. App. LEXIS 1084 (2002).

Intervention by Heir. — Trial court properly permitted nephew of decedent, who was claiming to be the sole heir of the decedent under a holographic will, to intervene at trial in a suit by the brother of the decedent, who sought specific performance of a contract by the decedent to make a will, after the brother of the decedent dismissed his claim against the nephew from the case and rested his case at trial. Taylor v. Abernethy, 149 N.C. App. 263, 560 S.E.2d 233, 2002 N.C. App. LEXIS 182 (2002).

Cited in Barton v. Sutton, — N.C. App. —, 568 S.E.2d 264, 2002 N.C. App. LEXIS 976 (2002).

Article 5.

Depositions and Discovery.

Rule 26. General provisions governing discovery.

CASE NOTES

I. In General.
II. Scope of Discovery Generally.

I. IN GENERAL.

Ample Opportunity for Discovery. — Trial court did not abuse its discretion in denying customer's request for discovery and motion to compel discovery because it was customer's fourth request for discovery and was filed one month before trial and 20 months after commencement of the case against the restaurant; the court found per G.S. 1A-1, Rule 26(b)(1)(a)(ii) that the customer had ample opportunity by discovery in the action to obtain the information sought. Lindsey v. Boddie-Noell Enters., Inc., 147 N.C. App. 166, 555 S.E.2d 369, 2001 N.C. App. LEXIS 1145 (2001), cert. denied, 355 N.C. 213, 559 S.E.2d 803 (2002).

II. SCOPE OF DISCOVERY GENERALLY.

Notice. — Investor's claim that the trial court erred in not providing the investor an opportunity to be heard in relation to an order which compelled the production of client/investor documents was rejected where no notice was required under G.S. 1A-1, Rule 26(b) for this type of discovery. Miles v. Martin, 147 N.C. App. 255, 555 S.E.2d 361, 2001 N.C. App. LEXIS 1135 (2001).

Attorney-Client Privilege. — Trial court did not err in ordering the production of client/investor documents where the investor failed to prove that an attorney-client privilege existed; he could not prove that he was compelled to produce the documents in violation of a privilege. Miles v. Martin, 147 N.C. App. 255, 555 S.E.2d 361, 2001 N.C. App. LEXIS 1135 (2001).

Rule 33. Interrogatories to parties.

CASE NOTES

Cited in Thompson v. First Citizens Bank & Trust Co., — N.C. App. —, 567 S.E.2d 184, 2002 N.C. App. LEXIS 889 (2002).

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

Rule 35. Physical and mental examination of persons.

CASE NOTES

Mental Examination of Child in Termination Proceeding Held Not Required. — Trial court did not err in denying a father's motion requesting a mental examination of his 13-year old child in a termination of parental rights proceeding where the child was competent and of suitable age to testify about his feelings towards his father and there was no indication that the child's desires and opinions about the termination of his father's rights were influenced by anyone associated with the Department of Social Services or would have been different had an independent medical evaluation been conducted. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202, 2002 N.C. App. LEXIS 364 (2002).

Rule 36. Requests for admission; effect of admission.

CASE NOTES

Discretion with Trial Court to Allow or Disallow Withdrawal of Admissions. — Trial court did not abuse its discretion in permitting a party to withdraw his admission that a signature on a contract was valid, as the trial court found that the party never intended to admit the validity of the signature, that the responses were submitted shortly after they were due, and that in the interest of justice the party who responded should not have been deprived of his right to have a jury determine the issue of the validity of the signature. Taylor v. Abernethy, 149 N.C. App. 263, 560 S.E.2d 233, 2002 N.C. App. LEXIS 182 (2002).

Cited in Thompson v. First Citizens Bank & Trust Co., — N.C. App. —, 567 S.E.2d 184, 2002 N.C. App. LEXIS 889 (2002).

Rule 37. Failure to make discovery; sanctions.

CASE NOTES

Failure to Participate in Arbitration in Good Faith. — Failure of defendant in auto accident case to appear at arbitration hearing, and lack of evidence regarding attorney's authority, resulted in conclusion that defendant failed to participate in arbitration hearing in good faith and meaningful manner; the failure or refusal to participate in an arbitration pro-

ceeding in a good faith and meaningful manner was subject to sanctions by the court on motion of a party, or report of the arbitrator. Bledsole v. Johnson, — N.C. App. —, 564 S.E.2d 902, 2002 N.C. App. LEXIS 652 (2002).

Finding of Negligence as Sanction Upheld. — Trial court properly sanctioned an employer and its employee for the employee's failure to respond to discovery in a personal injury suit by finding that they were negligent in the motor vehicle accident so that the only issues remaining at trial were the issues of the contributory negligence of the driver of the pickup that collided with the forklift the employee was driving for the employer and the amount of the damages suffered by the pickup driver and his passenger. Edwards v. Cerro, — N.C. App. —, 564 S.E.2d 277, 2002 N.C. App. LEXIS 581 (2002).

Article 6.

Trials.

Rule 41. Dismissal of actions.

CASE NOTES

II. Voluntary Dismissal.
III. Involuntary Dismissal.
A. In General.
C. Failure to Show Right to Relief.

II. VOLUNTARY DISMISSAL.

Voluntary Dismissal with Prejudice Barred Derivative Action. — Where the victims of an automobile accident were unable to take a voluntary dismissal under G.S. 1A-1, Rule 41(a)(1)(i), they took a voluntary dismissal with prejudice at the original civil negligence trial; thus, they were barred from refiling a negligence suit against defendant driver. Pardue v. Darnell, 148 N.C. App. 152, 557 S.E.2d 172, 2001 N.C. App. LEXIS 1264 (2001).

Review of Sanctions Following Dismissal. — Fact that plaintiffs voluntarily dismissed their claims against city did not preclude the appellate court from reviewing the grant of defendants' motion for sanctions against plaintiffs' counsel under G.S. 1A-1, Rule 11. Johnson v. Harris, 149 N.C. App. 928, 563 S.E.2d 224, 2002 N.C. App. LEXIS 383 (2002).

III. INVOLUNTARY DISMISSAL.

A. In General.

Dismissal Held Abuse of Discretion. — The involuntary dismissal of employee's workers' compensation claim, entered by deputy commissioner upon employee's failure to prosecute, which did not mention whether it was entered with or without prejudice, would be construed as having been entered with prejudice, and would be vacated based on the deputy commissioner's abuse of discretion, as lesser sanctions were appropriate and available. Harvey v. Cedar Creek BP, 149 N.C. App. 873, 562 S.E.2d 80, 2002 N.C. App. LEXIS 299 (2002).

C. Failure to Show Right to Relief.

Court to Pass on Sufficiency, Weight and Credibility of Evidence. —

Defendants' motion for involuntary dismissal in a quiet title action was properly granted where the trial judge used the procedure under G.S. 1A-1, Rule 41(b) and determined that plaintiff failed to prove by the greater weight of the evidence that she was the fee simple owner of the real property. Vernon v. Lowe, 148 N.C. App. 694, 559 S.E.2d 288, 2002 N.C. App. LEXIS 56 (2002).

Rule 42. Consolidation; separate trials.

CASE NOTES

I. In General.
III. Separate Trials.

I. IN GENERAL.

Cited in Graham v. Martin, 149 N.C. App. 831, 561 S.E.2d 583, 2002 N.C. App. LEXIS 298 (2002).

III. SEPARATE TRIALS.

When Bifurcation Is Appropriate. — There was no error in the bifurcation of a personal injury action, as the trial court was granted the authority to bifurcate a trial in furtherance of convenience or to avoid prejudice, in accordance with Rule 42(b); although commonly used in complicated tort proceedings, it was not restricted to such cases, and, if the jury in the instant case had found negligence, there would have been an opportunity to present evidence on damages. Marshall v. Williams, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 1071 (Sept. 17, 2002).

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

CASE NOTES

I. In General.
II. Directed Verdict.
A. In General.

I. IN GENERAL.

Applied in BNT Co. v. Baker Precythe Dev. Co., — N.C. App. —, 564 S.E.2d 891, 2002 N.C. App. LEXIS 677 (2002), cert. denied, 356 N.C. 159, 569 S.E.2d 283 (2002); Branch v. High Rock Realty, Inc., — N.C. App. —, 565 S.E.2d 248, 2002 N.C. App. LEXIS 727 (2002).

II. DIRECTED VERDICT.

A. In General.

Motion for Directed Verdict Improperly Granted. — Wife was not entitled to a directed verdict under Rule 50(a) in the husband's malicious prosecution claim; there was sufficient evidence of special damages to establish malicious prosecution where the wife had improperly sought and received an ex parte protective order against husband, as the order substantially interfered with husband's person and property. Alexander v. Alexander, — N.C. App. —, 567 S.E.2d 211, 2002 N.C. App. LEXIS 898 (2002).

Rule 51. Instructions to jury.

CASE NOTES

II. Charge to the Jury.
A. Generally.
IV. Special Instructions.

II. CHARGE TO THE JURY.

A. Generally.

Failure of the trial court to declare and explain the law, etc. Remand for a new trial was necessary where the trial court failed to adequately declare and explain the law to the jury in its instructions as to a constructive fraud claim, and failed to submit to the jury issues which properly framed the essential factual questions. Keener Lumber Co. v. Perry, 149 N.C. App. 19, 560 S.E.2d 817, 2002 N.C. App. LEXIS 128 (2002).

IV. SPECIAL INSTRUCTIONS.

Denial of Special Nuisance Instruction Was Proper. — Pursuant to G.S. 1A-1, N.C. R. Civ. P. 51(b), where neither the allegations of the complaint nor the evidence at trial supported liability under a theory of negligence in a suit against a developer for creating a private nuisance, the trial court properly declined to give a special instruction on nuisance that was requested by the developer, as the instruction essentially set forth a theory of contributory negligence. BNT Co. v. Baker Precythe Dev. Co., — N.C. App. —, 564 S.E.2d 891, 2002 N.C. App. LEXIS 677 (2002), cert. denied, 356 N.C. 159, 569 S.E.2d 283 (2002).

Rule 52. Findings by the court.

CASE NOTES

I. In General.
II. Findings and Conclusions, Generally.

I. IN GENERAL.

Cited in Staton v. Russell, — N.C. App. —, 565 S.E.2d 103, 2002 N.C. App. LEXIS 688 (2002).

II. FINDINGS AND CONCLUSIONS, GENERALLY.

Findings Held Supported by Evidence. — Trial court's findings that conveyances of property to church were not voluntary and were not done with the intent to defraud creditors was sufficiently supported by the evidence. Washington v. Mitchell, 146 N.C. App. 720, 553 S.E.2d 919, 2001 N.C. App. LEXIS 1074 (2001), cert. denied, 355 N.C. 223, 560 S.E.2d 367 (2002).

Duty of Judge to Find Facts and State Conclusions of Law Separately. — Trial court erred in issuing mixed findings of fact and conclusions of law in rendering a decision regarding a laborer's North Carolina Retaliatory Discrimination Act claims; pursuant to the mandatory language of Rule 52(a)(1), the trial court should have stated its findings of fact separately from its conclusions of law. Pineda-Lopez v. N.C. Growers Ass'n, — N.C. App. —, 566 S.E.2d 162, 2002 N.C. App. LEXIS 759 (2002).

Trial court's conclusions that statutory grounds existed for termination of parental rights were inadequate because they did not provide specific findings of facts established by the evidence, admissions, and stipulations. In re Anderson, — N.C. App. —, 564 S.E.2d 599, 2002 N.C. App. LEXIS 657 (2002).

Article 7.

Judgment.

Rule 54. Judgments.

CASE NOTES

I. In General.
II. Judgment on Multiple Claims or Involving Multiple Parties.

I. IN GENERAL.

Immediate Appeal from Interlocutory Orders Is Improper. — Appeal of an order denying certification of an interlocutory order was dismissed as an immediate appeal was not one of the proper methods for appealing an interlocutory order. Van Engen v. Que Scientific, Inc., — N.C. App. —, 567 S.E.2d 179, 2002 N.C. App. LEXIS 871 (2002).

Where the physical well being of a child was at issue, an interlocutory custody order was subject to appeal. McConnell v. McConnell, — N.C. App. —, 566 S.E.2d 801, 2002 N.C. App. LEXIS 879 (2002).

Appeal Dismissed as Interlocutory. — Appellate court dismissed an insurer's appeal as interlocutory where the trial court's order merely disposed of one of the various defenses, not a claim, raised by the insurer in its answer to a complaint. Yordy v. N.C. Farm Bureau Mut. Ins. Co., 149 N.C. App. 230, 560 S.E.2d 384, 2002 N.C. App. LEXIS 126 (2002).

Interlocutory Order Concerning Sovereign Immunity. — Appeal of interlocutory order warranted immediate appellate review where state Department of Transportation asserted that sovereign immunity barred condemned landowners' affirmative defenses and counterclaims. DOT v. Blue, 147 N.C. App. 596, 556 S.E.2d 609, 2001 N.C. App. LEXIS 1235 (2001).

Applied in Intermount Distribution v. Pub. Serv. Co., — N.C. App. —, 562 S.E.2d 626, 2002 N.C. App. LEXIS 572 (2002); Hudson v. McKenzie, — N.C. App. —, 564 S.E.2d 644, 2002 N.C. App. LEXIS 643 (2002); Guthrie v. Conroy, — N.C. App. —, 567 S.E.2d 403, 2002 N.C. App. LEXIS 874 (2002).

Cited in Certain Underwriters at Lloyd's London v. Hogan, 147 N.C. App. 715, 556 S.E.2d 662, 2001 N.C. App. LEXIS 1258 (2001); Alford

v. Catalytica Pharms., Inc., — N.C. App. —, 564 S.E.2d 267, 2002 N.C. App. LEXIS 587 (2002); Pineda-Lopez v. N.C. Growers Ass'n, — N.C. App. —, 566 S.E.2d 162, 2002 N.C. App. LEXIS 759 (2002).

II. JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.

Finding of No Just Reason for Delay as Certification That Judgment Is Final and Appealable. —

In a wrongful death action against a city and a railroad arising from a motorist's death after being struck by a train at a railroad crossing, the appellate court had jurisdiction to hear an appeal from the trial court's grant of the city's summary judgment motion where the trial court certified, under Rule 54(b), that there was no just reason for delay in the entry of a final judgment dismissing the claims against the city. Wilkerson v. Norfolk S. Ry., — N.C. App. —, 566 S.E.2d 104, 2002 N.C. App. LEXIS 744 (2002).

Appeal from Judgment Adjudicating Fewer Than All Claims, Rights or Liabilities. —

Appellate court, on its own motion, dismissed a wife's interlocutory appeal from a divorce from bed and board because the trial court judgment did not determine remaining contested custody and support matters. Washington v. Washington, 148 N.C. App. 206, 557 S.E.2d 648, 2001 N.C. App. LEXIS 1291 (2001).

Partial Summary Judgment, etc.

In an action challenging a self-help repossession, the trial court properly certified its partial summary judgment finding in the creditor's favor on the debtor's claims of wrongful conversion and/or repossession and declining to find the relevant statute unconstitutional, as final, under G.S. 1A-1, Rule 54(b). Giles v. First Va. Credit Servs., Inc., 149 N.C. App. 89, 560 S.E.2d 557, 2002 N.C. App. LEXIS 127 (2002), cert denied, 355 N.C. 491, 563 S.E.2d 568 (2002).

Dismissal of One Claim. — Appellate court could properly consider employees' appeal of the trial court's dismissal of one of their claims, even though other claims remained unresolved, as there was a final determination as to that claim, and the trial court certified, under G.S. 1A-1, Rule 54(b), that there was no just reason to delay the appeal. Alford v. Catalytica Pharms., Inc., — N.C. App. —, 564 S.E.2d 267, 2002 N.C. App. LEXIS 587 (2002).

Rule 55. Default.

CASE NOTES

IV. Setting Aside Default.

IV. SETTING ASIDE DEFAULT.

Early Pretrial Judgments. — Court could set aside judgment reassigning child custody when the previous child custody order had not been vacated and there was no showing of a change in circumstances concerning the child's welfare that supported the change in custody. West v. Marko, 130 N.C. App. 751, 504 S.E.2d 571, 1998 N.C. App. LEXIS 1165 (1998).

Entry of Judgment Set Aside. —

Court could set aside judgment reassigning child custody when the previous child custody order had not been vacated and there was no showing of a change in circumstances concerning the child's welfare that supported the change in custody. West v. Marko, 130 N.C. App. 751, 504 S.E.2d 571, 1998 N.C. App. LEXIS 1165 (1998).

Rule 56. Summary judgment.

CASE NOTES

I. In General.
III. Propriety of Summary Judgment.
B. Particular Types of Actions, etc.
D. Cases in Which Summary Judgment Held Improper.

I. IN GENERAL.

Summary Judgment Not Precluded by Earlier Denial of Motion Under § 1A-1, Rule 12(b)(6). —

In a wrongful death action against a city and a railroad arising from a motorist's death after being struck by a train at a railroad crossing, after a trial court partially denied the city's motion to dismiss under Rule 12(b)(6) and Rule 12(c), it was not precluded from granting the city's summary judgment motion. Wilkerson v.

Norfolk S. Ry., — N.C. App. —, 566 S.E.2d 104, 2002 N.C. App. LEXIS 744 (2002).

Denial of Sanctions Upheld. — Motion brought by plaintiffs who sought sanctions under G.S. 1A-1, Rule 56(g) on the grounds that defendant filed an affidavit in support of summary judgment that was not based on his personal knowledge, because it used a phrase with which he was unacquainted, in bad faith, was not so unwarranted by existing case law as to merit sanctions under G.S. 1A-1, Rule 11. Johnson v. Harris, 149 N.C. App. 928, 563 S.E.2d 224, 2002 N.C. App. LEXIS 383 (2002).

Applied in Culler v. Hamlett, 148 N.C. App. 389, 559 S.E.2d 192, 2002 N.C. App. LEXIS 19 (2002); Francine Delany New Sch. for Children, Inc. v. Asheville City Bd. of Educ., 150 N.C. App. 338, 563 S.E.2d 92, 2002 N.C. App. LEXIS 490 (2002); Green Park Inn, Inc. v. Moore, 149 N.C. App. 531, 562 S.E.2d 53, 2002 N.C. App. LEXIS 287 (2002); Metts v. Turner, 149 N.C. App. 844, 561 S.E.2d 345, 2002 N.C. App. LEXIS 297 (2002), cert. denied, 356 N.C. 164, 568 S.E.2d 198 (2002); Trujillo v. N.C. Grange Mut. Ins. Co., 149 N.C. App. 811, 561 S.E.2d 590, 2002 N.C. App. LEXIS 301 (2002), cert. denied, 356 N.C. 176, — S.E.2d — (2002); E. Carolina Internal Med., P.A. v. Faidas, 149 N.C. App. 940, 564 S.E.2d 53, 2002 N.C. App. LEXIS 391 (2002); Intermount Distribution v. Pub. Serv. Co., — N.C. App. —, 562 S.E.2d 626, 2002 N.C. App. LEXIS 572 (2002); Weaver v. O'Neal, — N.C. App. —, 566 S.E.2d 146, 2002 N.C. App. LEXIS 769 (2002); Blair Concrete Servs., Inc. v. Van-Allen Steel Co., — N.C. App. —, 566 S.E.2d 766, 2002 N.C. App. LEXIS 869 (2002); Guthrie v. Conroy, — N.C. App. —, 567 S.E.2d 403, 2002 N.C. App. LEXIS 874 (2002); Thompson v. First Citizens Bank & Trust Co., — N.C. App. —, 567 S.E.2d 184, 2002 N.C. App. LEXIS 889 (2002); Floyd v. Integon Gen. Ins. Corp., — N.C. App. —, 567 S.E.2d 823, 2002 N.C. App. LEXIS 916 (2002); Goodwin v. Webb, — N.C. App. —, 568 S.E.2d 311, 2002 N.C. App. LEXIS 977 (2002); Byrd v. Adams, — N.C. App. —, 568 S.E.2d 640, 2002 N.C. App. LEXIS 1067 (2002).

Cited in Bunn Lake Prop. Owner's Ass'n v. Setzer, 149 N.C. App. 289, 560 S.E.2d 576, 2002 N.C. App. LEXIS 214 (2002); Bolick v. Bon Worth, Inc., 150 N.C. App. 428, 562 S.E.2d 602, 2002 N.C. App. LEXIS 507 (2002); DeWitt v. Eveready Battery Co., 355 N.C. 672, 565 S.E.2d 140, 2002 N.C. LEXIS 548 (2002); Singleton v. Haywood Elec. Membership Corp., — N.C. App. —, 565 S.E.2d 234, 2002 N.C. App. LEXIS 715 (2002); Wilkerson v. Norfolk S. Ry., — N.C. App. —, 566 S.E.2d 104, 2002 N.C. App. LEXIS 744 (2002); Murphy v. First Union Capital Mkts. Corp., — N.C. App. —, 567 S.E.2d 189, 2002 N.C. App. LEXIS 865 (2002); ; Williams v. Smith, 149 N.C. App. 855, 561 S.E.2d 921, 2002 N.C. App. LEXIS 305 (2002); Adams v. Jefferson-Pilot Life Ins. Co., 148 N.C. App. 356, 558 S.E.2d 504, 2002 N.C. App. LEXIS 42 (2002); Bostic Packaging, Inc. v. City of Monroe, 149 N.C. App. 825, 562 S.E.2d 75, 2002 N.C. App. LEXIS 307 (2002), cert. denied, 355 N.C. 747, 565 S.E.2d 192 (2002); Tucker v. The Blvd. at Piper Glen LLC, 150 N.C. App. 150, 564 S.E.2d 248, 2002 N.C. App. LEXIS 409 (2002).

III. PROPRIETY OF SUMMARY JUDGMENT.

B. Particular Types of Actions, etc.

When Summary Judgment for Defendant Is Proper in Negligence Action. — Alleged tortfeasor was entitled to summary judgment, as there was no evidence that his driving while under the influence proximately caused the accident; the tortfeasor, who was under the legal blood-alcohol limit, had not violated any rules of the road. Efird v. Hubbard, — N.C. App. —, 565 S.E.2d 713, 2002 N.C. App. LEXIS 753 (2002).

D. Cases in Which Summary Judgment Held Improper.

Dispute over Broker's Commission. — In a dispute over a broker's entitlement to a commission, where the subject property was not actually leased until after the expiration of the listing and grace periods, even though the broker's efforts procured the lease, while it was apparent that the broker and the property owner intended to contract around the general rule that a broker was entitled to a commission upon procuring a willing and able lessee for the property, summary judgment was not proper because there were genuine fact questions as to the property owner's waiver of the listing period and the broker's entitlement to a commission on a quantum meruit basis. Carolantic Realty, Inc. v. Matco Group, Inc., — N.C. App. —, 566 S.E.2d 134, 2002 N.C. App. LEXIS 767 (2002).

Wills. — Where the caveators could not produce the revocatory writing, and where the decedent's attorney could not recall writing the will, the trial court erred in granting the caveators summary judgment on the ground that the will revoked an earlier will that had excluded the caveators as beneficiaries. In re Will of McCauley, 356 N.C. 91, 565 S.E.2d 88, 2002 N.C. LEXIS 550 (2002).

Electronic Surveillance. — Summary judgment was improperly granted on the husband's claim that the wife illegally videotaped the husband's in-home actions; because the husband did not establish that the videotaping included sound recordings, an issue of fact

remained, as only oral communications were covered by G.S. 15A-287. Kroh v. Kroh, — N.C. App. —, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002).

Rule 58. Entry of judgment.

CASE NOTES

Entry of Judgments After Oct. 1, 1994. — Amended version of rule applies to all judgments subject to entry on or after October 1, 1994 and applies to orders as well as judgments. West v. Marko, 130 N.C. App. 751, 504 S.E.2d 571, 1998 N.C. App. LEXIS 1165 (1998).

Objection Held Inadequate. — Defendant debtors' objection to certain language in a proposed order submitted by a creditor was not specific enough to comply with G.S. 1A-1, Rule 58, as it did not object to the fact that the judgment was signed out of session, but rather, to its contents, and would therefore be rejected. Conseco Fin. Servicing Corp. v. Dependable Hous., Inc., 150 N.C. App. 168, 564 S.E.2d 241, 2002 N.C. App. LEXIS 368 (2002).

Applied in In re Pittman, — N.C. App. —, 564 S.E.2d 899, 2002 N.C. App. LEXIS 642 (2002); J.M. Dev. Group v. Glover, — N.C. App. —, 566 S.E.2d 128, 2002 N.C. App. LEXIS 757 (2002).

Cited in Staton v. Russell, — N.C. App. —, 565 S.E.2d 103, 2002 N.C. App. LEXIS 688 (2002); Miller v. Miller, — N.C. App. —, 568 S.E.2d 914, 2002 N.C. App. LEXIS 1070 (2002).

Rule 59. New trials; amendment of judgments.

CASE NOTES

I. In General.

I. IN GENERAL.

Refusal to Award New Trial Upheld. — Trial court did not abuse its discretion in denying a new trial in a condemnation action where the corporate landowner's evidence as to the value of the property that was to be taken, presented in the testimony of two expert appraisers and the president of the corporate landowner, supported the jury's determination of the value of the property, even though the city presented testimony from two expert appraiser's that placed a much lower value on the property. City of Charlotte v. Whippoorwill Lake, Inc., — N.C. App. —, 563 S.E.2d 297, 2002 N.C. App. LEXIS 575 (2002).

Authority to Set Aside Verdict Contrary to Credible Testimony. — Trial court did not abuse its discretion in granting a new trial to passenger suing driver of motorcycle on which both parties were riding where the evidence did not support the jury's verdict and the driver and the owner failed to present evidence of contributory negligence. Roary v. Bolton, 150 N.C. App. 193, 563 S.E.2d 21, 2002 N.C. App. LEXIS 367 (2002).

Cited in Piedmont Triad Reg'l Water Auth. v. Lamb, — N.C. App. —, 564 S.E.2d 71, 2002 N.C. App. LEXIS 584 (2002), cert. denied, 356 N.C. 166, 568 S.E.2d 608 (2002); Rich, Rich & Nance v. Carolina Constr. Corp., — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 1077 (Sept. 17, 2002); Atchley Grading Co. v. W. Cabarrus Church, 148 N.C. App. 211, 557 S.E.2d 188, 2001 N.C. App. LEXIS 1286 (2001).

Rule 60. Relief from judgment or order.

CASE NOTES

I. In General.
II. Relief under Subsection (a).
III. Relief under Subsection (b).
A. In General.
B. Mistake, Inadvertence, Surprise and Excusable Neglect.
2. Relief Held Proper.
E. Other Reasons Justifying Relief Under Subdivision (b)(6).
F. Void Judgments.

I. IN GENERAL.

Applied in Gibby v. Lindsey, 149 N.C. App. 470, 560 S.E.2d 589, 2002 N.C. App. LEXIS 216 (2002); Bledsole v. Johnson, — N.C. App. —, 564 S.E.2d 902, 2002 N.C. App. LEXIS 652 (2002).

Cited in Belcher v. Averette, — N.C. App. —, 568 S.E.2d 630, 2002 N.C. App. LEXIS 1069 (2002); Rich, Rich & Nance v. Carolina Constr. Corp., — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 1077 (Sept. 17, 2002); Atchley Grading Co. v. W. Cabarrus Church, 148 N.C. App. 211, 557 S.E.2d 188, 2001 N.C. App. LEXIS 1286 (2001).

II. RELIEF UNDER SUBSECTION (a).

No Substantive Modifications. — Rule does not grant the trial court the authority to make substantive modifications to an entered judgment, thus a change in order was considered substantive and outside the boundaries of the rule when it altered the effect of the original order. Pratt v. Staton, 147 N.C. App. 771, 556 S.E.2d 621, 2001 N.C. App. LEXIS 1232 (2001).

III. RELIEF UNDER SUBSECTION (b).

A. In General.

Use by Industrial Commission. — Section 1A-1, Rule 60(b) may be utilized by the North Carolina Industrial Commission to achieve a just and proper determination of a claim, giving it the ability to set aside a judgment where it finds (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under G.S. 1A-1, Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. Jenkins v. Piedmont Aviation Servs., 147 N.C. App. 419, 557 S.E.2d 104, 2001 N.C. App. LEXIS 1192 (2001).

Relief from Paternity Judgment. — Trial court erred in granting a putative father's motion to compel DNA testing before it addressed the putative father's motion, under G.S. 1A-1, Rule 60(b)(1999), for relief from an earlier judgment establishing that he was the father of the child. State ex rel. Bright v. Flaskrud, 148 N.C. App. 710, 559 S.E.2d 286, 2002 N.C. App. LEXIS 58 (2002).

B. Mistake, Inadvertence, Surprise and Excusable Neglect.

2. Relief Held Proper.

Wife's Reliance on Husband's Assurances. —

Wife acted within a reasonable time for filing a Rule 60(b)(6) motion to set aside the previous alimony order as the wife testified that the balance owed on the equity line on the marital home was discovered only when the creditor informed the wife that it was instituting a foreclosure action. Sloan v. Sloan, — N.C. App. —, 566 S.E.2d 97, 2002 N.C. App. LEXIS 761 (2002).

E. Other Reasons Justifying Relief Under Subdivision (b)(6).

Meritorious Defense Required Under Subsection (b)(6). —

Where a default judgment was entered against an insured in an individual's negligence action because the insured failed to respond despite proper service of process, the trial court did not abuse its discretion in denying the intervening insurer's motion to set aside the judgment pursuant to Rule 60(b)(6) where the insurer failed to allege or show the existence of extraordinary circumstances, a meritorious defense, or that the trial court abused its discretion in refusing to set aside the judgment. Barton v. Sutton, — N.C. App. —, 568 S.E.2d 264, 2002 N.C. App. LEXIS 976 (2002).

Denial of Motion Upheld. — The trial court did not abuse its discretion in denying property owner's motion for relief from default judgment granting subcontractor a lien against certain real property, under G.S. 1A-1, Rule 60(b)(6), where the default judgment against the property owner was not void, and the record revealed no extraordinary circumstances or other showing by the property owner that would warrant relief from the judgment. Piedmont Rebar, Inc. v. Sun Constr., Inc., — N.C. App. —, 564 S.E.2d 281, 2002 N.C. App. LEXIS 583 (2002).

F. Void Judgments.

A judgment is void, etc.

Order setting aside a summary judgment was void ab initio and could be attacked at any time; the trial court did not have personal jurisdiction over the individual employers since the employee failed to serve the individual employers with a copy of the summons and complaint. Van Engen v. Que Scientific, Inc., — N.C. App. —, 567 S.E.2d 179, 2002 N.C. App. LEXIS 871 (2002).

A judgment is not void, etc.

Default judgment was not void for lack of jurisdiction due to a failure to use due diligence

to obtain personal service before service by publication because the person against whom the judgment was entered was not allowed to attack the judgment under Rule 4(j)(4) when he had actual notice of the proceedings against him. Creasman v. Creasman, — N.C. App. —, 566 S.E.2d 725, 2002 N.C. App. LEXIS 856 (2002).

Failure to Give Notice or Opportunity to Be Heard. —

Where a default judgment was entered against an insured in an individual's negligence action, the trial court did not abuse its discretion in denying the intervening insurer's motion to set aside the judgment as void under Rule 60(b)(4) on the ground that the individual who sued the insured had not given the insurer proper notification of the suit under G.S. 20-279.21(b)(3), as the insurer failed to show that the lack of notice to the insurer deprived the trial court of jurisdiction or authority to enter the default judgment against the insured, or otherwise rendered the judgment void. Barton v. Sutton, — N.C. App. —, 568 S.E.2d 264, 2002 N.C. App. LEXIS 976 (2002).

Rule 63. Disability of a judge.

CASE NOTES

Cited in In re Pittman, — N.C. App. —, 564 S.E.2d 899, 2002 N.C. App. LEXIS 642 (2002).

ARTICLE 8.

Miscellaneous.

Rule 65. Injunctions.

CASE NOTES

II. Preliminary Injunctions.
IV. Security.

II. PRELIMINARY INJUNCTIONS.

Irreparable Injury. — Corporation could not establish irreparable injury sufficient for a preliminary injunction by alleging the possibility that it would have to defend itself against lawsuits because it was adequately protected by G.S. 1A-1, Rule 11. DaimlerChrysler Corp. v. Kirkhart, 148 N.C. App. 572, 561 S.E.2d 276, 2002 N.C. App. LEXIS 60 (2002).

IV. SECURITY.

Application of Section (c). —

Where, in accordance with Rule 65(c), the trial court required an $ 800 bond from a former employer in granting the employer's motion for a temporary restraining order (TRO) against a former employee, the trial court did not have to revisit the issue of the adequacy of that security in converting the TRO into a preliminary injunction unless there was some proper suggestion that the existing security was inadequate, and, therefore, since the former employee failed to show that it challenged the sufficiency of the security in the trial court, the employee was precluded from challenging its sufficiency on appeal. Precision Walls, Inc. v. Servie, — N.C. App. —, 568 S.E.2d 267, 2002 N.C. App. LEXIS 980 (2002).

Trial Court Did Not Err in Not Requiring Security. — North Carolina trial court did not err in issuing an antisuit injunction against appellants, trusts and trustees, regarding a declaratory judgment action they filed in Florida without requiring appellee co-trustee to provide security pursuant to N.C. R. Civ. P. 65(c) where (1) appellants failed to seek any security deposit as a condition precedent to entry of the injunction in the trial court, (2) appellants failed to make any showing regarding how they would be harmed by the issuance of the injunction, and (3) it was implicit from the trial court's findings that one purpose of the antisuit injunction was to preserve the North Carolina trial court's jurisdiction over the interpretation of documents involved in certain cases pending in North Carolina. Staton v. Russell, — N.C. App. —, 565 S.E.2d 103, 2002 N.C. App. LEXIS 688 (2002).

Rule 68. Offer of judgment and disclaimer.

Legal Periodicals. —
For note, "Rule 68 — Should Costs Incurred After the Offer of Judgment be Included in Calculating the 'Judgment Finally Obtained' — The So-Called Novel Issue in Roberts v. Swain," see 24 Campbell L. Rev. 245 (2002).

CASE NOTES

I. In General.

I. IN GENERAL.

Lump Sum Offer. — Lump sum offers of judgment which expressly include both the amount of the judgment and the amount of costs are permissible under Rule 68, but it is incumbent on the defendant to make sure that he has used language which conveys that he is making a lump sum offer. Phillips v. Warren, — N.C. App. —, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

Meaning of "Judgment Finally Obtained". —
Costs incurred after an offer of judgment but prior to the entry of judgment should be included in calculating the "judgment finally obtained," under Rule 68. Phillips v. Warren, — N.C. App. —, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

Judgment finally obtained, when applying this rule consists of the verdict, costs, fees, interest and any other cost assessed to defendant for plaintiff's benefit, such as attorneys' fees. Phillips v. Warren, — N.C. App. —, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

What Attorneys' Fees Recoverable. —
Matter was remanded as trial court could properly consider the award of appellate attorney fees under circumstances in which an offer of judgment was made that was refused. Davis v. Kelly, 147 N.C. App. 102, 554 S.E.2d 402, 2001 N.C. App. LEXIS 1072 (2001).

When deciding whether to award attorneys' fees under G.S. 6-21.1, a trial court must examine the entire record, including but not limited to: (1) settlement offers made prior to institution of the action; (2) offers of judgment made pursuant to Rule 68 and whether the judgment finally obtained was more favorable than such offers; (3) whether defendant unjustly exercised superior bargaining power; (4) in the case of an unwarranted refusal by an insurance company, the context in which the dispute arose; (5) the timing of settlement offers; and (6) the amounts of settlement offers as compared to the jury verdict. Phillips v. Warren, — N.C. App. —, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

Applied in Phillips v. Warren, — N.C. App. —, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

Cited in Phillips v. Warren, — N.C. App. —, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

Chapter 1B.
Contribution.

Article 1.
Uniform Contribution Among Tort-Feasors Act.

§ 1B-1. Right to contribution.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in Potter v. Hilemn Labs., Inc., 150 N.C. App. 326, 564 S.E.2d 259, 2002 N.C. App. LEXIS 492 (2002).

Cited in Bowman v. Alan Vester Ford Lincoln Mercury, — N.C. App. —, 566 S.E.2d 818, 2002 N.C. App. LEXIS 886 (2002).

Chapter 1C.

Enforcement of Judgments.

Article 16.

Exempt Property.

§ 1C-1601. What property exempt; waiver; exceptions.

CASE NOTES

North Carolina, by this section, etc. — North Carolina has opted out of the exemption scheme provided by the U.S. Bankruptcy Code, so bankruptcy debtors in North Carolina depend on state law both for substance and for procedure. G.S. 1C-1601(f). In re McRae, 282 Bankr. 704, 2002 Bankr. LEXIS 957 (2002).

State Exemptions Apply in Bankrutpcy Proceeding. — Where a bankruptcy trustee objected to the use by a wife of her wild card exemption for property owned by her husband, pursuant to G.S. 1C-1601(f), the state exemptions applied to North Carolina residents in bankruptcy actions. In re Horstman, 276 Bankr. 80, 2002 Bankr. LEXIS 379 (Bankr. E.D.N.C. 2002).

Cited in In re Horstman, 276 Bankr. 80, 2002 Bankr. LEXIS 379 (Bankr. E.D.N.C. 2002); In re Connelly, 276 Bankr. 421, 2002 Bankr. LEXIS 562 (Bankr. W.D.N.C. 2002).

Article 17.

Uniform Enforcement of Foreign Judgments Act.

§ 1C-1703. Filing and status of foreign judgments.

CASE NOTES

Cited in HCA Health Servs. of Tex., Inc. v. Reddix, — N.C. App. —, 566 S.E.2d 754, 2002 N.C. App. LEXIS 876 (2002).

§ 1C-1704. Notice of filing; service.

CASE NOTES

Cited in HCA Health Servs. of Tex., Inc. v. Reddix, — N.C. App. —, 566 S.E.2d 754, 2002 N.C. App. LEXIS 876 (2002).

§ 1C-1705. Defenses; procedure.

CASE NOTES

Texas Judgment. — Trial court's factual findings on judgment debtor's claim that judgment debtor did not sign an agreed judgment which a corporation filed in Texas and sought to enforce in North Carolina were insufficient and the appellate court vacated the trial court's judgment in favor of the judgment debtor and remanded the case for further proceedings. HCA Health Servs. of Tex., Inc. v. Reddix, — N.C. App. —, 566 S.E.2d 754, 2002 N.C. App. LEXIS 876 (2002).

Article 18.

North Carolina Foreign Money Judgments Recognition Act.

§ 1C-1804. Grounds for nonrecognition.

CASE NOTES

Factual Findings by Trial Court; Insufficient. — Trial court's factual findings on judgment debtor's claim that judgment debtor did not sign an agreed judgment which a corporation filed in Texas and sought to enforce in North Carolina, pursuant to North Carolina's Uniform Enforcement of Foreign Judgments Act, G.S. 1C-1701 to 1C-1708 (2001), were insufficient. HCA Health Servs. of Tex., Inc. v. Reddix, — N.C. App. —, 566 S.E.2d 754, 2002 N.C. App. LEXIS 876 (2002).

Chapter 1D.

Punitive Damages.

§ 1D-15. Standards for recovery of punitive damages.

CASE NOTES

Applicability of Section. — Section 1D-15 is not to be applied retroactively and, therefore, applies only to cases arising after January 1, 1996. Rhone-Poulenc Agro, S.A. v. Dekalb Genetics Corp., 272 F.3d 1335, 2001 U.S. App. LEXIS 24812 (4th Cir. 2001).

Punitive Damage Award with Comparative Ratio Greater Than Three. — Sections 1D-15 and 1D-25, when taken together, imply that a punitive damage award with a comparative ratio greater than three, based upon a showing of fraud by only a preponderance of the evidence, will not be upheld under North Carolina law. Rhone-Poulenc Agro, S.A. v. Dekalb Genetics Corp., 272 F.3d 1335, 2001 U.S. App. LEXIS 24812 (4th Cir. 2001).

Cited in Edens v. Estate of Streett, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 20029 (W.D.N.C. Nov. 30, 2001); Ausley v. Bishop, 150 N.C. App. 56, 564 S.E.2d 252, 2002 N.C. App. LEXIS 382 (2002).

§ 1D-25. Limitation of amount of recovery.

CASE NOTES

Constitutionality — Separation of Powers. — Section 1D-25, which places a cap on punitive damages, did not unconstitutionally violate the principle of separation of powers, contrary to N.C. Const., Art. I, § 6, by exercising the power of remittitur because the cap on punitive damages is different from remittitur in that it requires an award to be limited after a proper jury trial, while remittitur is utilized only after a court has determined that a party has not received a fair and proper jury trial. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002).

Constitutionality — Open Courts. — Section 1D-25, which places a cap on punitive damages, is not unconstitutional under the open courts provision in N.C. Const., Art. I, § 18, because it does not limit the recovery of actual damages. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002).

Constitutionality — Due Process. — Section 1D-25, placing a cap on an award of punitive damages, does not take property without just compensation, infringing on a fundamental right, contrary to N.C. Const., Art. I, § 19, because punitive damages are not property belonging to an individual. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002).

Constitutionality — Equal Protection. — Section 1D-25, placing a cap on an award of punitive damages, does not treat similarly situated persons differently without compelling reason or rational justification, contrary to N.C. Const., Art. I, § 19, because no fundamental right is involved and the statute makes no mention of suspect classifications, subjecting it to rational basis review, and because the statute bears a rational relationship to a legitimate governmental interest in the state's economic development. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002).

Constitutionality — Vagueness. — Section 1D-25, which places a cap on punitive damages, is not unconstitutionally vague because it provides sufficient language for uniform judicial administration. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002).

Constitutionality — Special Legislation. — Section 1D-25, placing a cap on an award of punitive damages, is not unconstitutional special legislation contrary to N.C. Const., Art. II, § 24, which prohibits the enactment of any local, private or special legislation remitting fines, penalties and forfeitures, because it does not constitute remittitur. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002).

Section 1D-25, placing a cap on an award of punitive damages, is not unconstitutional special legislation, contrary to N.C. Const., Art. I, § 32, because it applies equally to all defendants and creates no distinction between groups. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002).

Constitutionality — Right to Jury Trial. — Section 1D-25, which places a cap on punitive damages, does not violate injured parties' rights to a jury trial, under N.C. Const., Art. I, § 25, because the right to punitive damages is not a property interest, and there is only a right to a civil jury trial concerning property. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002).

Application of Section Upheld. — Section 1D-25, which places a cap on punitive damages, was appropriately applied to limit each individual plaintiff's punitive damages award, rather than being applied per each plaintiff's claim or per defendant. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002).

This section is not retroactive.

Section 1D-25 is not to be applied retroactively and, therefore, applies only to cases arising after January 1, 1996. Rhone-Poulenc Agro, S.A. v. Dekalb Genetics Corp., 272 F.3d 1335, 2001 U.S. App. LEXIS 24812 (4th Cir. 2001).

Punitive Damage Award with Comparative Ratio Greater Than Three. — Sections 1D-15 and 1D-25, when taken together, imply that a punitive damage award with a comparative ratio greater than three, based upon a showing of fraud by only a preponderance of the evidence, will not be upheld under North Carolina law. Rhone-Poulenc Agro, S.A. v. Dekalb Genetics Corp., 272 F.3d 1335, 2001 U.S. App. LEXIS 24812 (4th Cir. 2001).

§ 1D-30. Bifurcated trial.

CASE NOTES

Remand for New Trial. — Where jury awarded compensatory damages, but not punitive damages, the appellate court was required to remand the entire case for retrial of all issues, following juror misconduct during punitive deliberation phase of bifurcated trial, since the same jury was required to hear and determine all issues. Lindsey v. Boddie-Noell Enters., Inc., 147 N.C. App. 166, 555 S.E.2d 369, 2001 N.C. App. LEXIS 1145 (2001), cert. denied, 355 N.C. 213, 559 S.E.2d 803 (2002).

Cited in Ausley v. Bishop, 150 N.C. App. 56, 564 S.E.2d 252, 2002 N.C. App. LEXIS 382 (2002).

§ 1D-35. Punitive damages awards.

CASE NOTES

Cited in Lindsey v. Boddie-Noell Enters., Inc., 147 N.C. App. 166, 555 S.E.2d 369, 2001 N.C. App. LEXIS 1145 (2001), cert. denied, 355 N.C. 213, 559 S.E.2d 803 (2002); Lindsey v. Boddie-Noell Enters., Inc., 147 N.C. App. 166, 555 S.E.2d 369, 2001 N.C. App. LEXIS 1145 (2001), cert. denied, 355 N.C. 213, 559 S.E.2d 803 (2002); Rosero v. Blake, 150 N.C. App. 250, 563 S.E.2d 248, 2002 N.C. App. LEXIS 509 (2002), cert. granted, 356 N.C. 166, — S.E.2d — (2002).

§ 4-1. Common law declared to be in force.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in Rosero v. Blake, 150 N.C. App. 250, 563 S.E.2d 248, 2002 N.C. App. LEXIS 509 (2002), cert. granted, 356 N.C. 166, — S.E.2d — (2002).

Chapter 5A.
Contempt.

Article 1.
Criminal Contempt.

§ 5A-14. Summary proceedings for contempt.

CASE NOTES

Contemnor Must Have Opportunity to Be Heard. —

Trial court failed to comply with the statutory requirements by failing to give defendant a summary opportunity to respond to the charge of criminal contempt after defendant failed to stand for the call to rise. State v. Randell, — N.C. App. —, 567 S.E.2d 814, 2002 N.C. App. LEXIS 928 (2002).

Article 2.
Civil Contempt.

§ 5A-21. Civil contempt; imprisonment to compel compliance.

CASE NOTES

I. General Consideration.
III. Purging Contempt.
V. Appeal and Error.

I. GENERAL CONSIDERATION.

Disobedience Must Be Willful. —

Father was properly held in contempt for not paying child support where (1) he was properly subject to an order increasing his child support obligation as of the date of the mother's filing of a divorce complaint, (2) the purpose of the order could be served by his compliance, and (3) his noncompliance with the order was willful in that he had made no payment toward the increase in his obligation from the date of the complaint to the date of trial, despite his ability to comply with the court's order, and he presented no evidence as to why he should not be held in contempt. Miller v. Miller, — N.C. App. —, 568 S.E.2d 914, 2002 N.C. App. LEXIS 1070 (2002).

Cited in Miller v. Miller, — N.C. App. —, 568 S.E.2d 914, 2002 N.C. App. LEXIS 1070 (2002).

III. PURGING CONTEMPT.

Payment of Child Support. — Husband could not be found in civil contempt under G.S. 5A-21(b), for his failure to pay child support, where he paid the past due support prior to the contempt hearing, even though it was paid after he was served with the show cause contempt motion. Reynolds v. Reynolds, 147 N.C. App. 566, 557 S.E.2d 126, 2001 N.C. App. LEXIS 1231 (2001), cert. denied, 355 N.C. 493, 563 S.E.2d 567 (2002).

V. APPEAL AND ERROR.

Incorrect standard in ruling on show cause order. — Trial court's conclusion, in ruling on a motion to show cause for failure to comply with the court's previous orders, that no showing had been made under G.S. 5A-21 was error, as the trial court was only required to determine, pursuant to G.S. 5A-23(a), whether the information contained in the motion and the record was sufficient to warrant a prudent person to believe the contemnor had the ability to comply with the trial court's order; since the trial court used the incorrect standard in denying the motion, remand was required. Young v. Mastrom, Inc., 149 N.C. App. 483, 560 S.E.2d 596, 2002 N.C. App. LEXIS 192 (2002).

§ 5A-23. Proceedings for civil contempt.

CASE NOTES

Incorrect standard in ruling on show cause order. — Trial court's conclusion, in ruling on a motion to show cause for failure to comply with the court's previous orders, that no showing had been made under G.S. 5A-21 was error, as the trial court was only required to determine, pursuant to G.S. 5A-23(a), whether the information contained in the motion and the record was sufficient to warrant a prudent person to believe the contemnor had the ability to comply with the trial court's order; since the trial court used the incorrect standard in denying the motion, remand was required. Young v. Mastrom, Inc., 149 N.C. App. 483, 560 S.E.2d 596, 2002 N.C. App. LEXIS 192 (2002).

Cited in Miller v. Miller, — N.C. App. —, 568 S.E.2d 914, 2002 N.C. App. LEXIS 1070 (2002).

Chapter 6.

Liability for Court Costs.

Article 3.

Civil Actions and Proceedings.

§ 6-21.1. Allowance of counsel fees as part of costs in certain cases.

CASE NOTES

I. GENERAL CONSIDERATION.

The obvious purpose of this section, etc. The purpose of G.S. 6-21.1 is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim, but the discretion accorded the trial court in awarding attorney fees pursuant to G.S. 6-21.1 is not unbridled. Phillips v. Warren, — N.C. App. —, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

Amount Obtained Means Compensatory Damages. — "Damages" as used in G.S. 6-21.1 applied only to the compensatory damage amounts when determining whether the judgment amount was equal to or less than $10,000. Boykin v. Morrison, 148 N.C. App. 98, 557 S.E.2d 583, 2001 N.C. App. LEXIS 1287 (2001).

Construing the phrase "judgment for recovery of damages" to include punitive damage award would decrease the number of cases to which G.S. 6-21.1 would apply. Boykin v. Morrison, 148 N.C. App. 98, 557 S.E.2d 583, 2001 N.C. App. LEXIS 1287 (2001).

Applied in Phillips v. Warren, — N.C. App. —, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

Cited in Boykin v. Morrison, 148 N.C. App. 98, 557 S.E.2d 583, 2001 N.C. App. LEXIS 1287 (2001); Phillips v. Warren, — N.C. App. —, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

III. PROCEDURE.

The trial court is to consider the entire record, etc. Trial court property excluded $6,180 in costs and attorney fees which plaintiff incurred to obtain judgment awarding her damages in the amount of $4,950 in a personal injury action, and trial court did not err by ordering the defendant to pay the plaintiff's attorney's fee. Sowell v. Clark, — N.C. App. —, 567 S.E.2d 200, 2002 N.C. App. LEXIS 897 (2002).

When deciding whether to award attorneys' fees under G.S. 6-21.1, a trial court must examine the entire record, including but not limited to: (1) settlement offers made prior to institution of the action; (2) offers of judgment made pursuant to G.S. 1A-1, N.C. R. Civ. P. 68 and whether the judgment finally obtained was more favorable than such offers; (3) whether defendant unjustly exercised superior bargaining power; (4) in the case of an unwarranted refusal by an insurance company, the context in which the dispute arose; (5) the timing of settlement offers; and (6) the amounts of settlement offers as compared to the jury verdict. Phillips v. Warren, — N.C. App. —, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

IV. SETTLEMENT.

Attorneys' Fees Where Settlement Offer Made. — Attorneys' fees which were incurred prior to the time the offer of judgment was made are recoverable. The G.S. 1A-1, Rule 68 sanctions only provide protection against the costs incurred after the offer has been made. Purdy v. Brown, 307 N.C. 93, 296 S.E.2d 459 (1982).

§ 6-21.5. Attorney's fees in nonjusticiable cases.

CASE NOTES

Court Required to Make Findings. — Trial court was required to evaluate whether the losing party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue. Winston-Salem Wrecker Ass'n v. Barker, 148 N.C. App. 114, 557 S.E.2d 614, 2001 N.C. App. LEXIS 1282 (2001).

Failure to Participate in Arbitration in Good Faith. — Failure of defendant in auto accident case to appear at arbitration hearing, and lack of evidence regarding attorney's authority, resulted in conclusion that defendant failed to participate in arbitration hearing in good faith and meaningful manner; the failure or refusal to participate in an arbitration proceeding in good faith and meaningful manner was subject to sanctions by the court on motion of a party, or report of the arbitrator. Bledsole v. Johnson, — N.C. App. —, 564 S.E.2d 902, 2002 N.C. App. LEXIS 652 (2002).

Chapter 7A.

Judicial Department.

SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

Article 3.

The Supreme Court.

Sec.
7A-11. Clerk of the Supreme Court; salary; bond; fees; oath.

Article 4.

Court of Appeals.

7A-20. Clerk; oath; bond; salary; assistants; fees.

Article 5.

Jurisdiction.

7A-37.1. Statewide court-ordered, nonbinding arbitration in certain civil actions.
7A-38.7. Dispute resolution fee for cases resolved in mediation.

Article 6.

Retirement of Justices and Judges of the Appellate Division; Retirement Compensation; Recall to Emergency Service; Disability Retirement.

7A-39.3. Retired justices and judges may become emergency justices and judges subject to recall to active service; compensation for emergency justices and judges on recall.
7A-142. Vacancies in office.

SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

Article 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

7A-273. Powers of magistrates in infractions or criminal actions.

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

Article 28.

Uniform Costs and Fees in the Trial Divisions.

7A-304. Costs in criminal actions.
7A-305. Costs in civil actions.
Sec.
7A-306. Costs in special proceedings.
7A-307. Costs in administration of estates.
7A-308. Miscellaneous fees and commissions.
7A-309. Magistrate's special fees.
7A-311. Uniform civil process fees.

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

Article 29.

Administrative Office of the Courts.

7A-343.3. Appellate Courts Printing and Computer Operations Fund.

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

Article 36.

Entitlement of Indigent Persons Generally.

7A-451. Scope of entitlement.
7A-455.1. Appointment fee in criminal cases.

Article 39B.

Indigent Defense Services Act.

7A-498.2. Establishment of Office of Indigent Defense Services.
7A-498.6. Director of Indigent Defense Services.
7A-498.7. Public Defender Offices.

SUBCHAPTER XIII. SENTENCING SERVICES PROGRAM.

Article 61.

Sentencing Services Program.

7A-771. Definitions.
7A-772. Allocation of funds.

SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 3.

The Supreme Court.

§ 7A-10. Organization; compensation of justices.

OPINIONS OF ATTORNEY GENERAL

Length of Service of Supreme Court Justice. — Upon taking office as an Associate Justice of the North Carolina Supreme Court, a justice was entitled to have his service as Director and Assistant Director of the Administrative Office of the Courts to be taken into account in calculating his service for longevity purposes, but his service as assistant district attorney could not be taken into account. See opinion of Attorney General to The Honorable Thomas W. Ross, Director, The Administrative Office of the Courts, 1999 N.C. AG LEXIS 28 (9/28/99).

§ 7A-11. Clerk of the Supreme Court; salary; bond; fees; oath.

The clerk of the Supreme Court shall be appointed by the Supreme Court to serve at its pleasure. The annual salary of the clerk shall be fixed by the Administrative Officer of the Courts, subject to the approval of the Supreme Court. The clerk may appoint assistants in the number and at the salaries fixed by the Administrative Officer of the Courts. The clerk shall perform such duties as the Supreme Court may assign, and shall be bonded to the State, for faithful performance of duty, in the same manner as the clerk of the superior court, and in such amount as the Administrative Officer of the Courts shall determine. He shall adopt a seal of office, to be approved by the Supreme Court. A fee bill for services rendered by the clerk shall be fixed by rules of the Supreme Court, and all such fees shall be remitted to the State treasury. Charges to litigants for the reproduction of appellate records and briefs shall be fixed by rule of the Supreme Court and remitted to the Appellate Courts Printing and Computer Operations Fund established in G.S. 7A-343.3. The operations of the Clerk of the Supreme Court shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. Before entering upon the duties of his office, the clerk shall take the oath of office prescribed by law. (1967, c. 108, s. 1; 1969, c. 1190, s. 2; 1973, c. 750; 1983, c. 913, s. 3; 2002-126, s. 2.2(j).)

Cross References. — As to remission of moneys collected through charges to litigants for the reproduction of appellate records and briefs under G.S. 7A-11 and G.S. 7A-20(b) to the State Treasurer to be held in the Appellate Courts Printing and Computer Operations Fund, see G.S. 7A-343.3.

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 2.2(j), effective July 1, 2002, deleted "except that charges to litigants for the reproduction of appellate records and briefs shall be fixed and administered as provided by rule of the Supreme Court" at the end of the sixth sentence; and added the seventh sentence.

ARTICLE 4.

Court of Appeals.

§ 7A-16. Creation and organization.

CASE NOTES

Amendment Held Unconstitutional. — Amendment to G.S. 7A-16 effected by Session Laws 2000-67, G.S. 15.5, which expanded the size of the state Court of Appeals from 12 judges to 15 and which allowed the newly appointed judges to serve until the year 2005 before being required to face a retention election, was unconstitutional to the extent that it conflicted with the provisions of N.C. Const., Art. IV, § 19, requiring a judge appointed to a judicial vacancy to stand for election at the next general election; remaining portions of the amendment by Session Laws 2000-67 were constitutional and could properly be severed from the unconstitutional clause. Pope v. Easley, 354 N.C. 544, 556 S.E.2d 265, 2001 N.C. LEXIS 1237 (2001).

§ 7A-20. Clerk; oath; bond; salary; assistants; fees.

(a) The Court of Appeals shall appoint a clerk to serve at its pleasure. Before entering upon his duties, the clerk shall take the oath of office prescribed for the clerk of the Supreme Court, conformed to the office of clerk of the Court of Appeals, and shall be bonded, in the same manner as the clerk of superior court, in an amount prescribed by the Administrative Officer of the Courts, payable to the State, for the faithful performance of his duties. The salary of the clerk shall be fixed by the Administrative Officer of the Courts, subject to the approval of the Court of Appeals. The number and salaries of his assistants, and their bonds, if required, shall be fixed by the Administrative Officer of the Courts. The clerk shall adopt a seal of office, to be approved by the Court of Appeals.

(b) Subject to approval of the Supreme Court, the Court of Appeals shall promulgate from time to time a fee bill for services rendered by the clerk, and such fees shall be remitted to the State Treasurer. Charges to litigants for the reproduction of appellate records and briefs shall be fixed by rule of the Supreme Court and remitted to the Appellate Courts Printing and Computer Operations Fund established in G.S. 7A-343.3. The operations of the Court of Appeals shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. (1967, c. 108, s. 1; 1983, c. 913, s. 4; 2002-126, s. 2.2(k).)

Cross References. — As to remission of moneys collected through charges to litigants for the reproduction of appellate records and briefs under G.S. 7A-11 and G.S. 7A-20(b) to the State Treasurer to be held in the Appellate Courts Printing and Computer Operations Fund, see G.S. 7A-343.3.

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 2.2(k), effective July 1, 2002, deleted "except that charges to litigants for the reproduction of appellate records and briefs shall be fixed and administered as provided by rule of the Supreme Court" at the end of the first sentence, and added the second sentence.

ARTICLE 5.

Jurisdiction.

§ 7A-27. Appeals of right from the courts of the trial divisions.

CASE NOTES

I. General Consideration.
IV. Interlocutory Orders.
B. Particular Orders.

I. GENERAL CONSIDERATION.

Applied in State v. Holmes, 355 N.C. 719, 565 S.E.2d 154, 2002 N.C. LEXIS 549 (2002); State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002); Boynton v. ESC Med. Sys., — N.C. App. —, 566 S.E.2d 730, 2002 N.C. App. LEXIS 873 (2002).

Cited in Darroch v. Lea, 150 N.C. App. 156, 563 S.E.2d 219, 2002 N.C. App. LEXIS 390 (2002); Carter v. Lee, 283 F.3d 240, 2002 U.S. App. LEXIS 3739 (4th. Cir. 2002); State v. Leeper, 356 N.C. 55, 565 S.E.2d 1, 2002 N.C. LEXIS 551 (2002); Fairfield Mt. Prop. Owners Ass'n v. Doolittle, 149 N.C. App. 486, 560 S.E.2d 604, 2002 N.C. App. LEXIS 189 (2002); State v. Al-Bayyinah, 356 N.C. 150, 567 S.E.2d 120, 2002 N.C. LEXIS 678 (2002); Van Engen v. Que Scientific, Inc., — N.C. App. —, 567 S.E.2d 179, 2002 N.C. App. LEXIS 871 (2002).

IV. INTERLOCUTORY ORDERS.

B. Particular Orders.

Preliminary Injunction Pursuant to Covenant Not to Compete. —

Where a former employer sued a former employee for violating a covenant not to compete, the employee was entitled to interlocutory review of the trial court's decision to issue a preliminary injunction which, inter alia, prohibited the employee from working for the employer's competitors in North Carolina or South Carolina, as the injunction adversely affected the employee's substantial right to earn a living and to practice the employee's livelihood. Precision Walls, Inc. v. Servie, — N.C. App. —, 568 S.E.2d 267, 2002 N.C. App. LEXIS 980 (2002).

§ 7A-30. Appeals of right from certain decisions of the Court of Appeals.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Martishius v. Carolco Studios, Inc., 355 N.C. 465, 562 S.E.2d 887, 2002 N.C. LEXIS 428 (2002); State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002).

§ 7A-31. Discretionary review by the Supreme Court.

CASE NOTES

Cited in Craig v. County of Chatham, 356 N.C. 40, 565 S.E.2d 172, 2002 N.C. LEXIS 539 (2002); Morris Communs. Corp. v. City of Asheville, 356 N.C. 103, 565 S.E.2d 70, 2002 N.C. LEXIS 546 (2002); State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002).

§ 7A-32. Power of Supreme Court and Court of Appeals to issue remedial writs.

CASE NOTES

Cited in In re Braithwaite, 150 N.C. App. 434, 562 S.E.2d 897, 2002 N.C. App. LEXIS 486 (2002), cert. denied, 356 N.C. 162, 568 S.E.2d 187 (2002); In re Will of McCauley, 356 N.C. 91, 565 S.E.2d 88, 2002 N.C. LEXIS 550 (2002); Staton v. Russell, — N.C. App. —, 565 S.E.2d 103, 2002 N.C. App. LEXIS 688 (2002); State v. Wilson, — N.C. App. —, 565 S.E.2d 223, 2002 N.C. App. LEXIS 714 (2002).

§ 7A-37.1. Statewide court-ordered, nonbinding arbitration in certain civil actions.

(a) The General Assembly finds that court-ordered, nonbinding arbitration may be a more economical, efficient and satisfactory procedure to resolve certain civil actions than by traditional civil litigation and therefore authorizes court-ordered nonbinding arbitration as an alternative civil procedure, subject to these provisions.

(b) The Supreme Court of North Carolina may adopt rules governing this procedure and may supervise its implementation and operation through the Administrative Office of the Courts. These rules shall ensure that no party is deprived of the right to jury trial and that any party dissatisfied with an arbitration award may have trial de novo.

(c) This procedure may be employed in civil actions where claims do not exceed fifteen thousand dollars ($15,000), except that it shall not be employed in actions in which the sole claim is an action on an account, including appeals from magistrates on such actions.

(d) This procedure may be implemented in a judicial district, in selected counties within a district, or in any court within a district, if the Director of the Administrative Office of the Courts, and the cognizant Senior Resident Superior Court Judge or the Chief District Court Judge of any court selected for this procedure, determine that use of this procedure may assist in the administration of justice toward achieving objectives stated in subsection (a) of this section in a judicial district, county, or court. The Director of the Administrative Office of the courts, acting upon the recommendation of the cognizant Senior Resident Superior Court Judge or Chief District Court Judge of any court selected for this procedure, may terminate this procedure in any judicial district, county, or court upon a determination that its use has not accomplished objectives stated in subsection (a) of this section.

(e) Arbitrators in this procedure shall have the same immunity as judges from civil liability for their official conduct. (1989, c. 301, s. 1; 2002-126, s. 14.3(a).)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 14.3(a), effective October 1, 2002, and applicable to actions and cases filed on or after that date, added "except that it shall not be employed in actions in which the sole claim is an action on an account, including appeals from magistrates on such actions" at the end of subsection (c).

CASE NOTES

Cited in Johnson v. Brewington, 150 N.C. App. 425, 562 S.E.2d 919, 2002 N.C. App. LEXIS 484 (2002); Bledsole v. Johnson, — N.C. App. —, 564 S.E.2d 902, 2002 N.C. App. LEXIS 652 (2002).

§ 7A-38.1. Mediated settlement conferences in superior court civil actions.

Legal Periodicals. —

For note, "A Mediation Nightmare?: The Effect of the North Carolina Supreme Court's Decision in Chappell v. Roth on the Enforceability and Integrity of Mediated Settlement Agreements," see 27 Wake Forest L. Rev. 643 (2002).

§ 7A-38.7. Dispute resolution fee for cases resolved in mediation.

(a) In each criminal case filed in the General Court of Justice that is resolved through referral to a community mediation center, a dispute resolution fee shall be assessed in the sum of sixty dollars ($60.00) for the support of the General Court of Justice. Fees assessed under this section shall be paid to the clerk of superior court in the county where the case was filed and remitted by the clerk to the State Treasurer.

(b) Before providing the district attorney with a dismissal form, the community mediation center shall require proof that the defendant has paid the dispute resolution fee as required by subsection (a) of this section. (2002-126, s. 29A.11(a).)

Editor's Note. — Session Laws 2002-126, s. 29A.11(c), made this section effective November 1, 2002, and applicable to cases resolved on or after that date.

Session Laws 2002-126, s. 29A.11(b), provides: "Each community mediation center shall maintain records as to the number of cases in which dispute resolution fees are assessed and paid. The Mediation Network of North Carolina shall collect this information from each center annually.

"Each community mediation center shall also maintain records as to the source of referral for all court-referred cases. Each center receiving State funds shall use a standardized form and methodology to determine the referral source and report that information annually to the Mediation Network of North Carolina.

"The Mediation Network of North Carolina shall report by March 15, 2003, to 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 fees collected year-to-date and the sources of referral of court-referred cases during the 2002-2003 fiscal year."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Article 6.

Retirement of Justices and Judges of the Appellate Division; Retirement Compensation; Recall to Emergency Service; Disability Retirement.

§ 7A-39.3. Retired justices and judges may become emergency justices and judges subject to recall to active service; compensation for emergency justices and judges on recall.

(a) Justices of the Supreme Court and judges of the Court of Appeals who have not reached the mandatory retirement age specified in G.S. 7A-4.20, but who have retired under the provisions of G.S. 7A-39.2, or under the Uniform Judicial Retirement Act after having completed 12 years of creditable service, may apply as provided in G.S. 7A-39.6 to become emergency justices or judges and upon being commissioned as an emergency justice or emergency judge shall be subject to temporary recall to active service in place of a justice or judge who is temporarily incapacitated as provided in G.S. 7A-39.5.

(b) In addition to the compensation or retirement allowance he would otherwise be entitled to receive by law, each emergency justice or emergency judge recalled for temporary active service shall be paid by the State his actual expenses, plus three hundred dollars ($300.00) for each day of active service rendered upon recall. No recalled retired or emergency justice or judge shall receive from the State total annual compensation for judicial services in excess of that received by an active justice or judge of the bench to which the justice or judge is being recalled. (1967, c. 108, s. 1; 1973, c. 640, s. 3; 1977, c. 736, s. 1; 1979, c. 884, s. 1; 1981, c. 455, s. 3; c. 859, s. 46; 1981 (Reg. Sess., 1982), c. 1253, s. 2; 1983, c. 784; 1985, c. 698, ss. 9(a), 16(b); 1987 (Reg. Sess., 1988), c. 1086, s. 31(a); 2002-159, s. 25.)

Effect of Amendments. — Session Laws 2002-159, s. 25, effective October 11, 2002, substituted "three hundred dollars ($300.00)" for "one hundred fifty dollars ($150.00)" in subsection (b).

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

Article 7.

Organization.

§ 7A-41. Superior court divisions and districts; judges.

Editor's Note. —

Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 4, provides: "Notwithstanding G.S. 7A-44.1, if any judge who on June 12, 1996, was a senior resident superior court judge ceases to be the senior resident superior court judge for a superior court district as a result of the transfer of a county from one superior court district to another, that judge may nevertheless appoint a judicial secretary to serve that judge's clerical and secretarial needs during that judge's continuation in office, at that judge's pleasure and under that judge's direction." Session Laws 2002-159, s. 91.3, provides that notwithstanding the provisions of Session Laws 2002-126, the provisions of Session Laws 1995 (Reg. Sess., 1996), c. 589, s. 4, remain in effect, and that the Judicial Department shall use $38,132 in avail-

able funds to continue a superior court judicial assistant position in Superior Court District 19B. In the event the position becomes vacant, it shall be reassigned to the senior resident superior court judge.

§ 7A-44. Salary and expenses of superior court judge.

OPINIONS OF ATTORNEY GENERAL

Length of Service. — Associate Justice of the North Carolina Supreme Court was entitled to have his service as Director and Assistant Director of the Administrative Office of the Courts to be taken into account in calculating his service for longevity purposes, but his service as assistant district attorney could not be taken into account. See opinion of Attorney General to The Honorable Thomas W. Ross, Director, The Administrative Office of the Courts, 1999 N.C. AG LEXIS 28 (9/28/99).

§ 7A-47. Powers of regular judges holding courts by assignment or exchange.

CASE NOTES

Authority of Assigned Presiding Superior Court Judge. — Presiding superior court judge, duly assigned by the Chief Justice of the North Carolina Supreme Court, acted with the power of the resident superior court judge; thus, the judge from another county who was assigned to serve as resident superior court judge was technically acting in a "resident" capacity when he ruled on a motion for an extension of time to file pleadings. Best v. Wayne Mem. Hosp., 147 N.C. App. 628, 556 S.E.2d 629, 2001 N.C. App. LEXIS 1259 (2001).

ARTICLE 11.

Special Regulations.

§ 7A-97. Court's control of argument.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001).

ARTICLE 12.

Clerk of Superior Court.

§ 7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.

Editor's Note. —

Session Laws 2002-12, s. 3, as amended by Session Laws 2002-54, s. 1, by Session Laws 2002-101, s. 1, and by Session Laws 2002-126, s. 31.4(c), effective July 1, 2002 and expiring September 30, 2002, provides: "State employees subject to G.S. 7A-102(c), 7A-171.1, or 20-187.3 shall not move up on salary schedules or receive automatic increases, including automatic step increases, until authorized by the General Assembly.

"Public school employees paid on the teacher

salary schedule or the school-based administrator salary schedule shall not move up on salary schedules or receive automatic step increases until authorized by the General Assembly."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 13.

Creation and Organization of the District Court Division.

§ 7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.

Editor's Note. —

Session Laws 2002-126, ss. 14.6(a) and (b), provides: "(a) Notwithstanding the provisions of G.S. 7A-133(c) establishing minimum numbers of magistrate provisions in each county, the Administrative Office of the Courts shall identify and eliminate five magistrate positions across the State in a manner that minimizes the impact on access to court resources. Positions may be eliminated only in counties that currently have at least five magistrate positions, and no more than one position per judicial district may be eliminated.

"In identifying the five positions, the Administrative Office of the Courts shall:

"(1) Identify counties with a disproportionate number of magistrate positions, based upon caseload;

"(2) Consider more cost-effective methods of providing access to magistrates in rural areas;

"(3) Determine the optimal mix of part-time and full-time magistrate positions; and

"(4) Consider ongoing discussions before the Courts Commission and the Judicial Counsel on magistrate staffing and jurisdiction.

"(b) The Administrative Office of the Courts shall report by December 1, 2002, to 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 positions to be eliminated and the methodology used to identify those positions."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

ARTICLE 14.

District Judges.

§ 7A-142. Vacancies in office.

A vacancy in the office of district judge shall be filled for the unexpired term by appointment of the Governor from nominations submitted by the bar of the judicial district as defined in G.S. 84-19, except that in judicial District 9, when vacancies occur in District Court District 9 or 9B, only those members who

reside in the district court district shall participate in the selection of the nominees. If the district court district is comprised of counties in more than one judicial district, the nominees shall be submitted jointly by the bars of those judicial districts, but only those members who reside in the district court district shall participate in the selection of the nominees. If the district court judge was elected as the nominee of a political party, then the district bar shall submit to the Governor the names of three persons who are residents of the district court district who are duly authorized to practice law in the district and who are members of the same political party as the vacating judge; provided that if there are not three persons who are available, the bar shall submit the names of two persons who meet the qualifications of this sentence. If the district court judge was not elected as the nominee of a political party, then the district bar shall submit to the Governor the names of three persons who are residents of the district court district and who are duly authorized to practice law in the district; provided that if there are not three persons who are available, the bar shall submit the names of two persons who meet the qualifications of this sentence. Within 60 days after the district bar submits nominations for a vacancy, the Governor shall appoint to fill the vacancy. If the Governor fails to appoint a district bar nominee within 60 days, then the district bar nominee who received the highest number of votes from the district bar shall fill the vacancy. If the district bar fails to submit nominations within 30 days from the date the vacancy occurs, the Governor may appoint to fill the vacancy without waiting for nominations. (1965, c. 310, s. 1; 1975, c. 441; 1981, c. 763, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 1006, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 16; c. 1056, s. 7; c. 1086, s. 112(b); 1991, c. 742, s. 16; 1999-237, s. 17.10; 2001-403, s. 2(a); 2002-159, s. 58.)

Editor's Note. —

Session Laws 2002-159, s. 58, effective October 11, 2002, repealed Session Laws 2001-403, s. 2(b), which would have deleted, effective December 2, 2002, the former third sentence, which read: "If the district court judge was elected as the nominee of a political party, then the district bar shall submit to the Governor the names of three persons who are residents of the district court district who are duly authorized to practice law in the district and who are members of the same political party as the vacating judge; provided that if there are not three persons who are available, the bar shall submit the names of two persons who meet the qualifications of this sentence."

Article 16.

Magistrates.

§ 7A-171.1. Duty hours, salary, and travel expenses within county.

Editor's Note. —

Session Laws 2002-12, s. 3, as amended by Session Laws 2002-54, s. 1, by Session Laws 2002-101, s. 1, and by Session Laws 2002-126, s. 31.4(c), effective July 1, 2002 and expiring September 30, 2002, provides: "State employees subject to G.S. 7A-102(c), 7A-171.1, or 20-187.3 shall not move up on salary schedules or receive automatic increases, including automatic step increases, until authorized by the General Assembly.

"Public school employees paid on the teacher salary schedule or the school-based administrator salary schedule shall not move up on salary schedules or receive automatic step increases until authorized by the General Assembly."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring

during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

ARTICLE 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

§ 7A-271. Jurisdiction of superior court.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in Hamilton v. Freeman, 147 N.C. App. 195, 554 S.E.2d 856, 2001 N.C. App. LEXIS 1147 (2001), cert. denied, 355 N.C. 285, 560 S.E.2d 802 (2002); State v. Wilson, — N.C. App. —, 565 S.E.2d 223, 2002 N.C. App. LEXIS 714 (2002).

§ 7A-273. Powers of magistrates in infractions or criminal actions.

In criminal actions or infractions, any magistrate has power:

(1) In infraction cases in which the maximum penalty that can be imposed is not more than fifty dollars ($50.00), exclusive of costs, or in Class 3 misdemeanors, other than the types of infractions and misdemeanors specified in subdivision (2) of this section, to accept guilty pleas or admissions of responsibility and enter judgment;

(2) In misdemeanor or infraction cases involving alcohol offenses under Chapter 18B of the General Statutes, traffic offenses, hunting, fishing, State park and recreation area rule offenses under Chapter 113 of the General Statutes, boating offenses under Chapter 75A of the General Statutes, and littering offenses under G.S. 14-399(c) and G.S. 14-399(c1), to accept written appearances, waivers of trial or hearing and pleas of guilty or admissions of responsibility, in accordance with the schedule of offenses and fines or penalties promulgated by the Conference of Chief District Judges pursuant to G.S. 7A-148, and in such cases, to enter judgment and collect the fines or penalties and costs;

(2a) In misdemeanor cases involving the violation of a county ordinance authorized by law regulating the use of dune or beach buggies or other power-driven vehicles specified by the governing body of the county on the foreshore, beach strand, or the barrier dune system, to accept written appearances, waivers of trial or hearing, and pleas of guilty or admissions of responsibility, in accordance with the schedule of offenses and fines or penalties promulgated by the Conference of Chief District Court Judges pursuant to G.S. 7A-148, and in such cases, to enter judgment and collect the fines or penalties and costs;

(3) To issue arrest warrants valid throughout the State;

(4) To issue search warrants valid throughout the county;

(5) To grant bail before trial for any noncapital offense;

(6) Notwithstanding the provisions of subdivision (1) of this section, to hear and enter judgment as the chief district judge shall direct in all worthless check cases brought under G.S. 14-107, when the amount of the check is two thousand dollars ($2,000) or less. Provided, however, that under this section magistrates may not impose a prison sentence longer than 30 days;

(7) To conduct an initial appearance as provided in G.S. 15A-511; and

(8) To accept written appearances, waivers of trial and pleas of guilty in violations of G.S. 14-107 when the amount of the check is two thousand dollars ($2,000) or less, restitution, including service charges and processing fees allowed by G.S. 14-107, is made, and the warrant does not charge a fourth or subsequent violation of this statute, and in these cases to enter judgments as the chief district judge directs.

(9) Repealed by Session Laws 1991 (Regular Session, 1992), c. 900, s. 118(d). (1965, c. 310, s. 1; 1969, c. 876, s. 2; c. 1190, s. 25; 1973, c. 6; c. 503, s. 8; c. 1286, s. 7; 1975, c. 626, s. 4; 1977, c. 873, s. 1; 1979, c. 144, s. 3; 1981, c. 555, s. 3; 1983, c. 586, s. 5; 1985, c. 425, s. 4; c. 764, s. 16; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1987, c. 355, ss. 1, 2; 1989, c. 343; c. 763; 1989 (Reg. Sess., 1990), c. 1041, s. 1; 1991, c. 520, s. 2; 1991 (Reg. Sess., 1992), c. 900, s. 118(d); 1993, c. 374, s. 4; c. 538, s. 35; 1994, Ex. Sess., c. 14, s. 1; c. 24, s. 14(b); 1999-80, s. 1; 2002-159, s. 1.)

Effect of Amendments. — Session Laws 2002-159, s. 1, effective October 11, 2002, substituted "G.S. 14-399(c) and G.S. 14-399(c1)" for "G.S. 14-399(c)" in subdivision (2).

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

ARTICLE 27.

Expenses of the Judicial Department.

§ 7A-302. Counties and municipalities responsible for physical facilities.

CASE NOTES

County Liability for Injuries to State Employees on County Property. — County was not subjected to tort liability for claims arising from third-party criminal conduct when a state employee was sexually assaulted in a county courthouse, particularly since the county undertook security measures to protect the public from harm in the courthouse; further the county did not waive its protection under the public duty doctrine. Wood v. Guilford County, 355 N.C. 161, 558 S.E.2d 490, 2002 N.C. LEXIS 16 (2002).

ARTICLE 28.

Uniform Costs and Fees in the Trial Divisions.

§ 7A-304. Costs in criminal actions.

(a) In every criminal case in the superior or district court, wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, or when costs are assessed against the prosecuting witness, the following costs shall be

assessed and collected, except that when the judgment imposes an active prison sentence, costs shall be assessed and collected only when the judgment specifically so provides, and that no costs may be assessed when a case is dismissed.

(1) For each arrest or personal service of criminal process, including citations and subpoenas, the sum of five dollars ($5.00), to be remitted to the county wherein the arrest was made or process was served, except that in those cases in which the arrest was made or process served by a law-enforcement officer employed by a municipality, the fee shall be paid to the municipality employing the officer.

(2) For the use of the courtroom and related judicial facilities, the sum of twelve dollars ($12.00) in the district court, including cases before a magistrate, and the sum of thirty dollars ($30.00) in superior court, to be remitted to the county in which the judgment is rendered. In all cases where the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used exclusively by the county or municipality for providing, maintaining, and constructing adequate courtroom and related judicial facilities, including: adequate space and furniture for judges, district attorneys, public defenders and other personnel of the Office of Indigent Defense Services, magistrates, juries, and other court related personnel; office space, furniture and vaults for the clerk; jail and juvenile detention facilities; free parking for jurors; and a law library (including books) if one has heretofore been established or if the governing body hereafter decides to establish one. In the event the funds derived from the facilities fees exceed what is needed for these purposes, the county or municipality may, with the approval of the Administrative Officer of the Courts as to the amount, use any or all of the excess to retire outstanding indebtedness incurred in the construction of the facilities, or to reimburse the county or municipality for funds expended in constructing or renovating the facilities (without incurring any indebtedness) within a period of two years before or after the date a district court is established in such county, or to supplement the operations of the General Court of Justice in the county.

(3) For the retirement and insurance benefits of both State and local government law-enforcement officers, the sum of seven dollars and twenty-five cents ($7.25), to be remitted to the State Treasurer. Fifty cents (50¢) of this sum shall be administered as is provided in Article 12C of Chapter 143 of the General Statutes. Five dollars and seventy-five cents ($5.75) of this sum shall be administered as is provided in Article 12E of Chapter 143 of the General Statutes, with one dollar and twenty-five cents ($1.25) being administered in accordance with the provisions of G.S. 143-166.50(e). One dollar ($1.00) of this sum shall be administered as is provided in Article 12F of Chapter 143 of the General Statutes.

(3a) For the supplemental pension benefits of sheriffs, the sum of seventy-five cents (75¢) to be remitted to the Department of Justice and administered under the provisions of Article 12G of Chapter 143 of the General Statutes.

(4) For support of the General Court of Justice, the sum of seventy-five dollars ($75.00) in the district court, including cases before a magistrate, and the sum of eighty-two dollars ($82.00) in the superior court, to be remitted to the State Treasurer. For a person convicted of a felony in superior court who has made a first appearance in district court, both the district court and superior court fees shall be assessed.

The State Treasurer shall remit the sum of one dollar and five cents ($1.05) of each fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.4.

(5) For using pretrial release services, the district or superior court judge shall, upon conviction, impose a fee of fifteen dollars ($15.00) to be remitted to the county providing the pretrial release services. This cost shall be assessed and collected only if the defendant had been accepted and released to the supervision of the agency providing the pretrial release services.

(6) For support of the General Court of Justice, for the issuance by the clerk of a report to the Division of Motor Vehicles pursuant to G.S. 20-24.2, the sum of fifty dollars ($50.00), to be remitted to the State Treasurer. Upon a showing to the court that the defendant failed to appear because of an error or omission of a judicial official, a prosecutor, or a law-enforcement officer, the court shall waive this fee.

(7) For the services of the State Bureau of Investigation laboratory facilities, the district or superior court judge shall, upon conviction, order payment of the sum of three hundred dollars ($300.00) to be remitted to the Department of Justice for support of the State Bureau of Investigation. This cost shall be assessed only in cases in which, as part of the investigation leading to the defendant's conviction, the laboratories have performed DNA analysis of the crime, tests of bodily fluids of the defendant for the presence of alcohol or controlled substances, or analysis of any controlled substance possessed by the defendant or the defendant's agent. The court may waive or reduce the amount of the payment required by this subdivision upon a finding of just cause to grant such a waiver or reduction.

(a1) Repealed by Session Laws 1997-475, s. 4.1.

(b) On appeal, costs are cumulative, and costs assessed before a magistrate shall be added to costs assessed in the district court, and costs assessed in the district court shall be added to costs assessed in the superior court, except that the fee for the Law-Enforcement Officers' Benefit and Retirement Fund and the Sheriffs' Supplemental Pension Fund and the fee for pretrial release services shall be assessed only once in each case. No superior court costs shall be assessed against a defendant who gives notice of appeal from the district court but withdraws it prior to the expiration of the 10-day period for entering notice of appeal. When a case is reversed on appeal, the defendant shall not be liable for costs, and the State shall be liable for the cost of printing records and briefs in the Appellate Division.

(c) Witness fees, expenses for blood tests and comparisons incurred by G.S. 8-50.1(a), jail fees and cost of necessary trial transcripts shall be assessed as provided by law in addition to other costs set out in this section. Nothing in this section shall limit the power or discretion of the judge in imposing fines or forfeitures or ordering restitution.

(d)(1) In any criminal case in which the liability for costs, fines, restitution, or any other lawful charge has been finally determined, the clerk of superior court shall, unless otherwise ordered by the presiding judge, disburse such funds when paid in accordance with the following priorities:

a. Sums in restitution to the victim entitled thereto;
b. Costs due the county;
c. Costs due the city;
d. Fines to the county school fund;
e. Sums in restitution prorated among the persons other than the victim entitled thereto;

f. Costs due the State;
g. Attorney's fees, including appointment fees assessed pursuant to G.S. 7A-455.1.

(2) Sums in restitution received by the clerk of superior court shall be disbursed when:
a. Complete restitution has been received; or
b. When, in the opinion of the clerk, additional payments in restriction will not be collected; or
c. Upon the request of the person or persons entitled thereto; and
d. In any event, at least once each calendar year.

(e) Unless otherwise provided by law, the costs assessed pursuant to this section for criminal actions disposed of in the district court are also applicable to infractions disposed of in the district court. The costs assessed in superior court for criminal actions appealed from district court to superior court are also applicable to infractions appealed to superior court. If an infraction is disposed of in the superior court pursuant to G.S. 7A-271(d), costs applicable to the original charge are applicable to the infraction. (1965, c. 310, s. 1; 1967, c. 601, s. 2; c. 691, ss. 27-29; c. 1049, s. 5; 1969, c. 1013, s. 3; c. 1190, ss. 28, 29; 1971, c. 377, ss. 19-21; c. 1129; 1973, c. 47, s. 2; 1975, c. 558, ss. 1, 2; 1975, 2nd Sess., c. 980, s. 1; 1979, c. 576, s. 3; 1981, c. 369; c. 691, s. 1; c. 896, s. 2; c. 959, s. 1; 1983, c. 713, ss. 2, 3; 1983 (Reg. Sess., 1984), c. 1034, s. 249; 1985, c. 479, s. 196(a); c. 729, ss. 2-4; c. 764, s. 17; 1986, Ex. Sess., c. 5; 1985 (Reg. Sess., 1986), c. 852, s. 17; c. 1015, s. 1; 1989, c. 664, ss. 1, 2; c. 786, s. 1; 1989 (Reg. Sess., 1990), c. 1044, s. 1; 1991, c. 742, s. 15(a); 1991 (Reg. Sess., 1992), c. 811, s. 1; 1993, c. 313, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 22.13(a); 1997-475, s. 4.1; 1998-212, ss. 19.4(k), 29A.12(a); 2000-109, s. 4(a); 2000-144, s. 2; 2001-424, s. 22.14(a); 2002-126, ss. 29A.4(a), 29A.8(a), 29A.9(b).)

Editor's Note. —

Session Laws 2002-126, s. 29A.4(c), provides: "Subsection (a) of this section [which amended subdivision (a)(4)] becomes effective October 1, 2002, and applies to all costs assessed or collected on or after that date, except that in misdemeanor or infraction cases disposed of on or after that date by written appearance, waiver of trial or hearing, and plea of guilt or admission of responsibility pursuant to G.S. 7A-180(4) or G.S. 7A-273(2), in which the citation or other criminal process was issued before that date, the cost shall be the lesser of those specified in G.S. 7A-304(a), as amended by subsection (a) of this section, or those specified in the notice portion of the defendant or respondent's copy of the citation or other criminal process, if any costs are specified in that notice."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Effect of Amendments. —

Session Laws 2002-126, s. 29A.4(a), effective October 1, 2002, in subdivision (a)(4), increased the fees in the first sentence from $65 to $75 and from $72 to $82 and added the second sentence. See editor's note for applicability.

Session Laws 2002-126, s. 29A.8(a), effective October 1, 2002, and applicable to court costs assessed or collected on or after that date, added subdivision (a)(7).

Session Laws 2002-126, s. 29A.9(b), effective December 1, 2002, and applicable to all requests for the appointment of counsel made on or after that date, added "including appointment fees assessed pursuant to G.S. 7A-455.1" at the end of subdivision (d)(1)g.

§ 7A-305. Costs in civil actions.

(a) In every civil action in the superior or district court, except for actions brought under Chapter 50B of the General Statutes, the following costs shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of twelve dollars ($12.00) in cases heard before a magistrate, and the sum of sixteen dollars ($16.00) in district and superior court, to be remitted to the county in which the judgment is rendered, except that in all cases in which the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice, the sum of sixty-nine dollars ($69.00) in the superior court, and the sum of fifty-four dollars ($54.00) in the district court except that if the case is assigned to a magistrate the sum shall be forty-three dollars ($43.00). Sums collected under this subdivision shall be remitted to the State Treasurer. The State Treasurer shall remit the sum of one dollar and five cents ($1.05) of each fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.4.

(a1) Reserved for future codification purposes.

(a2) In every final action for absolute divorce filed in the district court, a cost of twenty dollars ($20.00) shall be assessed against the person filing the divorce action. Costs collected by the clerk pursuant to this subsection shall be remitted to the State Treasurer for deposit to the North Carolina Fund for Displaced Homemakers established under G.S. 143B-394.10. Costs assessed under this subsection shall be in addition to any other costs assessed under this section.

(b) On appeal, costs are cumulative, and when cases heard before a magistrate are appealed to the district court, the General Court of Justice fee and the facilities fee applicable in the district court shall be added to the fees assessed before the magistrate. When an order of the clerk of the superior court is appealed to either the district court or the superior court, no additional General Court of Justice fee or facilities fee shall be assessed.

(b1) When a defendant files an answer in an action filed as a small claim which requires the entire case to be withdrawn from a magistrate and transferred to the district court, the difference between the General Court of Justice fee and facilities fee applicable to the district court and the General Court of Justice fee and facilities fee applicable to cases heard by a magistrate shall be assessed. The defendant is responsible for paying the fee.

(c) The clerk of superior court, at the time of the filing of the papers initiating the action or the appeal, shall collect as advance court costs, the facilities fee, General Court of Justice fee, and the divorce fee imposed under subsection (a2) of this section, except in suits by an indigent. The clerk shall also collect the fee for discovery procedures under Rule 27(a) and (b) at the time of the filing of the verified petition.

(d) The following expenses, when incurred, are also assessable or recoverable, as the case may be:

(1) Witness fees, as provided by law.
(2) Jail fees, as provided by law.
(3) Counsel fees, as provided by law.
(4) Expense of service of process by certified mail and by publication.
(5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.

(6) Fees for personal service and civil process and other sheriff's fees, as provided by law. Fees for personal service by a private process server may be recoverable in an amount equal to the actual cost of such service or fifty dollars ($50.00), whichever is less, unless the court finds that due to difficulty of service a greater amount is appropriate.

(7) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.

(8) Fees of interpreters, when authorized and approved by the court.

(9) Premiums for surety bonds for prosecution, as authorized by G.S. 1-109.

(e) Nothing in this section shall affect the liability of the respective parties for costs as provided by law. (1965, c. 310, s. 1; 1967, c. 108, s. 10; c. 691, s. 30; 1971, c. 377, ss. 23, 24; c. 1181, s. 1; 1973, c. 503, ss. 12-14; c. 1267, s. 3; 1975, c. 558, s. 3; 1975, 2nd Sess., c. 980, ss. 2, 3; 1979, 2nd Sess., c. 1234, s. 1; 1981, c. 555, s. 6; c. 691, s. 2; 1983, c. 713, ss. 4-6; 1989, c. 786, s. 2; 1991, c. 742, s. 15(b); 1991 (Reg. Sess., 1992), c. 811, s. 2; 1993, c. 435, s. 6; 1995, c. 275, s. 2; 1998-212, s. 29A.12(b); 1998-219, ss. 2, 3; 2000-109, s. 4(b); 2001-424, s. 22.14(b); 2002-126, ss. 29A.4(b), 29A.6(e).)

Editor's Note. —

Session Laws 2002-126, s. 29A.4(c), provides: "Subsection (b) of this section [which amended subdivision (a)(2)] becomes effective October 1, 2002, and applies to all costs assessed or collected on or after that date."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Effect of Amendments. —

Session Laws 2002-126, s. 29A.4(b), effective October 1, 2002, and applicable to all costs assessed or collected on or after that date, in subdivision (a)(2), substituted "sixty-nine dollars ($69.00)" for "fifty-nine dollars ($59.00)", "fifty-four dollars ($54.00)" for "forty-four dollars ($44.00)", and "forty-three dollars ($43.00)" for "thirty-three dollars ($33.00)."

Session Laws 2002-126, s. 29A.6(e), effective October 1, 2002, added "except for actions brought under Chapter 50B of the General Statutes" in subsection (a).

§ 7A-306. Costs in special proceedings.

(a) In every special proceeding in the superior court, the following costs shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of ten dollars ($10.00) to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice the sum of thirty dollars ($30.00). In addition, in proceedings involving land, except boundary disputes, if the fair market value of the land involved is over one hundred dollars ($100.00), there shall be an additional sum of thirty cents (30¢) per one hundred dollars ($100.00) of value, or major fraction thereof, not to exceed a maximum additional sum of two hundred dollars ($200.00). Fair market value is determined by the sale price if there is a sale, the appraiser's valuation if there is no sale, or the appraised value from the property tax records if there is neither

a sale nor an appraiser's valuation. Sums collected under this subdivision shall be remitted to the State Treasurer. The State Treasurer shall remit the sum of one dollar and five cents ($1.05) of each thirty-dollar ($30.00) General Court of Justice fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.4.

(b) The facilities fee and thirty dollars ($30.00) of the General Court of Justice fee are payable at the time the proceeding is initiated.

(c) The following additional expenses, when incurred, are assessable or recoverable, as the case may be:

(1) Witness fees, as provided by law.
(2) Counsel fees, as provided by law.
(3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.
(4) Fees for personal service of civil process, and other sheriff's fees, and for service by publication, as provided by law.
(5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fees of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.

(d) Costs assessed before the clerk shall be added to costs assessable on appeal to the judge or upon transfer to the civil issue docket.

(e) Nothing in this section shall affect the liability of the respective parties for costs, as provided by law.

(f) This section does not apply to a foreclosure under power of sale in a deed of trust or mortgage. (1965, c. 310, s. 1; 1967, c. 24, s. 2; 1971, c. 377, s. 25; c. 1181, s. 1; 1973, c. 503, s. 15; 1981, c. 691, s. 3; 1983, c. 713, ss. 7-9; c. 881, s. 4; 1985, c. 511, s. 1; 1989, c. 646, s. 1; 1991 (Reg. Sess., 1992), c. 811, s. 3; 1998-212, s. 29A.12(c); 2000-109, s. 4(c); 2001-424, s. 22.14(c); 2002-135, s. 1.)

Effect of Amendments. — Session Laws 2002-135, s. 1, effective October 1, 2002, and applicable to all acts done on or after that date, substituted "each thirty-dollar ($30.00) General Court of Justice fee" for "each fee" in the last sentence of subdivision (a)(2).

§ 7A-307. Costs in administration of estates.

(a) In the administration of the estates of decedents, minors, incompetents, of missing persons, and of trusts under wills and under powers of attorney, in trust proceedings under G.S. 36A-23.1, and in collections of personal property by affidavit, the following costs shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of ten dollars ($10.00), to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.
(2) For support of the General Court of Justice, the sum of thirty dollars ($30.00), plus an additional forty cents (40¢) per one hundred dollars ($100.00), or major fraction thereof, of the gross estate, not to exceed three thousand dollars ($3,000). Gross estate shall include the fair market value of all personalty when received, and all proceeds from the sale of realty coming into the hands of the fiduciary, but shall not include the value of realty. In collections of personal property by affidavit, the fee based on the gross estate shall be computed from the information in the final affidavit of collection made pursuant to G.S. 28A-25-3 and shall be paid when that affidavit is filed. In all other cases, this fee shall be computed from the information reported in the inventory and shall be paid when the inventory is filed with the clerk.

If additional gross estate, including income, comes into the hands of the fiduciary after the filing of the inventory, the fee for such additional value shall be assessed and paid upon the filing of any account or report disclosing such additional value. For each filing the minimum fee shall be fifteen dollars ($15.00). Sums collected under this subdivision shall be remitted to the State Treasurer. The State Treasurer shall remit the sum of one dollar and five cents ($1.05) of each thirty-dollar ($30.00) General Court of Justice fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.4.

(2a) Notwithstanding subdivision (2) of this subsection, the fee of forty cents (40¢) per one hundred dollars ($100.00), or major fraction, of the gross estate, not to exceed three thousand dollars ($3,000), shall not be assessed on personalty received by a trust under a will when the estate of the decedent was administered under Chapters 28 or 28A of the General Statutes. Instead, a fee of twenty dollars ($20.00) shall be assessed on the filing of each annual and final account.

(2b) Notwithstanding subdivisions (1) and (2) of this subsection, no costs shall be assessed when the estate is administered or settled pursuant to G.S. 28A-25-6.

(2c) Notwithstanding subdivision (2) of this subsection, the fee of forty cents (40¢) per one hundred dollars ($100.00), or major fraction, of the gross estate shall not be assessed on the gross estate of a trust that is the subject of a proceeding under G.S. 36A-23.1 if there is no requirement in the trust that accountings be filed with the clerk.

(3) For probate of a will without qualification of a personal representative, the clerk shall assess a facilities fee as provided in subdivision (1) of this subsection and shall assess for support of the General Court of Justice, the sum of twenty dollars ($20.00).

(b) In collections of personal property by affidavit, the facilities fee and thirty dollars ($30.00) of the General Court of Justice fee shall be paid at the time of filing the qualifying affidavit pursuant to G.S. 28A-25-1. In all other cases, these fees shall be paid at the time of filing of the first inventory. If the sole asset of the estate is a cause of action, these fees shall be paid at the time of the qualification of the fiduciary.

(b1) The clerk shall assess the following miscellaneous fees:

(1) Filing and indexing a will with no probate
— first page ..... $ 1.00
— each additional page or fraction thereof ..... .25

(2) Issuing letters to fiduciaries, per letter over five letters issued .. 1.00

(3) Inventory of safe deposits of a decedent, per box, per day 15.00

(4) Taking a deposition 10.00

(5) Docketing and indexing a will probated in another county in the State
— first page 6.00
— each additional page or fraction thereof ..... .25

(6) Hearing petition for year's allowance to surviving spouse or child, in cases not assigned to a magistrate, and allotting the same 8.00

(c) The following additional expenses, when incurred, are also assessable or recoverable, as the case may be:

(1) Witness fees, as provided by law.

(2) Counsel fees, as provided by law.

(3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.

(4) Fees for personal service of civil process, and other sheriff's fees, as provided by law.

(5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law.

(d) Costs assessed before the clerk shall be added to costs assessable on appeal to the judge or upon transfer to the civil issue docket.

(e) Nothing in this section shall affect the liability of the respective parties for costs, as provided by law. (1965, c. 310, s. 1; 1967, c. 691, s. 31; 1969, c. 1190, s. 30; 1971, c. 1181, s. 1; 1973, c. 1335, s. 1; 1981, c. 691, s. 4; 1983, c. 713, ss. 10-17; 1985, c. 481, ss. 1-5; 1985 (Reg. Sess., 1986), c. 855; 1987, c. 837; 1989, c. 719; 1991 (Reg. Sess., 1992), c. 811, ss. 4, 5; 1997-310, s. 4; 1998-212, s. 29A.12(d); 2000-109, s. 4(d); 2001-413, s. 1.2; 2001-424, s. 22.14(d); 2002-135, ss. 2, 3.)

Effect of Amendments. — Session Laws 2002-135, ss. 2, 3, effective October 1, 2002, and applicable to all acts done on or after that date, substituted "each thirty-dollar ($30.00) General Court of Justice fee" for "each fee" in the last sentence of subdivision (a)(2); and in subsection (b1), substituted "10.00" for "5.00" in subdivision (4), substituted "6.00" for "1.00" in subdivision (5), and substituted "8.00" for "4.00" in subdivision (6).

§ 7A-308. Miscellaneous fees and commissions.

(a) The following miscellaneous fees and commissions shall be collected by the clerk of superior court and remitted to the State for the support of the General Court of Justice:

(1) Foreclosure under power of sale in deed of trust or mortgage $60.00
If the property is sold under the power of sale, an additional amount will be charged, determined by the following formula: forty-five cents (.45) per one hundred dollars ($100.00), or major fraction thereof, of the final sale price. If the amount determined by the formula is less than ten dollars ($10.00), a minimum ten dollar ($10.00) fee will be collected. If the amount determined by the formula is more than three hundred dollars ($300.00), a maximum three hundred dollar ($300.00) fee will be collected.

(2) Proceeding supplemental to execution 30.00

(3) Confession of judgment 22.50

(4) Taking a deposition 10.00

(5) Execution 22.50

(6) Notice of resumption of former name 7.50

(7) Taking an acknowledgment or administering an oath, or both, with or without seal, each certificate (except that oaths of office shall be administered to public officials without charge) $1.50

(8) Bond, taking justification or approving 7.50

(9) Certificate, under seal 3.00

(10) Exemplification of records 7.50

(11) Recording or docketing (including indexing) any document
— first page 6.00
— each additional page or fraction thereof ..... .25

(12) Preparation of copies
— first page 1.50
— each additional page or fraction thereof ..... .25

(13) Preparation and docketing of transcript of judgment 7.50

(14) Substitution of trustee in deed of trust 7.50

(15) Execution of passport application — the amount allowed by federal law

(16) Repealed by Session Laws 1989, c. 783, s. 2.

(17) Criminal record search except if search is requested by an agency of the State or any of its political subdivisions or by an agency of the United States or by a petitioner in a proceeding under Article 2 of General Statutes Chapter 20 7.50

(18) Filing the affirmations, acknowledgments, agreements and resulting orders entered into under the provisions of G.S. 110-132 and G.S. 110-133 ..... 6.00

(19) Repealed by Session Laws 1989, c. 783, s. 3.

(20) Filing a motion to assert a right of access under G.S. 1-72.1 30.00.

(b) The fees and commissions set forth in this section are not chargeable when the service is performed as a part of the regular disposition of any action or special proceeding or the administration of an estate. When a transaction involves more than one of the services set forth in this section, only the greater service fee shall be charged. The Director of the Administrative Office of the courts shall issue guidelines pursuant to G.S. 7A-343(3) to be followed in administering this subsection.

(c) A person who participates in a program for the collection of worthless checks under G.S. 14-107.2 must pay a fee of sixty dollars ($60.00). The fee collected under this subsection must be remitted to the State by the clerk of the court in the county in which the program is established and credited to the Collection of Worthless Checks Fund. The Collection of Worthless Checks Fund is created as a special revenue fund. Revenue in the Fund does not revert at the end of the fiscal year, and interest and other investment income earned by the Fund accrues to the Fund. The money in the Fund is subject to appropriation by the General Assembly and may be used solely for the expenses of the programs established under G.S. 14-107.2 for the collection of worthless checks, including personnel, equipment, and other costs of district attorneys' offices that are attributable to the provision of these programs. (1965, c. 310, s. 1; 1967, c. 691, ss. 32, 33; 1969, c. 1190, s. 31; 1971, c. 956, s. 2; 1973, c. 503, s. 16; c. 886; 1975, c. 829; 1981, c. 313, s. 1; 1983, c. 713, s. 18; 1985, c. 475, ss. 2, 3; c. 481, ss. 6-8; c. 511, s. 2; 1989, c. 783, ss. 2-4; c. 786, ss. 1, 3; 1997-114, s. 1; 1997-443, s. 18.22(a); 1998-23, s. 11; 1998-212, s. 16.3; 1999-237, s. 17.7; 2000-67, s. 15.3A(a); 2000-109, s. 4(e); 2001-516, s. 2; 2002-126, ss. 29A.7(a), 29A.13.1(a); 2002-135, s. 4.)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, s. 29A.7(a), effective October 1, 2002, in subsection (c), substituted "sixty dollars ($60.00)" for "fifty dollars ($50.00)" in the first sentence, and added "including personnel, equipment, and other costs of district attorneys' offices that are attributable to the provision of these programs" at the end of the last sentence.

Session Laws 2002-126, s. 29A.13.1(a), effective October 1, 2002, and applicable to all acts done on or after that date, increased the fees in subsection (a).

Session Laws 2002-135, s. 4, effective October 1, 2002, and applicable to all acts done on or after that date, substituted "10.00" for "7.50" in subdivision (a)(4), as rewritten by Session Laws 2002-126, s. 29A.13.1(a).

§ 7A-309. Magistrate's special fees.

The following special fees shall be collected by the magistrate and remitted to the clerk of superior court for the use of the State in support of the General Court of Justice:

(1) Performing marriage ceremony $20.00

(2) Hearing petition for year's allowance to surviving spouse or child, issuing notices to commissioners, allotting the same,

and making return 8.00
(3) Taking a deposition 10.00
(4) Proof of execution or acknowledgment of any instrument 2.00
(5) Performing any other statutory function not incident to a civil or criminal action ..... $2.00.
(1965, c. 310, s. 1; 1973, c. 503, s. 17; 1983, c. 713, s. 19; 2002-126, s. 29A.10(a).)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 29A.10(a), effective October 1, 2002, and applicable to all acts done on or after that date, substituted "$20.00" for "$10.00" in subdivision (1); substituted "$8.00" for "$4.00" in subdivision (2); substituted "$10.00" for "$5.00" in subdivision (3); substituted "$2.00" for "$1.00" in subdivision (4); and substituted "$2.00" for "$1.00" in subdivision (5).

§ 7A-311. Uniform civil process fees.

(a) In a civil action or special proceeding, except for actions brought under Chapter 50B of the General Statutes, the following fees and commissions shall be assessed, collected, and remitted to the county:

(1)a. For each item of civil process served, including summons, subpoenas, notices, motions, orders, writs and pleadings, the sum of five dollars ($5.00). When two or more items of civil process are served simultaneously on one party, only one five dollar ($5.00) fee shall be charged.

b. When an item of civil process is served on two or more persons or organizations, a separate service charge shall be made for each person or organization. If the process is served, or attempted to be served, by a city policeman, the fee shall be remitted to the city rather than the county. If the process is served, or attempted to be served by the sheriff, the fee shall be remitted to the county. This subsection shall not apply to service of summons to jurors.

(2) For the seizure of personal property and its care after seizure, all necessary expenses, in addition to any fees for service of process.

(3) For all sales by the sheriff of property, either real or personal, or for funds collected by the sheriff under any judgment, five percent (5%) on the first five hundred dollars ($500.00), and two and one-half percent (2 ½%) on all sums over five hundred dollars ($500.00), plus necessary expenses of sale. Whenever an execution is issued to the sheriff, and subsequently while the execution is in force and outstanding, and after the sheriff has served or attempted to serve such execution, the judgment, or any part thereof, is paid directly or indirectly to the judgment creditor, the fee herein is payable to the sheriff on the amount so paid. The judgment creditor shall be responsible for collecting and paying all execution fees on amounts paid directly to the judgment creditor.

(4) For execution of a judgment of ejectment, all necessary expenses, in addition to any fees for service of process.

(5) For necessary transportation of individuals to or from State institutions or another state, the same mileage and subsistence allowances as are provided for State employees.

(b) All fees that are required to be assessed, collected, and remitted under subsection (a) of this section shall be collected in advance (except in suits in forma pauperis) except those contingent on expenses or sales prices. When the fee is not collected in advance or at the time of assessment, a lien shall exist in favor of the county on all property of the party owing the fee. If the fee remains

unpaid it shall be entered as a judgment against the debtor and shall be docketed in the judgment docket in the office of the clerk of superior court.

(c) The process fees and commissions set forth in this section are complete and exclusive and in lieu of any and all other process fees and commissions in civil actions and special proceedings. (1965, c. 310, s. 1; 1967, c. 691, s. 34; 1969, c. 1190, s. 31 1/2; 1973, c. 417, ss. 1, 2; c. 503, s. 18; c. 1139; 1979, c. 801, s. 2; 1989 (Reg. Sess., 1990), c. 1044, s. 2; 1998-212, s. 29A.12(e); 2002-126, ss. 29A.6(f), 29A.6(g).)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, ss. 29A.6(f) and (g), effective October 1, 2002, added "except for actions brought under Chapter 50B of the General Statutes" in subsection (a); and added "that are required to be assessed, collected, and remitted under subsection (a) of this section" in the first sentence of subsection (b).

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

ARTICLE 29.

Administrative Office of the Courts.

§ 7A-341. Appointment and compensation of Director.

OPINIONS OF ATTORNEY GENERAL

Longevity Pay. — Upon taking office as an Associate Justice of the North Carolina Supreme Court, a justice was entitled to have his service as Director and Assistant Director of the Administrative Office of the Courts to be taken into account in calculating his service for longevity purposes, but his service as assistant district attorney could not be taken into account. See opinion of Attorney General to The Honorable Thomas W. Ross, Director, The Administrative Office of the Courts, 1999 N.C. AG LEXIS 28 (9/28/99).

§ 7A-343.3. Appellate Courts Printing and Computer Operations Fund.

The Appellate Courts Printing and Computer Operations Fund is established within the Judicial Department as a nonreverting, interest-bearing special revenue account. Accordingly, interest and other investment income earned by the Fund shall be credited to it. All moneys collected through charges to litigants for the reproduction of appellate records and briefs under G.S. 7A-11 and G.S. 7A-20(b) shall be remitted to the State Treasurer and held in this Fund. Moneys in the Fund shall be used to support the print shop operations of the Supreme Court and the Court of Appeals, including personnel, maintenance, and capital costs. The Judicial Department may create and maintain receipt-supported positions for these purposes but shall report to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety prior to creating such new positions.

The Judicial Department shall report to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety by January 1 of each year on all receipts and expenditures of the Fund. (2002-126, s. 14.12.)

Editor's Note. — Session Laws 2002-126, s. 31.7, made this section effective July 1, 2002.

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

ARTICLE 36.

Entitlement of Indigent Persons Generally.

§ 7A-450. Indigency; definition; entitlement; determination; change of status.

Cross References. — As to representation by counsel of person affected by limited freedom of movement or access imposed due to terrorist incident, see G.S. 130A-475(b).

CASE NOTES

II. Appointment of Counsel.

II. APPOINTMENT OF COUNSEL.

Subsection (b1) mandates appointment of assistant counsel "in a timely manner", etc.

Although the appointment of assistant counsel required by G.S. 7A-450(b1) for an indigent person indicted for murder is not constitutionally required, counsel must be appointed in a timely manner. State v. Wilson, 354 N.C. 493, 556 S.E.2d 272, 2001 N.C. LEXIS 1236 (2001).

§ 7A-451. Scope of entitlement.

(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

(1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged;

(2) A hearing on a petition for a writ of habeas corpus under Chapter 17 of the General Statutes;

(3) A motion for appropriate relief under Chapter 15A of the General Statutes if the defendant has been convicted of a felony, has been fined five hundred dollars ($500.00) or more, or has been sentenced to a term of imprisonment;

(4) A hearing for revocation of probation;

(5) A hearing in which extradition to another state is sought;

(6) A proceeding for an inpatient involuntary commitment to a facility under Part 7 of Article 5 of Chapter 122C of the General Statutes, or a proceeding for commitment under Part 8 of Article 5 of Chapter 122C of the General Statutes.

(7) In any case of execution against the person under Chapter 1, Article 28 of the General Statutes, and in any civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes;

(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible;

(9) A hearing for revocation of parole at which the right to counsel is provided in accordance with the provisions of Chapter 148, Article 4, of the General Statutes;
(10) A proceeding for sterilization under Chapter 35, Article 7 (Sterilization of Persons Mentally Ill and Mentally Retarded) of the General Statutes; and
(11) A proceeding for the provision of protective services according to Chapter 108A, Article 6 of the General Statutes;
(12) In the case of a juvenile alleged to be neglected under Chapter 7A, Article 23 of the General Statutes;
(13) A proceeding to find a person incompetent under Subchapter I of Chapter 35A, of the General Statutes;
(14) A proceeding to terminate parental rights where a guardian ad litem is appointed pursuant to G.S. 7B-1101;
(15) An action brought pursuant to Article 24B of Chapter 7A of the General Statutes to terminate an indigent person's parental rights.
(16) A proceeding involving consent for an abortion on an unemancipated minor pursuant to Article 1A, Part 2 of Chapter 90 of the General Statutes. G.S. 7A-450.1, 7A-450.2, and 7A-450.3 shall not apply to this proceeding.
(17) A proceeding involving limitation on freedom of movement or access pursuant to G.S. 130A-475 or G.S. 130A-145.

(b) In each of the actions and proceedings enumerated in subsection (a) of this section, entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding, including, if applicable:
(1) An in-custody interrogation;
(2) A pretrial identification procedure which occurs after formal charges have been preferred and at which the presence of the indigent is required;
(3) A hearing for the reduction of bail, or to fix bail if bail has been earlier denied;
(4) A probable cause hearing;
(5) Trial and sentencing; and
(6) Review of any judgment or decree pursuant to G.S. 7A-27, 7A-30(1), 7A-30(2), and Subchapter XIV of Chapter 15A of the General Statutes.

(c) In any capital case, an indigent defendant who is under a sentence of death may apply to the superior court of the district where the defendant was indicted for the appointment of counsel to represent the defendant in preparing, filing, and litigating a motion for appropriate relief. The application for the appointment of such postconviction counsel may be made prior to completion of review on direct appeal and shall be made no later than 10 days from the latest of the following:
(1) The mandate has been issued by the Supreme Court of North Carolina on direct appeal pursuant to N.C.R. App. P. 32(b) and the time for filing a petition for writ of certiorari to the United States Supreme Court has expired without a petition being filed;
(2) The United States Supreme Court denied a timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina; or
(3) The United States Supreme Court granted the defendant's or the State's timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina, but subsequently left the defendant's death sentence undisturbed.

If there is not a criminal or mixed session of superior court scheduled for that district, the application must be made no later than 10 days from the

beginning of the next criminal or mixed session of superior court in the district. Upon application, supported by the defendant's affidavit, the superior court shall enter an order appointing the Office of Indigent Defense Services if the court finds that the defendant is indigent and desires counsel, and the Office of Defense Services shall appoint two counsel to represent the defendant. The defendant does not have a right to be present at the time of appointment of counsel, and the appointment need not be made in open court. If the defendant was previously adjudicated an indigent for purposes of trial or direct appeal, the defendant shall be presumed indigent for purposes of this subsection.

(d) The appointment of counsel as provided in subsection (c) of this section and the procedure for compensation shall comply with rules adopted by the Office of Indigent Defense Services.

(e) No counsel appointed pursuant to subsection (c) of this section shall have previously represented the defendant at trial or on direct appeal in the case for which the appointment is made unless the defendant expressly requests continued representation and understandingly waives future allegations of ineffective assistance of counsel.

(f) A guardian ad litem shall be appointed to represent the best interest of an underage party seeking judicial authorization to marry pursuant to G.S. 51-2A. The appointment and duties of the guardian ad litem shall be governed by G.S. 51-2A. The procedure for compensation of the guardian ad litem shall comply with rules adopted by the Office of Indigent Defense Services. (1969, c. 1013, s. 1; 1973, c. 151, ss. 1, 3; c. 616; c. 726, s. 4; c. 1116, s. 1; c. 1125; c. 1320; c. 1378, s. 2; 1977, c. 711, ss. 7, 8; c. 725, s. 2; 1979, 2nd Sess., c. 1206, s. 3; 1981, c. 966, s. 4; 1983, c. 638, s. 23; c. 864, s. 4; 1985, c. 509, s. 1; c. 589, s. 3; 1987, c. 550, s. 16; 1995, c. 462, s. 3; 1995 (Reg. Sess., 1996), c. 719, s. 7; 1998-202, s. 13(a); 2000-144, s. 6; 2001-62, s. 14; 2002-179, s. 16.)

Effect of Amendments. —
Session Laws 2002-179, s. 16, effective October 1, 2002, added subdivision (a)(17).

§ 7A-455.1. Appointment fee in criminal cases.

(a) Each person who requests the appointment of counsel in a criminal case shall pay to the clerk of court a nonrefundable appointment fee of fifty dollars ($50.00) at the time of appointment. Partial payments shall be credited against the amount of the fifty-dollar ($50.00) fee due. No fee shall be due if the court finds that the person is not entitled to the appointment of counsel.

(b) The appointment fee in this section is due regardless of the outcome of the proceedings. If paid before the final determination of the action at the trial level, the amount of the fee paid shall be credited against any amounts the court determines to be owed for the value of legal services rendered to the defendant. If not paid before the final determination of the action at the trial level, the unpaid amount of the fee shall be added to any amounts the court determines to be owed for the value of legal services rendered to the defendant and shall be collected in the same manner as attorneys' fees are collected for such representation. If no attorneys' fees are found due when the action is finally determined at the trial level, a judgment shall be entered, docketed, and indexed pursuant to G.S. 1-233 in the amount of the unpaid fee and shall constitute a lien as prescribed by the general law of the State applicable to judgments.

(c) The attorney representing the defendant when the action is finally determined at the trial level shall advise the court whether the appointment fee required by this section has been paid.

(d) Inability, failure, or refusal to pay the appointment fee shall not be grounds for denying appointment of counsel, for withdrawal of counsel, or for contempt.

(e) The appointment fee required by this section shall be assessed only once for each affidavit of indigency submitted by a defendant or other determination of indigency by the court, regardless of the number of cases for which an attorney is appointed. An additional appointment fee shall not be assessed for any additional cases thereafter assigned to an attorney if any cases for which a defendant was previously assessed an appointment fee are still pending. Nor shall an additional appointment fee be assessed if the charges for which an attorney was appointed are dismissed and subsequently refiled or if the defendant is appointed an attorney on appeal on a matter for which the defendant was assessed an appointment fee at the trial level.

(f) Of each appointment fee collected under this section, the sum of forty-five dollars ($45.00) shall be credited to the Indigent Persons' Attorney Fee Fund and the sum of five dollars ($5.00) shall be credited to the Court Information Technology Fund under G.S. 7A-343.2. These fees shall not revert.

(g) The Office of Indigent Defense Services shall adopt rules and develop forms to govern implementation of this section. (2002-126, s. 29A.9(a).)

Editor's Note. — Session Laws 2002-126, s. 29A.9(c), made this section effective December 1, 2002, and applicable to all requests for the appointment of counsel made on or after that date.

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

§ 7A-457. Waiver of counsel; pleas of guilty.

CASE NOTES

II. Waiver of Counsel.
A. In General.
B. Requirement of Writing.

II. WAIVER OF COUNSEL.

A. In General.

Trial Court's Findings of Waiver. — Section 7A-457 does not require a trial court, accepting an indigent defendant's waiver of counsel, to specifically find and state that it considered defendant's age, education, familiarity with the English language, mental condition and the complexity of the crime charged but, rather, requires the trial court only to consider those factors when determining whether defendant's waiver of counsel was made knowingly, intelligently, and voluntarily. State v. Fulp, 355 N.C. 171, 558 S.E.2d 156, 2002 N.C. LEXIS 19 (2002).

B. Requirement of Writing.

Lack of Written Waiver. —

Indigent defendant's waiver of counsel was not invalid because there was no written record of the waiver, in spite of G.S. 7A-457's requirement of a written waiver, because the requirement is directory, rather than mandatory, as long as the provisions of the statute were otherwise followed. State v. Fulp, 355 N.C. 171, 558 S.E.2d 156, 2002 N.C. LEXIS 19 (2002).

Article 39B.

Indigent Defense Services Act.

§ 7A-498.2. Establishment of Office of Indigent Defense Services.

(a) The Office of Indigent Defense Services, which is administered by the Director of Indigent Defense Services and includes the Commission on Indigent Defense Services and the Sentencing Services Program established in

Article 61 of this Chapter, is created within the Judicial Department. As used in this Article, "Office" means the Office of Indigent Defense Services, "Director" means the Director of Indigent Defense Services, and "Commission" means the Commission on Indigent Defense Services.

(b) The Office of Indigent Defense Services shall exercise its prescribed powers independently of the head of the Administrative Office of the Courts. The Office may enter into contracts, own property, and accept funds, grants, and gifts from any public or private source to pay expenses incident to implementing its purposes.

(c) The Director of the Administrative Office of the Courts shall provide general administrative support to the Office of Indigent Defense Services. The term "general administrative support" includes purchasing, payroll, and similar administrative services.

(d) The budget of the Office of Indigent Defense Services shall be a part of the Judicial Department's budget. The Commission on Indigent Defense Services shall consult with the Director of the Administrative Office of the Courts, who shall assist the Commission in preparing and presenting to the General Assembly the Office's budget, but the Commission shall have the final authority with respect to preparation of the Office's budget and with respect to representation of matters pertaining to the Office before the General Assembly.

(e) The Director of the Administrative Office of the Courts shall not reduce or modify the budget of the Office of Indigent Defense Services or use funds appropriated to the Office without the approval of the Commission. (2000-144, s. 1; 2002-126, s. 14.7(b).)

Editor's Note. —

Session Laws 2002-126, s. 14.7(a), 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 Administrative Office of the Courts to conduct the Sentencing Services Program, as provided by Article 61 of Chapter 7A of the General Statutes, are transferred to the Office of Indigent Defense Services. However, pursuant to the provisions of G.S. 7A-498.2(c), the Administrative Office of the Courts shall continue to have the responsibility of providing general administrative support to the Sentencing Services Program."

Session Laws 2002-126, s. 14.7(f), provides: "Each Sentencing Services Program shall review its procedures and implement methods of (i) minimizing the frequency with which plans are prepared but not presented to the court, and (ii) ensuring the efficient management of probation revocation cases when they are referred by a judge."

Session Laws 2002-126, s. 14.7(h), provides: "The Office of Indigent Defense Services shall report by January 1, 2003, to the Chairs of the Senate and House of Representatives Appropriations Committees and the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the reorganization of the Sentencing Services Program pursuant to this section. The report shall include the specific assignments for the State positions, the districts in which sentencing services will be available, the means by which those services will be provided, and an estimated number of plans and cost per plan for the 2002-2003 fiscal year."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Effect of Amendments. — Session Laws 2002-126, s. 14.7(b), effective July 1, 2002, added "and the Sentencing Services Program established in Article 61 of this Chapter" in subsection (a).

§ 7A-498.6. Director of Indigent Defense Services.

(a) The Director of Indigent Defense Services shall be appointed by the Commission for a term of four years. The Director may be removed during this term in the discretion of the Commission by a vote of two-thirds of all of the Commission members. The Director shall be an attorney licensed and eligible to practice in the courts of this State at the time of appointment and at all times during service as the Director.

(b) The Director shall:

(1) Prepare and submit to the Commission a proposed budget for the Office of Indigent Defense Services, an annual report containing pertinent data on the operations, costs, and needs of the Office, and such other information as the Commission may require;

(2) Assist the Commission in developing rules and standards for the delivery of services under this Article;

(3) Administer and coordinate the operations of the Office and supervise compliance with standards adopted by the Commission;

(4) Subject to policies and procedures established by the Commission, hire such professional, technical, and support personnel as deemed reasonably necessary for the efficient operation of the Office of Indigent Defense Services;

(5) Keep and maintain proper financial records for use in calculating the costs of the operations of the Office of Indigent Defense Services;

(6) Apply for and accept on behalf of the Office of Indigent Defense Services any funds that may become available from government grants, private gifts, donations, or bequests from any source;

(7) Coordinate the services of the Office of Indigent Defense Services with any federal, county, or private programs established to provide assistance to indigent persons in cases subject to this Article and consult with professional bodies concerning improving the administration of indigent services;

(8) Conduct training programs for attorneys and others involved in the legal representation of persons subject to this Article;

(8a) Administer the Sentencing Services Program established in Article 61 of this Chapter; and

(9) Perform other duties as the Commission may assign. (2000-144, s. 1; 2002-126, s. 14.7(c).)

Editor's Note. —

Session Laws 2002-126, s. 14.7(f), provides: "Each Sentencing Services Program shall review its procedures and implement methods of (i) minimizing the frequency with which plans are prepared but not presented to the court, and (ii) ensuring the efficient management of probation revocation cases when they are referred by a judge."

Session Laws 2002-126, s. 14.7(h), provides: "The Office of Indigent Defense Services shall report by January 1, 2003, to the Chairs of the Senate and House of Representatives Appropriations Committees and the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the reorganization of the Sentencing Services Program pursuant to this section. The report shall include the specific assignments for the State positions, the districts in which sentencing services will be available, the means by which those services will be provided, and an estimated number of plans and cost per plan for the 2002-2003 fiscal year."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Effect of Amendments. — Session Laws 2002-126, s. 14.7(c), effective July 1, 2002, deleted "and" at the end of subdivision (b)(8); and added subdivision (b)(8a).

§ 7A-498.7. Public Defender Offices.

(a) The following counties of the State are organized into the defender districts listed below, and in each of those defender districts an office of public defender is established:

Defender District	Counties
3A	Pitt
3B	Carteret
12	Cumberland
14	Durham
15B	Orange, Chatham
16A	Scotland, Hoke
16B	Robeson
18	Guilford
21	Forsyth
26	Mecklenburg
27A	Gaston
28	Buncombe

After notice to, and consultation with, the affected district bar, senior resident superior court judge, and chief district court judge, the Commission on Indigent Defense Services may recommend to the General Assembly that a district or regional public defender office be established. A legislative act is required in order to establish a new office or to abolish an existing office.

(b) For each new term, and to fill any vacancy, public defenders shall be appointed from a list of not less than two and not more than three names nominated by written ballot of the attorneys resident in the defender district who are licensed to practice law in North Carolina. The balloting shall be conducted pursuant to rules adopted by the Commission on Indigent Defense Services. The appointment shall be made by the senior resident superior court judge of the superior court district or set of districts as defined in G.S. 7A-44.1 that includes the county or counties of the defender district for which the public defender is being appointed.

(c) A public defender shall be an attorney licensed to practice law in North Carolina and shall devote full time to the duties of the office. In lieu of merit and other increment raises paid to regular State employees, a public defender shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as a public defender, appellate defender, assistant public or appellate defender, assistant district attorney, justice or judge of the General Court of Justice, or clerk of superior court.

(d) Subject to standards adopted by the Commission, the day-to-day operation and administration of public defender offices shall be the responsibility of the public defender in charge of the office. The public defender shall keep appropriate records and make periodic reports, as requested, to the Director of the Office of Indigent Defense Services on matters related to the operation of the office.

(e) The Office of Indigent Defense Services shall procure office equipment and supplies for the public defender, and provide secretarial and library support from State funds appropriated to the public defender's office for this purpose.

(f) Each public defender is entitled to assistant public defenders, investigators, and other staff, full-time or part-time, as may be authorized by the Commission. Assistants, investigators, and other staff are appointed by the public defender and serve at the pleasure of the public defender. Average and minimum compensation of assistants shall be as provided in the biennial Current Operations Appropriations Act. The actual salaries of assistants shall be set by the public defender in charge of the office, subject to approval by the Commission. The Commission shall fix the compensation of investigators. Assistants and investigators shall perform such duties as may be assigned by the public defender.

(g) In lieu of merit and other increment raises paid to regular State employees, an assistant public defender shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as a public defender, appellate defender, assistant public or appellate defender, assistant district attorney, justice or judge of the General Court of Justice, or clerk of superior court.

(h) The term of office of public defender appointed under this section is four years. A public defender or assistant public defender may be suspended or removed from office, and reinstated, for the same causes and under the same procedures as are applicable to removal of a district attorney.

(i) A public defender may apply to the Director of the Office of Indigent Defense Services to enter into contracts with local governments for the provision by the State of services of temporary assistant public defenders pursuant to G.S. 153A-212.1 or G.S. 160A-289.1.

(j) The Director of the Office of Indigent Defense Services may provide assistance requested pursuant to subsection (i) of this section only upon a showing by the requesting public defender, supported by facts, that the overwhelming public interest warrants the use of additional resources for the speedy disposition of cases involving drug offenses, domestic violence, or other offenses involving a threat to public safety.

(k) The terms of any contract entered into with local governments pursuant to subsection (i) of this section shall be fixed by the Director of the Office of Indigent Defense Services in each case. Nothing in this section shall be construed to obligate the General Assembly to make any appropriation to implement the provisions of this section or to obligate the Office of Indigent Defense Services to provide the administrative costs of establishing or maintaining the positions or services provided for under this section. Further, nothing in this section shall be construed to obligate the Office of Indigent Defense Services to maintain positions or services initially provided for under this section. (2000-144, s. 1; 2001-424, ss. 22.11(a), 22.11(d); 2002-126, s. 14.11(a).)

Editor's Note. —

Session Laws 2002-126, s. 14.11(b), provides: "The Office of Indigent Defense Services may use up to the sum of one million two hundred twenty-five thousand dollars ($1,225,000) in funds appropriated to create new positions for the Forsyth County Public Defender's office. These positions shall include the public defender, up to 13 assistant public defenders, and up to seven support positions."

Session Laws 2002-126, s. 14.11(c), provides: "The Office of Indigent Defense Services may use up to the sum of seven hundred forty-five thousand dollars ($745,000) in funds appropriated for expansion of the Mecklenburg County Public Defender's office through the creation of up to 10 attorney positions and up to five support positions. Funds may be used for salaries, benefits, equipment, and related expenses."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Effect of Amendments. —

Session Laws 2002-126, s. 14.11(a), effective October 1, 2002, added Defender District 21 to the list in subsection (a).

SUBCHAPTER XIII. SENTENCING SERVICES PROGRAM.

ARTICLE 61.

Sentencing Services Program.

§ 7A-770. Purpose.

Editor's Note. —

Session Laws 2002-126, s. 14.7(a), 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 Administrative Office of the Courts to conduct the Sentencing Services Program, as provided by Article 61 of Chapter 7A of the General Statutes, are transferred to the Office of Indigent Defense Services. However, pursuant to the provisions of G.S. 7A-498.2(c), the Administrative Office of the Courts shall continue to have the responsibility of providing general administrative support to the Sentencing Services Program."

Session Laws 2002-126, s. 14.7(f), provides: "Each Sentencing Services Program shall review its procedures and implement methods of (i) minimizing the frequency with which plans are prepared but not presented to the court, and (ii) ensuring the efficient management of probation revocation cases when they are referred by a judge."

Session Laws 2002-126, s. 14.7(g), provides: "As of July 1, 2002, the number of State positions assigned as administrative staff is reduced from 11 to four. Notwithstanding the provisions of G.S. 7A-772(b), the number of State positions shall not exceed 26. The Office of Indigent Defense Services may reallocate State employee positions in order to provide sentencing services in any of the districts formerly served by non-State agencies. The Office of Indigent Defense Services shall renegotiate contractual arrangements with some of the highest performing nonprofits that have administered sentencing services programs to date. Within existing funding, the Office of Indigent Defense Services may also contract with individuals or organizations to provide additional sentencing services."

Session Laws 2002-126, s. 14.7(h), provides: "The Office of Indigent Defense Services shall report by January 1, 2003, to the Chairs of the Senate and House of Representatives Appropriations Committees and the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the reorganization of the Sentencing Services Program pursuant to this section. The report shall include the specific assignments for the State positions, the districts in which sentencing services will be available, the means by which those services will be provided, and an estimated number of plans and cost per plan for the 2002-2003 fiscal year."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

§ 7A-771. Definitions.

As used in this Article:

(1) Recodified as subdivision (3b) by Session Laws 1999-306, s. 1, effective January 1, 2000.

(2) Recodified as subdivision (3a) by Session Laws 1999-306, s. 1, effective January 1, 2000.
(2a) "Director" means the Director of Indigent Defense Services.
(3) Repealed by Session Laws 1999-306, s. 1, effective January 1, 2000.
(3a) "Sentencing plan" means a plan presented in writing to the sentencing judge which provides a detailed assessment and description of the offender's background, including available information about past criminal activity, a matching of the specific offender's needs with available resources, and, if appropriate, the program's recommendations regarding an intermediate sentence.
(3b) "Sentencing services program" means an agency or State-run office within the superior court district which shall (i) prepare sentencing plans; (ii) arrange or contract with public and private agencies for necessary services for offenders; and (iii) assist offenders in initially obtaining services ordered as part of a sentence entered pursuant to a sentencing plan, if the assistance is not available otherwise.
(4) Repealed by Session Laws 1991, c. 566, s. 4.
(4a) "Superior court district" means a superior court district established by G.S. 7A-41 for those districts consisting of one or more entire counties, and otherwise means the applicable set of districts as that term is defined in G.S. 7A-41.1.
(5) Repealed by Session Laws 1999-306, s. 1, effective January 1, 2000. (1983, c. 909, s. 1; 1989, c. 770, s. 58; 1991, c. 566, ss. 2, 4; 1993 (Reg. Sess., 1994), c. 767, s. 14; 1995, c. 324, s. 21.9(c); 1997-57, s. 5; 1999-306, s. 1; 2002-126, s. 14.7(d).)

Editor's Note. —
Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."
Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —
Session Laws 2002-126, s. 14.7(d), effective July 1, 2002, substituted "Indigent Defense Services" for "the Administrative Office of the Courts" in subdivision (2a).

§ 7A-772. Allocation of funds.

(a) The Director may award grants in accordance with the policies established by this Article and in accordance with any laws made for that purpose, including appropriations acts and provisions in appropriations acts, and adopt regulations for the implementation, operation, and monitoring of sentencing services programs. Sentencing services programs that are grantees shall use the funds exclusively to develop a sentencing services program that provides sentencing information to judges and other court officials. Grants shall be awarded by the Director to agencies whose comprehensive program plans promise best to meet the goals set forth herein. The Director shall consider the plan required by G.S. 7A-774 in making funding decisions. If a senior resident superior court judge has not formally endorsed the plan, the Director shall consider that fact in making grant decisions, but the Director may, if appropriate, award grants to a program in which the judge has not endorsed the plan as submitted.
(b) The Director may establish local sentencing services programs and appoint those staff as the Director deems necessary. These personnel may serve as full-time or part-time State employees or may be hired on a contractual basis when determined appropriate by the director. Contracts entered under the authority of this subsection shall be exempt from the competitive bidding procedures under Chapter 143 of the General Statutes. The Office of Indigent Defense Services shall adopt rules necessary and

appropriate for the administration of the program. Funds appropriated by the General Assembly for the establishment and maintenance of sentencing services programs under this Article shall be administered by the Office of Indigent Defense Services. (1983, c. 909, s. 1; 1991, c. 566, ss. 2, 5; 1995, c. 324, s. 21.9(d); 1999-306, s. 1; 2002-126, s. 14.7(e).)

Editor's Note. — Session Laws 2002-126, s. 14.7(g), provides: "As of July 1, 2002, the number of State positions assigned as administrative staff is reduced from 11 to four. Notwithstanding the provisions of G.S. 7A-772(b), the number of State positions shall not exceed 26. The Office of Indigent Defense Services may reallocate State employee positions in order to provide sentencing services in any of the districts formerly served by non-State agencies. The Office of Indigent Defense Services shall renegotiate contractual arrangements with some of the highest performing nonprofits that have administered sentencing services programs to date. Within existing funding, the Office of Indigent Defense Services may also contract with individuals or organizations to provide additional sentencing services."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Effect of Amendments. —

Session Laws 2002-126, s. 14.7(e), effective July 1, 2002, twice substituted "Office of Indigent Defense Services" for "Administrative Office of the Courts" in subsection (b).

SUBCHAPTER XIV. DRUG TREATMENT COURTS.

ARTICLE 62.

North Carolina Drug Treatment Court Act.

§ 7A-790. Short title.

Editor's Note. — Session Laws 2002-126, s. 14.8(a), provides: "The Drug Treatment Court Program shall maintain the existing State-funded programs in Districts 5, 9, 9A, 10, 14, 21, and 26 during the 2002-2003 fiscal year."

Session Laws 2002-126, s. 14.8(b), provides: "It is the intent of the General Assembly that State Drug Treatment Court funds not be used to fund case manager positions when those services can be reasonably provided by the Treatment Alternatives to Street Crime (TASC) program in the Department of Health and Human Services or by other existing resources. The Drug Treatment Court Program shall identify areas of potential cost savings in the local programs that would result from reducing the number of case manager positions. The Program shall also identify areas in which federal funding might absorb administrative costs.

"The Drug Treatment Court Program shall report by February 1, 2003, to 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 savings identified."

Session Laws 2002-126, s. 14.8(c), provides: "Prior to the establishment of any new local drug treatment court programs, the local drug treatment court management committee shall consult with the TASC program as to the availability of case management services in that community."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Chapter 7B.

Juvenile Code.

SUBCHAPTER I. ABUSE, NEGLECT, DEPENDENCY.

Article 1.

Purposes; Definitions.

§ 7B-100. Purpose.

CASE NOTES

Best interest of the child is paramount. — The common thread running throughout the Juvenile Code, G.S. 7B-100 et seq., is that the court's primary concern must be the child's best interest; a child's interest in being protected from abuse and neglect is paramount to his parents' constitutional interest in the custody of their child. In re Pittman, 149 N.C. App. 756, 561 S.E.2d 560, 2002 N.C. App. LEXIS 303 (2002).

OPINIONS OF ATTORNEY GENERAL

Abuse Occurring in County Operated Secure Detention Facility. — The Department of Social Services has the authority to investigate an abuse complaint (involving a juvenile) which allegedly occurred in a county operated secure detention facility which is licensed by the North Carolina Office of Juvenile Justice. See Opinion of Attorney General to Mr. Lowell L. Siler, Esq., Deputy County Attorney, County of Durham, 2000 N.C. AG LEXIS 17 (9/11/2000).

§ 7B-101. Definitions.

CASE NOTES

Evidence Held Sufficient to Show Neglect.

Evidence supported a trial court's finding that father abused, neglected, or negligently provided care for his three-month old child where it showed that: (1) the father lived with the child; (2) the father knew his son had a medical condition; (3) the father took the child to the hospital; (4) the father left the hospital on a second occasion without the child being seen; (5) the father did not obtain subsequent medical treatment for his son; and (6) the child's injuries were serious and had been inflicted over a period of time. In re Pittman, 149

N.C. App. 756, 561 S.E.2d 560, 2002 N.C. App. LEXIS 303 (2002).

Evidence was sufficient to support a finding that the parents of a three-month old child abused, neglected, or negligently cared for the child where it showed that: (1) the parents could not reconstruct who cared for the child for days, or even weeks; (2) the parents failed to furnish a detailed account or proper medical history to explain the child's injuries; (3) both parents knew that the child had a medical condition; (4) the second time the child was taken to the hospital the parents left the hospital without the child being seen because they were tired of waiting; (5) the child's injuries were serious; and (6) the child's injuries were inflicted over a period of time. In re Pittman, 149 N.C. App. 756, 561 S.E.2d 560, 2002 N.C. App. LEXIS 303 (2002).

Trial court properly terminated the father's parental rights on the ground that the father neglected the children, because the father expressed some interest in visitation rights, but only if a paternity test showed that the father was one child's biological father. In re Mills, — N.C. App. —, 567 S.E.2d 168, 2002 N.C. App. LEXIS 905 (2002).

Applied in State v. Carrilo, 149 N.C. App. 543, 562 S.E.2d 47, 2002 N.C. App. LEXIS 280 (2002); In re Johnston, — N.C. App. —, 567 S.E.2d 219, 2002 N.C. App. LEXIS 866 (2002).

Cited in State v. Branham, — N.C. App. —, 569 S.E.2d 24, 2002 N.C. App. LEXIS 1078 (2002).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The citation to the Opinion of the Attorney General annotated under this section in the main volume should be to 48 N.C.A.G. 35 (1978).*

Article 2.

Jurisdiction.

§ 7B-200. Jurisdiction.

CASE NOTES

Cited in In re Poole, — N.C. App. —, 568 S.E.2d 200, 2002 N.C. App. LEXIS 775 (2002).

§ 7B-201. Retention of jurisdiction.

CASE NOTES

Periodic Judicial Review. — Contrary to the mother's assertion, when custody of five children was placed with the father and jurisdiction was terminated by the trial court's dispositional order, the trial court had no further duty or authority to conduct placement reviews. In re Dexter, 147 N.C. App. 110, 553 S.E.2d 922, 2001 N.C. App. LEXIS 1067 (2001).

Article 3.

Screening of Abuse and Neglect Complaints.

§ 7B-301. Duty to report abuse, neglect, dependency, or death due to maltreatment.

CASE NOTES

Statement Not Privileged. — Wife's statements to persons alleging that the husband had sexual relations with the family dog were not privileged under G.S. 7B-301 which concerned the abuse or neglect of children. Kroh v. Kroh, — N.C. App. —, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002).

§ 7B-309. Immunity of persons reporting and cooperating in an investigation.

CASE NOTES

Malicious Actions.
Trial court correctly held that the wife's statements to the social services department that the husband molested her two sons were made with actual malice, and therefore negated any defense of privilege under G.S. 7B-309. Kroh v. Kroh, — N.C. App. —, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002).

ARTICLE 4.

Venue; Petitions.

§ 7B-406. Issuance of summons.

CASE NOTES

Cited in In re Poole, — N.C. App. —, 568 S.E.2d 200, 2002 N.C. App. LEXIS 775 (2002).

§ 7B-407. Service of summons.

CASE NOTES

Cited in In re Poole, — N.C. App. —, 568 S.E.2d 200, 2002 N.C. App. LEXIS 775 (2002); In re Shaw, — N.C. App. —, 566 S.E.2d 744, 2002 N.C. App. LEXIS 863 (2002).

ARTICLE 5.

Temporary Custody; Nonsecure Custody; Custody Hearings.

§ 7B-502. Authority to issue custody orders; delegation.

CASE NOTES

Cited in In re Poole, — N.C. App. —, 568 S.E.2d 200, 2002 N.C. App. LEXIS 775 (2002).

§ 7B-505. Place of nonsecure custody.

A juvenile meeting the criteria set out in G.S. 7B-503 may be placed in nonsecure custody with the department of social services or a person designated in the order for temporary residential placement in:

(1) A licensed foster home or a home otherwise authorized by law to provide such care; or
(2) A facility operated by the department of social services; or
(3) Any other home or facility, including a relative's home approved by the court and designated in the order.

In placing a juvenile in nonsecure custody under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in

a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that placement with the relative would be contrary to the best interests of the juvenile. In placing a juvenile in nonsecure custody under this section, the court shall also consider whether it is in the juvenile's best interest to remain in the juvenile's community of residence. In placing a juvenile in nonsecure custody under this section, the court shall consider the Indian Child Welfare Act, Pub. L. No. 95-608, 25 U.S.C. §§ 1901, et seq., as amended, and the Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056, as amended, as they may apply. Placement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children, Article 38 of this Chapter. (1979, c. 815, s. 1; 1983, c. 639, ss. 1, 2; 1997-390, s. 4; 1997-443, s. 11A.118(a); 1998-202, s. 6; 1998-229, ss. 3, 20; 1999-456, s. 60; 2002-164, s. 4.7.)

Effect of Amendments. — Session Laws 2002-164, s. 4.7, effective October 23, 2002, inserted the third sentence in the second undesignated paragraph.

§ 7B-506. Hearing to determine need for continued nonsecure custody.

CASE NOTES

Cited in In re Poole, — N.C. App. —, 568 S.E.2d 200, 2002 N.C. App. LEXIS 775 (2002).

ARTICLE 8.

Hearing Procedures.

§ 7B-802. Conduct of hearing.

CASE NOTES

I. General Consideration.
II. Due Process Rights.

I. GENERAL CONSIDERATION.

Cited in In re Shaw, — N.C. App. —, 566 S.E.2d 744, 2002 N.C. App. LEXIS 863 (2002).

II. DUE PROCESS RIGHTS.

Applicability of Former G.S. 7A-631 to Hearing After Its Repeal. — Former G.S. 7A-631, which provided that the trial court in an adjudicatory hearing should protect a parent's privilege against self-incrimination, was repealed effective July 1, 1999; thus, the statute did not protect a child's mother's right against self-incrimination in a juvenile abuse and neglect proceeding. In re Pittman, 149 N.C. App. 756, 561 S.E.2d 560, 2002 N.C. App. LEXIS 303 (2002).

§ 7B-803. Continuances.

CASE NOTES

Denial of Continuance Proper. — Trial court properly denied mother's request for a continuance in termination of parental rights case where nothing in the record indicated that the court requested or needed additional information in the best interests of the children, that more time was needed for expeditious discovery, that the mother did not receive suf-

ficient notice of the hearing, that extraordinary circumstances necessitated a continuance in the case, and that the mother's absence from the hearing was voluntary or due to her own negligence in failing to obtain adequate transportation. In re Mitchell, 148 N.C. App. 483, 559 S.E.2d 237, 2002 N.C. App. LEXIS 43 (2002).

§ 7B-805. Quantum of proof in adjudicatory hearing.

CASE NOTES

Clear and Convincing Evidence Required. — Allegations of child abuse and neglect must be proven by clear and convincing evidence. In re Pittman, 149 N.C. App. 756, 561 S.E.2d 560, 2002 N.C. App. LEXIS 303 (2002).

Cited in In re Shaw, — N.C. App. —, 566 S.E.2d 744, 2002 N.C. App. LEXIS 863 (2002).

ARTICLE 9.

Dispositions.

§ 7B-900. Purpose.

CASE NOTES

Applied in In re Dexter, 147 N.C. App. 110, 553 S.E.2d 922, 2001 N.C. App. LEXIS 1067 (2001).

§ 7B-902. Consent judgment in abuse, neglect, or dependency proceeding.

CASE NOTES

Absence of Parents. —

In the absence of the father's presence, the mother's consent to the adjudication of neglect as to their daughter was insufficient to dispense with the requirement of an adjudicatory hearing. In re Shaw, — N.C. App. —, 566 S.E.2d 744, 2002 N.C. App. LEXIS 863 (2002).

§ 7B-903. Dispositional alternatives for abused, neglected, or dependent juvenile.

(a) The following alternatives for disposition shall be available to any court exercising jurisdiction, and the court may combine any of the applicable alternatives when the court finds the disposition to be in the best interests of the juvenile:

(1) The court may dismiss the case or continue the case in order to allow the parent, guardian, custodian, caretaker or others to take appropriate action.

(2) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the court may:

a. Require that the juvenile be supervised in the juvenile's own home by the department of social services in the juvenile's county, or by other personnel as may be available to the court, subject to conditions applicable to the parent, guardian, custodian, or caretaker as the court may specify; or

b. Place the juvenile in the custody of a parent, relative, private agency offering placement services, or some other suitable person; or

c. Place the juvenile in the custody of the department of social services in the county of the juvenile's residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of the department of social services in the county where the juvenile is found so that agency may return the juvenile to the responsible authorities in the juvenile's home state. The director may, unless otherwise ordered by the court, arrange for, provide, or consent to, needed routine or emergency medical or surgical care or treatment. In the case where the parent is unknown, unavailable, or unable to act on behalf of the juvenile, the director may, unless otherwise ordered by the court, arrange for, provide, or consent to any psychiatric, psychological, educational, or other remedial evaluations or treatment for the juvenile placed by a court or the court's designee in the custody or physical custody of a county department of social services under the authority of this or any other Chapter of the General Statutes. Prior to exercising this authority, the director shall make reasonable efforts to obtain consent from a parent or guardian of the affected juvenile. If the director cannot obtain such consent, the director shall promptly notify the parent or guardian that care or treatment has been provided and shall give the parent frequent status reports on the circumstances of the juvenile. Upon request of a parent or guardian of the affected juvenile, the results or records of the aforementioned evaluations, findings, or treatment shall be made available to such parent or guardian by the director unless prohibited by G.S. 122C-53(d). If a juvenile is removed from the home and placed in custody or placement responsibility of a county department of social services, the director shall not allow unsupervised visitation with, or return physical custody of the juvenile to, the parent, guardian, custodian, or caretaker without a hearing at which the court finds that the juvenile will receive proper care and supervision in a safe home.

In placing a juvenile in out-of-home care under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile. In placing a juvenile in out-of-home care under this section, the court shall also consider whether it is in the juvenile's best interest to remain in the juvenile's community of residence. Placement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children.

(3) In any case, the court may order that the juvenile be examined by a physician, psychiatrist, psychologist, or other qualified expert as may be needed for the court to determine the needs of the juvenile:

a. Upon completion of the examination, the court shall conduct a hearing to determine whether the juvenile is in need of medical, surgical, psychiatric, psychological, or other treatment and who should pay the cost of the treatment. The county manager, or such

person who shall be designated by the chairman of the county commissioners, of the juvenile's residence shall be notified of the hearing, and allowed to be heard. If the court finds the juvenile to be in need of medical, surgical, psychiatric, psychological, or other treatment, the court shall permit the parent or other responsible persons to arrange for treatment. If the parent declines or is unable to make necessary arrangements, the court may order the needed treatment, surgery, or care, and the court may order the parent to pay the cost of the care pursuant to G.S. 7B-904. If the court finds the parent is unable to pay the cost of treatment, the court shall order the county to arrange for treatment of the juvenile and to pay for the cost of the treatment. The county department of social services shall recommend the facility that will provide the juvenile with treatment.

b. If the court believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is developmentally disabled, the court shall refer the juvenile to the area mental health, developmental disabilities, and substance abuse services director for appropriate action. A juvenile shall not be committed directly to a State hospital or mental retardation center; and orders purporting to commit a juvenile directly to a State hospital or mental retardation center except for an examination to determine capacity to proceed shall be void and of no effect. The area mental health, developmental disabilities, and substance abuse director shall be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs. If institutionalization is determined to be the best service for the juvenile, admission shall be with the voluntary consent of the parent or guardian. If the parent, guardian, custodian, or caretaker refuses to consent to a mental hospital or retardation center admission after such institutionalization is recommended by the area mental health, developmental disabilities, and substance abuse director, the signature and consent of the court may be substituted for that purpose. In all cases in which a regional mental hospital refuses admission to a juvenile referred for admission by a court and an area mental health, developmental disabilities, and substance abuse director or discharges a juvenile previously admitted on court referral prior to completion of treatment, the hospital shall submit to the court a written report setting out the reasons for denial of admission or discharge and setting out the juvenile's diagnosis, indications of mental illness, indications of need for treatment, and a statement as to the location of any facility known to have a treatment program for the juvenile in question.

(b) When the court has found that a juvenile has suffered physical abuse and that the individual responsible for the abuse has a history of violent behavior against people, the court shall consider the opinion of the mental health professional who performed an evaluation under G.S. 7B-503(b) before returning the juvenile to the custody of that individual. (1979, c. 815, s. 1; 1981, c. 469, s. 19; 1985, c. 589, s. 5; c. 777, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 2; 1991, c. 636, s. 19(a); 1995 (Reg. Sess., 1996), c. 609, s. 3; 1997-516, s. 1A; 1998-202, s. 6; 1998-229, ss. 6, 23; 1999-318, s. 6; 1999-456, s. 60; 2002-164, s. 4.8.)

Effect of Amendments. — Session Laws 2002-164, s. 4.8, effective October 23, 2002, inserted the next to last sentence in the second paragraph of subdivision (a)(2)c.

§ 7B-907. Permanency planning hearing.

CASE NOTES

Where a natural father, as a potential candidate for custody, was dismissed because of his late appearance, the trial court should have considered whether the father was a candidate for custody of a minor child and should have had required interviews by the guardian ad litem and Department of Social Services to further investigate the child's placement with her other natural parent. In re Eckard, 148 N.C. App. 541, 559 S.E.2d 233, 2002 N.C. App. LEXIS 23 (2002).

ARTICLE 11.

Termination of Parental Rights.

§ 7B-1100. Legislative intent; construction of Article.

CASE NOTES

Cited in In re Mitchell, 148 N.C. App. 483, 559 S.E.2d 237, 2002 N.C. App. LEXIS 43 (2002).

§ 7B-1104. Petition or motion.

CASE NOTES

Petition Held Insufficient. — While there was sufficient evidence to support the termination of mother's parental rights with regard to her two older children, including the children's multiple placements in foster homes, the mother's severe mental problems, and the mother's inability to provide a stable residence, the trial court should have dismissed the Department of Social Services' petition for termination of parental rights as to her youngest child, removed from her care the day after its birth, because the petition did not allege any facts to support the allegation that the mother was unable to provide for the proper care and supervision of this child, as was required by G.S. 7B-1104(6). In re Hardesty, 150 N.C. App. 380, 563 S.E.2d 79, 2002 N.C. App. LEXIS 481 (2002).

§ 7B-1109. Adjudicatory hearing on termination.

CASE NOTES

Standard of Proof. —

During adjudication, the North Carolina Department of Social Services has the burden of proving by clear, cogent, and convincing evidence that one or more of the statutory grounds set forth in G.S. 7B-1111 for termination exists. In re Mitchell, 148 N.C. App. 483, 559 S.E.2d 237, 2002 N.C. App. LEXIS 43 (2002).

Finding of Neglect. — Trial court properly terminated the father's parental rights on the ground that the father neglected the father's children, because the father expressed some interest in visitation rights, but only if a paternity test showed that the father was one child's biological father. In re Mills, — N.C. App. —, 567 S.E.2d 168, 2002 N.C. App. LEXIS 905 (2002).

Failure to Make Reasonable Progress. —

The trial court's findings were insufficient to terminate the mother's rights since it did not address whether the mother could pay support, address the concerns leading to the child's removal, or list the unmet conditions. In re Locklear, — N.C. App. —, 566 S.E.2d 165, 2002 N.C. App. LEXIS 765 (2002).

Applied in In re Johnston, — N.C. App. —, 567 S.E.2d 219, 2002 N.C. App. LEXIS 866 (2002).

Cited in In re Hardesty, 150 N.C. App. 380, 563 S.E.2d 79, 2002 N.C. App. LEXIS 481 (2002).

§ 7B-1110. Disposition.

CASE NOTES

Burden of Proof at Disposition Stage of Hearing. — Although the evidence supported the findings of abuse by the mother and failure to correct conditions which led to the removal of her children, the trial court erroneously placed the burden of proof on the mother as to the best interests of the children at the dispositive stage of the hearing; therefore, the judgment had to be vacated as to the dispositional order and the case was remanded for a new dispositional hearing. In re Mitchell, 148 N.C. App. 483, 559 S.E.2d 237, 2002 N.C. App. LEXIS 43 (2002).

Finding of Neglect. — Trial court properly terminated the father's parental rights on the ground that the father neglected the father's children, because the father expressed some interest in visitation rights, but only if a paternity test showed that the father was one child's biological father. In re Mills, — N.C. App. —, 567 S.E.2d 168, 2002 N.C. App. LEXIS 905 (2002).

The evidence supported a finding that termination of parental rights was in the best interest of the child; etc.

Trial court's findings were supported by evidence that the mother left her three children in foster care for over a year without showing reasonable progress; her fourth child's treatment and status were clearly relevant to show neglect. In re Johnston, — N.C. App. —, 567 S.E.2d 219, 2002 N.C. App. LEXIS 866 (2002).

Cited in In re Pittman, 149 N.C. App. 756, 561 S.E.2d 560, 2002 N.C. App. LEXIS 303 (2002); In re Hardesty, 150 N.C. App. 380, 563 S.E.2d 79, 2002 N.C. App. LEXIS 481 (2002); In re Pierce, 356 N.C. 68, 565 S.E.2d 81, 2002 N.C. LEXIS 547 (2002); In re Anderson, — N.C. App. —, 564 S.E.2d 599, 2002 N.C. App. LEXIS 657 (2002); In re Locklear, — N.C. App. —, 566 S.E.2d 165, 2002 N.C. App. LEXIS 765 (2002).

§ 7B-1111. Grounds for terminating parental rights.

CASE NOTES

I. General Consideration.
II. Neglect.
III. Failure to Pay Reasonable Portion of Cost of Care.
V. Illustrative Cases.
VI. Willfully Leaving Child in Foster Care.

I. GENERAL CONSIDERATION.

Construction of Section. — Section 7B-1111(a)(2) deleted the "diligent efforts" requirement of former G.S. 7A-289.32(3), indicating an intent by the legislature to eliminate the requirement that the Department of Social Services provide services to a parent before termination of parental rights can occur; thus a determination that the department made diligent efforts to provide services to a parent is no longer a condition precedent to terminating parental rights. In re Frasher, 147 N.C. App. 513, 555 S.E.2d 379, 2001 N.C. App. LEXIS 1191 (2001).

Indian Child Welfare Act Compared. — In North Carolina, grounds for termination of a parent's parental rights must be supported by clear and convincing evidence, while a termination of parental rights under the Indian Child Welfare Act, 25 U.S.C.S. § 1912 (2002), requires evidence which justifies termination beyond a reasonable doubt; to meet the federal requirement, the trial court must conclude beyond a reasonable doubt that continued custody by the parent is likely to result in serious emotional or physical damages to the child. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202, 2002 N.C. App. LEXIS 364 (2002).

Cited in In re Hardesty, 150 N.C. App. 380, 563 S.E.2d 79, 2002 N.C. App. LEXIS 481 (2002); In re Johnston, — N.C. App. —, 567 S.E.2d 219, 2002 N.C. App. LEXIS 866 (2002).

II. NEGLECT.

Neglect may be manifested in ways less tangible than failure to provide physical necessities. —

Trial court properly terminated the father's parental rights on the ground that the father neglected the father's children, because the father expressed some interest in visitation rights, but only if a paternity test showed that the father was one child's biological father. In re Mills, — N.C. App. —, 567 S.E.2d 168, 2002 N.C. App. LEXIS 905 (2002).

Termination Not Upheld. —

The trial court's findings were insufficient to terminate the mother's rights since it did not

address whether the mother could pay support, address the concerns leading to the child's removal, or list the unmet conditions. In re Locklear, — N.C. App. —, 566 S.E.2d 165, 2002 N.C. App. LEXIS 765 (2002).

III. FAILURE TO PAY REASONABLE PORTION OF COST OF CARE.

Rights Not Properly Terminated. — The trial court erred in terminating a father's parental rights on the grounds of non-payment of a reasonable portion of foster care expenses under G.S. 7B-1111(a)(3), because no evidence was presented indicating the father was capable of earning an income while in prison, and the father was never ordered to pay any support at all. In re Clark, — N.C. App. —, 565 S.E.2d 245, 2002 N.C. App. LEXIS 718 (2002).

V. ILLUSTRATIVE CASES.

Mental Illness of Parent. —

Termination of the mother's parental rights was in the child's best interests as the record provided overwhelming evidence that the mother's intentional actions created a substantial risk of serious physical injury to the child; evidence showed that the mother had Munchausen Syndrome by Proxy (MSBP) and that during the two years prior to the child being removed, the mother subjected the child to 25 different emergency room visits, 60 office visits to pediatricians, 143 prescriptions, and 8 admissions to the hospital and the mother made no substantial improvements to correct the conditions as the mother continuously failed to comply with a court order preventing the mother from providing child care services to other minor children while unsupervised and caring for animals and she continued to display the attention-seeking behaviors associated with the disorder. In re Greene, — N.C. App. —, 568 S.E.2d 634, 2002 N.C. App. LEXIS 1068 (2002).

Findings of Fact Inadequate. — Trial court's findings that father had willfully left children in foster care for more than 12 months and that father had failed to pay a reasonable portion of the cost of caring for children were inadequate because, in large part, they were merely a recitation of allegations that a department of social services made in its petition seeking termination of parental rights and did not provide specific findings of the facts established by the evidence, admissions, and stipulations. In re Anderson, — N.C. App. —, 564 S.E.2d 599, 2002 N.C. App. LEXIS 657 (2002).

Rights Properly Terminated. —

Termination of father's parental rights was proper where: (1) the father never had a custodial relationship with his 13 year old child, nor did he have any significant personal or financial relationship with the child other than an occasional letter and a total of $125 in monies and gifts; (2) the relationship was unlikely to change in the future due to the father's lengthy incarceration and the child's unwillingness to see him; and (3) the father's only alternative for providing for the care of the child was through the assistance of his parents, who had no relationship with the child, and even failed to attend the termination of parental rights hearing. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202, 2002 N.C. App. LEXIS 364 (2002).

Evidence that the mother of two minor children had performed practically none of the things required by the court at the time that the children had been placed in foster care a year before, to include the fact that the mother had not even attended the termination hearing despite her attorney's efforts to contact her and to get her to attend, supported trial court's findings terminating the mother's parental rights. In re Frasher, 147 N.C. App. 513, 555 S.E.2d 379, 2001 N.C. App. LEXIS 1191 (2001).

Termination of parental rights was proper because clear, convincing, and cogent evidence showed the mother failed to make reasonable progress in correcting the condition, substance abuse, which led to the removal of her children. In re Mitchell, 148 N.C. App. 483, 559 S.E.2d 237, 2002 N.C. App. LEXIS 43 (2002).

Rights Not Properly Terminated. —

The trial court erred in terminating a father's parental rights on the grounds of the father's incapability of caring for the child pursuant to G.S. 7B-1111(a)(6) (2001); the father was scheduled to be released from prison shortly, and there was no evidence at trial to suggest that respondent suffered from any physical or mental illness or disability that would prevent him from providing proper care and supervision for the child, nor did the trial court make any findings of fact regarding such a condition. In re Clark, — N.C. App. —, 565 S.E.2d 245, 2002 N.C. App. LEXIS 718 (2002).

Where the child of respondent mother was removed from her because of the mother's drug use, but, during the 12 months prior to the filing of a petition to terminate her parental rights, the mother successfully completed a drug abuse treatment program, tested negative for drugs on several occasions, attended a drug abuser's support group, maintained regular employment as a nurse, and showed herself to be a fit and proper person for visitation, such evidence showed that the mother had made reasonable progress under the circumstances in correcting the conditions that led to the removal of the child; therefore, the trial court erred in terminating the mother's parental rights. In re Pierce, 356 N.C. 68, 565 S.E.2d 81, 2002 N.C. LEXIS 547 (2002).

VI. WILLFULLY LEAVING CHILD IN FOSTER CARE.

Failure to Show Progress. —

The evidence and the trial court's findings regarding respondent's substance abuse did not support the conclusion that mother had failed to make "reasonable progress under the circumstances. in correcting those conditions which led to the removal of the child" to foster care, as required by former G.S. 7A-789.32(3), where there was no evidence that the mother had used drugs for over two years, and evidence showed that she had successfully completed drug treatment, including random drug screens, attended Narcotics Anonymous, maintaining contact with her sponsor, and currently worked at a hospital, which required a drug screen before hiring her. In re Pierce, 146 N.C. App. 641, 554 S.E.2d 25 (2001), affirmed, 356 N.C. 68, 565 S.E.2d 81 (2002).

In a case in which after the Department of Social Services had filed a petition alleging that children were abused and neglected as a result of being placed with their grandfather, with whom their mother had placed them when the mother was sent to prison, mother and the children's father stipulated to findings of neglect, leading to the children's transfer to the Department's custody, and where at the time the petition was filed, the mother was living with a boyfriend, and did practically nothing to regain custody, not even attending the termination hearing, there was clear, cogent and convincing evidence to support the trial court's finding that the mother had left the children in foster care for a year without making reasonable progress in correcting the conditions that led to the children's placement in the first place. In re Frasher, 147 N.C. App. 513, 555 S.E.2d 379, 2001 N.C. App. LEXIS 1191 (2001).

Time Period for Reasonable Progress. — The 12-month standard in former G.S. 7A-289.32(3) for determining whether a parent has made reasonable progress in correcting the conditions that led to the removal of the parent's child refers to the 12-month period prior to the filing of the petition to terminate parental rights. In re Pierce, 356 N.C. 68, 565 S.E.2d 81, 2002 N.C. LEXIS 547 (2002).

Leaving Held "Willful". —

Evidence clearly and convincingly established that mentally ill mother willfully left her child in foster care for more than 12 months without showing reasonable progress to correct the conditions which led to the child's placement when she was unwilling to accept any responsibility for her situation and would not appropriately interact with her child. In re Fletcher, 148 N.C. App. 228, 558 S.E.2d 498, 2002 N.C. App. LEXIS 5 (2002).

Willful Leaving Not Shown. — Clear, cogent and convincing evidence did not show that the mother had willfully left her child in foster care without making reasonable progress toward resolving the problems which led to the child's foster care placement, in violation of G.S. 7B-1111(a)(2). In re Nesbitt, 147 N.C. App. 349, 555 S.E.2d 659, 2001 N.C. App. LEXIS 1168 (2001).

Evidence did not clearly and convincingly show father willfully left his child in foster care, under G.S. 7B-1111(a)(2), where he attended visits with the child, completed psychological evaluations and treatment, completed parenting classes and maintained contact with the Department of Social Services. In re Fletcher, 148 N.C. App. 228, 558 S.E.2d 498, 2002 N.C. App. LEXIS 5 (2002).

SUBCHAPTER II. UNDISCIPLINED AND DELINQUENT JUVENILES.

ARTICLE 18.

Venue; Petition; Summons.

§ 7B-1806. Service of summons.

CASE NOTES

Trial Court Properly Exercised Personal Jurisdiction over Juvenile. — Trial court properly exercised personal jurisdiction over the juvenile on a simple assault petition, as the juvenile's and the juvenile's parent's presence at the hearing on that petition as well as the juvenile's participation in the hearing without objection constituted a general appearance for the purposes of waiving any defect in service. In re Hodge, — N.C. App. —, 568 S.E.2d 878, 2002 N.C. App. LEXIS 1086 (2002).

ARTICLE 21.

Law Enforcement Procedures in Delinquency Proceedings.

§ 7B-2101. Interrogation procedures.

CASE NOTES

"Guardian". — Confession of 13-year-old, taken in the presence of his aunt, was properly admitted in evidence; though the aunt was not his legal guardian or custodian, because she clothed, housed, and fed him, and enrolled him in school, she acted as his "guardian" for purposes of this section. State v. Jones, 147 N.C. App. 527, 556 S.E.2d 644, 2001 N.C. App. LEXIS 1239 (2001), cert. denied and appeal dismissed, 355 N.C. 351, 562 S.E.2d 427 (2002).

Right of Juvenile to Have Parent Present. —

When juvenile invoked the right to have a parent present during the interrogation, all interrogation should have ceased; since it did not, the trial court erred by denying the juvenile's motion to suppress the statement, which was elicited in violation of G.S. 7B-2101(d). State v. Branham, — N.C. App. —, 569 S.E.2d 24, 2002 N.C. App. LEXIS 1078 (2002).

§ 7B-2102. Fingerprinting and photographing juveniles.

CASE NOTES

Juvenile Not in Custody for Purposes of Being Informed of Juvenile or Miranda Rights. — As the juvenile was not subject to a restraint on his freedom of movement of the degree associated with a formal arrest, the juvenile was not in custody for the purposes of being informed of juvenile or Miranda rights, and the trial court correctly determined that there was no requirement that the juvenile be informed of, or waive, such rights prior to the interview with the detective. In re Hodge, — N.C. App. —, 568 S.E.2d 878, 2002 N.C. App. LEXIS 1086 (2002).

ARTICLE 24.

Hearing Procedures.

§ 7B-2407. When admissions by juvenile may be accepted.

CASE NOTES

Cited in In re Wilson, — N.C. App. —, 568 S.E.2d 862, 2002 N.C. App. LEXIS 1074 (2002).

§ 7B-2408. Rules of evidence.

CASE NOTES

Cited in In re Wilson, — N.C. App. —, 568 S.E.2d 862, 2002 N.C. App. LEXIS 1074 (2002).

§ 7B-2411. Adjudication.

CASE NOTES

Self-Defense Not Grounds for Dismissal. — Trial court did not err in failing to dismiss a juvenile adjudication petition because the juvenile's claim of self-defense was not cause to dismiss the proceeding. In re Wilson, — N.C. App. —, 568 S.E.2d 862, 2002 N.C. App. LEXIS 1074 (2002).

ARTICLE 25.

Dispositions.

§ 7B-2500. Purpose.

CASE NOTES

Cited in In re Robinson, — N.C. App. —, 567 S.E.2d 227, 2002 N.C. App. LEXIS 855 (2002).

§ 7B-2502. Evaluation and treatment of undisciplined and delinquent juveniles.

(a) In any case, the court may order that the juvenile be examined by a physician, psychiatrist, psychologist, or other qualified expert as may be needed for the court to determine the needs of the juvenile. In the case of a juvenile adjudicated delinquent for committing an offense that involves the possession, use, sale, or delivery of alcohol or a controlled substance, the court shall require the juvenile to be tested for the use of controlled substances or alcohol within 30 days of the adjudication. In the case of any juvenile adjudicated delinquent, the court may, if it deems it necessary, require the juvenile to be tested for the use of controlled substances or alcohol. The results of these initial tests conducted pursuant to this subsection shall be used for evaluation and treatment purposes only. In placing a juvenile in out-of-home care under this section, the court shall also consider whether it is in the juvenile's best interest to remain in the juvenile's community of residence.

(b) Upon completion of the examination, the court shall conduct a hearing to determine whether the juvenile is in need of medical, surgical, psychiatric, psychological, or other evaluation or treatment and who should pay the cost of the evaluation or treatment. The county manager, or any other person who is designated by the chair of the board of county commissioners, of the county of the juvenile's residence shall be notified of the hearing, and allowed to be heard. If the court finds the juvenile to be in need of medical, surgical, psychiatric, psychological, or other evaluation or treatment, the court shall permit the parent, guardian, custodian, or other responsible persons to arrange for evaluation or treatment. If the parent, guardian, or custodian declines or is unable to make necessary arrangements, the court may order the needed evaluation or treatment, surgery, or care, and the court may order the parent to pay the cost of the care pursuant to Article 27 of this Chapter. If the court finds the parent is unable to pay the cost of evaluation or treatment, the court shall order the county to arrange for evaluation or treatment of the juvenile and to pay for the cost of the evaluation or treatment. The county department of social services shall recommend the facility that will provide the juvenile with evaluation or treatment.

(c) If the court believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is developmentally disabled, the court shall refer the

juvenile to the area mental health, developmental disabilities, and substance abuse services director for appropriate action. A juvenile shall not be committed directly to a State hospital or mental retardation center; and orders purporting to commit a juvenile directly to a State hospital or mental retardation center except for an examination to determine capacity to proceed shall be void and of no effect. The area mental health, developmental disabilities, and substance abuse director shall be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs. If institutionalization is determined to be the best service for the juvenile, admission shall be with the voluntary consent of the parent, guardian, or custodian. If the parent, guardian, or custodian refuses to consent to a mental hospital or retardation center admission after such institutionalization is recommended by the area mental health, developmental disabilities, and substance abuse director, the signature and consent of the court may be substituted for that purpose. In all cases in which a regional mental hospital refuses admission to a juvenile referred for admission by the court and an area mental health, developmental disabilities, and substance abuse director or discharges a juvenile previously admitted on court referral prior to completion of the juvenile's treatment, the hospital shall submit to the court a written report setting out the reasons for denial of admission or discharge and setting out the juvenile's diagnosis, indications of mental illness, indications of need for treatment, and a statement as to the location of any facility known to have a treatment program for the juvenile in question. (1979, c. 815, s. 1; 1981, c. 469, s. 19; 1985, c. 589, s. 5; c. 777, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 2; 1991, c. 636, s. 19(a); 1995 (Reg. Sess., 1996), c. 609, s. 3; 1997-516, s. 1A; 1998-202, s. 6; 1998-229, s. 6; 2002-164, s. 4.9.)

Effect of Amendments. — Session Laws 2002-164, s. 4.9, effective October 23, 2002, added the last sentence in subsection (a).

CASE NOTES

Cited in In re Braithwaite, 150 N.C. App. 434, 562 S.E.2d 897, 2002 N.C. App. LEXIS 486 (2002), cert. denied, 356 N.C. 162, 568 S.E.2d 187 (2002).

§ 7B-2503. Dispositional alternatives for undisciplined juveniles.

The following alternatives for disposition shall be available to the court exercising jurisdiction over a juvenile who has been adjudicated undisciplined. In placing a juvenile in out-of-home care under this section, the court shall also consider whether it is in the juvenile's best interest to remain in the juvenile's community of residence. The court may combine any of the applicable alternatives when the court finds it to be in the best interests of the juvenile:

(1) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:

a. Require that the juvenile be supervised in the juvenile's own home by a department of social services in the juvenile's county of residence, a juvenile court counselor, or other personnel as may be available to the court, subject to conditions applicable to the parent, guardian, or custodian or the juvenile as the judge may specify; or

b. Place the juvenile in the custody of a parent, guardian, custodian, relative, private agency offering placement services, or some other suitable person; or

c. Place the juvenile in the custody of a department of social services in the county of the juvenile's residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of a department of social services in the county where the juvenile is found so that agency may return the juvenile to the responsible authorities in the juvenile's home state. An order placing a juvenile in the custody or placement responsibility of a county department of social services shall contain a finding that the juvenile's continuation in the juvenile's own home would be contrary to the juvenile's best interest. This placement shall be reviewed in accordance with G.S. 7B-906. The director may, unless otherwise ordered by the judge, arrange for, provide, or consent to, needed routine or emergency medical or surgical care or treatment. In the case where the parent is unknown, unavailable, or unable to act on behalf of the juvenile or juveniles, the director may, unless otherwise ordered by the judge, arrange for, provide or consent to any psychiatric, psychological, educational, or other remedial evaluations or treatment for the juvenile placed by a judge or the judge's designee in the custody or physical custody of a county department of social services under the authority of this or any other Chapter of the General Statutes. Prior to exercising this authority, the director shall make reasonable efforts to obtain consent from a parent, guardian, or custodian of the affected juvenile. If the director cannot obtain consent, the director shall promptly notify the parent, guardian, or custodian that care or treatment has been provided and shall give the parent, guardian, or custodian frequent status reports on the circumstances of the juvenile. Upon request of a parent, guardian, or custodian of the affected juvenile, the results or records of the aforementioned evaluations, findings, or treatment shall be made available to the parent, guardian, or custodian by the director unless prohibited by G.S. 122C-53(d).

(2) Place the juvenile under the protective supervision of a juvenile court counselor for a period of up to three months, with an extension of an additional three months in the discretion of the court.

(3) Excuse the juvenile from compliance with the compulsory school attendance law when the court finds that suitable alternative plans can be arranged by the family through other community resources for one of the following:

a. An education related to the needs or abilities of the juvenile including vocational education or special education;

b. A suitable plan of supervision or placement; or

c. Some other plan that the court finds to be in the best interests of the juvenile. (1979, c. 815, s. 1; 1981, c. 469, s. 19; 1985, c. 589, s. 5; c. 777, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 2; 1991, c. 636, s. 19(a); 1995 (Reg. Sess., 1996), c. 609, s. 3; 1997-516, s. 1A; 1998-202, s. 6; 1998-229, s. 6; 2001-208, s. 8; 2001-487, s. 101; 2001-490, s. 2.19; 2002-164, s. 4.10.)

Effect of Amendments. — Session Laws 2002-164, s. 4.10, effective October 23, 2002, inserted the second sentence in the introductory paragraph.

ARTICLE 26.

Modification and Enforcement of Dispositional Orders; Appeals.

§ 7B-2603. Right to appeal transfer decision.

CASE NOTES

Preservation for Review Not Established. — Defendant juvenile failed to preserve the right to appeal a transfer order because defendant did not appeal the district court's order to the superior court; the General Assembly removed from G.S. 7B-2603, any indication that a juvenile could skip an appeal in the superior court, but still challenge the transfer order after losing a trial in the superior court. State v. Wilson, — N.C. App. —, 565 S.E.2d 223, 2002 N.C. App. LEXIS 714 (2002).

ARTICLE 30.

Juvenile Records and Social Reports of Delinquency and Undisciplined Cases.

§ 7B-3000. Juvenile court records.

(a) The clerk shall maintain a complete record of all juvenile cases filed in the clerk's office to be known as the juvenile record. The record shall include the summons and petition, any secure or nonsecure custody order, any electronic or mechanical recording of hearings, and any written motions, orders, or papers filed in the proceeding.

(b) All juvenile records shall be withheld from public inspection and, except as provided in this subsection, may be examined only by order of the court. Except as provided in subsection (c) of this section, the following persons may examine the juvenile's record and obtain copies of written parts of the record without an order of the court:

(1) The juvenile;

(2) The juvenile's parent, guardian, or custodian, or the authorized representative of the juvenile's parent, guardian, or custodian;

(3) The prosecutor; and

(4) Court counselors.

Except as provided in subsection (c) of this section, the prosecutor may, in the prosecutor's discretion, share information obtained from a juvenile's record with law enforcement officers sworn in this State, but may not allow a law enforcement officer to photocopy any part of the record.

(c) The court may direct the clerk to "seal" any portion of a juvenile's record. The clerk shall secure any sealed portion of a juvenile's record in an envelope clearly marked "SEALED: MAY BE EXAMINED ONLY BY ORDER OF THE COURT", or with similar notice, and shall permit examination or copying of sealed portions of a juvenile's record only pursuant to a court order specifically authorizing inspection or copying.

(d) Any portion of a juvenile's record consisting of an electronic or mechanical recording of a hearing shall be transcribed only when notice of appeal has been timely given and shall be copied electronically or mechanically, only by order of the court. After the time for appeal has expired with no appeal having been filed, the court may enter a written order directing the clerk to destroy the recording of the hearing.

(e) The juvenile's record of an adjudication of delinquency for an offense that would be a felony if committed by an adult may be used by law enforcement,

the magistrate, and the prosecutor for pretrial release and plea negotiating decisions.

(f) The juvenile's record of an adjudication of delinquency for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult may be used in a subsequent criminal proceeding against the juvenile either under G.S. 8C-1, Rule 404(b), or to prove an aggravating factor at sentencing under G.S. 15A-1340.4(a), 15A-1340.16(d), or 15A-2000(e). The record may be so used only by order of the court in the subsequent criminal proceeding, upon motion of the prosecutor, after an in camera hearing to determine whether the record in question is admissible.

(g) Except as provided in subsection (d) of this section, a juvenile's record shall be destroyed only as authorized by G.S. 7B-3200 or by rules adopted by the Administrative Office of the Courts. (1979, c. 815, s. 1; 1987, c. 297; 1994, Ex. Sess., c. 7, s. 1; 1995, c. 462, s. 4; c. 509, s. 5; 1997-459, s. 2; 1998-202, s. 6; 2000-137, s. 3; 2002-159, s. 26.)

Effect of Amendments. — Session Laws 2002-159, s. 26, effective October 11, 2002, substituted "Administrative Office of the Courts" for "Department of Juvenile and Delinquency Prevention" in subsection (g).

SUBCHAPTER IV. PARENTAL AUTHORITY; EMANCIPATION.

ARTICLE 34.

Parental Authority over Juveniles.

§ 7B-3400. Juvenile under 18 subject to parents' control.

OPINIONS OF ATTORNEY GENERAL

No Conflict with G.S. 90-21.5. — Section 7B-3400, which provides that minors are subject to the supervision and control of their parents "notwithstanding any other provision of law," does not abrogate or conflict with G.S. 90-21.5, which specifies the circumstances under which minors can consent to health services. See opinion of Attorney General to Dr. David King, Chairman, Rowan Board of Health, 1999 N.C. AG LEXIS 27, 38 (8/25/99).

Chapter 8.

Evidence.

Article 7.

Competency of Witnesses.

§ 8-50.1. Competency of blood tests; jury charge; taxing of expenses as costs.

CASE NOTES

Cited in Rice v. Rice, 147 N.C. App. 505, 555 S.E.2d 924, 2001 N.C. App. LEXIS 1190 (2001).

§ 8-54. Defendant in criminal action competent but not compellable to testify.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in State v. Ward, 354 N.C. 231, 555 S.E.2d 251, 2001 N.C. LEXIS 1097 (2001).

Chapter 8B.

Interpreters for Deaf Persons.

§ 8B-1. Definitions; right to interpreter; determination of competence.

As used in this Chapter:

(1) "Appointing authority" means the presiding judge or clerk of superior court in a judicial proceeding, or a hearing officer, examiner, commissioner, chairman, presiding officer or similar official in a legislative or administrative proceeding.

(2) "Deaf person" means a person whose hearing impairment is so significant that the individual is impaired in processing linguistic information through hearing, with or without amplification.

(3) **(Effective until July 1, 2003)** "Qualified interpreter" means an interpreter certified as qualified under standards and procedures promulgated by the Department of Health and Human Services. If the appointing authority finds that an interpreter possessing these qualifications is not available, an interpreter without these qualifications may be called and used as a qualified interpreter if the interpreter's actual qualifications have otherwise been determined to be adequate for the present need. In no event will an interpreter be considered qualified if the interpreter is unable to communicate effectively with and simultaneously and accurately interpret for the deaf person.

A deaf person who does not utilize sign language may request an aural/oral interpreter. Before this interpreter is appointed, the appointing authority shall satisfy itself that the aural/oral interpreter is competent to interpret the proceedings to the deaf person and to present the testimony, statements, and any other information tendered by the deaf person.

(3) **(Effective July 1, 2003)** "Qualified interpreter" means an interpreter licensed under Chapter 90D of the General Statutes. If the appointing authority finds that a licensed interpreter is not available, an unlicensed interpreter may be called and used as a qualified interpreter if the interpreter's actual qualifications have otherwise been determined to be adequate for the present need. In no event will an interpreter be considered qualified if the interpreter is unable to communicate effectively with and simultaneously and accurately interpret for the deaf person.

A deaf person who does not utilize sign language may request an aural/oral interpreter. Before this interpreter is appointed, the appointing authority shall satisfy itself that the aural/oral interpreter is competent to interpret the proceedings to the deaf person and to present the testimony, statements, and any other information tendered by the deaf person. (1981, c. 937, s. 1; 1997-443, s. 11A.118(a); 2002-182, s. 2.)

Subdivision (3) Set Out Twice. — The first version of subdivision (3) set out above is effective until July 1, 2003. The second version of subdivision (3) is effective July 1, 2003.

Effect of Amendments. — Session Laws 2002-182, s. 2, effective July 1, 2003, rewrote subdivision (3), the definition of "Qualified interpreter," which formerly was defined as an interpeter certified as qualified under standards and procedures promulgated by the Department of Health and Human Services.

§ 8B-6. (Effective July 1, 2003) List of interpreters; coordination of interpreter services.

The Department of Health and Human Services shall prepare and maintain an up-to-date list of qualified and available interpreters. A copy of the list shall be provided to each clerk of superior court and to the North Carolina Interpreter and Transliterator Licensing Board created in Chapter 90D of the General Statutes. When requested by an appointing authority to provide an interpreter the Division of Services for the Deaf and the Hard of Hearing shall assist in arranging for an interpreter at the time and place needed through its program of community services for the hearing impaired. (2002-182, s. 3.)

For the section as in effect until July 1, 2003, see the main volume.

Effect of Amendments. — Session Laws 2002-182, s. 3, effective July 1, 2003, added "and to the North Carolina Interpreter and Transliterator Licensing Board created in Chapter 90D of the General Statutes" at the end of the second sentence.

§ 8B-10. (Effective July 1, 2003) North Carolina Training and Licensing Preparation Program fees.

The Division of Services for the Deaf and the Hard of Hearing of the Department of Health and Human Services may charge a fee of no more than fifty dollars ($50.00) to individuals who participate in interpreter training or workshops offered by the North Carolina Training and Licensing Preparation Program. The Division may charge a fee of no more than one hundred dollars ($100.00) for a diagnostic evaluation offered under the Program. This fee is for voluntary diagnostic services only. These fees are to cover the cost of administering the Program and are payable when a participant takes part in a planned activity. (2002-182, s. 4.)

For the section as in effect until July 1, 2003, see the main volume.

Effect of Amendments. — Session Laws 2002-182, s. 4, effective July 1, 2003, rewrote the section heading and section, which formerly provided the application and assessment fees for the Interpreter Classification System.

Chapter 8C.

Evidence Code.

§ 8C-1. Rules of Evidence.

CASE NOTES

Applied in State v. Alexander, — N.C. App. —, 568 S.E.2d 317, 2002 N.C. App. LEXIS 972 (2002).

Article 1.

General Provisions.

Rule 103. Rulings on evidence.

CASE NOTES

Timely Objection Required. —

Party believing the methodology used by an expert witness in valuing property at issue is not valid or, if valid, is not properly applied to the facts at issue has an obligation to object to its admission; if a timely objection is not lodged at trial, it cannot be argued on appeal that the trial court erred in relying on this evidence in determining the value of the asset at issue. Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

Waiver of Objection. —

Defendant's attempt to "shock" the victim with a stun gun constituted the use of a dangerous weapon during a robbery; defendant failed to preserve his argument that the trial court improperly excluded testimony. State v. Gay, — N.C. App. —, 566 S.E.2d 121, 2002 N.C. App. LEXIS 774 (2002).

Applied in State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001).

Cited in State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001).

Rule 104. Preliminary questions.

CASE NOTES

Discretion in Determining Competency. —

Trial court did not abuse its discretion in finding competent a witness who suffered from viral encephalitis, a motor disease that affected his speech, because the witness was sufficiently audible and understandable when he repeated his testimony. State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

Article 2.

Judicial Notice.

Rule 201. Judicial notice of adjudicative facts.

CASE NOTES

Prior Proceedings. —

Trial court did not err by taking judicial notice of findings from a prior custody action between biological parents, in which the

mother had been found unfit, to support an award of custody to a non-parent in a second custody action. Davis v. McMillian, — N.C. App. —, 567 S.E.2d 159, 2002 N.C. App. LEXIS 862 (2002).

Board of Election Decision. — Court properly refused to take judicial notice of the Board of Elections' decision dismissing a law firm's complaint against a political campaign committee regarding an ad the committee published which defamed the firm and one of its members, because the board's decision that the ad did not constitute criminal election activity under G.S. 163-274(8), was a legislative fact not properly subject to judicial notice. Boyce & Isley, PLLC v. Cooper, — N.C. App. —, 568 S.E.2d 803, 2002 N.C. App. LEXIS 1088 (2002).

Newspaper Articles. — Court properly refused to take judicial notice of newspaper articles, in rendering its decision on a political campaign committee's motion to dismiss a law firm's defamation and unfair practices complaint against it, because the articles had no relevance to the complaint's legal sufficiency or to any absolute defense to the firm's claims. Boyce & Isley, PLLC v. Cooper, — N.C. App. —, 568 S.E.2d 803, 2002 N.C. App. LEXIS 1088 (2002).

ARTICLE 4.

Relevancy and Its Limits.

Rule 401. Definition of "relevant evidence."

CASE NOTES

I. General Consideration.
II. Relevant Evidence.
III. Irrelevant Evidence.

I. GENERAL CONSIDERATION.

Applied in State v. Ward, 354 N.C. 231, 555 S.E.2d 251, 2001 N.C. LEXIS 1097 (2001); State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002); State v. Robertson, 149 N.C. App. 563, 562 S.E.2d 551, 2002 N.C. App. LEXIS 288 (2002); State v. Hannah, 149 N.C. App. 713, 563 S.E.2d 1, 2002 N.C. App. LEXIS 296 (2002), cert. denied, 355 N.C. 754, 566 S.E.2d 81 (2002); N.C. State Bar v. Gilbert, — N.C. App. —, 566 S.E.2d 685, 2002 N.C. App. LEXIS 782 (2002); State v. Bullock, — N.C. App. —, 566 S.E.2d 768, 2002 N.C. App. LEXIS 885 (2002).

Cited in State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, — U.S. —, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002); State v. Stokes, 150 N.C. App. 211, 565 S.E.2d 196, 2002 N.C. App. LEXIS 512 (2002), cert. granted, 356 N.C. 175, 569 S.E.2d 278 (2002); State v. Stokes, — N.C. App. —, 561 S.E.2d 547, 2002 N.C. App. LEXIS 312 (2002); State v. Wilson, — N.C. App. —, 565 S.E.2d 223, 2002 N.C. App. LEXIS 714 (2002); State v. Marecek, — N.C. App. —, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002).

II. RELEVANT EVIDENCE.

Evidence that another person committed the crime for which defendant is charged generally is relevant and admissible, etc.

Trial court did not err in not permitting defendant to introduce evidence that three other people may have been responsible for the crimes for which he was tried because the evidence did not tend both to implicate the others and to be inconsistent with the guilt of defendant. State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

Testimony Regarding Mental State. —

Murder defendant was not prejudiced by the testimony of defendant's case manager as to defendant's frustration and desire to leave a homeless shelter and that defendant was irritated and argumentative. State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

Evidence Held Relevant. —

Murder defendant's statement that he would like to see his former girlfriend get the electric chair was admissible in order to show defendant's bias against her, as he had accused her of participating in the murder. State v. Williams,

— N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

Evidence of defendant's possession of pornographic materials, without any evidence that defendant had viewed the pornographic materials with the victim, or any evidence that defendant had asked the victim to look at pornographic materials other than the victim's mere speculation, was not relevant to proving defendant committed the offenses of indecent liberties with a child and first degree sex offense with a female child under the age of 13 and should not have been admitted by the trial court; however, the error was not prejudicial under G.S. 15A-1443. State v. Smith, — N.C. App. —, 568 S.E.2d 289, 2002 N.C. App. LEXIS 973 (2002).

III. IRRELEVANT EVIDENCE.

Evidence of Prior Convictions. — In an habitual offender prosecution, evidence of convictions not relied on to prove the habitual offender charge were irrelevant and should have been redacted from documents submitted to the jury. State v. Lotharp, 148 N.C. App. 435, 559 S.E.2d 807, 2002 N.C. App. LEXIS 18 (2002).

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

CASE NOTES

Evidence Held Relevant. —

Although the weapons could not be directly tied to defendant's crimes, the trial court did not err in admitting the pepper spray and stun gun into evidence and allowing the prosecution to demonstrate their functioning to the jury. State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, — U.S. —, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

Evidence Held Irrelevant. —

Trial court properly did not permit into evidence at defendant's murder trial the plea agreement of a witness who acted in concert with defendant, because the plea agreement did not show that the witness received any type of consideration for his testimony, and was, therefore, irrelevant. State v. Lambert, 149 N.C. App. 163, 560 S.E.2d 221, 2002 N.C. App. LEXIS 123 (2002).

Applied in State v. Robertson, 149 N.C. App. 563, 562 S.E.2d 551, 2002 N.C. App. LEXIS 288 (2002); N.C. State Bar v. Gilbert, — N.C. App. —, 566 S.E.2d 685, 2002 N.C. App. LEXIS 782 (2002).

Cited in State v. Wilson, — N.C. App. —, 565 S.E.2d 223, 2002 N.C. App. LEXIS 714 (2002); State v. McDonald, — N.C. App. —, 565 S.E.2d 273, 2002 N.C. App. LEXIS 725 (2002); State v. Marecek, — N.C. App. —, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002).

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

CASE NOTES

I. General Consideration.
II. Photographs and Videotapes.
IV. Admission or Exclusion of Evidence Not Prejudicial.

I. GENERAL CONSIDERATION.

Specific Finding Not Required So Long as Balancing Test Occurred. —

As long as the procedure followed by the trial court when admitting prejudicial evidence demonstrates that a balancing test, weighing the prejudicial impact of the evidence against its probative value, has been conducted, a specific finding is not required. State v. Harris, 149 N.C. App. 398, 562 S.E.2d 547, 2002 N.C. App. LEXIS 411 (2002).

Discretion of Trial Judge. —

Trial court's decision to admit evidence under this rule was not to be grounds for relief on appeal unless it was manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision; in a case involving a charge that defendant performed a sex act on a minor girl, the trial court did not err in allowing the girl's mother to testify that defendant had performed a sex act on the mother nearly 20 years before. State v. Love, — N.C. App. —, 568 S.E.2d 320, 2002 N.C. App. LEXIS 971 (2002).

Applied in State v. Ward, 354 N.C. 231, 555 S.E.2d 251, 2001 N.C. LEXIS 1097 (2001);

State v. Cole, 147 N.C. App. 637, 556 S.E.2d 666, 2001 N.C. App. LEXIS 1257 (2001); State v. Diehl, 147 N.C. 646, 557 S.E.2d 152, 2001 N.C. App. LEXIS 1260 (2001); State v. Robertson, 149 N.C. App. 563, 562 S.E.2d 551, 2002 N.C. App. LEXIS 288 (2002); State v. Hannah, 149 N.C. App. 713, 563 S.E.2d 1, 2002 N.C. App. LEXIS 296 (2002), cert. denied, 355 N.C. 754, 566 S.E.2d 81 (2002); State v. White, 355 N.C. 696, 565 S.E.2d 55, 2002 N.C. LEXIS 675 (2002); N.C. State Bar v. Gilbert, — N.C. App. —, 566 S.E.2d 685, 2002 N.C. App. LEXIS 782 (2002).

Cited in State v. Wilson, — N.C. App. —, 565 S.E.2d 223, 2002 N.C. App. LEXIS 714 (2002); State v. Smith, — N.C. App. —, 568 S.E.2d 289, 2002 N.C. App. LEXIS 973 (2002).

II. PHOTOGRAPHS AND VIDEOTAPES.

Where a party introduces photographs for illustrative purposes, etc.

Videotape taken of the murder victim's body found sitting beside a road was admissible as the videotape was offered and received solely for illustrative purposes and not to inflame the passions of the jury; furthermore, a proper foundation was laid for the admission of the videotape. State v. Smith, — N.C. App. —, 566 S.E.2d 793, 2002 N.C. App. LEXIS 867 (2002).

Photographs Held Properly Admitted. — Photographs of defendant's victims were not too gory or gruesome to show to the jury. State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

Admittance of Videotape Recordings. — Where defendant was accused of inviting teenage girls to his home, giving them alcohol and drugs, and encouraging them to undress as he photographed them, the trial court did not err in allowing portions of a 17 year old videotape of defendant engaging in sexual activity with a minor to be played for the jury, as the probative value of the videotape was not outweighed by the prejudicial effect upon defendant. State v. Patterson, 149 N.C. App. 354, 561 S.E.2d 321, 2002 N.C. App. LEXIS 215 (2002).

Compact disc presentation on shaken baby syndrome, used to illustrate the State's expert's testimony on the manner in which shaking an infant causes the severity of injuries sustained in the typical shaken baby syndrome case, was not unduly prejudicial to defendant accused of felony murder for shaking a child; the trial court limited the jury's consideration of the video to its use as illustrative evidence only. State v. Carrilo, 149 N.C. App. 543, 562 S.E.2d 47, 2002 N.C. App. LEXIS 280 (2002).

IV. ADMISSION OR EXCLUSION OF EVIDENCE NOT PREJUDICIAL.

Evidence of Prior Conviction Properly Admitted After Character Put at Issue. — Although defendant's motion to suppress evidence of his prior conviction for assault with a deadly weapon had been granted, the trial court did not abuse its discretion by permitting the evidence to be admitted where defendant put his character at issue by offering the testimony of two witnesses as to his peaceful nature during the time frame of the conviction. State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72, 2002 N.C. App. LEXIS 498 (2002).

Jury Instructions. — Allowance of the testimony of defendant's robbery and kidnapping victim at his trial for the kidnapping, robbery, rape, and murder of two victims was not unduly prejudicial as the jury was instructed to consider the testimony only for the limited purpose of motive, intent, identity, or common plan, and the jury was specifically admonished not to consider the testimony on the issue of defendant's character. State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

Evidence Properly Admitted. —

Where defendant was accused of inviting teenage girls to his home for parties, giving them alcohol and drugs, and photographing them as they undressed, the trial court did not err in admitting into evidence defendant's prior convictions for similar conduct, as the acts for which defendant was on trial were sufficiently similar to the previous acts, and the prior incidents, occurring 10 to 15 years earlier, were not too remote in time as to no longer be more probative than prejudicial. State v. Patterson, 149 N.C. App. 354, 561 S.E.2d 321, 2002 N.C. App. LEXIS 215 (2002).

Murder defendant was not prejudiced by the testimony of defendant's case manager as to defendant's frustration and desire to leave a homeless shelter and that defendant was irritated and argumentative. State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

Admission of 911 Statements Held Proper. — Child's statements in the 911 call were clearly probative as to whether defendant had shot the victim; the child was in the next room when he heard the shot and the surrounding circumstances established that defendant had been inside when the shooting occurred. State v. Wright, — N.C. App. —, 566 S.E.2d 151, 2002 N.C. App. LEXIS 768 (2002).

Evidence of Victim's State of Mind Admissible. — Testimony by the victim's friend was admissible to show the victim's state of mind prior to a meeting with defendant and revealed her fear of defendant and of an imminent encounter with him; the probative value of the testimony outweighed any prejudicial effect. State v. Williams, — N.C. App. —, 566 S.E.2d 155, 2002 N.C. App. LEXIS 772 (2002).

Statements Regarding Prior Similar Actions. —

Admission of defendant's inculpatory admissions made to a sex offender evaluator in an-

other case did not violate G.S. 8C-1, N.C. R. Evid. 403 where the trial court's ruling that the value of the statements outweighed any prejudicial effect was the result of the exercise of sound discretion. State v. Maney, — N.C. App. —, 565 S.E.2d 743, 2002 N.C. App. LEXIS 754 (2002).

Admission of Prior Murder Conviction. — Evidence of defendant's conviction for second-degree murder 27 years earlier was properly admitted in defendant's murder trial where the trial court found similarities between the two murders, and the 18 years defendant spent in prison were excluded when the trial court ruled on whether the previous crime was too remote; the probative value of the previous conviction upon the issues for which it was offered, defendant's intent to kill and his identity as the perpetrator, far outweighed the possibility of unfair prejudice. State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002).

Evidence of defendant's prior assault on the victim, a few months before the act which caused victim's death, was not prohibited, because it tended to show a common plan or scheme and absence of accident, and tended to negate self-defense, and was, thus, more probative than prejudicial. State v. Harris, 149 N.C. App. 398, 562 S.E.2d 547, 2002 N.C. App. LEXIS 411 (2002).

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

CASE NOTES

I. General Consideration.
II. Character Evidence Generally.
III. Other Crimes and Wrongs.
IV. Illustrative Cases.

I. GENERAL CONSIDERATION.

Rule 405 Compared. — A criminal defendant is entitled to introduce evidence of his good character, thereby placing his character at issue, and the State in rebuttal can then introduce evidence of defendant's bad character; unlike evidence of prior bad acts being offered under G.S. 8C-1, Rule 404(b), G.S. 8C-1, Rule 405(a) does not contain any time limit or rule regarding remoteness, and the North Carolina Supreme Court has explicitly refused to impose one. State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72, 2002 N.C. App. LEXIS 498 (2002).

Evidence of Motive. —

Defendant's disturbance at the bank was relevant and admissible to show defendant's need for money and the motivation to commit the kidnapping and ultimate murder. State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, — U.S. —, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

Applied in State v. Hannah, 149 N.C. App. 713, 563 S.E.2d 1, 2002 N.C. App. LEXIS 296 (2002), cert. denied, 355 N.C. 754, 566 S.E.2d 81 (2002).

Cited in State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001).

II. CHARACTER EVIDENCE GENERALLY.

Admission of Evidence Not Prejudicial. —

Although it was error for the trial court to permit the State to ask defendant a question about his temper, the error was not prejudicial as there was other evidence at trial that was sufficient to support defendant's first-degree felony murder conviction. State v. Stafford, — N.C. App. —, 564 S.E.2d 60, 2002 N.C. App. LEXIS 578 (2002).

Evidence of defendant's possession of pornographic magazines and videos was improperly admitted as evidence of defendant's intent to engage in a sexual relationship with the victim, or as evidence of defendant's preparation, plan, knowledge or absence of mistake in defendant's trial for taking indecent liberties with a child and first degree sex offense with a female child under the age of 13; however, the error was not prejudicial under G.S. 15A-1443. State v. Smith, — N.C. App. —, 568 S.E.2d 289, 2002 N.C. App. LEXIS 973 (2002).

III. OTHER CRIMES AND WRONGS.

Basis for Exception in Subsection (b). —

Defendant's robbery and kidnapping victim was properly allowed to testify at defendant's trial for the kidnapping, robbery, rape, and murder of two victims as the kidnapping, threatening, and robbing of the witness was particularly similar to the murder allegations, indicating the same person committed the crimes charged. State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

Prior Violent Acts of Defendant. —

Evidence of murder defendant's prior assault on the victim, a few months before the act

which caused her death, was properly admitted under G.S. 8C-1, Rule 404(b), because it tended to show malice, premeditation, deliberation, intent and ill will on defendant's part, and was thus relevant to an issue other than defendant's character. State v. Harris, 149 N.C. App. 398, 562 S.E.2d 547, 2002 N.C. App. LEXIS 411 (2002).

Chain-of-events evidence leading up to murder, etc.

Defendant's wife was properly permitted to testify as to defendant's threatening actions towards defendant's wife before and after the murder, burglary, and robbery of defendant's landlord because it pertained to the chain of events explaining the context, motive, and set-up of the crime. State v. Smith, — N.C. App. —, 566 S.E.2d 793, 2002 N.C. App. LEXIS 867 (2002).

Prior Acts Must Be Sufficiently Similar and Not So Remote in Time as to Be Prejudicial. —

Because there were factual dissimilarities between two robberies which occurred one month before a third robbery which defendant was charged with committing, trial court should not have allowed the victim of the first two robberies to testify about them, and the state supreme court ordered a new trial after defendant was convicted of first-degree murder and sentenced to death. State v. Al-Bayyinah, 356 N.C. 150, 567 S.E.2d 120, 2002 N.C. LEXIS 678 (2002).

Prior Bad Acts Showing Intent, Plan or Design. —

In defendant's trial in state court for offenses committed during a two-week crime spree, the trial court did not err in permitting testimony of a bank clerk who witnessed defendant's robbery of a bank during the crime spree, even though defendant was charged for this robbery in federal court; the evidence of the bank robbery was not introduced to show defendant's propensity to commit the state court offenses, but to show that his actions were part of a scheme or plan to commit such offenses during the two-week period. State v. Floyd, 148 N.C. App. 290, 558 S.E.2d 237, 2002 N.C. App. LEXIS 13 (2002).

Prior Convictions Showing Intent or Knowledge. — Trial court did not abuse its discretion in admitting evidence of previously dismissed heroin charges against defendant for purpose of showing guilty knowledge where the trial court gave a limiting instruction to the jury on consideration of the evidence. State v. Woolridge, 147 N.C. App. 685, 557 S.E.2d 158, 2001 N.C. App. LEXIS 1249 (2001).

In prosecution for possession of cocaine, possession of cocaine with intent to sell and deliver, and sale and delivery of cocaine, evidence of defendant's prior convictions were properly admitted under G.S. 8C-1, Rule 404(b) to show intent and knowledge, because (1) all occurred at the same address, (2) defendant was present at all offenses, (3) all involved cocaine, and (4) the prior convictions occurred within a year of the current charge. State v. Wilkerson, 148 N.C. App. 310, 559 S.E.2d 5, 2002 N.C. App. LEXIS 24 (2002).

Prior Sex Acts by Defendant Showing Intent, Motive, or Plan. — Trial court did not err in permitting child sex offender's prior child victims to testify to show that defendant had a motive for the commission of the crime charged, that defendant had the necessary intent, and there existed in the mind of defendant a plan, scheme, system or design involved in the crime charged in the case. State v. Carpenter, 147 N.C. App. 386, 556 S.E.2d 316, 2001 N.C. App. LEXIS 1185 (2001), cert. denied, 355 N.C. 222, 560 S.E.2d 365 (2002).

Where defendant was accused of meeting teenage girls in a skating rink, inviting them to his home for parties, providing drugs and alcohol to these girls, and photographing them in various stages of undress, evidence that defendant had been convicted in another state of similar crimes 10 to 15 years earlier was admissible as evidence of defendant's motive and intent, and of a common scheme or plan. State v. Patterson, 149 N.C. App. 354, 561 S.E.2d 321, 2002 N.C. App. LEXIS 215 (2002).

Same — Showing Common Scheme. —

Other acts evidence was admissible as the testimony by defendant's natural daughter of his sexual assaults against her showed a "common plan or scheme" by defendant of abusing young female family members. State v. Starner, — N.C. App. —, 566 S.E.2d 814, 2002 N.C. App. LEXIS 899 (2002).

Prior Sex Acts by Defendant Showing Intent, Motive or Plan. —

At defendant's trial on charges of first degree statutory rape of a female child under 13 years old, statutory sexual offense of a female child under 13 years old, and taking indecent liberties with a child, trial court properly allowed victim's sister to testify that the defendant had touched her vagina and breasts and had masturbated in front of her; this testimony showed a pattern of opportunity as well as a common plan or scheme. State v. Brothers, — N.C. App. —, 564 S.E.2d 603, 2002 N.C. App. LEXIS 653 (2002).

Evidence of prior sex acts, etc.

Where testimony of defendant's two daughters gave ample evidence of the types of sexual abuse they suffered to conclude that the same person committed the offenses, admission of prior bad acts acts evidence was held appropriate under G.S. 8C-1, Rule 404(b). State v. Patterson, 150 N.C. App. 383, 563 S.E.2d 88, 2002 N.C. App. LEXIS 491 (2002).

Rule allows admission of conduct evidence so long as it is offered for a purpose other than to

show that defendant had the propensity to engage in the charged conduct; in a case involving a charge that defendant performed a sex act on a minor girl, the trial court did not err in allowing the girl's mother to testify that defendant had performed a sex act on the mother nearly 20 years before. State v. Love, — N.C. App. —, 568 S.E.2d 320, 2002 N.C. App. LEXIS 971 (2002).

Evidence of a party's prior driving record, etc.

While the trial court erred in admitting defendant's entire driving record because of the remoteness in time of some of the convictions, admission of the entire record did not prejudice defendant to the extent required under a plain error analysis, and defendant's driving convictions were admissible to prove defendant's malice in his trial for second degree murder following an auto accident. State v. Goodman, 149 N.C. App. 57, 560 S.E.2d 196, 2002 N.C. App. LEXIS 132 (2002).

Witness' Statement to Officer. — Officer's testimony that a witness said she was afraid to talk to the police did not violate the rule against evidence of "other crimes," as the testimony did not relate to "other crimes" of defendant; it did, however, violate the hearsay rule. State v. Evans, 149 N.C. App. 767, 562 S.E.2d 102, 2002 N.C. App. LEXIS 310 (2002).

IV. ILLUSTRATIVE CASES.

Evidence Held Admissible. —

Where two defendants were convicted of armed robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury, the trial court did not commit error in admitting testimony about the first defendant's drug transaction, which had occurred four years before the instant crimes. State v. Holadia, 149 N.C. App. 248, 561 S.E.2d 514, 2002 N.C. App. LEXIS 221 (2002), cert. denied, 355 N.C. 497, 562 S.E.2d 432 (2002).

Evidence of violence against child's mother was admissible to show why the mother did not take any action against defendant when he first began assaulting her son, to identify defendant, rather than the mother, as the perpetrator, and to dispel defendant's contention that the child's injuries were accidentally inflicted; because the evidence of prior acts of domestic violence toward the mother was offered for a purpose other than to show the propensity of defendant to commit the crime for which he was being tried, the trial court did not abuse its discretion in admitting the evidence. State v. Carrilo, 149 N.C. App. 543, 562 S.E.2d 47, 2002 N.C. App. LEXIS 280 (2002).

Evidence of defendant's conviction for second-degree murder 27 years earlier was properly admitted in defendant's murder trial where the trial court found similarities between the two murders, and the 18 years defendant spent in prison were excluded when the trial court ruled on whether the previous crime was too remote; the probative value of the previous conviction upon the issues for which it was offered, defendant's intent to kill and his identity as the perpetrator, far outweighed the possibility of unfair prejudice. State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002).

Although defendant's motion to suppress evidence of his prior conviction for assault with a deadly weapon was granted, the trial court did not abuse its discretion by permitting the evidence to be admitted where defendant put his character at issue by offering the testimony of two witnesses as to his peaceful nature during the time frame of the conviction. State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72, 2002 N.C. App. LEXIS 498 (2002).

When defense counsel revealed that a police detective falsely told defendant he had been caught on videotape committing two robberies, the prosecutor's question of the detective as to whether defendant had been caught on videotape committing other robberies was not inadmissible under G.S. 8C-1, Rule 404(b). State v. Fleming, 148 N.C. App. 16, 557 S.E.2d 560, 2001 N.C. App. LEXIS 1276 (2001).

Where defendant was tried for multiple sexual assaults and two murders by strangulation, the trial court did not err in permitting defendant's former girlfriend to testify concerning choking incidents between herself and defendant in order to show motive, plan, common scheme, and intent. State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

Defendant's conduct with two women was sufficiently similar and proximate in time to support its admission under G.S. 8C-1, N.C. R. Evid. 404(b) where defendant was charged with sexual misconduct with a 12-year old which consisted of rubbing her breast and digitally penetrating her vagina, and a witness testified that, when she was 15 years old, defendant had sexual intercourse and performed oral sex on her without her consent. State v. Smith, — N.C. App. —, 568 S.E.2d 289, 2002 N.C. App. LEXIS 973 (2002).

Rule 405. Methods of proving character.

CASE NOTES

Rule 404 Compared. — A criminal defendant is entitled to introduce evidence of his good character, thereby placing his character at issue, and the State in rebuttal can then introduce evidence of defendant's bad character; unlike evidence of prior bad acts being offered under G.S. 8C-1, Rule 404(b), G.S. 8C-1, Rule 405(a) does not contain any time limit or rule regarding remoteness, and the North Carolina Supreme Court has explicitly refused to impose one. State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72, 2002 N.C. App. LEXIS 498 (2002).

Rebuttal of Evidence as to Defendant's Character. —

Although defendant's motion to suppress evidence of his prior conviction for assault with a deadly weapon had been granted, the trial court did not abuse its discretion by permitting the evidence to be admitted where defendant put his character at issue by offering the testimony of two witnesses as to his peaceful nature during the time frame of the conviction. State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72, 2002 N.C. App. LEXIS 498 (2002).

Expert Opinion on Credibility. —

Trial court committed plain error in distributing to the jury an expert witness' report prepared following an evaluation of an alleged sexual assault victim, wherein the expert gave the opinion that the victim's disclosure of the alleged sexual assault was credible; the admission of that portion of the report constituted impermissible expert testimony on the credibility of the alleged sexual assault victim's testimony; moreover, because there was no physical evidence of abuse and the State's case was almost entirely dependent on the alleged victim's credibility with the jury, the admission of the statement was plain error. State v. O'Connor, — N.C. App. —, 564 S.E.2d 296, 2002 N.C. App. LEXIS 639 (2002).

Rule 406. Habit; routine practice.

CASE NOTES

Cited in State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001).

Rule 412. Rape or sex offense cases; relevance of victim's past behavior.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Prior Abuse of Child Not Admissible. — Trial court did not abuse its discretion in refusing to permit defendant from introducing evidence that his minor sexual assault victim had been sexually abused by her father years earlier because there was no indication in the record that this evidence was relevant to the victim's credibility. State v. Yearwood, 147 N.C. App. 662, 556 S.E.2d 672, 2001 N.C. App. LEXIS 1256 (2001).

Cited in State v. Smith, — N.C. App. —, 568 S.E.2d 289, 2002 N.C. App. LEXIS 973 (2002).

ARTICLE 6.

Witnesses.

Rule 601. General rule of competency; disqualification of witness.

CASE NOTES

III. Testimony Not Disqualified.

III. TESTIMONY NOT DISQUALIFIED.

Officer Who Interviewed Defendant. — Law enforcement officer who customarily spoke a different dialect of defendant's language was competent to testify about his interview of defendant, under G.S. 8C-1, Rule 601(a), as there was little difference between the two dialects and the officer had conducted numerous interviews of individuals who spoke defendant's dialect. State v. Aquino, 149 N.C. App. 172, 560 S.E.2d 552, 2002 N.C. App. LEXIS 122 (2002).

Witness with Illness Affecting Speech. — Trial court did not abuse its discretion in finding competent a witness who suffered from viral encephalitis, a motor disease that affected his speech, because the witness was sufficiently audible and understandable when he repeated his testimony. State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

Rule 602. Lack of personal knowledge.

CASE NOTES

Admission of 911 Statements Held Proper. — Child's statements in the 911 call were clearly probative as to whether defendant had shot the victim; the child was in the next room when he heard the shot and the surrounding circumstances established that defendant had been inside when the shooting occurred. State v. Wright, — N.C. App. —, 566 S.E.2d 151, 2002 N.C. App. LEXIS 768 (2002).

Testimony Establishing Personal Knowledge. — Witness properly permitted to testify as to her degree of certainty in her testimony since such evidence was within the witness's personal knowledge. State v. Cole, 147 N.C. App. 637, 556 S.E.2d 666, 2001 N.C. App. LEXIS 1257 (2001).

Cited in State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001).

Rule 606. Competency of juror as witness.

CASE NOTES

Admissibility of Jurors' Affidavits. — Trial court properly received and considered affidavits of jurors which stated that one juror had provided the jurors with definitions of the words "willful" and "wanton" from a dictionary during juror deliberations. Lindsey v. Boddie-Noell Enters., Inc., 147 N.C. App. 166, 555 S.E.2d 369, 2001 N.C. App. LEXIS 1145 (2001), cert. denied, 355 N.C. 213, 559 S.E.2d 803 (2002).

Applied in Gregory v. Kilbride, — N.C. App. —, 565 S.E.2d 685, 2002 N.C. App. LEXIS 685 (2002).

Rule 607. Who may impeach.

CASE NOTES

Cited in State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

Rule 608. Evidence of character and conduct of witness.

CASE NOTES

I. General Consideration.
II. Opinion and Reputation Evidence of Character.
III. Specific Instances of Conduct.

I. GENERAL CONSIDERATION.

Applied in N.C. State Bar v. Gilbert, — N.C. App. —, 566 S.E.2d 685, 2002 N.C. App. LEXIS 782 (2002).

II. OPINION AND REPUTATION EVIDENCE OF CHARACTER.

Expert Opinion on Credibility. —

Trial court committed plain error in distributing to the jury an expert witness' report prepared following an evaluation of an alleged sexual assault victim, wherein the expert gave the opinion that the victim's disclosure of the alleged sexual assault was credible; the admission of that portion of the report constituted impermissible expert testimony on the credibility of the alleged sexual assault victim's testimony; moreover, because there was no physical evidence of abuse and the State's case was almost entirely dependent on the alleged victim's credibility with the jury, the admission of the statement was plain error. State v. O'Connor, — N.C. App. —, 564 S.E.2d 296, 2002 N.C. App. LEXIS 639 (2002).

Truthfulness of Defendant. —

Although the trial court erred in refusing to allow the admission of testimony regarding defendant's character for truthfulness after defendant's credibility was impugned by the State, the error was not prejudicial. State v. Marecek, — N.C. App. —, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002).

III. SPECIFIC INSTANCES OF CONDUCT.

Evidence Held Admissible. —

Trial court properly allowed evidence of a paid confidential informant's prior conviction but properly excluded the details of the conviction under G. S. 8C-1, N.C. R. Evid. 608(b). State v. Rhodes, — N.C. App. —, 565 S.E.2d 266, 2002 N.C. App. LEXIS 710 (2002), cert. denied, 356 N.C. 173, 569 S.E.2d 273 (2002).

Rule 609. Impeachment by evidence of conviction of crime.

CASE NOTES

Testimony Regarding Prior Conviction Inadmissible. — Under G.S. 8C-1, Rule 609(b), defendant was improperly cross-examined about a 15 year old aggravated battery conviction, because the conviction was stale, it shed no light on his veracity, and substantial likelihood of prejudice outweighed the minimal impeachment value of the evidence. State v. Harris, 149 N.C. App. 398, 562 S.E.2d 547, 2002 N.C. App. LEXIS 411 (2002).

Error Not Prejudicial. —

If it was error for the trial court to preclude defendant from cross-examining a prosecution witness about prior shoplifting convictions, nevertheless, as a second offense of shoplifting was a class 2 misdemeanor, concerning which the witness could be cross-examined under G.S. 8C-1, Rule 609(a), defendant did not show prejudice from this error. State v. Williams, — N.C. App. —, 563 S.E.2d 616, 2002 N.C. App. LEXIS 577 (2002).

Cited in State v. Harris, 149 N.C. App. 398, 562 S.E.2d 547, 2002 N.C. App. LEXIS 411 (2002); State v. Rhodes, — N.C. App. —, 565 S.E.2d 266, 2002 N.C. App. LEXIS 710 (2002), cert. denied, 356 N.C. 173, 569 S.E.2d 273 (2002).

Rule 611. Mode and order of interrogation and presentation.

CASE NOTES

Limitation on Cross-Examination of Expert Upheld. — Sexual assault victim's previous sexual abuse at the hands of her father properly excluded from defendant's cross exam-

ination of child psychologist since (1) the credibility of the psychologist's and the victim's testimony were not at issue, and (2) defendant made no showing that the trial court's limitation of the cross examination could have improperly influenced the jury's verdict. State v. Yearwood, 147 N.C. App. 662, 556 S.E.2d 672, 2001 N.C. App. LEXIS 1256 (2001).

Leading Question Permitted. —

While the State's question to a witness asking her to describe the clothes defendant was wearing when he shot the victim may have been a leading question, it was not objectionable, because the question was merely reiterating and further developing the witness's previous statement in which she had stated that defendant shot the victim. State v. Stafford, — N.C. App. —, 564 S.E.2d 60, 2002 N.C. App. LEXIS 578 (2002).

Applied in State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002).

Cited in State v. Holland, — N.C. App. —, 566 S.E.2d 90, 2002 N.C. App. LEXIS 708 (2002).

ARTICLE 7.

Opinions and Expert Testimony.

Rule 701. Opinion testimony by lay witness.

CASE NOTES

Instantaneous Conclusions of the Mind. —

Witnesses were permitted to testify, based on their personal observations, about the mental state of the victim shortly after a pawnshop confrontation with the defendant, in which the defendant threatened to get the victim. State v. Smith, — N.C. App. —, 566 S.E.2d 793, 2002 N.C. App. LEXIS 867 (2002).

Testimony Upheld. —

Witness was permitted to testify that defendant by his actions apparently knew and recognized a person who entered the courtroom where defendant claimed that he did not know the person. State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

Child's statements in the 911 call were clearly probative as to whether defendant had shot the victim; the child was in the next room when he heard the shot and the surrounding circumstances established that defendant had been inside when the shooting occurred. State v. Wright, — N.C. App. —, 566 S.E.2d 151, 2002 N.C. App. LEXIS 768 (2002).

Cited in State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001).

Rule 702. Testimony by experts.

CASE NOTES

I. General Consideration.
II. Qualification of Expert.
III. Expert Opinion Not Admissible.
IV. Expert Opinion Admissible.

I. GENERAL CONSIDERATION.

Applied in State v. Stokes, — N.C. App. —, 561 S.E.2d 547, 2002 N.C. App. LEXIS 312 (2002); State v. Stokes, 150 N.C. App. 211, 565 S.E.2d 196, 2002 N.C. App. LEXIS 512 (2002), cert. granted, 356 N.C. 175, 569 S.E.2d 278 (2002); Gregory v. Kilbride, — N.C. App. —, 565 S.E.2d 685, 2002 N.C. App. LEXIS 685 (2002).

Cited in Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

II. QUALIFICATION OF EXPERT.

Police Officer. — Trial court properly found the length of a police officer's employment as a narcotics officer, as well as his knowledge of cocaine manufacturing, the division and packaging of the drug, and his extensive knowledge of illegal drug operations provided him with the requisite expertise to testify to a hypothetical question based on the facts of a case as an expert. State v. Moore, — N.C. App. —, 566 S.E.2d 713, 2002 N.C. App. LEXIS 853 (2002).

Law Enforcement Officer As Expert. — Trial court did not abuse its discretion by allowing state trooper who (1) had formal training in investigating accidents, (2) had investigated between 2,000 and 2,500 accidents, and (3) had investigated defendant's accident, to testify as an expert witness in accident investigation and reconstruction. State v. Holland, — N.C. App. —, 566 S.E.2d 90, 2002 N.C. App. LEXIS 708 (2002).

III. EXPERT OPINION NOT ADMISSIBLE.

Medical Doctor on Child Abuse. —

Trial court erred by permitting a doctor to testify as to his opinion that defendant's stepdaughter had been sexually abused where the doctor's opinion was not supported by an adequate foundation, and its admission was prejudicial error. State v. Dixon, 150 N.C. App. 46, 563 S.E.2d 594, 2002 N.C. App. LEXIS 392 (2002).

Medical Doctor on Child Abuse. — Even though the State failed to lay an adequate foundation for the admission of a pediatrician's statement of opinion under G.S. 8C-1, Rule 702, and the trial court's admission of the challenged portion of the testimony was error, it did not constitute plain error based upon other overwhelming evidence against defendant. State v. Stancil, 355 N.C. 266, 559 S.E.2d 788, 2002 N.C. LEXIS 182 (2002).

Likely to Confuse Jury. —

Trial court did not err in not permitting a psychologist to testify at trial as an expert witness as to eyewitness identifications since the court properly appraised the probative and prejudicial value of the evidence under G.S. 8C-1, Rule 403 and found that any probative value of the proffered testimony was outweighed by the risk of confusing the jury. State v. Cole, 147 N.C. App. 637, 556 S.E.2d 666, 2001 N.C. App. LEXIS 1257 (2001).

IV. EXPERT OPINION ADMISSIBLE.

Physician. —

Doctor was properly qualified as an expert witness in medical malpractice action involving shoulder dystocia in the delivery of a baby where the record showed that the witness and the doctor defending the action belonged to the American College of Obstetrics and Gynecology, the witness testified that he was a perinatologist and that all perinatologists were first obstetrician gynecologists, that perinatology, like obstetrics, included the performance in management of shoulder dystocia, and that even though he was considered a perinatologist, he continued to practice as an obstetrician gynecologist; accordingly, the witness was of the same or similar specialty as the doctor who delivered the baby such that he met the criteria for testifying as medical expert witness. Leatherwood v. Ehlinger, — N.C. App. —, 564 S.E.2d 883, 2002 N.C. App. LEXIS 678 (2002).

Forensic Pathologist. —

Although the state medical examiner who testified for the State in defendant's murder trial admitted uncertainty as to whether two of the victims had been shot twice, the medical examiner's testimony that the two victims at issue might have been shot twice based on the nature of their injuries was permissible opinion testimony under G.S. 8C-1, N.C. R. Evid. 702(a), 703 because the medical examiner was more qualified than the jury to formulate an opinion regarding the number of gunshot wounds suffered by the victims, and the testimony was based on the medical examiner's autopsies of the victims and the medical examiner's observations as an expert in forensic pathology; the fact that there was uncertainty about the number of gunshot wounds went to the weight of the evidence, rather than its admissibility. State v. Lippard, — N.C. App. —, 568 S.E.2d 657, 2002 N.C. App. LEXIS 965 (2002).

Nurse. — There was no abuse of discretion in the admission of expert testimony regarding nursing and the proper standard of care in a nursing home; both witnesses were amply qualified by training, experience, and knowledge to assist the jury in understanding the evidence with respect to nursing procedures and the applicable standard of care required of the elder care corporation, and the testimony did not have the potential to confuse or mislead the jury so as to outweigh its probative value. Estate of Hendrickson v. Genesis Health Venture, Inc., — N.C. App. —, 565 S.E.2d 254, 2002 N.C. App. LEXIS 722 (2002).

Expert in Child Sexual Abuse Case. —

Trial court properly permitted clinical social worker to express expert testimony in case of man accused of sexually abusing a boy since the social worker was properly qualified as an expert in the area of child sex abuse evaluations and interviewing, a proper foundation was laid, and the testimony was clearly instructive and helpful to the jury in understanding the evidence. State v. Carpenter, 147 N.C. App. 386, 556 S.E.2d 316, 2001 N.C. App. LEXIS 1185 (2001), cert. denied, 355 N.C. 222, 560 S.E.2d 365 (2002).

Trial court did not err in permitting counselor who had talked with child sexual abuse victim to testify as an expert witness since the counselor's testimony that the child's behavior was consistent with a child who had been sexually abused was of the nature that would assist the jury in their ultimate determination of whether defendant sexually abused the child. State v. Isenberg, 148 N.C. App. 29, 557 S.E.2d 568, 2001 N.C. App. LEXIS 1266 (2001),

cert. denied, 355 N.C. 288, 561 S.E.2d 268 (2002).

Opinion of a witness, qualified as an expert in pediatrics and the identification of child abuse based on thousands of examinations of abused children, linking an injury on the victim's face to contemporaneous sexual abuse, was properly admitted. State v. Santiago, 148 N.C. App. 62, 557 S.E.2d 601, 2001 N.C. App. LEXIS 1281 (2001), cert. denied, 355 N.C. 291, 561 S.E.2d 499 (2002).

Expert in Child Sexual Abuse Case. — At defendant's trial on charges of first degree statutory rape of a female child under 13 years old, statutory sexual offense of a female child under 13 years old, and taking indecent liberties with a child, trial court properly allowed expert testimony by pediatrician that the victim was sexually abused because the pediatrician's testimony was based on her own examination of the victim, and medical history she obtained from a child protective services investigator and the victim's mother. State v. Brothers, — N.C. App. —, 564 S.E.2d 603, 2002 N.C. App. LEXIS 653 (2002).

Expert on Firearms Could Testify as to Wounds Inflicted. — Trial court properly permitted an expert witness in the field of firearm analysis and identification to testify from autopsy photographs of the victim that the wounds inflicted on the victim were consistent with the type of ammunition for which spent cartridges were found at the murder scene. State v. Holmes, 355 N.C. 719, 565 S.E.2d 154, 2002 N.C. LEXIS 549 (2002).

Expert on Mitochondrial DNA Analysis. —

Special agent with the North Carolina State Bureau of Investigation, assigned to the forensic crime lab, could testify that (1) he conducted DNA analysis in using blood samples from defendant and blood samples and vaginal material from the victim and, (2) assuming a single semen donor, the DNA banding pattern was consistent with a mixture of the victim's and defendant's DNA profile. State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

Expert on Handwriting. — Trial court erred in refusing to permit a handwriting expert to render an expert opinion as to the validity of a signature on a contract, on the basis that handwriting analysis was not based in science and was not scientifically proven, as expert testimony may be deemed to be reliable notwithstanding the fact that it is not based in science. Taylor v. Abernethy, 149 N.C. App. 263, 560 S.E.2d 233, 2002 N.C. App. LEXIS 182 (2002).

Rule 703. Bases of opinion testimony by experts.

CASE NOTES

Admission of Expert Testimony Upheld. —

Doctor's expert testimony with respect to the cause of the plaintiffs' daughter's injury, based on his training as an obstetrician gynecologist and his extensive experience with shoulder dystocia emergencies and brachial plexus injuries, was that birth simulated studies using manikin and cadaver models supported his conclusion that, if during delivery an obstetrician applies a downward level of traction involving excessive pressure, an injury to the C8-T1 area of the baby's brachial plexus could result; this testimony clearly demonstrated doctor's opinion that the daughter's injury was causally linked to the delivering physician's care, was based on more than mere speculation, and was sufficiently reliable to be submitted to the jury. Leatherwood v. Ehlinger, — N.C. App. —, 564 S.E.2d 883, 2002 N.C. App. LEXIS 678 (2002).

Although the state medical examiner who testified for the State in defendant's murder trial admitted uncertainty as to whether two of the victims had been shot twice, the medical examiner's testimony that the two victims at issue might have been shot twice based on the nature of their injuries was permissible opinion testimony under G.S. 8C-1, N.C. R. Evid. 702(a), 703 because the medical examiner was more qualified than the jury to formulate an opinion regarding the number of gunshot wounds suffered by the victims, and the testimony was based on the medical examiner's autopsies of the victims and the medical examiner's observations as an expert in forensic pathology; the fact that there was uncertainty about the number of gunshot wounds went to the weight of the evidence, rather than its admissibility. State v. Lippard, — N.C. App. —, 568 S.E.2d 657, 2002 N.C. App. LEXIS 965 (2002).

Rule 704. Opinion on ultimate issue.

CASE NOTES

Death as "Homicide". — Where expert used the word "homicide" to explain the factual groundwork of the expert's function as a medical examiner and did not use the word as a legal term of art and where the expert explained how the expert determined that the victim's death was a homicide instead of death by natural causes, suicide, or accident, the expert's testimony conveyed a proper opinion for an expert in forensic pathology, and the trial court properly allowed it. State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, — U.S. —, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

Cited in Taylor v. Abernethy, 149 N.C. App. 263, 560 S.E.2d 233, 2002 N.C. App. LEXIS 182 (2002).

ARTICLE 8.

Hearsay.

Rule 801. Definitions and exception for admissions of a party-opponent.

CASE NOTES

Adoption of Another's Statement as One's Own. —

Trial court's giving a jury instruction on implied admission was not in error as the defendant's lack of denials to certain accusations by another person and the statement by the defendant to that person that the defendant was too smart to get caught contained both express and implied admissions by the defendant State v. Marecek, — N.C. App. —, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002).

Statements Admissible to Explain Subsequent Conduct. —

Admission of a detective's conversation with an inmate implicating defendant in two murders to explain the detective's subsequent conduct was inadmissible when it went beyond what was necessary to explain that conduct, and was relied on as substantive evidence of defendant's alleged crime. State v. Canady, 355 N.C. 242, 559 S.E.2d 762, 2002 N.C. LEXIS 176 (2002).

Out-of-Court Statements to Impeach Party. — Trial court did not err in allowing the State to introduce out-of-court statements to impeach codefendant where the statements were not admitted for substantive purposes and would have been otherwise admissible because of the prior inconsistent statement exception to the hearsay rule. State v. Martinez, 149 N.C. App. 553, 561 S.E.2d 528, 2002 N.C. App. LEXIS 273 (2002).

Admission by Party Opponent. —

Trial court properly permitted testimony as to statements defendant made to fellow inmates while in jail that he had killed two women. State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

Applied in State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002); State v. Evans, 149 N.C. App. 767, 562 S.E.2d 102, 2002 N.C. App. LEXIS 310 (2002); State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002); State v. Marecek, — N.C. App. —, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002).

Cited in State v. Martinez, 149 N.C. App. 553, 561 S.E.2d 528, 2002 N.C. App. LEXIS 273 (2002); State v. McCail, — N.C. App. —, 565 S.E.2d 96, 2002 N.C. App. LEXIS 686 (2002).

Rule 802. Hearsay rule.

CASE NOTES

Applied in State v. Evans, 149 N.C. App. 767, 562 S.E.2d 102, 2002 N.C. App. LEXIS 310 (2002); State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

Cited in State v. McCail, — N.C. App. —, 565 S.E.2d 96, 2002 N.C. App. LEXIS 686 (2002).

Rule 803. Hearsay exceptions; availability of declarant immaterial.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); State v. Brothers, — N.C. App. —, 564 S.E.2d 603, 2002 N.C. App. LEXIS 653 (2002); Kroh v. Kroh, — N.C. App. —, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002).

II. PRESENT SENSE IMPRESSION.

There is no rigid rule about how long is too long to be considered "immediately thereafter," etc.

Murder victim's statements to a relative made the same day as the defendant returned stolen items to the murder victim and threatened the murder victim, but made after a police officer had stayed with the murder victim all afternoon did not qualify as being made immediately after the event and were therefore not admissible under the present sense impression hearsay exception. State v. Smith, — N.C. App. —, 566 S.E.2d 793, 2002 N.C. App. LEXIS 867 (2002).

III. EXCITED UTTERANCES.

State Made in 911 Call. — Child's statements in the 911 call were clearly probative as to whether defendant had shot the victim; the child was in the next room when he heard the shot and the surrounding circumstances established that defendant had been inside when the shooting occurred. State v. Wright, — N.C. App. —, 566 S.E.2d 151, 2002 N.C. App. LEXIS 768 (2002).

IV. MENTAL, EMOTIONAL OR PHYSICAL CONDITION.

Statement murder victim made to witnesses, etc.

A murder victim's statements, made shortly before his death, in which he expressed fear that the defendant was going to kill him were admissible under the state of mind exception to the hearsay rule to show the status of the victim's relationship to the defendant prior to the killing, that defendant had a motive for the killing, and that the killing was a deliberate premeditated act rather than a spontaneous act done in self-defense; the probative value of such testimony outweighed any potential prejudice to defendant. State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002).

The victim's tearful statements to others that her husband was having an affair, that she might not return alive from their vacation, and don't let him get away with this were admissible to show the victim's state of mind. State v. Marecek, — N.C. App. —, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002).

Testimony As to Victim's Fear of the Defendant. —

Testimony by the victim's friend was admissible to show the victim's state of mind prior to a meeting with defendant and revealed her fear of defendant and of an imminent encounter with him; the probative value of the testimony outweighed any prejudicial effect. State v. Williams, — N.C. App. —, 566 S.E.2d 155, 2002 N.C. App. LEXIS 772 (2002).

V. STATEMENTS FOR DIAGNOSIS OR TREATMENT.

Statements Made by a Child Abuse Victim to Health Care Professional. —

Statements made by a child victim of a sex offender to a nurse and then a doctor who examined her after she was taken to a hospital were admissible under the medical diagnosis exception to the hearsay rule as the required assurances of trustworthiness were present and the statements made were reasonably pertinent to diagnosis. State v. Isenberg, 148 N.C. App. 29, 557 S.E.2d 568, 2001 N.C. App. LEXIS 1266 (2001), cert. denied, 355 N.C. 288, 561 S.E.2d 268 (2002).

VII. RECORDS OF REGULARLY CONDUCTED ACTIVITY.

Results of Psychological Testing. — Even with the availability of the business exception to the hearsay rule, the results of a Minnesota Multiphasic Personality Inventory test were

hearsay and incompetent, and were improperly admitted where the psychologist who administered the test was not present at the trial, there was no testimony at trial to establish that the test was properly administered, there was no testimony whether results of the analysis were temporary or permanent, the results were admitted for the truth of the matter asserted, and the trial court provided no limiting instruction with respect to the testimony. Barringer v. Mid Pines Dev. Group, LLC, — N.C. App. —, 568 S.E.2d 648, 2002 N.C. App. LEXIS 963 (2002).

XIII. OTHER EXCEPTIONS.

Trial Court's Inquiry for Admission Under G.S. 8C-1, Rule 803(24) and G.S. 8C-1, Rule 804(b)(5). —

Requirements for a hearsay statement to be admissible under G.S. 8C-1, Rule 803(24) where the availability of the declarant is immaterial are: (1) the proponent must notify his adversary in writing of his intent to introduce the statement; (2) the statement must not be admissible under any of the listed hearsay exceptions; (3) the statement must possess circumstantial guarantees of trustworthiness equivalent to those of the listed exceptions; (4) the statement must be offered as evidence of a material fact; (5) the statement must be more probative on the point for which it is offered than other evidence which the proponent can produce through reasonable efforts; and (6) the general purposes of the rules of evidence and the interests of justice must best be served by admission of the statement into evidence. For a hearsay statement to be admissible under G.S. 8C-1, Rule 804(b)(5), where the availability of the declarant is material, the same six requirements must be met after the proponent first proves that the declarant is unavailable. State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002).

Evidence Held Admissible. — The hearsay statement of an unavailable declarant was properly admitted where: (1) the statement was made while the declarant was in a law enforcement vehicle; (2) the declarant had first-hand knowledge of the event; (3) the declarant had no motive to lie, as the statement was adverse to the interests of a relative, and the declarant was not trying to evade personal responsibility for the crime; (4) there was no indication the statement was recanted; and (5) the declarant was unavailable for the trial, despite the State's diligent efforts to locate the declarant. State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002).

Rule 804. Hearsay exceptions; declarant unavailable.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); Kroh v. Kroh, — N.C. App. —, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002).

II. UNAVAILABILITY AS A WITNESS.

Trial Courts' Inquiry for Admission Under G.S. 8C-1, Rule 803(24) and G.S. 8C-1, Rule 804(b)(5). — Requirements for a hearsay statement to be admissible under G.S. 8C-1, Rule 803(24) where the availability of the declarant is immaterial are: (1) the proponent must notify his adversary in writing of his intent to introduce the statement; (2) the statement must not be admissible under any of the listed hearsay exceptions; (3) the statement must possess circumstantial guarantees of trustworthiness equivalent to those of the listed exceptions; (4) the statement must be offered as evidence of a material fact; (5) the statement must be more probative on the point for which it is offered than other evidence which the proponent can produce through reasonable efforts; and (6) the general purposes of the rules of evidence and the interests of justice must best be served by admission of the statement into evidence. For a hearsay statement to be admissible under G.S. 8C-1, Rule 804(b)(5), where the availability of the declarant is material, the same six requirements must be met after the proponent first proves that the declarant is unavailable. State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002).

Trustworthiness Not Shown. —

Trial court did not err in denying the testimony of an unavailable witness where defendant did not establish that the declarant's statement possessed equivalent circumstantial guarantees of trustworthiness, and the trial judge specifically concluded that the general purposes of the rules and the interests of justice

would not be best served by the admission of the statement. State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

Unavailability Requirement Not Satisfied. —

Hearsay testimony that another individual committed the murder that defendant was charged with was properly excluded because defendant was unable to prove the declarant's unavailability due to death, under G.S. 8C-1, N.C. R. Evid. 804(a)(4). State v. McCail, — N.C. App. —, 565 S.E.2d 96, 2002 N.C. App. LEXIS 686 (2002).

Statement Held Admissible. — Hearsay statement of unavailable declarant was properly admitted where: (1) the statement was made while the declarant was in a law enforcement vehicle; (2) the declarant had first-hand knowledge of the event; (3) the declarant had no motive to lie, as the statement was adverse to the interests of a relative, and the declarant was not trying to evade personal responsibility for the crime; (4) there was no indication the statement was recanted; and (5) the declarant was unavailable for the trial, despite the State's diligent efforts to locate the declarant. State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002).

V. STATEMENT AGAINST INTEREST.

Statement Held Inadmissible. — Hearsay testimony that another individual committed the murder that defendant was charged with was properly excluded because the proffered testimony did not provide the corroborating circumstances required for the admission of a statement tending to expose an unavailable declarant to criminal liability, under G.S. 8C-1, N.C. R. Evid. 804(b)(3). State v. McCail, — N.C. App. —, 565 S.E.2d 96, 2002 N.C. App. LEXIS 686 (2002).

VI. OTHER EXCEPTIONS.

Trustworthiness of Statement by Child. —

Counselor who had examined child sexual abuse victim permitted to testify at trial as to substantive evidence based on what the victim had told him under the subdivision (5) residual exception to G.S. 8C-1, Rule 804 after the victim refused to testify. State v. Isenberg, 148 N.C. App. 29, 557 S.E.2d 568, 2001 N.C. App. LEXIS 1266 (2001), cert. denied, 355 N.C. 288, 561 S.E.2d 268 (2002).

Article 9.

Authentication and Identification.

Rule 901. Requirement of authentication or identification.

CASE NOTES

Cited in State v. Martinez, 149 N.C. App. 553, 561 S.E.2d 528, 2002 N.C. App. LEXIS 273 (2002); Kroh v. Kroh, — N.C. App. —, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002).

Article 10.

Contents of Writings, Recordings and Photographs.

Rule 1002. Requirement of original.

CASE NOTES

Cited in Kroh v. Kroh, — N.C. App. —, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002).

Rule 1003. Admissibility of duplicates.

CASE NOTES

Cited in Kroh v. Kroh, — N.C. App. —, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002).

Chapter 9.

Jurors.

Article 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

§ 9-3. Qualifications of prospective jurors.

CASE NOTES

Excuse Based on Age. — Statutory scheme allowing trial judge to exercise his discretion to excuse jurors over the age of 65 has a rational basis and is not constitutionally infirm. State v. Rogers, 355 N.C. 420, 562 S.E.2d 859, 2002 N.C. LEXIS 429 (2002).

§ 9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure.

CASE NOTES

Excuse Based on Age. — Statutory scheme allowing trial judge to exercise his discretion to excuse jurors over the age of 65 has a rational basis and is not constitutionally infirm. State v. Rogers, 355 N.C. 420, 562 S.E.2d 859, 2002 N.C. LEXIS 429 (2002).

§ 9-6.1. Excuses on account of age.

CASE NOTES

Constitutionality. — There is no constitutional infirmity in the statutory scheme as it relates to excusal of jurors over the age of 65. State v. Rogers, 355 N.C. 420, 562 S.E.2d 859, 2002 N.C. LEXIS 429 (2002).

Chapter 10A.

Notaries.

§ 10A-4. Commissioning.

(a) Except as provided in subsection (c) of this section, the Secretary shall commission as a notary any qualified person who submits an application in accordance with this Chapter.

(b) A person qualified for a notarial commission shall meet all of the following requirements:

(1) Be at least 18 years of age.

(2) Reside or work in this State.

(3) Satisfactorily complete a course of study that is approved by the Secretary and consists of not less than three hours nor more than six hours of classroom instruction provided by community colleges throughout the State, unless the person is a licensed member of the Bar of this State.

(4) Purchase and keep as a reference a manual approved by the Secretary that describes the duties, authority, and ethical responsibilities of notaries public.

(5) Submit an application containing no significant misstatement or omission of fact. The application form shall be provided by the Secretary and be available at the register of deeds office in each county. Every application shall bear the signature of the applicant written with pen and ink, and the signature shall be acknowledged by the applicant before a person authorized to administer oaths. The applicant shall also obtain the recommendation of one publicly elected official in North Carolina whose recommendation shall be contained on the application.

(6) Pay a nonrefundable fee of fifty dollars ($50.00).

(c) The Secretary may deny an application for commission or recommission as a notary if any of the following applies to the applicant:

(1) The applicant has been convicted of a crime involving dishonesty or moral turpitude.

(1a) The applicant has been convicted of a felony and the applicant's rights have not been restored.

(2) The applicant has had a notarial commission or professional license revoked, suspended, or restricted by this or any other state.

(3) The applicant has engaged in official misconduct, whether or not disciplinary action resulted.

(4) The applicant knowingly uses false or misleading advertising in which the applicant as a notary represents that the applicant has powers, duties, rights or privileges that the applicant does not possess by law.

(5) The applicant is found by a court of this State or any other state to have engaged in the unauthorized practice of law.

(d), (e) Repealed by Session Laws 1998-228, s. 3, effective January 1, 1999.

(Code, ss. 3304, 3305; Rev., ss. 2347, 2348; C.S., s. 3172; 1927, c. 117; 1959, c. 1161, s. 2; 1969, c. 563, s. 1; c. 912, s. 1; 1973, c. 680, s. 1; 1983, c. 427, ss. 1, 2; c. 713, s. 22; 1991, c. 683, s. 2; 1995, c. 226, s. 1; 1998-228, s. 3; 1999-337, s. 3(a); 2001-450, s. 1; 2002-126, s. 29A.21.)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, s. 29A.21, effective November 1, 2002, substituted "fifty dollars ($50.00)" for "thirty dollars ($30.00)" in subdivision (b)(6).

§ 10A-9. Powers and limitations.

OPINIONS OF ATTORNEY GENERAL

An attorney may notarize a document for a client and then represent that client in a legal matter relating to the same document. See opinion of Attorney General to Ms. Sheila Stafford Pope, General Counsel, N.C. Secretary of State, 2001 N.C. AG LEXIS 34 (8/9/01).

§ 10A-16. Acts of notaries public in certain instances validated.

(a) Any acknowledgment taken and any instrument notarized by a person prior to qualification as a notary public but after commissioning or recommissioning as a notary public, or by a person whose notary commission has expired, is hereby validated. The acknowledgment and instrument shall have the same legal effect as if the person qualified as a notary public at the time the person performed the act.

(b) All documents bearing a notarial seal and which contain any of the following errors are validated and given the same legal effect as if the errors had not occurred:

(1) The date of the expiration of the notary's commission is stated, whether correctly or erroneously.

(2) The notarial seal does not contain a readable impression of the notary's name, contains an incorrect spelling of the notary's name, or does not bear the name of the notary exactly as it appears on the commission, as required by G.S. 10A-11.

(3) The notary's signature does not comport exactly with the name on the notary commission or on the notary seal, as required by G.S. 10A-9.

(4) The notarial seal contains typed, printed, drawn, or handwritten material added to the seal, fails to contain the words "North Carolina" or the abbreviation "N. C.", or contains correct information except that instead of the abbreviation for North Carolina contains the abbreviation for another state.

(c) All deeds of trust in which the notary was named in the document as a trustee only are validated.

(d) This section applies to notarial acts performed on or before July 1, 2002. (1945, c. 665; 1947, c. 313; 1949, c. 1; 1953, c. 702; 1961, cc. 483, 734; 1965, c. 37; 1969, c. 83; c. 716, s. 1; 1971, c. 229, s. 1; 1973, c. 680, s. 1; 1977, c. 734, s. 1; 1979, c. 226, s. 2; c. 643, s. 1; 1981, c. 164, ss. 1, 2; 1983, c. 205, s. 1; 1985, c. 71, s. 1; 1987, c. 277, s. 9; 1989, c. 390, s. 9; 1991, c. 683, s. 2; 1997-19, s. 1; 1997-469, s. 2; 1998-228, s. 10; 1999-21, s. 2; 2001-154, s. 1; 2002-159, s. 27.)

Effect of Amendments. —

Session Laws 2002-159, s. 27, effective October 11, 2002, rewrote subsection (b); and substituted "July 1, 2002" for "April 15, 2001" in subsection (d).

Chapter 12.

Statutory Construction.

§ 12-3.1. Fees and charges by agencies.

(a) Authority. — Only the General Assembly has the power to authorize an agency to establish or increase a fee or charge for the rendering of any service or fulfilling of any duty to the public. In the construction of a statute, unless that construction would be inconsistent with the manifest intent of the General Assembly or repugnant to the context of the statute, the legislative grant of authority to an agency to make and promulgate rules shall not be construed as a grant of authority to the agency to establish by rule a fee or a charge for the rendering of any service or fulfilling of any duty to the public, unless the statute expressly provides for the grant of authority to establish a fee or charge for that specific service. Notwithstanding any other law, an agency's establishment or increase of a fee or charge shall not go into effect until one of the following conditions has been met:

(1) The General Assembly has enacted express authorization of the amount of the fee or charge to be established or increased and the purpose of that fee or charge.

(2) The General Assembly has enacted general authorization for the agency to establish or increase the fee or charge, and the agency has consulted with the Joint Legislative Commission on Governmental Operations on the amount and purpose of the fee or charge to be established or increased.

(b) Definitions. — The following definitions apply in this section:

(1) Agency. — Every agency, institution, board, commission, bureau, department, division, council, member of the Council of State, or officer of the legislative, executive or judicial branches of State government. The term does not include counties, cities, towns, villages, other municipal corporations or political subdivisions of the State or any agencies of these subdivisions, the University of North Carolina, community colleges, hospitals, county or city boards of education, other local public districts, units, or bodies of any kind, or private corporations created by act of the General Assembly.

(2) Rule. — Every rule, regulation, ordinance, standard, and amendment thereto adopted by any agency, including rules and regulations regarding substantive matters, standards for products, procedural rules for complying with statutory or regulatory authority or requirements and executive orders of the Governor.

(c) Exceptions. — This section does not apply to any of the following:

(1) Rules establishing fees or charges to State, federal or local governmental units.

(2) A reasonable fee or charge for copying, transcripts of public hearings, State publications, or mailing a document or other item.

(3) Reasonable registration fees covering the cost of a conference or workshop.

(4) Reasonable user fees covering the cost of providing data processing services.

(d) In lieu of the requirements of subdivision (a)(2) of this section, the North Carolina State Ports Authority shall report the establishment or increase of any fee to the Joint Legislative Commission on Governmental Operations as

provided in G.S. 143B-454(a)(11). (1979, c. 559, s. 1; 1981, c. 695, ss. 1, 2; 1987, c. 564, s. 35; 1991, c. 418, s. 6; 2001-427, s. 8(a); 2002-99, s. 7(c).)

Editor's Note. — Session Laws 2002-159, s. 88, provides: "Notwithstanding G.S. 12-3.1(a)(2), the North Carolina Locksmith Licensing Board may adopt its initial fees as authorized by G.S. 74F-9 without prior consultation with the Joint Legislative Commission on Governmental Operations. The North Carolina Locksmith Licensing Board shall report on the amount and purpose of its initial fees to the Joint Legislative Commission on Governmental Operations prior to the next meeting of the Joint Legislative Commission on Governmental Operations following the adoption of the initial fees."

Effect of Amendments. —

Session Laws 2002-99, s. 7(c), effective August 29, 2002, added subsection (d).

Chapter 14.

Criminal Law.

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

Article 7A.

Rape and Other Sex Offenses.

Sec.
14-27.1. Definitions.
14-27.3. Second-degree rape.
14-27.5. Second-degree sexual offense.

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

Article 19B.

Financial Transaction Card Crime Act.

14-113.8. Definitions.
14-113.9. Financial transaction card theft.

Article 19C.

Financial Identity Fraud.

14-113.20. Financial identity fraud.
14-113.20A. Trafficking in stolen identities.
14-113.22. Punishment and liability.

Article 21.

Forgery.

14-119. Forgery of notes, checks, and other securities; counterfeiting of instruments.

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

Article 26.

Offenses Against Public Morality and Decency.

14-178. Incest.
14-179. [Repealed.]

Article 27A.

Sex Offender and Public Protection Registration Programs.

Part 1. Registration Programs, Purpose and Definitions Generally.

14-208.6. Definitions.

Part 2. Sex Offender and Public Protection Registration Program.

14-208.7. Registration.
14-208.8. Prerelease notification.
14-208.9. Change of address; change of academic status or educational employment status.
14-208.11. Failure to register; falsification of verification notice; failure to return verification form; order for arrest.
14-208.14. Statewide registry; Division of Criminal Statistics designated custodian of statewide registry.

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

Article 31.

Misconduct in Public Office.

14-234. Public officers or employees benefiting from public contracts; exceptions.
14-236, 14-237. [Repealed.]

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

Article 37.

Lotteries, Gaming, Bingo and Raffles.

Part 2. Bingo and Raffles.

14-309.7. Licensing procedure.
14-309.11. Accounting and use of proceeds.

Article 39.

Protection of Minors.

14-313. Youth access to tobacco products.

Article 52.

Miscellaneous Police Regulations.

14-401.18. Sale of certain packages of cigarettes prohibited.
14-401.20. Defrauding drug and alcohol screening tests; penalty.

Article 53B.

Firearm Regulation.

14-409.40. Statewide uniformity of local regulation.

Article 60.

Computer-Related Crime.

14-453. Definitions.
14-453.1. Exceptions.
14-453.2. Jurisdiction.
14-454.1. Accessing government computers.

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Felonies and Misdemeanors.

§ 14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice, or with deceit and intent to defraud, or with ethnic animosity.

Legal Periodicals. — Survey of Developments in North Carolina Law and the Fourth Circuit, 1999: Clarifying North Carolina's Ethnic Intimidation Statute and Penalty Enhancement for Bias Crimes, 78 N.C.L. Rev. 2003 (2000).

ARTICLE 2.

Principals and Accessories.

§ 14-7. Accessories after the fact; trial and punishment.

CASE NOTES

Cited in State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002).

ARTICLE 2A.

Habitual Felons.

§ 14-7.1. Persons defined as habitual felons.

Legal Periodicals. — Once, Twice, Four Times a Felon: North Carolina's Unconstitutional Recidivist Statutes, see 24 Campbell L. Rev. 381 (2001).

CASE NOTES

Applied in State v. Lee, — N.C. App. —, 564 S.E.2d 597, 2002 N.C. App. LEXIS 650 (2002), cert. denied, 356 N.C. 171, 568 S.E.2d 856 (2002).

Cited in State v. Norman, 149 N.C. App. 588, 562 S.E.2d 453, 2002 N.C. App. LEXIS 268 (2002).

§ 14-7.4. Evidence of prior convictions of felony offenses.

CASE NOTES

Proof of Prior Convictions. — Use of true copies of the court record to prove prior convictions under the Habitual Felons Act, as opposed to certified copies, was not improper. State v. Gant, — N.C. App. —, 568 S.E.2d 909, 2002 N.C. App. LEXIS 1072 (2002).

§ 14-7.5. Verdict and judgment.

CASE NOTES

The trial court erred by sentencing the defendant as an habitual felon, etc.

Trial court erred in finding defendant guilty of being a habitual felon based on defendant's stipulation to his status as such, where the court failed to establish a record showing that defendant's stipulation was a guilty plea to the habitual felon charge. State v. Edwards, — N.C. App. —, 563 S.E.2d 288, 2002 N.C. App. LEXIS 589 (2002).

§ 14-7.6. Sentencing of habitual felons.

CASE NOTES

Use of Prior Convictions. —

By using the defendant's five felony convictions in the habitual felon indictment, the State was precluded from using the same five convictions to increase defendant's prior record level points; accordingly, the trial court erred in using one conviction used to establish defendant's habitual felon status to enhance defendant's sentence. State v. Lee, — N.C. App. —, 564 S.E.2d 597, 2002 N.C. App. LEXIS 650 (2002), cert. denied, 356 N.C. 171, 568 S.E.2d 856 (2002).

No Contest Plea. — "Conviction" within the context of this section includes a judgment entered upon a no contest plea, as long as the statutory procedures in G.S. 15A-1022 for entering a no contest plea are followed by the trial court in entering the plea. State v. Jones, — N.C. App. —, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002).

ARTICLE 2B.

Violent Habitual Felons.

§ 14-7.9. Charge of violent habitual felon.

CASE NOTES

Held Sufficient. — Indictments were sufficient where each one listed two prior conviction for felonies in Florida that met the requirements under North Carolina law for violent habitual felon status, and each specified a different one of the current offenses as an underlying substantive charge. State v. Floyd, 148 N.C. App. 290, 558 S.E.2d 237, 2002 N.C. App. LEXIS 13 (2002).

§ 14-7.12. Sentencing of violent habitual felons.

CASE NOTES

Cited in State v. Floyd, 148 N.C. App. 290, 558 S.E.2d 237, 2002 N.C. App. LEXIS 13 (2002).

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

ARTICLE 6.

Homicide.

§ 14-17. Murder in the first and second degree defined; punishment.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in State v. Phillips, 262 N.C. 723, 138 S.E.2d 626 (1964); State v. Stokes, 150 N.C. App. 211, 565 S.E.2d 196, 2002 N.C. App. LEXIS 512 (2002), cert. granted, 356 N.C. 175, 569 S.E.2d 278 (2002).

Cited in Hartman v. Lee, 283 F.3d 190, 2002 U.S. App. LEXIS 3448 (4th Cir. 2002); State v. Stokes, — N.C. App. —, 561 S.E.2d 547, 2002 N.C. App. LEXIS 312 (2002); State v. Hannah, 149 N.C. App. 713, 563 S.E.2d 1, 2002 N.C. App. LEXIS 296 (2002), cert. denied, 355 N.C. 754, 566 S.E.2d 81 (2002).

IV. MURDER IN PERPETRATION OF A FELONY.

Homicide in Perpetration or Attempted Perpetration of Burglary. —

Defendant's admission he pulled up a chair to the outside of the victim's window, had a gun in his possession when it discharged, and shot the victim, allowed the jury to infer defendant's attempted first-degree burglary and resulting felony murder. State v. Bumgarner, 147 N.C. App. 409, 556 S.E.2d 324, 2001 N.C. App. LEXIS 1178 (2001).

Kidnapping. —

When defendant presented the victim's withdrawal slip and driver's license to the bank while holding the victim hostage in the passenger's seat, she made a false representation to the bank that the withdrawal was legitimate and had the continuing support of the victim; because defendant's misrepresentation was clearly calculated to mislead and did in fact mislead, defendant's actions constituted a false pretense and the "purpose" element of the kidnapping charge was satisfied and thus, the kidnapping and felony murder convictions were supported by sufficient evidence. State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, — U.S. —, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

Indictment for Underlying Felony. — The State was not required to indict defendant for burglary in order to use burglary as the underlying felony in felony murder charges; thus, any variance between the burglary indictment and the jury charge on burglary did not prevent the State from using burglary as the underlying felony. State v. Scott, — N.C. App. —, 564 S.E.2d 285, 2002 N.C. App. LEXIS 576 (2002).

VII. EVIDENCE.

A. In General.

Premeditation and Deliberation Shown. —

Deliberation and premeditation in the victim's murder were shown by the fact that defendant took a revolver to a meeting with the victim, indicative of some preparation and intent to do harm to the victim; his statement that "she was going to take my kids" demonstrated ill will or previous difficulties. State v. Williams, — N.C. App. —, 566 S.E.2d 155, 2002 N.C. App. LEXIS 772 (2002).

VIII. INSTRUCTIONS.

A. In General.

Instruction on Acting in Concert. —

District court did not abuse its discretion by instructing the jury where it gave the definition of conspiracy four times and gave a long instruction on the definition of murder under North Carolina law. United States v. Celestine,

— F.3d —, 2002 U.S. App. LEXIS 16140 (4th Cir. Aug. 9, 2002).

B. Degree of Offense.

Instructions on Involuntary Manslaughter and Second-Degree Murder Not Required. — Neither involuntary manslaughter nor second-degree murder are applicable when a victim is killed in the course of a felony set forth in G.S. 14-17, so no lesser-included offense instruction on those offenses is required. State v. Ray, 149 N.C. App. 137, 560 S.E.2d 211, 2002 N.C. App. LEXIS 130 (2002).

Article 7A.

Rape and Other Sex Offenses.

§ 14-27.1. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Mentally disabled" means (i) a victim who suffers from mental retardation, or (ii) a victim who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act.

(2) "Mentally incapacitated" means a victim who due to any act committed upon the victim is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act.

(3) "Physically helpless" means (i) a victim who is unconscious; or (ii) a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act.

(4) "Sexual act" means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes. (1979, c. 682, s. 1; 2002-159, s. 2(a).)

Cross References. — For the Address Confidentiality Program, see G.S. 15C-1 et seq.

Effect of Amendments. — Session Laws 2002-159, s. 2(a), effective December 1, 2002, and applicable to offenses committed on or after that date, substituted "Mentally disabled" for "Mentally defective" in subdivision (1).

CASE NOTES

Instruction on "Sexual Act" Sufficient. — An instruction setting forth the elements for first degree sexual offense that defines a sexual act as "any penetration, however slight, by an object into the genital opening of a person's body," comports with G.S. 14-27.1, which defines a sexual act as "penetration, however slight, by any object into the genital or anal opening of another person's body." State v. Brothers, — N.C. App. —, 564 S.E.2d 603, 2002 N.C. App. LEXIS 653 (2002).

Proof of Penetration. —

Circumstantial evidence of defendant's penetration of child victim's anus with a foreign object held sufficient. State v. Santiago, 148 N.C. App. 62, 557 S.E.2d 601, 2001 N.C. App. LEXIS 1281 (2001), cert. denied, 355 N.C. 291, 561 S.E.2d 499 (2002).

Cited in State v. Yearwood, 147 N.C. App. 662, 556 S.E.2d 672, 2001 N.C. App. LEXIS 1256 (2001).

§ 14-27.2. First-degree rape.

CASE NOTES

I. General Consideration.
V. Consent.

I. GENERAL CONSIDERATION.

Cited in State v. Robertson, 149 N.C. App. 563, 562 S.E.2d 551, 2002 N.C. App. LEXIS 288 (2002).

V. CONSENT.

Consent Induced by Fear and Violence Is Void. —

Circumstantial evidence and a co-defendant's testimony that the victim feared defendant because defendant was carrying a knife was sufficient to prove lack of consent. State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

§ 14-27.3. Second-degree rape.

(a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:

(1) By force and against the will of the other person; or

(2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.

(b) Any person who commits the offense defined in this section is guilty of a Class C felony. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 5; 1981, cc. 63, 179; 1993, c. 539, s. 1130; 1994, Ex. Sess., c. 24, s. 14(c); 2002-159, s. 2(b).)

Effect of Amendments. — Session Laws 2002-159, s. 2(b), effective December 1, 2002, and applicable to offenses committed on or after that date, substituted "mentally disabled" for "mentally defective" twice in subdivision (a)(2).

§ 14-27.4. First-degree sexual offense.

CASE NOTES

III. Practice and Procedure.

III. PRACTICE AND PROCEDURE.

Testimony of Children. —

Child victim's testimony of defendant's conduct and testimony by previous child victims of similar conduct, along with expert testimony of clinical social worker, was sufficient to convict defendant of first-degree sexual offense. State v. Carpenter, 147 N.C. App. 386, 556 S.E.2d 316, 2001 N.C. App. LEXIS 1185 (2001), cert. denied, 355 N.C. 222, 560 S.E.2d 365 (2002).

§ 14-27.5. Second-degree sexual offense.

(a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:

(1) By force and against the will of the other person; or

(2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.

(b) Any person who commits the offense defined in this section is guilty of a Class C felony. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 7; 1981, c. 63; c. 179, s. 14; 1993, c. 539, s. 1131; 1994, Ex. Sess., c. 24, s. 14(c); 2002-159, s. 2(c).)

Effect of Amendments. — Session Laws 2002-159, s. 2(c), effective December 1, 2002, and applicable to offenses committed on or after that date, substituted "mentally disabled" for "mentally defective" twice in subdivision (a)(2).

ARTICLE 8.

Assaults.

§ 14-32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments.

CASE NOTES

I. General Consideration.
IX. Instructions to Jury.

I. GENERAL CONSIDERATION.

Primary distinction between felonious assault under G.S. 14-32 and misdemeanor assault under G.S. 14-33 is that a conviction of felonious assault requires a showing that a deadly weapon was used and serious injury resulted, while if the evidence shows that only one of the two elements is present, i.e., that either a deadly weapon was used or serious injury resulted, the offense is punishable only as a misdemeanor. State v. Lowe, — N.C. App. —, 564 S.E.2d 313, 2002 N.C. App. LEXIS 651 (2002).

Applied in State v. White, 355 N.C. 696, 565 S.E.2d 55, 2002 N.C. LEXIS 675 (2002).

Cited in State v. Williams, — N.C. App. —, 563 S.E.2d 616, 2002 N.C. App. LEXIS 577 (2002).

IX. INSTRUCTIONS TO JURY.

Failure to Submit Lesser Offense Held Not Error. —

Where the defendant was charged with assault with a deadly weapon inflicting serious injury, he was not entitled to instructions on either simple assault or assault with a deadly weapon, where the evidence was undisputed that the victim had been seriously injured. State v. Uvalle, — N.C. App. —, 565 S.E.2d 727, 2002 N.C. App. LEXIS 752 (2002).

Instruction as to Both Assault and Serious Injury. — The plain meaning of "inflicts serious injury," under G.S. 14-32(b) was that if a person committed an assault with a deadly weapon and serious injury resulted from that assault, the person was guilty of felonious assault, so a disjunctive jury instruction which did not allow a determination of whether the jury unanimously found that defendant both committed an assault with a deadly weapon and serious injury resulted from the use of that deadly weapon was fatally defective. State v. Lotharp, 148 N.C. App. 435, 559 S.E.2d 807, 2002 N.C. App. LEXIS 18 (2002).

Instruction Held Erroroneous. — As assault inflicting serious bodily injury is not a lesser included offense of assault with a deadly weapon with intent to kill and inflict serious injury, the trial court committed reversible error in submitting the former to the jury. State v. Hannah, 149 N.C. App. 713, 563 S.E.2d 1, 2002 N.C. App. LEXIS 296 (2002), cert. denied, 355 N.C. 754, 566 S.E.2d 81 (2002).

§ 14-32.4. Assault inflicting serious bodily injury.

CASE NOTES

What Is Serious Bodily Injury. — Proof of "serious bodily injury" requires proof of a more severe injury than the "serious injury" element of other assault offenses. State v. Williams, — N.C. App. —, 563 S.E.2d 616, 2002 N.C. App. LEXIS 577 (2002).

Serious Bodily Injury Shown. — Evidence that the victim had to have his jaw wired shut

for two months, causing him to lose a great deal of weight, and that he continued to suffer from back spasms as a result of two broken ribs, all as a result of his assault, was sufficient evidence of "serious bodily injury." State v. Williams, — N.C. App. —, 563 S.E.2d 616, 2002 N.C. App. LEXIS 577 (2002).

Lesser Included Offense. — As assault inflicting serious bodily injury is not a lesser included offense of assault with a deadly weapon with intent to kill and inflict serious injury, the trial court committed reversible error in submitting the former to the jury. State v. Hannah, 149 N.C. App. 713, 563 S.E.2d 1, 2002 N.C. App. LEXIS 296 (2002), cert. denied, 355 N.C. 754, 566 S.E.2d 81 (2002).

Cited in State v. Uvalle, — N.C. App. —, 565 S.E.2d 727, 2002 N.C. App. LEXIS 752 (2002).

§ 14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.

CASE NOTES

I. General Consideration.
II. Other Crimes.
V. Assaults on Females.

I. GENERAL CONSIDERATION.

Failure to Dismiss Charge Held Error. — Because the arrest warrant failed to charge defendant with the commission of a simple assault, G.S. 14-33(a), the trial court erred in failing to dismiss the charge as stated in the criminal pleading and the appellate court vacated defendant's conviction for assault. State v. Garcia, 146 N.C. App. 745, 553 S.E.2d 914, 2001 N.C. App. LEXIS 1076 (2001).

Cited in State v. Williams, — N.C. App. —, 563 S.E.2d 616, 2002 N.C. App. LEXIS 577 (2002); State v. Norman, 149 N.C. App. 588, 562 S.E.2d 453, 2002 N.C. App. LEXIS 268 (2002); In re Wilson, — N.C. App. —, 568 S.E.2d 862, 2002 N.C. App. LEXIS 1074 (2002).

II. OTHER CRIMES.

Misdemeanor Assault Inflicting Serious Injury. — Where the appellate court found sufficient evidence from which the jury could believe that fists and a commode lid were not used as deadly weapons but did inflict serious injury on victim, the trial court was required to give the instruction on the lesser included offense of misdemeanor assault inflicting serious injury. State v. Lowe, — N.C. App. —, 564 S.E.2d 313, 2002 N.C. App. LEXIS 651 (2002).

Failure to Instruct as to Lesser Offense Held Not Error. —

Where there was no dispute that defendant, who was charged with felonious assault with a deadly weapon inflicting serious injury, used a "deadly weapon," to cause the victim's injuries, or that those injuries were serious, he was not entitled to an instruction on the lesser included offense of misdemeanor assault State v. Uvalle, — N.C. App. —, 565 S.E.2d 727, 2002 N.C. App. LEXIS 752 (2002).

V. ASSAULTS ON FEMALES.

Amendment of Jury Instruction. — Trial court did not err in amending the jury instructions to read that the assault, in violation of G.S. 14-33(c)(2), could have been committed if defendant intentionally touched, however slight, the body of the alleged victim. State v. West, 146 N.C. App. 741, 554 S.E.2d 837, 2001 N.C. App. LEXIS 1075 (2001).

§ 14-33.2. Habitual misdemeanor assault.

Legal Periodicals. — Once, Twice, Four Times a Felon: North Carolina's Unconstitutional Recidivist Statutes, see 24 Campbell L. Rev. 381 (2001).

CASE NOTES

Indictments. — Indictment was insufficient to charge defendant with the felony of habitual misdemeanor assault where the absence of any indictment alleging violation of G.S. 14-33.2, habitual misdemeanor assault, rendered the principal indictment one which charged the defendant with only the misdemeanor of assault on a female. State v. Williams, — N.C. App. —, 568 S.E.2d 890, 2002 N.C. App. LEXIS 1081 (2002).

§ 14-34. Assaulting by pointing gun.

CASE NOTES

Cited in Integon Specialty Ins. Co. v. Austin, — N.C. App. —, 565 S.E.2d 736, 2002 N.C. App. LEXIS 749 (2002).

§ 14-34.1. Discharging certain barreled weapons or a firearm into occupied property.

CASE NOTES

A firearm can be discharged "into" occupied property even if the firearm itself is inside, etc.

The trial court properly denied defendant's motion to dismiss charges of discharging a firearm into occupied property under G.S. 14-34.1; there was substantial evidence from which a jury could have found that defendant fired "into" occupied property, as a witness indicated that although defendant was almost leaning inside the car, he was definitely standing outside and in the crease of the door when he shot the victim. State v. Alexander, — N.C. App. —, 568 S.E.2d 317, 2002 N.C. App. LEXIS 972 (2002).

Article 10.

Kidnapping and Abduction.

§ 14-39. Kidnapping.

CASE NOTES

I. General Consideration.
II. Kidnapping, Generally.
VI. First-Degree Kidnapping.

I. GENERAL CONSIDERATION.

First and Second Degrees Distinguished. — There are two degrees of kidnapping in North Carolina: (1) if the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony; (2) if the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony. State v. Pratt, — N.C. App. —, 568 S.E.2d 276, 2002 N.C. App. LEXIS 970 (2002).

The difference between kidnapping and the lesser-included offense of false imprisonment, etc.

Under G.S. 14-39(a)(2), (3) (2001), any person who, unlawfully and without consent, confines, restrains, or removes from one place to another any other person is guilty of kidnapping if such confinement, restraint or removal is for one of several purposes outlined in the statute, including facilitating the commission of any felony and terrorizing the person so confined. State v. Pratt, — N.C. App. —, 568 S.E.2d 276, 2002 N.C. App. LEXIS 970 (2002).

Cited in State v. Morris, 147 N.C. App. 247, 555 S.E.2d 353, 2001 N.C. App. LEXIS 1140 (2001), aff'd, 355 N.C. 488, 562 S.E.2d 421 (2002); State v. Cobb, 150 N.C. App. 31, 563 S.E.2d 600, 2002 N.C. App. LEXIS 387 (2002), cert. denied, 356 N.C. 169, 568 S.E.2d 618 (2002); State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002).

II. KIDNAPPING, GENERALLY.

Evidence of Purpose Held Sufficient. — When defendant presented the victim's withdrawal slip and driver's license to the bank while holding the victim hostage in the passenger's seat, she made a false representation to the bank that the withdrawal was legitimate and had the continuing support of the victim;

because defendant's misrepresentation was clearly calculated to mislead and did in fact mislead, defendant's actions constituted a false pretense and the "purpose" element of the kidnapping charge was satisfied. State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, — U.S. —, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

Evidence held sufficient, etc.

Evidence showed the required restraint for kidnapping where an inference could be made that defendant fraudulently induced the victim to return to his apartment by assuring her that he would help her, fraudulently induced her to enter his bedroom, and once there, restrained her, brandished a knife, and threatened either to have sex with her or to kill her. State v. Robertson, 149 N.C. App. 563, 562 S.E.2d 551, 2002 N.C. App. LEXIS 288 (2002).

VI. FIRST-DEGREE KIDNAPPING.

Illustrative Case. — Trial court's refusal to dismiss the charges of first-degree kidnapping or to lower the charges to second-degree kidnapping was proper where: (1) defendant ordered two victims into the woods at gunpoint, where he bound their hands and wrapped their faces with duct tape; (2) defendant repeatedly threatened to kill the men if they did not comply with his demands; and (3) defendant left the victims bound and gagged in the woods at nighttime. State v. Pratt, — N.C. App. —, 568 S.E.2d 276, 2002 N.C. App. LEXIS 970 (2002).

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

ARTICLE 14.

Burglary and Other Housebreakings.

§ 14-51. First and second degree burglary.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in State v. Osborne, 149 N.C. App. 235, 562 S.E.2d 528, 2002 N.C. App. LEXIS 217 (2002); State v. Hannah, 149 N.C. App. 713, 563 S.E.2d 1, 2002 N.C. App. LEXIS 296 (2002), cert. denied, 355 N.C. 754, 566 S.E.2d 81 (2002); State v. Scott, — N.C. App. —, 564 S.E.2d 285, 2002 N.C. App. LEXIS 576 (2002).

§ 14-51.1. Use of deadly physical force against an intruder.

CASE NOTES

Front Porch of Home. —

Whether a porch, deck, garage, or other appurtenance attached to a dwelling is within the home or residence for purposes of G.S. 14-51.1 is a question of fact best left for the jury's determination based on the evidence presented at trial. State v. Blue, — N.C. —, 565 S.E.2d 133, 2002 N.C. LEXIS 540 (2002).

When a trial judge, in response to the jury's question asking whether a porch was inside a home, responded that "a porch is not inside the home," this was tantamount to instructing the jury that the porch could not as a matter of law be inside the home for purposes of a defense of habitation defense under G.S. 14-51.1, and it improperly invaded the province of the jury and commented on the evidence. State v. Blue, — N.C. —, 565 S.E.2d 133, 2002 N.C. LEXIS 540 (2002).

Construction. — In enacting G.S. 14-51.1, the general assembly broadened the defense of habitation to make the use of deadly force justifiable whether to prevent unlawful entry into the home or to terminate an unlawful entry by an intruder. State v. Blue, — N.C. —, 565 S.E.2d 133, 2002 N.C. LEXIS 540 (2002).

§ 14-54. Breaking or entering buildings generally.

CASE NOTES

I. General Consideration.
VII. Indictment.
IX. Trial.
B. Evidence.

I. GENERAL CONSIDERATION.

Cited in State v. Norman, 149 N.C. App. 588, 562 S.E.2d 453, 2002 N.C. App. LEXIS 268 (2002).

VII. INDICTMENT.

Indictment Must Sufficiently Describe Crime. —

Where larceny charge should have been dismissed by the trial court due to a variance between the indictment and the evidence at trial, a breaking and entering felony conviction was vacated. State v. Craycraft, — N.C. App. —, 567 S.E.2d 206, 2002 N.C. App. LEXIS 892 (2002).

IX. TRIAL.

B. Evidence.

Evidence Held Sufficient. —

Though the owner of the goods allegedly stolen by defendant after he broke and entered the owner's home did not testify, evidence that defendant exited the premise through a window with a crowbar in his hand, as well as a knapsack or jacket containing the goods, and that pry marks were located on the window, was sufficient to convict him under this section. State v. Jones, — N.C. App. —, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002).

Article 15.

Arson and Other Burnings.

§ 14-58. Punishment for arson.

CASE NOTES

Applied in State v. Scott, — N.C. App. —, 564 S.E.2d 285, 2002 N.C. App. LEXIS 576 (2002).

§ 14-65. Fraudulently setting fire to dwelling houses.

CASE NOTES

Sufficiency of Evidence. —

Evidence that defendant was delinquent in his mortgage payments and that the proceeds from his homeowner's insurance policy would have been sufficient to cover his mortgage debt, along with evidence contradicting his accounts of his whereabouts the day of the fire, and evidence that there had been no forcible entry to the house, that the fire was intentionally started inside the house, that items had been cleared from defendant's yard immediately preceding the fire, and that items defendant claimed were lost in the fire being found in his new house were sufficient to sustain a charge of fraudulently burning a dwelling. State v. Payne, 149 N.C. App. 421, 561 S.E.2d 507, 2002 N.C. App. LEXIS 218 (2002).

Aggravation of Sentence. — Fact that fraudulently burning a dwelling involved property of great monetary value was not an element of the offense, so it could be used to aggravate defendant's sentence. State v. Payne, 149 N.C. App. 421, 561 S.E.2d 507, 2002 N.C. App. LEXIS 218 (2002).

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

ARTICLE 16.

Larceny.

§ 14-71.1. Possessing stolen goods.

CASE NOTES

Applied in State v. Jones, — N.C. App. —, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002).

§ 14-72. Larceny of property; receiving stolen goods or possessing stolen goods.

CASE NOTES

I. General Consideration.
VIII. Practice and Procedure.
A. Indictment.

I. GENERAL CONSIDERATION.

Applied in State v. Jones, — N.C. App. —, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002).

VIII. PRACTICE AND PROCEDURE.

A. Indictment.

Ownership of Property. —
Indictment lacking an indication of the victim's legal ownership of the property at issue was insufficient on a larceny charge because the State is required to prove ownership and a proper indictment must identify as victim a legal entity capable of owning property. State v. Norman, 149 N.C. App. 588, 562 S.E.2d 453, 2002 N.C. App. LEXIS 268 (2002).

ARTICLE 17.

Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons.

CASE NOTES

I. General Consideration.
III. Armed Robbery.
V. Use or Threatened Use of Dangerous Weapon.
B. Dangerous Weapon.
VIII. Indictment.
X. Instructions.

I. GENERAL CONSIDERATION.

Applied in State v. Cobb, 150 N.C. App. 31, 563 S.E.2d 600, 2002 N.C. App. LEXIS 387 (2002), cert. denied, 356 N.C. 169, 568 S.E.2d 618 (2002).

Cited in State v. Frazier, 150 N.C. App. 416, 562 S.E.2d 910, 2002 N.C. App. LEXIS 483 (2002).

III. ARMED ROBBERY.

Decedent as Victim. — A homicide victim is still a person, within the meaning of the robbery statute, when the interval between the fatal blow and the taking of property is short. State v. Wilson, 354 N.C. 493, 556 S.E.2d 272, 2001 N.C. LEXIS 1236 (2001).

Robbery from a dead victim was possible when the taking and the death were part of a continuous chain of events. State v. Gainey, 355 N.C. 73, 558 S.E.2d 463, 2002 N.C. LEXIS 21 (2002).

V. USE OR THREATENED USE OF DANGEROUS WEAPON.

B. Dangerous Weapon.

BB Gun. — Defendant's conviction of robbery with a dangerous weapon by the use of a BB gun required evidence that a BB gun was a dangerous weapon, as well as a jury instruction on the definition of a dangerous weapon. State v. Fleming, 148 N.C. App. 16, 557 S.E.2d 560, 2001 N.C. App. LEXIS 1276 (2001).

VIII. INDICTMENT.

Same — Particular Identity or Value. — Attempted armed robbery indictment which alleged the attempted taking of an unspecified amount of cash from the presence of an individual with the use of a weapon was not insufficient for failing to specify the amount of cash or the true legal owner of the cash. State v. Burroughs, 147 N.C. App. 693, 556 S.E.2d 339, 2001 N.C. App. LEXIS 1240 (2001).

X. INSTRUCTIONS.

Common Purpose. — Fact that the trial court's instructions on the law of acting in concert allowed the jury to convict defendant of robbery with a dangerous weapon without proof that he shared a common purpose with his codefendants to use a firearm in the robbery did not result in error, in light of the principle that G.S. 14-87 did not create a new crime but merely increased the punishment which could be imposed for common law robbery when the perpetrator used a weapon. State v. Thompson, 149 N.C. App. 276, 560 S.E.2d 568, 2002 N.C. App. LEXIS 213 (2002), appeal dismissed, 355 N.C. 499, 564 S.E.2d 231 (2002).

ARTICLE 19.

False Pretenses and Cheats.

§ 14-100. Obtaining property by false pretenses.

CASE NOTES

II. Elements of Offense.
IV. Illustrative Cases.

II. ELEMENTS OF OFFENSE.

Deceit Shown. — Where defendant obtained items by having a store clerk charge them to defendant's employer's account using a false purchase order, and the store clerk testified that he believed that defendant was buying the items on account for the employer with the employer's authorization, the State sufficiently proved deceit as an element of obtaining property by false pretenses, because the clerk was deceived, even if the store owner, upon seeing the purchase order after the sale, was not deceived. State v. Edwards, — N.C. App. —, 563 S.E.2d 288, 2002 N.C. App. LEXIS 589 (2002).

Charges of Embezzlement and False Pretenses Mutually Exclusive. —

Trial court did not err by finding that defendant had taken advantage of a position of trust by taking money from people who sought his help securing loans and using that finding as an aggravating factor when it imposed sentence, but because defendant's plea to a charge that he took money by false pretenses when he withdrew $22,200 from a swimming association's account was really a plea to embezzlement, the trial court should not have used the trust or confidence aggravating factor when it sentenced defendant for committing that crime. State v. Murphy, — N.C. App. —, 567 S.E.2d 442, 2002 N.C. App. LEXIS 923 (2002).

IV. ILLUSTRATIVE CASES.

Evidence Held Sufficient. —

When defendant presented the victim's withdrawal slip and driver's license to the bank while holding the victim hostage in the passenger's seat, she made a false representation to the bank that the withdrawal was legitimate and had the continuing support of the victim; defendant's misrepresentation was clearly cal-

culated to mislead and did in fact mislead. State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, — U.S. —, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

Article 19B.

Financial Transaction Card Crime Act.

§ 14-113.8. Definitions.

The following words and phrases as used in this Chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) Acquirer. — "Acquirer" means a business organization, financial institution, or an agent of a business organization or financial institution that authorizes a merchant to accept payment by financial transaction card for money, goods, services or anything else of value.

(1a) Automated Banking Device. — "Automated banking device" means any machine which when properly activated by a financial transaction card and/or personal identification code may be used for any of the purposes for which a financial transaction card may be used.

(2) Cardholder. — "Cardholder" means the person or organization named on the face of a financial transaction card to whom or for whose benefit the financial transaction card is issued by an issuer.

(3) Expired Financial Transaction Card. — "Expired financial transaction card" means a financial transaction card which is no longer valid because the term shown on it has elapsed.

(4) Financial Transaction Card. — "Financial transaction card" or "FTC" means any instrument or device whether known as a credit card, credit plate, bank services card, banking card, check guarantee card, debit card, or by any other name, issued with or without fee by an issuer for the use of the cardholder:

a. In obtaining money, goods, services, or anything else of value on credit; or

b. In certifying or guaranteeing to a person or business the availability to the cardholder of funds on deposit that are equal to or greater than the amount necessary to honor a draft or check payable to the order of such person or business; or

c. In providing the cardholder access to a demand deposit account or time deposit account for the purpose of:

1. Making deposits of money or checks therein; or
2. Withdrawing funds in the form of money, money orders, or traveler's checks therefrom; or
3. Transferring funds from any demand deposit account or time deposit account to any other demand deposit account or time deposit account; or
4. Transferring funds from any demand deposit account or time deposit account to any credit card accounts, overdraft privilege accounts, loan accounts, or any other credit accounts in full or partial satisfaction of any outstanding balance owed existing therein; or
5. For the purchase of goods, services or anything else of value; or
6. Obtaining information pertaining to any demand deposit account or time deposit account;

d. But shall not include a telephone number, credit number, or other credit device which is covered by the provisions of Article 19A of this Chapter.

(5) Issuer. — "Issuer" means the business organization or financial institution or its duly authorized agent which issues a financial transaction card.

(6) Personal Identification Code. — "Personal identification code" means a numeric and/or alphabetical code assigned to the cardholder of a financial transaction card by the issuer to permit authorized electronic use of that FTC.

(7) Presenting. — "Presenting" means, as used herein, those actions taken by a cardholder or any person to introduce a financial transaction card into an automated banking device, including utilization of a personal identification code, or merely displaying or showing a financial transaction card to the issuer, or to any person or organization providing money, goods, services, or anything else of value, or any other entity with intent to defraud.

(8) Receives. — "Receives" or "receiving" means acquiring possession or control or accepting a financial transaction card as security for a loan.

(9) Revoked Financial Transaction Card. — "Revoked financial transaction card" means a financial transaction card which is no longer valid because permission to use it has been suspended or terminated by the issuer.

(10) Scanning Device. — "Scanning device means a scanner, reader, or any other device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on a financial transaction card. (1967, c. 1244, s. 2; 1971, c. 1213, s. 4; 1979, c. 741, s. 1; 1989, c. 161, s. 1; 2002-175, s. 2.)

Effect of Amendments. — Session Laws 2002-175, s. 2, effective December 1, 2002, and applicable to offenses committed on or after that date, added subdivision (10).

CASE NOTES

Cited in State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002).

§ 14-113.9. Financial transaction card theft.

(a) A person is guilty of financial transaction card theft when the person does any of the following:

(1) Takes, obtains or withholds a financial transaction card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it; or who, with knowledge that it has been so taken, obtained or withheld, receives the financial transaction card with intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder.

(2) Receives a financial transaction card that he knows to have been lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder, and who retains possession with intent to use it or to sell it or to transfer it to a person other than the issuer or the cardholder.

(3) Not being the issuer, sells a financial transaction card or buys a financial transaction card from a person other than the issuer.

(4) Not being the issuer, during any 12-month period, receives financial transaction cards issued in the names of two or more persons which he has reason to know were taken or retained under circumstances which constitute a violation of G.S. 14-113.13(a)(3) and subdivision (3) of subsection (a) of this section.

(5) With the intent to defraud any person, either (i) uses a scanning device to access, read, obtain, memorize, or store, temporarily or permanently, information encoded on another person's financial transaction card, or (ii) receives the encoded information from another person's financial transaction card.

(b) Credit card theft is punishable as provided by G.S. 14-113.17(b). (1967, c. 1244, s. 2; 1979, c. 741, s. 1; c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 2002-175, s. 3.)

Effect of Amendments. — Session Laws 2002-175, s. 3, effective December 1, 2002, and applicable to offenses committed on or after that date, in subsection (a), added "the person does any of the following" at the end of the introductory paragraph, substituted "Takes" for "He takes" in subdivision (1), substituted "Receives" for "He receives" in subdivision (2), substituted "Not" for "He, not" in subdivisions (3) and (4), added subdivision (5), and made minor stylistic changes throughout the subsection.

CASE NOTES

Cited in State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002).

Article 19C.

Financial Identity Fraud.

§ 14-113.20. Financial identity fraud.

(a) A person who knowingly obtains, possesses, or uses identifying information of another person, living or dead, with the intent to fraudulently represent that the person is the other person for the purposes of making financial or credit transactions in the other person's name, to obtain anything of value, benefit, or advantage, or for the purpose of avoiding legal consequences is guilty of a felony punishable as provided in G.S. 14-113.22(a).

(b) The term "identifying information" as used in this Article includes the following:

(1) Social security numbers.
(2) Drivers license numbers.
(3) Checking account numbers.
(4) Savings account numbers.
(5) Credit card numbers.
(6) Debit card numbers.
(7) Personal Identification (PIN) Code as defined in G.S. 14-113.8(6).
(8) Electronic identification numbers.
(9) Digital signatures.
(10) Any other numbers or information that can be used to access a person's financial resources.
(11) Biometric data.
(12) Fingerprints.
(13) Passwords.
(14) Parent's legal surname prior to marriage.

(c) It shall not be a violation under this Article for a person to do any of the following:

(1) Lawfully obtain credit information in the course of a bona fide consumer or commercial transaction.
(2) Lawfully exercise, in good faith, a security interest or a right of offset by a creditor or financial institution.

(3) Lawfully comply, in good faith, with any warrant, court order, levy, garnishment, attachment, or other judicial or administrative order, decree, or directive, when any party is required to do so. (1999-449, s. 1; 2000-140, s. 37; 2002-175, s. 4.)

Cross References. — As to damages for identity fraud, see G.S. 1-539.2C.

Effect of Amendments. — Session Laws 2002-175, s. 4, effective December 1, 2002, and applicable to offenses committed on or after that date, substituted "identifying information of another person, living or dead" for "personal identifying information of another person without the consent of that other person" and inserted "to obtain anything of value, benefit, or advantage" in subsection (a); in subsection (b), substituted "Article" for "section" in the introductory paragraph, and added subdivisions (11) through (14); and substituted "Article" for "section" in the introductory paragraph of subsection (c).

§ 14-113.20A. Trafficking in stolen identities.

(a) It is unlawful for a person to sell, transfer, or purchase the identifying information of another person with the intent to commit financial identity fraud, or to assist another person in committing financial identity fraud, as set forth in G.S. 14-113.20.

(b) A violation of this section is a felony punishable as provided in G.S. 14-113.22(a1). (2002-175, s. 5.)

Cross References. — As to damages for identity fraud, see G.S. 1-539.2C.

Editor's Note. — Session Laws 2002-175, s. 9, made this section effective December 1, 2002, and applicable to offenses committed on or after that date.

§ 14-113.22. Punishment and liability.

(a) A violation of G.S.14-113.20(a) is punishable as a Class G felony, except it is punishable as a Class F felony if: (i) the victim suffers arrest, detention, or conviction as a proximate result of the offense, or (ii) the person is in possession of the identifying information pertaining to three or more separate persons.

(a1) A violation of G.S. 14-113.20A is punishable as a Class E felony.

(a2) The court may order a person convicted under G.S. 14-113.20 or G.S. 14-113.20A to pay restitution pursuant to Article 81C of Chapter 15A of the General Statutes for financial loss caused by the violation to any person. Financial loss included under this subsection may include, in addition to actual losses, lost wages, attorneys' fees, and other costs incurred by the victim in correcting his or her credit history or credit rating, or in connection with any criminal, civil, or administrative proceeding brought against the victim resulting from the misappropriation of the victim's identifying information.

(b) Notwithstanding subsection (a), (a1), or (a2) of this section, any person who commits an act made unlawful by this Article may also be liable for damages under G.S. 1-539.2C.

(c) In any case in which a person obtains identifying information of another person in violation of this Article, uses that information to commit a crime in addition to a violation of this Article, and is convicted of that additional crime, the court records shall reflect that the person whose identity was falsely used to commit the crime did not commit the crime. (1999-449, s. 1; 2002-175, ss. 6, 7.)

Cross References. — As to trafficking in stolen identities, see G.S. 14-113.20A.

Effect of Amendments. — Session Laws 2002-175, ss. 6, 7, effective December 1, 2002, and applicable to offenses committed on or after that date, rewrote the section.

Article 21.

Forgery.

§ 14-119. Forgery of notes, checks, and other securities; counterfeiting of instruments.

(a) It is unlawful for any person to forge or counterfeit any instrument, or possess any counterfeit instrument, with the intent to injure or defraud any person, financial institution, or governmental unit. Any person in violation of this subsection is guilty of a Class I felony.

(b) Any person who transports or possesses five or more counterfeit instruments with the intent to injure or defraud any person, financial institution, or governmental unit is guilty of a Class G felony.

(c) As used in this Article, the term:

(1) "Counterfeit" means to manufacture, copy, reproduce, or forge an instrument that purports to be genuine, but is not, because it has been falsely copied, reproduced, forged, manufactured, embossed, encoded, duplicated, or altered.

(2) "Financial institution" means any mutual fund, money market fund, credit union, savings and loan association, bank, or similar institution, either foreign or domestic.

(3) "Governmental unit" means the United States, any United States territory, any state of the United States, any political subdivision, agency, or instrumentality of any state, or any foreign jurisdiction.

(4) "Instrument" means (i) any currency, bill, note, warrant, check, order, or similar instrument of or on any financial institution or governmental unit, or any cashier or officer of the institution or unit; or (ii) any security issued by, or on behalf of, any corporation, financial institution, or governmental unit. (1819, c. 994, s. 1, P.R.; R.C., c. 34, s. 60; Code, s. 1030; Rev., s. 3419; C.S., s. 4293; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1983, c. 397, s. 1; 2002-175, s. 1.)

Effect of Amendments. — Session Laws 2002-175, s. 1, effective December 1, 2002, and applicable to offenses committed on or after that date, rewrote the section.

SUBCHAPTER VI. CRIMINAL TRESPASS.

Article 22.

Damages and Other Offenses to Land and Fixtures.

§ 14-127. Willful and wanton injury to real property.

CASE NOTES

Evidence Held Sufficient. —

There was sufficient evidence to support juvenile delinquency adjudication based on violation of statute prohibiting injury to real property. In re Pineault, — N.C. App. —, 566 S.E.2d 854, 2002 N.C. App. LEXIS 896 (2002).

ARTICLE 22B.

First and Second Degree Trespass.

§ 14-159.14. Lesser included offenses.

CASE NOTES

Conviction of Lesser Offense Vacated. — First degree trespass was a lesser included offense of misdemeanor breaking and entering; hence, where defendant was erroneously convicted of both offenses, his conviction for first degree trespass had to be vacated. State v. Williams, — N.C. App. —, 563 S.E.2d 616, 2002 N.C. App. LEXIS 577 (2002).

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

ARTICLE 26.

Offenses Against Public Morality and Decency.

§ 14-178. Incest.

(a) Offense. — A person commits the offense of incest if the person engages in carnal intercourse with the person's (i) grandparent or grandchild, (ii) parent or child or stepchild or legally adopted child, (iii) brother or sister of the half or whole blood, or (iv) uncle, aunt, nephew, or niece.

(b) Punishment and Sentencing. —

(1) A person is guilty of a Class B1 felony if either of the following occurs:

a. The person commits incest against a child under the age of 13 and the person is at least 12 years old and is at least four years older than the child when the incest occurred.

b. The person commits incest against a child who is 13, 14, or 15 years old and the person is at least six years older than the child when the incest occurred.

(2) A person is guilty of a Class C felony if the person commits incest against a child who is 13, 14, or 15 and the person is more than four but less than six years older than the child when the incest occurred.

(3) In all other cases of incest, the parties are guilty of a Class F felony.

(c) No Liability for Children Under 16. — No child under the age of 16 is liable under this section if the other person is at least four years older when the incest occurred. (1879, c. 16, s. 1; Code, s. 1060; Rev., s. 3351; 1911, c. 16; C.S., s. 4337; 1965, c. 132; 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. 1192; 1994, Ex. Sess., c. 24, s. 14(c); 2002-119, s. 1.)

Editor's Note. —

The preamble to Session Laws 2002-119, provides: "Whereas, despite the progress made in modernizing laws to protect children in North Carolina, a little-known loophole exists in the General Statutes of North Carolina that has very troubling consequences for some abused children; and

"Whereas, this loophole allows far lesser penalties for perpetrators convicted of sexually assaulting their own children than for those who rape or molest other children; and

"Whereas, this unintended disparity is the result of archaic incest laws that date to 1879; statutes that were originally intended to limit intermarriage among family members but now hamper modern efforts to fight sexual abuse of children; and

"Whereas, this double standard, that essentially rewards perpetrators for the most un-

thinkable betrayal of a child's trust, does not reflect the values and goals of the citizens of North Carolina; and

"Whereas, criminals who sexually assault children should be prosecuted without regard to familial relationship; Now, therefore, the General Assembly of North Carolina enacts:"

Effect of Amendments. — Session Laws 2002-119, s. 1, effective December 1, 2002, and applicable to offenses committed on or after that date, rewrote the section.

§ 14-179: Repealed by Session Laws 2002-119, s. 2, effective December 1, 2002.

Cross References. — For present provisions pertaining to incest between uncle and niece and nephew and aunt, see G.S. 14-178.

§ 14-202.1. Taking indecent liberties with children.

CASE NOTES

I. General Consideration.
II. Elements and Proof of Offense.
III. Evidence.

I. GENERAL CONSIDERATION.

Cited in State v. Yearwood, 147 N.C. App. 662, 556 S.E.2d 672, 2001 N.C. App. LEXIS 1256 (2001); United States v. Pierce, 278 F.3d 282, 2002 U.S. App. LEXIS 447 (4th Cir. 2002).

II. ELEMENTS AND PROOF OF OFFENSE.

Conviction on Bill of Particulars Not Required. — Trial court did not err during defendant's trial on the charge of taking indecent liberties with a child by denying the defendant's motion to require the jury to convict him on specific acts set out in a bill of particulars; even if some jurors found that one type of sexual conduct occurred and other jurors found that another type of sexual conduct occurred, the jury as a whole could unanimously find that there occurred sexual conduct within the ambit of immoral, improper, or indecent liberties. State v. Brothers, — N.C. App. —, 564 S.E.2d 603, 2002 N.C. App. LEXIS 653 (2002).

III. EVIDENCE.

Hearsay Testimony Held Sufficient. — Testimony of minor victim's counselor, examining nurse, and examining doctor as to victim's statements and physical condition was sufficient to withstand defendant's motion to dismiss five counts of indecent liberties with a minor child offenses after the victim refused to testify. State v. Isenberg, 148 N.C. App. 29, 557 S.E.2d 568, 2001 N.C. App. LEXIS 1266 (2001), cert. denied, 355 N.C. 288, 561 S.E.2d 268 (2002).

Testimony by Child, Other Children, and Social Worker Held Sufficient. — Child victim's testimony of defendant's conduct and testimony by previous child victims of similar conduct, along with expert testimony of clinical social worker, was sufficient to convict defendant of taking indecent liberties with a child. State v. Carpenter, 147 N.C. App. 386, 556 S.E.2d 316, 2001 N.C. App. LEXIS 1185 (2001), cert. denied, 355 N.C. 222, 560 S.E.2d 365 (2002).

§ 14-202.2. Indecent liberties between children.

CASE NOTES

Evidence Held Sufficient. — Evidence was sufficient to support juvenile's adjudication as a delinquent for taking indecent liberties with a child where the juvenile undertook the act for the purpose of arousing or gratifying sexual desire. In re T.C.S., 148 N.C. App. 297, 558 S.E.2d 251, 2002 N.C. App. LEXIS 12 (2002).

Cited in State v. Brothers, — N.C. App. —, 564 S.E.2d 603, 2002 N.C. App. LEXIS 653 (2002).

ARTICLE 27A.

Sex Offender and Public Protection Registration Programs.

Part 1. Registration Programs, Purpose and Definitions Generally.

§ 14-208.6. Definitions.

The following definitions apply in this Article:

(1a) "Aggravated offense" means any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

(1b) "County registry" means the information compiled by the sheriff of a county in compliance with this Article.

(1c) "Division" means the Division of Criminal Statistics of the Department of Justice.

(1d) "Employed" includes employment that is full-time or part-time for a period of time exceeding 14 days or for an aggregate period of time exceeding 30 days during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit.

(1e) "Institution of higher education" means any postsecondary public or private educational institution, including any trade or professional institution, college, or university.

(1f) "Mental abnormality" means a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of others.

(1g) "Nonresident student" means a person who is not a resident of North Carolina but who is enrolled in any type of school in the State on a part-time or full-time basis.

(1h) "Nonresident worker" means a person who is not a resident of North Carolina but who has employment or carries on a vocation in the State, on a part-time or full-time basis, with or without compensation or government or educational benefit, for more than 14 days, or for an aggregate period exceeding 30 days in a calendar year.

(1i) "Offense against a minor" means any of the following offenses if the offense is committed against a minor, and the person committing the offense is not the minor's parent: G.S. 14-39 (kidnapping), G.S. 14-41 (abduction of children), and G.S. 14-43.3 (felonious restraint). The term also includes the following if the person convicted of the following is not the minor's parent: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.

(2) "Penal institution" means:

a. A detention facility operated under the jurisdiction of the Division of Prisons of the Department of Correction;

b. A detention facility operated under the jurisdiction of another state or the federal government; or

c. A detention facility operated by a local government in this State or another state.

(2a) "Personality disorder" means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.

(2b) "Recidivist" means a person who has a prior conviction for an offense that is described in G.S. 14-208.6(4).

(3) "Release" means discharged or paroled.

(4) "Reportable conviction" means:

a. A final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting. A final conviction for aiding and abetting is a reportable conviction only if the court sentencing the individual finds that the registration of that individual under this Article furthers the purposes of this Article as stated in G.S. 14-208.5.

b. A final conviction in another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense as defined by this section.

c. A final conviction in a federal jurisdiction (including a court martial) of an offense, which is substantially similar to an offense against a minor or a sexually violent offense as defined by this section.

(5) "Sexually violent offense" means a violation of G.S. 14-27.2 (first degree rape), G.S. 14-27.3 (second degree rape), G.S. 14-27.4 (first degree sexual offense), G.S. 14-27.5 (second degree sexual offense), G.S. 14-27.6 (attempted rape or sexual offense), G.S. 14-27.7 (intercourse and sexual offense with certain victims), G.S. 14-178 (incest between near relatives), G.S. 14-190.6 (employing or permitting minor to assist in offenses against public morality and decency), G.S. 14-190.16 (first degree sexual exploitation of a minor), G.S. 14-190.17 (second degree sexual exploitation of a minor), G.S. 14-190.17A (third degree sexual exploitation of a minor), G.S. 14-190.18 (promoting prostitution of a minor), G.S. 14-190.19 (participating in the prostitution of a minor), or G.S. 14-202.1 (taking indecent liberties with children). The term also includes the following: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.

(6) "Sexually violent predator" means a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses directed at strangers or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.

(7) "Sheriff" means the sheriff of a county in this State.

(8) "Statewide registry" means the central registry compiled by the Division in accordance with G.S. 14-208.14.

(9) "Student" means a person who is enrolled on a full-time or part-time basis, in any postsecondary public or private educational institution, including any trade or professional institution, or other institution of higher education. (1995, c. 545, s. 1; 1997-15, ss. 1, 2; 1997-516, s. 1; 1999-363, s. 1; 2001-373, s. 1; 2002-147, s. 16.)

Effect of Amendments. — Session Laws 2002-147, s. 16, effective October 9, 2002, and applicable to persons convicted on or after that date, inserted subdivisions (1d)

and (1e), redesignated former subdivisions (1d) through (1g) as subdivisions (1f) through (1i); and added subdivision (9).

OPINIONS OF ATTORNEY GENERAL

Who Must Register. — An individual convicted of the federal offense of sexual abuse of a ward is required to register as a sex offender. See opinion of Attorney General to Sheriff Johnny M. Williams, Warren County Sheriff's Office, 2002 N.C. AG LEXIS 19 (6/24/02).

CASE NOTES

Cited in State v. Parks, 147 N.C. App. 485, 556 S.E.2d 20, 2001 N.C. App. LEXIS 1184 (2001).

Part 2. Sex Offender and Public Protection Registration Program.

§ 14-208.7. Registration.

(a) A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides. If the person moves to North Carolina from outside this State, the person shall register within 10 days of establishing residence in this State, or whenever the person has been present in the State for 15 days, whichever comes first. If the person is a current resident of North Carolina, the person shall register:

(1) Within 10 days of release from a penal institution or arrival in a county to live outside a penal institution; or

(2) Immediately upon conviction for a reportable offense where an active term of imprisonment was not imposed.

Registration shall be maintained for a period of 10 years following release from a penal institution. If no active term of imprisonment was imposed, registration shall be maintained for a period of 10 years following each conviction for a reportable offense.

(a1) A person who is a nonresident student or a nonresident worker and who has a reportable conviction, or is required to register in the person's state of residency, is required to maintain registration with the sheriff of the county where the person works or attends school. In addition to the information required under subsection (b) of this section, the person shall also provide information regarding the person's school or place of employment as appropriate and the person's address in his or her state of residence.

(b) The Division shall provide each sheriff with forms for registering persons as required by this Article. The registration form shall require:

(1) The person's full name, each alias, date of birth, sex, race, height, weight, eye color, hair color, drivers license number, and home address;

(2) The type of offense for which the person was convicted, the date of conviction, and the sentence imposed;

(3) A current photograph;

(4) The person's fingerprints;

(5) A statement indicating whether the person is a student or expects to enroll as a student within a year of registering. If the person is a student or expects to enroll as a student within a year of registration,

then the registration form shall also require the name and address of the educational institution at which the person is a student or expects to enroll as a student; and

(6) A statement indicating whether the person is employed or expects to be employed at an institution of higher education within a year of registering. If the person is employed or expects to be employed at an institution of higher education within a year of registration, then the registration form shall also require the name and address of the educational institution at which the person is or expects to be employed.

The sheriff shall photograph the individual at the time of registration and take fingerprints from the individual at the time of registration both of which will be kept as part of the registration form. The registrant will not be required to pay any fees for the photograph or fingerprints taken at the time of registration.

(c) When a person registers, the sheriff with whom the person registered shall immediately send the registration information to the Division in a manner determined by the Division. The sheriff shall retain the original registration form and other information collected and shall compile the information that is a public record under this Part into a county registry. (1995, c. 545, s. 1; 1997-516, s. 1; 2001-373, s. 4; 2002-147, s. 17.)

Effect of Amendments. — Session Laws 2002-147, s. 17, effective October 9, 2002, and applicable to persons convicted on or after that date, added subdivisions (b)(5) and (6); and made minor stylistic changes.

CASE NOTES

Cited in State v. Parks, 147 N.C. App. 485, 556 S.E.2d 20, 2001 N.C. App. LEXIS 1184 (2001).

§ 14-208.8. Prerelease notification.

(a) At least 10 days, but not earlier than 30 days, before a person who will be subject to registration under this Article is due to be released from a penal institution, an official of the penal institution shall:

(1) Inform the person of the person's duty to register under this Article and require the person to sign a written statement that the person was so informed or, if the person refuses to sign the statement, certify that the person was so informed;

(2) Obtain the registration information required under G.S. 14-208.7(b)(1), (2), (5), and (6), as well as the address where the person expects to reside upon the person's release; and

(3) Send the Division and the sheriff of the county in which the person expects to reside the information collected in accordance with subdivision (2) of this subsection.

(b) If a person who is subject to registration under this Article does not receive an active term of imprisonment, the court pronouncing sentence shall conduct, at the time of sentencing, the notification procedures specified in subsection (a) of this section. (1995, c. 545, s. 1; 1997-516, s. 1; 2002-147, s. 18.)

Effect of Amendments. — Session Laws 2002-147, s. 18, effective October 9, 2002, and applicable to persons convicted on or after that date, substituted "G.S. 14-208.7(b)(1), (2), (5), and (6)" for "G.S. 14-208.7(b)(1) and (2)" in subdivision (a)(2).

§ 14-208.9. Change of address; change of academic status or educational employment status.

(a) If a person required to register changes address, the person shall provide written notice of the new address not later than the tenth day after the change to the sheriff of the county with whom the person had last registered. Upon receipt of the notice, the sheriff shall immediately forward this information to the Division. If the person moves to another county in this State, the Division shall inform the sheriff of the new county of the person's new residence.

(b) If a person required to register moves to another state, the person shall provide written notice of the new address not later than 10 days after the change to the sheriff of the county with whom the person had last registered. Upon receipt of the notice, the sheriff shall notify the person that the person must comply with the registration requirements in the new state of residence. The sheriff shall also immediately forward the change of address information to the Division, and the Division shall inform the appropriate state official in the state to which the registrant moves of the person's new address.

(c) If a person required to register changes his or her academic status either by enrolling as a student or by terminating enrollment as a student, then the person shall provide written notice of the new status not later than the tenth day after the change to the sheriff of the county with whom the person registered. The written notice shall include the name and address of the institution of higher education at which the student is or was enrolled. Upon receipt of the notice, the sheriff shall immediately forward this information to the Division.

(d) If a person required to register changes his or her employment status either by obtaining employment at an institution of higher education or by terminating employment at an institution of higher education, then the person shall provide written notice of the new status not later than the tenth day after the change to the sheriff of the county with whom the person registered. The written notice shall include the name and address of the institution of higher education at which the person is or was employed. Upon receipt of the notice, the sheriff shall immediately forward this information to the Division. (1995, c. 545, s. 1; 1997-516, s. 1; 2001-373, s. 5; 2002-147, s. 19.)

Effect of Amendments. — Session Laws 2002-176, s. 19, effective October 9, 2002, and applicable to persons convicted on or after that date, added subsections (c) and (d).

CASE NOTES

Form of Notice. — Reading G.S. 14-208.11(a)(2) in pari materia with G.S. 14-208.9, a sex offender required to register his address with the sheriff who fails to notify the sheriff with whom he last registered of a change of address in writing may be found guilty of a class F felony. State v. Holmes, 149 N.C. App. 572, 562 S.E.2d 26, 2002 N.C. App. LEXIS 285 (2002).

§ 14-208.11. Failure to register; falsification of verification notice; failure to return verification form; order for arrest.

(a) A person required by this Article to register who does any of the following is guilty of a Class F felony:

(1) Fails to register.

(2) Fails to notify the last registering sheriff of a change of address.

(3) Fails to return a verification notice as required under G.S. 14-208.9A.

(4) Forges or submits under false pretenses the information or verification notices required under this Article.
(5) Fails to inform the registering sheriff of enrollment or termination of enrollment as a student.
(6) Fails to inform the registering sheriff of employment at an institution of higher education or termination of employment at an institution of higher education.

(a1) If a person commits a violation of subsection (a) of this section, the probation officer, parole officer, or any other law enforcement officer who is aware of the violation shall immediately arrest the person in accordance with G.S. 15A-401, or seek an order for the person's arrest in accordance with G.S. 15A-305.

(b) Before a person convicted of a violation of this Article is due to be released from a penal institution, an official of the penal institution shall conduct the prerelease notification procedures specified under G.S. 14-208.8(a)(2) and (3). If upon a conviction for a violation of this Article, no active term of imprisonment is imposed, the court pronouncing sentence shall, at the time of sentencing, conduct the notification procedures specified under G.S. 14-208.8(a)(2) and (3). (1995, c. 545, s. 1; 1997-516, s. 1; 2002-147, s. 20.)

Effect of Amendments. — Session Laws 2002-147, s. 20, effective October 9, 2002, and applicable to persons convicted on or after that date, added subdivisions (a)(5) and (6).

CASE NOTES

Elements of Violation. — To meet its burden under G.S. 14-208.11(a)(2) of proving a sex offender's felonious failure to notify a sheriff of a change in his address, the State must prove that (1) defendant is a sex offender who is required to register; and (2) defendant failed to notify the last registering sheriff of a change of address in writing. State v. Holmes, 149 N.C. App. 572, 562 S.E.2d 26, 2002 N.C. App. LEXIS 285 (2002).

Form of Notice. — Reading G.S. 14-208.11(a)(2) in pari materia with G.S. 14-208.9, a sex offender required to register his address with the sheriff who fails to notify the sheriff with whom he last registered of a change of address in writing may be found guilty of a class F felony. State v. Holmes, 149 N.C. App. 572, 562 S.E.2d 26, 2002 N.C. App. LEXIS 285 (2002).

False Address Given. — Evidence was sufficient to show that defendant submitted information under false pretenses to the sexual offender registry when he registered his address on release from prison as being that of his estranged wife when he actually lived in another county with his sister. State v. Parks, 147 N.C. App. 485, 556 S.E.2d 20, 2001 N.C. App. LEXIS 1184 (2001).

§ 14-208.14. Statewide registry; Division of Criminal Statistics designated custodian of statewide registry.

(a) The Division of Criminal Statistics shall compile and keep current a central statewide sex offender registry. The Division is the State agency designated as the custodian of the statewide registry. As custodian the Division has the following responsibilities:

(1) To receive from the sheriff or any other law enforcement agency or penal institution all sex offender registrations, changes of address, changes of academic or educational employment status, and prerelease notifications required under this Article or under federal law. The Division shall also receive notices of any violation of this Article, including a failure to register or a failure to report a change of address.
(2) To provide all need-to-know law enforcement agencies (local, State, campus, federal, and those located in other states) immediately upon

receipt by the Division of any of the following: registration information, a prerelease notification, a change of address, a change of academic or educational employment status, or notice of a violation of this Article.

(2a) To notify the appropriate law enforcement unit at an institution of higher education as soon as possible upon receipt by the Division of relevant information based on registration information or notice of a change of academic or educational employment status. If an institution of higher education does not have a law enforcement unit, then the Division shall provide the information to the local law enforcement agency that has jurisdiction for the campus.

(3) To coordinate efforts among law enforcement agencies and penal institutions to ensure that the registration information, changes of address, prerelease notifications, and notices of failure to register or to report a change of address are conveyed in an appropriate and timely manner.

(4) To provide public access to the statewide registry in accordance with this Article.

(b) The statewide registry shall include the following:

(1) Registration information obtained by a sheriff or penal institution under this Article or from any other local or State law enforcement agency.

(2) Registration information received from a state or local law enforcement agency or penal institution in another state.

(3) Registration information received from a federal law enforcement agency or penal institution. (1997-516, s. 1; 2002-147, s. 21.)

Effect of Amendments. — Session Laws 2002-147, s. 21, effective October 9, 2002, and applicable to persons convicted on or after that date, inserted "changes of academic or educational employment status" following "changes of address" in subdivision (a)(1); inserted "campus" following "State" inside the parenthetical, and inserted "a change of academic or educational employment status" following "a change of address" in subdivision (a)(2); and added subdivision (a)(2a).

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

ARTICLE 30.

Obstructing Justice.

§ 14-223. Resisting officers.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in State v. Norman, 149 N.C. App. 588, 562 S.E.2d 453, 2002 N.C. App. LEXIS 268 (2002).

Article 31.

Misconduct in Public Office.

§ 14-234. Public officers or employees benefiting from public contracts; exceptions.

(a)(1) No public officer or employee who is involved in making or administering a contract on behalf of a public agency may derive a direct benefit from the contract except as provided in this section, or as otherwise allowed by law.

(2) A public officer or employee who will derive a direct benefit from a contract with the public agency he or she serves, but who is not involved in making or administering the contract, shall not attempt to influence any other person who is involved in making or administering the contract.

(3) No public officer or employee may solicit or receive any gift, reward, or promise of reward in exchange for recommending, influencing, or attempting to influence the award of a contract by the public agency he or she serves.

(a1) For purposes of this section:

(1) As used in this section, the term "public officer" means an individual who is elected or appointed to serve or represent a public agency, other than an employee or independent contractor of a public agency.

(2) A public officer or employee is involved in administering a contract if he or she oversees the performance of the contract or has authority to make decisions regarding the contract or to interpret the contract.

(3) A public officer or employee is involved in making a contract if he or she participates in the development of specifications or terms or in the preparation or award of the contract. A public officer is also involved in making a contract if the board, commission, or other body of which he or she is a member takes action on the contract, whether or not the public officer actually participates in that action, unless the contract is approved under an exception to this section under which the public officer is allowed to benefit and is prohibited from voting.

(4) A public officer or employee derives a direct benefit from a contract if the person or his or her spouse: (i) has more than a ten percent (10%) ownership or other interest in an entity that is a party to the contract; (ii) derives any income or commission directly from the contract; or (iii) acquires property under the contract.

(5) A public officer or employee is not involved in making or administering a contract solely because of the performance of ministerial duties related to the contract.

(b) Subdivision (a)(1) of this section does not apply to any of the following:

(1) Any contract between a public agency and a bank, banking institution, savings and loan association, or with a public utility regulated under the provisions of Chapter 62 of the General Statutes.

(2) An interest in property conveyed by an officer or employee of a public agency under a judgment, including a consent judgment, entered by a superior court judge in a condemnation proceeding initiated by the public agency.

(3) Any employment relationship between a public agency and the spouse of a public officer of the agency.

(4) Remuneration from a public agency for services, facilities, or supplies furnished directly to needy individuals by a public officer or employee of the agency under any program of direct public assistance being

rendered under the laws of this State or the United States to needy persons administered in whole or in part by the agency if: (i) the programs of public assistance to needy persons are open to general participation on a nondiscriminatory basis to the practitioners of any given profession, professions or occupation; (ii) neither the agency nor any of its employees or agents, have control over who, among licensed or qualified providers, shall be selected by the beneficiaries of the assistance; (iii) the remuneration for the services, facilities or supplies are in the same amount as would be paid to any other provider; and (iv) although the public officer or employee may participate in making determinations of eligibility of needy persons to receive the assistance, he or she takes no part in approving his or her own bill or claim for remuneration.

(b1) No public officer who will derive a direct benefit from a contract entered into under subsection (b) of this section may deliberate or vote on the contract or attempt to influence any other person who is involved in making or administering the contract.

(c) through (d) Repealed by Session Laws 2001-409, s. 1, effective July 1, 2002.

(d1) Subdivision (a)(1) of this section does not apply to (i) any elected official or person appointed to fill an elective office of a village, town, or city having a population of no more than 15,000 according to the most recent official federal census, (ii) any elected official or person appointed to fill an elective office of a county within which there is located no village, town, or city with a population of more than 15,000 according to the most recent official federal census, (iii) any elected official or person appointed to fill an elective office on a city board of education in a city having a population of no more than 15,000 according to the most recent official federal census, (iv) any elected official or person appointed to fill an elective office as a member of a county board of education in a county within which there is located no village, town or city with a population of more than 15,000 according to the most recent official federal census, (v) any physician, pharmacist, dentist, optometrist, veterinarian, or nurse appointed to a county social services board, local health board, or area mental health, developmental disabilities, and substance abuse board serving one or more counties within which there is located no village, town, or city with a population of more than 15,000 according to the most recent official federal census, and (vi) any member of the board of directors of a public hospital if all of the following apply:

(1) The undertaking or contract or series of undertakings or contracts between the village, town, city, county, county social services board, county or city board of education, local health board or area mental health, developmental disabilities, and substance abuse board, or public hospital and one of its officials is approved by specific resolution of the governing body adopted in an open and public meeting, and recorded in its minutes and the amount does not exceed twelve thousand five hundred dollars ($12,500) for medically related services and twenty-five thousand dollars ($25,000) for other goods or services within a 12-month period.

(2) The official entering into the contract with the unit or agency does not participate in any way or vote.

(3) The total annual amount of contracts with each official, shall be specifically noted in the audited annual financial statement of the village, town, city, or county.

(4) The governing board of any village, town, city, county, county social services board, county or city board of education, local health board, area mental health, developmental disabilities, and substance abuse

board, or public hospital which contracts with any of the officials of their governmental unit shall post in a conspicuous place in its village, town, or city hall, or courthouse, as the case may be, a list of all such officials with whom such contracts have been made, briefly describing the subject matter of the undertakings or contracts and showing their total amounts; this list shall cover the preceding 12 months and shall be brought up-to-date at least quarterly.

(d2) Subsection (d1) of this section does not apply to contracts that are subject to Article 8 of Chapter 143 of the General Statutes, Public Building Contracts.

(d3) Subsection (a) of this section does not apply to an application for or the receipt of a grant under the Agriculture Cost Share Program for Nonpoint Source Pollution Control created pursuant to G.S. 143-215.74 by a member of the Soil and Water Conservation Commission if the requirements of G.S. 139-4(e) are met, and does not apply to a district supervisor of a soil and water conservation district if the requirements of G.S. 139-8(b) are met.

(d4) Subsection (a) of this section does not apply to an application for, or the receipt of a grant or other financial assistance from, the Tobacco Trust Fund created under Article 75 of Chapter 143 of the General Statutes by a member of the Tobacco Trust Fund Commission or an entity in which a member of the Commission has an interest provided that the requirements of G.S. 143-717(h) are met.

(d5) This section does not apply to a public hospital subject to G.S. 131E-14.2 or a public hospital authority subject to G.S. 131E-21.

(e) Anyone violating this section shall be guilty of a Class 1 misdemeanor.

(f) A contract entered into in violation of this section is void. A contract that is void under this section may continue in effect until an alternative can be arranged when: (i) immediate termination would result in harm to the public health or welfare, and (ii) the continuation is approved as provided in this subsection. A public agency that is a party to the contract may request approval to continue contracts under this subsection as follows:

(1) Local governments, as defined in G.S. 159-7(15), public authorities, as defined in G.S. 159-7(10), local school administrative units, and community colleges may request approval from the chair of the Local Government Commission.

(2) All other public agencies may request approval from the State Director of the Budget.

Approval of continuation of contracts under this subsection shall be given for the minimum period necessary to protect the public health or welfare. (1825, c. 1269, P.R.; 1826, c. 29; R.C., c. 34, s. 38; Code, s. 1011; Rev., s. 3572; C.S., s. 4388; 1929, c. 19, s. 1; 1969, c. 1027; 1975, c. 409; 1977, cc. 240, 761; 1979, c. 720; 1981, c. 103, ss. 1, 2, 5; 1983, c. 544, ss. 1, 2; 1985, c. 190; 1987, c. 570; 1989, c. 231; 1991 (Reg. Sess., 1992), c. 1030, s. 5; 1993, c. 539, s. 145; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 519, s. 4; 2000-147, s. 6; 2001-409, s. 1; 2001-487, ss. 44(a), 44(b), 45; 2002-159, s. 28.)

Effect of Amendments. — Session Laws 2002-159, s. 28, effective October 11, 2002, substituted "G.S. 143-717(h)" for "G.S. 143-717(g)" in subsection (d4).

OPINIONS OF ATTORNEY GENERAL

Simultaneous Membership in County Partnership for Children and County Interagency Transportation Corporation Was Permitted. — Members of a county partnership for children, who were also members of the board of directors of the county interagency transportation corporation, did not violate G.S. 14-234 by remaining on the partnership board and participating in a vote to award a grant to the interagency transportation corporation, where one of the individuals who sat on both boards was the county administrator and the

other was chairman of the interagency transportation corporation, as no personal benefits accrued to those individuals. See opinion of Attorney General to Kipling Godwin, Chairman, Columbus County Partnership for Children, 1999 N.C. AG LEXIS 36 (8/27/99).

Regional Medical Center May Make Grant to Nonprofit Corporation Where Trustees Are on Board of Corporation. — There is no violation of G.S. 14-234 where a regional medical center makes a grant to a nonprofit corporation, even if one member of the board of trustees of the regional medical center is a member of the board of directors of the nonprofit corporation and another is executive director of the nonprofit corporation, assuming that neither of the trustees will personally benefit, either directly or indirectly, from the grant to the nonprofit corporation. See opinion of Attorney General to A. Dumay Gorham, Jr., Marshall, Williams & Gorham, L.L.P., 1999 N.C. AG LEXIS 42 (9/1/99).

Member of General Assembly with Financial Interest in Company. — A member of the General Assembly likely would not violate G.S. 14-234 if a company in which he has a financial interest contracts with governmental agencies in another state, a private company, or a political subdivision of the state because in none of these instances is the power to contract joined with private economic interests. See opinion of Attorney General to Burley B. Mitchell, Jr., Womble Carlyle Sandridge & Rice, 2001 N.C. AG LEXIS 2 (2/16/2001).

§§ 14-236, 14-237: Repealed by Session Laws 2001-409, ss. 2, 3, effective July 1, 2002.

Article 33.

Prison Breach and Prisoners.

§ 14-256.1. Escape from private correctional facility.

OPINIONS OF ATTORNEY GENERAL

Federal inmates who escape from private prisons are subject to North Carolina criminal penalties. See opinion of Attorney General to Senator Frank W. Ballance, Jr. and Representative E. David Redwine, 2001 N.C. AG LEXIS 5 (3/28/2001).

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

Article 35.

Offenses Against the Public Peace.

§ 14-277.3. Stalking.

Cross References. — For the Address Confidentiality Program, see G.S. 15C-1 et seq.

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

ARTICLE 36A.

Riots and Civil Disorders.

§ 14-288.4. Disorderly conduct.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Disorderly Conduct in School. —

For charge of disorderly conduct involving schools, there needed to be substantial interference with, disruption of, and confusion of the operation of a school in its program of instructing and training the students there enrolled; a juvenile adjudication would be reversed where the evidence did not support a finding of disorderly conduct involving schools. In re Brown, 150 N.C. App. 127, 562 S.E.2d 583, 2002 N.C. App. LEXIS 401 (2002).

Given the severity and nature of defendant's language, coupled with the fact that a teacher was required to stop teaching her class for at least several minutes, defendant's actions substantially interfered with the operation of a classroom and supported a juvenile delinquency adjudication based on disorderly conduct in a school. In re Pineault, — N.C. App. —, 566 S.E.2d 854, 2002 N.C. App. LEXIS 896 (2002).

Cited in Martin v. Parker, 150 N.C. App. 179, 563 S.E.2d 216, 2002 N.C. App. LEXIS 366 (2002).

§ 14-288.8. Manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapon of mass death and destruction; exceptions.

CASE NOTES

Applied in State v. McMillian, 147 N.C. App. 707, 557 S.E.2d 138, 2001 N.C. App. LEXIS 1246 (2001), cert. denied, 355 N.C. 219, 560 S.E.2d 152 (2002).

ARTICLE 36B.

Nuclear, Biological, or Chemical Weapons of Mass Destruction.

§ 14-288.21. Unlawful manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of a nuclear, biological, or chemical weapon of mass destruction; exceptions; punishment.

Cross References. — For provisions relating to terrorist incident using nuclear, biological, or chemical agents, see G.S. 130A-475 et seq.

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

ARTICLE 37.

Lotteries, Gaming, Bingo and Raffles.

Part 1. Lotteries and Gaming.

§ 14-292. Gambling.

CASE NOTES

Cited in Hatcher v. Harrah's NC Casino Co., — N.C. App. —, 565 S.E.2d 241, 2002 N.C. App. LEXIS 712 (July 2, 2002).

§ 14-295. Keeping gaming tables, illegal punchboards or slot machines, or betting thereat.

CASE NOTES

Cited in Helton v. Good, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 12436 (W.D.N.C. July 5, 2002).

§ 14-298. Gaming tables, illegal punchboards, slot machines, and prohibited video game machines to be destroyed by police officers.

CASE NOTES

Constitutionality. — G.S. 14-306.1(a)(1)(a)-(b) and G.S. 14-298 are unconstitutional under the United States Constitution; the absence of a definition of the term "warehouse," the application of G.S. 14-298 to allow destruction of video gaming machines without adequate process, and retroactive prohibitions demonstrate the absence of a rational relationship to the legislative interest of preventing an influx of video gaming machines into North Carolina in response to a South Carolina ban on video poker. Helton v. Good, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 12436 (W.D.N.C. July 5, 2002).

§ 14-304. Manufacture, sale, etc., of slot machines and devices.

OPINIONS OF ATTORNEY GENERAL

Storage of Video Games or Video Poker Machines Not Permitted. — Video games or video poker machines, the operation of which would be illegal under North Carolina law, may not be lawfully stored or warehoused in the state. See Opinion of Attorney General to The Honorable R.C. Soles, Jr., North Carolina Senate, 2000 N.C. AG LEXIS 15 (6/7/2000).

§ 14-306. Slot machine or device defined.

CASE NOTES

Cited in Helton v. Good, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 12436 (W.D.N.C. July 5, 2002).

§ 14-306.1. Types of machines and devices prohibited by law; penalties.

Editor's Note. —
Session Laws 2002-180, ss. 19.1 to 19.9, establish the House Select Study Committee on Video Gaming Machines, for the purpose of studying the federal and state regulation of video gaming machines; the problems associated with their operation; the difficulties associated with the enforcement of the video gaming laws of this State; the most appropriate law enforcement agency to enforce such laws; the effect of the decision in Helton v. Good, 208 F. Supp. 2d 597 (W.D.N.C.) on the video gaming laws of this state; the potential impact that a ban on video gaming machines would have on the casino operations of the Eastern Band of the Cherokee Indians; and the feasibility of levying a fee on video gaming machines to be used to enforce the current video gaming laws of this State. The Committee is to report its findings and recommendations no later than the convening of the 2003 General Assembly, and shall terminate upon the filing of its report.

CASE NOTES

Constitutionality. — G.S. 14-306.1(a)(1)(a)-(b) and G.S. 14-298 are unconstitutional under the United States Constitution; the absence of a definition of the term "warehouse," the application of G.S. 14-298 to allow destruction of video gaming machines without adequate process, and retroactive prohibitions demonstrate the absence of a rational relationship to the legislative interest of preventing an influx of video gaming machines into North Carolina in response to a South Carolina ban on video poker. Helton v. Good, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 12436 (W.D.N.C. July 5, 2002).

§ 14-308. Declared a public nuisance.

CASE NOTES

Cited in Helton v. Good, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 12436 (W.D.N.C. July 5, 2002).

§ 14-309. Violation made criminal.

CASE NOTES

Cited in Helton v. Good, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 12436 (W.D.N.C. July 5, 2002).

Part 2. Bingo and Raffles.

§ 14-309.7. Licensing procedure.

(a) An exempt organization may not operate a bingo game at a location without a license. Application for a bingo license shall be made to the Department of Crime Control and Public Safety on a form prescribed by the Department. The Department shall charge an annual application fee of one hundred dollars ($100.00) to defray the cost of issuing bingo licenses and handling bingo audit reports. The fees collected shall be deposited in the General Fund of the State. This license shall expire one year after the granting of the license. This license may be renewed yearly, if the applicant pays the application fee and files an audit with the Department pursuant to G.S. 14-309.11. A copy of the application and license shall be furnished to the local law-enforcement agency in the county or municipality in which the licensee intends to operate before bingo is conducted by the licensee.

(b) Each application and renewal application shall contain the following information:

(1) The name and address of the applicant and if the applicant is a corporation, association or other similar legal entity, the name and home address of each of the officers of the organization as well as the name and address of the directors, or other persons similarly situated, of the organization.

(2) The name and home address of each of the members of the special committee.

(3) A copy of the application for recognition of exemptions and a determination letter from the Internal Revenue Service and the Department of Revenue that indicates that the organization is an exempt organization and stating the section under which that exemption is granted; except that if the organization is a State or local branch, lodge, post, or chapter of a national organization, a copy of the determination letter of the national organization satisfies this requirement.

(4) The location at which the applicant will conduct the bingo games. If the premises are leased, a copy of the lease or rental agreement.

(c) In order for an exempt organization to have a member familiar with the operation of bingo present on the premises at all times when bingo is being played and for this member to be responsible for the receiving, reporting and depositing of all revenues received, the exempt organization may pay one member for conducting a bingo game. Such pay shall be on an hourly basis only for the time bingo is actually being played and shall not exceed one and one-half times the existing minimum wage in North Carolina. The member paid under this provision shall be a member in good standing of the exempt organization for at least one year and shall not be the lessor or an employee or agent of the lessor. No other person may be compensated for conducting a bingo game from funds derived from any activities occurring in, or simultaneously with, the playing of bingo, including funds derived from concessions. An exempt organization shall not contract with any person for the purpose of conducting a bingo game. Except as provided in subsection (e) of this section, an exempt organization may hold a bingo game only in or on property owned (either legally or equitably and the buildings must be of a permanent nature with approved plumbing for bathrooms and not movable or of a temporary nature such as a tent or lean-to) or leased by the organization from the owner or bona fide property management agent (no subleasing is permitted) at a total monthly rental in an amount not to exceed one and one-quarter percent (11/4%) of the total assessed ad valorem tax value of the portion of the building actually used for the bingo games and the land value on which the building is

located (not to exceed two acres) for all activities conducted therein including the playing of bingo for a period of not less than one year and actually occupied and used by that organization on a regular basis for purposes other than bingo for at least six months before the game; and all equipment used by the exempt organization in conducting the bingo game must be owned by the organization. Unless the exempt organization leases the property in accordance with this subsection, an exempt organization may conduct a bingo game only in or on property that is exempt from property taxes levied under Subchapter II of Chapter 105 of the General Statutes, or that is classified and not subject to any property taxes levied under Subchapter II of Chapter 105 of the General Statutes. It shall be unlawful for any person to operate beach bingo games at a location which is being used by any licensed exempt organization for the purpose of conducting bingo games.

(d) Conduct of a bingo game or raffle under this Part on such property shall not operate to defeat an exemption or classification under Subchapter II of Chapter 105 of the General Statutes.

(e) An exempt organization that wants to conduct only an annual or semiannual bingo game may apply to the Department of Crime Control and Public Safety for a limited occasion permit. The Department of Crime Control and Public Safety may require such information as is reasonable and necessary to determine that the bingo game is conducted in accordance with the provisions of this Part but may not require more information than previously specified in this section for application of a regular license. The application shall be made to the Department on prescribed forms at least 30 days prior to the scheduled date of the bingo game. In lieu of the reporting requirements of G.S. 14-309.11(b) the exempt organization shall file with the licensing agency and local law-enforcement a report on prescribed forms no later than 30 days following the conduct of the bingo game for which the permit was obtained. Such report may require such information as is reasonable and necessary to determine that the bingo game was conducted in accordance with the provisions of this Part but may not require more information than specified in G.S. 14-309.11(b). Any licensed exempt organization may donate or loan its equipment or use of its premises to an exempt organization which has secured a limited occasion permit provided such arrangement is disclosed in the limited occasion permit application and is approved by the Department of Crime Control and Public Safety. Except as stated above, all provisions of this Part shall apply to any exempt organization operating a bingo game under this provision. (1983, c. 896, s. 3; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1107, ss. 2, 4, 6; 1987, c. 866, ss. 1, 2; 1987 (Reg. Sess., 1988), c. 1001, s. 1; 1997-443, s. 11A.118(a); 2002-159, ss. 3(a), 3(b).)

Effect of Amendments. — Session Laws 2002-159, s. 3(a) and (b), effective October 11, 2002, substituted "Department of Crime Control and Public Safety" for "Department of Health and Human Services" once in subsection (a) and three times in subsection (e).

§ 14-309.11. Accounting and use of proceeds.

(a) All funds received in connection with a bingo game shall be placed in a separate bank account. No funds may be disbursed from this account except the exempt organization may expend proceeds for prizes, advertising, utilities, and the purchase of supplies and equipment used [in conducting the raffle and] in playing bingo, taxes and license fees related to bingo and the payment of compensation as authorized by G.S. 14-309.7(c) and for the purposes set forth below for the remaining proceeds. Such payments shall be made by consecutively numbered checks. Any proceeds available in the account after payment of the above expenses shall inure to the exempt organization to be used for

religious, charitable, civic, scientific, testing, public safety, literary, or educational purposes or for purchasing, constructing, maintaining, operating or using equipment or land or a building or improvements thereto owned by and for the exempt organization and used for civic purposes or made available by the exempt organization for use by the general public from time to time, or to foster amateur sports competition, or for the prevention of cruelty to children or animals, provided that no proceeds shall be used or expended for social functions for the members of the exempt organization.

(b) An audit of the account required by subsection (a) of this section shall be prepared annually for the period of January 1 through December 31 or otherwise as directed by the Department of Crime Control and Public Safety and shall be filed with the Department of Crime Control and Public Safety and the local law-enforcement agency at a time directed by the Department of Crime Control and Public Safety. The audit shall be prepared on a form approved by the Department of Crime Control and Public Safety and shall include the following information:

(1) The number of bingo games conducted or sponsored by the exempt organization;
(2) The location and date at which each bingo game was conducted and the prize awarded;
(3) The gross receipts of each bingo game;
(4) The cost or amount of any prize given at each bingo game;
(5) The amount paid in prizes at each session;
(6) The net return to the exempt organization; and
(7) The disbursements from the separate account and the purpose of those disbursements, including the date of each transaction and the name and address of each payee.

(c) Any person who shall willfully furnish, supply, or otherwise give false information in any audit or statement filed pursuant to this section shall be guilty of a Class 2 misdemeanor.

(d) All books, papers, records and documents relevant to determining whether an organization has acted or is acting in compliance with this section shall be open to inspection by the law-enforcement agency or its designee, or the district attorney or his designee, or the Department of Crime Control and Public Safety at reasonable times and during reasonable hours. (1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, ss. 2, 3, 9; 1987, c. 866, s. 3; 1987 (Reg. Sess., 1988), c. 1001, s. 1; 1993, c. 539, s. 213; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.118(a); 2002-159, ss. 4(a), (b).)

Effect of Amendments. — Session Laws 2002-159, s. 4(a) and (b), effective October 11, 2002, substituted "Department of Crime Control and Public Safety" for "Department of Health and Human Services" four times in subsection (b) and one time in subsection (d).

Article 39.

Protection of Minors.

§ 14-313. Youth access to tobacco products.

(a) Definitions. — The following definitions apply in this section:

(1) Distribute. — To sell, furnish, give, or provide tobacco products, including tobacco product samples, or cigarette wrapping papers to the ultimate consumer.
(2) Proof of age. — A drivers license or other photographic identification that includes the bearer's date of birth that purports to establish that the person is 18 years of age or older.

(3) Sample. — A tobacco product distributed to members of the general public at no cost for the purpose of promoting the product.

(4) Tobacco product. — Any product that contains tobacco and is intended for human consumption.

(b) Sale or distribution to persons under the age of 18 years. — If any person shall distribute, or aid, assist, or abet any other person in distributing tobacco products or cigarette wrapping papers to any person under the age of 18 years, or if any person shall purchase tobacco products or cigarette wrapping papers on behalf of a person, less than 18 years, the person shall be guilty of a Class 2 misdemeanor; provided, however, that it shall not be unlawful to distribute tobacco products or cigarette wrapping papers to an employee when required in the performance of the employee's duties. Retail distributors of tobacco products shall prominently display near the point of sale a sign in letters at least five-eighths of an inch high which states the following:

N.C. LAW STRICTLY PROHIBITS

THE PURCHASE OF TOBACCO PRODUCTS

BY PERSONS UNDER THE AGE OF 18.

PROOF OF AGE REQUIRED.

Failure to post the required sign shall be an infraction punishable by a fine of twenty-five dollars ($25.00) for the first offense and seventy-five dollars ($75.00) for each succeeding offense.

A person engaged in the sale of tobacco products shall demand proof of age from a prospective purchaser if the person has reasonable grounds to believe that the prospective purchaser is under 18 years of age. Failure to demand proof of age as required by this subsection is a Class 2 misdemeanor if in fact the prospective purchaser is under 18 years of age. Proof that the defendant demanded, was shown, and reasonably relied upon proof of age in the case of a retailer, or any other documentary or written evidence of age in the case of a nonretailer, or that the defendant relied on the electronic system established and operated by the Division of Motor Vehicles pursuant to G.S. 20-37.02, shall be a defense to any action brought under this subsection. Retail distributors of tobacco products shall train their sales employees in the requirements of this law.

(b1) Vending machines. — Tobacco products shall not be distributed in vending machines; provided, however, vending machines distributing tobacco products are permitted (i) in any establishment which is open only to persons 18 years of age and older; or (ii) in any establishment if the vending machine is under the continuous control of the owner or licensee of the premises or an employee thereof and can be operated only upon activation by the owner, licensee, or employee prior to each purchase and the vending machine is not accessible to the public when the establishment is closed. The owner, licensee, or employee shall demand proof of age from a prospective purchaser if the person has reasonable grounds to believe that the prospective purchaser is under 18 years of age. Failure to demand proof of age as required by this subsection is a Class 2 misdemeanor if in fact the prospective purchaser is under 18 years of age. Proof that the defendant demanded, was shown, and reasonably relied upon proof of age shall be a defense to any action brought under this subsection. Vending machines distributing tobacco products in establishments not meeting the above conditions shall be removed prior to December 1, 1997. Any person distributing tobacco products through vending

machines in violation of this subsection shall be guilty of a Class 2 misdemeanor.

(c) Purchase by persons under the age of 18 years. — If any person under the age of 18 years purchases or accepts receipt, or attempts to purchase or accept receipt, of tobacco products or cigarette wrapping papers, or presents or offers to any person any purported proof of age which is false, fraudulent, or not actually his or her own, for the purpose of purchasing or receiving any tobacco product or cigarette wrapping papers, the person shall be guilty of a Class 2 misdemeanor.

(d) Send or assist person less than 18 years to purchase or receive tobacco product. — If any person shall send a person less than 18 years of age to purchase, acquire, receive, or attempt to purchase, acquire, or receive tobacco products or cigarette wrapping papers, or if any person shall aid or abet a person who is less than 18 years of age in purchasing, acquiring, or receiving or attempting to purchase, acquire, or receive tobacco products or cigarette wrapping papers, the person shall be guilty of a Class 2 misdemeanor; provided, however, persons under the age of 18 may be enlisted by police or local sheriffs' departments to test compliance if the testing is under the direct supervision of that law enforcement department and written parental consent is provided; provided further, that the Department of Health and Human Services shall have the authority, pursuant to a written plan prepared by the Secretary of Health and Human Services, to use persons under 18 years of age in annual, random, unannounced inspections, provided that prior written parental consent is given for the involvement of these persons and that the inspections are conducted for the sole purpose of preparing a scientifically and methodologically valid statistical study of the extent of success the State has achieved in reducing the availability of tobacco products to persons under the age of 18, and preparing any report to the extent required by section 1926 of the federal Public Health Service Act (42 USC § 300x-26).

(e) Statewide uniformity. — It is the intent of the General Assembly to prescribe this uniform system for the regulation of tobacco products to ensure the eligibility for and receipt of any federal funds or grants that the State now receives or may receive relating to the provisions of G.S. 14-313. To ensure uniformity, no political subdivisions, boards, or agencies of the State nor any county, city, municipality, municipal corporation, town, township, village, nor any department or agency thereof, may enact ordinances, rules or regulations concerning the sale, distribution, display or promotion of tobacco products or cigarette wrapping papers on or after September 1, 1995. This subsection does not apply to the regulation of vending machines, nor does it prohibit the Secretary of Revenue from adopting rules with respect to the administration of the tobacco products taxes levied under Article 2A of Chapter 105 of the General Statutes.

(f) Deferred prosecution. — Notwithstanding G.S. 15A-1341(a1), any person charged with a misdemeanor under this section shall be qualified for deferred prosecution pursuant to Article 82 of Chapter 15A of the General Statutes provided the defendant has not previously been placed on probation for a violation of this section and so states under oath. (1891, c. 276; Rev., s. 3804; C.S., s. 4438; 1969, c. 1224, s. 3; 1991, c. 628, s. 1; 1993, c. 539, s. 216; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 241, s. 1; 1997-434, ss. 1-6; 1997-443, s. 11A.118(a); 2001-461, s. 5; 2002-159, s. 5.)

Effect of Amendments. — Session Laws 2002-159, s. 5, effective October 11, 2002, deleted "to" following "on behalf of" in the first sentence of subsection (b).

§ 14-318.4. Child abuse a felony.

CASE NOTES

Defendant Held to Be a Caretaker. — A caretaker under the Juvenile Code included an adult member of the juvenile's household; thus, there was substantial evidence that defendant, who lived with the child and his mother and watched the child for short periods of time, provided supervision of the child within the meaning of the felony child abuse statute, and was a caretaker to the child. State v. Carrilo, 149 N.C. App. 543, 562 S.E.2d 47, 2002 N.C. App. LEXIS 280 (2002).

Article 47.

Cruelty to Animals.

§ 14-360. Cruelty to animals; construction of section.

CASE NOTES

Warrantless Seizure Violated Fourth Amendment. — Seizure of emaciated horses from an open field was an unreasonable seizure under the Fourth Amendment where the animal control officers, who had to cut an electrical fence to obtain access to the animals, and who spent three days making arrangements for the seizure of the horses, failed to obtain a warrant during that time. State v. Nance, 149 N.C. App. 734, 562 S.E.2d 557, 2002 N.C. App. LEXIS 315 (2002).

Cited in Malloy v. Cooper, 356 N.C. 113, 565 S.E.2d 76, 2002 N.C. LEXIS 543 (2002).

§ 14-362.2. Dog fighting and baiting.

CASE NOTES

Constitutionality. — To discourage spectators at dogfights is a valid exercise of the State's police power and G.S. 14-362.2, making being a spectator at a dogfight a criminal offense, is not unconstitutionally vague nor overbroad. State v. Arnold, 147 N.C. App. 670, 557 S.E.2d 119, 2001 N.C. App. LEXIS 1244 (2001), cert. denied, 355 N.C. 286, 560 S.E.2d 808 (2002).

Article 52.

Miscellaneous Police Regulations.

§ 14-401.14. Ethnic intimidation; teaching any technique to be used for ethnic intimidation.

Legal Periodicals. — Survey of Developments in North Carolina Law and the Fourth Circuit, 1999: Clarifying North Carolina's Ethnic Intimidation Statute and Penalty Enhancement for Bias Crimes, 78 N.C.L. Rev. 2003 (2000).

§ 14-401.18. Sale of certain packages of cigarettes prohibited.

(a) Definitions. — The following definitions apply in this section:
(1) Cigarette. — Defined in G.S. 105-113.4.
(2) Package. — Defined in G.S. 105-113.4.

(b) Offenses. — A person who sells or holds for sale (other than for export to a foreign country) a package of cigarettes that meets one or more of the following descriptions commits a Class A1 misdemeanor and engages in an unfair trade practice prohibited by G.S. 75-1.1:

(1) The package differs in any respect with the requirements of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, for the placement of labels, warnings, or any other information upon a package of cigarettes that is to be sold within the United States.

(2) The package is labeled "For Export Only," "U.S. Tax Exempt," "For Use Outside U.S.," or has similar wording indicating that the manufacturer did not intend that the product be sold in the United States.

(3) The package was altered by adding or deleting the wording, labels, or warnings described in subdivision (1) or (2) of this subsection.

(4) The package was imported into the United States after January 1, 2000, in violation of 26 U.S.C. § 5754.

(5) The package violates federal trademark or copyright laws, federal laws governing the submission of ingredient information to federal authorities pursuant to 15 U.S.C. § 1335a, federal laws governing the import of certain cigarettes pursuant to 19 U.S.C. § 1681 and 19 U.S.C. § 1681b, or any other provision of federal law or regulation.

(c) Contraband. — A package of cigarettes described in subsection (b) of this section is contraband and may be seized by a law enforcement officer. The procedure for seizure and disposition of this contraband is the same as the procedure under G.S. 105-113.31 and G.S. 105-113.32 for non-tax-paid cigarettes. (1999-333, s. 5; 2002-145, s. 4.)

Effect of Amendments. — Session Laws 2002-145, s. 4, effective January 1, 2003, rewrote subdivision (b)(5).

§ 14-401.20. Defrauding drug and alcohol screening tests; penalty.

(a) It is unlawful for a person to do any of the following:

(1) Sell, give away, distribute, or market urine in this State or transport urine into this State with the intent that it be used to defraud a drug or alcohol screening test.

(2) Attempt to foil or defeat a drug or alcohol screening test by the substitution or spiking of a sample or the advertisement of a sample substitution or other spiking device or measure.

(b) It is unlawful for a person to do any of the following:

(1) Adulterate a urine or other bodily fluid sample with the intent to defraud a drug or alcohol screening test.

(2) Possess adulterants that are intended to be used to adulterate a urine or other bodily fluid sample for the purpose of defrauding a drug or alcohol screening test.

(3) Sell adulterants with the intent that they be used to adulterate a urine or other bodily fluid sample for the purpose of defrauding a drug or alcohol screening test.

(c) A violation of this section is punishable as follows:

(1) For a first offense under this section, the person is guilty of a Class 1 misdemeanor.

(2) For a second or subsequent offense under this section, the person is guilty of a Class I felony. (2002-183, s. 1.)

Editor's Note. — Session Laws 2002-183, s. 2, makes the section effective December 1, 2002, and applicable to offenses committed on or after that date.

Article 53B.

Firearm Regulation.

§ 14-409.40. Statewide uniformity of local regulation.

(a) It is declared by the General Assembly that the regulation of firearms is properly an issue of general, statewide concern, and that the entire field of regulation of firearms is preempted from regulation by local governments except as provided by this section.

(a1) The General Assembly further declares that the lawful design, marketing, manufacture, distribution, sale, or transfer of firearms or ammunition to the public is not an unreasonably dangerous activity and does not constitute a nuisance per se and furthermore, that it is the unlawful use of firearms and ammunition, rather than their lawful design, marketing, manufacture, distribution, sale, or transfer that is the proximate cause of injuries arising from their unlawful use. This subsection applies only to causes of action brought under subsection (g) of this section.

(b) Unless otherwise permitted by statute, no county or municipality, by ordinance, resolution, or other enactment, shall regulate in any manner the possession, ownership, storage, transfer, sale, purchase, licensing, or registration of firearms, firearms ammunition, components of firearms, dealers in firearms, or dealers in handgun components or parts.

(c) Notwithstanding subsection (b) of this section, a county or municipality, by zoning or other ordinance, may regulate or prohibit the sale of firearms at a location only if there is a lawful, general, similar regulation or prohibition of commercial activities at that location. Nothing in this subsection shall restrict the right of a county or municipality to adopt a general zoning plan that prohibits any commercial activity within a fixed distance of a school or other educational institution except with a special use permit issued for a commercial activity found not to pose a danger to the health, safety, or general welfare of persons attending the school or educational institution within the fixed distance.

(d) No county or municipality, by zoning or other ordinance, shall regulate in any manner firearms shows with regulations more stringent than those applying to shows of other types of items.

(e) A county or municipality may regulate the transport, carrying, or possession of firearms by employees of the local unit of government in the course of their employment with that local unit of government.

(f) Nothing contained in this section prohibits municipalities or counties from application of their authority under G.S. 153A-129, 160A-189, 14-269, 14-269.2, 14-269.3, 14-269.4, 14-277.2, 14-415.11, 14-415.23, including prohibiting the possession of firearms in public-owned buildings, on the grounds or parking areas of those buildings, or in public parks or recreation areas, except nothing in this subsection shall prohibit a person from storing a firearm within a motor vehicle while the vehicle is on these grounds or areas. Nothing contained in this section prohibits municipalities or counties from exercising powers provided by law in declared states of emergency under Article 36A of this Chapter.

(g) The authority to bring suit and the right to recover against any firearms or ammunition marketer, manufacturer, distributor, dealer, seller, or trade association by or on behalf of any governmental unit, created by or pursuant to an act of the General Assembly or the Constitution, or any department, agency,

or authority thereof, for damages, abatement, injunctive relief, or any other remedy resulting from or relating to the lawful design, marketing, manufacture, distribution, sale, or transfer of firearms or ammunition to the public is reserved exclusively to the State. Any action brought by the State pursuant to this section shall be brought by the Attorney General on behalf of the State. This section shall not prohibit a political subdivision or local governmental unit from bringing an action against a firearms or ammunition marketer, manufacturer, distributor, dealer, seller, or trade association for breach of contract or warranty for defect of materials or workmanship as to firearms or ammunition purchased by the political subdivision or local governmental unit. (1995 (Reg. Sess., 1996), c. 727, s. 1; 2002-77, s. 1.)

Editor's Note. — Session Laws 2002-77, s. 2, contains a severability clause.

Effect of Amendments. — Session Laws 2002-77, s. 1, effective August 15, 2002, inserted subsection (a1); and added subsection (g).

Article 54A.

The Felony Firearms Act.

§ 14-415.1. Possession of firearms, etc., by felon prohibited.

CASE NOTES

Requested Jury Instructions. — Where defendant, who was not within his own premises, voluntarily confronted his neighbors while armed, although not under a present or imminent threat of death or injury, he was not entitled to a justification instruction to the jury. State v. Napier, 149 N.C. App. 462, 560 S.E.2d 867, 2002 N.C. App. LEXIS 220 (2002).

Article 60.

Computer-Related Crime.

§ 14-453. Definitions.

As used in this Article, unless the context clearly requires otherwise, the following terms have the meanings specified:

(1) "Access" means to instruct, communicate with, cause input, cause output, cause data processing, or otherwise make use of any resources of a computer, computer system, or computer network.

(1a) "Authorization" means having the consent or permission of the owner, or of the person licensed or authorized by the owner to grant consent or permission to access a computer, computer system, or computer network in a manner not exceeding the consent or permission.

(1b) "Commercial electronic mail" means messages sent and received electronically consisting of commercial advertising material, the principal purpose of which is to promote the for-profit sale or lease of goods or services to the recipient.

(2) "Computer" means an internally programmed, automatic device that performs data processing or telephone switching.

(3) "Computer network" means the interconnection of communication systems with a computer through remote terminals, or a complex

consisting of two or more interconnected computers or telephone switching equipment.

(4) "Computer program" means an ordered set of data that are coded instructions or statements that when executed by a computer cause the computer to process data.

(4a) "Computer services" means computer time or services, including data processing services, Internet services, electronic mail services, electronic message services, or information or data stored in connection with any of these services.

(5) "Computer software" means a set of computer programs, procedures and associated documentation concerned with the operation of a computer, computer system, or computer network.

(6) "Computer system" means at least one computer together with a set of related, connected, or unconnected peripheral devices.

(6a) "Data" means a representation of information, facts, knowledge, concepts, or instructions prepared in a formalized or other manner and intended for use in a computer, computer system, or computer network. Data may be embodied in any form including computer printouts, magnetic storage media, optical storage media, and punch cards, or may be stored internally in the memory of a computer.

(6b) "Electronic mail" means the same as the term is defined in G.S. 14-196.3(a)(2).

(6c) "Electronic mail service provider" means any person who (i) is an intermediary in sending or receiving electronic mail and (ii) provides to end users of electronic mail services the ability to send or receive electronic mail.

(7) "Financial instrument" includes any check, draft, money order, certificate of deposit, letter of credit, bill of exchange, credit card or marketable security, or any electronic data processing representation thereof.

(7a) "Government computer" means any computer, computer program, computer system, computer network, or any part thereof, that is owned, operated, or used by any State or local governmental entity.

(8) "Property" includes financial instruments, information, including electronically processed or produced data, and computer software and computer programs in either machine or human readable form, and any other tangible or intangible item of value.

(8a) "Resource" includes peripheral devices, computer software, computer programs, and data, and means to be a part of a computer, computer system, or computer network.

(9) "Services" includes computer time, data processing and storage functions.

(10) "Unsolicited" means not addressed to a recipient with whom the initiator has an existing business or personal relationship and not sent at the request of, or with the express consent of, the recipient. (1979, c. 831, s. 1; 1993 (Reg. Sess., 1994), c. 764, s. 1; 1999-212, s. 2; 2000-125, s. 3; 2002-157, s. 1.)

Effect of Amendments. — Session Laws 2002-157, s. 1, effective December 1, 2002, and applicable to offenses committed on or after that date, added subdivision (7a).

§ 14-453.1. Exceptions.

This Article does not apply to or prohibit:

(1) Any terms or conditions in a contract or license related to a computer, computer network, software, computer system, database, or telecommunication device; or

(2) Any software or hardware designed to allow a computer, computer network, software, computer system, database, information, or telecommunication service to operate in the ordinary course of a lawful business or that is designed to allow an owner or authorized holder of information to protect data, information, or rights in it. (2002-157, s. 2.)

Editor's Note. — Session Laws 2002-157, s. 7, makes this section effective December 1, 2002, and applicable to offenses committed on or after that date.

§ 14-453.2. Jurisdiction.

Any offense under this Article committed by the use of electronic communication may be deemed to have been committed where the electronic communication was originally sent or where it was originally received in this State. "Electronic communication" means the same as the term is defined in G.S. 14-196.3(a). (2002-157, s. 3.)

Editor's Note. — Session Laws 2002-157, s. 7, makes this section effective December 1, 2002, and applicable to offenses committed on or after that date.

§ 14-454.1. Accessing government computers.

(a) It is unlawful to willfully, directly or indirectly, access or cause to be accessed any government computer for the purpose of:

(1) Devising or executing any scheme or artifice to defraud, or

(2) Obtaining property or services by means of false or fraudulent pretenses, representations, or promises.

A violation of this subsection is a Class F felony.

(b) Any person who willfully and without authorization, directly or indirectly, accesses or causes to be accessed any government computer for any purpose other than those set forth in subsection (a) of this section is guilty of a Class H felony.

(c) Any person who willfully and without authorization, directly or indirectly, accesses or causes to be accessed any educational testing material or academic or vocational testing scores or grades that are in a government computer is guilty of a Class 1 misdemeanor.

(d) For the purpose of this section the phrase "access or cause to be accessed" includes introducing, directly or indirectly, a computer program (including a self-replicating or a self-propagating computer program) into a computer, computer program, computer system, or computer network. (2002-157, s. 4.)

Editor's Note. — Session Laws 2002-157, s. 7, makes this section effective December 1, 2002, and applicable to offenses committed on or after that date.

§ 14-455. Damaging computers, computer programs, computer systems, computer networks, and resources.

(a) It is unlawful to willfully and without authorization alter, damage, or destroy a computer, computer program, computer system, computer network, or any part thereof. A violation of this subsection is a Class G felony if the damage caused by the alteration, damage, or destruction is more than one thousand dollars ($1,000). Any other violation of this subsection is a Class 1 misdemeanor.

(a1) It is unlawful to willfully and without authorization alter, damage, or destroy a government computer. A violation of this subsection is a Class F felony.

(b) This section applies to alteration, damage, or destruction effectuated by introducing, directly or indirectly, a computer program (including a self-replicating or a self-propagating computer program) into a computer, computer program, computer system, or computer network. (1979, c. 831, s. 1; 1979, 2nd Sess., c. 1316, s. 20; 1981, cc. 63, 179; 1993, c. 539, s. 294; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 764, s. 1; 1995, c. 509, s. 12; 2000-125, s. 5; 2002-157, s. 5.)

Effect of Amendments. — Session Laws 2002-157, s. 5, effective December 1, 2002, and applicable to offenses committed on or after that date, added subsection (a1).

§ 14-456.1. Denial of government computer services to an authorized user.

(a) Any person who willfully and without authorization denies or causes the denial of government computer services is guilty of a Class H felony. For the purposes of this section, the term "government computer service" means any service provided or performed by a government computer as defined in G.S. 14-454.1.

(b) This section also applies to denial of services effectuated by introducing, directly or indirectly, a computer program (including a self-replicating or a self-propagating computer program) into a computer, computer program, computer system, or computer network. (2002-157, s. 6.)

Editor's Note. — Session Laws 2002-157, s. 7, makes this section effective December 1, 2002, and applicable to offenses committed on or after that date.

Chapter 15.

Criminal Procedure.

Article 15.

Indictment.

Article 2.

Record and Disposition of Seized, etc., Articles.

§ 15-12. Publication of notice of unclaimed property; advertisement and sale or donation of unclaimed bicycles.

Local Modification. — Mecklenburg: 2002-92, s. 1.

Article 15.

Indictment.

§ 15-144. Essentials of bill for homicide.

CASE NOTES

Constitutionality of Section. — The allowance of a short form indictment for murder violates neither the Sixth Amendment nor the due process clause of the Fourteenth Amendment to the United States Constitution. Hartman v. Lee, 283 F.3d 190, 2002 U.S. App. LEXIS 3448 (4th Cir. 2002).

Short-Form Murder Indictment Complied with Statutory Requirements. — Short-form murder indictment did not violate defendant's constitutional rights as it complied with the requirements of G.S. 15-144, for a short-form murder indictment because the indictment contained the language that defendant unlawfully, willfully and feloniously and with malice aforethought killed the victim. State v. Phillips, — N.C. App. —, 565 S.E.2d 697, 2002 N.C. App. LEXIS 713 (2002).

Offenses Which Indictment Will Support. —

Where the indictment was insufficient to allege attempted first degree murder because the indictment failed to include the essential element of malice aforethought, but was sufficient to allege voluntary manslaughter, the case could be remanded for sentencing and entry of judgment for attempted voluntary manslaughter based on the jury's verdict. State v. Bullock, — N.C. App. —, 566 S.E.2d 768, 2002 N.C. App. LEXIS 885 (2002).

Applied in State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544, 2001 N.C. App. LEXIS 1234 (2001); State v. Smith, — N.C. App. —, 566 S.E.2d 793, 2002 N.C. App. LEXIS 867 (2002); State v. Dudley, — N.C. App. —, 566 S.E.2d 843, 2002 N.C. App. LEXIS 888 (2002).

§ 15-144.1. Essentials of bill for rape.

(a) In indictments for rape it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the offense of rape was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously did ravish and carnally know the victim, naming her, by force and against her will and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for rape in the first degree and will support a verdict of guilty of rape in the first degree, rape in the second degree, attempted rape or assault on a female.

(b) If the victim is a female child under the age of 13 years it is sufficient to allege that the accused unlawfully, willfully, and feloniously did carnally know and abuse a child under 13, naming her, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for the rape of a female child under the age of 13 years and all lesser included offenses.

(c) If the victim is a person who is mentally disabled, mentally incapacitated, or physically helpless it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did carnally know and abuse a person who was mentally disabled, mentally incapacitated or physically helpless, naming such victim, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law for the rape of a mentally disabled, mentally incapacitated or physically helpless person and all lesser included offenses. (1977, c. 861, s. 1; 1979, c. 682, s. 10; 1983, c. 720, s. 1; 2002-159, s. 2(d).)

Effect of Amendments. — Session Laws 2002-159, s. 2(d), effective December 1, 2002, and applicable to offenses committed on or after that date, substituted "mentally disabled" for "mentally defective" three times in subsection (c).

§ 15-144.2. Essentials of bill for sex offense.

(a) In indictments for sex offense it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the sex offense was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim, naming the victim, by force and against the will of such victim and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for a first degree sex offense and will support a verdict of guilty of a sex offense in the first degree, a sex offense in the second degree, an attempt to commit a sex offense or an assault.

(b) If the victim is a person under the age of 13 years, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, naming the child, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for a sex offense against a child under the age of 13 years and all lesser included offenses.

(c) If the victim is a person who is mentally disabled, mentally incapacitated, or physically helpless it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a person

who was mentally disabled, mentally incapacitated or physically helpless, naming such victim, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law for a sex offense against a mentally disabled, mentally incapacitated or physically helpless person and all lesser included offenses. (1979, c. 682, s. 11; 1983, c. 720, ss. 2, 3; 2002-159, s. 2(e).)

Effect of Amendments. — Session Laws 2002-159, s. 2(e), effective December 1, 2002, and applicable to offenses committed on or after that date, substituted "mentally disabled" for "mentally defective" three times in subsection (c).

CASE NOTES

Short Form Constitutionally Valid. — Short-form indictment for the crime of first-degree sexual offense is constitutionally valid even though it fails to allege one of the elements of sex offense. State v. Love, — N.C. App. —, 568 S.E.2d 320, 2002 N.C. App. LEXIS 971 (2002).

Article 17.

Trial in Superior Court.

§ 15-170. Conviction for a less degree or an attempt.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in State v. Evans, 149 N.C. App. 767, 562 S.E.2d 102, 2002 N.C. App. LEXIS 310 (2002); State v. Scott, — N.C. App. —, 564 S.E.2d 285, 2002 N.C. App. LEXIS 576 (2002).

Article 19A.

Credits against the Service of Sentences and for Attainment of Prison Privileges.

§ 15-196.1. Credits allowed.

CASE NOTES

"Custody". — Defendant participating in a residential treatment program where his freedom was substantially limited was in "custody," for purposes of entitlement to a sentencing credit for time spent in the program. State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002).

Language of G.S. 15-196.1 demonstrates the legislature's intention that a defendant be credited with all time defendant was in custody and not at liberty as the result of a charge. State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002).

Treatment Program Not Custody in State Institution. — Legislature's action in converting alternative treatment program to a residential program acknowledged that participation in the program was a lesser sanction than commitment to or confinement in a State institution. State v. Hearst, 147 N.C. App. 298, 555 S.E.2d 357, 2001 N.C. App. LEXIS 1137 (2001), cert. granted, appeal dismissed, 355 N.C. 218, 560 S.E.2d 148 (2002).

Participation in alternative treatment program did not constitute commitment or confinement in a State institution such that a defen-

dant was entitled to credit under G.S. 15-196.1 for time spent participating therein. State v. Hearst, 147 N.C. App. 298, 555 S.E.2d 357, 2001 N.C. App. LEXIS 1137 (2001), cert/granted, appeal dismissed, 355 N.C. 218, 560 S.E.2d 148 (2002).

Applied in State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002).

Cited in State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002).

Chapter 15A.

Criminal Procedure Act

SUBCHAPTER I. GENERAL.

ARTICLE 1.

Definitions and General Provisions.

§ 15A-101. Definitions.

CASE NOTES

Applied in State v. Jones, — N.C. App. —, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002).

Cited in N.C. Dep't of Corr. v. Brunson, — N.C. App. —, 567 S.E.2d 416, 2002 N.C. App. LEXIS 930 (2002).

§ 15A-101.1. Electronic technology in criminal process and procedure.

As used in this Chapter, in Chapter 7A of the General Statutes, in Chapter 15 of the General Statutes, and in all other provisions of the General Statutes that deal with criminal process or procedure:

(1) "Copy" means all identical versions of a document created or existing in paper form, including the original and all other identical versions of the document in paper form.

(2) "Document" means any pleading, criminal process, subpoena, complaint, motion, application, notice, affidavit, commission, waiver, consent, dismissal, order, judgment, or other writing intended in a criminal or contempt proceeding to authorize or require an action, to record a decision or to communicate or record information. The term does not include search warrants. A document may be created and exist in paper form or in electronic form or in both forms. Each document shall contain the legible, printed name of the person who signed the document.

(3) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, Internet, or similar capabilities.

(4) "Electronic Repository" means an automated electronic repository for criminal process created and maintained pursuant to G.S. 15A-301.1.

(5) "Electronic signature" means any electronic method of signing a document that meets each of the following requirements:

a. Identifies and authenticates a particular person as the signer of the document, is unique to the person using it, is capable of certification, and is under the sole control of the person using it.

b. Is attached to or logically associated with the document in such a manner that if the document is altered in any way without authorization of the signer, the signature is invalidated.

c. Indicates that person's intent to issue, enter or otherwise authenticate the document.

(6) "Entered" means signed and filed in the office of the clerk of superior court of the county in which the document is to be entered. A document may be entered in either paper form or electronic form.

(7) "Filing" or "filed" means:

a. When the document is in paper form, delivering the original document to the office where the document is to be filed. Filing is complete when the original document is received in the office where the document is to be filed.

b. When the document is in electronic form, creating and saving the document, or transmitting it, in such a way that it is unalterably retained in the electronic records of the office where the document is to be filed. A document is "unalterably retained" in an electronic record when it may not be edited or otherwise altered except by a person with authorization to do so. Filing is complete when the document has first been unalterably retained in the electronic records of the office where the document is to be filed.

(8) "Issued" applies to documents in either paper form or electronic form. A document that is first created in paper form is issued when it is signed. A document that is first created in electronic form is issued when it is signed, filed in the office of the clerk of superior court of the county for which it is to be issued, and retained in the Electronic Repository.

(9) "Original" means:

a. A document first created and existing only in paper form, bearing the original signature of the person who signed it. The term also includes each copy in paper form that is printed through the facsimile transmission of the copy bearing the original signature of the person who signed it.
b. A document existing in electronic form, including the electronic form of the document and any copy that is printed from the electronic form.

(10) "Signature" means any symbol, including, but not limited to, the name of an individual, which is executed by that individual, personally or through an authorized agent, with the intent to authenticate or to effect the issuance or entry of a document. The term includes an electronic signature. A document may be signed by the use of any manual, mechanical or electronic means that causes the individual's signature to appear in or on the document. Any party challenging the validity of a signature shall have the burden of pleading, producing evidence, and proving the following:
a. The signature was not the act of the person whose signature it appears to be.
b. If the signature is an electronic signature, the requirements of subdivision (5) of this section have not been met. (2002-64, s. 1.)

Cross References. — As to criminal process, generally, see G.S. 15A-301. As to automated electronic repository for criminal process, see G.S. 15A-301.1.

Editor's Note. — Session Laws 2002-64, s. 4, made this section effective January 1, 2003, and applicable to all acts done on and after that date.

Article 5.

Expunction of Records.

§ 15A-145. Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor; expunction of certain other misdemeanors.

(a) Whenever any person who has (i) not yet attained the age of 18 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor other than a traffic violation, or (ii) not yet attained the age of 21 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor possession of alcohol pursuant to G.S. 18B-302(b)(1), he may file a petition in the court where he was convicted for expunction of the misdemeanor from his criminal record. The petition cannot be filed earlier than two years after the date of the conviction or any period of probation, whichever occurs later, and the petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that he has been of good behavior for the two-year period since the date of conviction of the misdemeanor in question and has not been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States or the laws of this State or any other state.
(2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character

and reputation of the petitioner in the community in which he lives and that his character and reputation are good.

(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.

(4) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the misdemeanor in question or during the two-year period following that conviction.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the two-year period that he deems desirable.

(b) If the court, after hearing, finds that the petitioner had remained of good behavior and been free of conviction of any felony or misdemeanor, other than a traffic violation, for two years from the date of conviction of the misdemeanor in question, and (i) petitioner was not 18 years old at the time of the conviction in question, or (ii) petitioner was not 21 years old at the time of the conviction of possession of alcohol pursuant to G.S. 18B-302(b)(1), it shall order that such person be restored, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, or indictment, information, or trial, or response to any inquiry made of him for any purpose.

(c) The court shall also order that the said misdemeanor conviction be expunged from the records of the court, and direct all law-enforcement agencies bearing record of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief or head of such other arresting agency shall then transmit the copy of the order with a form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation.

(d) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts, the names of those persons granted a discharge under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted a discharge.

(e) A person who files a petition for expunction of a criminal record under this section must pay the clerk of superior court a fee of sixty-five dollars ($65.00) at the time the petition is filed. Fees collected under this subsection shall be deposited in the General Fund. This subsection does not apply to petitions filed by an indigent. (1973, c. 47, s. 2; c. 748; 1975, c. 650, s. 5; 1977, c. 642, s. 1; c. 699, ss. 1, 2; 1979, c. 431, ss. 1, 2; 1985, c. 636, s. 1; 1999-406, s. 8; 2002-126, ss. 29A.5(a), (b).)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 29A.5(a) and (b), effective October 1, 2002, and applicable to petitions filed on or after that date, deleted "The cost of expunging such records shall be taxed against the petitioner." at the end of subsection (c); and added subsection (e).

§ 15A-146. Expunction of records when charges are dismissed or there are findings of not guilty.

(a) If any person is charged with a crime, either a misdemeanor or a felony, or was charged with an infraction under G.S. 18B-302(i) prior to December 1, 1999, and the charge is dismissed, or a finding of not guilty or not responsible is entered, that person may apply to the court of the county where the charge was brought for an order to expunge from all official records any entries relating to his apprehension or trial. The court shall hold a hearing on the application and, upon finding that the person had not previously received an expungement under this section, G.S. 15A-145, or G.S. 90-96, and that the person had not previously been convicted of any felony under the laws of the United States, this State, or any other state, the court shall order the expunction. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial.

(b) The court may also order that the said entries shall be expunged from the records of the court, and direct all law-enforcement agencies bearing record of the same to expunge their records of the entries. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief or head of such other arresting agency shall then transmit the copy of the order with the form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation. The costs of expunging these records shall not be taxed against the petitioner.

(b1) Any person entitled to expungement under this section may also apply to the court for an order expunging DNA records when the person's case has been dismissed by the trial court and the person's DNA record or profile has been included in the State DNA Database and the person's DNA sample is stored in the State DNA Databank. A copy of the application for expungement of the DNA record or DNA sample shall be served on the district attorney for the judicial district in which the felony charges were brought not less than 20 days prior to the date of the hearing on the application. If the application for expungement is granted, a certified copy of the trial court's order dismissing the charges shall be attached to an order of expungement. The order of expungement shall include the name and address of the defendant and the defendant's attorney and shall direct the SBI to send a letter documenting expungement as required by subsection (b2) of this section.

(b2) Upon receiving an order of expungement entered pursuant to subsection (b1) of this section, the SBI shall purge the DNA record and all other identifying information from the State DNA Database and the DNA sample stored in the State DNA Databank covered by the order, except that the order shall not apply to other offenses committed by the individual that qualify for inclusion in the State DNA Database and the State DNA Databank. A letter documenting expungement of the DNA record and destruction of the DNA sample shall be sent by the SBI to the defendant and the defendant's attorney at the address specified by the court in the order of expungement.

(c) The Clerk of Superior Court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts, the names of those persons granted an expungement under the provisions of this section and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted such expungement. The information contained in such files shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted an expungement. (1979, c. 61; 1985, c. 636, ss. 1-7; 1991, c. 326, s. 1; 1997-138, s. 1; 1999-406, s. 9; 2001-108, s. 2; 2001-282, s. 1; 2002-126, s. 29A.5(c).)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, s. 29A.5(c), effective July 1, 2002, and applicable to petitions filed on or after that date, substituted "The costs of expunging these records shall not be taxed against the petitioner." for "The costs of expunging such records shall be taxed against the petitioner." at the end of subsection (b).

OPINIONS OF ATTORNEY GENERAL

This Section Does Not Apply to Records of Civil Drivers License Revocations Maintained by Division of Motor Vehicles. — Section 15A-146, which prescribes procedures for expunction of criminal records, does not apply to records of civil drivers license revocations maintained by the Division of Motor Vehicles and, therefore, does not require the Division of Motor Vehicles to expunge records of a 30-day drivers license revocation under G.S. 20-16.5 based on the same operation of a vehicle that gave rise to a criminal charge against the driver which is subsequently dismissed. See opinion of Attorney General to Mr. Mike Bryant, Director, Driver License Section, N.C. Division of Motor Vehicles, 2001 N.C. AG LEXIS 22 (6/13/2001).

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES.

ARTICLE 11.

Search Warrants.

§ 15A-246. Form and content of the search warrant.

CASE NOTES

Description of Premises Held Sufficient. —

Search warrant's description of the type and color of the residence in which defendant resided, with a map to the residence attached, which listed defendant's first name only, and stated that an informant had observed defendant at the residence searched, but stated an incorrect address for the premises, was adequate, under G.S. 15A-246(4) and 15A-246(5). State v. Moore, — N.C. App. —, 566 S.E.2d 713, 2002 N.C. App. LEXIS 853 (2002).

§ 15A-249. Officer to give notice of identity and purpose.

CASE NOTES

Time Between Notice and Entry. — Where police officer, in executing search warrant for drugs, simultaneously announced his presence and entered the residence, the officer violated G.S. 15A-249. State v. Sumpter, 150 N.C. App. 431, 563 S.E.2d 60, 2002 N.C. App. LEXIS 493 (2002).

§ 15A-251. Entry by force.

CASE NOTES

Search Conducted in Accordance with Section. — Based upon the fact that the police officers were executing a warrant to search for narcotics which could be easily disposed of, forcing entry after six to eight seconds did not violate defendant's statutory and constitutional rights. State v. Reid, — N.C. App. —, 566 S.E.2d 186, 2002 N.C. App. LEXIS 758 (2002).

§ 15A-257. Return of the executed warrant.

CASE NOTES

Cited in State v. Bullin, — N.C. App. —, 564 S.E.2d 576, 2002 N.C. App. LEXIS 649 (2002).

Article 14.

Nontestimonial Identification.

§ 15A-273. Basis for order.

CASE NOTES

Sufficient Affidavit. — Affidavit submitted to obtain an order for non-testimonial identification evidence from defendant was sufficient because it was reasonable to infer that defendant met the physical description of the perpetrator given by the victims, a Peeping Tom was reported at the location of one of the rapes, an officer saw a man squatting next to an air conditioner unit there wearing a light gray or blue windbreaker and blue jeans who ran when he saw the officer, and defendant was stopped nearby wearing a light blue windbreaker and blue jeans; therefore, defendant was a suspect based on more than a minimal amount of objective justification and more than an unparticularized hunch. State v. Pearson, 356 N.C. 22, 566 S.E.2d 50, 2002 N.C. LEXIS 545 (2002).

§ 15A-279. Implementation of order.

CASE NOTES

Evidence Admissible Despite Absence of Counsel. — Evidence obtained pursuant to a non-testimonial identification order was admissible despite the nonobservance of defendant's right to counsel, under G.S. 15A-279(d), because the evidence was not obtained as a result of the violation; as the evidence would have been obtained even if counsel had been provided and present, and the lack of counsel to advise defendant to have the evidence destroyed under G.S. 15A-280 was not determinative since there was sufficient probable cause to obtain a later search warrant without that evidence. State v. Pearson, 356 N.C. 22, 566 S.E.2d 50, 2002 N.C. LEXIS 545 (2002).

§ 15A-280. Return.

CASE NOTES

Purpose. — Section 15A-280's purposes are twofold: (1) it requires a return to the judge who issued the non-testimonial identification order (NIO) setting forth a product inventory, and (2) it allows the subject of the NIO the opportunity to make a motion to have the NIO products destroyed. State v. Pearson, 356 N.C. 22, 566 S.E.2d 50, 2002 N.C. LEXIS 545 (2002).

Insubstantial Violation. — Officer's failure to return to the issuing judge an inventory of the evidence seized pursuant to the judge's order for non-testimonial identification evidence did not require the suppression of the evidence seized pursuant to G.S. 15A-974(2); the collection of the evidence seized was not causally related to the statutory violation, only insignificant interests were violated as defendant was present when the evidence was taken and was aware of what was taken, and defendant did not move for destruction of the evidence after the expiration of the time within which the inventory was to be filed. State v. Pearson, 356 N.C. 22, 566 S.E.2d 50, 2002 N.C. LEXIS 545 (2002).

§ 15A-282. Copy of results to person involved.

CASE NOTES

Insubstantial Violation. — Officer's failure to provide defendant with a copy of any test results on the evidence seized from him pursuant to a non-testimonial identification order did not require the suppression of the evidence pursuant to G.S. 15A-974(2); the interest protected was insignificant because the samples had already been taken and the deviation from the statute was an unintentional oversight. State v. Pearson, 356 N.C. 22, 566 S.E.2d 50, 2002 N.C. LEXIS 545 (2002).

Article 16.

Electronic Surveillance.

§ 15A-286. Definitions.

CASE NOTES

Cited in State v. McGriff, — N.C. App. —, 566 S.E.2d 776, 2002 N.C. App. LEXIS 870 (2002); Kroh v. Kroh, — N.C. App. —, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002).

§ 15A-287. Interception and disclosure of wire, oral, or electronic communications prohibited.

CASE NOTES

Overheard Conversation Admissible into Evidence. — Woman's continued listening to a conversation over her cordless telephone between the defendant and the statutory rape victim was not done with a bad purpose or without a justifiable excuse, rather, it was done out of concern for the welfare of a minor; therefore, her testimony as to the conversation which she heard was admissible. State v. McGriff, — N.C. App. —, 566 S.E.2d 776, 2002 N.C. App. LEXIS 870 (2002).

Summary Judgment Improperly Granted. — Summary judgment was improperly granted on the husband's claim that the wife illegally videotaped the husband's in-home actions; as the husband did not establish that the videotaping included sound recordings, an issue of fact remained as only oral communications were covered by G.S. 15A-287. Kroh v. Kroh, — N.C. App. —, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002).

§ 15A-296. Recovery of civil damages authorized.

CASE NOTES

Cited in Kroh v. Kroh, — N.C. App. —, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002).

SUBCHAPTER III. CRIMINAL PROCESS.

ARTICLE 17.

Criminal Process.

§ 15A-301. Criminal process generally.

(a) Formal Requirements. —

(1) A record of each criminal process issued in the trial division of the General Court of Justice must be maintained in the office of the clerk in either paper form or in electronic form in the Electronic Repository as provided in G.S. 15A-301.1.

(2) Criminal process, other than a citation, must be signed and dated by the justice, judge, magistrate, or clerk who issues it. The citation must be signed and dated by the law-enforcement officer who issues it.

(b) To Whom Directed. — Warrants for arrest and orders for arrest must be directed to a particular officer, a class of officers, or a combination thereof, having authority and territorial jurisdiction to execute the process. A criminal summons must be directed to the person summoned to appear and must be delivered to and may be served by any law-enforcement officer having authority and territorial jurisdiction to make an arrest for the offense charged, except that in those instances where the defendant is called into a law-enforcement agency to receive a summons, any employee so designated by the agency's chief executive officer may serve a criminal summons at the agency's office. The citation must be directed to the person cited to appear.

(c) Service. —

(1) A law-enforcement officer or other employee designated as provided in subsection (b) receiving for service or execution a criminal process that was first created and exists only in paper form must note thereon the date and time of its receipt. A law enforcement officer receiving a copy of a criminal process that was printed in paper form as provided in G.S. 15A-301.1 shall cause the date of receipt to be recorded as provided in that section. Upon execution or service, a copy of the process must be delivered to the person arrested or served.

(2) A corporation may be served with criminal summons as provided in G.S. 15A-773.

(d) Return. —

(1) The officer or other employee designated as provided in subsection (b) who serves or executes a criminal process that was first created and exists only in paper form must enter the date and time of the service or execution on the process and return it to the clerk of court in the county in which issued. The officer or other employee designated as provided in subsection (b) of this section who serves or executes a copy of a criminal process that was printed in paper form as provided in

G.S. 15A-301.1 shall promptly cause the date of the service or execution to be recorded as provided in that section.

(2) If criminal process that was created and exists only in paper form is not served or executed within a number of days indicated below, it must be returned to the clerk of court in the county in which it was issued, with a reason for the failure of service or execution noted thereon.
   a. Warrant for arrest — 180 days.
   b. Order for arrest — 180 days.
   c. Criminal summons — 90 days or the date the defendant is directed to appear, whichever is earlier.

(3) Failure to return the process to the clerk as required by subdivision (2) of this subsection does not invalidate the process, nor does it invalidate service or execution made after the period specified in subdivision (2).

(4) The clerk to which return of a criminal process that was created and exists only in paper form is made may redeliver the process to a law-enforcement officer or other employee designated as provided in subsection (b) for further attempts at service. If the process is a criminal summons, he may reissue it only upon endorsement of a new designated time and date of appearance.

(e) Copies to Be Made by Clerk. —

(1) The clerk may make a certified copy of any criminal process that was created and exists only in paper form filed in his office pursuant to subsection (a) when the original process has been lost or when the process has been returned pursuant to subdivision (d)(2). The copy may be executed as effectively as the original process whether or not the original has been redelivered as provided in G.S. 15A-301(d)(4).

(2) When criminal process is returned to the clerk pursuant to subdivision (d)(1) and it appears that the appropriate venue is in another county, the clerk must make and retain a certified copy of the process and transmit the original process to the clerk in the appropriate county.

(3) Upon request of a defendant, the clerk must make and furnish to him without charge one copy of every criminal process filed against him.

(4) Nothing in this section prevents the making and retention of uncertified copies of process for information purposes under G.S. 15A-401(a)(2) or for any other lawful purpose.

(f) Protection of Process Server. — An officer or other employee designated as provided in subsection (b), and serving process as provided in subsection (b), receiving under this section or under G.S. 15A-301.1 criminal process which is complete and regular on its face may serve the process in accordance with its terms and need not inquire into its regularity or continued validity, nor does he incur criminal or civil liability for its due service.

(g) Recall of Process — Authority. — A criminal process that has not been served on the defendant, other than a citation, shall be recalled by a judicial official or by a person authorized to act on behalf of a judicial official as follows:

(1) A warrant or criminal summons shall be recalled by the issuing judicial official when that official determines that probable cause did not exist for its issuance.

(2) Any criminal process other than a warrant or criminal summons may be recalled for good cause by any judicial official of the trial division in which it was issued. Good cause includes, without limitation, the fact that:
   a. A copy of the process has been served on the defendant.
   b. All charges on which the process is based have been disposed.
   c. The person named as the defendant in the process is not the person who committed the charged offense.

d. It has been determined that grounds for the issuance of an order for arrest did not exist, no longer exist or have been satisfied.

(3) The disposition of all charges on which a process is based shall effect the recall, without further action by the court, of that process and of all other outstanding process issued in connection with the charges, including all orders for arrest issued for the defendant's failure to appear to answer the charges.

When the process was first created and exists only in paper form, the recall shall promptly be communicated by any reasonable means to each law enforcement agency known to be in possession of the original or a copy of the process, and each agency shall promptly return the process to the court, unserved. When the process is in the Electronic Repository, the recall shall promptly be entered in the Electronic Repository, and no further copies of the process shall be printed in paper form. The recall shall also be communicated by any reasonable means to each agency that is known to be in possession of a copy of the process in paper form and that does not have remote electronic access to the Electronic Repository. (1868-9, c. 178, subch. 3, s. 4; Code, s. 1135; Rev., s. 3159; C.S., s. 4525; 1957, c. 346; 1969, c. 44, s. 28; 1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, ss. 136, 137; 1979, c. 725, ss. 1-3; 1989, c. 262, s. 3; 2002-64, s. 3.)

Cross References. — As to electronic technology in criminal process and procedure, see G.S. 15A-101.1.

Effect of Amendments. — Session Laws 2002-64, s. 3, effective January 1, 2003, and applicable to all acts done on and after that date, rewrote the section.

§ 15A-301.1. Electronic Repository.

(a) The Administrative Office of the Courts shall create and maintain, in cooperation with State and local law enforcement agencies, an automated electronic repository for criminal process (hereinafter referred to as the Electronic Repository), which shall comprise a secure system of electronic data entry, storage, and retrieval that provides for creating, signing, issuing, entering, filing, and retaining criminal process in electronic form, and that provides for the following with regard to criminal process in electronic form:

(1) Tracking criminal process.

(2) Accessing criminal process through remote electronic means by all authorized judicial officials and employees and all authorized law enforcement officers and agencies that have compatible electronic access capacity.

(3) Printing any criminal process in paper form by any authorized judicial official or employee or any authorized law enforcement officer or agency.

The Administrative Office of the Courts shall assure that all electronic signatures effected through use of the system meet the requirements of G.S. 15A-101.1(5).

(b) Any criminal process may be created, signed, and issued in electronic form, filed electronically in the office of a clerk of superior court, and retained in electronic form in the Electronic Repository.

(c) Any process that was first created, signed, and issued in paper form may subsequently be filed in electronic form and entered in the Electronic Repository by the judicial official who issued the process or by any person authorized to enter it on behalf of the judicial official. All copies of the process in paper form are then subject to the provisions of subsections (i) and (k) of this section.

(d) Any criminal process in the Electronic Repository shall be part of the official records of the clerk of superior court of the county for which it was

issued and shall be maintained in the office of that clerk as required by G.S. 15A-301(a).

(e) Any criminal process in the Electronic Repository may, at any time and at any place in this State, be printed in paper form and delivered to a law enforcement agency or officer by any judicial official, law enforcement officer, or other authorized person.

(f) When printed in paper form pursuant to subsection (e) of this section, any copy of a criminal process in the Electronic Repository confers the same authority and has the same force and effect for all other purposes as the original of a criminal process that was created and exists only in paper form.

(g) Service of any criminal process in the Electronic Repository may be effected by delivering to the person to be served a copy of the process that was printed in paper form pursuant to subsection (e) of this section.

(h) The tracking information specified in subsection (i) of this section shall promptly be entered in the Electronic Repository when one or both of the following occurs:

(1) A process is first created, signed, and issued in paper form and subsequently entered in electronic form in the Electronic Repository as provided in subsection (c) of this section.

(2) A copy of a process in the Electronic Repository is printed in paper form pursuant to subsection (e) of this section.

(i) The following tracking information shall be entered in the Electronic Repository in accordance with subsections (c) and (h) of this section:

(1) The date and time when the process was printed in paper form.

(2) The name of the law enforcement agency by or for which the process was printed in paper form.

(3) If available, the name and identification number of the law enforcement officer to whom any copy of the process was delivered.

(j) The service requirements set forth in subsection (k) of this section shall apply to:

(1) Each copy of a criminal process that is first created in paper form and subsequently entered into the Electronic Repository as provided in subsection (c) of this section.

(2) Each copy of a criminal process in the Electronic Repository that is printed in paper form pursuant to subsection (e) of this section.

(k) Service Requirements for Process Entered in the Electronic Repository. — The copy of the process shall be served not later than 24 hours after it has been printed. The date, time, and place of service shall promptly be recorded in the Electronic Repository and shall be part of the official records of the court. If the process is not served within 24 hours, that fact shall promptly be recorded in the Electronic Repository and all copies of the process in paper form shall be destroyed. The process may again be printed in paper form at later times and at the same or other places. Subsection (f) of this section applies to each successively printed copy of the process. When service of the warrant is no longer being actively pursued, that fact shall be promptly recorded in the Electronic Repository.

(*l*) A law enforcement officer or agency that does not have compatible remote access to the Electronic Repository shall promptly communicate, by any reasonable means, the information required by subsection (k) of this section to the clerk of superior court of the county in which the process was issued or to any other person authorized to enter information into the Electronic Repository, and the information shall promptly be entered in the Electronic Repository.

(m) Failure to enter any information as required by subsection (i) or (k) of this section does not invalidate the process, nor does it invalidate service or execution made after the period specified in subsection (k) of this section.

(n) A warrant created and existing only in paper form is returned within the meaning of G.S. 132-1.4(k) when it is returned as provided in G.S. 15A-301(d). A warrant that exists only in electronic form in the Electronic Repository is returned within the meaning of G.S. 132-1.4(k), when it has been served or when service of the warrant is no longer being actively pursued, as either fact is entered in the Electronic Repository pursuant to subsection (k) of this section. (2002-64, s. 2.)

Cross References. — As to electronic technology in criminal process and procedure, see G.S. 15A-101.1.

Editor's Note. — Session Laws 2002-64, s. 4, made this section effective January 1, 2003, and applicable to all acts done on and after that date.

§ 15A-302. Citation.

CASE NOTES

Citation Requirements. — A citation complies with all necessary requirements where it identifies the crimes charged and the date of the offenses, contains the name and address of the person cited, identifies the officer issuing the citation, designates the court in which the defendant is required to appear, and designates the date and time. State v. Phillips, 149 N.C. App. 310, 560 S.E.2d 852, 2002 N.C. App. LEXIS 185 (2002), appeal dismissed, 355 N.C. 499, 564 S.E.2d 230 (2002).

Cited in State v. Phillips, — N.C. App. —, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002).

§ 15A-303. Criminal summons.

CASE NOTES

Cited in State v. Phillips, — N.C. App. —, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002).

§ 15A-304. Warrant for arrest.

CASE NOTES

Probable Cause Explained. — Sufficient evidence was presented to the magistrate in support of defendant's arrest warrant to support the reasonable probability that defendant was involved in drug trafficking; probable cause determinations were the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, acted. State v. Bullin, — N.C. App. —, 564 S.E.2d 576, 2002 N.C. App. LEXIS 649 (2002).

Cited in State v. Garcia, 146 N.C. App. 745, 553 S.E.2d 914, 2001 N.C. App. LEXIS 1076 (2001).

SUBCHAPTER IV. ARREST.

ARTICLE 20.

Arrest.

§ 15A-401. Arrest by law-enforcement officer.

(a) Arrest by Officer Pursuant to a Warrant. —

(1) Warrant in Possession of Officer. — An officer having a warrant for arrest in his possession may arrest the person named or described therein at any time and at any place within the officer's territorial jurisdiction.

(2) Warrant Not in Possession of Officer. — An officer who has knowledge that a warrant for arrest has been issued and has not been executed, but who does not have the warrant in his possession, may arrest the person named therein at any time. The officer must inform the person arrested that the warrant has been issued and serve the warrant upon him as soon as possible. This subdivision applies even though the arrest process has been returned to the clerk under G.S. 15A-301.

(b) Arrest by Officer Without a Warrant. —

(1) Offense in Presence of Officer. — An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence.

(2) Offense Out of Presence of Officer. — An officer may arrest without a warrant any person who the officer has probable cause to believe:

a. Has committed a felony; or

b. Has committed a misdemeanor, and:

1. Will not be apprehended unless immediately arrested, or

2. May cause physical injury to himself or others, or damage to property unless immediately arrested; or

c. Has committed a misdemeanor under G.S. 14-72.1, 14-134.3, 20-138.1, or 20-138.2; or

d. Has committed a misdemeanor under G.S. 14-33(a), 14-33(c)(1), 14-33(c)(2), or 14-34 when the offense was committed by a person with whom the alleged victim has a personal relationship as defined in G.S. 50B-1; or

e. Has committed a misdemeanor under G.S. 50B-4.1(a).

(3) Repealed by Session Laws 1991, c. 150.

(4) A law enforcement officer may detain an individual arrested for violation of an order limiting freedom of movement or access issued pursuant to G.S. 130A-475 or G.S. 130A-145 in the area designated by the State Health Director or local health director pursuant to such order. The person may be detained in such area until the initial appearance before a judicial official pursuant to G.S. 15A-511 and G.S. 15A-534.5.

(c) How Arrest Made. —

(1) An arrest is complete when:

a. The person submits to the control of the arresting officer who has indicated his intention to arrest, or

b. The arresting officer, with intent to make an arrest, takes a person into custody by the use of physical force.

(2) Upon making an arrest, a law-enforcement officer must:

a. Identify himself as a law-enforcement officer unless his identity is otherwise apparent,

b. Inform the arrested person that he is under arrest, and

c. As promptly as is reasonable under the circumstances, inform the arrested person of the cause of the arrest, unless the cause appears to be evident.

(d) Use of Force in Arrest. —

(1) Subject to the provisions of subdivision (2), a law-enforcement officer is justified in using force upon another person when and to the extent that he reasonably believes it necessary:

a. To prevent the escape from custody or to effect an arrest of a person who he reasonably believes has committed a criminal offense, unless he knows that the arrest is unauthorized; or

b. To defend himself or a third person from what he reasonably

believes to be the use or imminent use of physical force while effecting or attempting to effect an arrest or while preventing or attempting to prevent an escape.

(2) A law-enforcement officer is justified in using deadly physical force upon another person for a purpose specified in subdivision (1) of this subsection only when it is or appears to be reasonably necessary thereby:

a. To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force;

b. To effect an arrest or to prevent the escape from custody of a person who he reasonably believes is attempting to escape by means of a deadly weapon, or who by his conduct or any other means indicates that he presents an imminent threat of death or serious physical injury to others unless apprehended without delay; or

c. To prevent the escape of a person from custody imposed upon him as a result of conviction for a felony.

Nothing in this subdivision constitutes justification for willful, malicious or criminally negligent conduct by any person which injures or endangers any person or property, nor shall it be construed to excuse or justify the use of unreasonable or excessive force.

(e) Entry on Private Premises or Vehicle; Use of Force. —

(1) A law-enforcement officer may enter private premises or a vehicle to effect an arrest when:

a. The officer has in his possession a warrant or order or a copy of the warrant or order for the arrest of a person, provided that an officer may utilize a copy of a warrant or order only if the original warrant or order is in the possession of a member of a law enforcement agency located in the county where the officer is employed and the officer verifies with the agency that the warrant is current and valid; or the officer is authorized to arrest a person without a warrant or order having been issued,

b. The officer has reasonable cause to believe the person to be arrested is present, and

c. The officer has given, or made reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice would present a clear danger to human life.

(2) The law-enforcement officer may use force to enter the premises or vehicle if he reasonably believes that admittance is being denied or unreasonably delayed, or if he is authorized under subsection (e)(1)c to enter without giving notice of his authority and purpose.

(f) Use of Deadly Weapon or Deadly Force to Resist Arrest. —

(1) A person is not justified in using a deadly weapon or deadly force to resist an arrest by a law-enforcement officer using reasonable force, when the person knows or has reason to know that the officer is a law-enforcement officer and that the officer is effecting or attempting to effect an arrest.

(2) The fact that the arrest was not authorized under this section is no defense to an otherwise valid criminal charge arising out of the use of such deadly weapon or deadly force.

(3) Nothing contained in this subsection (f) shall be construed to excuse or justify the unreasonable or excessive force by an officer in effecting an arrest. Nothing contained in this subsection (f) shall be construed to bar or limit any civil action arising out of an arrest not authorized by this Article. (1868-9, c. 178, subch. 1, ss. 3, 5; Code, ss. 1126, 1128; Rev., ss. 3178, 3180; C.S., ss. 4544, 4546; 1955, c. 58; 1973, c. 1286, s. 1; 1979, c. 561, s. 3; c. 725, s. 4; 1983, c. 762, s. 1; 1985, c. 548; 1991, c. 150, s. 1; 1995, c. 506, s. 10; 1997-456, s. 3; 1999-23, s. 7; 1999-399, s. 1; 2002-179, s. 14.)

Effect of Amendments. — Session Laws 2002-179, s. 14, effective October 1, 2002, added subdivision (b)(4).

Legal Periodicals. —

For article, "Law Enforcement Use of Force: The Objective Reasonableness Standards Under North Carolina and Federal Law," see 24 Campbell L. Rev. 201 (2002).

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in State v. Martinez, 150 N.C. App. 364, 562 S.E.2d 914, 2002 N.C. App. LEXIS 485 (2002); State v. Phillips, — N.C. App. —, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002).

III. ARREST WITHOUT WARRANT.

A. In General.

Information from Reliable Informant. — Officers and deputies had probable cause to believe that defendant was engaged in criminal activity sufficient to justify a warrantless arrest where a known and reliable informant gave a deputy detailed information that defendant would be delivering a large amount of cocaine to a specific location to which he would be driven by a woman in a black car in about 50 minutes, the deputy and other officers set up surveillance near the specified location, and defendant arrived at the specified location in the car with the woman. State v. Chadwick, 149 N.C. App. 200, 560 S.E.2d 207, 2002 N.C. App. LEXIS 124 (2002).

B. Illustrative Cases.

1. Offense in Presence of Officer.

Violation of Motor Vehicle Act. — Police officer had probable cause to arrest defendant for speeding and failing to produce a driver's license after the officer clocked defendant on radar going 57 miles per hour in a zone where the posted speed limit was 35 miles per hour and where defendant failed to produce his driver's license to the officer upon request after the officer stopped defendant. State v. Phillips, 149 N.C. App. 310, 560 S.E.2d 852, 2002 N.C. App. LEXIS 185 (2002), appeal dismissed, 355 N.C. 499, 564 S.E.2d 230 (2002).

OPINIONS OF ATTORNEY GENERAL

Arrests of Inmates Either Inside or Outside Confines of Private Prison Facility. — In order to make arrests of inmates either inside or outside the confines of a private prison facility, and use force in doing so, the employees of a private prison operator must obtain certification as municipal law enforcement officers, be deputized by the sheriff, or become commissioned as company police officers; absent certification as a law enforcement officer or deputization, the employees of a private prison operator may only detain inmates and use force against them consistent with the common law principles of self defense and defense of property. See opinion of Attorney General to Senator Frank W. Ballance, Jr. and Representative E. David Redwine, 2001 N.C. AG LEXIS 5 (3/28/2001).

§ 15A-405. Assistance to law-enforcement officers by private persons to effect arrest or prevent escape; benefits for private persons.

OPINIONS OF ATTORNEY GENERAL

Arrests of Inmates Either Inside or Outside Confines of Private Prison Facility. — In order to make arrests of inmates either inside or outside the confines of a private prison facility, and use force in doing so, the employees of a private prison operator must obtain certification as municipal law enforcement officers, be deputized by the sheriff, or become commissioned as company police officers; absent certification as a law enforcement officer or

deputization, the employees of a private prison operator may only detain inmates and use force against them consistent with the common law principles of self defense and defense of property. See opinion of Attorney General to Senator Frank W. Ballance, Jr. and Representative E. David Redwine, 2001 N.C. AG LEXIS 5 (3/28/2001).

SUBCHAPTER V. CUSTODY.

ARTICLE 23.

Police Processing and Duties upon Arrest.

§ 15A-501. Police processing and duties upon arrest generally.

CASE NOTES

I. General Consideration.
IV. Right of Communication.

I. GENERAL CONSIDERATION.

Applied in State v. Phillips, 149 N.C. App. 310, 560 S.E.2d 852, 2002 N.C. App. LEXIS 185 (2002), appeal dismissed, 355 N.C. 499, 564 S.E.2d 230 (2002); State v. Phillips, — N.C. App. —, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002).

Cited in State v. Bullin, — N.C. App. —, 564 S.E.2d 576, 2002 N.C. App. LEXIS 649 (2002).

IV. RIGHT OF COMMUNICATION.

Right to Communication When Intoxication Is Essential Element of Offense. —

Defendant charged with driving while impaired was informed of his right to communicate with counsel, family, and friends by a State trooper, pursuant to G.S. 15A-501, after his arrest and was given a telephone; defendant's failure to complete a long distance call because defendant failed to dial the area code did not mean that there was a failure to afford defendant his rights under G.S. 15A-501. State v. Lewis, 147 N.C. App. 274, 555 S.E.2d 348, 2001 N.C. App. LEXIS 1136 (2001).

ARTICLE 24.

Initial Appearance.

§ 15A-511. Initial appearance.

CASE NOTES

Applied in State v. Phillips, 149 N.C. App. 310, 560 S.E.2d 852, 2002 N.C. App. LEXIS 185 (2002), appeal dismissed, 355 N.C. 499, 564 S.E.2d 230 (2002); State v. Phillips, — N.C. App. —, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002).

Article 26.

Bail.

Part 1. General Provisions.

§ 15A-534.1. Crimes of domestic violence; bail and pretrial release.

OPINIONS OF ATTORNEY GENERAL

Authority to Set Conditions. — A magistrate does not have the authority to set conditions of pretrial release for a defendant arrested for a domestic violence crime for the first 48 hours after arrest; only a judge may set conditions of pre-trial release in such cases for the first 48 hours after arrest. See opinion of Attorney General to Senator Hamilton C. Horton, Jr., 20th District, Senate Chamber, 2002 N.C. AG LEXIS 10 (1/24/02).

§ 15A-534.5. Detention to protect public health.

If a judicial official conducting an initial appearance finds by clear and convincing evidence that a person arrested for violation of an order limiting freedom of movement or access issued pursuant to G.S. 130A-475 or G.S. 130A-145 poses a threat to the health and safety of others, the judicial official shall deny pretrial release and shall order the person to be confined in an area or facility designated by the judicial official. Such pretrial confinement shall terminate when a judicial official determines that the confined person does not pose a threat to the health and safety of others. These determinations shall be made only after the State Health Director or local health director has made recommendations to the court. (2002-179, s. 15.)

Editor's Note. — Session Laws 2002-179, s. 22, made this section effective October 1, 2002.

Part 2. Bail Bond Forfeiture.

§ 15A-544.5. Setting aside forfeiture.

CASE NOTES

Extraordinary Cause. — Under prior law surety-bondsman's efforts to locate defendant, where the surety had posted an appearance bond on defendant's behalf and defendant failed to appear, were not extraordinary because the surety did not make any trips to Georgia, where defendant was found, to pick up defendant, nor did he show any other efforts or excess expenses to recover defendant. State v. McCarn, — N.C. App. —, 566 S.E.2d 751, 2002 N.C. App. LEXIS 868 (2002).

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

ARTICLE 32.

Indictment and Related Instruments.

§ 15A-644. Form and content of indictment, information or presentment.

CASE NOTES

Cited in State v. Floyd, 148 N.C. App. 290, 558 S.E.2d 237, 2002 N.C. App. LEXIS 13 (2002).

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

ARTICLE 37.

Uniform Criminal Extradition Act.

§ 15A-734. Arrest without a warrant.

CASE NOTES

Cited in State v. Lippard, — N.C. App. —, 568 S.E.2d 657, 2002 N.C. App. LEXIS 965 (2002).

SUBCHAPTER VIII-A. RIGHTS OF CRIME VICTIMS AND WITNESSES.

ARTICLE 46.

Crime Victims' Rights Act.

§ 15A-833. Evidence of victim impact.

CASE NOTES

Cited in State v. White, 355 N.C. 696, 565 S.E.2d 55, 2002 N.C. LEXIS 675 (2002).

SUBCHAPTER IX. PRETRIAL PROCEDURE.

ARTICLE 48.

Discovery in the Superior Court.

§ 15A-903. Disclosure of evidence by the State — Information subject to disclosure.

CASE NOTES

I. General Consideration.
II. Statement of Defendant.
IV. Statements of Witnesses.
VI. Documents, Tangible Objects, and Reports.

I. GENERAL CONSIDERATION.

Applied in State v. Ward, 354 N.C. 231, 555 S.E.2d 251, 2001 N.C. LEXIS 1097 (2001); State v. China, — N.C. App. —, 564 S.E.2d 64, 2002 N.C. App. LEXIS 580 (2002).

II. STATEMENT OF DEFENDANT.

Inculpatory Statements. — Prosecutor complied with G.S. 15A-903 by revealing inculpatory statements made by defendant to the police as soon as the prosecutor knew of them, even though it was shortly before trial. State v. Parks, 148 N.C. App. 600, 560 S.E.2d 179, 2002 N.C. App. LEXIS 53 (2002).

IV. STATEMENTS OF WITNESSES.

Testimony Properly Allowed. —

Where defense counsel had possession of witness' interview before the trial even commenced, and made effective use of the transcript at trial by extensively cross-examining the witness with the interview transcript, and where the State did not introduce detective's testimony regarding the interview until after defense counsel had already vigorously cross-examined the witness regarding the content of the interview, the trial court did not err in allowing the detective to read from the interview. State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72, 2002 N.C. App. LEXIS 498 (2002).

Defendant was properly provided requested witness statements at trial after the witness testified on direct, pursuant to G.S. 15A-903(f)(1). State v. McCail, — N.C. App. —, 565 S.E.2d 96, 2002 N.C. App. LEXIS 686 (2002).

VI. DOCUMENTS, TANGIBLE OBJECTS, AND REPORTS.

Prior Recorded Statement of State Witness. —

Due process requirements and the requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), were satisfied where the State provided defendant with a transcript of a witness's statements to a detective before the trial and in time to make effective use of the evidence on cross-examination of the witness; defendant's argument that he was unable to make effective use of the evidence because the delay in disclosure deprived him of the opportunity to use the interview to investigate and possibly locate more witnesses was rejected as being both speculative and not required by law. State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72, 2002 N.C. App. LEXIS 498 (2002).

§ 15A-904. Disclosure of evidence by the State — Certain reports not subject to disclosure.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Investigative Files of Those Preparing State's Case. —

Trial court did not err when it denied defendant's request for the following: (1) police files dealing with any other murders or rapes having a common modus operandi with the crimes charged against defendant and the identification of all persons identified as suspects in

those crimes; (2) evidence relating to another suspect in one victim's case; (3) evidence relating to another person as a suspect in the crimes charged against defendant; and (4) evidence relating to other murders and rapes in which defendant was a suspect. State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

§ 15A-906. Disclosure of evidence by the defendant — Certain evidence not subject to disclosure.

CASE NOTES

Cited in State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

§ 15A-910. Regulation of discovery — Failure to comply.

CASE NOTES

Particular Remedy Within Discretion of Trial Court. —

When the State tried to introduce lab reports in a drug case without prior disclosure to defendant, and the trial court offered defendant a recess to allow independent testing of the substance, as well as an opportunity to request a mistrial, and ordered the State to provide full discovery to defendant, who was then allowed time to review the reports and voir dire the lab agents, the trial court's refusal to exclude the reports was not an abuse of discretion. State v. Moore, — N.C. App. —, 566 S.E.2d 713, 2002 N.C. App. LEXIS 853 (2002).

Failure to Impose Sanctions Not Improper. —

Trial court did not err by admitted photos first shown to defendant on the morning of trial, in violation of a discovery order, as defendant had been on notice of the existence of the photos and was not surprised by their introduction. State v. Jones, — N.C. App. —, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002).

Trial court was not required to impose sanctions for late discovery, but instead, it was a matter of discretion for the trial judge; the trial court was affirmed where no sanction was imposed for the State's late disclosure of several statements. State v. Love, — N.C. App. —, 568 S.E.2d 320, 2002 N.C. App. LEXIS 971 (2002).

Article 49.

Pleadings and Joinder.

§ 15A-921. Pleadings in criminal cases.

CASE NOTES

Cited in State v. Garcia, 146 N.C. App. 745, 553 S.E.2d 914, 2001 N.C. App. LEXIS 1076 (2001).

§ 15A-922. Use of pleadings in misdemeanor cases generally.

CASE NOTES

Statutory right to object to trial on citation, etc.

While defendant was entitled to have the State file a statement of charges if he objected to being tried by citation, where defendant did not object to trial by citation in the court of original jurisdiction he was no longer entitled to assert that right. State v. Phillips, 149 N.C.

App. 310, 560 S.E.2d 852, 2002 N.C. App. LEXIS 185 (2002), appeal dismissed, 355 N.C. 499, 564 S.E.2d 230 (2002).

Applied in State v. Phillips, — N.C. App. —, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002).

§ 15A-923. Use of pleadings in felony cases and misdemeanor cases initiated in the superior court division.

CASE NOTES

Limited Amendment of Indictment Permitted. — Bill of indictment may not be amended in a manner which substantially altered the charge set forth, however, if the proof was in line with the indictment, an amendment would not substantially alter the charge within the meaning of G.S. 15A-923. State v. Parker, 146 N.C. App. 715, 555 S.E.2d 609, 2001 N.C. App. LEXIS 1080 (2001).

There could be no amendment to a bill of indictment if the change in the indictment would substantially alter the charge set forth in the indictment; a non-essential variance was not fatal to the charged offense. State v. Brady, 147 N.C. App. 755, 557 S.E.2d 148, 2001 N.C. App. LEXIS 1245 (2001).

Correction of Victim's Name. —

Amendment to an indictment which corrected the misspelling of a victim's name was permissible since it did not substantially alter the charge in the original indictment. State v. McNair, 146 N.C. App. 674, 554 S.E.2d 665, 2001 N.C. App. LEXIS 1061 (2001).

The State may prove that an offense charged was committed on some date other than the time named in the indictment.

Changing the dates in the indictment in a statutory rape case to expand the time frame did not substantially alter the charge set forth in the indictment. State v. McGriff, — N.C. App. —, 566 S.E.2d 776, 2002 N.C. App. LEXIS 870 (2002).

§ 15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

In cases of sexual assaults on children, temporal specificity requisites diminish.

Statutory rape conviction was affirmed as defendant's contention that the variance between the dates in the indictment and the evidence presented at trial was fatal and deprived him of a potential alibi defense had no merit. State v. McGriff, — N.C. App. —, 566 S.E.2d 776, 2002 N.C. App. LEXIS 870 (2002).

Indictment Held Sufficient. —

Indictment charging that defendant attempted to obtain property with an intent to defraud met the requirements of G.S. 15A-924(a)(5) where it stated that defendant pretended to be someone else in order to cash a check without authorization, and that he obtained property by means of a false pretense which was calculated to deceive and did deceive. State v. Armstead, 149 N.C. App. 652, 560 S.E.2d 227, 2002 N.C. App. LEXIS 266 (2002).

Indictment Held Insufficient. — Defendant was improperly convicted of first-degree arson, as the indictment only alleged elements of second-degree arson, and was not sufficient to put him on notice that he might be tried for first-degree arson and to allow him to prepare a defense. State v. Scott, — N.C. App. —, 564 S.E.2d 285, 2002 N.C. App. LEXIS 576 (2002).

Arrest Warrant Held Insufficient. — Because the arrest warrant failed to charge defendant with the commission of a simple assault under G.S. 14-33(a), the trial court erred in failing to dismiss the charge as stated in the criminal pleading and the appellate court vacated defendant's conviction for assault. State v. Garcia, 146 N.C. App. 745, 553 S.E.2d 914, 2001 N.C. App. LEXIS 1076 (2001).

§ 15A-925. Bill of particulars.

CASE NOTES

Motion for Bill of Particulars Properly Denied. —

Trial court did not err in denying defendant's motion for a bill of particulars because defendant failed to show that the information requested was necessary to enable defendant to adequately prepare or conduct a defense; thus, defendant did not prove palpable and gross abuse of discretion on the part of the trial court; furthermore, the prosecution provided defendant with open file discovery and defendant received copies of the victims' statements and copies of every police report that had been prepared in connection with the particular investigations so that all of the information that defendant requested was in these materials. State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

§ 15A-926. Joinder of offenses and defendants.

CASE NOTES

II. Joinder of Offenses.
A. In General.
B. Illustrative Cases.

II. JOINDER OF OFFENSES.

A. In General.

Continuing Transactions. —

Joinder at trial of defendant's offenses of armed robberies of cash checking businesses, robberies at gunpoint of individuals, robbery at gunpoint of an individual's automobile, and larceny of a car in a parking lot resulting from a two-week crime spree upheld where the offenses were connected transactionally and the evidence was overlapping. State v. Floyd, 148 N.C. App. 290, 558 S.E.2d 237, 2002 N.C. App. LEXIS 13 (2002).

B. Illustrative Cases.

Evidence Was Sufficient for Transactional Connection. —

Joinder of criminal drug charges was appropriate because the charges of trafficking, conspiracy, and possession with the intent to manufacture, sell, or deliver all stemmed from a series of actions occurring over a short period of time that were part of one general transaction. State v. Bullin, — N.C. App. —, 564 S.E.2d 576, 2002 N.C. App. LEXIS 649 (2002).

Joinder of offenses was proper in a case where the defendant was accused of sexually assaulting women and strangling to death two victims because transactional connection was established through numerous factors: (1) all of the victims were either prostitutes or had at some time exchanged sex for drugs or money, (2) the victims were all African-Americans and were drug addicts and/or drug users, (3) defendant's method of assaulting the victims was by strangulation that often left distinct scratches from defendant's long fingernails, (4) all of the surviving victims, except for one who could not identify the defendant, stated that the defendant was well-mannered prior to the assaults but that he would snap instantly and begin assaulting them, (5) defendant used a knife or box cutter at some point during the assaults, (6) the police were able to use DNA evidence to link defendant to three victims, (7) all of the offenses occurred within a one-square-mile area, (8) the incidents took place in a fifteen- to sixteen-month span, with the longest time between offenses being close to five months, and (9) the similarities in the cases were such that the essential evidence in one case would have been admissible in every other case to prove intent, plan, or design. State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

The following substantial similarities, etc.

Two murders with which defendant was charged were properly joined for trial under G.S. 15A-926(a), due to the similarity of their modus operandi and their temporal proximity of four months, as well as their occurrence in the same county. State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

§ 15A-927. Severance of offenses; objection to joinder of defendants for trial.

CASE NOTES

Deletions from defendant's statement of references to codefendant, etc. —

Where the State called a jail inmate as a witness to testify about conversations he had with defendant, in which defendant stated that he had gotten a gun from his friend and shot the victim, the trial court correctly prohibited the inmate from testifying that defendant was assisted by his friend, due to the likelihood that this reference would implicate codefendant in the shooting, substantially threatening his Sixth Amendment rights. Defendant was not prejudiced by the admission of the sanitized statement because it was not materially altered by deleting the reference to the codefendant. State v. Stafford, — N.C. App. —, 564 S.E.2d 60, 2002 N.C. App. LEXIS 578 (2002).

Cited in State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

§ 15A-928. Allegation and proof of previous convictions in superior court.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Special Indictments. —

Indictment was insufficient to charge defendant with the felony of habitual misdemeanor assault where the absence of any indictment alleging violation of G.S. 14-33.2, habitual misdemeanor assault, rendered the principal indictment one which charged the defendant with only the misdemeanor of assault on a female. State v. Williams, — N.C. App. —, 568 S.E.2d 890, 2002 N.C. App. LEXIS 1081 (2002).

ARTICLE 51.

Arraignment.

§ 15A-942. Right to counsel.

CASE NOTES

Cited in State v. Phillips, — N.C. App. —, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002).

ARTICLE 52.

Motions Practice.

§ 15A-954. Motion to dismiss — Grounds applicable to all criminal pleadings; dismissal of proceedings upon death of defendant.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Arrest Warrant Insufficient. — Because the arrest warrant failed to charge defendant with the commission of a simple assault under G.S. 14-33(a), the trial court erred in failing to dismiss the charge as stated in the criminal pleading and the appellate court vacated defendant's conviction for assault. State v. Garcia, 146 N.C. App. 745, 553 S.E.2d 914, 2001 N.C. App. LEXIS 1076 (2001).

§ 15A-957. Motion for change of venue.

CASE NOTES

Cited in State v. McCail, — N.C. App. —, 565 S.E.2d 96, 2002 N.C. App. LEXIS 686 (2002).

§ 15A-958. Motion for a special venire from another county.

CASE NOTES

Cited in State v. McCail, — N.C. App. —, 565 S.E.2d 96, 2002 N.C. App. LEXIS 686 (2002).

ARTICLE 53.

Motion to Suppress Evidence.

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.

CASE NOTES

I. General Consideration.
III. Substantial Violation of Chapter.

I. GENERAL CONSIDERATION.

Applied in State v. Nance, 149 N.C. App. 734, 562 S.E.2d 557, 2002 N.C. App. LEXIS 315 (2002).

Cited in State v. Moore, — N.C. App. —, 566 S.E.2d 713, 2002 N.C. App. LEXIS 853 (2002).

III. SUBSTANTIAL VIOLATION OF CHAPTER.

Officer's failure to provide defendant with a copy of any test results on the evidence seized from him pursuant to a non-testimonial identification order did not require the suppression of the evidence pursuant to G.S. 15A-974(2); the interest protected was insignificant because the samples had already been taken and the deviation from the statute was an unintentional oversight. State v. Pearson, 356 N.C. 22, 566 S.E.2d 50, 2002 N.C. LEXIS 545 (2002).

Officer's failure to return to the issuing judge an inventory of the evidence seized pursuant to the judge's order for non-testimonial identification evidence did not require the suppression of the evidence seized pursuant to G.S. 15A-974(2); the collection of the evidence seized was not causally related to the statutory violation, only insignificant interests were violated as defendant was present when the evidence was taken and was aware of what was taken, and defendant did not move for destruction of the evidence after the expiration of the time within which the inventory was to be filed. State v. Pearson, 356 N.C. 22, 566 S.E.2d 50, 2002 N.C. LEXIS 545 (2002).

§ 15A-977. Motion to suppress evidence in superior court; procedure.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Timing of Court's Written Findings and Conclusions. — Although the trial court's findings of fact and conclusions of law regarding its denial of defendant's suppression motion were entered during jury deliberations, the delay in entering the findings and conclusions did not amount to prejudicial error, as G.S. 15A-977 did not require the findings and conclusions to have been made in writing at the time of the ruling and defendant failed to show any prejudice from the delay. State v. Lippard, — N.C. App. —, 568 S.E.2d 657, 2002 N.C. App. LEXIS 965 (2002).

Suppression of Statements Made by Defendant. — Summary denial of defendant's motion under G.S. 15A-977 to suppress the admission of statements he had made to police, was proper where the statements had been revealed to the defense by the prosecutor as soon as the prosecutor knew of them and it was not required that defendant receive Miranda warnings prior to making them, as they were made in a conversation initiated by defendant. State v. Parks, 148 N.C. App. 600, 560 S.E.2d 179, 2002 N.C. App. LEXIS 53 (2002).

Cited in State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

§ 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.

CASE NOTES

I. General Consideration.
II. Appeal From Denial of Motion.

I. GENERAL CONSIDERATION.

Cited in State v. Castellon, — N.C. App. —, 566 S.E.2d 696, 2002 N.C. App. LEXIS 860 (2002); State v. Pimental, — N.C. App. —, 568 S.E.2d 867, 2002 N.C. App. LEXIS 1076 (2002).

II. APPEAL FROM DENIAL OF MOTION.

Notice of Intention to Appeal Required. —

Defendant waived his G.S. 15A-979(b) right to appeal an order denying defendant's suppression motion after he pleaded guilty where defendant failed to notify the State and the trial court during plea negotiations of defendant's intention to appeal the denial of his motion to suppress. State v. Stevens, — N.C. App. —, 566 S.E.2d 149, 2002 N.C. App. LEXIS 771 (2002).

Failure to Comply Results in Dismissal of Appeal. —

Defendant's appeal was dismissed as he waived his right to appeal issues relating to the denial of his motion to suppress by failing to specifically reserve his right of appeal on the transcript of plea; the dismissal was without prejudice to defendant's right to seek an evidentiary hearing in superior court to determine whether the guilty plea was in fact entered reserving defendant's right to appeal the denial of the motions to suppress. State v. Pimental, — N.C. App. —, 568 S.E.2d 867, 2002 N.C. App. LEXIS 1076 (2002).

Right to Appeal Conditional. —

While G.S. 15A-979(b) allows appellate review of the denial of a motion to suppress upon appeal from a judgment entered on a guilty plea, this statutory right to appeal is conditional, not absolute; a defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty, and such notice must be specifically given. State v. Pimental, — N.C. App. —, 568 S.E.2d 867, 2002 N.C. App. LEXIS 1076 (2002).

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

ARTICLE 56.

Incapacity to Proceed.

§ 15A-1001. No proceedings when defendant mentally incapacitated; exception.

CASE NOTES

Mentally Ill Defendant Competent to Stand Trial. — Defendant was competent to stand trial despite his mental illness where three experts testified that defendant understood the nature of the proceedings against him; one expert opined that defendant was capable of assisting in his own defense, one testified that defendant's delusions impaired his ability to assist in his defense, in that defendant was "reluctant" and "emotionally unable" to provide his counsel with the names of potential witnesses, and the third offered no opinion as to defendant's ability to assist in his defense. State v. Pratt, — N.C. App. —, 568 S.E.2d 276, 2002 N.C. App. LEXIS 970 (2002).

Defendant on Medication Held Competent. —

Appellate court rejected defendant's argument that defendant's failure to take his Prozac, an antidepressant, for two weeks prior to the entry of plea, would "nullify" the expert opinion that defendant was competent to stand trial and understood the proceedings. State v. Ager, — N.C. App. —, 568 S.E.2d 328, 2002 N.C. App. LEXIS 969 (2002).

Cited in In re Robinson, — N.C. App. —, 567 S.E.2d 227, 2002 N.C. App. LEXIS 855 (2002).

ARTICLE 58.

Procedures Relating to Guilty Pleas in Superior Court.

§ 15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.

CASE NOTES

No Contest Plea. — "Conviction" within the context of G.S. 14-7.6 includes a judgment entered upon a no contest plea, as long as the statutory procedures in this section for entering a no contest plea are followed by the trial court in entering the plea. State v. Jones, — N.C. App. —, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002).

Cited in State v. Edwards, — N.C. App. —, 563 S.E.2d 288, 2002 N.C. App. LEXIS 589 (2002).

§ 15A-1023. Action by judge in plea arrangements relating to sentence; no approval required when arrangement does not relate to sentence.

CASE NOTES

Trial Court's Rejection of Plea Agreement Not Appealable. — Trial court's rejection of defendant's plea arrangement with the prosecution, which included a sentencing range, was not appealable. State v. Santiago, 148 N.C. App. 62, 557 S.E.2d 601, 2001 N.C. App. LEXIS 1281 (2001), cert. denied, 355 N.C. 291, 561 S.E.2d 499 (2002).

Article 59.

Maintenance of Order in the Courtroom.

§ 15A-1031. Custody and restraint of defendant and witnesses.

CASE NOTES

When Defendant May Be Restrained During Trial. —

Trial court properly ordered defendant in capital murder case to be discreetly shackled because of the defendant's numerous instances of misconduct while in jail awaiting trial and while in the detention center immediately prior to trial. State v. Holmes, 355 N.C. 719, 565 S.E.2d 154, 2002 N.C. LEXIS 549 (2002).

Judge Did Not Err in Decision to Restrain or Remove Defendant. —

The trial judge's decision to require defendant to wear a leg brace restraint during trial, which was not visible to the jury, did not violate defendant's constitutional rights. State v. Wilson, 354 N.C. 493, 556 S.E.2d 272, 2001 N.C. LEXIS 1236 (2001).

Cited in State v. Floyd, 148 N.C. App. 290, 558 S.E.2d 237, 2002 N.C. App. LEXIS 13 (2002).

Article 62.

Mistrial.

§ 15A-1061. Mistrial for prejudice to defendant.

CASE NOTES

Mistrial Properly Denied. —

Trial court did not abuse its discretion in refusing to declare a mistrial after a court officer made improper remarks in the presence of some jurors regarding one of defendant's witnesses and an alternate juror responded to the remarks. The trial court conducted a proper inquiry into the matter and dismissed the alternate juror who had spoken to the court officer, and the record supported the trial court's determination after questioning the jurors that the improper remarks did not prohibit the remaining jurors from rendering an impartial decision in the case. State v. Lippard, — N.C. App. —, 568 S.E.2d 657, 2002 N.C. App. LEXIS 965 (2002).

Emotional Outburst by Victim's Family. — Trial court did not abuse its discretion in denying a motion for mistrial where the trial court excused jurors when an emotional outburst occurred, cautioned the audience, provided a curative instruction to the jury and the defendant failed to establish that it was clearly erroneous for the trial court to find that the emotional outburst did not result in irreparable prejudice to defendant. State v. Revels, — N.C. App. —, 569 S.E.2d 15, 2002 N.C. App. LEXIS 1090 (2002).

Defendant in Handcuffs Not Prejudiced. —

The trial court is not required to undertake a voir dire of an entire panel of prospective jurors whenever there is a possibility that one or more members of the panel observed the defendant in restraints. State v. Ward, 354 N.C. 231, 555 S.E.2d 251, 2001 N.C. LEXIS 1097 (2001).

Defendant Seen in Custody. — Defendant was not entitled to a mistrial after a juror saw him in custody, when it was determined that no other jurors saw this or were told about it, and the juror was replaced. State v. VanCamp, 150 N.C. App. 347, 562 S.E.2d 921, 2002 N.C. App. LEXIS 506 (2002).

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

ARTICLE 72.

Selecting and Impaneling the Jury.

§ 15A-1211. Selection procedure generally; role of judge; challenge to the panel; authority of judge to excuse jurors.

CASE NOTES

Juror's Financial Hardship. — Trial court did not abuse its discretion in denying defendant's challenge for cause of prospective juror who expressed concern over his financial hardship in the event of a long trial since the juror repeatedly stated during both the State's and defendant's voir dire that he could follow the law, that he had no outside distractions, that he could be fair to both sides, and could listen to all the evidence fairly. State v. Reed, 355 N.C. 150, 558 S.E.2d 167, 2002 N.C. LEXIS 13 (2002).

Failure to Preserve Juror Challenge for Appellate Review. — Defendant who failed to object to juror selection process at trial, and in fact consented to the juror selection process at trial, failed to preserve issue of propriety of juror selection process in light of her failure to follow the procedures clearly set out for jury panel challenges and her failure to alert the trial court to the challenged improprieties. State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544, 2001 N.C. App. LEXIS 1234 (2001).

Preservation for Review. — Defendant waived his assignment of error to the jury selection process because defendant never challenged the jury selection process in writing and never objected in any way to the allegedly improper method of placing prospective jurors in panels. State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002).

§ 15A-1212. Grounds for challenge for cause.

CASE NOTES

I. GENERAL CONSIDERATION.

Juror's Financial Hardship. — Trial court did not abuse its discretion in denying defendant's challenge for cause of prospective juror who expressed concern over his financial hardship in the event of a long trial since the juror repeatedly stated during both the State's and defendant's voir dire that he could follow the law, that he had no outside distractions, that he could be fair to both sides, and could listen to all the evidence fairly. State v. Reed, 355 N.C. 150, 558 S.E.2d 167, 2002 N.C. LEXIS 13 (2002).

IV. INABILITY TO RENDER VERDICT IN ACCORDANCE WITH LAW.

Juror Belief That Bible Interpretation Supersedes Law. — Trial court did not err by excusing a prospective juror for cause ex mero motu, where she stated that she would not follow the law if it did not "line up with" the Bible. State v. Jones, — N.C. App. —, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002).

Inability to Faithfully and Impartially Apply the Law. — While a prospective juror's reservations about capital punishment or conscientious or religious scruples against its imposition were not a sufficient basis for the juror's excusal, when the trial court was left with the definite impression that the juror would be unable to faithfully and impartially apply the law, due to her equivocal responses to questions about applying the law, the trial court did not abuse its discretion by excusing the juror for cause. State v. Jones, 355 N.C. 117, 558 S.E.2d 97, 2002 N.C. LEXIS 12 (2002).

§ 15A-1214. Selection of jurors; procedure.

CASE NOTES

I. General Consideration.
III. Questioning of Prospective Jurors.

I. GENERAL CONSIDERATION.

Necessity of Exhausting Peremptory Challenges Under Subsection (h). —
Defendant cannot demonstrate prejudice in the jury selection process if he does not exhaust his peremptory challenges. State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544, 2001 N.C. App. LEXIS 1234 (2001).

Where defendant did not exhaust his peremptory challenges In accord with the main volume. See State v. Billings, 348 N.C. 169, 500 S.E.2d 423 (1998).

Cited in State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544, 2001 N.C. App. LEXIS 1234 (2001); State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002).

III. QUESTIONING OF PROSPECTIVE JURORS.

Whether to allow sequestration and individual voir dire is a matter for the trial court's discretion, etc. —
Trial court properly rejected defendant's alternate selection method whereby replacement jurors would be called and examined during defendant's voir dire until the defense was satisfied with the 12 jurors remaining in the box; further the trial court properly refused to direct that prospective jurors be questioned separately since whether to allow individual voir dire and sequestration of prospective jurors is a decision squarely within the discretion of the trial court and will not be overruled on appeal unless the party challenging the ruling establishes an abuse of that discretion. State v. Anderson, 355 N.C. 136, 558 S.E.2d 87, 2002 N.C. LEXIS 14 (2002).

ARTICLE 73.

Criminal Jury Trial in Superior Court.

§ 15A-1222. Expression of opinion prohibited.

CASE NOTES

I. General Consideration.
II. Questions by Trial Judge.

I. GENERAL CONSIDERATION.

Instructions Given to Defense Counsel. — When the trial judge decided not to submit a lesser-included offense instruction, contrary to his prior decision announced to counsel, after defense counsel had begun his closing argument, and instructed defense counsel to correct his argument that such an instruction would be submitted to the jury, this was not an impermissible expression of the trial judge's opinion. State v. Wilson, 354 N.C. 493, 556 S.E.2d 272, 2001 N.C. LEXIS 1236 (2001).

Admonishment of Defendant. — Trial judge's admonishment of defendant was not an improper expression of judicial opinion because the jury could not rationally have inferred from the judge's expression that he thought defendant was guilty. State v. Poland, 148 N.C. App. 588, 560 S.E.2d 186, 2002 N.C. App. LEXIS 49 (2002).

Cited in State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); State v. Blue, — N.C. —, 565 S.E.2d 133, 2002 N.C. LEXIS 540 (2002).

II. QUESTIONS BY TRIAL JUDGE.

Clarification of Testimony. —
Trial court's line of questioning to a police detective helped to clarify the witness's testi-

mony and was not prejudicial to defendant. State v. Lorenzo, 147 N.C. App. 728, 556 S.E.2d 625, 2001 N.C. App. LEXIS 1251 (2001).

Trial court did not prejudice defendant by asking questions to a doctor concerning the seriousness and permanency of the victim's injuries as he did not express an opinion concerning defendant's guilt, nor did he make any statement tending to discredit or prejudice defendant. State v. Bullock, — N.C. App. —, 566 S.E.2d 768, 2002 N.C. App. LEXIS 885 (2002).

§ 15A-1225. Exclusion of witnesses.

CASE NOTES

Applied in State v. Bullin, — N.C. App. —, 564 S.E.2d 576, 2002 N.C. App. LEXIS 649 (2002).

Cited in State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001).

§ 15A-1226. Rebuttal evidence; additional evidence.

CASE NOTES

Cited in State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001).

§ 15A-1230. Limitations on argument to the jury.

CASE NOTES

Discretion of Trial Judge. —

Trial court did not abuse its discretion in denying defendant's request to argue that the victim's husband shot the victim, as it was not a matter in issue at the trial because there was no such evidence presented at trial. State v. Bullock, — N.C. App. —, 566 S.E.2d 768, 2002 N.C. App. LEXIS 885 (2002).

Remarks Held Not to Necessitate Ex Mero Motu Correction. —

Prosecutor was not improperly vouching for the State's witness in closing argument, but was merely giving the jury reasons to believe the State's witnesses who had given prior inconsistent statements and were previously unwilling to cooperate with investigators; furthermore, even if the appellate court were to assume, without deciding, that the prosecutor's argument did constitute improper vouching for State witnesses, the argument was not so grossly improper as to require the trial court to intervene ex mero motu. State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002).

When a prosecutor becomes abusive, etc.

Prosecutor's name-calling directed at defendant in closing argument required reversal of the death penalty imposed. State v. Jones, 355 N.C. 117, 558 S.E.2d 97, 2002 N.C. LEXIS 12 (2002).

Improper Argument of Facts Outside Record. —

Prosecutor's reference, in closing argument in a death penalty case, to the Columbine school shootings and the Oklahoma City bombing were improper references to events outside the record which, by implication, urged the jurors to compare defendant's acts with infamous acts of others and attempted to lead the jurors away from the evidence by appealing to their sense of passion and prejudice. State v. Jones, 355 N.C. 117, 558 S.E.2d 97, 2002 N.C. LEXIS 12 (2002).

Argument Held Not Improper. —

State's closing argument was proper in that references to defendant's psychiatrist's examination were aimed at questioning psychiatrist's ability to make a meaningful and accurate diagnosis of defendant based on spending 90 minutes with defendant. State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002).

§ 15A-1231. Jury instructions.

CASE NOTES

Failure to Record Bench Conferences and In-Chamber Proceedings. —

A defendant is required to show he was materially prejudiced by any unrecorded jury instruction conference in order to be entitled to a new sentencing hearing. State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002).

Applied in State v. Holmes, 355 N.C. 719, 565 S.E.2d 154, 2002 N.C. LEXIS 549 (2002).

§ 15A-1232. Jury instructions; explanation of law; opinion prohibited.

CASE NOTES

I. General Consideration.
III. Jury Instructions.
D. Summary of Evidence.

I. GENERAL CONSIDERATION.

Cited in State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001).

III. JURY INSTRUCTIONS.

D. Summary of Evidence.

But Trial Court Not Relieved of Burden of Declaring and Explaining Law Arising on Evidence. — In giving jury instructions, the trial court is not required to state, summarize, or recapitulate the evidence, or to explain the application of the law to the evidence, but this statute does not relieve the trial court of its burden of declaring and explaining the law arising on the evidence relating to each substantial feature of the case. State v. Blue, — N.C. —, 565 S.E.2d 133, 2002 N.C. LEXIS 540 (2002).

Instructions Upheld. — In a felony murder case, where defendant was charged with robbery with a dangerous weapon and felony larceny, and the victim's wallet and car were taken, the trial court was not obliged to instruct the jury as to which property was the subject of the robbery charge, and which was the subject of the larceny charge, where the court provided instructions as to the elements of each offense and referenced the vehicle during its instructions in the lesser included offenses of felony larceny. State v. Cobb, 150 N.C. App. 31, 563 S.E.2d 600, 2002 N.C. App. LEXIS 387 (2002), cert. denied, 356 N.C. 169, 568 S.E.2d 618 (2002).

§ 15A-1233. Review of testimony; use of evidence by the jury.

CASE NOTES

Failure to Obtain Party's Consent Was Not Prejudicial. —

In a murder prosecution, the trial court's error, under G.S. 15A-1233(b), in allowing the jury to take an admitted written, prior consistent statement of a witness's testimony to the jury room without defendant's consent was harmless, in light of extensive other evidence of defendant's malice. State v. Demos, 148 N.C. App. 343, 559 S.E.2d 17, 2002 N.C. App. LEXIS 17 (2002), cert. denied, 355 N.C. 495, 564 S.E.2d 47 (2002).

§ 15A-1234. Additional instructions.

CASE NOTES

Cited in State v. Blue, — N.C. —, 565 S.E.2d 133, 2002 N.C. LEXIS 540 (2002); State v. Dexter, — N.C. App. —, 566 S.E.2d 493, 2002 N.C. App. LEXIS 750 (2002).

§ 15A-1235. Length of deliberations; deadlocked jury.

CASE NOTES

I. General Consideration.
III. Comment on Expense of Retrial.

I. GENERAL CONSIDERATION.

And in the Context of the Circumstances. —

Jury could have reasonably concluded that it was required to deliberate until it reached a unanimous verdict, which was a violation of G.S. 15A-1235(c) and N.C. Const. art. I, § 24, where the trial court encouraged deliberations despite being told three times that jury was deadlocked, and it did not address juror's request to be absent the next day so he could attend his wife's surgery. State v. Dexter, — N.C. App. —, 566 S.E.2d 493, 2002 N.C. App. LEXIS 750 (2002).

Cited in State v. Dexter, — N.C. App. —, 566 S.E.2d 493, 2002 N.C. App. LEXIS 750 (2002).

III. COMMENT ON EXPENSE OF RETRIAL.

Comment Prohibited. —

Trial court's comment to a jury which had indicated it was deadlocked that the case would probably have to be retried, at great expense to the taxpayers, was reversible error. State v. Burroughs, 147 N.C. App. 693, 556 S.E.2d 339, 2001 N.C. App. LEXIS 1240 (2001).

§ 15A-1241. Record of proceedings.

CASE NOTES

Lack of Complete Record Harmless. —

Trial court's error, in having unrecorded private discussions with prospective jurors in a capital case, was harmless beyond a reasonable doubt, as the record did not indicate that any action was taken by the trial judge as a result of these discussions. State v. Scott, — N.C. App. —, 564 S.E.2d 285, 2002 N.C. App. LEXIS 576 (2002).

Cited in State v. VanCamp, 150 N.C. App. 347, 562 S.E.2d 921, 2002 N.C. App. LEXIS 506 (2002).

§ 15A-1242. Defendant's election to represent himself at trial.

CASE NOTES

Who Must Make Inquiry. — The inquiry required by this section need not be made by the presiding trial judge, but may be made at a preliminary hearing by another trial judge. State v. Kinlock, — N.C. App. —, 566 S.E.2d 738, 2002 N.C. App. LEXIS 861 (2002).

The defendant's waiver of counsel, etc.

Contrary to defendant's assertion, the trial court did not impose a jail sentence in the absence of a voluntary waiver of counsel; the record showed that defendant was advised of the charges and the possible sentence and understood the law regarding waiver of counsel, but unequivocally refused representation by an attorney because defendant had personal convictions against representation by attorneys. State v. Phillips, — N.C. App. —, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002).

Request to Proceed Pro Se Properly Granted. —

Trial court complied with statutory requirements prior to allowing defendant to proceed without counsel by repeatedly advising defendant of his right to have an attorney present, advising defendant that if he could not afford an attorney, one would be appointed for him, attempting to appoint an attorney for defendant, to which defendant clearly and unequivocally objected, informing defendant of the consequences of his action, including the fact that he would not have the assistance of an attorney, that he would be held to the same standards as an attorney, and that the trial court would not act as his attorney during trial, engaging in a lengthy discussion with defendant about the nature of the charges to ensure that he understood them, and informing defendant of the

possible punishments for all charges if convicted; therefore, defendant's decision to waive counsel was voluntary, knowing, and intelligent. State v. Phillips, 149 N.C. App. 310, 560 S.E.2d 852, 2002 N.C. App. LEXIS 185 (2002), appeal dismissed, 355 N.C. 499, 564 S.E.2d 230 (2002).

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

ARTICLE 80.

Defendants Found Not Guilty by Reason of Insanity.

§ 15A-1321. Automatic civil commitment of defendants found not guilty by reason of insanity.

CASE NOTES

Cited in In re Hayes, — N.C. App. —, 564 S.E.2d 305, 2002 N.C. App. LEXIS 648 (2002).

ARTICLE 81.

General Sentencing Provisions.

§ 15A-1331. Authorized sentences; conviction.

CASE NOTES

Applied in State v. Graham, 149 N.C. App. 215, 562 S.E.2d 286, 2002 N.C. App. LEXIS 133 (2002).

§ 15A-1334. The sentencing hearing.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Opportunity to Prepare for Hearing. — Trial court properly allowed the State time to obtain a superceding indictment relating to the habitual felon charge which changed the date of the occurrence of defendant's first felony; this defect was only technical in nature and its presence in the original indictment did not deprive defendant of sufficient notice that he was being prosecuted as an habitual felon. State v. Gant, — N.C. App. —, 568 S.E.2d 909, 2002 N.C. App. LEXIS 1072 (2002).

§ 15A-1335. Resentencing after appellate review.

CASE NOTES

Section Not Applicable When Original Plea Vacated. — Relief under G.S. 15A-1335 not available to defendant who successfully challenged his sentence for his plea bargained entry of guilty to attempted possession of cocaine while having a status as an habitual felon, and upon the vacation of his plea and the setting aside of his sentence was indicted for attempted possession of cocaine and felonious possession of drug paraphernalia and received

a longer sentence than his original sentence upon his conviction. State v. Wagner, 148 N.C. App. 658, 560 S.E.2d 174, 2002 N.C. App. LEXIS 47 (2002).

Article 81B.

Structured Sentencing of Persons Convicted of Crimes.

Part 1. General Provisions.

§ 15A-1340.10. Applicability of structured sentencing.

Legal Periodicals. —
For recent development, "Structured Sentencing and the Puzzling Statutory Maximum Punishment: Apprendi's Impact on North Carolina Sentencing Law," see 80 N.C.L. Rev. 1033 (2002).

CASE NOTES

Cited in State v. Marecek, — N.C. App. —, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002).

§ 15A-1340.12. Purposes of sentencing.

CASE NOTES

Improper Aggravation. — Trial court erred in using the degradation of the victim in an attempted rape as an aggravating factor for sentencing; the factor was not reasonably related to the purposes of sentencing, and a new sentencing hearing was required. State v. Robertson, 149 N.C. App. 563, 562 S.E.2d 551, 2002 N.C. App. LEXIS 288 (2002).

Applied in State v. Robertson, 149 N.C. App. 563, 562 S.E.2d 551, 2002 N.C. App. LEXIS 288 (2002).

Part 2. Felony Sentencing.

§ 15A-1340.14. Prior record level for felony sentencing.

CASE NOTES

Proof of Criminal History. —
The State failed to prove by a preponderance of the evidence that defendant was the same person convicted of the prior crimes listed on his prior record level worksheet where the State did not submit any evidence tending to prove that fact and submitted only the worksheet into evidence. State v. Goodman, 149 N.C. App. 57, 560 S.E.2d 196, 2002 N.C. App. LEXIS 132 (2002).

Stipulation. — Comments by defendant's attorney constituted a stipulation to the prior convictions listed on a worksheet submitted by the State. State v. Eubanks, — N.C. App. —, 565 S.E.2d 738, 2002 N.C. App. LEXIS 766 (2002).

Applied in State v. Lee, — N.C. App. —, 564 S.E.2d 597, 2002 N.C. App. LEXIS 650 (2002), cert. denied, 356 N.C. 171, 568 S.E.2d 856 (2002); State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

§ 15A-1340.16. Aggravated and mitigated sentences.

CASE NOTES

Indictment Requirement. — Defendant's plea of guilty had no bearing on the requirement that statutory factors supporting an enhancement must be included in the indictment. State v. Wimbish, 147 N.C. App. 287, 555 S.E.2d 329, 2001 N.C. App. LEXIS 1142 (2001).

Weight Distribution. — Because the trial court specifically noted its weight distribution by stating that each aggravating factor, standing on its own, was sufficient to outweigh all the mitigating factors, it eliminated the need for remand were it determined that the trial court erred in finding an aggravating factor. State v. Norman, — N.C. App. —, 564 S.E.2d 630, 2002 N.C. App. LEXIS 689 (2002).

Evidence of Good Character. — Trial court did not err when it concluded that 24 letters which defendant submitted from family members, friends, and prisoners did not establish that defendant was a person of good character. State v. Murphy, — N.C. App. —, 567 S.E.2d 442, 2002 N.C. App. LEXIS 923 (2002).

Breach of Trust — Aggravating Factor. — Evidence that the defendant took advantage of a position of trust or confidence to commit statutory rape of a 14-year-old girl was sufficient to permit the trial court to apply this factor as an aggravating factor at sentencing. State v. McGriff, — N.C. App. —, 566 S.E.2d 776, 2002 N.C. App. LEXIS 870 (2002).

Trial court did not err by finding that defendant had taken advantage of a position of trust by taking money from people who sought his help securing loans and using that finding as an aggravating factor when it imposed sentence, but because defendant's plea to a charge that he took money by false pretenses when he withdrew $22,200 from a swimming association's account was really a plea to embezzlement, the trial court should not have used the trust or confidence aggravating factor when it sentenced defendant for committing that crime. State v. Murphy, — N.C. App. —, 567 S.E.2d 442, 2002 N.C. App. LEXIS 923 (2002).

The defendant knowingly created a great risk of death, etc.

Defendant's firing of 11 shots using Speer Gold Dot 155-grain jacketed hollow-point rounds, fired from a Ruger .40 caliber Smith and Wesson semi-automatic handgun was the knowing creation of a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person, under G.S. 15A-1340.16(d)(8). State v. Demos, 148 N.C. App. 343, 559 S.E.2d 17, 2002 N.C. App. LEXIS 17 (2002), cert. denied, 355 N.C. 495, 564 S.E.2d 47 (2002).

Position of Trust or Confidence Not Shown. — The court reversed and remanded, for resentencing only, sentencing judgments for two non-capital crimes, based upon insufficient evidence of the aggravating factor of G.S. 15A-1340.16(d)(15), as the evidence showed at most that defendant and victim enjoyed an amiable working relationship or friendship, but did not demonstrate a relationship conducive to reliance of one upon the other. State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002).

§ 15A-1340.16A. Enhanced sentence if defendant is convicted of a Class A, B1, B2, C, D, or E felony and the defendant used, displayed, or threatened to use or display a firearm during the commission of the felony.

CASE NOTES

Firearm Enhancement for Armed Robbery. — Sawed-off shotgun used in an armed robbery was properly used to aggravate defendant's sentence for armed robbery since the element used under the aggravation of sentence statute of the shotgun being sawed-off was not an element of the crime of armed robbery. State v. McMillian, 147 N.C. App. 707, 557 S.E.2d 138, 2001 N.C. App. LEXIS 1246 (2001), cert. denied, 355 N.C. 219, 560 S.E.2d 152 (2002).

Firearm Enhancement for Homicide. — Fact that defendant's use of a certain weapon to kill his victims was an element of the State's case against him did not prohibit the use of the weapon to aggravate his sentence. State v. Demos, 148 N.C. App. 343, 559 S.E.2d 17, 2002 N.C. App. LEXIS 17 (2002), cert. denied, 355 N.C. 495, 564 S.E.2d 47 (2002).

Firearm Enhancement Held Improper. — Enhanced sentence for use of a firearm was vacated and the case was remanded for resen-

tencing because the indictment failed to allege that defendant used, displayed, or threatened to use or display a firearm at the time of the felony, and this statutory factor was not submitted to the jury. State v. Guice, — N.C. App. —, 564 S.E.2d 925, 2002 N.C. App. LEXIS 721 (2002).

Indictment Requirement. — Indictment was fatally defective because it failed to allege the required facts to support a firearm enhancement for possessing a firearm during a kidnapping. State v. McNair, 146 N.C. App. 674, 554 S.E.2d 665, 2001 N.C. App. LEXIS 1061 (2001).

Trial court committed error when it enhanced defendant's first-degree burglary sentence, pursuant to G.S. 15A-1340.16A, without the statutory firearm enhancement factors having been charged in the indictment, without submitting those factors to a jury, and without requiring the State to prove them beyond a reasonable doubt. State v. Wimbish, 147 N.C. App. 287, 555 S.E.2d 329, 2001 N.C. App. LEXIS 1142 (2001).

Defendant's plea of guilty had no bearing on the requirement that statutory factors supporting an enhancement must be included in the indictment. State v. Wimbish, 147 N.C. App. 287, 555 S.E.2d 329, 2001 N.C. App. LEXIS 1142 (2001).

Where defendant's indictment failed to allege the statutory factors supporting enhancement under G.S. 15A-1340.16A, the imposition of the firearm enhancement penalty for simple assault, assault with a deadly weapon, and kidnapping was improper; thus, defendant's sentence was vacated. State v. Boyd, 148 N.C. App. 304, 559 S.E.2d 1, 2002 N.C. App. LEXIS 16 (2002).

§ 15A-1340.23. Punishment limits for each class of offense and prior conviction level.

Local Modification. — Pitt: 2002-142, s. 6. For other local modifications to this section, see the main volume.

CASE NOTES

Cited in State v. Williams, — N.C. App. —, 563 S.E.2d 616, 2002 N.C. App. LEXIS 577 (2002).

ARTICLE 82.

Probation.

§ 15A-1341. Probation generally.

Legal Periodicals. —
A Fourth Amendment Problem with Probation in North Carolina, 23 Campbell L. Rev. 143 (2000).

§ 15A-1343. Conditions of probation.

(a) In General. — The court may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.

(b) Regular Conditions. — As regular conditions of probation, a defendant must:

(1) Commit no criminal offense in any jurisdiction.

(2) Remain within the jurisdiction of the court unless granted written permission to leave by the court or his probation officer.

(3) Report as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit him at reasonable times, answer all reasonable inquir-

ies by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.

(4) Satisfy child support and other family obligations as required by the court. If the court requires the payment of child support, the amount of the payments shall be determined as provided in G.S. 50-13.4(c).

(5) Possess no firearm, explosive device or other deadly weapon listed in G.S. 14-269 without the written permission of the court.

(6) Pay a supervision fee as specified in subsection (c1).

(7) Remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip him for suitable employment. A defendant pursuing a course of study or of vocational training shall abide by all of the rules of the institution providing the education or training, and the probation officer shall forward a copy of the probation judgment to that institution and request to be notified of any violations of institutional rules by the defendant.

(8) Notify the probation officer if he fails to obtain or retain satisfactory employment.

(9) Pay the costs of court, any fine ordered by the court, and make restitution or reparation as provided in subsection (d).

(10) Pay the State of North Carolina for the costs of appointed counsel, public defender, or appellate defender to represent him in the case(s) for which he was placed on probation.

(11) At a time to be designated by his probation officer, visit with his probation officer a facility maintained by the Division of Prisons.

In addition to these regular conditions of probation, a defendant required to serve an active term of imprisonment as a condition of special probation pursuant to G.S. 15A-1344(e) or G.S. 15A-1351(a) shall, as additional regular conditions of probation, obey the rules and regulations of the Department of Correction governing the conduct of inmates while imprisoned and report to a probation officer in the State of North Carolina within 72 hours of his discharge from the active term of imprisonment.

Regular conditions of probation apply to each defendant placed on supervised probation unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court. It is not necessary for the presiding judge to state each regular condition of probation in open court, but the conditions must be set forth in the judgment of the court.

Defendants placed on unsupervised probation are subject to the provisions of this subsection, except that defendants placed on unsupervised probation are not subject to the regular conditions contained in subdivisions (2), (3), (6), (8), and (11).

(b1) Special Conditions. — In addition to the regular conditions of probation specified in subsection (b), the court may, as a condition of probation, require that during the probation the defendant comply with one or more of the following special conditions:

(1) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(2) Attend or reside in a facility providing rehabilitation, counseling, treatment, social skills, or employment training, instruction, recreation, or residence for persons on probation.

(2a) Repealed by Session Laws 2002, ch. 126, s. 17.18, effective August 15, 2002.

(2b) Participate in and successfully complete a Drug Treatment Court Program pursuant to Article 62 of Chapter 7A of the General Statutes.

(3) Submit to imprisonment required for special probation under G.S. 15A-1351(a) or G.S. 15A-1344(e).

(3a) Repealed by Session Laws 1997-57, s. 3.

(3b) Submit to supervision by officers assigned to the Intensive Supervision Program established pursuant to G.S. 143B-262(c), and abide by the rules adopted for that Program. Unless otherwise ordered by the court, intensive supervision also requires multiple contacts by a probation officer per week, a specific period each day during which the offender must be at his or her residence, and that the offender remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip the offender for suitable employment.

(3c) Remain at his or her residence unless the court or the probation officer authorizes the offender to leave for the purpose of employment, counseling, a course of study, or vocational training. The offender shall be required to wear a device which permits the supervising agency to monitor the offender's compliance with the condition electronically.

(4) Surrender his or her driver's license to the clerk of superior court, and not operate a motor vehicle for a period specified by the court.

(5) Compensate the Department of Environment and Natural Resources or the North Carolina Wildlife Resources Commission, as the case may be, for the replacement costs of any marine and estuarine resources or any wildlife resources which were taken, injured, removed, harmfully altered, damaged or destroyed as a result of a criminal offense of which the defendant was convicted. If any investigation is required by officers or agents of the Department of Environment and Natural Resources or the Wildlife Resources Commission in determining the extent of the destruction of resources involved, the court may include compensation of the agency for investigative costs as a condition of probation. This subdivision does not apply in any case governed by G.S. 143-215.3(a)(7).

(6) Perform community or reparation service and pay any fee required by law or ordered by the court for participation in the community or reparation service program.

(7) Submit at reasonable times to warrantless searches by a probation officer of his or her person and of his or her vehicle and premises while the probationer is present, for purposes specified by the court and reasonably related to his or her probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse the Department of Correction for the actual cost of drug screening and drug testing, if the results are positive.

(8) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for him or her by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used.

(8a) Purchase the least expensive annual statewide license or combination of licenses to hunt, trap, or fish listed in G.S. 113-270.2, 113-270.3, 113-270.5, 113-271, 113-272, and 113-272.2 that would be required to engage lawfully in the specific activity or activities in which the defendant was engaged and which constitute the basis of the offense or offenses of which he was convicted.

(9) If the offense is one in which there is evidence of physical, mental or sexual abuse of a minor, the court should encourage the minor and the minor's parents or custodians to participate in rehabilitative treatment and may order the defendant to pay the cost of such treatment.

(9a) Attend and complete an abuser treatment program if (i) the court finds the defendant is responsible for acts of domestic violence and (ii) the program is approved by the Domestic Violence Commission.

(10) Satisfy any other conditions determined by the court to be reasonably related to his rehabilitation.

(b2) Special Conditions of Probation for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. — As special conditions of probation, a defendant who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, must:

(1) Register as required by G.S. 14-208.7 if the offense is a reportable conviction as defined by G.S. 14-208.6(4).

(2) Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court.

(3) Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.

(4) Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.

(5) Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless the court expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the minor child's best interest to allow the probationer to reside in the same household with a minor child.

(6) Satisfy any other conditions determined by the court to be reasonably related to his rehabilitation.

Defendants subject to the provisions of this subsection shall not be placed on unsupervised probation.

(c) Statement of Conditions. — A defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which he is being released. If any modification of the terms of that probation is subsequently made, he must be given a written statement setting forth the modifications.

(c1) Supervision Fee. — Any person placed on supervised probation pursuant to subsection (a) of this section shall pay a supervision fee of thirty dollars ($30.00) per month, unless exempted by the court. The court may exempt a person from paying the fee only for good cause and upon written motion of the person placed on supervised probation. No person shall be required to pay more than one supervision fee per month. The court may require that the fee be paid in advance or in a lump sum or sums, and a probation officer may require payment by such methods if he is authorized by subsection (g) to determine the payment schedule. Supervision fees must be paid to the clerk of court for the county in which the judgment was entered or the deferred prosecution agreement was filed. Fees collected under this subsection shall be transmitted to the State for deposit into the State's General Fund.

(d) Restitution as a Condition of Probation. — As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant. When restitution or reparation is a condition imposed, the court shall take into consideration the factors set out in G.S. 15A-1340.35 and G.S.

15A-1340.36. As used herein, "reparation" shall include but not be limited to the performing of community services, volunteer work, or doing such other acts or things as shall aid the defendant in his rehabilitation. As used herein "aggrieved party" includes individuals, firms, corporations, associations, other organizations, and government agencies, whether federal, State or local, including the Crime Victims Compensation Fund established by G.S. 15B-23. A government agency may benefit by way of reparation even though the agency was not a party to the crime provided that when reparation is ordered, community service work shall be rendered only after approval has been granted by the owner or person in charge of the property or premises where the work will be done.

(e) Costs of Court and Appointed Counsel. — Unless the court finds there are extenuating circumstances, any person placed upon supervised or unsupervised probation under the terms set forth by the court shall, as a condition of probation, be required to pay all court costs and costs for appointed counsel or public defender in the case in which he was convicted. The cost of appointed counsel or public defender services shall be determined in accordance with rules adopted by the Office of Indigent Defense Services. The court shall determine the amount of those costs to be repaid and the method of payment.

(f) Repealed by Session Laws 1983, c. 561, s. 5.

(g) Probation Officer May Determine Payment Schedules. — If a person placed on supervised probation is required as a condition of that probation to pay any moneys to the clerk of superior court, the court may delegate to a probation officer the responsibility to determine the payment schedule. The court may also authorize the probation officer to transfer the person to unsupervised probation after all the moneys are paid to the clerk. If the probation officer transfers a person to unsupervised probation, he must notify the clerk of that action. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 8-10; 1979, c. 662, s. 1; c. 801, s. 3; c. 830, s. 12; 1981, c. 530, ss. 1, 2; 1983, c. 135, s. 1; c. 561, ss. 1-6; c. 567, s. 2; c. 712, s. 1; 1983 (Reg. Sess., 1984), c. 972, ss. 1, 2; 1985, c. 474, ss. 1, 7, 8; 1985 (Reg. Sess., 1986), c. 859, ss. 1, 2; 1987, c. 282, s. 33; c. 397, s. 1; c. 579, ss. 1, 2; c. 598, s. 1; c. 819, s. 32; c. 830, s. 17; 1989, c. 529, s. 5; c. 727, s. 218(4); 1989 (Reg. Sess., 1990), c. 1010, s. 1; c. 1034, s. 1; 1991 (Reg. Sess., 1992), c. 1000, s. 1; 1993, c. 538, s. 16; 1994, Ex. Sess., c. 9, s. 1; c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.14(c); 1997-57, s. 3; 1997-443, ss. 11A.119(a), 19.11(a); 1998-212, ss. 17.21(a), 19.4(f); 1999-298, s. 2; 2000-125, s. 8; 2000-144, s. 31; 2002-105, s. 3; 2002-126, ss. 17.18(a), 29A.2(a).)

Editor's Note. —

Session Laws 2002-126, s. 17.18(c), provides: "Funds appropriated to the Department of Correction for the 2002-2003 fiscal year are reduced by four million sixty-six thousand five hundred ninety-five dollars ($4,066,595) as a result of the termination of the IMPACT boot camp program, effective August 15, 2002. Of the remaining funds budgeted for the IMPACT program, the Department shall use the sum of three hundred ninety thousand three hundred twelve dollars ($390,312) to establish 12 inmate community work crews as follows: one crew each at Marion, Rutherford, Catawba, and Caldwell correctional facilities, and two crews each at Southern, Anson, Robeson, and Sanford correctional facilities."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-105, s. 3, effective September 6, 2002, substituted "Domestic Violence Commission" for "Department of Administration" in subdivision (b1)(9a).

Session Laws 2002-126, s. 17.18(a), effective August 15, 2002, repealed subdivision (b1)(2a), which read: "Submit to a period of residential treatment in the Intensive Motivational Pro-

gram of Alternative Correctional Treatment (IMPACT), pursuant to G.S. 15A-1343.1, for a minimum of 90 days or a maximum of 120 days and abide by all rules and regulations of that program. This condition may also include a period of supervision through the Post-Boot Camp Probation Program."

Session Laws 2002-126, s. 29A.2(a), effective October 1, 2002, and applicable to supervision fees assessed or collected on or after that date, in the first sentence of subsection (c1), added "of this section" and substituted "thirty dollars ($30.00)" for "twenty dollars ($20.00)."

Legal Periodicals. —

A Fourth Amendment Problem with Probation in North Carolina, 23 Campbell L. Rev. 143 (2000).

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Defendant Not Given Written Notice of Modifications. —

Defendant did not receive adequate notice of the probation modification because he never received written notice as required by statute; therefore, he could not be convicted of violating his probation. State v. Seek, — N.C. App. —, 566 S.E.2d 750, 2002 N.C. App. LEXIS 872 (2002).

Applied in State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002).

Cited in State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002).

§ 15A-1343.1: Repealed by Session Laws 2002-126, s. 17.18, effective August 15, 2002.

Editor's Note. — Session Laws 2002-126, s. 17.18(c), provides: "Funds appropriated to the Department of Correction for the 2002-2003 fiscal year are reduced by four million sixty-six thousand five hundred ninety-five dollars ($4,066,595) as a result of the termination of the IMPACT boot camp program, effective August 15, 2002. Of the remaining funds budgeted for the IMPACT program, the Department shall use the sum of three hundred ninety thousand three hundred twelve dollars ($390,312) to establish 12 inmate community work crews as follows: one crew each at Marion, Rutherford, Catawba, and Caldwell correctional facilities, and two crews each at Southern, Anson, Robeson, and Sanford correctional facilities."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

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Session Laws 2002-126, s. 31.6 is a severability clause.

§ 15A-1343.2. Special probation rules for persons sentenced under Article 81B.

CASE NOTES

Cited in State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002).

§ 15A-1344. Response to violations; alteration and revocation.

CASE NOTES

Court Has Discretion to Run Revoked Probation Sentence Either Concurrently or Consecutively with Other Sentences. — This section permits the trial court to impose a consecutive sentence when a suspended sentence is activated upon revocation of a probationary judgment without regard to whether the sentence previously imposed ran concurrently or consecutively. State v. Paige, 90 N.C. App. 142, 369 S.E.2d 606 (1988).

Compliance with Subsection (f) Required. — Trial court's revocation of defendant's probation was an error where the State failed to comply with G.S. 15A-1344(f)(1) by not filing a written motion before the expiration of the probation period indicating the State's intent to conduct a revocation hearing. State v. Hicks, 148 N.C. App. 203, 557 S.E.2d 594, 2001 N.C. App. LEXIS 1289 (2001).

Cited in State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002).

ARTICLE 83.

Imprisonment.

§ 15A-1351. Sentence of imprisonment; incidents; special probation.

CASE NOTES

Cited in State v. Hearst, 356 N.C. 132, 567 S.E.2d 124, 2002 N.C. LEXIS 679 (2002).

§ 15A-1355. Calculation of terms of imprisonment.

Editor's Note. —

Session Laws 2001-424, s. 25.1(b), as amended by Session Laws 2002-126, s. 17.19, as added by Session Laws 2002-159, s. 77, provides: "This section [Session Laws 2001-424, s. 25.1, which added subsection (d) of G.S. 15A-1355] is effective when it becomes law [September 26, 2001] and applies to inmates serving sentences on or after that date. Inmates sentenced under the Fair Sentencing Act or prior law who meet the criteria established pursuant to this section may be awarded gain time."

Session Laws 2002-126, s. 17.18(c), provides: "Funds appropriated to the Department of Correction for the 2002-2003 fiscal year are reduced by four million sixty-six thousand five hundred ninety-five dollars ($4,066,595) as a result of the termination of the IMPACT boot camp program, effective August 15, 2002. Of the remaining funds budgeted for the IMPACT program, the Department shall use the sum of three hundred ninety thousand three hundred twelve dollars ($390,312) to establish 12 inmate community work crews as follows: one crew each at Marion, Rutherford, Catawba, and Caldwell correctional facilities, and two crews each at Southern, Anson, Robeson, and Sanford correctional facilities."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2001-424, s. 25.1, as amended by Session Laws 2002-126, s. 17.19, as added by Session Laws 2002-159, s. 77, added subsection (d). See editor's note for effective date and applicability.

Article 84A.

Post-Release Supervision.

§ 15A-1368.4. Conditions of post-release supervision.

(a) In General. — Conditions of post-release supervision may be reintegrative in nature or designed to control the supervisee's behavior and to enforce compliance with law or judicial order. A supervisee may have his supervision period revoked for any violation of a controlling condition or for repeated violation of a reintegrative condition. Compliance with reintegrative conditions may entitle a supervisee to earned time credits as described in G.S. 15A-1368.2(d).

(b) Required Condition. — The Commission shall provide as an express condition of every release that the supervisee not commit another crime during the period for which the supervisee remains subject to revocation. A supervisee's failure to comply with this controlling condition is a supervision violation for which the supervisee may face revocation as provided in G.S. 15A-1368.3.

(b1) Additional Required Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. — In addition to the required condition set forth in subsection (b) of this section, for a supervisee who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, controlling conditions, violations of which may result in revocation of post-release supervision, are:

(1) Register as required by G.S. 14-208.7 if the offense is a reportable conviction as defined by G.S. 14-208.6(4).

(2) Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the Commission.

(3) Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.

(4) Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.

(5) Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless a court of competent jurisdiction expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the child's best interest to allow the supervisee to reside in the same household with a minor child.

(c) Discretionary Conditions. — The Commission, in consultation with the Division of Community Corrections, may impose conditions on a supervisee it believes reasonably necessary to ensure that the supervisee will lead a law-abiding life or to assist the supervisee to do so.

(d) Reintegrative Conditions. — Appropriate reintegrative conditions, for which a supervisee may receive earned time credits against the length of the supervision period, and repeated violation that may result in revocation of post-release supervision, are:

(1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip the supervisee for suitable employment.

(2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on post-release supervision.

(4) Support the supervisee's dependents and meet other family responsibilities.

(5) In the case of a supervisee who attended a basic skills program during incarceration, continue attending a basic skills program in pursuit of a General Education Development Degree or adult high school diploma.

(6) Satisfy other conditions reasonably related to reintegration into society.

(e) Controlling Conditions. — Appropriate controlling conditions, violation of which may result in revocation of post-release supervision, are:

(1) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for the supervisee by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used.

(2) Comply with a court order to pay the costs of reintegrative treatment for a minor and a minor's parents or custodians where the offense involved evidence of physical, mental, or sexual abuse of a minor.

(3) Comply with a court order to pay court costs and costs for appointed counsel or public defender in the case for which the supervisee was convicted.

(4) Not possess a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or a post-release supervision officer.

(5) Report to a post-release supervision officer at reasonable times and in a reasonable manner, as directed by the Commission or a post-release supervision officer.

(6) Permit a post-release supervision officer to visit at reasonable times at the supervisee's home or elsewhere.

(7) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the post-release supervision officer.

(8) Answer all reasonable inquiries by the post-release supervision officer and obtain prior approval from the post-release supervision officer for any change in address or employment.

(9) Promptly notify the post-release supervision officer of any change in address or employment.

(10) Submit at reasonable times to searches of the supervisee's person by a post-release supervision officer for purposes reasonably related to the post-release supervision. The Commission shall not require as a condition of post-release supervision that the supervisee submit to any other searches that would otherwise be unlawful. Whenever the search consists of testing for the presence of illegal drugs, the supervisee may also be required to reimburse the Department of Correction for the actual cost of drug testing and drug screening, if the results are positive.

(11) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.

(12) Comply with an order from a court of competent jurisdiction regarding the payment of an obligation of the supervisee in connection with any judgment rendered by the court.

(13) Remain in one or more specified places for a specified period or periods each day, and wear a device that permits the defendant's compliance with the condition to be monitored electronically.

(14) Submit to supervision by officers assigned to the Intensive Post-Release Supervision Program established pursuant to G.S. 143B-262(c), and abide by the rules adopted for that Program.

(e1) Prohibited Conditions. — The Commission shall not impose community service as a condition of post-release supervision.

(f) Required Supervision Fee. — The Commission shall require as a condition of post-release supervision that the supervisee pay a supervision fee of thirty dollars ($30.00) per month. The Commission may exempt a supervisee from this condition only if it finds that requiring payment of the fee is an undue economic burden. The fee shall be paid to the clerk of superior court of the county in which the supervisee was convicted. The clerk shall transmit any money collected pursuant to this subsection to the State to be deposited in the State's General Fund. In no event shall a supervisee be required to pay more than one supervision fee per month. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.14(b); 1997-57, s. 6; 1997-237, s. 6; 2001-487, s. 47(c); 2002-126, s. 29A.2(b).)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, s. 29A.2(b), effective October 1, 2002, and applicable to supervision fees assessed or collected on or after that date, substituted "thirty dollars ($30.00)" for "twenty dollars ($20.00)" in subsection (f).

Article 85.

Parole.

§ 15A-1371. Parole eligibility, consideration, and refusal.

(a) Eligibility. — Unless his sentence includes a minimum sentence, a prisoner serving a term of imprisonment for a conviction of impaired driving under G.S. 20-138.1 other than one included in a sentence of special probation imposed under authority of this Subchapter is eligible for release on parole at any time. A prisoner whose sentence includes a minimum term of imprisonment imposed under authority of this Subchapter is eligible for release on parole only upon completion of the service of that minimum term or one fifth of the maximum penalty allowed by law for the offense for which the prisoner is sentenced, whichever is less, less any credit allowed under G.S. 15A-1355(c) and Article 19A of Chapter 15 of the General Statutes.

(a1) Repealed by Session Laws 1994, Ex. Sess., c. 21, s. 3.

(b)(1), (2) Repealed by Session Laws 1993, c. 538, s. 22.

(3) Whenever the Post-Release Supervision and Parole Commission will be considering for parole a prisoner serving a sentence of life imprisonment the Commission must notify, at least 30 days in advance of considering the parole, by first class mail at the last known address:

a. The prisoner;

b. The district attorney of the district where the prisoner was convicted;

c. The head of the law enforcement agency that arrested the prisoner, if the head of the agency has requested in writing that he be notified;

d. Any of the victim's immediate family members who have requested in writing to be notified; and

e. Repealed by Session Laws 1993, c. 538, s. 22.

f. As many newspapers of general circulation and other media in the county where the defendant was convicted and if different, in the county where the prisoner was charged, as reasonable.

The Post-Release Supervision and Parole Commission must consider any information provided by any such parties before consideration of parole. The Commission must also give the district attorney, the head of the law enforcement agency who has requested in writing to be notified, the victim, any member of the victim's immediate family who has requested to be notified, and as many newspapers of general circulation and other media in the county or counties designated in sub-subdivision f. of this section as reasonable, written notice of its decision within 10 days of that decision. The Parole Commission shall not, however, include the name of any victim in its notification to the newspapers and other media.

(c) Repealed by Session Laws 1993, c. 538, s. 22.

(d) Criteria. — The Post-Release Supervision and Parole Commission may refuse to release on parole a prisoner it is considering for parole if it believes:

(1) There is a substantial risk that he will not conform to reasonable conditions of parole; or

(2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or

(3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or

(4) There is a substantial risk that he would engage in further criminal conduct.

(e) Refusal of Parole. — A prisoner who has been granted parole may elect to refuse parole and to serve the remainder of his term of imprisonment.

(f) Repealed by Session Laws 1993, c. 538, s. 22.

(g) Notwithstanding the provisions of subsection (a), a prisoner serving a sentence of not less than 30 days nor as great as 18 months for impaired driving may be released on parole when he completes service of one-third of his maximum sentence unless the Post-Release Supervision and Parole Commission finds in writing that:

(1) There is a substantial risk that he will not conform to reasonable conditions of parole; or

(2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or

(3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or

(4) There is a substantial risk that he would engage in further criminal conduct.

If a prisoner is released on parole by operation of this subsection, the term of parole is the unserved portion of the sentence to imprisonment, and the conditions of parole, unless otherwise specified by the Post-Release Supervision and Parole Commission, are those authorized in G.S. 15A-1374(b)(4) through (10).

In order that the Post-Release Supervision and Parole Commission may have an adequate opportunity to make a determination whether parole under this section should be denied, no prisoner eligible for parole under this subsection shall be released from confinement prior to the fifth full working day after he shall have been placed in the custody of the Secretary of Correction or the custodian of a local confinement facility.

(h) Community Service Parole. — Notwithstanding the provisions of any other subsection herein, prisoners serving sentences for impaired driving shall

be eligible for community service parole, in the discretion of the Post-Release Supervision and Parole Commission.

Community service parole is early parole for the purpose of participation in a program of community service under the supervision of a probation/parole officer. A parolee who is paroled under this subsection must perform as a condition of parole community service in an amount and over a period of time to be determined by the Post-Release Supervision and Parole Commission. However, the total amount of community service shall not exceed an amount equal to 32 hours for each month of active service remaining in his minimum sentence. The Post-Release Supervision and Parole Commission may grant early parole under this section without requiring the performance of community service if it determines that such performance is inappropriate to a particular case.

The probation/parole officer and the community service coordinator shall develop a program of community service for the parolee. The community service coordinator shall report any willful failure to perform community service work to the probation/parole officer. Parole may be revoked for any parolee who willfully fails to perform community service work as directed by a community service coordinator. The provisions of G.S. 15A-1376 shall apply to this violation of a condition of parole.

Community service parole eligibility shall be available to a prisoner:

(1) Who is serving an active sentence the term of which exceeds six months; and

(2) Who, in the opinion of the Post-Release Supervision and Parole Commission, is unlikely to engage in further criminal conduct; and

(3) Who agrees to complete service of his sentence as herein specified; and

(4) Who has served one-half of his minimum sentence.

In computing the service requirements of subdivision (4) of this subsection, credit shall be given for good time and gain time credit earned pursuant to G.S. 148-13. Nothing herein is intended to create or shall be construed to create a right or entitlement to community service parole in any prisoner.

(i) A fee of two hundred dollars ($200.00) shall be paid by all persons who participate in the Community Service Parole Program. That fee must be paid to the clerk of court in the county in which the parolee is released. The fee must be paid in full within two weeks unless the Post-Release Supervision and Parole Commission, upon a showing of hardship by the person, allows the person additional time to pay the fee. The parolee may not be required to pay the fee before the person begins the community service unless the Post-Release Supervision and Parole Commission specifically orders that the person do so. Fees collected under this subsection shall be deposited in the General Fund. The fee imposed under this subsection may be paid as prescribed by the supervising parole officer.

(j) The Post-Release Supervision and Parole Commission may terminate a prisoner's community service parole before the expiration of the term of imprisonment where doing so will not endanger the public, unduly depreciate the seriousness of the crime, or promote disrespect for the law. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 19A-22; 1979, c. 749, ss. 9, 10; 1979, 2nd Sess., c. 1316, s. 42; 1981, c. 63, s. 1; c. 179, s. 14; 1983 (Reg. Sess., 1984), c. 1098, s. 1; 1985, c. 453, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 960, s. 2; c. 1012, ss. 2, 5; 1987, c. 47; c. 783, s. 7; 1989, c. 1, ss. 3, 4; 1991, c. 217, s. 3; c. 288, s. 2; 1993, c. 538, s. 22; 1994, Ex. Sess., c. 21, s. 3; c. 24, s. 14(b); c. 25, ss. 1, 2; 2002-126, s. 29A.1(a).)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 29A.1(a), effective October 1, 2002,

and applicable to fees assessed or collected on or after that date, in subsection (i), substituted "the person" for "he" and "him" throughout; substituted "two hundred dollars ($200.00)" for "one hundred dollars ($100.00)" in the first sentence; and substituted "subsection" for "section" in the last sentence.

§ 15A-1374. Conditions of parole.

(a) In General. — The Post-Release Supervision and Parole Commission may in its discretion impose conditions of parole it believes reasonably necessary to insure that the parolee will lead a law-abiding life or to assist him to do so. The Commission must provide as an express condition of every parole that the parolee not commit another crime during the period for which the parole remains subject to revocation. When the Commission releases a person on parole, it must give him a written statement of the conditions on which he is being released.

(b) Appropriate Conditions. — As conditions of parole, the Commission may require that the parolee comply with one or more of the following conditions:

(1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip him for suitable employment.

(2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on parole.

(4) Support his dependents and meet other family responsibilities.

(5) Refrain from possessing a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or the parole officer.

(6) Report to a parole officer at reasonable times and in a reasonable manner, as directed by the Commission or the parole officer.

(7) Permit the parole officer to visit him at reasonable times at his home or elsewhere.

(8) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the parole officer.

(9) Answer all reasonable inquiries by the parole officer and obtain prior approval from the parole officer for any change in address or employment.

(10) Promptly notify the parole officer of any change in address or employment.

(11) Submit at reasonable times to searches of his person by a parole officer for purposes reasonably related to his parole supervision. The Commission may not require as a condition of parole that the parolee submit to any other searches that would otherwise be unlawful. Whenever the search consists of testing for the presence of illegal drugs, the parolee may also be required to reimburse the Department of Correction for the actual cost of drug testing and drug screening, if the results are positive.

(11a) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.

(11b) Comply with an order from a court of competent jurisdiction regarding the payment of an obligation of the parolee in connection with any judgment rendered by the court.

(11c) In the case of a parolee who was attending a basic skills program during incarceration, continue attending a basic skills program in pursuit of a General Education Development Degree or adult high school diploma.

(12) Satisfy other conditions reasonably related to his rehabilitation.

(c) Supervision Fee. — The Commission must require as a condition of parole that the parolee pay a supervision fee of thirty dollars ($30.00) per month. The Commission may exempt a parolee from this condition of parole only if it finds that requiring him to pay the fee will constitute an undue economic burden. The fee must be paid to the clerk of superior court of the county in which the parolee was convicted. The clerk must transmit any money collected pursuant to this subsection to the State to be deposited in the general fund of the State. In no event shall a person released on parole be required to pay more than one supervision fee per month. (1977, c. 711, s. 1; 1979, c. 749, s. 11; 1983, c. 562; 1985, c. 474, s. 6; 1987, c. 579, s. 3; c. 830, s. 17; 1989 (Reg. Sess., 1990), c. 1034, s. 2; 1991, c. 54, s. 1; 1991 (Reg. Sess., 1992), c. 1000, s. 2; 1993, c. 538, s. 39; 1994, Ex. Sess., c. 24, s. 14(b); 2002-126, s. 29A.2(c).)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 29A.2(c), effective October 1, 2002, and applicable to supervision fees assessed or collected on or after that date, substituted "thirty dollars ($30.00)" for "twenty dollars ($20.00)" in subsection (c).

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

ARTICLE 88.

Post-Trial Motions and Appeal.

§ 15A-1401. Post-trial motions and appeal.

CASE NOTES

Cited in Carter v. Lee, 283 F.3d 240, 2002 U.S. App. LEXIS 3739 (4th. Cir. 2002).

ARTICLE 89.

Motion for Appropriate Relief and Other Post-Trial Relief.

§ 15A-1419. When motion for appropriate relief denied.

CASE NOTES

Denial of Relief Where Claim Not Raised on Previous Appeal. —

To avoid procedural default under G.S. 15A-1419(a)(3), defendants must raise those ineffective assistance of counsel claims on direct review that are apparent from the record. State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

Cited in Carter v. Lee, 283 F.3d 240, 2002 U.S. App. LEXIS 3739 (4th. Cir. 2002); Basden v. Lee, 290 F.3d 602, 2002 U.S. App. LEXIS 8634 (4th Cir. 2002).

§ 15A-1420. Motion for appropriate relief; procedure.

CASE NOTES

Evidentiary Hearing Not Needed. — Defendant was not entitled to a hearing on a motion for appropriate relief where the motion failed to show that he was denied the effective assistance of counsel, or that newly discovered evidence would change the result of the trial. State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72, 2002 N.C. App. LEXIS 498 (2002).

Cited in Carter v. Lee, 283 F.3d 240, 2002 U.S. App. LEXIS 3739 (4th. Cir. 2002).

§ 15A-1422. Review upon appeal.

CASE NOTES

Writ of Certiorari Limited. — While G.S. 15A-1444(e) allows a defendant to petition for writ of certiorari after entering a guilty plea, the appellate court is limited to issuing a writ of certiorari in appropriate circumstances to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief, N.C. R. App. P. 21(a)(1). State v. Pimental, — N.C. App. —, 568 S.E.2d 867, 2002 N.C. App. LEXIS 1076 (2002).

Cited in Allen v. Mitchell, 276 F.3d 183, 2001 U.S. App. LEXIS 27233 (4th Cir. 2001); In re Braithwaite, 150 N.C. App. 434, 562 S.E.2d 897, 2002 N.C. App. LEXIS 486 (2002), cert. denied, 356 N.C. 162, 568 S.E.2d 187 (2002); State v. Dickson, — N.C. App. —, 564 S.E.2d 640, 2002 N.C. App. LEXIS 654 (2002); State v. Wilson, — N.C. App. —, 565 S.E.2d 223, 2002 N.C. App. LEXIS 714 (2002).

ARTICLE 91.

Appeal to Appellate Division.

§ 15A-1443. Existence and showing of prejudice.

CASE NOTES

I. General Consideration.
II. Prejudicial Error.
III. Harmless Error.
IV. Rights under Federal Constitution.

I. GENERAL CONSIDERATION.

Applied in State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, — U.S. —, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002); State v. Carpenter, 147 N.C. App. 386, 556 S.E.2d 316, 2001 N.C. App. LEXIS 1185 (2001), cert. denied, 355 N.C. 222, 560 S.E.2d 365 (2002); State v. Patterson, 149 N.C. App. 354, 561 S.E.2d 321, 2002 N.C. App. LEXIS 215 (2002); State v. Evans, 149 N.C. App. 767, 562 S.E.2d 102, 2002 N.C. App. LEXIS 310 (2002); State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002); State v. Holmes, 355 N.C. 719, 565 S.E.2d 154, 2002 N.C. LEXIS 549 (2002); State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002); State v. Marecek, — N.C. App. —, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002).

Cited in State v. Ward, 354 N.C. 231, 555 S.E.2d 251, 2001 N.C. LEXIS 1097 (2001); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); State v. White, 355 N.C. 696, 565 S.E.2d 55, 2002 N.C. LEXIS 675 (2002); State v. Lippard, — N.C. App. —, 568 S.E.2d 657, 2002 N.C. App. LEXIS 965 (2002); State v. Blue, — N.C. —, 565 S.E.2d 133, 2002 N.C. LEXIS 540 (2002).

II. PREJUDICIAL ERROR.

Stale Miranda Warnings. — Defendant's conviction of battered child syndrome felony murder would be reversed where his statement should have been suppressed since he was in

custody, the officer initiated questioning by the word "how," and the 19-hour-old Miranda warning was stale, and, since the defendant's response bolstered his earlier incriminating statements, the State did not carry its burden under G.S. 15A-1443(b) to prove that the response was not prejudicial or harmless beyond a reasonable doubt. State v. Stokes, 150 N.C. App. 211, 565 S.E.2d 196, 2002 N.C. App. LEXIS 512 (2002), cert. granted, 356 N.C. 175, 569 S.E.2d 278 (2002).

Prejudicial Error Not Shown. —

Trial court did not commit error in murder trial of defendant accused of strangling two women whose bodies showed scratch marks made by a person with long fingernails, by admitting photographs of the defendant taken by the media during a pretrial hearing to demonstrate the length of defendant's fingernails at that time where defendant had since the hearing cropped his fingernails. State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

Murder defendant was not prejudiced by the testimony of defendant's case manager as to defendant's frustration and desire to leave a homeless shelter and that defendant was irritated and argumentative. State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

Defendant failed to carry his burden to show prejudice because any alleged prejudice that may have resulted from a detective's alleged conclusory testimony that defendant was guilty was rendered moot when the detective testified that other people were included in the investigation of a crime. State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

III. HARMLESS ERROR.

Violation of Rights Held Harmless Error. —

Overwhelming admissible evidence of defendant's guilt rendered the erroneous admission of evidence seized from his trash can, in violation of his Fourth Amendment rights, harmless, under G.S. 15A-1443(b). State v. Rhodes, — N.C. App. —, 565 S.E.2d 266, 2002 N.C. App. LEXIS 710 (2002), cert. denied, 356 N.C. 173, 569 S.E.2d 273 (2002).

Admission of Improper Testimony Held Harmless Error. —

Evidence of defendant's possession of pornographic materials, without any evidence that defendant had viewed the pornographic materials with the victim, or any evidence that defendant had asked the victim to look at pornographic materials other than the victim's mere speculation, was not relevant to proving defendant committed the offenses of indecent liberties with a child and first degree sex offense with a female child under the age of 13 and should not have been admitted by the trial court; however, the error was not prejudicial under G.S. 15A-1443. State v. Smith, — N.C. App. —, 568 S.E.2d 289, 2002 N.C. App. LEXIS 973 (2002).

Failure to Give Limiting Instruction. — Given the overwhelming evidence of defendant's prior traffic violations, he failed to show a reasonable possibility that the absence of a limiting instruction by the trial court as to his prior assault conviction likely caused the jury to convict him of second degree murder following a traffic accident. State v. Goodman, 149 N.C. App. 57, 560 S.E.2d 196, 2002 N.C. App. LEXIS 132 (2002).

Defendant was not prejudiced by the expert testimony of a pediatrician at defendant's trial on charges of first degree statutory rape of a female child under 13 years old, statutory sexual offense of a female child under 13 years old, and taking indecent liberties with a child; although the pediatrician had formulated her opinion in part from statements the victim made to her mother and a social worker, the victim testified at trial and the defendant had ample opportunity to cross-examine her. State v. Brothers, — N.C. App. —, 564 S.E.2d 603, 2002 N.C. App. LEXIS 653 (2002).

Admission of Evidence of Possession of Pornography Not Prejudicial. — Evidence of defendant's possession of pornographic magazines and videos was improperly admitted as evidence of defendant's intent to engage in a sexual relationship with the victim, or as evidence of defendant's preparation, plan, knowledge or absence of mistake in defendant's trial for taking indecent liberties with a child and first degree sex offense with a female child under the age of 13; however, the error was not prejudicial under G.S. 15A-1443. State v. Smith, — N.C. App. —, 568 S.E.2d 289, 2002 N.C. App. LEXIS 973 (2002).

Exclusion of Cumulative Evidence. —

Even assuming the trial court erred by excluding medical testimony offered by defendant to show that the driver of a farm tractor involved in an accident on a public road had extensive health problems and problems with alcohol in order to raise doubts about who caused the accident, the error was not prejudicial because that testimony was cumulative to other testimony that the defendant was permitted to introduce. State v. Holland, — N.C. App. —, 566 S.E.2d 90, 2002 N.C. App. LEXIS 708 (2002).

Refused to Allow Cross-Examination. — If it was error for the trial court to preclude defendant from cross-examining a prosecution witness about prior shoplifting convictions, nevertheless, as a second offense of shoplifting was a Class 2 misdemeanor, concerning which the witness could be cross-examined, defendant

did not show prejudice from this error. State v. Williams, — N.C. App. —, 563 S.E.2d 616, 2002 N.C. App. LEXIS 577 (2002).

IV. RIGHTS UNDER FEDERAL CONSTITUTION.

Error Presumed Prejudicial. —

Defendant was granted a new trial where defendant's Sixth Amendment right to counsel was violated and the appellate court could not determine beyond a reasonable doubt that the admission of officer's testimony was harmless beyond a reasonable doubt; the error was prejudicial since the State failed to argue that the admission of defendant's statement to the officer was harmless beyond a reasonable doubt. State v. Stokes, — N.C. App. —, 561 S.E.2d 547, 2002 N.C. App. LEXIS 312 (2002).

§ 15A-1444. When defendant may appeal; certiorari.

CASE NOTES

Writ of Certiorari Limited. — While G.S. 15A-1444(e) allows a defendant to petition for writ of certiorari after entering a guilty plea, the appellate court is limited to issuing a writ of certiorari in appropriate circumstances to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief, N.C. R. App. P. 21(a)(1). State v. Pimental, — N.C. App. —, 568 S.E.2d 867, 2002 N.C. App. LEXIS 1076 (2002).

No Appeal of Finding of Aggravation Was Permitted As of Right. — Defendant was not entitled to appeal his sentence as of right under G.S. 15A-1444(e) where he contended that the trial court erred in finding as a non-statutory aggravating factor for sentencing that the murder he pleaded guilty to was committed with malice, premeditation and deliberation. State v. Pimental, — N.C. App. —, 568 S.E.2d 867, 2002 N.C. App. LEXIS 1076 (2002).

Motion to Withdraw Guilty Plea Was Properly Denied. — Defendant's motion to withdraw his guilty plea and petition for a writ of certiorari were denied where, inter alia: (1) defendant never asserted his legal innocence; (2) the State's evidence of premeditation was not weak; (3) there appeared to be a significant amount of time between the entry of the plea and defendant's desire to change it; (4) defendant was not denied the effective assistance of counsel; and (5) defendant was competent, within the meaning of G.S. 15A-1001(a) (2001), at the time of the entry of his plea. State v. Ager, — N.C. App. —, 568 S.E.2d 328, 2002 N.C. App. LEXIS 969 (2002).

Appeal dismissed because defendant was not entitled to appellate review, etc.

Under G.S. 15A-1444(e), a defendant who has entered a plea of guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea. State v. Pimental, — N.C. App. —, 568 S.E.2d 867, 2002 N.C. App. LEXIS 1076 (2002).

Applied in State v. Jones, — N.C. App. —, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002).

Cited in State v. China, — N.C. App. —, 564 S.E.2d 64, 2002 N.C. App. LEXIS 580 (2002); State v. Spivey, 150 N.C. App. 189, 563 S.E.2d 12, 2002 N.C. App. LEXIS 394 (2002); State v. Dickson, — N.C. App. —, 564 S.E.2d 640, 2002 N.C. App. LEXIS 654 (2002); State v. Murphy, — N.C. App. —, 567 S.E.2d 442, 2002 N.C. App. LEXIS 923 (2002); State v. Pimental, — N.C. App. —, 568 S.E.2d 867, 2002 N.C. App. LEXIS 1076 (2002).

§ 15A-1446. Requisites for preserving the right to appellate review.

CASE NOTES

Right to Appeal Waived by Insufficient Record. —

Defendant failed to preserve his argument that the trial court improperly excluded testimony because he failed to establish on the trial record the significance of the excluded and what it would have revealed. State v. Gay, — N.C. App. —, 566 S.E.2d 121, 2002 N.C. App. LEXIS 774 (2002).

SUBCHAPTER XV. CAPITAL PUNISHMENT.

ARTICLE 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

CASE NOTES

I. GENERAL CONSIDERATION.

Evidence Admissible. —

Because the jury had already heard during the guilt or innocence phase of defendant's trial that defendant was the one who shot the victim, the trial court did not err during the sentencing phase in permitting a police investigator to testify that one person stated to the investigator that the defendant had confessed to that person that the defendant had shot the victim. State v. Holmes, 355 N.C. 719, 565 S.E.2d 154, 2002 N.C. LEXIS 549 (2002).

Exchange of Jurors for Sentencing Phase Based on Their Convictions as to Death Penalty. —

Trial court acted properly in not permitting jurors who were opposed to the death penalty to sit as jurors in the guilt-innocence phase of defendant's trial. State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

Applied in State v. Ward, 354 N.C. 231, 555 S.E.2d 251, 2001 N.C. LEXIS 1097 (2001); State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002); State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002); State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

Cited in Carter v. Lee, 283 F.3d 240, 2002 U.S. App. LEXIS 3739 (4th. Cir. 2002); State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002); Basden v. Lee, 290 F.3d 602, 2002 U.S. App. LEXIS 8634 (4th Cir. 2002).

II. REVIEW OF JUDGMENT AND SENTENCE.

In conducting a proportionality review, etc.

The court determined that the sentence of death imposed was not disproportionate to the crime, because the jury's findings of three of the four aggravating circumstances submitted were supported by the evidence, and nothing in the record suggested that defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. State v. White, 355 N.C. 696, 565 S.E.2d 55, 2002 N.C. LEXIS 675 (2002).

Sentence Held Not Excessive or Disproportionate. —

Appellate court reviewed defendant's sentence under G.S. 15A-2000(d)(2) and found that (1) the evidence fully supported the aggravating circumstance found by the jury; (2) there was no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) the sentence of death was not disproportionate to other cases; thus, it affirmed defendant's sentence of death. State v. Parker, 354 N.C.

268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, — U.S. —, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

Death penalty was not disproportionate where defendant killed two men on the same day in the course of one attempted and one successful robbery, one murder was premeditated, and defendant had a juvenile conviction for what would have been a felony crime of violence had defendant been an adult. State v. Leeper, 356 N.C. 55, 565 S.E.2d 1, 2002 N.C. LEXIS 551 (2002).

III. AGGRAVATING CIRCUMSTANCES.

A. In General.

Submission of Multiple Factors Upheld. —

The trial court did not err in submitting both statutory aggravating circumstances that the murder was committed while defendant was engaged in the commission of an armed robbery, G.S. 15A-2000(e)(5), and that it was committed for pecuniary gain, G.S. 15A-2000(e)(6), because separate, independent evidence supported submission of both of the aggravating circumstances, as the evidence demonstrated that defendant stole the victim's vehicle for transportation, not to sell it. State v. White, 355 N.C. 696, 565 S.E.2d 55, 2002 N.C. LEXIS 675 (2002).

Evidence Supported Multiple Aggravating Circumstances. —

Evidence was held sufficient for the jury to find defendant guilty of all charges, including first-degree felony murder of a woman coworker, and to find the G.S. 15A-2000(e)(5), (6), and (9) aggravating factors (during a robbery, for pecuniary gain, and especially heinous, atrocious, or cruel). State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002).

B. Prior Convictions.

Effective Date. — Juvenile records may be examined and used in sentencing for subsequent, criminal proceedings, provided the crime for which the defendant is being sentenced was committed on or after May 1, 1994; that the juvenile adjudication was prior to that date is immaterial. State v. Leeper, 356 N.C. 55, 565 S.E.2d 1, 2002 N.C. LEXIS 551 (2002).

C. Avoiding Arrest or Escaping Custody.

When Submission of Factor is Proper. — Submission of the G.S. 15A-2000(e)(4) aggravating circumstance is proper where the trial court finds substantial, competent evidence in the record from which the jury can infer that at least one of defendant's purposes for a killing was the desire to avoid subsequent detection and apprehension for a crime. State v. Nicholson, 355 N.C. 1, 558 S.E.2d 109, 2002 N.C. LEXIS 24 (2002).

Murdering a Law Enforcement Officer. — It was not error to submit aggravating circumstances to a jury on both committing murder to avoid apprehension for a crime, under G.S. 15A-2000(e)(4), and murdering a law enforcement officer performing his official duty, under G.S. 15A-2000(e)(8), because one circumstance deals with defendant's purpose and the other deals with the factual circumstance of defendant's crime, i.e., that he killed a law enforcement officer. State v. Nicholson, 355 N.C. 1, 558 S.E.2d 109, 2002 N.C. LEXIS 24 (2002).

D. Felony Murder.

When Subdivision (e)(5) Instruction Proper. —

Where a jury convicts a defendant of first-degree murder under the theory of premeditation and deliberation and under the felony murder rule, and both theories are supported by the evidence, the underlying felony may be submitted to the jury by the trial court as an aggravating circumstance under G.S. 15A-2000(e)(5). State v. Robinson, 355 N.C. 320, 561 S.E.2d 245, 2002 N.C. LEXIS 330 (2002).

Evidence Held Sufficient. — Either the G.S. 2000(e)(5) aggravating circumstance or the G.S. 2000(e)(11) aggravating circumstance, standing alone, is sufficient to support a sentence of death. State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

E. Especially Heinous, Atrocious, or Cruel Act.

Several types of murders meet the especially heinous, atrocious, or cruel criteria, etc.

Defendant's statements that a murder was satanically motivated could show depravity of mind and were, thus, properly admitted for the jury's consideration in determining the existence of the G.S. 15A-2000(e)(9) aggravating circumstance. State v. White, 355 N.C. 696, 565 S.E.2d 55, 2002 N.C. LEXIS 675 (2002).

Instruction Under Subdivision (e)(9) Held Proper. —

Trial court did not err in instructing the jury as to the especially heinous, atrocious, or cruel aggravating circumstance in a case where defendant was also convicted of kidnapping and armed robbery; the record contained a wealth of evidence supporting the aggravating circumstance that surmounted a challenge to any alleged inadequacies in the trial court's limiting instruction; further, the evidence did not overlap with other evidence showing that defendant took the victim's car by use of a deadly weapon and transported the victim to a remote area against the victim's will for the purpose of

inflicting serious bodily harm. State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002).

H. Judicial Officer or Witness.

Construction with Other Factors. — Submission of aggravating circumstances to a jury for both committing a murder to avoid apprehension for a crime, under G.S. 15A-2000(e)(4), and murder of a law enforcement officer engaged in his official duties, under G.S. 15A-2000(e)(8), was proper because one deals with defendant's purpose and the other deals with the factual circumstance of the killing, i.e., that defendant killed a law enforcement officer. State v. Nicholson, 355 N.C. 1, 558 S.E.2d 109, 2002 N.C. LEXIS 24 (2002).

Two-Part Test. — Under subdivision (e)(8), the fact that a victim was waiting to testify against a defendant may be considered in making the factual determination of whether the victim was a witness against defendant, however, the factual determination was only the first step, the State also had to show that defendant's motivation in killing the victim was that she was a witness. State v. Long, 354 N.C. 534, 557 S.E.2d 89, 2001 N.C. LEXIS 1235 (2001).

Murder of Witness or to Disrupt Government Function Shown. — Where murdered wife was scheduled to return to court to obtain extension of ex parte domestic violence order against defendant husband the morning after her murder, evidence was sufficient to submit to jury either the aggravating circumstance that murder was committed to disrupt or hinder the lawful exercise of a governmental function (G.S. 15A-2000(e)(7)) or that it was committed against a witness because of the exercise of her official duty as a witness (G.S. 15A-2000(e)(8)). State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001).

IV. MITIGATING CIRCUMSTANCES.

A. In General.

The trial judge's jury instructions were proper, etc.

Trial court properly amended a requested mitigator to avoid a misinterpretation unsupported by substantial evidence. State v. Holmes, 355 N.C. 719, 565 S.E.2d 154, 2002 N.C. LEXIS 549 (2002).

B. No Significant Prior Criminal Activity.

Test for Submission to Jury. — The proper determination, when considering the submission of a mitigating circumstance under G.S. 15A-2000(f)(1), is whether a rational jury could conclude that defendant had no significant history of prior criminal activity, and a significant history of prior criminal activity, for purposes of G.S. 15A-2000(f)(1), is one that is likely to influence the jury's sentence recommendation and is not supported by the mere absence of any substantial evidence concerning the defendant's prior criminal history. State v. Gainey, 355 N.C. 73, 558 S.E.2d 463, 2002 N.C. LEXIS 21 (2002).

No Significant Prior Activity Shown. — Rational jury could have concluded that defendant had no significant history of prior criminal activity; thus, the trial court properly submitted the (f)(1) mitigating circumstance, G.S. 15A-2000(f)(1), to the jury. State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, — U.S. —, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

Criminal Record Admissible to Negate Evidence Under Subdivision (f)(1). —

Any alleged error by the trial court in allowing the G.S. 15A-2000(f)(1) mitigator to be introduced and thereby allowing the State's rebuttal evidence as to defendant's criminal history was not so egregious and prejudicial that defendant was not able to receive a fair sentencing proceeding as a result of the trial court's decision; therefore the alleged error did not rise to the level of plain error. State v. Williams, — N.C. —, — S.E.2d —, 2002 N.C. LEXIS 538 (June 28, 2002).

C. Mental or Emotional Disturbance.

Test for Submission to Jury. — In considering when the G.S. 15A-2000(f)(2) mitigating circumstance may be submitted, the central question is a defendant's mental and emotional state at the time of the crime, and the use of the word "disturbance" in the G.S. 15A-2000(f)(2) circumstance shows the North Carolina General Assembly intended something more than mental impairment. State v. Gainey, 355 N.C. 73, 558 S.E.2d 463, 2002 N.C. LEXIS 21 (2002).

E. Impaired Capacity.

Where None of the Evidence Supports Existence of Factor. —

Defendant failed to show that defendant's ability to appreciate the criminality of his actions or to conform his conduct to the law was impaired when defendant's own forensic psychology expert testified that he was not suggesting that defendant was unable to tell the difference between right and wrong or to appreciate the nature and quality of his actions. State v. Holmes, 355 N.C. 719, 565 S.E.2d 154, 2002 N.C. LEXIS 549 (2002).

F. Age of Defendant.

Emotional Age Also a Factor. — Chronological age is not the determinative factor in concluding the mitigating circumstance under G.S. 15A-2000(f)(7) exists; a defendant's imma-

turity, youthfulness, or lack of emotional or intellectual development are relevant. State v. Gainey, 355 N.C. 73, 558 S.E.2d 463, 2002 N.C. LEXIS 21 (2002).

§ 15A-2002. Capital offenses; jury verdict and sentence.

CASE NOTES

Instructions Not Required to Be Repeated. —

Trial court was not required to state "life imprisonment without parole" every time it alluded to or mentioned the alternative sentence. State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002).

§ 15A-2005. Mentally retarded defendants; death sentence prohibited.

CASE NOTES

Cited in State v. Anderson, 355 N.C. 136, 558 S.E.2d 87, 2002 N.C. LEXIS 14 (2002).

§ 15A-2006: Expired pursuant to Session Laws 2001-346, s. 3, effective October 1, 2002.

Editor's Note. — Session Laws 2001-346, s. 4, provided that this section was effective October 1, 2001, and expired October 1, 2002.

Chapter 15B.

Victims Compensation.

§ 15B-10. Awarding claims.

OPINIONS OF ATTORNEY GENERAL

Nontraffic Misdemeanors and Contributory Misconduct. — In all cases of nontraffic misdemeanors and contributory misconduct the final decision to award or deny a claim must be made by the Crime Victims Compensation Commission even if the amount of the claim is less than $ 7,500.00; the director of the commission recommends denial or award of such claims, and the commission decides. See opinion of Attorney General to Mr. A. A. Adams, Chairman, North Carolina Victims Compensation Commission, 2000 N.C. AG LEXIS 30 (4/5/2000).

§ 15B-11. Grounds for denial of claim or reduction of award.

OPINIONS OF ATTORNEY GENERAL

Nontraffic Misdemeanors and Contributory Misconduct. — In all cases of nontraffic misdemeanors and contributory misconduct the final decision to award or deny a claim must be made by the Crime Victims Compensation Commission even if the amount of the claim is less than $ 7,500.00; the director of the commission recommends denial or award of such claims, and the commission decides. See opinion of Attorney General to Mr. A. A. Adams, Chairman, North Carolina Victims Compensation Commission, 2000 N.C. AG LEXIS 30 (4/5/2000).

Chapter 15C.

Address Confidentiality Program.

§ 15C-1. Purpose.

The purpose of this Chapter is to enable the State and the agencies of North Carolina to respond to requests for public records without disclosing the location of a victim of domestic violence, sexual offense, or stalking; to enable interagency cooperation in providing address confidentiality for victims of domestic violence, sexual offense, or stalking; and to enable the State and its agencies to accept a program participant's use of an address designated by the Office of the Attorney General as a substitute address. (2002-171, s. 1.)

Cross References. — As to domestic violence, generally, see G.S. 50B-1 et seq. As to rape and other sex offenses, see G.S. 14-27.1 et seq. As to stalking, see G.S. 14-277.3. As to public records, generally, see G.S. 132-1 et seq.

Editor's Note. — Session Laws 2002-171, s. 10, made this Chapter effective January 1, 2003.

Session Laws 2002-171, s. 9, provides: "No General Fund appropriations shall be used to implement this act. The Attorney General and all other agencies to which this act applies shall implement the provisions of this act with funds that are or will become available as a result of the settlement of the case entitled State of Florida, et al. v. Nine West Group, Inc., and John Does 1-500, Civil Action No. 00 CIV 1707 (BDP), U.S.D.C., Southern District of New York, or other grants or funds that are not appropriated from the General Fund."

§ 15C-2. Definitions.

The following definitions apply in this Chapter:

(1) Actual address or address. — A residential, work, or school street address as specified on the individual's application to be a program participant under this Chapter.

(2) Address Confidentiality Program or Program. — A program in the Office of the Attorney General to protect the confidentiality of the address of a relocated victim of domestic violence, sexual offense, or stalking to prevent the victim's assailants or potential assailants from finding the victim through public records.

(3) Agency of North Carolina or agency. — Includes every elected or appointed State or local public office, public officer, or official; institution, board, commission, bureau, council, department, authority, or other unit of government of the State or of any local government; or unit, special district, or other political subdivision of State or local government.

(4) Application assistant. — An employee of an agency or nonprofit organization who provides counseling, referral, shelter, or other specialized services to victims of domestic violence, sexual offense, or stalking and who has been designated by the Attorney General to assist individuals with applications to participate in the Address Confidentiality Program.

(5) Attorney General. — Office of the Attorney General.
(6) Person. — Any individual, corporation, limited liability company, partnership, trust, estate, or other association or any state, the United States, or any subdivision thereof.
(7) Program participant. — An individual accepted into the Address Confidentiality Program in accordance with this Chapter.
(8) Public record. — A public record as defined in Chapter 132 of the General Statutes.
(9) Substitute address. — An address designated by the Attorney General under the Address Confidentiality Program.
(10) Victim of domestic violence. — An individual against whom domestic violence, as described in G.S. 50B-1, has been committed.
(11) Victim of a sexual offense. — An individual against whom a sexual offense, as described in Article 7A of Chapter 14 of the General Statutes, has been committed.
(12) Victim of stalking. — An individual against whom stalking, as described in G.S. 14-277.3, has been committed. (2002-171, s. 1.)

§ 15C-3. Address Confidentiality Program.

The General Assembly establishes the Address Confidentiality Program in the Office of the Attorney General to protect the confidentiality of the address of a relocated victim of domestic violence, sexual offense, or stalking to prevent the victim's assailants or potential assailants from finding the victim through public records. Under this Program, the Attorney General shall designate a substitute address for a program participant and act as the agent of the program participant for purposes of service of process and receiving and forwarding first-class mail or certified or registered mail. The Attorney General shall not be required to forward any mail other than first-class mail or certified or registered mail to the program participant. The Attorney General shall not be required to track or otherwise maintain records of any mail received on behalf of a program participant unless the mail is certified or registered mail. (2002-171, s. 1.)

§ 15C-4. Filing and certification of applications; authorization card.

(a) An individual who wants to participate in the Address Confidentiality Program shall file an application with the Attorney General with the assistance of an application assistant. Any of the following individuals may apply to the Attorney General to have an address designated by the Attorney General to serve as the substitute address of the individual:
(1) An adult individual.
(2) A parent or guardian acting on behalf of a minor when the minor resides with the individual.
(3) A guardian acting on behalf of an incapacitated individual.
(b) The application shall be dated, signed, and verified by the applicant and shall be signed by the application assistant who assisted in the preparation of the application.
(c) The application shall contain all of the following:
(1) A statement by the applicant that the applicant is a victim of domestic violence, sexual offense, or stalking and that the applicant fears for the applicant's safety or the safety of the applicant's child.
(2) Evidence that the applicant is a victim of domestic violence, sexual offense, or stalking. This evidence may include any of the following:
a. Law enforcement, court, or other federal or state agency records or files.

b. Documentation from a domestic violence program if the applicant is alleged to be a victim of domestic violence.

c. Documentation from a religious, medical, or other professional from whom the applicant has sought assistance in dealing with the alleged domestic violence, sexual offense, or stalking.

(3) A statement by the applicant that disclosure of the applicant's address would endanger the applicant's safety or the safety of the applicant's child.

(4) A statement by the applicant that the applicant has or will confidentially relocate in North Carolina.

(5) A designation of the Attorney General as an agent for the applicant for purposes of service of process and the receipt of first-class mail or certified or registered mail.

(6) The mailing address and telephone number where the applicant can be contacted by the Attorney General.

(7) The address that the applicant requests not to be disclosed by the Attorney General that directly relates to the increased risk of domestic violence, sexual offense, or stalking.

(8) A statement as to whether there is any existing court order or court action involving the applicant related to divorce proceedings, child support, child custody, or child visitation and the court that issued the order or has jurisdiction over the action.

(9) A statement by the applicant that to the best of the applicant's knowledge, the information contained in the application is true.

(10) A recommendation of an application assistant that the applicant have an address designated by the Attorney General to serve as the substitute address of the applicant.

(d) Upon the filing of a properly completed application, the Attorney General shall certify the applicant as a program participant. Upon certification, the Attorney General shall issue an Address Confidentiality Program authorization card to the program participant. The Address Confidentiality Program authorization card shall remain valid for so long as the program participant remains certified under the Program.

(e) Applicants shall be certified for four years following the date of filing unless the certification is withdrawn or canceled prior to the end of the four-year period. A program participant may withdraw the certification by filing a request for withdrawal acknowledged before a notary with the Attorney General. A certification may be renewed by filing an application containing the information required by G.S. 15C-3 with the Attorney General at least 30 days prior to expiration of the current certification. (2002-171, s. 1.)

§ 15C-5. Change of name, address, or telephone number.

(a) A program participant shall notify the Attorney General within 30 days after the program participant has obtained a legal name change by providing the Attorney General a certified copy of any judgment or order evidencing the change or any other documentation the Attorney General deems to be sufficient evidence of the name change. If the program participant fails to notify the Attorney General of a name change in the manner provided in this subsection, the Attorney General shall cancel the certification of the program participant in the Program.

(b) A program participant shall notify the Attorney General of a change in address or telephone number from the address or telephone number listed for the program participant on the application at least seven days before the change occurs. If the program participant fails to notify the Attorney General of a change in address or telephone number in the manner provided in this

subsection, the Attorney General shall cancel the certification of the program participant in the Program. (2002-171, s. 1.)

§ 15C-6. Falsifying application information.

An applicant who falsely attests in an application that disclosure of the applicant's address would endanger the applicant's safety or the safety of the applicant's child or who knowingly provides false information when applying for certification or renewal shall lose certification in the Program. The Attorney General shall investigate violations of this section. Upon finding that a violation has occurred, the Attorney General shall assess a civil penalty against the applicant not to exceed five hundred dollars ($500.00). (2002-171, s. 1.)

§ 15C-7. Certification cancellation; records.

(a) The Attorney General shall cancel the certification of a program participant under any of the following circumstances:

(1) The program participant files a request for withdrawal of the certification pursuant to G.S. 15C-4.

(2) The program participant fails to notify the Attorney General of a change in the program participant's name, address, or telephone number listed on the application pursuant to G.S. 15C-5.

(3) The program participant submitted false information in applying for certification to the Program in violation of G.S. 15C-6.

(4) Mail forwarded to the program participant by the Attorney General is returned as undeliverable.

(b) The provisions of Article 3 of Chapter 150B of the General Statutes shall not apply to any cancellation of certification by the Attorney General pursuant to subsection (a) of this section.

(c) The Attorney General shall send notice of cancellation to the program participant. Notice of cancellation shall set out the reasons for cancellation. The program participant shall have 30 days to appeal the cancellation decision under procedures developed by the Attorney General.

(d) Any records or documents pertaining to a program participant shall be maintained in accordance with The General Schedule for State Agencies as established by the Department of Cultural Resources.

(e) An individual who ceases to be a program participant is responsible for notifying persons who use the substitute address designated by the Attorney General as the program participant's address that the designated substitute address is no longer the individual's address. (2002-171, s. 1.)

§ 15C-8. Address use by State or local agencies.

(a) The program participant, and not the Attorney General, is responsible for requesting that agencies of North Carolina use the address designated by the Attorney General as the substitute address of the program participant.

(b) Except as otherwise provided in this section, when a program participant submits a current and valid Address Confidentiality Program authorization card to an agency of North Carolina, the agency shall accept the address designation by the Attorney General on the authorization card as the program participant's substitute address when creating a new public record.

(c) An agency may request a waiver from the requirements of the Address Confidentiality Program by submitting a waiver request to the Attorney General. The agency's waiver request shall be in writing and include an explanation of why the agency cannot meet its statutory or administrative

obligations by possessing or using the substitute address and an affirmation that, if the Attorney General accepts the waiver, the agency will only use the program participant's actual address for those statutory or administrative purposes.

(d) The Attorney General's acceptance or denial of an agency's waiver request shall be made in writing and include a statement of specific reasons for acceptance or denial. Acceptance or denial of an agency's waiver request is not subject to further review.

(e) A board of elections shall use the actual address of a program participant for all election-related purposes and shall keep the address confidential from the public under the provisions of G.S. 163-82.10(d). Use of the actual address on letters placed in the United States mail by a board of elections shall not be considered a breach of confidentiality. The substitute address designation provided by the Attorney General shall not be used as an address for voter registration or verification purposes.

(f) For purposes of levying and collecting property taxes on motor vehicles pursuant to Article 22A of Chapter 105 of the General Statutes, the Attorney General shall issue to the county, city, or town assessor or tax collector a list containing the names and actual addresses of program participants residing in that county, city, or town. This list shall be used only for the purposes of listing, appraising, or assessing taxes on motor vehicles and collecting property taxes on motor vehicles in the county, city, or town. The county, city, or town assessor or tax collector or any current or former officer, employee, or agent of any county, city, or town, who in the course of service to or employment by the county, city, or town has access to the name and actual address of a program participant, shall not disclose this information to any other person.

(g) The substitute address designated by the Attorney General shall not be used for purposes of listing, appraising, or assessing taxes on property and collecting taxes on property under the provisions of Subchapter II of Chapter 105 of the General Statutes.

(h) The substitute address designated by the Attorney General shall not be used as an address by any register of deeds on recorded documents or for the purpose of indexing land registered under Article 4 of Chapter 43 of the General Statutes in the index of registered instruments pursuant to G.S. 161-22.

(i) A local school administrative unit shall use the actual address of a program participant for any purpose related to admission or assignment pursuant to Article 25 of Chapter 115C of the General Statutes and shall keep the actual address confidential from the public under the provisions of this Article. The substitute address designated by the Attorney General shall not be used as an address for admission or assignment purposes. For purposes of student records created under Chapter 115C of the General Statutes, the substitute address designated by the Attorney General shall be used.

(j) Except as otherwise provided in this section, a program participant's actual address and telephone number maintained by an agency of North Carolina is not a public record within the meaning of Chapter 132 of the General Statutes. A program participant's actual address or telephone number maintained by the Attorney General or disclosed by the Attorney General pursuant to this Chapter is not a public record within the meaning of Chapter 132 of the General Statutes. (2002-171, s. 1.)

Cross References. — As to registration of land transactions, and the effect of registration, see G.S. 43-13 et seq. As to listing, appraisal, and assessment of property and collection of taxes on property, see G.S. 105-271 et seq. As to motor vehicles, generally, see G.S. 105-330 et seq. As to admission and assignment of students, see G.S. 115C-364 et seq. As to public records, generally, see G.S. 132-1. As to index of registered instruments, see G.S. 161-22. As to official record of voter registration, see G.S. 163-82.10.

§ 15C-9. Disclosure of address prohibited.

(a) The Attorney General is prohibited from disclosing any address or telephone number of a program participant other than the substitute address designated by the Attorney General, except under the following circumstances:

(1) The information is requested by a federal, state, or local law enforcement agency for official use only.

(2) The information is required by direction of a court order. However, any person to whom a program participant's address or telephone number has been disclosed shall not disclose the address or telephone number to any other person unless permitted to do so by order of the court.

(3) Upon request by an agency to verify the participation of a specific program participant when the verification is for official use only.

(4) Upon request by an agency, in the manner provided for by G.S. 15C-8.

(5) The program participant is required to disclose the program participant's actual address as part of a registration required by Article 27A of Chapter 14 of the General Statutes.

(b) The Attorney General shall provide immediate notification of disclosure to a program participant when disclosure is made pursuant to subdivision (2) or (4) of subsection (a) of this section.

(c) If, at the time of application, an applicant is subject to a court order related to divorce proceedings, child support, child custody, or child visitation, the Attorney General shall notify the court that issued the order of the certification of the program participant in the Address Confidentiality Program and the substitute address designated by the Attorney General. If, at the time of application, an applicant is involved in a court action related to divorce proceedings, child support, child custody, or child visitation, the Attorney General shall notify the court having jurisdiction over the action of the certification of the applicant in the Address Confidentiality Program and the substitute address designated by the Attorney General.

(d) No person shall knowingly and intentionally obtain a program participant's actual address or telephone number from the Attorney General or an agency knowing that the person is not authorized to obtain the address information.

(e) No employee of the Attorney General or an agency shall knowingly and intentionally disclose a program participant's actual address or telephone number to a person known to the employee to be prohibited from receiving the program participant's actual address or telephone number, unless the disclosure is permissible by law. This subsection only applies when an employee obtains a program participant's actual address or telephone number during the course of the employee's official duties and, at the time of disclosure, the employee has specific knowledge that the actual address or telephone number disclosed belongs to a program participant.

(f) Any person who knowingly and intentionally obtains or discloses information in violation of this Chapter shall be guilty of a Class 1 misdemeanor and assessed a fine not to exceed two thousand five hundred dollars ($2,500). (2002-171, s. 1.)

§ 15C-10. Assistance for program applicants.

The Attorney General shall designate agencies of North Carolina and nonprofit organizations that provide counseling and shelter services to victims of domestic violence, sexual offense, or stalking to assist individuals applying to be program participants. Any assistance and counseling rendered by the Office of the Attorney General or its designee to applicants shall in no way be construed as legal advice. (2002-171, s. 1.)

§ 15C-11. Limited liability.

The State, agencies of North Carolina, and their officers, officials, employees, and agents, both past and present, in their official and individual capacities, shall be immune and held harmless from any liability in any action brought by or on behalf of any person injured or harmed by the actions or inactions of these entities and individuals in implementing this Chapter. However, if an employee's actions resulting in harm were not within the course and scope of the employee's duties, then that employee may be subject to suit as an individual to the extent permitted by the laws of the State of North Carolina. (2002-159, s. 28.5; 2002-171, s. 1.)

Effect of Amendments. — Session Laws 2002-159, s. 28.5, effective October 11, 2002, deleted "the Attorney General determines that" following "However, if" in this section as enacted by Session Laws 2002-171, s. 1.

§ 15C-12. Rule-making authority.

The Attorney General is authorized to adopt any rules deemed necessary to carry out the provisions of this Chapter. (2002-171, s. 1.)

§ 15C-13. Additional time for action.

Whenever the laws of this State provide a program participant a legal right to act within a prescribed period of 10 days or less after the service of a notice or other paper upon the program participant, and the notice or paper is served upon the program participant by mail pursuant to this Chapter, five days shall be added to the prescribed period. (2002-171, s. 1.)

Chapter 16.
Gaming Contracts and Futures.

Article 1.
Gaming Contracts.

§ 16-1. Gaming and betting contracts void.

CASE NOTES

Cited in Hatcher v. Harrah's NC Casino Co., — N.C. App. —, 565 S.E.2d 241, 2002 N.C. App. LEXIS 712 (July 2, 2002).

Chapter 17C.

North Carolina Criminal Justice Education and Training Standards Commission.

§ 17C-1. Findings and policy.

OPINIONS OF ATTORNEY GENERAL

Chapter Does Not Apply to Director of State Bureau of Investigation. — The Director of the State Bureau of Investigation is legally eligible to take the oath of office reserved to a North Carolina Criminal Justice Officer, even where the director has not met the Chapter 17C education and training requirements, as Chapter 17C does not apply to the Director. See opinion of Attorney General to The Honorable John Glenn, Chairman, The North Carolina Criminal Justice Education and Training Standards Commission, 1999 N.C. AG LEXIS 30 (12/1/99).

§ 17C-6. Powers of Commission.

(a) In addition to powers conferred upon the Commission elsewhere in this Chapter, the Commission shall have the following powers, which shall be enforceable through its rules and regulations, certification procedures, or the provisions of G.S. 17C-10:

(1) Promulgate rules and regulations for the administration of this Chapter, which rules may require (i) the submission by any criminal justice agency of information with respect to the employment, education, retention, and training of its criminal justice officers, and (ii) the submission by any criminal justice training school of information with respect to its criminal justice training programs that are required by this Chapter.

(2) Establish minimum educational and training standards that must be met in order to qualify for entry level employment and retention as a criminal justice officer in temporary or probationary status or in a permanent position.

(3) Certify and recertify, pursuant to the standards that it has established for the purpose, persons as qualified under the provisions of this Chapter to be employed at entry level and retained as criminal justice officers.

(4) Establish minimum standards for the certification of criminal justice training schools and programs or courses of instruction that are required by this Chapter.

(5) Certify and recertify, pursuant to the standards that it has established for the purpose, criminal justice training schools and programs or courses of instruction that are required by this Chapter.

(6) Establish minimum standards and levels of education and experience for all criminal justice instructors and school directors who participate in programs or courses of instruction that are required by this Chapter.

(7) Certify and recertify, pursuant to the standards that it has established for the purpose, criminal justice instructors and school directors who participate in programs or courses of instruction that are required by this Chapter.

(8) Investigate and make such evaluations as may be necessary to determine if criminal justice agencies, schools, and individuals are complying with the provisions of this Chapter.
(9) Adopt and amend bylaws, consistent with law, for its internal management and control.
(10) Enter into contracts incident to the administration of its authority pursuant to this Chapter.
(11) Establish minimum standards and levels of training for certification and periodic recertification of operators of and instructors for training programs in radio microwave, laser, and other electronic speed-measuring instruments.
(12) Certify and recertify, pursuant to the standards that it has established, operators and instructors for training programs for each approved type of radio microwave, laser, and other electronic speed-measuring instruments.
(13) In conjunction with the Secretary of Crime Control and Public Safety, approve use of specific models and types of radio microwave, laser, and other speed-measuring instruments and establish the procedures for operation of each approved instrument and standards for calibration and testing for accuracy of each approved instrument.
(14) Establish minimum standards for in-service training for criminal justice officers.

(b) The Commission shall have the following powers, which shall be advisory in nature and for which the Commission is not authorized to undertake any enforcement actions:

(1) Identify types of criminal justice positions, other than entry level positions, for which advanced or specialized training and education are appropriate, and establish minimum standards for the certification of persons as being qualified for those positions on the basis of specified education, training, and experience; provided, that compliance with these minimum standards shall be discretionary on the part of criminal justice agencies with respect to their criminal justice officers;
(2) Certify, pursuant to the standards that it has established for the purpose, criminal justice officers for those criminal justice agencies that elect to comply with the minimum education, training, and experience standards established by the Commission for positions for which advanced or specialized training, education, and experience are appropriate;
(3) Consult and cooperate with counties, municipalities, agencies of this State, other governmental agencies, and with universities, colleges, junior colleges, and other institutions concerning the development of criminal justice youth development centers and programs or courses of instruction;
(4) Study and make reports and recommendations concerning criminal justice education and training in North Carolina;
(5) Conduct and stimulate research by public and private agencies which shall be designed to improve education and training in the administration of criminal justice;
(6) Study, obtain data, statistics, and information and make reports concerning the recruitment, selection, education, retention, and training of persons serving criminal justice agencies in this State; to make recommendations for improvement in methods of recruitment, selection, education, retention, and training of persons serving criminal justice agencies;
(7) Make recommendations concerning any matters within its purview pursuant to this Chapter;

(8) Appoint such advisory committees as it may deem necessary;
(9) Do such things as may be necessary and incidental to the administration of its authority pursuant to this Chapter;
(10) Formulate basic plans for and promote the development and improvement of a comprehensive system of education and training for the officers and employees of criminal justice agencies consistent with its rules and regulations;
(11) Maintain liaison among local, State and federal agencies with respect to criminal justice education and training;
(12) Promote the planning and development of a systematic career development program for criminal justice professionals.

(c) All decisions and rules and regulations heretofore made by the North Carolina Criminal Justice Training and Standards Council and the North Carolina Criminal Justice Education and Training System Council shall remain in full force and effect unless and until repealed or suspended by action of the North Carolina Criminal Justice Education and Training Standards Commission established herein. The present Councils are terminated on December 31, 1979, and their power, duties and responsibilities vest in the North Carolina Criminal Justice Education and Training Standards Commission effective January 1, 1980.

(d) The standards established by the Commission pursuant to G.S. 17C-6(a)(11) and 17C-6(a)(12) and by the Commission and the Secretary of Crime Control and Public Safety pursuant to G.S. 17C-6(a)(13) shall not be less stringent than standards established by the U.S. Department of Transportation, National Highway Traffic Safety Administration, National Bureau of Standards, or the Federal Communications Commission. (1971, c. 963, s. 6; 1975, c. 372, s. 2; 1979, c. 763, s. 1; 1979, 2nd Sess., c. 1184, ss. 1, 2; 1989, c. 757, s. 4; 1994, Ex. Sess., c. 18, s. 2; 1995, c. 509, s. 14.1; 2000-140, s. 38.1(b); 2002-159, s. 29.)

Effect of Amendments. —

Session Laws 2002-159, s. 29, effective October 11, 2002, in subsection (a), inserted "and school directors" in subdivisions (6) and (7), and made minor stylistic changes throughout the rest of the subsection.

Chapter 17E.

North Carolina Sheriffs' Education and Training Standards Commission.

§ 17E-8. Special requirements; authorizations.

OPINIONS OF ATTORNEY GENERAL

Deputization of Citizens to Recapture Escaped Inmates. — The state or a local government cannot provide to a private prison operator the authority to deputize citizens to assist its employees in recapturing escaped inmates. See opinion of Attorney General to Senator Frank W. Ballance, Jr. and Representative E. David Redwine, 2001 N.C. AG LEXIS 5 (3/28/2001).

Chapter 18B.

Regulation of Alcoholic Beverages.

Article 1.

General Provisions.

§ 18B-102. Manufacture, sale, etc., forbidden except as expressly authorized.

CASE NOTES

Constitutionality. — Provisions of North Carolina's alcoholic beverage code, which prohibited out-of-state wineries from selling wine directly to North Carolina residents but allowed North Carolina wineries to make direct sales, violated the Commerce Clause, and state officials were enjoined from enforcing those provisions. Beskind v. Easley, 197 F. Supp. 2d 464, 2002 U.S. Dist. LEXIS 6045 (W.D.N.C. 2002).

§ 18B-102.1. Direct shipments from out-of-state prohibited.

CASE NOTES

Constitutionality. — Provisions of North Carolina's alcoholic beverage code, which prohibited out-of-state wineries from selling wine directly to North Carolina residents but allowed North Carolina wineries to make direct sales, violated the Commerce Clause, and state officials were enjoined from enforcing those provisions. Beskind v. Easley, 197 F. Supp. 2d 464, 2002 U.S. Dist. LEXIS 6045 (W.D.N.C. 2002).

§ 18B-109. Direct shipment of alcoholic beverages into State.

CASE NOTES

Constitutionality. — Provisions of North Carolina's alcoholic beverage code, which prohibited out-of-state wineries from selling wine directly to North Carolina residents but allowed North Carolina wineries to make direct sales, violated the Commerce Clause, and state officials were enjoined from enforcing those provisions. Beskind v. Easley, 197 F. Supp. 2d 464, 2002 U.S. Dist. LEXIS 6045 (W.D.N.C. 2002).

Article 1A.

Compensation for Injury Caused by Sales to Underage Persons.

§ 18B-120. Definitions.

CASE NOTES

Parents as Aggrieved Parties. — Parents of an underage drinker who died from injuries proximately resulting from his operation of a motor vehicle while impaired after consuming alcohol negligently sold by a permittee may be included within the class of "aggrieved parties" under subdivision (1) of G.S. 18B-120, and may recover damages, including damages pursuant to G.S. 28A-18-2(b). Storch v. Winn-Dixie Charlotte, Inc., 149 N.C. App. 478, 560 S.E.2d 881, 2002 N.C. App. LEXIS 199 (2002).

Article 9.

Issuance of Permits.

§ 18B-902. Application for permit; fees.

(a) Form. — An application for an ABC permit shall be on a form prescribed by the Commission and shall be notarized. Each person required to qualify under G.S. 18B-900(c) shall sign and swear to the application and shall submit a full set of fingerprints with the application.

(b) Investigation. — Before issuing a new permit, the Commission, with the assistance of the ALE Division, shall investigate the applicant and the premises for which the permit is requested. The Commission may request the assistance of local ABC officers in investigating applications. An applicant shall cooperate fully with the investigation.

The Department of Justice may provide a criminal record check to the ALE Division for a person who has applied for a permit through the Commission. The ALE Division shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The ALE Division and the Commission shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection.

(c) False Information. — Knowingly making a false statement in an application for an ABC permit shall be grounds for denying, suspending, revoking or taking other action against the permit as provided in G.S. 18B-104 and shall also be unlawful.

(d) Fees. — An application for an ABC permit shall be accompanied by payment of the following application fee:

(1) On-premises malt beverage permit — $400.00.

(2) Off-premises malt beverage permit — $400.00.

(3) On-premises unfortified wine permit — $400.00.
(4) Off-premises unfortified wine permit — $400.00.
(5) On-premises fortified wine permit — $400.00.
(6) Off-premises fortified wine permit — $400.00.
(7) Brown-bagging permit — $400.00, unless the application is for a restaurant seating less than 50, in which case the fee shall be $200.00.
(8) Special occasion permit — $400.00.
(9) Limited special occasion permit — $50.00.
(10) Mixed beverages permit — $1,000.
(11) Culinary permit — $200.00.
(12) Unfortified winery permit — $300.00.
(13) Fortified winery permit — $300.00.
(14) Limited winery permit — $300.00.
(15) Brewery permit — $300.00.
(16) Distillery permit — $300.00.
(17) Fuel alcohol permit — $100.00.
(18) Wine importer permit — $300.00.
(19) Wine wholesaler permit — $300.00.
(20) Malt beverage importer permit — $300.00.
(21) Malt beverage wholesaler permit — $300.00.
(22) Bottler permit — $300.00.
(23) Salesman permit — $100.00.
(24) Vendor representative permit — $50.00.
(25) Nonresident malt beverage vendor permit — $100.00.
(26) Nonresident wine vendor permit — $100.00.
(27) Any special one-time permit under G.S. 18B-1002 — $50.00.
(28) Winery special event permit — $200.00.
(29) Mixed beverages catering permit — $200.00.
(30) Guest room cabinet permit — $1,000.
(31) Liquor importer/bottler permit — $500.00.
(32) Cider and vinegar manufacturer permit — $200.00.
(33) Brew on premises permit — $400.00.
(34) Wine producer permit — $300.00.
(35) Wine tasting permit — $100.00.

(e) Repealed by Session Laws 1998-95, s. 29, effective May 1, 1999.

(f) Fee Not Refundable. — The fee required by subsection (d) shall not be refunded.

(g) Fees to Treasurer. — All fees collected by the Commission under this or any other section of this Chapter shall be remitted to the State Treasurer for the General Fund. (1949, c. 974, ss. 1, 2; 1963, c. 119; c. 426, s. 12; 1965, c. 326; 1971, c. 872, s. 1; 1973, c. 758, s. 2; c. 1012; 1975, c. 19, s. 5; 1977, c. 70, s. 19.1; c. 668, s. 3; c. 977, ss. 1, 2; 1979, c. 286, s. 4; 1981, c. 412, s. 2; c. 747, ss. 55, 56; 1983, c. 713, s. 105; 1989, c. 737, s. 3; c. 800, s. 7; 1991, c. 267, s. 2; c. 565, ss. 2, 7; c. 669, s. 2; c. 689, ss. 307, 308; 1991 (Reg. Sess., 1992), c. 920, s. 5; 1993, c. 415, s. 11; 1993 (Reg. Sess., 1994), c. 745, s. 28; 1995, c. 404, s. 2; c. 466, s. 7; 1997-134, s. 3; 1997-467, s. 2; 1998-95, s. 29; 2001-262, s. 6; 2001-487, s. 49(f); 2002-147, s. 1.)

Editor's Note. — Session Laws 2002-147, s. 15, provides: "If the Private Security Officer Employment Standards Act of 2002 [S. 2238, 107th Cong. (2002)] is enacted by the United States Congress, the State of North Carolina declines to participate in the background check system authorized by that act as a result of the enactment of this act."

Effect of Amendments. —

Session Laws 2002-147, s. 1, effective October 9, 2002, rewrote the second sentence of subsection (a) and added the last two paragraphs of subsection (b).

§ 18B-903. Duration of permit; renewal and transfer.

(a) Duration. — Once issued, ABC permits shall be valid for the following periods, unless earlier surrendered, suspended or revoked:

(1) On-premises and off-premises malt beverage, unfortified wine, and fortified wine permits; culinary permits; and all permits listed in G.S. 18B-1100 shall remain valid indefinitely;

(2) Limited special occasion permits shall be valid for 48 hours before and after the occasion for which the permit was issued;

(3) Special one-time permits issued under G.S. 18B-1002 shall be valid for the period stated on the permit;

(4) Temporary permits issued under G.S. 18B-905 shall be valid for 90 days; and

(5) All other ABC permits shall be valid for one year, from May 1 to April 30.

(b) Renewal. — Application for renewal of an ABC permit shall be on a form provided by the Commission. An application for renewal shall be accompanied by an application fee of twenty-five percent (25%) of the original application fee set in G.S. 18B-902, except that the renewal application fee for each mixed beverages permit and each guest room cabinet permit shall be seven hundred fifty dollars ($750.00). A renewal fee shall not be refundable.

(b1) Registration. — Each person holding a malt beverage, fortified wine, or unfortified wine permit issued pursuant to G.S. 18B-902(d)(1) through G.S. 18B-902(d)(6) shall register by May 1 of each year on a form provided by the Commission, in order to provide information needed by the State in enforcing this Chapter and to support the costs of that enforcement. The registration required by this subsection shall be accompanied by an annual registration and inspection fee of two hundred dollars ($200.00) for each permit held. The fee shall be paid by May 1 of each year.

(c) Change in Ownership. — All permits for an establishment shall automatically expire and shall be surrendered to the Commission if:

(1) Ownership of the establishment changes; or

(2) There is a change in the membership of the firm, association or partnership owning the establishment, involving the acquisition of a twenty-five percent (25%) or greater share in the firm, association or partnership by someone who did not previously own a twenty-five percent (25%) or greater share; or

(3) Twenty-five percent (25%) or more of the stock of the corporate permittee owning the establishment is acquired by someone who did not previously own twenty-five percent (25%) or more of the stock.

(d) Change in Management. — A corporation holding a permit for an establishment for which the manager is required to qualify as an applicant under G.S. 18B-900(c) shall, within 30 days after employing a new manager, submit to the Commission an application for substitution of a manager. The application shall be signed by the new manager, shall be on a form provided by the Commission, and shall be accompanied by a fee of ten dollars ($10.00). The fee shall not be refundable.

(e) Transfer. — An ABC permit may not be transferred from one person to another or from one location to another.

(f) Lost Permits. — The Commission may issue duplicate ABC permits for an establishment when the existing valid permits have been lost or damaged. The request for duplicate permits shall be on a form provided by the Commission, certified by the permittee and the Alcohol Law Enforcement Division, and accompanied by a fee of ten dollars ($10.00).

(g) Name Change. — The Commission may issue new permits to a permittee upon application and payment of a fee of ten dollars ($10.00) for each location

when the permittee's name or name of the business is changed. (1971, c. 872, s. 1; 1975, c. 330, s. 1; c. 411, s. 4; 1981, c. 412, s. 2; c. 747, s. 57; 1983, c. 713, s. 106; 1989, c. 800, s. 8; 1991, c. 565, ss. 3, 7; 1991 (Reg. Sess., 1992), c. 920, s. 6; 1998-95, s. 30; 2002-126, s. 29A.13.)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 29A.13, effective October 1, 2002, added subsection (b1).

Article 10.

Retail Activity.

§ 18B-1000. Definitions concerning establishments.

The following requirements and definitions shall apply to this Chapter:

(1) Community theatre. — An establishment owned and operated by a bona fide nonprofit organization that is engaged solely in the business of sponsoring or presenting amateur or professional theatrical events to the public. A permit issued for a community theatre is valid only during regularly scheduled theatrical events sponsored by such nonprofit organization.

(1a) Convention center. — An establishment that meets either of the following requirements:

a. A publicly owned or operated establishment that is engaged in the business of sponsoring or hosting conventions and similar large gatherings, including auditoriums, armories, civic centers, convention centers, and coliseums.

b. A privately owned facility located in a city that has a population of at least 200,000 but not more than 250,000 by the 2000 federal census and is located in a county that has previously authorized the issuance of mixed beverage permits by referendum. To qualify as a convention center under this subdivision, the facility shall meet each of the following requirements:

1. The facility shall be located within an area that has been designated as an Urban Redevelopment Area under Article 22 of Chapter 160A of the General Statutes, and shall be certified by the appropriate local official as being consistent with the city's redevelopment plan for the area in which the facility is located.

2. The facility shall contain at least 7,500 square feet of floor space that is available for public use and shall be used exclusively for banquets, receptions, meetings, and similar gatherings.

3. The facility's annual gross receipts from the sale of alcoholic beverages shall be less than fifty percent (50%) of the gross receipts paid to all providers at permitted functions for food, nonalcoholic beverages, alcoholic beverages, service, and facility usage fees (excluding receipts or charges for entertainment and ancillary services not directly related to providing food and beverage service). The person to whom a permit has been issued for a privately owned facility shall be required to maintain copies of all contracts and invoices for items supplied by providers for a period of three years from the date of the event.

A permit issued for a convention center shall be valid only for those parts of the building used for conventions, banquets, receptions, and other events, and only during scheduled activities.

(1b) Cooking school. — An establishment substantially engaged in the business of operating a school in which cooking techniques are taught for a fee.

(2) Eating establishment. — An establishment engaged in the business of regularly and customarily selling food, primarily to be eaten on the premises. Eating establishments shall include businesses that are referred to as restaurants, cafeterias, or cafes, but that do not qualify under subdivision (6). Eating establishments shall also include lunchstands, grills, snack bars, fast-food businesses, and other establishments, such as drugstores, which have a lunch counter or other section where food is sold to be eaten on the premises.

(3) Food business. — An establishment engaged in the business of regularly and customarily selling food, primarily to be eaten off the premises. Food businesses shall include grocery stores, convenience stores, and other establishments, such as variety stores or drugstores, where food is regularly sold, and shall also include establishments engaged primarily in selling unfortified or fortified wine or both, for consumption off the premises.

(4) Hotel. — An establishment substantially engaged in the business of furnishing lodging. A hotel shall have a restaurant either on or closely associated with the premises. The restaurant and hotel need not be owned or operated by the same person.

(5) Private club. — An establishment that is organized and operated solely for a social, recreational, patriotic, or fraternal purpose and that is not open to the general public, but is open only to the members of the organization and their bona fide guests. This provision does not, however, prohibit such an establishment from being open to the general public for raffles and bingo games as required by G.S. 14-309.11(a) and G.S. 14-309.13. Except for bona fide religious organizations, no organization that discriminates in the selection of its membership on the basis of religion shall be eligible to receive any permit issued under this Chapter.

(5a) Residential private club. — A private club that is located in a privately owned, primarily residential and recreational development.

(6) Restaurant. — An establishment substantially engaged in the business of preparing and serving meals. To qualify as a restaurant, an establishment's gross receipts from food and nonalcoholic beverages shall be not less than forty percent (40%) of the total gross receipts from food, nonalcoholic beverages, and alcoholic beverages. A restaurant shall also have a kitchen and an inside dining area with seating for at least 36 people.

(7) Retail business. — An establishment engaged in any retail business, regardless of whether food is sold on the premises.

(8) Sports club. — An establishment substantially engaged in the business of providing an 18-hole golf course, two or more tennis courts, or both. The sports club can either be open to the general public or to members and their guests. To qualify as a sports club, an establishment's gross receipts for club activities shall be greater than its gross receipts for alcoholic beverages. This provision does not prohibit a sports club from operating a restaurant. Receipts for food shall be included in with the club activity fee.

(9) Congressionally chartered veterans organizations. — An establishment that is organized as a federally chartered, nonprofit veterans organization, and is operated solely for patriotic or fraternal purposes.

(10) Wine producer. — A farming establishment of at least five acres committed to the production of grapes, berries, or other fruits for the manufacture of unfortified wine. (1905, c. 498, ss. 6-8; Rev., ss. 3526, 3534; C.S., s. 3371; 1937, c. 49, ss. 12, 16, 22; c. 411; 1955, c. 999; 1967, c. 222, ss. 1, 8; c. 1256, s. 3; 1969, c. 1018; 1971, c. 872, s. 1; 1973, c. 1226; 1977, c. 176, s. 1; 1981, c. 412, s. 2; 1981 (Reg. Sess., 1982), c. 1262, s. 15; 1983, c. 583, s. 1; c. 896, s. 5; 1987, c. 307, s. 1; c. 391, s. 1; 1993, c. 415, ss. 14, 15; 1993 (Reg. Sess., 1994), c. 579, s. 1; 1995, c. 466, s. 8; c. 509, s. 15; 2001-262, s. 7; 2001-487, s. 49(d); 2002-188, s. 1.)

Effect of Amendments. —
Session Laws 2002-188, s. 1, effective October 31, 2002, rewrote subdivision (1a).

§ 18B-1005. Conduct on licensed premises.

CASE NOTES

On a First Amendment challenge, because the predominant purpose of this section is to address the secondary effects of lewd conduct and not merely to suppress erotic expression, it is content neutral and thus subject only to intermediate scrutiny rather than strict scrutiny. Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 2002 U.S. App. LEXIS 17943 (4th Cir. 2002).

In an overbreadth challenge based on the First Amendment, plaintiffs were likely to prevail at trial because G.S. 18B-1005(a)(5) would apply to much mainstream entertainment such as ballet and other kinds of dance as well as theater and movies with clear artistic merit. Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 2002 U.S. App. LEXIS 17943 (4th Cir. 2002).

Article 11.

Commercial Activity.

§ 18B-1101. Authorization of unfortified winery permit.

The holder of an unfortified winery permit may:

(1) Manufacture unfortified wine;

(2) Sell, deliver and ship unfortified wine in closed containers to wholesalers licensed under this Chapter as authorized by the ABC laws, except that wine may be sold to exporters and nonresident wholesalers only when the purchase is not for resale in this State;

(2a) Receive, in closed containers, unfortified wine produced inside or outside North Carolina under the winery's label from grapes, berries, or other fruits owned by the winery, and sell, deliver, and ship that wine to wholesalers, exporters, and nonresident wholesalers in the same manner as its wine manufactured in North Carolina. This provision may be used only by a winery during its first three years of operation or when there is substantial damage to its grapes, berries, or other fruits from catastrophic crop loss. This provision may be used only three years out of every 10 years and notice must be given to the Commission each time this provision is used;

(3) Ship its wine in closed containers to individual purchasers inside and outside this State;

(4) Furnish or sell "short-filled" packages, on which State taxes have been or will be paid, to its employees for the use of the employees or their families and guests in this State;
(5) Regardless of the results of any local wine election, sell the wine owned by the winery at the winery for on- or off-premise consumption upon obtaining the appropriate permit under G.S. 18B-1001;
(6) Sell the wine owned by the winery for on- or off-premise consumption at no more than three other locations in the State, upon obtaining the appropriate permit under G.S. 18B-1001; and
(7) Obtain a wine wholesaler permit to sell, deliver, and ship at wholesale unfortified wine manufactured at the winery. The authorization of this subdivision applies only to a winery that annually sells, to persons other than exporters and nonresident wholesalers when the purchase is not for resale in this State, no more than 300,000 gallons of unfortified wine manufactured by it at the winery.

A sale under subdivision (4) shall not be considered a retail or wholesale sale under the ABC laws. (1973, c. 511, ss. 1, 2; 1975, c. 411, s. 6; 1979, c. 224; 1981, c. 412, s. 2; c. 747, s. 60; 1985, c. 89, s. 4; 1989, c. 800, s. 2; 2001-262, s. 2; 2001-487, s. 49(b); 2002-102, s. 2.)

Effect of Amendments. — Session Laws 2002-102, s. 2, effective August 29, 2002, inserted "inside or" preceding "outside" in the first sentence of subdivision (2a).

§ 18B-1114. Authorization of nonresident wine vendor permit.

CASE NOTES

Constitutionality. — Provisions of North Carolina's alcoholic beverage code, which prohibited out-of-state wineries from selling wine directly to North Carolina residents but allowed North Carolina wineries to make direct sales, violated the Commerce Clause, and state officials were enjoined from enforcing those provisions. Beskind v. Easley, 197 F. Supp. 2d 464, 2002 U.S. Dist. LEXIS 6045 (W.D.N.C. 2002).

§ 18B-1114.4. Viticulture/Enology course authorization.

(a) Authorization. — The holder of a viticulture/enology course authorization may:
(1) Manufacture wine from grapes grown on the school's campus or leased property for the purpose of providing instruction and education on the making of unfortified wines.
(2) Possess wines manufactured during the viticulture/enology program for the purpose of conducting wine-tasting seminars and classes for students who are 21 years of age or older.
(3) Sell wines produced during the course to wholesalers or to retailers upon obtaining a wine wholesaler permit under G.S. 18B-1107, except that the permittee may not receive shipments of wines from other producers.

(b) Limitation. — Authorization for a viticulture/enology course shall be granted by the Commission only for a community college or college that offers a viticulture/enology program as a part of its curriculum offerings for students of the school. No retail sales of wine shall be made by the students, instructor, or school. Wines may be manufactured only from grapes grown in a viticulture/enology course vineyard, not to exceed five acres, that is located on the school's campus or leased property.

(c) The holder of a viticulture/enology course authorization may manufacture wines from grapes grown by others until June 30, 2004. Otherwise, wine may be manufactured only as provided in subsection (b) of this section.

(d) The holder of a viticulture/enology course authorization shall not be considered a winery for the purposes of this Chapter or Chapter 105 of the General Statutes. (2002-102, s. 1.)

Editor's Note. — Session Laws 2002-102, s. 4, made this section effective August 29, 2002.

Chapter 19A.
Protection of Animals.

Article 3.
Animal Welfare Act.

§ 19A-20. Title of Article.

Editor's Note. — Session Laws 2002-180, ss. 6.1 to 6.7, creates the Legislative Study Commission on Companion Animals, for the purpose of reviewing the laws regarding the treatment of such animals. In conducting its study, the Commission is directed to consider the operation of public and private animal shelters, including their condition, size, staff, budgets, euthanasia procedures, and adoption programs; ways to reduce the unwanted companion animal population through spay-neuter programs and the cost savings associated with these programs; minimum standards and responsibilities required of companion animal owners; and the need and feasibility of licensing commercial breeders and kennel operators. The Commission may make an interim report to the 2003 General Assembly and shall make its final report to the 2004 Regular Session of the 2003 General Assembly upon its convening, and shall terminate the earlier of the filing of its final report or upon the convening of the 2004 Regular Session of the 2003 General Assembly.

Chapter 20.

Motor Vehicles.

Article 1.

Division of Motor Vehicles.

Article 2.

Uniform Driver's License Act.

Article 2C.

Commercial Driver License.

Article 3.

Motor Vehicle Act of 1937.

Article 3B.

Permanent Weighing Stations and Portable Scales.

Article 4.

State Highway Patrol.

Article 1.

Division of Motor Vehicles.

§ 20-4: Repealed by Session Laws 2002-190, s. 4, effective January 1, 2003.

Editor's Note. — Session Laws 2002-190, s. 1, provides: "All statutory authority, powers, duties, and functions, including rulemaking, budgeting, purchasing, records, personnel, personnel positions, salaries, property, and unexpended balances of appropriations, allocations, reserves, support costs, and other funds allocated to the Department of Transportation, Division of Motor Vehicles Enforcement Section, for the regulation and enforcement of commercial motor vehicles, oversize and overweight vehicles, motor carrier safety, and mobile and manufactured housing are transferred to and vested in the Department of Crime Control and Public Safety. This transfer has all the elements of a Type I transfer as defined in G.S. 143A-6.

"The Department of Crime Control and Public Safety shall be considered a continuation of the transferred portion of the Department of Transportation, Division of Motor Vehicles Enforcement Section, for the purpose of succession to all rights, powers, duties, and obligations of the Enforcement Section and of those rights, powers, duties, and obligations exercised by the Department of Transportation, Division of Motor Vehicles on behalf of the Enforcement Section. Where the Department of Transportation, the Division of Motor Vehicles, or the Enforcement Section, or any combination thereof are referred to by law, contract, or other document, that reference shall apply to the Department of Crime Control and Public Safety.

"All equipment, supplies, personnel, or other properties rented or controlled by the Department of Transportation, Division of Motor Vehicles Enforcement Section for the regulation and enforcement of commercial motor vehicles, oversize and overweight vehicles, motor carrier safety, and mobile and manufactured housing shall be administered by the Department of Crime Control and Public Safety."

Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the

Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Session Laws 2002-190, s. 18, as amended by Session Laws 2002-159, s. 31.5(b), makes Session Laws 2002-190 effective January 1, 2003.

§ 20-4.01. Definitions.

Unless the context requires otherwise, the following definitions apply throughout this Chapter to the defined words and phrases and their cognates:

(1a) Alcohol. — Any substance containing any form of alcohol, including ethanol, methanol, propanol, and isopropanol.

(1b) Alcohol Concentration. — The concentration of alcohol in a person, expressed either as:

a. Grams of alcohol per 100 milliliters of blood; or

b. Grams of alcohol per 210 liters of breath.

The results of a defendant's alcohol concentration determined by a chemical analysis of the defendant's breath or blood shall be reported to the hundredths. Any result between hundredths shall be reported to the next lower hundredth.

(1c) Business District. — The territory prescribed as such by ordinance of the Board of Transportation.

(2) Canceled. — As applied to drivers' licenses and permits, a declaration that a license or permit which was issued through error or fraud is void and terminated.

(2a) Class A Motor Vehicle. — A combination of motor vehicles that meets either of the following descriptions:

a. Has a combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.

b. Has a combined GVWR of less than 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.

(2b) Class B Motor Vehicle. — Any of the following:

a. A single motor vehicle that has a GVWR of at least 26,001 pounds.

b. A combination of motor vehicles that includes as part of the combination a towing unit that has a GVWR of at least 26,001 pounds and a towed unit that has a GVWR of less than 10,001 pounds.

(2c) Class C Motor Vehicle. — Any of the following:

a. A single motor vehicle not included in Class B.

b. A combination of motor vehicles not included in Class A or Class B.

(3) Repealed by Session Laws 1979, c. 667, s. 1.

(3a) Chemical Analysis. — A test or tests of the breath, blood, or other bodily fluid or substance of a person to determine the person's alcohol concentration or presence of an impairing substance, performed in accordance with G.S. 20-139.1, including duplicate or sequential analyses.

(3b) Chemical Analyst. — A person granted a permit by the Department of Health and Human Services under G.S. 20-139.1 to perform chemical analyses.

(3c) Commercial Drivers License (CDL). — A license issued by a state to an individual who resides in the state that authorizes the individual to drive a class of commercial motor vehicle. A "nonresident commercial drivers license (NRCDL)" is issued by a state to an individual who resides in a foreign jurisdiction.

(3d) Commercial Motor Vehicle. — Any of the following motor vehicles that are designed or used to transport passengers or property:

a. A Class A motor vehicle that has a combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.
b. A Class B motor vehicle.
c. A Class C motor vehicle that meets either of the following descriptions:
1. Is designed to transport 16 or more passengers, including the driver.
2. Is transporting hazardous materials and is required to be placarded in accordance with 49 C.F.R. Part 172, Subpart F.
d. Repealed by Session Laws 1999, c. 330, s. 9, effective December 1, 1999.

(4) Commissioner. — The Commissioner of Motor Vehicles.

(4a) Conviction. — A conviction for an offense committed in North Carolina or another state:
a. In-State. When referring to an offense committed in North Carolina, the term means any of the following:
1. A final conviction of a criminal offense, including a no contest plea.
2. A determination that a person is responsible for an infraction, including a no contest plea.
3. An unvacated forfeiture of cash in the full amount of a bond required by Article 26 of Chapter 15A of the General Statutes.
4. A third or subsequent prayer for judgment continued within any five-year period.
b. Out-of-State. When referring to an offense committed outside North Carolina, the term means any of the following:
1. An unvacated adjudication of guilt.
2. A determination that a person has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal.
3. An unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court.
4. A violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated.

(4b) Crash. — Any event that results in injury or property damage attributable directly to the motion of a motor vehicle or its load. The terms collision, accident, and crash and their cognates are synonymous.

(5) Dealer. — Every person engaged in the business of buying, selling, distributing, or exchanging motor vehicles, trailers, or semitrailers in this State, and having an established place of business in this State.
The terms "motor vehicle dealer," "new motor vehicle dealer," and "used motor vehicle dealer" as used in Article 12 of this Chapter have the meaning set forth in G.S. 20-286.

(5a) Disqualification. — A withdrawal of the privilege to drive a commercial motor vehicle.

(6) Division. — The Division of Motor Vehicles acting directly or through its duly authorized officers and agents.

(7) Driver. — The operator of a vehicle, as defined in subdivision (25). The terms "driver" and "operator" and their cognates are synonymous.

(7a) Electric Personal Assistive Mobility Device. — A self-balancing nontandem two-wheeled device, designed to transport one person, with a propulsion system that limits the maximum speed of the device to 15 miles per hour or less.

(7b) Employer. — Any person who owns or leases a commercial motor vehicle or assigns a person to drive a commercial motor vehicle.

(8) Essential Parts. — All integral and body parts of a vehicle of any type required to be registered hereunder, the removal, alteration, or substitution of which would tend to conceal the identity of the vehicle or substantially alter its appearance, model, type, or mode of operation.

(9) Established Place of Business. — Except as provided in G.S. 20-286, the place actually occupied by a dealer or manufacturer at which a permanent business of bargaining, trading, and selling motor vehicles is or will be carried on and at which the books, records, and files necessary and incident to the conduct of the business of automobile dealers or manufacturers shall be kept and maintained.

(10) Explosives. — Any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities, or packing that an ignition by fire, by friction, by concussion, by percussion, or by detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructible effects on contiguous objects or of destroying life or limb.

(11) Farm Tractor. — Every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry.

(11a) For-Hire Motor Carrier. — A person who transports passengers or property by motor vehicle for compensation.

(12) Foreign Vehicle. — Every vehicle of a type required to be registered hereunder brought into this State from another state, territory, or country, other than in the ordinary course of business, by or through a manufacturer or dealer and not registered in this State.

(12a) Golf Cart. — A vehicle designed and manufactured for operation on a golf course for sporting or recreational purposes and that is not capable of exceeding speeds of 20 miles per hour.

(12b) Gross Vehicle Weight Rating (GVWR). — The value specified by the manufacturer as the maximum loaded weight a vehicle is capable of safely hauling. The GVWR of a combination vehicle is the GVWR of the power unit plus the GVWR of the towed unit or units. When a vehicle is determined by an enforcement officer to be structurally altered in any way from the manufacturer's original design in an attempt to increase the hauling capacity of the vehicle, the GVWR of that vehicle shall be deemed to be the greater of the license weight or the total weight of the vehicle or combination of vehicles for the purpose of enforcing this Chapter.

(12c) Hazardous Materials. — Materials designated as hazardous by the United States Secretary of Transportation under 49 U.S.C. § 1803.

(13) Highway. — The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic. The terms "highway" and "street" and their cognates are synonymous.

(14) House Trailer. — Any trailer or semitrailer designed and equipped to provide living or sleeping facilities and drawn by a motor vehicle.

(14a) Impairing Substance. — Alcohol, controlled substance under Chapter 90 of the General Statutes, any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances.

(15) Implement of Husbandry. — Every vehicle which is designed for agricultural purposes and used exclusively in the conduct of agricultural operations.

(16) Intersection. — The area embraced within the prolongation of the lateral curblines or, if none, then the lateral edge of roadway lines of two or more highways which join one another at any angle whether or not one such highway crosses the other.

Where a highway includes two roadways 30 feet or more apart, then every crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection. In the event that such intersecting highway also includes two roadways 30 feet or more apart, then every crossing of two roadways of such highways shall be regarded as a separate intersection.

(17) License. — Any driver's license or any other license or permit to operate a motor vehicle issued under or granted by the laws of this State including:

a. Any temporary license or learner's permit;

b. The privilege of any person to drive a motor vehicle whether or not such person holds a valid license; and

c. Any nonresident's operating privilege.

(18) Local Authorities. — Every county, municipality, or other territorial district with a local board or body having authority to adopt local police regulations under the Constitution and laws of this State.

(19) Manufacturer. — Every person, resident, or nonresident of this State, who manufactures or assembles motor vehicles.

(20) Manufacturer's Certificate. — A certification on a form approved by the Division, signed by the manufacturer, indicating the name of the person or dealer to whom the therein-described vehicle is transferred, the date of transfer and that such vehicle is the first transfer of such vehicle in ordinary trade and commerce. The description of the vehicle shall include the make, model, year, type of body, identification number or numbers, and such other information as the Division may require.

(21) Metal Tire. — Every tire the surface of which in contact with the highway is wholly or partly of metal or other hard, nonresilient material.

(21a) Moped. — A type of passenger vehicle as defined in G.S. 105-164.3.

(21b) Motor Carrier. — A for-hire motor carrier or a private motor carrier.

(22) Motorcycle. — A type of passenger vehicle as defined in G.S. 20-4.01(27).

(23) Motor Vehicle. — Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. This shall not include mopeds as defined in G.S. 20-4.01(27)d1.

(24) Nonresident. — Any person whose legal residence is in some state, territory, or jurisdiction other than North Carolina or in a foreign country.

(24a) Offense Involving Impaired Driving. — Any of the following offenses:

a. Impaired driving under G.S. 20-138.1.

b. Death by vehicle under G.S. 20-141.4 when conviction is based upon impaired driving or a substantially similar offense under previous law.

c. First or second degree murder under G.S. 14-17 or involuntary manslaughter under G.S. 14-18 when conviction is based upon impaired driving or a substantially similar offense under previous law.

d. An offense committed in another jurisdiction which prohibits substantially similar conduct prohibited by the offenses in this subsection.

e. A repealed or superseded offense substantially similar to impaired driving, including offenses under former G.S. 20-138 or G.S. 20-139.

f. Impaired driving in a commercial motor vehicle under G.S. 20-138.2, except that convictions of impaired driving under G.S. 20-138.1 and G.S. 20-138.2 arising out of the same transaction shall be considered a single conviction of an offense involving impaired driving for any purpose under this Chapter.

g. Habitual impaired driving under G.S. 20-138.5.

A conviction under former G.S. 20-140(c) is not an offense involving impaired driving.

(25) Operator. — A person in actual physical control of a vehicle which is in motion or which has the engine running. The terms "operator" and "driver" and their cognates are synonymous.

(25a) Out of Service Order. — A declaration that a driver, a commercial motor vehicle, or a motor carrier operation is out-of-service.

(26) Owner. — A person holding the legal title to a vehicle, or in the event a vehicle is the subject of a chattel mortgage or an agreement for the conditional sale or lease thereof or other like agreement, with the right of purchase upon performance of the conditions stated in the agreement, and with the immediate right of possession vested in the mortgagor, conditional vendee or lessee, said mortgagor, conditional vendee or lessee shall be deemed the owner for the purpose of this Chapter. For the purposes of this Chapter, the lessee of a vehicle owned by the government of the United States shall be considered the owner of said vehicle.

(27) Passenger Vehicles. —

a. Excursion passenger vehicles. — Vehicles transporting persons on sight-seeing or travel tours.

b. For hire passenger vehicles. — Vehicles transporting persons for compensation. This classification shall not include vehicles operated as ambulances; vehicles operated by the owner where the costs of operation are shared by the passengers; vehicles operated pursuant to a ridesharing arrangement as defined in G.S. 136-44.21; vehicles transporting students for the public school system under contract with the State Board of Education or vehicles leased to the United States of America or any of its agencies on a nonprofit basis; or vehicles used for human service or volunteer transportation.

c. Common carriers of passengers. — Vehicles operated under a certificate of authority issued by the Utilities Commission for operation on the highways of this State between fixed termini or over a regular route for the transportation of persons for compensation.

c1. Child care vehicles. — Vehicles under the direction and control of a child care facility, as defined in G.S. 110-86(3), and driven by an owner, employee, or agent of the child care facility for the primary purpose of transporting children to and from the child care facility, or to and from a place for participation in an event or activity in connection with the child care facility.

d. Motorcycles. — Vehicles having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, including motor scooters and motor-driven bicycles,

but excluding tractors and utility vehicles equipped with an additional form of device designed to transport property, three-wheeled vehicles while being used by law-enforcement agencies and mopeds as defined in subdivision d1 of this subsection.

d1. Moped. — Defined in G.S. 105-164.3.

d2. Motor home or house car. — A vehicular unit, designed to provide temporary living quarters, built into as an integral part, or permanently attached to, a self-propelled motor vehicle chassis or van. The vehicle must provide at least four of the following facilities: cooking, refrigeration or icebox, self-contained toilet, heating or air conditioning, a portable water supply system including a faucet and sink, separate 110-125 volt electrical power supply, or an LP gas supply.

d3. School activity bus. — A vehicle, generally painted a different color from a school bus, whose primary purpose is to transport school students and others to or from a place for participation in an event other than regular classroom work. The term includes a public, private, or parochial vehicle that meets this description.

d4. School bus. — A vehicle whose primary purpose is to transport school students over an established route to and from school for the regularly scheduled school day, that is equipped with alternately flashing red lights on the front and rear and a mechanical stop signal, and that bears the words "School Bus" on the front and rear in letters at least 8 inches in height. The term includes a public, private, or parochial vehicle that meets this description.

e. U-drive-it passenger vehicles. — Passenger vehicles included in the definition of U-drive-it vehicles set forth in this section.

f. Ambulances. — Vehicles equipped for transporting wounded, injured, or sick persons.

g. Private passenger vehicles. — All other passenger vehicles not included in the above definitions.

h. Low-speed vehicle. A four-wheeled electric vehicle whose top speed is greater than 20 miles per hour but less than 25 miles per hour.

(28) Person. — Every individual, firm, partnership, association, corporation, governmental agency, or combination thereof of whatsoever form or character.

(29) Pneumatic Tire. — Every tire in which compressed air is designed to support the load.

(29a) Private Motor Carrier. — A person who transports passengers or property by motor vehicle in interstate commerce and is not a for-hire motor carrier.

(30) Private Road or Driveway. — Every road or driveway not open to the use of the public as a matter of right for the purpose of vehicular traffic.

(31) Property-Hauling Vehicles. —

a. Vehicles used for the transportation of property.

b., c. Repealed by Session Laws 1995 (Regular Session, 1996), c. 756, s. 4.

d. Semitrailers. — Vehicles without motive power designed for carrying property or persons and for being drawn by a motor vehicle, and so constructed that part of their weight or their load rests upon or is carried by the pulling vehicle.

e. Trailers. — Vehicles without motive power designed for carrying property or persons wholly on their own structure and to be drawn by a motor vehicle, including "pole trailers" or a pair of wheels used primarily to balance a load rather than for purposes of transportation.

f. Repealed by Session Laws 1995 (Regular Session, 1996), c. 756, s. 4.

(31a) Provisional Licensee. — A person under the age of 18 years.

(32) Public Vehicular Area. — Any area within the State of North Carolina that meets one or more of the following requirements:

a. The area is generally open to and used by the public for vehicular traffic, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of any of the following:

1. Any public or private hospital, college, university, school, orphanage, church, or any of the institutions, parks or other facilities maintained and supported by the State of North Carolina or any of its subdivisions.

2. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space for customers, patrons, or the public.

3. Any property owned by the United States and subject to the jurisdiction of the State of North Carolina. (The inclusion of property owned by the United States in this definition shall not limit assimilation of North Carolina law when applicable under the provisions of Title 18, United States Code, section 13).

b. The area is a beach area used by the public for vehicular traffic.

c. The area is a road opened to vehicular traffic within or leading to a subdivision for use by subdivision residents, their guests, and members of the public, whether or not the subdivision roads have been offered for dedication to the public.

d. The area is a portion of private property used for vehicular traffic and designated by the private property owner as a public vehicular area in accordance with G.S. 20-219.4.

(32a) Recreational Vehicle. — A vehicular type unit primarily designed as temporary living quarters for recreational, camping, or travel use that either has its own motive power or is mounted on, or towed by, another vehicle. The basic entities are camping trailer, fifth-wheel travel trailer, motor home, travel trailer, and truck camper.

a. Motor home. — As defined in G.S. 20-4.01(27)d2.

b. Travel trailer. — A vehicular unit mounted on wheels, designed to provide temporary living quarters for recreational, camping, or travel use, and of a size or weight that does not require a special highway movement permit when towed by a motorized vehicle.

c. Fifth-wheel trailer. — A vehicular unit mounted on wheels designed to provide temporary living quarters for recreational, camping, or travel use, of a size and weight that does not require a special highway movement permit and designed to be towed by a motorized vehicle that contains a towing mechanism that is mounted above or forward of the tow vehicle's rear axle.

d. Camping trailer. — A vehicular portable unit mounted on wheels and constructed with collapsible partial side walls that fold for towing by another vehicle and unfold at the campsite to provide temporary living quarters for recreational, camping, or travel use.

e. Truck camper. — A portable unit that is constructed to provide temporary living quarters for recreational, camping, or travel use, consisting of a roof, floor, and sides and is designed to be loaded onto and unloaded from the bed of a pickup truck.

(32b) Regular Drivers License. — A license to drive a commercial motor vehicle that is exempt from the commercial drivers license requirements or a noncommercial motor vehicle.

(33)a. Flood Vehicle. — A motor vehicle that has been submerged or partially submerged in water to the extent that damage to the body, engine, transmission, or differential has occurred.

b. Non-U.S.A. Vehicle. — A motor vehicle manufactured outside of the United States and not intended by the manufacturer for sale in the United States.

c. Reconstructed Vehicle. — A motor vehicle of a type required to be registered hereunder that has been materially altered from original construction due to removal, addition or substitution of new or used essential parts; and includes glider kits and custom assembled vehicles.

d. Salvage Motor Vehicle. — Any motor vehicle damaged by collision or other occurrence to the extent that the cost of repairs to the vehicle and rendering the vehicle safe for use on the public streets and highways would exceed seventy-five percent (75%) of its fair retail market value, whether or not the motor vehicle has been declared a total loss by an insurer. Repairs shall include the cost of parts and labor. Fair market retail values shall be as found in the NADA Pricing Guide Book or other publications approved by the Commissioner.

e. Salvage Rebuilt Vehicle. — A salvage vehicle that has been rebuilt for title and registration.

f. Junk Vehicle. — A motor vehicle which is incapable of operation or use upon the highways and has no resale value except as a source of parts or scrap, and shall not be titled or registered.

(33a) Relevant Time after the Driving. — Any time after the driving in which the driver still has in his body alcohol consumed before or during the driving.

(33b) Reportable Crash. — A crash involving a motor vehicle that results in one or more of the following:

a. Death or injury of a human being.

b. Total property damage of one thousand dollars ($1,000) or more, or property damage of any amount to a vehicle seized pursuant to G. S. 20-28.3.

(34) Resident. — Any person who resides within this State for other than a temporary or transitory purpose for more than six months shall be presumed to be a resident of this State; but absence from the State for more than six months shall raise no presumption that the person is not a resident of this State.

(35) Residential District. — The territory prescribed as such by ordinance of the Department of Transportation.

(36) Revocation or Suspension. — Termination of a licensee's or permittee's privilege to drive or termination of the registration of a vehicle for a period of time stated in an order of revocation or suspension. The terms "revocation" or "suspension" or a combination of both terms shall be used synonymously.

(37) Road Tractors. — Vehicles designed and used for drawing other vehicles upon the highway and not so constructed as to carry any part of the load, either independently or as a part of the weight of the vehicle so drawn.

(38) Roadway. — That portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the shoulder. In the event a highway includes two or more separate roadways the term

"roadway" as used herein shall refer to any such roadway separately but not to all such roadways collectively.

(39) Safety Zone. — Traffic island or other space officially set aside within a highway for the exclusive use of pedestrians and which is so plainly marked or indicated by proper signs as to be plainly visible at all times while set apart as a safety zone.

(40) Security Agreement. — Written agreement which reserves or creates a security interest.

(41) Security Interest. — An interest in a vehicle reserved or created by agreement and which secures payments or performance of an obligation. The term includes but is not limited to the interest of a chattel mortgagee, the interest of a vendor under a conditional sales contract, the interest of a trustee under a chattel deed of trust, and the interest of a lessor under a lease intended as security. A security interest is "perfected" when it is valid against third parties generally.

(41a) Serious Traffic Violation. — A conviction of one of the following offenses when operating a commercial motor vehicle:

a. Excessive speeding, involving a single charge of any speed 15 miles per hour or more above the posted speed limit.
b. Careless and reckless driving.
c. A violation of any State or local law relating to motor vehicle traffic control, other than a parking violation, arising in connection with a fatal accident.
d. Improper or erratic lane changes.
e. Following the vehicle ahead too closely.

(42) Solid Tire. — Every tire of rubber or other resilient material which does not depend upon compressed air for the support of the load.

(43) Specially Constructed Vehicles. — Vehicles of a type required to be registered hereunder not originally constructed under a distinctive name, make, model, or type by a generally recognized manufacturer of vehicles and not materially altered from their original construction.

(44) Special Mobile Equipment. — Defined in G.S. 105-164.3.

(44a) Specialty Vehicles. — Vehicles of a type required to be registered under this Chapter that are modified from their original construction for an educational, emergency services, or public safety use.

(45) State. — A state, territory, or possession of the United States, District of Columbia, Commonwealth of Puerto Rico, or a province of Canada.

(46) Street. — A highway, as defined in subdivision (13). The terms "highway" and "street" and their cognates are synonymous.

(47) Suspension. — Termination of a licensee's or permittee's privilege to drive or termination of the registration of a vehicle for a period of time stated in an order of revocation or suspension. The terms "revocation" or "suspension" or a combination of both terms shall be used synonymously.

(48) Truck Tractors. — Vehicles designed and used primarily for drawing other vehicles and not so constructed as to carry any load independent of the vehicle so drawn.

(48a) U-drive-it vehicles. — The following vehicles that are rented to a person, to be operated by that person:

a. A private passenger vehicle other than the following:
   1. A private passenger vehicle of nine-passenger capacity or less that is rented for a term of one year or more.
   2. A private passenger vehicle that is rented to public school authorities for driver-training instruction.
b. A property-hauling vehicle under 7,000 pounds that does not haul products for hire and that is rented for a term of less than one year.

c. Motorcycles.

(48b) Under the Influence of an Impairing Substance. — The state of a person having his physical or mental faculties, or both, appreciably impaired by an impairing substance.

(48c) Utility Vehicle. — Vehicle designed and manufactured for general maintenance, security, recreational, and landscaping purposes, but does not include vehicles designed and used primarily for the transportation of persons or property on a street or highway.

(49) Vehicle. — Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks; provided, that for the purposes of this Chapter bicycles shall be deemed vehicles and every rider of a bicycle upon a highway shall be subject to the provisions of this Chapter applicable to the driver of a vehicle except those which by their nature can have no application. This term shall not include a device which is designed for and intended to be used as a means of transportation for a person with a mobility impairment, or who uses the device for mobility enhancement, is suitable for use both inside and outside a building, including on sidewalks, and is limited by design to 15 miles per hour when the device is being operated by a person with a mobility impairment, or who uses the device for mobility enhancement. This term shall not include an electric personal assistive mobility device as defined in G.S. 20-4.01(7a).

(50) Wreckers. — Vehicles with permanently attached cranes used to move other vehicles; provided, that said wreckers shall be equipped with adequate brakes for units being towed. (1973, c. 1330, s. 1; 1975, cc. 94, 208; c. 716, s. 5; c. 743; c. 859, s. 1; 1977, c. 313; c. 464, s. 34; 1979, c. 39; c. 423, s. 1; c. 574, ss. 1-4; c. 667, s. 1; c. 680; 1981, c. 606, s. 3; c. 792, s. 2; 1983, c. 435, s. 8; 1983 (Reg. Sess., 1984), c. 1101, ss. 1-3; 1985, c. 509, s. 6; 1987, c. 607, s. 2; c. 658, s. 1; 1987 (Reg. Sess., 1988), c. 1069; c. 1105, s. 1; c. 1112, ss. 1-3; 1989, c. 455, ss. 1, 2; c. 727, s. 219(1); c. 771, ss. 1, 18; 1991, c. 449, s. 2; c. 726, ss. 1-4; 1991 (Reg. Sess., 1992), c. 1015, s. 1; 1993 (Reg. Sess., 1994), c. 761, s. 22; 1995, c. 191, s. 1; 1995 (Reg. Sess., 1996), c. 756, ss. 2-4; 1997-379, s. 5.1; 1997-443, s. 11A.8; 1997-456, s. 27; 1998-149, s. 1; 1998-182, ss. 1, 1.1, 26; 1998-217, s. 62(e); 1999-330, s. 9; 1999-337, s. 28(c)-(e); 1999-406, s. 14; 1999-452, ss. 1-5; 2000-155, s. 9; 2000-173, s. 10(c); 2001-212, s. 2; 2001-341, ss. 1, 2; 2001-356, ss. 1, 2; 2001-441, s. 1; 2001-487, ss. 50(a), 51; 2002-72, s. 19(b); 2002-98, ss. 1-3.)

Effect of Amendments. —

Session Laws 2002-72, s. 19(b), effective August 12, 2002, substituted "Recreational Vehicle" for "Recreation Vehicle" at the beginning of subdivision (32a).

Session Laws 2002-98, ss. 1 to 3, effective August 29, 2002, added present subdivision (7a); redesignated former subdivision (7a) as present subdivision (7b); and in subdivision (49) added the last sentence.

CASE NOTES

Under Influence of Impairing Substance. —

Where the tortfeasor rear-ended the injured party's vehicle, the trial court erred in granting the tortfeasor's motion for summary judgment on the injured party's punitive damages claim, because the tortfeasor failed to show that he was not under the influence of an impairing substance under G.S. 20-4.01(14a), where he admitted to drinking two beers and taking three prescription drugs before the accident; the tortfeasor offered no evidence that the prescription drugs, mixed with alcohol, were not an impairing substance. Byrd v. Adams, — N.C. App. —, 568 S.E.2d 640, 2002 N.C. App. LEXIS 1067 (2002).

ARTICLE 2.

Uniform Driver's License Act.

§ 20-7. Issuance and renewal of drivers licenses.

CASE NOTES

Cited in Craig v. Faulkner, — N.C. App. —, 565 S.E.2d 733, 2002 N.C. App. LEXIS 743 (2002).

§ 20-9. What persons shall not be licensed.

CASE NOTES

Cited in Craig v. Faulkner, — N.C. App. —, 565 S.E.2d 733, 2002 N.C. App. LEXIS 743 (2002).

§ 20-9.2. Selective service system registration requirements.

(a) Any male United States citizen or immigrant who is at least 18 years of age but less than 26 years of age shall be registered in compliance with the requirements of the Military Selective Service Act, 50 U.S.C. § 453 (1948), when applying for the issuance, renewal, or duplication of a drivers license, commercial drivers license, or identification card.

(b) The Division shall forward in an electronic format the necessary personal information of the applicants identified in subsection (a) of this section required for registration to the Selective Service System. An application for the issuance, renewal, or duplication of a drivers license, commercial drivers license, or identification card constitutes an affirmation that the applicant has already registered with the Selective Service System or that he authorizes the Division to forward the necessary information to the Selective Service System for registration. The Division shall notify the applicant that his application for the issuance, renewal, or duplication of a drivers license, commercial drivers license, or identification card serves as his consent to be registered with the Selective Service System pursuant to this section. (2002-162, s. 1.)

Editor's Note. — Session Laws 2002-162, s. 3, made this section effective October 17, 2002.

Session Laws 2002-162, s. 2, as amended by Session Laws 2002-159, s. 67, mandates the Division of Motor Vehicles to implement the requirements of s. 1 of the act at the earliest practical date, but no later than April 1, 2003.

§ 20-10.1. Mopeds.

It shall be unlawful for any person who is under the age of 16 years to operate a moped as defined in G.S. 105-164.3 upon any highway or public vehicular area of this State. (1979, c. 574, s. 8; 2002-72, s. 6.)

Effect of Amendments. — Session Laws 2002-72, s. 6, effective August 12, 2002, substituted "G.S. 105-164.3" for "G.S. 20-4.01(27)d1."

§ 20-11. Issuance of limited learner's permit and provisional drivers license to person who is less than 18 years old.

(a) Process. — Safe driving requires instruction in driving and experience. To ensure that a person who is less than 18 years old has both instruction and experience before obtaining a drivers license, driving privileges are granted first on a limited basis and are then expanded in accordance with the following process:

(1) Level 1. — Driving with a limited learner's permit.
(2) Level 2. — Driving with a limited provisional license.
(3) Level 3. — Driving with a full provisional license.

A permit or license issued under this section must have a color background or border that indicates the level of driving privileges granted by the permit or license.

(b) Level 1. — A person who is at least 15 years old but less than 18 years old may obtain a limited learner's permit if the person meets all of the following requirements:

(1) Passes a course of driver education prescribed in G.S. 20-88.1 or a course of driver instruction at a licensed commercial driver training school.
(2) Passes a written test administered by the Division.
(3) Has a driving eligibility certificate or a high school diploma or its equivalent.

(c) Level 1 Restrictions. — A limited learner's permit authorizes the permit holder to drive a specified type or class of motor vehicle only under the following conditions:

(1) The permit holder must be in possession of the permit.
(2) A supervising driver must be seated beside the permit holder in the front seat of the vehicle when it is in motion. No person other than the supervising driver can be in the front seat.
(3) For the first six months after issuance, the permit holder may drive only between the hours of 5:00 a.m. and 9:00 p.m.
(4) After the first six months after issuance, the permit holder may drive at any time.
(5) Every person occupying the vehicle being driven by the permit holder must have a safety belt properly fastened about his or her body, or be restrained by a child passenger restraint system as provided in G.S. 20-137.1(a), when the vehicle is in motion.

(d) Level 2. — A person who is at least 16 years old but less than 18 years old may obtain a limited provisional license if the person meets all of the following requirements:

(1) Has held a limited learner's permit issued by the Division for at least 12 months.
(2) Has not been convicted of a motor vehicle moving violation or seat belt infraction during the preceding six months.
(3) Passes a road test administered by the Division.
(4) Has a driving eligibility certificate or a high school diploma or its equivalent.

(e) Level 2 Restrictions. — A limited provisional license authorizes the license holder to drive a specified type or class of motor vehicle only under the following conditions:

(1) The license holder shall be in possession of the license.
(2) The license holder may drive without supervision in any of the following circumstances:
a. From 5:00 a.m. to 9:00 p.m.

b. When driving to or from work.
c. When driving to or from an activity of a volunteer fire department, volunteer rescue squad, or volunteer emergency medical service, if the driver is a member of the organization.

(3) The license holder may drive with supervision at any time. When the license holder is driving with supervision, the supervising driver shall be seated beside the license holder in the front seat of the vehicle when it is in motion. The supervising driver need not be the only other occupant of the front seat, but shall be the person seated next to the license holder.

(4) When the license holder is driving the vehicle and is not accompanied by the supervising driver, there may be no more than one passenger under 21 years of age in the vehicle. This limit does not apply to passengers who are members of the license holder's immediate family or whose primary residence is the same household as the license holder. However, if a family member or member of the same household as the license holder who is younger than 21 years of age is a passenger in the vehicle, no other passengers under 21 years of age, who are not members of the license holder's immediate family or members of the license holder's household, may be in the vehicle.

(5) Every person occupying the vehicle being driven by the license holder shall have a safety belt properly fastened about his or her body, or be restrained by a child passenger restraint system as provided in G.S. 20-137.1(a), when the vehicle is in motion.

(f) Level 3. — A person who is at least 16 years old but less than 18 years old may obtain a full provisional license if the person meets all of the following requirements:

(1) Has held a limited provisional license issued by the Division for at least six months.

(2) Has not been convicted of a motor vehicle moving violation or seat belt infraction during the preceding six months.

(3) Has a driving eligibility certificate or a high school diploma or its equivalent.

A person who meets these requirements may obtain a full provisional license by mail.

(g) Level 3 Restrictions. — The restrictions on Level 1 and Level 2 drivers concerning time of driving, supervision, and passenger limitations do not apply to a full provisional license.

(h) Exception for Persons 16 to 18 Who Have an Unrestricted Out-of-State License. — A person who is at least 16 years old but less than 18 years old, who was a resident of another state and has an unrestricted drivers license issued by that state, and who becomes a resident of this State may obtain one of the following upon the submission of a driving eligibility certificate or a high school diploma or its equivalent:

(1) A temporary permit, if the person has not completed a drivers education program that meets the requirements of the Superintendent of Public Instruction but is currently enrolled in a drivers education program that meets these requirements. A temporary permit is valid for the period specified in the permit and authorizes the holder of the permit to drive a specified type or class of motor vehicle when in possession of the permit, subject to any restrictions imposed by the Division concerning time of driving, supervision, and passenger limitations. The period must end within 10 days after the expected completion date of the drivers education program in which the applicant is enrolled.

(2) A full provisional license, if the person has completed a drivers education program that meets the requirements of the Superinten-

dent of Public Instruction, has held the license issued by the other state for at least 12 months, and has not been convicted during the preceding six months of a motor vehicle moving violation, a seat belt infraction, or an offense committed in another jurisdiction that would be a motor vehicle moving violation or seat belt infraction if committed in this State.

(2a) A full provisional license, if the person has completed a drivers education program that meets the requirements of the Superintendent of Public Instruction, has held both a learner's permit and a restricted license from another state for at least six months each, the Commissioner finds that the requirements for the learner's permit and restricted license are comparable to the requirements for a learner's permit and restricted license in this State, and the person has not been convicted during the preceding six months of a motor vehicle moving violation, a seat belt infraction, or an offense committed in another jurisdiction that would be a moving violation or a seat belt infraction if committed in this State.

(3) A limited provisional license, if the person has completed a drivers education program that meets the requirements of the Superintendent of Public Instruction but either did not hold the license issued by the other state for at least 12 months or was convicted during the preceding six months of a motor vehicle moving violation, a seat belt infraction, or an offense committed in another jurisdiction that would be a motor vehicle moving violation or seat belt infraction if committed in this State.

(h1) Exception for Persons 16 to 18 Who Have an Out-of-State Restricted License. — A person who is at least 16 years old but less than 18 years old, who was a resident of another state and has a restricted drivers license issued by that state, and who becomes a resident of this State may obtain one of the following:

(1) A limited provisional license, if the person has completed a drivers education program that meets the requirements of the Superintendent of Public Instruction, held the restricted license issued by the other state for at least 12 months, and whose parent or guardian certifies that the person has not been convicted during the preceding six months of a motor vehicle moving violation, a seat belt infraction, or an offense committed in another jurisdiction that would be a motor vehicle moving violation or seat belt infraction if committed in this State.

(2) A limited learners permit, if the person has completed a drivers education program that meets the requirements of the Superintendent of Public Instruction but either did not hold the restricted license issued by the other state for at least 12 months or was convicted during the preceding six months of a motor vehicle moving violation, a seat belt infraction, or an offense committed in another jurisdiction that would be a motor vehicle moving violation or seat belt infraction if committed in this State. A person who qualifies for a limited learners permit under this subdivision and whose parent or guardian certifies that the person has not been convicted of a moving violation in the preceding six months shall be deemed to have held a limited learners permit in this State for each month the person held a restricted license in another state.

(h2) Exception for Persons Age 15 Who Have an Out-of-State Unrestricted or Restricted License. — A person who is age 15, who was a resident of another state, has an unrestricted or restricted drivers license issued by that state, and who becomes a resident of this State may obtain a limited learners permit if

the person has completed a drivers education program that meets the requirements of the Superintendent of Public Instruction. A person who qualifies for a limited learners permit under this subsection and whose parent or guardian certifies that the person has not been convicted of a moving violation in the preceding six months shall be deemed to have held a limited learners permit in this State for each month the person held an unrestricted or restricted license in another state.

(h3) Exception for Persons Less Than Age 18 Who Have a Federally Issued Unrestricted or Restricted License. — A person who is less than age 18, who has an unrestricted or restricted drivers license issued by the federal government, and who becomes a resident of this State may obtain a limited provisional license or a provisional license if the person has completed a drivers education program substantially equivalent to the drivers education program that meets the requirements of the Superintendent of Public Instruction. A person who qualifies for a limited provisional license or a provisional license under this subsection and whose parent or guardian certifies that the person has not been convicted of a moving violation in the preceding six months shall be deemed to have held a limited provisional license or a provisional license in this State for each month the person held an unrestricted or restricted license issued by the federal government.

(i) Application. — An application for a permit or license authorized by this section must be signed by both the applicant and another person. That person must be:

(1) The applicant's parent or guardian;

(2) A person approved by the applicant's parent or guardian; or

(3) A person approved by the Division.

(j) Duration and Fee. — A limited learner's permit expires on the eighteenth birthday of the permit holder. A limited provisional license expires on the eighteenth birthday of the license holder. A limited learner's permit or limited provisional license issued under this section that expires on a weekend or State holiday shall remain valid through the fifth regular State business day following the date of expiration. A full provisional license expires on the date set under G.S. 20-7(f). The fee for a limited learner's permit or a limited provisional license is ten dollars ($10.00). The fee for a full provisional license is the amount set under G.S. 20-7(i).

(k) Supervising Driver. — A supervising driver shall be a parent, grandparent, or guardian of the permit holder or license holder or a responsible person approved by the parent or guardian or the Division. A supervising driver shall be a licensed driver who has been licensed for at least five years. At least one supervising driver shall sign the application for a permit or license.

(*l*) Violations. — It is unlawful for the holder of a limited learner's permit, a temporary permit, or a limited provisional license to drive a motor vehicle in violation of the restrictions that apply to the permit or license. Failure to comply with a restriction concerning the time of driving or the presence of a supervising driver in the vehicle constitutes operating a motor vehicle without a license. Failure to comply with any other restriction, including seating and passenger limitations, is an infraction punishable by a monetary penalty as provided in G.S. 20-176. Failure to comply with the provisions of subsection (e) of this section shall not constitute negligence per se or contributory negligence by the driver or passenger in any action for the recovery of damages arising out of the operation, ownership or maintenance of a motor vehicle. Any evidence of failure to comply with the provisions of subsection (e) of this section shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on a violation of this section. No drivers license points or insurance surcharge shall be assessed for failure to comply with seating and occupancy limitations in subsection (e) of this section.

(m) Insurance Status. — The holder of a limited learner's permit is not considered a licensed driver for the purpose of determining the inexperienced operator premium surcharge under automobile insurance policies.

(n) Driving Eligibility Certificate. — A person who desires to obtain a permit or license issued under this section must have a high school diploma or its equivalent or must have a driving eligibility certificate. A driving eligibility certificate must meet the following conditions:

(1) The person who is required to sign the certificate under subdivision (4) of this subsection must show that he or she has determined that one of the following requirements is met:
   a. The person is currently enrolled in school and is making progress toward obtaining a high school diploma or its equivalent.
   b. A substantial hardship would be placed on the person or the person's family if the person does not receive a certificate.
   c. The person cannot make progress toward obtaining a high school diploma or its equivalent.

(1a) The person who is required to sign the certificate under subdivision (4) of this subsection also must show that one of the following requirements is met:
   a. The person who seeks a permit or license issued under this section is not subject to subsection (n1) of this section.
   b. The person who seeks a permit or license issued under this section is subject to subsection (n1) of this section and is eligible for the certificate under that subsection.

(2) It must be on a form approved by the Division.

(3) It must be dated within 30 days of the date the person applies for a permit or license issuable under this section.

(4) It must be signed by the applicable person named below:
   a. The principal, or the principal's designee, of the public school in which the person is enrolled.
   b. The administrator, or the administrator's designee, of the nonpublic school in which the person is enrolled.
   c. The person who provides the academic instruction in the home school in which the person is enrolled.
   c1. The person who provides the academic instruction in the home in accordance with an educational program found by a court, prior to July 1, 1998, to comply with the compulsory attendance law.
   d. The designee of the board of directors of the charter school in which the person is enrolled.
   e. The president, or the president's designee, of the community college in which the person is enrolled.

Notwithstanding any other law, the decision concerning whether a driving eligibility certificate was properly issued or improperly denied shall be appealed only as provided under the rules adopted in accordance with G.S. 115C-12(28), 115D-5(a3), or 115C-566, whichever is applicable, and may not be appealed under this Chapter.

(n1) Lose Control; Lose License.

(1) The following definitions apply in this subsection:
   a. Applicable State entity. — The State Board of Education for public schools and charter schools, the State Board of Community Colleges for community colleges, or the Secretary of Administration for nonpublic schools and home schools.
   b. Certificate. — A driving eligibility certificate that meets the conditions of subsection (n) of this section.
   c. Disciplinary action. — An expulsion, a suspension for more than 10 consecutive days, or an assignment to an alternative educational setting for more than 10 consecutive days.

d. Enumerated student conduct. — One of the following behaviors that results in disciplinary action:
1. The possession or sale of an alcoholic beverage or an illegal controlled substance on school property.
2. The bringing, possession, or use on school property of a weapon or firearm that resulted in disciplinary action under G.S. 115C-391(d1) or that could have resulted in that disciplinary action if the conduct had occurred in a public school.
3. The physical assault on a teacher or other school personnel on school property.

e. School. — A public school, charter school, community college, nonpublic school, or home school.

f. School administrator. — The person who is required to sign certificates under subdivision (4) of subsection (n) of this section.

g. School property. — The physical premises of the school, school buses or other vehicles under the school's control or contract and that are used to transport students, and school-sponsored curricular or extracurricular activities that occur on or off the physical premises of the school.

h. Student. — A person who desires to obtain a permit or license issued under this section.

(2) Any student who was subject to disciplinary action for enumerated student conduct that occurred either after the first day of July before the school year in which the student enrolled in the eighth grade or after the student's fourteenth birthday, whichever event occurred first, is subject to this subsection.

(3) A student who is subject to this subsection is eligible for a certificate when the school administrator determines that the student has exhausted all administrative appeals connected to the disciplinary action and that one of the following conditions is met:
a. The enumerated student conduct occurred before the student reached the age of 15, and the student is now at least 16 years old.
b. The enumerated student conduct occurred after the student reached the age of 15, and it is at least one year after the date the student exhausted all administrative appeals connected to the disciplinary action.
c. The student needs the certificate in order to drive to and from school, a drug or alcohol treatment counseling program, as appropriate, or a mental health treatment program, and no other transportation is available.

(4) A student whose permit or license is denied or revoked due to ineligibility for a certificate under this subsection may otherwise be eligible for a certificate if, after six months from the date of the ineligibility, the school administrator determines that one of the following conditions is met:
a. The student has returned to school or has been placed in an alternative educational setting, and has displayed exemplary student behavior, as defined by the applicable State entity.
b. The disciplinary action was for the possession or sale of an alcoholic beverage or an illegal controlled substance on school property, and the student subsequently attended and successfully completed, as defined by the applicable State entity, a drug or alcohol treatment counseling program, as appropriate. (1935, c. 52, s. 6; 1953, c. 355; 1955, c. 1187, s. 8; 1963, c. 968, ss. 2, 2A; 1965, c. 410, s. 3; c. 1171; 1967, c. 694; 1969, c. 37; 1973, c. 191, ss. 1, 2; c. 664, ss. 1, 2; 1975, c. 79; c. 716, s. 5; 1979, c. 101; c. 667, ss.

15, 16, 41; 1981 (Reg. Sess., 1982), c. 1257, s. 2; 1989 (Reg. Sess., 1990), c. 1021, s. 11; 1991, c. 689, s. 326; 1993, c. 539, s. 319; 1994, Ex. Sess., c. 24, s. 14(c); 1997-16, s. 1; 1997-443, s. 32.20; 1997-507, s. 1; 1998-149, ss. 2.1, 2.2, 2.3, 2.4, 2.5; 1998-212, s. 9.21(c); 1999-243, ss. 1, 2; 1999-276, s. 1; 1999-387, s. 4; 1999-452, s. 9; 2001-194, s. 1; 2001-487, s. 51.5(a); 2002-73, ss. 1, 2; 2002-159, s. 30.)

Editor's Note. —

The preamble to Session Laws 2002-73, which amended subsections (e) and (*l*), reads: "Whereas, studies have shown that the system of Graduated Drivers Licenses instituted in North Carolina on December 1, 1997, has reduced the number of accidents involving young drivers; and

"Whereas, statistics also indicate that when the supervising driver is not present, the risk of accident increases with the presence of passengers who may distract the license holder; and

"Whereas, the studies show that the risk of accident increases with the number of passengers in the vehicle driven by the young graduated license holder; and

"Whereas, the General Assembly finds that limiting the number of passengers to reduce the likelihood of a young driver having an accident is in the public interest; Now, therefore,

"The General Assembly of North Carolina enacts:"

Effect of Amendments. —

Session Laws 2002-73, s. 1, 2, effective December 1, 2002 and applicable to limited provisional licenses issued on or after that date, in subsection (e), substituted "shall" for "most" throughout, added present subdivision (4), and renumbered former subdivision (4) as present subdivision (5); and in subsection (*l*), added the last three sentences.

Session Laws 2002-159, s. 30, effective October 11, 2002, inserted the third sentence in subsection (j).

§ 20-17.4. Disqualification to drive a commercial motor vehicle.

(a) One Year. — Any of the following disqualifies a person from driving a commercial motor vehicle for one year:

(1) A first conviction of G.S. 20-138.1, driving while impaired, that occurred while the person was driving a motor vehicle that is not a commercial motor vehicle.

(2) A first conviction of G.S. 20-138.2, driving a commercial motor vehicle while impaired.

(3) A first conviction of G.S. 20-166, hit and run, involving a commercial motor vehicle driven by the person.

(4) A first conviction of a felony in the commission of which a commercial motor vehicle was used.

(5) Refusal to submit to a chemical test when charged with an implied-consent offense, as defined in G.S. 20-16.2, that occurred while the person was driving a commercial motor vehicle.

(6) A second or subsequent conviction, as defined in G.S. 20-138.2A(d), of driving a commercial motor vehicle after consuming alcohol under G.S. 20-138.2A.

(a1) Ten-Day Disqualification. — A person who is convicted for a first offense of driving a commercial motor vehicle after consuming alcohol under G.S. 20-138.2A is disqualified from driving a commercial motor vehicle for 10 days.

(b) Modified Life. — A person who has been disqualified from driving a commercial motor vehicle for a conviction or refusal described in subsection (a) who, as the result of a separate incident, is subsequently convicted of an offense or commits an act requiring disqualification under subsection (a) is disqualified for life. The Division may adopt guidelines, including conditions, under which a disqualification for life under this subsection may be reduced to 10 years.

(b1) Life Without Reduction. — A person is disqualified from driving a commercial motor vehicle for life, without the possibility of reinstatement after 10 years, if that person is convicted of a third or subsequent violation of G.S. 20-138.2, a fourth or subsequent violation of G.S. 20-138.2A, or if the person refuses to submit to a chemical test a third time when charged with an implied-consent offense, as defined in G.S. 20-16.2, that occurred while the person was driving a commercial motor vehicle.

(c) Life. — A person is disqualified from driving a commercial motor vehicle for life if that person uses a commercial motor vehicle in the commission of any felony involving the manufacture, distribution, or dispensing of a controlled substance, or possession with intent to manufacture, distribute, or dispense a controlled substance.

(d) Less Than a Year. — A person is disqualified from driving a commercial motor vehicle for 60 days if that person is convicted of two serious traffic violations, or 120 days if convicted of three or more serious traffic violations, committed in a commercial motor vehicle arising from separate incidents occurring within a three-year period. For purposes of this subsection, a "serious violation" includes violations of G.S. 20-140(f) and G.S. 20-141(j3).

(e) Three Years. — A person is disqualified from driving a commercial motor vehicle for three years if that person is convicted of an offense or commits an act requiring disqualification under subsection (a) and the offense or act occurred while the person was transporting a hazardous material that required the motor vehicle driven to be placarded.

(f) Revocation Period. — A person is disqualified from driving a commercial motor vehicle for the period during which the person's regular or commercial drivers license is revoked.

(g) Violation of Out-of-Service Order. — Any person convicted for violating an out-of-service order, except as described in subsection (h) of this section, shall be disqualified as follows:

(1) A person is disqualified from driving a commercial vehicle for a period of 90 days if convicted of a first violation of an out-of-service order.

(2) A person is disqualified for a period of one year if convicted of a second violation of an out-of-service order during any 10-year period, arising from separate incidents.

(3) A person is disqualified for a period of three years if convicted of a third or subsequent violation of an out-of-service order during any 10-year period, arising from separate incidents.

(h) Violation of Out-of-Service Order; Special Rule for Hazardous Materials and Passenger Offenses. — Any person convicted for violating an out-of-service order while transporting hazardous materials or while operating a commercial vehicle designed or used to transport more than 15 passengers, including the driver, shall be disqualified as follows:

(1) A person is disqualified for a period of 180 days if convicted of a first violation of an out-of-service order.

(2) A person is disqualified for a period of three years if convicted of a second or subsequent violation of an out-of-service order during any 10-year period, arising from separate incidents.

(i) Disqualification for Out-of-State Violations. — The Division shall withdraw the privilege to operate a commercial vehicle of any resident of this State upon receiving notice of the person's conviction in another state for an offense that, if committed in this State, would be grounds for disqualification. The period of disqualification shall be the same as if the offense occurred in this State.

(j) Disqualification of Persons Without Commercial Drivers Licenses. — Any person convicted of an offense that requires disqualification under this section, but who does not hold a commercial drivers license, shall be disqual-

ified from operating a commercial vehicle in the same manner as if the person held a valid commercial drivers license. (1989, c. 771, s. 3; 1991, c. 726, s. 8; 1993, c. 533, s. 5; 1998-149, s. 3; 1998-182, s. 19; 2000-109, s. 7(e); 2002-72, s. 7.)

Effect of Amendments. — Session Laws 2002-72, s. 7, effective August 12, 2002, substituted "vehicle that is not" for "vehicle not" in subdivision (a)(1).

§ 20-17.7. Commercial motor vehicle out-of-service fines authorized.

The Secretary of Crime Control and Public Safety may adopt rules implementing fines for violation of out-of-service criteria as defined in 49 C.F.R. § 390.5. These fines may not exceed the schedule of fines adopted by the Commercial Motor Vehicle Safety Alliance that is in effect on the date of the violations. (1999-330, s. 1; 2002-159, s. 31.5(b); 2002-190, s. 3.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 3, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Secretary of Crime Control and Public Safety" for "Commissioner."

§ 20-28. Unlawful to drive while license revoked or while disqualified.

(a) Driving While License Revoked. — Except as provided in subsection (a1) of this section, any person whose drivers license has been revoked who drives any motor vehicle upon the highways of the State while the license is revoked is guilty of a Class 1 misdemeanor. Upon conviction, the person's license shall be revoked for an additional period of one year for the first offense, two years for the second offense, and permanently for a third or subsequent offense.

The restoree of a revoked drivers license who operates a motor vehicle upon the highways of the State without maintaining financial responsibility as provided by law shall be punished as for driving without a license.

(a1) Driving Without Reclaiming License. — A person convicted under subsection (a) shall be punished as if the person had been convicted of driving without a license under G.S. 20-35 if the person demonstrates to the court that either subdivisions (1) and (2), or subdivision (3) of this subsection is true:

(1) At the time of the offense, the person's license was revoked solely under G.S. 20-16.5; and

(2)a. The offense occurred more than 45 days after the effective date of a revocation order issued under G.S. 20-16.5(f) and the period of revocation was 45 days as provided under subdivision (3) of that subsection; or

b. The offense occurred more than 30 days after the effective date of the revocation order issued under any other provision of G.S. 20-16.5; or

(3) At the time of the offense the person had met the requirements of G.S. 50-13.12, or G.S. 110-142.2 and was eligible for reinstatement of the person's drivers license privilege as provided therein.

In addition, a person punished under this subsection shall be treated for drivers license and insurance rating purposes as if the person had been convicted of driving without a license under G.S. 20-35, and the conviction report sent to the Division must indicate that the person is to be so treated.

(b) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 3.

(c) When Person May Apply for License. — A person whose license has been revoked under this section for one year may apply for a license after 90 days. A person whose license has been revoked under this section for two years may apply for a license after 12 months. A person whose license has been revoked under this section permanently may apply for a license after three years. Upon the filing of an application the Division may, with or without a hearing, issue a new license upon satisfactory proof that the former licensee has not been convicted of a moving violation under this Chapter or the laws of another state, a violation of any provision of the alcoholic beverage laws of this State or another state, or a violation of any provisions of the drug laws of this State or another state when any of these violations occurred during the revocation period. The Division may impose any restrictions or conditions on the new license that the Division considers appropriate for the balance of the revocation period. When the revocation period is permanent, the restrictions and conditions imposed by the Division may not exceed three years.

(d) Driving While Disqualified. — A person who was convicted of a violation that disqualified the person and required the person's drivers license to be revoked who drives a motor vehicle during the revocation period is punishable as provided in the other subsections of this section. A person who has been disqualified who drives a commercial motor vehicle during the disqualification period is guilty of a Class 1 misdemeanor and is disqualified for an additional period as follows:

(1) For a first offense of driving while disqualified, a person is disqualified for a period equal to the period for which the person was disqualified when the offense occurred.

(2) For a second offense of driving while disqualified, a person is disqualified for a period equal to two times the period for which the person was disqualified when the offense occurred.

(3) For a third offense of driving while disqualified, a person is disqualified for life.

The Division may reduce a disqualification for life under this subsection to 10 years in accordance with the guidelines adopted under G.S. 20-17.4(b). A person who drives a commercial motor vehicle while the person is disqualified and the person's drivers license is revoked is punishable for both driving while the person's license was revoked and driving while disqualified. (1935, c. 52, s. 22; 1945, c. 635; 1947, c. 1067, s. 16; 1955, c. 1020, s. 1; c. 1152, s. 18; c. 1187, s. 20; 1957, c. 1046; 1959, c. 515; 1967, c. 447; 1973, c. 47, s. 2; cc. 71, 1132; 1975, c. 716, s. 5; 1979, c 377, ss. 1, 2; c. 667, s. 41; 1981, c. 412, s. 4; c. 747, s. 66; 1983, c. 51; 1983 (Reg. Sess., 1984), c. 1101, s. 18A; 1989, c. 771, s. 4; 1991, c. 509, s. 2; c. 726, s. 12; 1993, c. 539, ss. 320-322; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 761, ss. 2, 3; 1995, c. 538, s. 2(e), (f); 2002-159, s. 6.)

Effect of Amendments. — Session Laws 2002-159, s. 6, effective October 11, 2002, substituted "45 days" for "30 days" twice in subdivision (a1)(2)a., and substituted "30 days" for "10 days" in subdivision (a1)(2)b.

§ 20-29. Surrender of license.

CASE NOTES

Cited in State v. Phillips, — N.C. App. —, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002).

Article 2C.

Commercial Driver License.

§ 20-37.20. Notification of traffic convictions.

(a) Out-of-state Resident. — Within 10 days after receiving a report of the conviction of any nonresident holder of a commercial driver license for any violation of State law or local ordinance relating to motor vehicle traffic control, other than parking violations, committed in a commercial vehicle, the Division shall notify the driver licensing authority in the licensing state of the conviction.

(b) **(For effective date, see note)** Foreign Diplomat. — The Division must notify the United States Department of State within 15 days after it receives one or more of the following reports for a holder of a drivers license issued by the United States Department of State:

(1) A report of a conviction for a violation of State law or local ordinance relating to motor vehicle traffic control, other than parking violations.

(2) A report of a civil revocation order. (1989, c. 771, s. 2; 2001-498, s. 7; 2002-159, s. 31.)

Editor's Note. — Session Laws 2001-498, s. 8, provides that s. 7, which amended this section, "becomes effective at the earliest practical date, but no later than January 1, 2003."

Effect of Amendments. —

Session Laws 2002-159, s. 31, effective October 11, 2002, in subsection (b), substituted "one or more" for "one of or more" and "drivers license" for "driver's license."

Article 3.

Motor Vehicle Act of 1937.

Part 2. Authority and Duties of Commissioner and Division.

§ 20-49. Police authority of Division.

The Commissioner and such officers and inspectors of the Division as he shall designate and all members of the Highway Patrol and law enforcement officers of the Department of Crime Control and Public Safety shall have the power:

(1) Of peace officers for the purpose of enforcing the provisions of this Article and of any other law regulating the operation of vehicles or the use of the highways.

(2) To make arrests upon view and without warrant for any violation committed in their presence of any of the provisions of this Article or other laws regulating the operation of vehicles or the use of the highways.

(3) At all time to direct all traffic in conformance with law, and in the event of a fire or other emergency or to expedite traffic or to insure safety, to direct traffic as conditions may require, notwithstanding the provisions of law.

(4) When on duty, upon reasonable belief that any vehicle is being operated in violation of any provision of this Article or of any other law regulating the operation of vehicles to require the driver thereof to stop and exhibit his driver's license and the registration card issued for the vehicle, and submit to an inspection of such vehicle, the registration plates and registration card thereon or to an inspection and test of the equipment of such vehicle.

(5) To inspect any vehicle of a type required to be registered hereunder in any public garage or repair shop or in any place where such vehicles are held for sale or wrecking, for the purpose of locating stolen vehicles and investigating the title and registration thereof.
(6) To serve all warrants relating to the enforcement of the laws regulating the operation of vehicles or the use of the highways.
(7) To investigate traffic accidents and secure testimony of witnesses or of persons involved.
(8) To investigate reported thefts of motor vehicles, trailers and semitrailers and make arrest for thefts thereof.
(9) For the purpose of determining compliance with the provisions of this Chapter, to inspect all files and records of the persons hereinafter designated and required to be kept under the provisions of this Chapter or of the registrations of the Division:
a. Persons dealing in or selling and buying new, used or junked motor vehicles and motor vehicle parts; and
b. Persons operating garages or other places where motor vehicles are repaired, dismantled, or stored. (1937, c. 407, s. 14; 1955, c. 554, s. 1; 1975, c. 716, s. 5; 1979, c. 93; 2002-159, s. 31.5(b); 2002-190, s. 5.)

Editor's Note. — Session Laws 2002-190, s. 1, provides: "All statutory authority, powers, duties, and functions, including rulemaking, budgeting, purchasing, records, personnel, personnel positions, salaries, property, and unexpended balances of appropriations, allocations, reserves, support costs, and other funds allocated to the Department of Transportation, Division of Motor Vehicles Enforcement Section, for the regulation and enforcement of commercial motor vehicles, oversize and overweight vehicles, motor carrier safety, and mobile and manufactured housing are transferred to and vested in the Department of Crime Control and Public Safety. This transfer has all the elements of a Type I transfer as defined in G.S. 143A-6.

"The Department of Crime Control and Public Safety shall be considered a continuation of the transferred portion of the Department of Transportation, Division of Motor Vehicles Enforcement Section, for the purpose of succession to all rights, powers, duties, and obligations of the Enforcement Section and of those rights, powers, duties, and obligations exercised by the Department of Transportation, Division of Motor Vehicles on behalf of the Enforcement Section. Where the Department of Transportation, the Division of Motor Vehicles, or the Enforcement Section, or any combination thereof are referred to by law, contract, or other document, that reference shall apply to the Department of Crime Control and Public Safety.

"All equipment, supplies, personnel, or other properties rented or controlled by the Department of Transportation, Division of Motor Vehicles Enforcement Section for the regulation and enforcement of commercial motor vehicles, oversize and overweight vehicles, motor carrier safety, and mobile and manufactured housing shall be administered by the Department of Crime Control and Public Safety."

Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 5, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, inserted "and law enforcement officers of the Department of Crime Control and Public Safety" in the introductory paragraph.

Part 3. Registration and Certificates of Titles of Motor Vehicles.

§ 20-50. Owner to secure registration and certificate of title; temporary registration markers.

Local Modification. — Moore: 1995, c. 13, s. 3; 2002-82, s. 2; Town of Lake Waccamaw: Session Laws 2001-356, s. 6; Town of Cary; 2001-485, s. 3; Village of Whispering Pines: 2002-82, s. 1.

§ 20-51. Exempt from registration.

The following shall be exempt from the requirement of registration and certificate of title:

(1) Any such vehicle driven or moved upon a highway in conformance with the provisions of this Article relating to manufacturers, dealers, or nonresidents.

(2) Any such vehicle which is driven or moved upon a highway only for the purpose of crossing such highway from one property to another.

(3) Any implement of husbandry, farm tractor, road construction or maintenance machinery or other vehicle which is not self-propelled that was designed for use in work off the highway and which is operated on the highway for the purpose of going to and from such nonhighway projects.

(4) Any vehicle owned and operated by the government of the United States.

(5) Farm tractors equipped with rubber tires and trailers or semitrailers when attached thereto and when used by a farmer, his tenant, agent, or employee in transporting his own farm implements, farm supplies, or farm products from place to place on the same farm, from one farm to another, from farm to market, or from market to farm. This exemption shall extend also to any tractor, implement of husbandry, and trailer or semitrailer while on any trip within a radius of 10 miles from the point of loading, provided that the vehicle does not exceed a speed of 35 miles per hour. This section shall not be construed as granting any exemption to farm tractors, implements of husbandry, and trailers or semitrailers which are operated on a for-hire basis, whether money or some other thing of value is paid or given for the use of such tractors, implements of husbandry, and trailers or semitrailers.

(6) Any trailer or semitrailer attached to and drawn by a properly licensed motor vehicle when used by a farmer, his tenant, agent, or employee in transporting unginned cotton, peanuts, soybeans, corn, hay, tobacco, silage, cucumbers, potatoes, fertilizers or chemicals purchased or owned by the farmer or tenant for personal use in implementing husbandry, irrigation pipes, loaders, or equipment owned by the farmer or tenant from place to place on the same farm, from one farm to another, from farm to gin, from farm to dryer, or from farm to market, and when not operated on a for-hire basis. The term "transporting" as used herein shall include the actual hauling of said products and all unloaded travel in connection therewith.

(7) Those small farm trailers known generally as tobacco-handling trailers, tobacco trucks or tobacco trailers when used by a farmer, his tenant, agent or employee, when transporting or otherwise handling tobacco in connection with the pulling, tying or curing thereof.

(8) Any vehicle which is driven or moved upon a highway only for the purpose of crossing or traveling upon such highway from one side to the other provided the owner or lessee of the vehicle owns the fee or a leasehold in all the land along both sides of the highway at the place or crossing.

(9) Mopeds as defined in G.S. 20-4.01(27)d1.

(10) Devices which are designed for towing private passenger motor vehicles or vehicles not exceeding 5,000 pounds gross weight. These devices are known generally as "tow dollies." A tow dolly is a two-wheeled device without motive power designed for towing disabled motor vehicles and is drawn by a motor vehicle in the same manner as a trailer.

(11) Devices generally called converter gear or dollies consisting of a tongue attached to either a single or tandem axle upon which is mounted a fifth wheel and which is used to convert a semitrailer to a full trailer for the purpose of being drawn behind a truck tractor and semitrailer.
(12) Motorized wheelchairs or similar vehicles not exceeding 1,000 pounds gross weight when used for pedestrian purposes by a handicapped person with a mobility impairment as defined in G.S. 20-37.5.
(13) Any vehicle registered in another state and operated temporarily within this State by a public utility, a governmental or cooperative provider of utility services, or a contractor for one of these entities for the purpose of restoring utility services in an emergency outage.
(14) Electric personal assistive mobility devices as defined in G.S. 20-4.01(7a).
(15) Any vehicle that meets all of the following:
a. Is designed for use in work off the highway.
b. Is used for agricultural quarantine programs under the supervision of the Department of Agriculture and Consumer Services.
c. Is driven or moved on the highway for the purpose of going to and from nonhighway projects.
d. Is identified in a manner approved by the Division of Motor Vehicles.
e. Is operated by a person who possesses an identification card issued by the Department of Agriculture and Consumer Services. (1937, c. 407, s. 16; 1943, c. 500; 1949, c. 429; 1951, c. 705, s. 2; 1953, c. 826, ss. 2, 3; c. 1316, s. 1; 1961, cc. 334, 817; 1963, c. 145; 1965, c. 1146; 1971, c. 107; 1973, cc. 478, 757, 964; 1979, c. 574, s. 6; 1981 (Reg. Sess., 1982), c. 1286; 1983, cc. 288, 732; 1987, c. 608; 1989, c. 157, s. 2; 1991, c. 411, s. 4; 1995, c. 50, s. 4; 1999-281, s. 2; 2002-98, s. 4; 2002-150, s. 1.)

Editor's Note. — The number of subdivision (15) was designated as such by the Revisor of Statutes, the number in Session Laws 2002-150, s. 1, having been (14).

Effect of Amendments. — Session Laws 2002-98, s. 4, effective August 29, 2002, added subdivision (14).

Session Laws 2002-150, s. 1, effective October 9, 2002, added subdivision (15).

§ 20-54. Authority for refusing registration or certificate of title.

The Division shall refuse registration or issuance of a certificate of title or any transfer of registration upon any of the following grounds:
(1) The application contains a false or fraudulent statement, the applicant has failed to furnish required information or reasonable additional information requested by the Division, or the applicant is not entitled to the issuance of a certificate of title or registration of the vehicle under this Article.
(2) The vehicle is mechanically unfit or unsafe to be operated or moved upon the highways.
(3) The Division has reasonable ground to believe that the vehicle is a stolen or embezzled vehicle, or that the granting of registration or the issuance of a certificate of title would constitute a fraud against the rightful owner or another person who has a valid lien against the vehicle.
(4) The registration of the vehicle stands suspended or revoked for any reason as provided in the motor vehicle laws of this State.
(5) The required fee has not been paid.

(6) The vehicle is not in compliance with the emissions inspection requirements of Part 2 of Article 3A of this Chapter or a civil penalty assessed as a result of the failure of the vehicle to comply with that Part has not been paid.
(7) The Division has been notified that the motor vehicle has been seized by a law enforcement officer and is subject to forfeiture pursuant to G.S. 20-28.2, et seq., or any other statute. However, the Division shall not prevent the renewal of existing registration prior to an order of forfeiture.
(8) The vehicle is a golf cart or utility vehicle.
(9) The applicant motor carrier is subject to an order issued by the Federal Motor Carrier Safety Administration or the Division to cease all operations based on a finding that the continued operations of the motor carrier pose an "imminent hazard" as defined in 49 C.F.R. § 386.72(b)(1). (1937, c. 407, s. 19; 1975, c. 716, s. 5; 1993 (Reg. Sess., 1994), c. 754, s. 7; 1998-182, s. 9; 2001-356, s. 3; 2002-152, s. 1.)

Local Modification. — Moore: 1995, c. 13, s. 3; 2002-82, s. 2; Town of Lake Waccamaw: 2001-356, s. 6; Town of Cary; 2001-485, s. 3; Village of Whispering Pines: 2002-82, s. 1.

Editor's Note. — Session Laws 2002-152, s. 6, provides: "The Division shall adopt rules to implement the provisions of this act."

Effect of Amendments. — Session Laws 2002-152, s. 1, effective December 1, 2002, added subdivision (9).

§ 20-63. Registration plates furnished by Division; requirements; replacement of regular plates with First in Flight plates; surrender and reissuance; displaying; preservation and cleaning; alteration or concealment of numbers; commission contracts for issuance.

(a) The Division upon registering a vehicle shall issue to the owner one registration plate for a motorcycle, trailer or semitrailer and for every other motor vehicle. Registration plates issued by the Division under this Article shall be and remain the property of the State, and it shall be lawful for the Commissioner or his duly authorized agents to summarily take possession of any plate or plates which he has reason to believe is being illegally used, and to keep in his possession such plate or plates pending investigation and legal disposition of the same. Whenever the Commissioner finds that any registration plate issued for any vehicle pursuant to the provisions of this Article has become illegible or is in such a condition that the numbers thereon may not be readily distinguished, he may require that such registration plate, and its companion when there are two registration plates, be surrendered to the Division. When said registration plate or plates are so surrendered to the Division, a new registration plate or plates shall be issued in lieu thereof without charge. The owner of any vehicle who receives notice to surrender illegible plate or plates on which the numbers are not readily distinguishable and who willfully refuses to surrender said plates to the Division shall be guilty of a Class 2 misdemeanor.

(b) Every license plate shall have displayed upon it the registration number assigned to the vehicle for which it is issued, the name of the State of North Carolina, which may be abbreviated, and the year number for which it is issued or the date of expiration. A plate issued for a commercial vehicle, as defined in G.S. 20-4.2(1), and weighing 26,001 pounds or more, must bear the word "commercial," unless the plate is a special registration plate authorized in G.S. 20-79.4 or the commercial vehicle is a trailer or is licensed for 6,000

pounds or less. The plate issued for vehicles licensed for 7,000 pounds through 26,000 pounds must bear the word "weighted".

A registration plate issued by the Division for a private passenger vehicle or for a private hauler vehicle licensed for 6,000 pounds or less, other than a Friends of the Great Smoky Mountains National Park special registration plate or a Rocky Mountain Elk Foundation special registration plate shall be a "First in Flight" plate. A "First in Flight" plate shall have the words "First in Flight" printed at the top of the plate above all other letters and numerals. The background of the plate shall depict the Wright Brothers biplane flying over Kitty Hawk Beach, with the plane flying slightly upward and to the right.

(c) Such registration plate and the required numerals thereon, except the year number for which issued, shall be of sufficient size to be plainly readable from a distance of 100 feet during daylight.

(d) Registration plates issued for a motor vehicle other than a motorcycle, trailer, or semitrailer shall be attached thereto, one in the front and the other in the rear: Provided, that when only one registration plate is issued for a motor vehicle other than a truck-tractor, said registration plate shall be attached to the rear of the motor vehicle. The registration plate issued for a truck-tractor shall be attached to the front thereof. Provided further, that when only one registration plate is issued for a motor vehicle and this motor vehicle is transporting a substance that may adhere to the plate so as to cover or discolor the plate or if the motor vehicle has a mechanical loading device that may damage the plate, the registration plate may be attached to the front of the motor vehicle.

Any motor vehicle of the age of 35 years or more from the date of manufacture may bear the license plates of the year of manufacture instead of the current registration plates, if the current registration plates are maintained within the vehicle and produced upon the request of any person.

The Division shall provide registered owners of motorcycles and motorcycle trailers with suitably reduced size registration plates.

(e) Preservation and Cleaning of Registration Plates. — It shall be the duty of each and every registered owner of a motor vehicle to keep the registration plates assigned to such motor vehicle reasonably clean and free from dust and dirt, and such registered owner, or any person in his employ, or who operates such motor vehicle by his authority, shall, upon the request of any proper officer, immediately clean such registration plates so that the numbers thereon may be readily distinguished, and any person who shall neglect or refuse to so clean a registration plate, after having been requested to do so, shall be guilty of a Class 3 misdemeanor.

(f) Operating with False Numbers. — Any person who shall willfully operate a motor vehicle with a registration plate which has been repainted or altered or forged shall be guilty of a Class 2 misdemeanor.

(g) Alteration, Disguise, or Concealment of Numbers. — Any operator of a motor vehicle who shall willfully mutilate, bend, twist, cover or cause to be covered or partially covered by any bumper, light, spare tire, tire rack, strap, or other device, or who shall paint, enamel, emboss, stamp, print, perforate, or alter or add to or cut off any part or portion of a registration plate or the figures or letters thereon, or who shall place or deposit or cause to be placed or deposited any oil, grease, or other substance upon such registration plates for the purpose of making dust adhere thereto, or who shall deface, disfigure, change, or attempt to change any letter or figure thereon, or who shall display a number plate in other than a horizontal upright position, shall be guilty of a Class 2 misdemeanor. Any operator of a motor vehicle who shall otherwise intentionally cover any number or registration renewal sticker on a registration plate with any material that makes the number or registration renewal sticker illegible commits an infraction and shall be fined under G.S. 14-3.1.

(h) Commission Contracts for Issuance of Plates and Certificates. — All registration plates, registration certificates, and certificates of title issued by the Division, outside of those issued from the Raleigh offices of the Division and those issued and handled through the United States mail, shall be issued insofar as practicable and possible through commission contracts entered into by the Division for the issuance of the plates and certificates in localities throughout North Carolina with persons, firms, corporations or governmental subdivisions of the State of North Carolina. The Division shall make a reasonable effort in every locality, except as noted above, to enter into a commission contract for the issuance of the plates and certificates and a record of these efforts shall be maintained in the Division. In the event the Division is unsuccessful in making commission contracts, it shall issue the plates and certificates through the regular employees of the Division. Whenever registration plates, registration certificates, and certificates of title are issued by the Division through commission contract arrangements, the Division shall provide proper supervision of the distribution. Nothing contained in this subsection will allow or permit the operation of fewer outlets in any county in this State than are now being operated.

Commission contracts entered into by the Division under this subsection shall provide for the payment of compensation on a per transaction basis. The collection of the highway use tax shall be considered a separate transaction for which one dollar and twenty-seven cents ($1.27) compensation shall be paid. The performance at the same time of one or more of the remaining transactions listed in this subsection shall be considered a single transaction for which one dollar and forty-three cents ($1.43) compensation shall be paid.

A transaction is any of the following activities:

(1) Issuance of a registration plate, a registration card, a registration renewal sticker, or a certificate of title.
(2) Issuance of a handicapped placard or handicapped identification card.
(3) Acceptance of an application for a personalized registration plate.
(4) Acceptance of a surrendered registration plate, registration card, or registration renewal sticker, or acceptance of an affidavit stating why a person cannot surrender a registration plate, registration card, or registration renewal sticker.
(5) Cancellation of a title because the vehicle has been junked.
(6) Acceptance of an application for, or issuance of, a refund for a fee or a tax, other than the highway use tax.
(7) Receipt of the civil penalty imposed by G.S. 20-309 for a lapse in financial responsibility or receipt of the restoration fee imposed by that statute.
(8) Acceptance of a notice of failure to maintain financial responsibility for a motor vehicle.
(8a) Collection of civil penalties imposed for violations of G.S. 20-183.8A.
(8b) Sale of one or more inspection stickers in a single transaction to a licensed inspection station.
(9) Collection of the highway use tax.
(10) Acceptance of a temporary lien filing.

(i) Electronic Applications and Collections. — The Division is authorized to accept electronic applications for the issuance of registration plates, registration certificates, and certificates of title, and to electronically collect fees and penalties. (1937, c. 407, s. 27; 1943, c. 726; 1951, c. 102, ss. 1-3; 1955, c. 119, s. 1; 1961, c. 360, s. 4; c. 861, s. 2; 1963, c. 552, s. 6; c. 1071; 1965, c. 1088; 1969, c. 1140; 1971, c. 945; 1973, c. 629; 1975, c. 716, s. 5; 1979, c. 470, s. 1; c. 604, s. 1; c. 917, s. 4; 1981, c. 750; c. 859, s. 76; 1983, c. 253, ss. 1-3; 1985, c. 257; 1991 (Reg. Sess., 1992), c. 1007, s. 32; 1993, c. 539, ss. 333-336; 1994, Ex. Sess., c. 24, s. 14(c); 1997-36, s. 1; 1997-443, s. 32.7(a); 1997-461, s. 1; 1998-160, s. 3; 1998-212, ss. 15.4(a), 27.6(a); 1999-452, ss. 13, 14; 2000-182, s. 3; 2001-424, s. 27.21; 2001-487, s. 50(c); 2002-159, s. 31.1.)

Editor's Note. —

Session Laws 2002-126, ss. 26.15(a) to (k), create the Commission to Study Commission Contracts for the Issuance of Motor Vehicle Registration Plates and Certificates. The Commission is to review the history and policies that led to the enactment of G.S. 20-63(h), providing for contracts for the issuance of registration plates and certificates, study the current implementation and consequences of its provisions, study how registration plates and certificates are handled in other states, study the implications and potential effects on contract agents of the authority of the Division of Motor Vehicles to use electronic applications and collections authorized in G.S. 20-63(i), study any other relevant factors, and make findings and recommendations, with a final report due on or before the first day of the 2003 Session of the General Assembly. In addition, the Division of Motor Vehicles, in consultation and cooperation with the Commission contract agents, is to conduct a productivity study of all transactions and other activity of contract agencies, and use this data to develop a proposal for compensating agents based on the tasks they undertake, with periodic adjustments to account for inflation; this proposal is to be submitted to the Commission on or before November 1, 2002.

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Effect of Amendments. —

Session Laws 2002-159, s. 31.1, effective October 11, 2002, in the first sentence of the second paragraph of subsection (b), inserted "or a Rocky Mountain Elk Foundation special registration plate."

Part 3A. Salvage Titles.

§ 20-71.4. Failure to disclose damage to a vehicle shall be a misdemeanor.

CASE NOTES

Fraudulent Intent Must Be Pleaded for Civil Liability. — In order to properly plead a cause of action under this section and G.S. 20-348(a), a plaintiff must allege fraudulent intent in addition to a violation of the provisions of this section. Bowman v. Alan Vester Ford Lincoln Mercury, — N.C. App. —, 566 S.E.2d 818, 2002 N.C. App. LEXIS 886 (2002).

Part 5. Issuance of Special Plates.

§ 20-79.4. Special registration plates.

(a) General. — Upon application and payment of the required registration fees, a person may obtain from the Division a special registration plate for a motor vehicle registered in that person's name if the person qualifies for the registration plate. A special registration plate may not be issued for a vehicle registered under the International Registration Plan. A special registration plate may be issued for a commercial vehicle that is not registered under the International Registration Plan. A holder of a special registration plate who becomes ineligible for the plate, for whatever reason, must return the special plate within 30 days.

(b) Types. — The Division shall issue the following types of special registration plates:

(1) Administrative Officer of the Courts. — Issuable to the Director of the Administrative Office of the Courts. The plate shall bear the phrase "J-20".

(2) Amateur Radio Operator. — Issuable to an amateur radio operator who holds an unexpired and unrevoked amateur radio license issued by the Federal Communications Commission and who asserts to the Division that a portable transceiver is carried in the vehicle. The plate shall bear the phrase "Amateur Radio". The plate shall bear the operator's official amateur radio call letters, or call letters with numerical or letter suffixes so that an owner of more than one vehicle may have the call letters on each.

(3) American Legion. — Issuable to a member of the American Legion. The plate shall bear the words "American Legion" and the emblem of the American Legion. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(3a) Animal Lovers. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a picture of a dog and cat and the phrase "I Care."

(3b) Audubon North Carolina. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the National Audubon Society, Inc., logo and a representation of a bird native to North Carolina.

(3c) Aviation Maintenance Technician. — Issuable to a person who is a Federal Aviation Authority certified Aviation Maintenance Technician. The plate shall bear the logo of the F.A.A. Airworthiness Program and the initials "A.M.T." The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(3d) Bronze Star Recipient. — Issuable to a recipient of the Bronze Star. The plate shall bear the emblem of the Bronze Star and the words "Bronze Star".

(4) Civil Air Patrol Member. — Issuable to an active member of the North Carolina Wing of the Civil Air Patrol. The plate shall bear the phrase "Civil Air Patrol". A plate issued to an officer member shall begin with the number "201" and the number shall reflect the seniority of the member; a plate issued to an enlisted member, a senior member, or a cadet member shall begin with the number "501".

(5) Civic Club. — Issuable to a member of a nationally recognized civic organization whose member clubs in the State are exempt from State corporate income tax under G.S. 105-130.11(a)(5). Examples of these clubs include Jaycees, Kiwanis, Optimist, Rotary, Ruritan, and Shrine. The plate shall bear a word or phrase identifying the civic club and the emblem of the civic club. The Division may not issue a civic club plate authorized by this subdivision unless it receives at least 300 applications for that civic club plate.

(6) Class D Citizen's Radio Station Operator. — Issuable to a Class D citizen's radio station operator. For an operator who has been issued Class D citizen's radio station call letters by the Federal Communications Commission, the plate shall bear the operator's official Class D citizen's radio station call letters. For an operator who has not been issued Class D citizen's radio station call letters by the Federal Communications Commission, the plate shall bear the phrase "Citizen's Band Radio".

(7) Clerk of Superior Court. — Issuable to a current or retired clerk of superior court. A plate issued to a current clerk shall bear the phrase "Clerk Superior Court" and the letter "C" followed by a number that indicates the county the clerk serves. A plate issued to a retired clerk shall bear the phrase "Clerk Superior Court, Retired", the letter "C"

followed by a number that indicates the county the clerk served, and the letter "X" indicating the clerk's retired status.

(8) Coast Guard Auxiliary Member. — Issuable to an active member of the United States Coast Guard Auxiliary. The plate shall bear the phrase "Coast Guard Auxiliary".

(9) Collegiate Insignia Plate. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or an insignia representing a public or private college or university.

(9a) Combat Infantry Badge Recipient. — Issuable to a recipient of the Combat Infantry Badge. The plate shall bear the phrase "Combat Infantry Badge " and a representation of the Combat Infantry Badge. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(10) Combat Veteran. — Issuable to a veteran of the armed forces who served in a combat zone, or in waters adjacent to a combat zone, during a period of war and who was separated from the armed forces under honorable conditions. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate. A "period of war" is any of the following:

a. World War I, which began April 16, 1917, and ended November 11, 1918.
b. World War II, which began December 7, 1941, and ended December 31, 1946.
c. The Korean Conflict, which began June 27, 1950, and ended January 31, 1955.
d. The Vietnam Era, which began August 5, 1964, and ended May 7, 1975.
e. The Persian Gulf War.
f. Any other campaign, expedition, or engagement for which the United States Department of Defense authorizes a campaign badge or medal.

(11) County Commissioner. — Issuable to a county commissioner of a county in this State. The plate shall bear the words "County Commissioner" followed first by a number representing the commissioner's county and then by a letter or number that distinguishes plates issued to county commissioners of the same county. The number of a county shall be the order of the county in an alphabetical list of counties that assigns number one to the first county in the list and a letter or number to distinguish different cars owned by the county commissioners in that county. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(11a) Repealed by Session Laws 2001-498, s. 2, effective December 19, 2001.

(12) Disabled Veteran. — Issuable to a veteran of the armed forces of the United States who suffered a 100% service-connected disability.

(12a) Distinguished Flying Cross. — Issuable to a recipient of the Distinguished Flying Cross. The plate shall bear the emblem of the Distinguished Flying Cross and the words "Distinguished Flying Cross".

(13) District Attorney. — Issuable to a North Carolina or United States District Attorney. The plate issuable to a North Carolina district attorney shall bear the letters "DA" followed by a number that represents the prosecutorial district the district attorney serves. The plate for a United States attorney shall bear the phrase "U.S.

Attorney" followed by a number that represents the district the attorney serves, with 1 being the Eastern District, 2 being the Middle District, and 3 being the Western District.

(13a) Ducks Unlimited. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the logo of Ducks Unlimited, Inc., and shall bear the words: "Ducks Unlimited".

(13b) Eagle Scout. — Issuable to a young man who has been certified as an Eagle Scout by the Boy Scouts of America, or to his parents or guardians. The plate shall bear the insignia of the Boy Scouts of America and shall bear the words "Eagle Scout". The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(14) 82nd Airborne Division Association Member. — Issuable to a member of the 82nd Airborne Division Association, Inc. The plate shall bear the insignia of the 82nd Airborne Division Association, Inc. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(15) Fire Department or Rescue Squad Member. — Issuable to an active regular member or volunteer member of a fire department, rescue squad, or both a fire department and rescue squad. The plate shall bear the words "Firefighter", "Rescue Squad", or "Firefighter-Rescue Squad".

(15a) First in Forestry. — Issuable to the registered owner of a motor vehicle. The plate shall bear the words "First in Forestry". The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(16) Future Farmers of America. — Issuable to a member or a supporter of the National Future Farmers of America Organization. The plate shall bear the emblem of the organization and the letters "FFA". The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(16a) Girl Scout Gold Award recipient. — Issuable to a young woman who has been certified as a Girl Scout Gold Award recipient by the Girl Scouts of the U.S.A., or to her parents or guardians. The plate shall bear the insignia of the Girl Scouts of the U.S.A. and shall bear the words "Girl Scout Gold Award". The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(16b) Goodness Grows. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the "Goodness Grows in North Carolina" logo and the phrase "Agriculture: NC's #1 Industry".

(16c) **(Effective until June 30, 2006)** Harley Owners' Group. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall be designed in consultation with and approved by the Harley-Davidson Motor Company, Inc., and shall bear the words and trademark of the "Harley Owners' Group". The Division shall not develop this plate unless the Harley-Davidson Motor Company, Inc., licenses, without charge, the State to use the words and trademark of the Harley Owners' Group on the plate.

(17) Historic Vehicle Owner. — Issuable for a motor vehicle that is at least 35 years old measured from the date of manufacture. The plate for an historic vehicle shall bear the word "Antique" unless the vehicle is a model year 1943 or older. The plate for a vehicle that is a model year 1943 or older shall bear the word "Antique" or the words "Horseless Carriage", at the option of the vehicle owner.

(18) Historical Attraction Plate. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or an insignia representing a publicly owned or nonprofit historical attraction located in North Carolina.

(19) Honorary Plate. — Issuable to a member of the Honorary Consular Corps, who has been certified by the U. S. State Department, the plate shall bear the words "Honorary Consular Corps" and a distinguishing number based on the order of issuance.

(19a) International Association of Fire Fighters. — Issuable to a member of the International Association of Fire Fighters. The plate shall bear the logo of the International Association of Fire Fighters. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(20) Judge or Justice. — Issuable to a sitting or retired judge or justice in accordance with G.S. 20-79.6.

(20a) Kids First. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear the phrase "Kids First" and a logo of children's hands.

(21) Legion of Valor. — Issuable to a recipient of one of the following military decorations: the Congressional Medal of Honor, the Distinguished Service Cross, the Navy Cross, or the Air Force Cross. The plate shall bear the emblem and name of the recipient's decoration.

(22) Legislator. — Issuable to a member of the North Carolina General Assembly. The plate shall bear "The Great Seal of the State of North Carolina" and, as appropriate, the word "Senate" or "House" followed by the Senator's or Representative's assigned seat number.

(22a) Litter Prevention. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase and picture appropriate to the subject of litter prevention in North Carolina.

(23) Magistrate. — Issuable to a current or retired North Carolina magistrate. A plate issued to a current magistrate shall bear the letters "MJ" followed by a number indicating the district court district the magistrate serves, then by a hyphen, and then by a number indicating the seniority of the magistrate. The Division shall use the number "9" to designate District Court Districts 9 and 9B. A plate issued to a retired magistrate shall bear the phrase "Magistrate, Retired ", the letters "MJX " followed by a hyphen and the number that indicates the district court district the magistrate served, followed by a letter based on the order of issuance of the plates.

(24) March of Dimes. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or an insignia representing the March of Dimes Foundation.

(25) Marshal. — Issuable to a United States Marshal. The plate shall bear the phrase "U.S. Marshal" followed by a number that represents the district the Marshal serves, with 1 being the Eastern District, 2 being the Middle District, and 3 being the Western District.

(26) Military Reservist. — Issuable to a member of a reserve component of the armed forces of the United States. The plate shall bear the name and insignia of the appropriate reserve component. Plates shall be numbered sequentially for members of a component with the numbers 1 through 5000 reserved for officers, without regard to rank.

(27) Military Retiree. — Issuable to an individual who has retired from the armed forces of the United States. The plate shall bear the word "Retired" and the name and insignia of the branch of service from which the individual retired.

(27a) Military Veteran. — Issuable to an individual who served honorably in the armed services of the United States. The plate shall bear the words "U.S. Military Veteran" and the name and insignia of the branch of service in which the individual served. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(27b) Military Wartime Veteran. — Issuable to either a member or veteran of the armed services of the United States who served during a period of war. If the person is a veteran of the armed services, then the veteran must be separated from the armed services under honorable conditions. The plate shall bear a word or phrase identifying the period of war and a replica of the campaign badge or medal awarded for that war. Except for World War II and Korean Conflict plates, the Division may not issue a plate authorized by this subdivision unless it receives at least 300 applications for that plate. A "period of war" is any of the following:

a. World War I, meaning the period beginning April 16, 1917, and ending November 11, 1918.
b. World War II, meaning the period beginning December 7, 1941, and ending December 31, 1946.
c. The Korean Conflict, meaning the period beginning June 27, 1950, and ending January 31, 1955.
d. The Vietnam Era, meaning the period beginning August 5, 1964, and ending May 7, 1975.
e. Desert Storm, meaning the period beginning August 2, 1990, and ending April 11, 1991.
f. Any other campaign, expedition, or engagement for which the United States Department of Defense authorizes a campaign badge or medal.

(28) National Guard Member. — Issuable to an active or a retired member of the North Carolina National Guard. The plate shall bear the phrase "National Guard". A plate issued to an active member shall bear a number that reflects the seniority of the member; a plate issued to a commissioned officer shall begin with the number "1"; a plate issued to a noncommissioned officer with a rank of E7, E8, or E9 shall begin with the number "1601"; a plate issued to an enlisted member with a rank of E6 or below shall begin with the number "3001". The plate issued to a retired or separated member shall indicate the member's retired status.

(28a) Native American. — Issuable to the registered owner of a motor vehicle. The plate may bear a phrase or an insignia representing Native Americans. The Division must receive 300 or more applications for the plate before it may be developed.

(28b) NC Agribusiness. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the logo of the North Carolina Agribusiness Council, Inc., and the phrase "NC's #1 Industry".

(29) Olympic Games. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or insignia representing the Olympic Games.

(29a) Omega Psi Phi Fraternity. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the fraternity's symbol and name.

(30) Partially Disabled Veteran. — Issuable to a veteran of the armed forces of the United States who suffered a service connected disability of less than 100%.

(31) Pearl Harbor Survivor. — Issuable to a veteran of the armed forces of the United States who was present at and survived the attack on Pearl Harbor on December 7, 1941. The plate will bear the phrase "Pearl Harbor Survivor" and the insignia of the Pearl Harbor Survivors' Association.

(32) Personalized. — Issuable to the registered owner of a motor vehicle. The plate will bear the letters or letters and numbers requested by the owner. The Division may refuse to issue a plate with a letter combination that is offensive to good taste and decency. The Division may not issue a plate that duplicates another plate.

(33) Prisoner of War. — Issuable to the following:

a. A member or veteran member of the armed forces of the United States who has been captured and held prisoner by forces hostile to the United States while serving in the armed forces.

b. The surviving spouse of a person who had a prisoner of war plate at the time of death so long as the surviving spouse continues to renew the plate and does not remarry.

(34) Professional Sports Fan. — Issuable to the registered owner of a motor vehicle. The plate shall bear the logo of a professional sports team located in North Carolina. The Division shall receive 300 or more applications for a professional sports fan plate before a plate may be issued. The Division shall not develop a professional sports fan plate unless the professional sports team licenses, without charge, the State to use the official team logo on the plate.

(35) Purple Heart Recipient. — Issuable to a recipient of the Purple Heart award. The plate shall bear the phrase "Purple Heart Veteran, Combat Wounded" and the letters "PH".

(36) Register of Deeds. — Issuable to a register of deeds. The plate shall bear the words "Register of Deeds" and the letter "R" followed by a number representing the county of the register of deeds. The number of a county shall be the order of the county in an alphabetical list of counties that assigns number one to the first county in the list.

(36a) Retired Highway Patrol. — Issuable to an individual who has retired from the North Carolina Highway Patrol. The plate shall bear the phrase "SHP, Retired." The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(36b) **(Effective until June 30, 2006)** Rocky Mountain Elk Foundation. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the phrase "Rocky Mountain Elk Foundation" and a logo approved by the Rocky Mountain Elk Foundation, Inc.

(36c) Save the Sea Turtles. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear the phrase "Save the Sea Turtles" and a representation related to sea turtles.

(37) Scenic Rivers. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the words "Scenic Rivers" and a picture representing the unique beauty of the scenic rivers of North Carolina.

(38) School Technology. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or an insignia representing the public school system in North Carolina.

(39) Sheriff. — Issuable to a current sheriff or to a retired sheriff who served as sheriff for at least 10 years before retiring. A plate issued to

a current sheriff shall bear the word "Sheriff" and the letter "S" followed by a number that indicates the county the sheriff serves. A plate issued to a retired sheriff shall bear the phrase "Sheriff, Retired", the letter "S" followed by a number that indicates the county the sheriff served, and the letter "X" indicating the sheriff's retired status.

(39a) Silver Star Recipient. — Issuable to a recipient of the Silver Star. The plate shall bear the emblem of the Silver Star and the words "Silver Star".

(40) Soil and Water Conservation. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase and picture appropriate to the subject of water quality and environmental protection in North Carolina.

(40a) Special Forces Association. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear a representation of the Special Forces Association shoulder patch with tabs and shall bear the words "Special Forces Association."

(41) Special Olympics. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or an insignia representing the North Carolina Special Olympics.

(42) Square Dance Clubs. — Issuable to a member of a recognized square dance organization exempt from corporate income tax under G.S. 105-130.11(a)(5). The plate shall bear a word or phrase identifying the club and the emblem of the club. The Division shall not issue a dance club plate authorized by this subdivision unless it receives at least 300 applications for that dance club plate.

(43) State Government Official. — Issuable to elected and appointed members of State government in accordance with G.S. 20-79.5.

(44) State Attraction. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or an insignia representing a publicly owned or nonprofit State or federal attraction located in North Carolina.

(45) Street Rod Owner. — Issuable to the registered owner of a modernized private passenger motor vehicle manufactured prior to the year 1949 or designed to resemble a vehicle manufactured prior to the year 1949. The plate shall bear the phrase "Street Rod". The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(45a) Support Public Schools. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear a picture representing an old-time one-room schoolhouse and shall bear the words: "Support Our Public Schools".

(45b) Sweet Potato. — Issuable to the registered owner of a motor vehicle. The plate may bear a phrase and picture representing the State's official vegetable, the sweet potato. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(45c) Tobacco Heritage. — Issuable to the registered owner of a motor vehicle. The plate shall bear a picture of a tobacco leaf and plow. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(46) Transportation Personnel. — Issuable to various members of the Divisions of the Department of Transportation. The plate shall bear the letters "DOT" followed by a number from 1 to 85, as designated by the Governor.

(46a) U.S. Navy Specialty. — Issuable to a veteran of the United States Navy Submariner Service. The plate shall bear the phrase "Silent

Service Veteran" and shall bear a representation of the Submarine Service Qualification pin. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(47) U.S. Representative. — Issuable to a United States Representative for North Carolina. The plate shall bear the phrase "U.S. House" and shall be issued on the basis of Congressional district numbers.

(48) U.S. Senator. — Issuable to a United States Senator for North Carolina. The plates shall bear the phrase "U.S. Senate" and shall be issued on the basis of seniority represented by the numbers 1 and 2.

(48a) University Health Systems of Eastern Carolina. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or insignia representing the University Health Systems of Eastern Carolina.

(48b) The V Foundation for Cancer Research. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear a phrase and insignia representing The V Foundation for Cancer Research.

(49) Veterans of Foreign Wars. — Issuable to a member or a supporter of the Veterans of Foreign Wars. The plate shall bear the words "Veterans of Foreign Wars" or "VFW" and the emblem of the VFW. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

(50) Repealed by Session Laws 2001-498, s. 2, effective December 19, 2001.

(51) Wildlife Resources. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear a picture representing a native wildlife species occurring in North Carolina.

(c) Repealed by Session Laws 1991 (Regular Session, 1992), c. 1042, s. 1. (1991, c. 672, s. 2; c. 726, s. 23; 1991 (Reg. Sess., 1992), c. 1042, s. 1; 1993, c. 543, s. 2; 1995, c. 326, ss. 1-3; c. 433, ss. 1, 4.1; 1997-156, s. 1; 1997-158, s. 1; 1997-339, s. 1; 1997-427, s. 1; 1997-461, ss. 2-4; 1997-477, s. 1; 1997-484, ss. 1-3; 1998-155, s. 1; 1998-160, ss. 1, 2; 1998-163, ss. 3-5; 1999-220, s. 3.1; 1999-277, s. 1; 1999-314, s. 1; 1999-403, s. 1; 1999-450, s. 1; 1999-452, s. 16; 2000-159, ss. 1, 2; 2001-40, s. 1; 2001-483, s. 1; 2001-498, ss. 1(a), 1(b), 2; 2002-134, ss. 1-4; 2002-159, s. 68.)

Effect of Amendments. —

Session Laws 2002-134, ss. 1-4, as amended by Session Laws 2002-159, s. 68, effective October 3, 2002, recodified subdivisions (b)(3c) and (b)(45b) as subdivisions (b)(3d) and (b)(45c), respectively; added new subdivisions (b)(3c), (b)(28b), and (b)(45b); added "Except for World War II and Korean Conflict plates" at the beginning of the fourth sentence of subdivision (b)(27b); and rewrote the second sentence of subdivision (b)(36b).

§ 20-79.7. Fees for special registration plates and distribution of the fees.

(a) Fees. — Upon request, the Division shall provide and issue free of charge one registration plate to a recipient of the Congressional Medal of Honor, a 100% disabled veteran, and an ex-prisoner of war. All other special registration plates, including additional Congressional Medal of Honor, 100% Disabled Veteran, and Ex-Prisoner of War plates, are subject to the regular motor vehicle registration fee in G.S. 20-87 or G.S. 20-88 plus an additional fee in the following amount:

Special Plate	Additional Fee Amount
Historical Attraction	$30.00
State Attraction	$30.00
Collegiate Insignia	$25.00
Goodness Grows	$25.00
Kids First	$25.00
Olympic Games	$25.00
NC Agribusiness	$25.00
Special Olympics	$25.00
The V Foundation for Cancer Research Division	$25.00
University Health Systems of Eastern Carolina	$25.00
Animal Lovers	$20.00
Audubon North Carolina	$20.00
Ducks Unlimited	$20.00
(Effective until June 30, 2006) Harley Owners' Group	$20.00
First in Forestry	$20.00
Litter Prevention	$20.00
March of Dimes	$20.00
Omega Psi Phi Fraternity	$20.00
(Effective until June 30, 2006) Rocky Mountain Elk Foundation	$25.00
Save the Sea Turtles	$20.00
Scenic Rivers	$20.00
School Technology	$20.00
Soil and Water Conservation	$20.00
Special Forces Association	$20.00
Support Public Schools	$20.00
Wildlife Resources	$20.00
Personalized	$20.00
Active Member of the National Guard	None
100% Disabled Veteran	None
Ex-Prisoner of War	None
Legion of Valor	None
Purple Heart Recipient	None
Silver Star Recipient	None
All Other Special Plates	$10.00.

(b) Distribution of Fees. — The Special Registration Plate Account and the Collegiate and Cultural Attraction Plate Account are established within the Highway Fund. The Division must credit the additional fee imposed for the special registration plates listed in subsection (a) among the Special Registration Plate Account (SRPA), the Collegiate and Cultural Attraction Plate Account (CCAPA), and the Natural Heritage Trust Fund (NHTF), which is established under G.S. 113-77.7, as follows:

Special Plate	SRPA	CCAPA	NHTF
Animal Lovers	$10	$10	0
Audubon North Carolina	$10	$10	0
Ducks Unlimited	$10	$10	0
First in Forestry	$10	0	$10
Goodness Grows	$10	$15	0

Special Plate	SRPA	CCAPA	NHTF
(Effective until June 30, 2006) Harley Owners' Group	$10	$10	0
Historical Attraction	$10	$20	0
In-State Collegiate Insignia	$10	$15	0
Kids First	$10	$15	0
Litter Prevention	$10	$10	0
March of Dimes	$10	$10	0
NC Agribusiness	$10	$15	0
Olympic Games	$10	$15	0
Omega Psi Phi Fraternity	$10	$10	0
Out-of-state Collegiate Insignia	$10	0	$15
Personalized	$10	0	$10
(Effective until June 30, 2006) Rocky Mountain Elk Foundation	$10	$15	0
Save the Sea Turtles	$10	$10	0
Scenic Rivers	$10	$10	0
School Technology	$10	$10	0
Soil and Water Conservation	$10	$10	0
Special Forces Association	$10	$10	0
Special Olympics	$10	$10	0
State Attraction	$10	$20	0
Support Public Schools	$10	$10	0
The V Foundation for Cancer Research	$10	$15	0
University Health Systems of Eastern Carolina	$10	$15	0
Wildlife Resources	$10	$10	0
All other Special Plates	$10	0	0.

(c) Use of Funds in Special Registration Plate Account. —

(1) The Division shall deduct the costs of special registration plates, including the costs of issuing, handling, and advertising the availability of the special plates, from the Special Registration Plate Account.

(2) From the funds remaining in the Special Registration Plate Account after the deductions in accordance with subdivision (1) of this subsection, there is annually appropriated from the Special Registration Plate Account the sum of five hundred twenty-five thousand dollars ($525,000) to provide operating assistance for the Visitor Centers:

a. on U.S. Highway 17 in Camden County, ($75,000);
b. on U.S. Highway 17 in Brunswick County, ($75,000);
c. on U.S. Highway 441 in Macon County, ($75,000);
d. in the Town of Boone, Watauga County, ($75,000);
e. on U.S. Highway 29 in Caswell County, ($75,000);
f. on U.S. Highway 70 in Carteret County, ($75,000); and
g. on U.S. Highway 64 in Tyrrell County, ($75,000).

(3) The Division shall transfer the remaining revenue in the Account quarterly as follows:

a. Thirty-three percent (33%) to the account of the Department of Commerce to aid in financing out-of-state print and other media advertising under the program for the promotion of travel and industrial development in this State.
b. Fifty percent (50%) to the Department of Transportation to be used solely for the purpose of beautification of highways other than

those designated as interstate. These funds shall be administered by the Department of Transportation for beautification purposes not inconsistent with good landscaping and engineering principles.

c. Seventeen percent (17%) to the account of the Department of Health and Human Services to promote travel accessibility for disabled persons in this State. These funds shall be used to collect and update site information on travel attractions designated by the Department of Commerce in its publications, to provide technical assistance to travel attractions concerning accommodation of disabled tourists, and to develop, print, and promote the publication ACCESS NORTH CAROLINA as provided in G.S. 168-2. Any funds allocated for these purposes that are neither spent nor obligated at the end of the fiscal year shall be transferred to the Department of Administration for removal of man-made barriers to disabled travelers at State-funded travel attractions. Guidelines for the removal of man-made barriers shall be developed in consultation with the Department of Health and Human Services. (1967, c. 413; 1971, c. 42; 1973, c. 507, s. 5; c. 1262, s. 86; 1975, c. 716, s. 5; 1977, c. 464, s. 3; c. 771, s. 4; 1979, c. 126, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1258, s. 6; 1983, c. 848; 1985, c. 766; 1987, c. 252; c. 738, s. 140; c. 830, ss. 113(a), 116(a)-(c); 1989, c. 751, s. 7(1); c. 774, s. 1; 1989 (Reg. Sess., 1990), c. 814, s. 31; 1991, c. 672, s. 3; c. 726, s. 23; 1991 (Reg. Sess., 1992), c. 959, s. 2; c. 1042, s. 2; c. 1044, ss. 33, 34; 1993, c. 321, s. 169.3(a); c. 543, s. 3; 1995, c. 163, s. 2; c. 324, s. 18.7(a); c. 433, ss. 2, 3; c. 507, s. 18.17(a); 1996, 2nd Ex. Sess., c. 18, s. 19.11(e); 1997-443, s. 11A.118(a); 1997-477, ss. 2, 3; 1997-484, ss. 4, 5; 1998-163, s. 1; 1999-277, ss. 2, 3; 1999-403, ss. 2, 3; 1999-450, ss. 2, 3; 2000-159, ss. 3, 4; 2001-414, s. 32; 2001-498, ss. 3(a), 3(b), 4(a), 4(b); 2002-134, ss. 5, 6.)

Effect of Amendments. — Session Laws 2002-134, ss. 5, 6, effective October 3, 2002, inserted entries for "NC Agribusiness" special plates in subsections (a) and (b).

§ 20-81.12. Collegiate insignia plates and certain other special plates.

(a) Collegiate Insignia Plates. — The Division must receive 300 or more applications for a collegiate insignia license plate for a college or university before a collegiate license plate may be developed. The color, design, and material for the plate must be approved by both the Division and the alumni or alumnae association of the appropriate college or university. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of in-State collegiate insignia plates to the Board of Governors of The University of North Carolina for in-State, public colleges and universities and to the respective board of trustees for in-State, private colleges and universities in proportion to the number of collegiate plates sold representing that institution for use for academic enhancement.

(b) Historical Attraction Plates. — The Division must receive 300 or more applications for an historical attraction plate representing a publicly owned or nonprofit historical attraction located in North Carolina and listed below before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of historical attraction plates to the organizations named below in

proportion to the number of historical attraction plates sold representing that organization:

(1) Historical Attraction Within Historic District. — The revenue derived from the special plate shall be transferred quarterly to the appropriate Historic Preservation Commission, or entity designated as the Historic Preservation Commission, and used to maintain property in the historic district in which the attraction is located. As used in this subdivision, the term "historic district" means a district created under G.S. 160A-400.4.

(2) Nonprofit Historical Attraction. — The revenue derived from the special plate shall be transferred quarterly to the nonprofit corporation that is responsible for maintaining the attraction for which the plate is issued and used to develop and operate the attraction.

(3) State Historic Site. — The revenue derived from the special plate shall be transferred quarterly to the Department of Cultural Resources and used to develop and operate the site for which the plate is issued. As used in this subdivision, the term "State historic site" has the same meaning as in G.S. 121-2(11).

(b1) Special Olympics Plates. — The Division must receive 300 or more applications for a special olympics plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of special olympics plates to the North Carolina Special Olympics, Inc., to be used to train volunteers to assist in the statewide games and to help pay the costs of the statewide games.

(b2) State Attraction Plates. — The Division must receive 300 or more applications for a State attraction plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of State attraction plates to the organizations named below in proportion to the number of State attraction plates sold representing that organization:

(1) Friends of the Great Smoky Mountains National Park. — The revenue derived from the special plate shall be transferred quarterly to the Friends of the Great Smoky Mountains National Park, Inc., to be used for educational materials, preservation programs, capital improvements for the portion of the Great Smoky Mountains National Park that is located in North Carolina, and operating expenses of the Great Smoky Mountains National Park.

(1a) The North Carolina Arboretum. — The revenue derived from the special plate shall be transferred quarterly to The North Carolina Arboretum Society and used to help the Society obtain grants for the North Carolina Arboretum and for capital improvements to the North Carolina Arboretum.

(1b) The North Carolina Maritime Museum. — The revenue derived from the special plate shall be transferred quarterly to Friends of the Museum, North Carolina Maritime Museum, Inc., to be used for educational programs and conservation programs and for operating expenses of the North Carolina Maritime Museum.

(2) The North Carolina Zoological Society. — The revenue derived from the special plate shall be transferred quarterly to The North Carolina Zoological Society, Incorporated, to be used for educational programs and conservation programs at the North Carolina Zoo at Asheboro and for operating expenses of the North Carolina Zoo at Asheboro.

(b3) Wildlife Resources Plates. — The Division must receive 300 or more applications for a wildlife resources plate with a picture representing a particular native wildlife species occurring in North Carolina before the plate may be developed. The Division must transfer quarterly the money in the

Collegiate and Cultural Attraction Plate Account derived from the sale of wildlife resources plates to the Wildlife Conservation Account established by G.S. 143-247.2.

(b4) Olympic Games. — The Division may not issue an Olympic Games special plate unless it receives 300 or more applications for the plate and the U.S. Olympic Committee licenses, without charge, the State to develop a plate bearing the Olympic Games symbol and name. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Olympic Games plates to the N.C. Health and Fitness Foundation, Inc., which will allocate the funds as follows:

(1) Fifty percent (50%) to the U.S. Olympic Committee to assist in training olympic athletes.
(2) Twenty-five percent (25%) to North Carolina Amateur Sports to assist with administration of the State Games of North Carolina.
(3) Twenty-five percent (25%) to the Governor's Council on Physical Fitness and Health to support local fitness council development throughout North Carolina.

(b5) March of Dimes Plates. — The Division must receive 300 or more applications for a March of Dimes plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of March of Dimes plates to the Eastern Carolina Chapter of the March of Dimes Birth Defects Foundation. The Eastern Carolina Chapter shall disperse the revenue proportionately among the Eastern Carolina Chapter, the Western Carolina Chapter, the Greater Triad Chapter, and the Greater Piedmont Chapter of the March of Dimes Birth Defects Foundation based upon the population of the area each Chapter represents. The money must be used for the prevention of birth defects through local community services and educational programs and through research and development.

(b6) School Technology Plates. — The Division must receive 300 or more applications for a School Technology plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of School Technology plates to the State School Technology Fund, which is established under G.S. 115C-102.6D.

(b7) Scenic Rivers Plates. — The Division must receive 300 or more applications for a Scenic Rivers plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Scenic Rivers plates to the Clean Water Management Trust Fund established in G.S. 113-45.3.

(b8) Soil and Water Conservation Plates. — The Division must receive 300 or more applications for a soil and water conservation plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the soil and water conservation plates to the Soil and Water Conservation Account established in G.S. 143B-297.1.

(b9) Kids First Plates. — The Division must receive 300 or more applications for a Kids First plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Kids First plates to the North Carolina Children's Trust Fund established in G.S. 7B-1302.

(b10) University Health Systems of Eastern Carolina. — The Division must receive 300 or more applications for a University Health Systems of Eastern Carolina plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of University Health Systems of Eastern Carolina plates

to the Pitt Memorial Hospital Foundation, Inc., for use in the Children's Hospital of Eastern North Carolina.

(b11) Animal Lovers Plates. — The Division must receive 300 or more applications before an animal lovers plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the animal lovers plate to the Spay/Neuter Account established in G.S. 19A-60.

(b12) Support Public Schools Plates. — The Division must receive 300 or more applications for a Support Public Schools plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Support Public Schools plates to the Fund for the Reduction of Class Size in Public Schools created pursuant to G.S. 115C-472.10.

(b13) Ducks Unlimited Plates. — The Division must receive 300 or more applications for a Ducks Unlimited plate and receive any necessary licenses from Ducks Unlimited, Inc., for use of their logo before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Ducks Unlimited plates to the Wildlife Resources Commission to be used to support the conservation programs of Ducks Unlimited, Inc., in this State.

(b14) Omega Psi Phi Fraternity Plates. — The Division must receive 300 or more applications for an Omega Psi Phi Fraternity plate and receive any necessary licenses, without charge, from Omega Psi Phi Fraternity, Incorporated, before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Omega Psi Phi Fraternity plates to the United Negro College Fund, Inc., through the Winston-Salem Area Office for the benefit of UNCF colleges in this State.

(b15) Litter Prevention Plates. — The Division must receive 300 or more applications for a Litter Prevention plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the litter prevention plates to the Litter Prevention Account created pursuant to G.S. 136-125.1.

(b16) Goodness Grows Plates. — The Division must receive 300 or more applications for a Goodness Grows plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Goodness Grows plates to the North Carolina Agricultural Promotions, Inc., to be used to promote the sale of North Carolina agricultural products.

(b17) Audubon North Carolina Plates. — The Division must receive 300 or more applications for an Audubon North Carolina plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Audubon North Carolina plates to the National Audubon Society, Inc., a nonprofit corporation, for the account of the NC State Office to be used for bird and other wildlife conservation and educational activities in the State of North Carolina.

(b18) Special Forces Association. — The Division must receive 300 or more applications for a Special Forces Association plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Special Forces Association plates to the Airborne & Special Operations Museum in Fayetteville, North Carolina.

(b19) The V Foundation for Cancer Research. — The Division must receive 300 or more applications for a V Foundation plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of V Foundation

plates to The V Foundation for Cancer Research to fund cancer research grants.

(b20) Save the Sea Turtles. — The Division must receive 300 or more applications for a Save the Sea Turtles plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Save the Sea Turtles plates to The Karen Beasley Sea Turtle Rescue and Rehabilitation Center.

(b21) **(Effective until June 30, 2006)** Harley Owners' Group. — The Division must receive 300 or more applications for a Harley Owners' Group plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Harley Owners' Group plates to the State Board of Community Colleges to support the motorcycle safety instruction program established pursuant to G.S. 115D-72.

(b22) **(Effective until June 30, 2006)** Rocky Mountain Elk Foundation. — The Division must receive 300 or more applications for a Rocky Mountain Elk Foundation plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Account derived from the sale of Rocky Mountain Elk Foundation plates to Rocky Mountain Elk Foundation, Inc.

(b23) NC Agribusiness. — The Division must receive 300 or more applications for a NC Agribusiness plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of NC Agribusiness plates to the North Carolina Agribusiness Council, Inc., to be used to promote awareness of the importance of agribusiness in North Carolina.

(c) General. — An application for a special license plate named in this section may be made at any time during the year. If the application is made to replace an existing current valid plate, the special plate must be issued with the appropriate decals attached. No refund shall be made to the applicant for any unused portion remaining on the original plate. The request for a special license plate named in this section may be combined with a request that the plate be a personalized license plate.

(d) through (g) Repealed by Session Laws 1991 (Regular Session, 1992), c. 1042, s. 3. (1991, c. 758, s. 1; 1991 (Reg. Sess., 1992), c. 1007, s. 33; c. 1042, s. 3; 1993, c. 543, s. 5; 1995, c. 433, s. 4; 1997-427, s. 2; 1997-477, s. 4; 1997-484, s. 6; 1999-277, s. 4; 1999-403, s. 4; 1999-450, s. 4; 2000-159, ss. 5, 6; 2000-163, s. 3; 2001-498, ss. 6(a), 6(b); 2002-134, s. 7.)

Effect of Amendments. —
Session Laws 2002-134, s. 7, effective October 3, 2002, added subsection (b23).

Part 7. Title and Registration Fees.

§ 20-87. Passenger vehicle registration fees.

These shall be paid to the Division annually, as of the first day of January, for the registration and licensing of passenger vehicles, fees according to the following classifications and schedules:

(1) For-Hire Passenger Vehicles. — The fee for a passenger vehicle that is operated for compensation and has a capacity of 15 passengers or less is seventy-eight dollars ($78.00). The fee for a passenger vehicle that is operated for compensation and has a capacity of more than 15 passengers is one dollar and forty cents ($1.40) per hundred pounds of empty weight of the vehicle.

(2) U-Drive-It Vehicles. — U-drive-it vehicles shall pay the following tax:

Motorcycles:	1-passenger capacity	$18.00
	2-passenger capacity	22.00
	3-passenger capacity	26.00
Automobiles:	15 or fewer passengers	$41.00
Buses:	16 or more passengers	$1.40 per hundred pounds of empty weight
Trucks under 7,000 pounds that do not haul products for hire:	4,000 pounds	$41.50
	5,000 pounds	$51.00
	6,000 pounds	$61.00.

(3) Repealed by Session Laws 1981, c. 976, s. 3.

(4) Limousine Vehicles. — For-hire passenger vehicles on call or demand which do not solicit passengers indiscriminately for hire between points along streets or highways, shall be taxed at the same rate as for-hire passenger vehicles under G.S. 20-87(1) but shall be issued appropriate registration plates to distinguish such vehicles from taxicabs.

(5) Private Passenger Vehicles. — There shall be paid to the Division annually, as of the first day of January, for the registration and licensing of private passenger vehicles, fees according to the following classifications and schedules:

Private passenger vehicles of not more than fifteen passengers	$20.00
Private passenger vehicles over fifteen passengers	23.00

Provided, that a fee of only one dollar ($1.00) shall be charged for any vehicle given by the federal government to any veteran on account of any disability suffered during war so long as such vehicle is owned by the original donee or other veteran entitled to receive such gift under Title 38, section 252, United States Code Annotated.

(6) Private Motorcycles. — The base fee on private passenger motorcycles shall be nine dollars ($9.00); except that when a motorcycle is equipped with an additional form of device designed to transport persons or property, the base fee shall be sixteen dollars ($16.00). An additional fee of three dollars ($3.00) is imposed on each private motorcycle registered under this subdivision in addition to the base fee. The revenue from the additional fee, in addition to any other funds appropriated for this purpose, shall be used to fund the Motorcycle Safety Instruction Program created in G.S. 115D-72.

(7) Dealer License Plates. — The fee for a dealer license plate is the regular fee for each of the first five plates issued to the same dealer and is one-half the regular fee for each additional dealer license plate issued to the same dealer. The "regular fee" is the fee set in subdivision (5) of this section for a private passenger motor vehicle of not more than 15 passengers.

(8) Driveaway Companies. — Any person engaged in the business of driving new motor vehicles from the place of manufacture to the place of sale in this State for compensation shall pay a fee of one-half of the amount that would otherwise be payable under this section for each set of plates.

(9) House Trailers. — In lieu of other registration and license fees levied on house trailers under this section or G.S. 20-88, the registration and license fee on house trailers shall be seven dollars ($7.00) for the license year or any portion thereof.

(10) Special Mobile Equipment. — The fee for special mobile equipment for the license year or any part of the license year is two times the fee in subdivision (5) for a private passenger motor vehicle of not more than 15 passengers.

(11) Any vehicle fee determined under this section according to the weight of the vehicle shall be increased by the sum of three dollars ($3.00) to arrive at the total fee.

(12) Low-Speed Vehicles. — The fee for a low-speed vehicle is the same as the fee for private passengers vehicles of not more than 15 passengers. (1937, c. 407, s. 51; 1939, c. 275; 1943, c. 648; 1945, c. 564, s. 1; c. 576, s. 2; 1947, c. 220, s. 3; c. 1019, ss. 1-3; 1949, c. 127; 1951, c. 819, ss. 1, 2; 1953, c. 478; c. 826, s. 4; 1955, c. 1313, s. 2; 1957, c. 1340, s. 3; 1961, c. 1172, s. 1a; 1965, c. 927; 1967, c. 1136; 1969, c. 600, ss. 3-11; 1971, c. 952; 1973, c. 107; 1975, c. 716, s. 5; 1981, c. 976, ss. 1-4; 1981 (Reg. Sess., 1982), c. 1255; 1983, c. 713, s. 61; c. 761, ss. 142, 143, 145; 1985, c. 454, s. 2; 1987, c. 333; 1989, c. 755, ss. 2, 4; c. 770, ss. 74.2, 74.3; 1989 (Reg. Sess., 1990), c. 830, s. 1; 1991 (Reg. Sess., 1992), c. 1015, s. 2; 1993, c. 320, s. 5; c. 440, s. 7; 1995 (Reg. Sess., 1996), c. 756, s. 7; 1999-438, s. 27; 1999-452, s. 17; 2001-356, s. 4; 2001-414, s. 31; 2002-72, s. 8.)

Effect of Amendments. — Session Laws 2002-72, s. 7, effective August 12, 2002, in subsection (6), substituted "An additional fee" for "A fee" in the second sentence, and substituted "shall be used to fund the Motorcycle Safety Instruction Program created in G.S. 115D-72" for "shall be deposited in fund" in the third sentence.

§ 20-91.1. Taxes to be paid; suits for recovery of taxes.

No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Article. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and notify such officer in writing that he pays the same under protest. Such payment shall be without prejudice to any defense or rights he may have in the premises, and he may, at any time within 30 days after such payment, demand the same in writing from the Secretary of Crime Control and Public Safety; and if the same shall not be refunded within 90 days thereafter, may sue such official in the courts of the State for the amount so demanded. Such suit must be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides. (1951, c. 1011, s. 1; 2002-159, s. 31.5(b); 2002-190, s. 3.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 3, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Secretary of Crime Control and Public Safety" for "Commissioner of Motor Vehicles" in the third sentence.

§ 20-91.2. Overpayment of taxes to be refunded with interest.

If the Secretary of Crime Control and Public Safety discovers from the examination of any report, or otherwise, that any taxpayer has overpaid the

correct amount of tax (including penalties, interest and costs, if any), such overpayment shall be refunded to the taxpayer within 60 days after it is ascertained together with interest thereon at the rate of six percent (6%) per annum: Provided, that interest on any such refund shall be computed from a date 90 days after date tax was originally paid by the taxpayer. Provided, further, that demand for such refund is made by the taxpayer within three years from the date of such overpayment or the due date of the report, whichever is later. (1951, c. 1011, s. 1; 2002-159, s. 31.5(b); 2002-190, s. 3.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 3, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Secretary of Crime Control and Public Safety" for "Commissioner of Motor Vehicles" in the first sentence.

§ 20-99. Remedies for the collection of taxes.

(a) If any tax imposed by this Chapter, or any other tax levied by the State and payable to the Commissioner of Motor Vehicles, or any portion of such tax, be not paid within 30 days after the same becomes due and payable, and after the same has been assessed, the Commissioner of Motor Vehicles shall issue an order under his hand and official seal, directed to the sheriff of any county of the State, commanding him to levy upon and sell the real and personal property of the taxpayer found within his county for the payment of the amount thereof, with the added penalties, additional taxes, interest, and cost of executing the same, and to return to the Commissioner of Motor Vehicles the money collected by virtue thereof within a time to be therein specified, not less than 60 days from the date of the order. The said sheriff shall, thereupon, proceed upon the same in all respects with like effect and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the order, to be collected in the same manner.

(b) Bank deposits, rents, salaries, wages, and all other choses in action or property incapable of manual levy or delivery, hereinafter called the intangible, belonging, owing, or to become due to any taxpayer subject to any of the provisions of this Chapter, or which has been transferred by such taxpayer under circumstances which would permit it to be levied upon if it were tangible, shall be subject to attachment or garnishment as herein provided, and the person owing said intangible, matured or unmatured, or having same in his possession or control, hereinafter called the garnishee, shall become liable for all sums due by the taxpayer under this Chapter to the extent of the amount of the intangible belonging, owing, or to become due to the taxpayer subject to the setoff of any matured or unmatured indebtedness of the taxpayer to the garnishee. To effect such attachment or garnishment the Commissioner of Motor Vehicles shall serve or cause to be served upon the taxpayer and the garnishee a notice as hereinafter provided, which notice may be served by any deputy or employee of the Commissioner of Motor Vehicles or by any officer having authority to serve summonses. Said notice shall show:

(1) The name of the taxpayer and his address, if known;

(2) The nature and amount of the tax, and the interest and penalties thereon, and the year or years for which the same were levied or assessed, and

(3) Shall be accompanied by a copy of this subsection, and thereupon the procedure shall be as follows:

If the garnishee has no defense to offer or no setoff against the taxpayer, he shall, within 10 days after service of said notice, answer

the same by sending to the Commissioner of Motor Vehicles by registered mail a statement to that effect, and if the amount due or belonging to the taxpayer is then due or subject to his demand, it shall be remitted to the Commissioner with said statement, but if said amount is to mature in the future, the statement shall set forth that fact and the same shall be paid to the Commissioner upon maturity, and any payment by the garnishee hereunder shall be a complete extinguishment of any liability therefor on his part to the taxpayer. If the garnishee has any defense or setoff, he shall state the same in writing under oath, and, within 10 days after service of said notice, shall send two copies of said statement to the Commissioner by registered mail; if the Commissioner admits such defense or setoff, he shall so advise the garnishee in writing within 10 days after receipt of such statement and the attachment or garnishment shall thereupon be discharged to the amount required by such defense or setoff, and any amount attached or garnished hereunder which is not affected by such defense or setoff shall be remitted to the Commissioner as above provided in cases where the garnishee has no defense or setoff, and with like effect. If the Commissioner shall not admit the defense or setoff, he shall set forth in writing his objections thereto and shall send a copy thereof to the garnishee within 10 days after receipt of the garnishee's statement, or within such further time as may be agreed on by the garnishee, and at the same time he shall file a copy of said notice, a copy of the garnishee's statement, and a copy of his objections thereto in the superior court of the county where the garnishee resides or does business where the issues made shall be tried as in civil actions.

If judgment is entered in favor of the Commissioner of Motor Vehicles by default or after hearing, the garnishee shall become liable for the taxes, interest and penalties due by the taxpayer to the extent of the amount over and above any defense or setoff of the garnishee belonging, owing, or to become due to the taxpayer, but payments shall not be required from amounts which are to become due to the taxpayer until the maturity thereof, nor shall more than ten percent (10%) of any taxpayer's salary or wages be required to be paid hereunder in any one month. The garnishee may satisfy said judgment upon paying said amount, and if he fails to do so, execution may issue as provided by law. From any judgment or order entered upon such hearing either the Commissioner of Motor Vehicles or the garnishee may appeal as provided by law. If, before or after judgment, adequate security is filed for the payment of said taxes, interest, penalties, and costs, the attachment or garnishment may be released or execution stayed pending appeal, but the final judgment shall be paid or enforced as above provided. The taxpayer's sole remedies to question his liability for said taxes, interest, and penalties shall be those provided in G.S. 105-267, as now or hereafter amended or supplemented. If any third person claims any intangible attached or garnished hereunder and his lawful right thereto, or to any part thereof, is shown to the Commissioner, he shall discharge the attachment or garnishment to the extent necessary to protect such right, and if such right is asserted after the filing of said copies as aforesaid, it may be established by interpleader as now or hereafter provided by the General Statutes in cases of attachment and garnishment. In case such third party has no notice of proceedings hereunder, he shall have the right to file his petition under oath with the Commissioner at any time within 12 months after said intangible is paid to him and if the

Commissioner finds that such party is lawfully entitled thereto or to any part thereof, he shall pay the same to such party as provided for refunds by G.S. 105-407 and if such payment is denied, said party may appeal from the determination of the Commissioner to the Superior Court of Wake County or to the superior court of the county wherein he resides or does business. The intangibles of a taxpayer shall be paid or collected hereunder only to the extent necessary to satisfy said taxes, interest, penalties, and costs. Except as hereinafter set forth, the remedy provided in this section shall not be resorted to unless a warrant for collection or execution against the taxpayer has been returned unsatisfied: Provided, however, if the Commissioner is of opinion that the only effective remedy is that herein provided, it shall not be necessary that a warrant for collection or execution shall be first returned unsatisfied, and in no case shall it be a defense to the remedy herein provided that a warrant for collection or execution has not been first returned unsatisfied: Provided, however, that no salary or wage at the rate of less than two hundred dollars ($200.00) per month, whether paid weekly or monthly, shall be attached or garnished under the provisions of this section.

(c) In addition to the remedy herein provided, the Commissioner of Motor Vehicles is authorized and empowered to make a certificate setting forth the essential particulars relating to the said tax, including the amount thereof, the date when the same was due and payable, the person, firm, or corporation chargeable therewith, and the nature of the tax, and under his hand and seal transmit the same to the clerk of the superior court of any county in which the delinquent taxpayer resides or has property; whereupon, it shall be the duty of the clerk of the superior court of the county [to] record the certificate in the same manner as a judgment, and execution may issue thereon with the same force and effect as an execution upon any other judgment of the superior court; said tax shall become a lien on realty only from the date of the docketing of such certificate in the office of the clerk of the superior court and on personalty only from the date of the levy on such personalty and upon execution thereon no homestead or personal property exemption shall be allowed.

(d) The remedies herein given are cumulative and in addition to all other remedies provided by law for the collection of said taxes.

(e) The provisions, procedures, and remedies provided in this section apply to the collection of penalties imposed under the provisions of Article 3A of this Chapter and of G.S. 20-96, G.S. 20-118, or any other provisions of this Chapter imposing a tax or penalty for operation of a vehicle in excess of the weight limits provided in this Chapter and the Commissioner and the Secretary of the Department of Crime Control and Public Safety are authorized to collect such taxes or penalties by the use of the procedure established in subsections (a), (b), (c) and (d) of this section. (1937, c. 407, s. 63; 1945, c. 576, s. 4; 1951, c. 819, s. 1; 1955, c. 554, s. 10; 1971, c. 528, s. 12; 1995 (Reg. Sess., 1996), c. 756, s. 11; 1997-29, s. 11; 2002-159, s. 31.5(b); 2002-190, s. 6.)

Editor's Note. —

Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 6, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "and the Secretary of the Department of Crime Control and Public Safety are" for "is" following Commissioner in subsection (e).

Part 8. Anti-Theft and Enforcement Provisions.

§ 20-110. When registration shall be rescinded.

(a) The Division shall rescind and cancel the registration of any vehicle which the Division shall determine is unsafe or unfit to be operated or is not equipped as required by law.

(b) The Division shall rescind and cancel the registration of any vehicle whenever the person to whom the registration card or registration number plates therefor have been issued shall make or permit to be made any unlawful use of the said card or plates or permit the use thereof by a person not entitled thereto.

(c) Repealed by Session Laws 1993, c. 440, s. 8.

(d) The Division shall rescind and cancel the certificate of title to any vehicle which has been erroneously issued or fraudulently obtained or is unlawfully detained by anyone not entitled to possession.

(e) and (f) Repealed by Session Laws 1993, c. 440, s. 8.

(g) The Division shall rescind and cancel the registration plates issued to a carrier of passengers or property which has been secured by such carrier as provided under G.S. 20-50 when the license is being used on a vehicle other than the one for which it was issued or which is being used by the lessor-owner after the lease with such lessee has been terminated.

(h) The Division may rescind and cancel the registration or certificate of title on any vehicle on the grounds that the application therefor contains any false or fraudulent statement or that the holder of the certificate was not entitled to the issuance of a certificate of title or registration.

(i) The Division may rescind and cancel the registration or certificate of title of any vehicle when the Division has reasonable grounds to believe that the vehicle is a stolen or embezzled vehicle, or that the granting of registration or the issuance of certificate of title constituted a fraud against the rightful owner or person having a valid lien upon such vehicle.

(j) The Division may rescind and cancel the registration or certificate of title of any vehicle on the grounds that the registration of the vehicle stands suspended or revoked under the motor vehicle laws of this State.

(k) The Division shall rescind and cancel a certificate of title when the Division finds that such certificate has been used in connection with the registration or sale of a vehicle other than the vehicle for which the certificate was issued.

(*l*) The Division may rescind and cancel the registration and certificate of title of a vehicle when presented with evidence, such as a sworn statement, that the vehicle has been transferred to a person who has failed to get a new certificate of title for the vehicle as required by G.S. 20-73. A person may submit evidence to the Division by mail.

(m) The Division shall rescind and cancel the registration of vehicles of a motor carrier that is subject to an order issued by the Federal Motor Carrier Safety Administration or the Division to cease all operations based on a finding that the continued operations of the motor carrier pose an "imminent hazard" as defined in 49 C.F.R. § 386.72(b)(1). (1937, c. 407, s. 74; 1945, c. 576, s. 5; 1947, c. 220, s. 4; 1951, c. 985, s. 1; 1953, c. 831, s. 4; 1955, c. 294, s. 1; c. 554, s. 11; 1975, c. 716, s. 5; 1981, c. 976, s. 11; 1991, c. 183, s. 1; 1993, c. 440, s. 8; 2002-152, s. 2.)

Editor's Note. — Session Laws 2002-152, s. 6, provides: "The Division shall adopt rules to implement the provisions of this act."

Effect of Amendments. — Session Laws 2002-152, s. 2, effective December 1, 2002, added subsection (m).

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-116. Size of vehicles and loads.

(a) The total outside width of any vehicle or the load thereon shall not exceed 102 inches, except as otherwise provided in this section. When hogsheads of tobacco are being transported, a tolerance of six inches is allowed. When sheet or bale tobacco is being transported the load must not exceed a width of 114 inches at the top of the load and the bottom of the load at the truck bed must not exceed the width of 102 inches inclusive of allowance for load shifting or settling. Vehicles (other than passenger buses) that do not exceed the overall width of 102 inches and otherwise provided in this section may be operated in accordance with G.S. 20-115.1(c), (f), and (g).

(b) No passenger-type vehicle or recreational vehicle shall be operated on any highway with any load carried thereon extending beyond the line of the fenders on the left side of such vehicle nor extending more than six inches beyond the line of the fenders on the right side thereof.

(c) No vehicle, unladen or with load, shall exceed a height of 13 feet, six inches. Provided, however, that neither the State of North Carolina nor any agency or subdivision thereof, nor any person, firm or corporation, shall be required to raise, alter, construct or reconstruct any underpass, wire, pole, trestle, or other structure to permit the passage of any vehicle having a height, unladen or with load, in excess of 12 feet, six inches. Provided further, that the operator or owner of any vehicle having an overall height, whether unladen or with load, in excess of 12 feet, six inches, shall be liable for damage to any structure caused by such vehicle having a height in excess of 12 feet, six inches. The term "automobile transport" as used in this subsection shall mean only vehicles engaged exclusively in transporting automobiles, trucks and other commercial vehicles.

(d) Maximum Length. — The following maximum lengths apply to vehicles. A truck-tractor and semitrailer shall be regarded as two vehicles for the purpose of determining lawful length and license taxes.

(1) Except as otherwise provided in this subsection, a single vehicle having two or three axles shall not exceed 40 feet in length overall of dimensions inclusive of front and rear bumpers.

(2) Trucks transporting unprocessed cotton from farm to gin shall not exceed 48 feet in length overall of dimensions inclusive of front and rear bumpers.

(3) Recreational vehicles shall not exceed 45 feet in length overall, excluding bumpers and mirrors.

(e) Except as provided by G.S. 20-115.1, no combination of vehicles coupled together shall consist of more than two units and no such combination of vehicles shall exceed a total length of 60 feet inclusive of front and rear bumpers, subject to the following exceptions: Said length limitation shall not apply to vehicles operated in the daytime when transporting poles, pipe, machinery or other objects of a structural nature which cannot readily be dismembered, nor to such vehicles transporting such objects operated at nighttime by a public utility when required for emergency repair of public service facilities or properties, but in respect to such night transportation every such vehicle and the load thereon shall be equipped with a sufficient number of clearance lamps on both sides and marker lamps upon the extreme ends of said projecting load to clearly mark the dimensions of such load: Provided that vehicles designed and used exclusively for the transportation of motor vehicles shall be permitted an overhang tolerance front or rear not to

exceed five feet. Provided, that wreckers in an emergency may tow a combination tractor and trailer to the nearest feasible point for repair and/or storage: Provided, however, that a combination of a house trailer used as a mobile home, together with its towing vehicle, shall not exceed a total length of 55 feet exclusive of front and rear bumpers. Provided further, that the said limitation that no combination of vehicles coupled together shall consist of more than two units shall not apply to trailers not exceeding three in number drawn by a motor vehicle used by municipalities for the removal of domestic and commercial refuse and street rubbish, but such combination of vehicles shall not exceed a total length of 50 feet inclusive of front and rear bumpers. Provided further, that the said limitation that no combination of vehicles coupled together shall consist of more than two units shall not apply to a combination of vehicles coupled together by a saddle mount device used to transport motor vehicles in a driveway service when no more than three saddle mounts are used and provided further, that equipment used in said combination is approved by the safety regulations of the Federal Highway Administration and the safety rules of the Department of Crime Control and Public Safety.

(f) The load upon any vehicle operated alone, or the load upon the front vehicle of a combination of vehicles, shall not extend more than three feet beyond the foremost part of the vehicle. Under this subsection "load" shall include the boom on a self-propelled vehicle.

A utility pole carried by a self-propelled pole carrier may extend beyond the front overhang limit set in this subsection if the pole cannot be dismembered, the pole is less than 80 feet in length and does not extend more than 10 feet beyond the front bumper of the vehicle, and either of the following circumstances apply:

(1) It is daytime and the front of the extending load of poles is marked by a flag of the type required by G.S. 20-117 for certain rear overhangs.

(2) It is nighttime, operation of the vehicle is required to make emergency repairs to utility service, and the front of the extending load of poles is marked by a light of the type required by G.S. 20-117 for certain rear overhangs.

As used in this subsection, a "self-propelled pole carrier" is a vehicle designed to carry a pole on the side of the vehicle at a height of at least five feet when measured from the bottom of the brace used to carry the pole. A self-propelled pole carrier may not tow another vehicle when carrying a pole that extends beyond the front overhang limit set in this subsection.

(g)(1) No vehicle shall be driven or moved on any highway unless the vehicle is constructed and loaded to prevent any of its load from falling, blowing, dropping, sifting, leaking, or otherwise escaping therefrom, and the vehicle shall not contain any holes, cracks, or openings through which any of its load may escape. However, sand may be dropped for the purpose of securing traction, or water or other substance may be sprinkled, dumped, or spread on a roadway in cleaning or maintaining the roadway. For purposes of this subsection, load does not include water accumulated from precipitation.

(2) A truck, trailer, or other vehicle licensed for more than 7,500 pounds gross vehicle weight that is loaded with rock, gravel, stone, or any other similar substance, other than sand, that could fall, blow, leak, sift, or drop shall not be driven or moved on any highway unless:

a. The height of the load against all four walls does not extend above a horizontal line six inches below their tops when loaded at the loading point; and

b. The load is securely covered by tarpaulin or some other suitable covering to prevent any of its load from falling, dropping, sifting, leaking, blowing, or otherwise escaping therefrom.

(3) A truck, trailer, or other vehicle:
a. Licensed for any gross vehicle weight and loaded with sand; or
b. Licensed for 7,500 pounds or less gross vehicle weight and loaded with rock, gravel, stone, or any other similar substance that could fall, blow, leak, sift, or drop;
shall not be driven or moved on any highway unless:
a. The height of the load against all four walls does not extend above a horizontal line six inches below the top when loaded at the loading point;
b. The load is securely covered by tarpaulin or some other suitable covering; or
c. The vehicle is constructed to prevent any of its load from falling, dropping, sifting, leaking, blowing, or otherwise escaping therefrom.

(4) This section shall not be applicable to or in any manner restrict the transportation of seed cotton, poultry or livestock, or silage or other feed grain used in the feeding of poultry or livestock.

(h) Whenever there exist two highways of the State highway system of approximately the same distance between two or more points, the Department of Transportation may, when in the opinion of the Department of Transportation, based upon engineering and traffic investigation, safety will be promoted or the public interest will be served, designate one of the highways the "truck route" between those points, and to prohibit the use of the other highway by heavy trucks or other vehicles of a gross vehicle weight or axle load limit in excess of a designated maximum. In such instances the highways selected for heavy vehicle traffic shall be designated as "truck routes" by signs conspicuously posted, and the highways upon which heavy vehicle traffic is prohibited shall likewise be designated by signs conspicuously posted showing the maximum gross vehicle weight or axle load limits authorized for those highways. The operation of any vehicle whose gross vehicle weight or axle load exceeds the maximum limits shown on signs over the posted highway shall constitute a Class 2 misdemeanor: Provided, that nothing in this subsection shall prohibit a truck or other motor vehicle whose gross vehicle weight or axle load exceeds that prescribed for those highways from using them when its destination is located solely upon that highway, road or street: Provided, further, that nothing in this subsection shall prohibit passenger vehicles or other light vehicles from using any highways designated for heavy truck traffic.

(i) Repealed by Session Laws 1973, c. 1330, s. 39.

(j) Self-propelled grain combines of other farm equipment self-propelled, pulled or otherwise, not exceeding 18 feet in width may be operated on any highway, except a highway or section of highway that is a part of the National System of Interstate and Defense Highways: Provided that all such combines or equipment which exceed 10 feet in width may be so operated only under the following conditions:

(1) Said equipment may only be so operated during daylight hours; and
(2) Said equipment must display a red flag on front and rear, said flags shall not be smaller than three feet wide and four feet long and be attached to a stick, pole, staff, etc., not less than four feet long and shall be so attached to said equipment as to be visible from both directions at all times while being operated on the public highway for not less than 300 feet; and
(3) Equipment [covered] by this section, which by necessity must travel more than 10 miles or where by nature of the terrain or obstacles the flags referred to in subdivision (2) are not visible from both directions for 300 feet at any point along the proposed route, must be preceded

at a distance of 300 feet and followed at a distance of 300 feet by a flagman in a vehicle having mounted thereon an appropriate warning light or flag.

(4) Every such piece of equipment so operated shall operate to the right of the center line when meeting traffic coming from the opposite direction and at all other times when possible and practical.

(5) Violation of this section shall not constitute negligence per se.

(6) When said equipment is causing a delay in traffic, the operator of said equipment shall move the equipment off the paved portion of the highway at the nearest practical location until the vehicles following said equipment have passed.

(k) Nothing in this section shall be construed to prevent the operation of passenger buses having an overall width of 102 inches, exclusive of safety equipment, upon the highways of this State which are 20 feet or wider and that are designated as the State primary system, or as municipal streets, when, and not until, the federal law and regulations thereunder permit the operation of passenger buses having a width of 102 inches or wider on the National System of Interstate and Defense Highways. (1937, c. 246; c. 407, s. 80; 1943, c. 213, s. 1; 1945, c. 242, s. 1; 1947, c. 844; 1951, c. 495, s. 1; c. 733; 1953, cc. 682, 1107; 1955, c. 296, s. 2; c. 729; 1957, c. 65, s. 11; cc. 493, 1183, 1190; 1959, c. 559; 1963, c. 356, s. 1; c. 610, ss. 1, 2; c. 702, s. 4; c. 1027, s. 1; 1965, c. 471; 1967, c. 24, s. 4; c. 710; 1969, cc. 128, 880; 1971, cc. 128, 680, 688, 1079; 1973, c. 507, s. 5; c. 546; c. 1330, s. 39; 1975, c. 148, ss. 1-5; c. 716, s. 5; 1977, c. 464, s. 34; 1979, cc. 21, 218; 1981, c. 169, s. 1; 1983, c. 724, s. 2; 1985, c. 587; 1987, c. 272; 1989, c. 277, s. 1; c. 790, s. 2; 1991, c. 112, s. 1; c. 449, ss. 1, 2.1; 1993, c. 539, s. 355; 1994, Ex. Sess., c. 24, s. 14(c); 1995 (Reg. Sess., 1996), c. 573, s. 1; c. 756, s. 14; 1998-149, s. 7; 1999-438, s. 28; 2000-185, s. 2; 2001-341, ss. 3, 4; 2001-512, s. 2; 2002-72, s. 19(c); 2002-159, s. 31.5(b); 2002-190, s. 2.)

Editor's Note. —

Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. —

Session Laws 2002-190, s. 2, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Department of Crime Control and Public Safety" for "Division" at the end of subsection (e).

Session Laws 2002-72, s. 19(c), effective August 12, 2002, rewrote subsection (d).

§ 20-118. Weight of vehicles and load.

(a) For the purposes of this section, the following definitions shall apply:

(1) Single-axle weight. — The gross weight transmitted by all wheels whose centers may be included between two parallel transverse vertical planes 40 inches apart, extending across the full width of the vehicle.

(2) Tandem-axle weight. — The gross weight transmitted to the road by two or more consecutive axles whose centers may be included between parallel vertical planes spaced more than 40 inches and not more than 96 inches apart, extending across the full width of the vehicle.

(3) Axle group. — Any two or more consecutive axles on a vehicle or combination of vehicles.

(4) Gross weight. — The weight of any single axle, tandem axle, or axle group of a vehicle or combination of vehicles plus the weight of any load thereon.

(5) Light-traffic roads. — Any highway on the State Highway System, excepting routes designated I, U.S. or N.C., posted by the Department of Transportation to limit the axle weight below the statutory limits.

(b) The following weight limitations shall apply to vehicles operating on the highways of the State:

(1) The single-axle weight of a vehicle or combination of vehicles shall not exceed 20,000 pounds.

(2) The tandem-axle weight of a vehicle or combination of vehicles shall not exceed 38,000 pounds.

(3) The gross weight imposed upon the highway by any axle group of a vehicle or combination of vehicles shall not exceed the maximum weight given for the respective distance between the first and last axle of the group of axles measured longitudinally to the nearest foot as set forth in the following table:

*Distance Between Axles**	*Maximum Weight in Pounds for any Group of Two or More Consecutive Axles*					
	2 Axles	*3 Axles*	*4 Axles*	*5 Axles*	*6 Axles*	*7 Axles*
4	38000					
5	38000					
6	38000					
7	38000					
8 or less	38000	38000				
more than 8	38000	42000				
9	39000	42500				
10	40000	43500				
11		44000				
12		45000	50000			
13		45500	50500			
14		46500	51500			
15		47000	52000			
16		48000	52500	58000		
17		48500	53500	58500		
18		49500	54000	59000		
19		50000	54500	60000		
20		51000	55500	60500	66000	
21		51500	56000	61000	66500	
22		52500	56500	61500	67000	
23		53000	57500	62500	68000	
24		54000	58000	63000	68500	74000
25		54500	58500	63500	69000	74500
26		55500	59500	64000	69500	75000
27		56000	60000	65000	70000	75500
28		57000	60500	65500	71000	76500
29		57500	61500	66000	71500	77000
30		58500	62000	66500	72000	77500
31		59000	62500	67500	72500	78000
32		60000	63500	68000	73000	78500
33			64000	68500	74000	79000
34			64500	69000	74500	80000
35			65500	70000	75000	
36			66000**	70500	75500	
37			66500**	71000	76000	

*Distance Between Axles**	*Maximum Weight in Pounds for any Group of Two or More Consecutive Axles*					
	2 Axles	*3 Axles*	*4 Axles*	*5 Axles*	*6 Axles*	*7 Axles*
38			67500**	72000	77000	
39			68000	72500	77500	
40			68500	73000	78000	
41			69500	73500	78500	
42			70000	74000	79000	
43			70500	75000	80000	
44			71500	75500		
45			72000	76000		
46			72500	76500		
47			73500	77500		
48			74000	78000		
49			74500	78500		
50			75500	79000		
51			76000	80000		
52			76500			
53			77500			
54			78000			
55			78500			
56			79500			
57			80000			

*Distance in Feet Between the Extremes of any Group of Two or More Consecutive Axles.

**See exception in G.S. 20-118(c)(1).

(4) The Department of Transportation may establish light-traffic roads and further restrict the axle weight limit on such light-traffic roads lower than the statutory limits. The Department of Transportation shall have authority to designate any highway on the State Highway System, excluding routes designated by I, U.S. and N.C., as a light-traffic road when in the opinion of the Department of Transportation, such road is inadequate to carry and will be injuriously affected by vehicles using the said road carrying the maximum axle weight. All such roads so designated shall be conspicuously posted as light-traffic roads and the maximum axle weight authorized shall be displayed on proper signs erected thereon.

(c) Exceptions. — The following exceptions apply to G.S. 20-118(b) and 20-118(e).

(1) Two consecutive sets of tandem axles may carry a gross weight of 34,000 pounds each without penalty provided the overall distance between the first and last axles of the consecutive sets of tandem axles is 36 feet or more.

(2) When a vehicle is operated in violation of G.S. 20-118(b)(1), 20-118(b)(2), or 20-118(b)(3), but the gross weight of the vehicle or combination of vehicles does not exceed that permitted by G.S. 20-118(b)(3), the owner of the vehicle shall be permitted to shift the load within the vehicle, without penalty, from one axle to another to comply with the weight limits in the following cases:

a. Where the single-axle load exceeds the statutory limits, but does not exceed 21,000 pounds.

b. Where the vehicle or combination of vehicles has tandem axles, but the tandem-axle weight does not exceed 40,000 pounds.

(3) When a vehicle is operated in violation of G.S. 20-118(b)(4) the owner of the vehicle shall be permitted, without penalty, to shift the load

within the vehicle from one axle to another to comply with the weight limits where the single-axle weight does not exceed the posted limit by 2,500 pounds.

(4) A truck or other motor vehicle shall be exempt from such light-traffic road limitations provided for pursuant to G.S. 20-118(b)(4), when transporting supplies, material or equipment necessary to carry out a farming operation engaged in the production of meats and agricultural crops and livestock or poultry by-products or a business engaged in the harvest or processing of seafood when the destination of such vehicle and load is located solely upon said light-traffic road.

(5) The light-traffic road limitations provided for pursuant to subdivision (b)(4) of this section do not apply to a vehicle while that vehicle is transporting only the following from its point of origin on a light-traffic road to either one of the two nearest highways that is not a light-traffic road:

a. Processed or unprocessed seafood transported from boats or any other point of origin to a processing plant or a point of further distribution.

b. Meats or agricultural crop products transported from a farm to first market.

c. Forest products originating and transported from a farm or from woodlands to first market without interruption or delay for further packaging or processing after initiating transport.

d. Livestock or poultry transported from their point of origin to first market.

e. Livestock by-products or poultry by-products transported from their point of origin to a rendering plant.

f. Recyclable material transported from its point of origin to a scrap-processing facility for processing. As used in this subpart, the terms "recyclable material" and "processing" have the same meaning as in G.S. 130A-290(a).

g. Garbage collected by the vehicle from residences or garbage dumpsters if the vehicle is fully enclosed and is designed specifically for collecting, compacting, and hauling garbage from residences or from garbage dumpsters. As used in this subpart, the term "garbage" does not include hazardous waste as defined in G.S. 130A-290(a), spent nuclear fuel regulated under G.S. 20-167.1, low-level radioactive waste as defined in G.S. 104E-5, or radioactive material as defined in G.S. 104E-5.

h. Treated sludge collected from a wastewater treatment facility.

i. Apples when transported from the orchard to the first processing or packing point.

j. Trees grown as Christmas trees from the field, farm, stand, or grove to first processing point.

(6) A truck or other motor vehicle shall be exempt from such light-traffic road limitations provided by G.S. 20-118(b)(4) when such motor vehicles are owned, operated by or under contract to a public utility, electric or telephone membership corporation or municipality and such motor vehicles are used in connection with installation, restoration or emergency maintenance of utility services.

(7) A wrecker may tow a disabled vehicle or combination of vehicles in an emergency to the nearest feasible point for parking or storage without being in violation of G.S. 20-118 provided that the wrecker and towed vehicle or combination of vehicles otherwise meet all requirements of this section.

(8) A firefighting vehicle operated by any member of a municipal or rural fire department in the performance of his duties, regardless of

whether members of that fire department are paid or voluntary and any vehicle of a voluntary lifesaving organization, when operated by a member of that organization while answering an official call shall be exempt from such light-traffic road limitations provided by G.S. 20-118(b)(4).

(9) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 12.

(10) Fully enclosed motor vehicles designed specifically for collecting, compacting and hauling garbage from residences, or from garbage dumpsters shall, when operating for those purposes, be allowed a single axle weight not to exceed 23,500 pounds on the steering axle on vehicles equipped with a boom, or on the rear axle on vehicles loaded from the rear. This exemption shall not apply to vehicles operating on interstate highways, vehicles transporting hazardous waste as defined in G.S. 130A-290(a)(8), spent nuclear fuel regulated under G.S. 20-167.1, low-level radioactive waste as defined in G.S. 104E-5(9a), or radioactive material as defined in G.S. 104E-5(14).

(11) A truck or other motor vehicle shall be exempt for light-traffic road limitations issued under subdivision (b)(4) of this section when transporting heating fuel for on-premises use at a destination located on the light-traffic road.

(12) Subsections (b) and (e) of this section do not apply to a vehicle that (i) is hauling agricultural crops from the farm where they were grown to first market, (ii) is within 35 miles of that farm, (iii) does not operate on an interstate highway or posted bridge while hauling the crops, and meets one of the following descriptions:

a. Is a five-axle combination with a gross weight of no more than 90,000 pounds, a single-axle weight of no more than 22,000 pounds, a tandem-axle weight of no more than 42,000 pounds, and a length of at least 51 feet between the first and last axles of the combination.

b. Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 13.

c. Is a four-axle combination with a gross weight that does not exceed the limit set in subdivision (b)(3) of this section, a single-axle weight of no more than 22,000 pounds, and a tandem-axle weight of no more than 42,000 pounds.

(13) Vehicles specifically designed for fire fighting that are owned by a municipal or rural fire department. This exception does not apply to vehicles operating on interstate highways.

(14) Subsections (b) and (e) of this section do not apply to a vehicle that meets all of the conditions below, but all other enforcement provisions of this Article remain applicable:

a. Is hauling aggregates from a distribution yard or a State-permitted production site within a North Carolina county contiguous to the North Carolina State border to a destination in another state adjacent to that county as verified by a weight ticket in the driver's possession and available for inspection by enforcement personnel.

b. Does not operate on an interstate highway or posted bridge.

c. Does not exceed 69,850 pounds gross vehicle weight and 53,850 pounds per axle grouping for tri-axle vehicles. For purposes of this subsection, a tri-axle vehicle is a single power unit vehicle with a three consecutive axle group on which the respective distance between any two consecutive axles of the group, measured longitudinally center to center to the nearest foot, does not exceed eight feet. For purposes of this subsection, the tolerance provisions of subsection (h) of this section do not apply, and vehicles must be licensed in accordance with G.S. 20-88.

d. Repealed by Session Laws 2001-487, s. 10, effective December 16, 2001.

(15) Subsections (b) and (e) of this section do not apply to a vehicle or vehicle combination that meets all of the conditions below, but all other enforcement provisions of this Article remain applicable:

a. Is hauling wood residuals, including wood chips, sawdust, mulch, or tree bark.

b. Does not operate on an interstate highway, a posted light-traffic road, or a posted bridge.

c. Does not exceed a maximum gross weight 4,000 pounds in excess of what is allowed in subsection (b) of this section.

d. Does not exceed a single-axle weight of more than 22,000 pounds and a tandem-axle weight of more than 42,000 pounds.

(d) The Department of Transportation is authorized to abrogate certain exceptions. The exceptions provided for in G.S. 20-118(c)(4) and 20-118(c)(5) as applied to any light-traffic road may be abrogated by the Department of Transportation upon a determination of the Department of Transportation that undue damage to such light-traffic road is resulting from such vehicles exempted by G.S. 20-118(c)(4) and 20-118(c)(5). In those cases where the exemption to the light-traffic roads are abrogated by the Department of Transportation, the Department shall post the road to indicate no exemptions.

(e) Penalties. —

(1) Except as provided in subdivision (2) of this subsection, for each violation of the single-axle or tandem-axle weight limits set in subdivision (b)(1), (b)(2), or (b)(4) of this section, the Department of Transportation shall assess a civil penalty against the owner or registrant of the vehicle in accordance with the following schedule: for the first 1,000 pounds or any part thereof, four cents (4¢) per pound; for the next 1,000 pounds or any part thereof, six cents (6¢) per pound; and for each additional pound, ten cents (10¢) per pound. These penalties apply separately to each weight limit violated. In all cases of violation of the weight limitation, the penalty shall be computed and assessed on each pound of weight in excess of the maximum permitted.

(2) The penalty for a violation of the single-axle or tandem-axle weight limits by a vehicle that is transporting an item listed in subdivision (c)(5) of this section is one-half of the amount it would otherwise be under subdivision (1) of this subsection.

(3) If an axle-group weight of a vehicle exceeds the weight limit set in subdivision (b)(3) of this section plus any tolerance allowed in subsection (h) of this section, the Department of Transportation shall assess a civil penalty against the owner or registrant of the motor vehicle. The penalty shall be assessed on the number of pounds by which the axle-group weight exceeds the limit set in subdivision (b)(3), as follows: for the first 2,000 pounds or any part thereof, two cents (2¢) per pound; for the next 3,000 pounds or any part thereof, four cents (4¢) per pound; for each pound in excess of 5,000 pounds, ten cents (10¢) per pound. Tolerance pounds in excess of the limit set in subdivision (b)(3) are subject to the penalty if the vehicle exceeds the tolerance allowed in subsection (h) of this section. These penalties apply separately to each axle-group weight limit violated.

(4) The penalty for a violation of an axle-group weight limit by a vehicle that is transporting an item listed in subdivision (c)(5) of this section is one-half of the amount it would otherwise be under subdivision (3) of this subsection.

(5) A violation of a weight limit in this section is not punishable under G.S. 20-176.

(f) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 15.

(g) General Statutes 20-118 shall not be construed to permit the gross weight of any vehicle or combination in excess of the safe load carrying capacity established by the Department of Transportation on any bridge pursuant to G.S. 136-72.

(h) Tolerance. — A vehicle may exceed maximum and the inner axle-group weight limitations set forth in subdivision (b)(3) of this section by a tolerance of ten percent (10%). This exception does not authorize a vehicle to exceed either the single-axle or tandem-axle weight limitations set forth in subdivisions (b)(1) and (b)(2) of this section, or the maximum gross weight limit of 80,000 pounds. This exception does not apply to bridges posted under G.S. 136-72 or to vehicles operating on interstate highways. The tolerance allowed under this subsection does not authorize the weight of a vehicle to exceed the weight for which that vehicle is licensed under G.S. 20-88. No tolerance on the single-axle weight or the tandem-axle weight provided for in subdivisions (b)(1) and (b)(2) of this section shall be granted administratively or otherwise. The Department of Transportation shall report back to the Transportation Oversight Committee and to the General Assembly on the effects of the tolerance granted under this section, any abuses of this tolerance, and any suggested revisions to this section by that Department on or before May 1, 1998.

(i) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 16.

(j) Repealed by Session Laws 1987, c. 392.

(k) From September 1 through March 1 of each year, a vehicle which is equipped with a self-loading bed and which is designed and used exclusively to transport compressed seed cotton from the farm to a cotton gin may operate on the highways of the State, except interstate highways, with a tandem-axle weight not exceeding 44,000 pounds. Such vehicles shall be exempt from light-traffic road limitations only from point of origin on the light-traffic road to the nearest State-maintained road which is not posted to prohibit the transportation of statutory load limits. This exemption does not apply to restricted, posted bridge structures. (1937, c. 407, s. 82; 1943, c. 213, s. 2; cc. 726, 784; 1945, c. 242, s. 2; c. 569, s. 2; c. 576, s. 7; 1947, c. 1079; 1949, c. 1207, s. 2; 1951, c. 495, s. 2; c. 942, s. 1; c. 1013, ss. 5, 6, 8; 1953, cc. 214, 1092; 1959, c. 872; c. 1264, s. 6; 1963, c. 159; c. 610, ss. 3-5; c. 702, s. 5; 1965, cc. 483, 1044; 1969, c. 537; 1973, c. 507, s. 5; c. 1449, ss. 1, 2; 1975, c. 325; c. 373, s. 2; c. 716, s. 5; c. 735; c. 736, ss. 1-3; 1977, c. 461; c. 464, s. 34; 1977, 2nd Sess., c. 1178; 1981, c. 690, ss. 27, 28; c. 726; c. 1127, s. 53.1; 1983, c. 407; c. 724, s. 1; 1983 (Reg. Sess., 1984), c. 1116, ss. 105-109; 1985, c. 54; c. 274; 1987, c. 392; c. 707, ss. 1-4; 1991, c. 202, s. 1; 1991 (Reg. Sess., 1992), c. 905, s. 1; 1993, c. 426, ss. 1, 2; c. 470, s. 1; c. 533, s. 11; 1993 (Reg. Sess., 1994), c. 761, ss. 10-16; 1995, c. 109, s. 3; c. 163, s. 4; c. 332, ss. 1-3 ; c. 509, s. 135.1(b); 1995 (Reg. Sess., 1996), c. 756, s. 29; 1997-354, s. 1; 1997-373, s. 1; 1997-466, s. 2; 1998-149, ss. 8, 9, 9.1; 1998-177, s. 1; 1999-452, s. 23; 2000-57, s. 1; 2001-487, ss. 10, 50(e); 2002-126, s. 26.16(a).)

Editor's Note. —

Session Laws 2002-126, s. 26.16(b), provides: "The Joint Legislative Transportation Oversight Committee shall study the rationale for and effect of the exceptions to the highway weight limitations contained in G.S. 20-118(c)."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Effect of Amendments. —

Session Laws 2002-126, s. 26.16(a), effective July 1, 2002, added subdivision (c)(15).

§ 20-126. Mirrors.

(a) No person shall drive a motor vehicle on the streets or highways of this State unless equipped with an inside rearview mirror of a type approved by the Commissioner, which provides the driver with a clear, undistorted, and reasonably unobstructed view of the highway to the rear of such vehicle; provided, a vehicle so constructed or loaded as to make such inside rearview mirror ineffective may be operated if equipped with a mirror of a type to be approved by the Commissioner located so as to reflect to the driver a view of the highway to the rear of such vehicle. A violation of this subsection shall not constitute negligence per se in civil actions. Farm tractors, self-propelled implements of husbandry and construction equipment and all self-propelled vehicles not subject to registration under this Chapter are exempt from the provisions of this section. Provided that pickup trucks equipped with an outside rearview mirror approved by the Commissioner shall be exempt from the inside rearview mirror provision of this section. Any inside mirror installed in any motor vehicle by its manufacturer shall be deemed to comply with the provisions of this subsection.

(b) It shall be unlawful for any person to operate upon the highways of this State any vehicle manufactured, assembled or first sold on or after January 1, 1966 and registered in this State unless such vehicle is equipped with at least one outside mirror mounted on the driver's side of the vehicle. Mirrors herein required shall be of a type approved by the Commissioner.

(c) No person shall operate a motorcycle upon the streets or highways of this State unless such motorcycle is equipped with a rearview mirror so mounted as to provide the operator with a clear, undistorted and unobstructed view of at least 200 feet to the rear of the motorcycle. No motorcycle shall be registered in this State after January 1, 1968, unless such motorcycle is equipped with a rearview mirror as described in this section. Violation of the provisions of this subsection shall not be considered negligence per se or contributory negligence per se in any civil action. (1937, c. 407, s. 89; 1965, c. 368; 1967, c. 282, s. 1; c. 674, s. 2; c. 1139; 2002-159, ss. 22(a), 22(b).)

Effect of Amendments. — Session Laws 2002-159, s. 22(a) and (b), effective October 11, 2002, codified Session Laws 1967, c. 282, s. 1.2 as the last sentence of subsection (a); and amended that sentence by substituting "this subsection" for "this Act" at the end.

§ 20-135.2A. Seat belt use mandatory.

(a) Each front seat occupant who is 16 years of age or older and each driver of a passenger motor vehicle manufactured with seat belts shall have a seat belt properly fastened about his or her body at all times when the vehicle is in forward motion on a street or highway in this State.

(b) "Passenger Motor Vehicle," as used in this section, means a motor vehicle with motive power designed for carrying 10 passengers or fewer, but does not include a motorcycle, a motorized pedacycle or a trailer.

(c) This section shall not apply to any of the following:

(1) A driver or occupant with a medical or physical condition that prevents appropriate restraint by a safety belt or with a professionally certified mental phobia against the wearing of vehicle restraints;

(2) A motor vehicle operated by a rural letter carrier of the United States Postal Service while performing duties as a rural letter carrier and a motor vehicle operated by a newspaper delivery person while actually engaged in delivery of newspapers along the person's specified route;

(3) A driver or passenger frequently stopping and leaving the vehicle or delivering property from the vehicle if the speed of the vehicle between stops does not exceed 20 miles per hour;

(4) Any vehicle registered and licensed as a property-carrying vehicle in accordance with G.S. 20-88, while being used for agricultural or commercial purposes; or

(5) A motor vehicle not required to be equipped with seat safety belts under federal law.

(d) Evidence of failure to wear a seat belt shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on a violation of this section or as justification for the stop of a vehicle or detention of a vehicle operator and passengers.

(e) Any driver or passenger who fails to wear a seat belt as required by this section shall have committed an infraction and shall pay a penalty of twenty-five dollars ($25.00) plus court costs in the sum of fifty dollars ($50.00). Court costs assessed under this section are for the support of the General Court of Justice and shall be remitted to the State Treasurer. Conviction of an infraction under this section has no other consequence.

(f) No drivers license points or insurance surcharge shall be assessed on account of violation of this section.

(g) The Commissioner of the Division of Motor Vehicles and the Department of Public Instruction shall incorporate in driver education programs and driver licensing programs instructions designed to encourage compliance with this section as an important means of reducing the severity of injury to the users of restraint devices and on the requirements and penalties specified in this law.

(h) Repealed by Session Laws 1999-183, s. 3, effective October 1, 1999.

(1985, c. 222, s. 1; 1987, c. 623; 1991, c. 448, s. 1; 1994, Ex. Sess., c. 5, s. 1; 1997-16, s. 2; 1997-443, s. 32.20; 1999-183, ss. 1-3; 2002-126, s. 29A.3(a).)

Editor's Note. —

Session Laws 2002-126, s. 29A.3(b), provides: "This section becomes effective October 1, 2002, and applies to all costs assessed or collected on or after that date, except that in cases disposed of on or after that date by written appearance, waiver of trial or hearing, or admission of responsibility pursuant to G.S. 7A-180(4) or G.S. 7A-273(2), in which the citation or other criminal process was issued before that date, no costs shall be assessed."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Effect of Amendments. — Session Laws 2002-126, s. 135.2A(e), effective October 1, 2002, rewrote subsection (e). See editor's note.

Part 10. Operation of Vehicles and Rules of the Road.

§ 20-138.1. Impaired driving.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in State v. McDonald, — N.C. App. —, 565 S.E.2d 273, 2002 N.C. App. LEXIS 725 (2002); Efird v. Hubbard, — N.C. App. —, 565 S.E.2d 713, 2002 N.C. App. LEXIS 753 (2002).

Cited in Iodice v. United States, 289 F.3d 270, 2002 U.S. App. LEXIS 8388 (4th Cir. 2002); Davis v. N.C. Dep't of Crime Control & Pub. Safety, — N.C. App. —, 565 S.E.2d 716, 2002 N.C. App. LEXIS 777 (2002).

§ 20-138.3. Driving by person less than 21 years old after consuming alcohol or drugs.

CASE NOTES

Cited in Iodice v. United States, 289 F.3d 270, 2002 U.S. App. LEXIS 8388 (4th Cir. 2002).

§ 20-138.7. (Effective until September 30, 2006) Transporting an open container of alcoholic beverage.

For this section as in effect September 30, 2006, see the main volume.

Editor's Note. — Session Laws 2000-155, s. 21, as amended by Session Laws 2002-25, s. 1, provides that the amendment to this section by s. 4 of the act is effective September 1, 2000, and expires September 30, 2006.

§ 20-139.1. Procedures governing chemical analyses; admissibility; evidentiary provisions; controlled-drinking programs.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in State v. McDonald, — N.C. App. —, 565 S.E.2d 273, 2002 N.C. App. LEXIS 725 (2002).

§ 20-140. Reckless driving.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in State v. Phillips, — N.C. App. —, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002).

§ 20-140.4. Special provisions for motorcycles and mopeds.

Editor's Note. — Session Laws 2002-170, s. 7, provides: "The Joint Legislative Transportation Oversight Committee shall study the creation of a moped identification tag program administered by a third-party contractor approved by the Commissioner of Motor Vehicles. The Committee shall report its findings and recommendations on this issue to the General Assembly by March 1, 2003."

§ 20-141.5. Speeding to elude arrest.

CASE NOTES

Defendant's prior conviction under G.S. 20-141.5(a) obviously presented a serious risk of injury to another in the abstract; it had not been necessary to consider evidence concerning the statutory definition, and thus, in sentencing the defendant, the federal district court correctly proceeded under the "otherwise" clause of 18 U.S.C.S. § 924(e)(2)(B). United States v. Green, — F.3d —, 2002 U.S. App. LEXIS 9656 (4th Cir. May 22, 2002).

§ 20-158.2. Control of vehicles on Turnpike System.

The North Carolina Turnpike Authority may control vehicles at appropriate places by erecting traffic control devices to collect tolls. (2002-133, s. 2.)

Cross References. — As to public toll roads and bridges, generally, see G.S. 136-89.180 et seq. As to the North Carolina Turnpike Authority, see G.S. 136-89.182.

Editor's Note. — Session Laws 2002-133, s. 10, made this section effective October 3, 2002.

§ 20-161. Stopping on highway prohibited; warning signals; removal of vehicles from public highway.

CASE NOTES

IV. Negligence and Proximate Cause.

IV. NEGLIGENCE AND PROXIMATE CAUSE.

Evidence Held to Disclose Contributory Negligence. —

Where plaintiff may have raised a question of fact for the jury as to whether her stop at an accident site to offer assistence was a "necessary" one, it was uncontested that plaintiff had no disabling condition which caused her to stop the vehicle; thus, she violated G.S. 20- 161(a), and it was proper for the trial court to direct a verdict in favor of defendant. Hutton v. Logan, — N.C. App. —, 566 S.E.2d 782, 2002 N.C. App. LEXIS 884 (2002).

§ 20-162. Parking in front of private driveway, fire hydrant, fire station, intersection of curb lines or fire lane.

Local Modification. — City of Wilson: 1985, c. 137; Town of Manteo: 2002-141, s. 7.

§ 20-166. Duty to stop in event of accident or collision; furnishing information or assistance to injured person, etc.; persons assisting exempt from civil liability.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in Hutton v. Logan, — N.C. App. —, 566 S.E.2d 782, 2002 N.C. App. LEXIS 884 (2002).

Part 11C. Electric Personal Assistive Mobility Devices.

§ 20-175.6. Electric personal assistive mobility devices.

(a) Electric Personal Assistive Mobility Device. — As defined in G.S. 20-4.01(7a).

(b) Exempt From Registration. — As provided in G.S. 20-51.

(c) Use of Device. — An electric personal assistive mobility device may be operated on public highways with posted speeds of 25 miles per hour or less, sidewalks, and bicycle paths. A person operating an electric personal assistive mobility device on a sidewalk, roadway, or bicycle path shall yield the right-of-way to pedestrians and other human-powered devices. A person operating an electric personal assistive mobility device shall have all rights and duties of a pedestrian, including the rights and duties set forth in Part 11 of this Article.

(d) Municipal Regulation. — For the purpose of assuring the safety of persons using highways and sidewalks, municipalities having jurisdiction over public streets, sidewalks, alleys, bridges, and other ways of public passage may by ordinance regulate the time, place, and manner of the operation of electric personal assistive mobility devices, but shall not prohibit their use. (2002-98, s. 5.)

Cross References. — As to definition of electric personal assistive mobility device, see G.S. 20-4.01. As to exemption of electric personal assistive mobility device from registration and title under the motor vehicle laws, see G.S. 20-51.

Editor's Note. — Session Laws 2002-98, s. 6, made this Part effective August 29, 2002.

Part 12. Sentencing; Penalties.

§ 20-179.4. Community service alternative punishment; responsibilities of the Department of Crime Control and Public Safety; fee.

(a) The Department of Crime Control and Public Safety shall conduct a community service alternative punishment program for persons sentenced under G.S. 20-179(i), (j) or (k).

(b) The Secretary of Crime Control and Public Safety shall assign at least one coordinator to each district court district as defined in G.S. 7A-133 to assure and report to the court the person's compliance with the community service sentence. 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 must provide office space in the courthouse or other convenient place, necessary equipment, and secretarial service for the use of each coordinator assigned to that county.

(c) A fee of two hundred dollars ($200.00) shall be paid by all persons serving a community service sentence. That fee shall be paid to the clerk of court in the county in which the person is convicted. The fee shall be paid in full within two weeks unless the court, upon a showing of hardship by the person, allows additional time to pay the fee. The person may not be required to pay the fee before beginning the community service unless the court specifically orders the person to do so.

(d) Fees collected under this section shall be deposited in the general fund.

(e) The coordinator shall report to the court in which the community service was ordered a significant violation of the terms of the probation judgment related to community service. The court shall then conduct a hearing to

determine if there is a willful failure to comply. If the court determines there is a willful failure to pay the prescribed fee or to complete the work as ordered by the coordinator within the applicable time limits, the court shall revoke any limited driving privilege issued in the impaired driving case until the community service requirement has been met and in addition may take any further action authorized by Article 82 of General Statutes Chapter 15A for violation of a condition of probation. (1983, c. 761, s. 154; 1983 (Reg. Sess., 1984), c. 1101, ss. 34, 35; 1987 (Reg. Sess., 1988), c. 1037, s. 82; 1989, c. 752, s. 109; 1995, c. 496, s. 9; 1997-234, s. 1; 2002-126, s. 29A.1(b).)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 29A.1(b), effective October 1, 2002, and applicable to fees assessed or collected on or after that date, substituted "two hundred dollars ($200.00)" for "one hundred dollars ($100.00)" in subsection (c).

Article 3B.

Permanent Weighing Stations and Portable Scales.

§ 20-183.9. Establishment and maintenance of permanent weighing stations.

The Department of Crime Control and Public Safety is hereby authorized, empowered and directed to equip, operate, and maintain permanent weighing stations equipped to weigh vehicles using the streets and highways of this State to determine whether such vehicles are being operated in accordance with legislative enactments relating to weights of vehicles and their loads. The permanent weighing stations shall be established at such locations on the streets and highways in this State as will enable them to be used most advantageously in determining the weight of vehicles and their loads. (1951, c. 988, s. 1; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, ss. 34, 37; 1979, c. 76; 2002-159, s. 31.5(b); 2002-190, s. 7.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 7, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Department of Crime Control and Public Safety" for "Department of Transportation," substituted "equip, operate and maintain" for "establish during the biennium ending June 30, 1953, not less than six nor more than 13," and deleted the former last sentence, pertaining to equipping and maintaining weighing stations.

§ 20-183.10. Operation by Department of Crime Control and Public Safety uniformed personnel with powers of peace officers.

The permanent weighing stations to be established pursuant to the provisions of this Article shall be operated by the Department of Crime Control and Public Safety and the personnel assigned to the various stations shall wear uniforms to be selected and furnished by the Department of Crime Control and Public Safety. The uniformed officers assigned to the various permanent weighing stations shall have the powers of peace officers for the purpose of enforcing the provisions of this Chapter and in making arrests, serving

process, and appearing in court in all matters and things relating to the weight of vehicles and their loads. (1951, c. 988, s. 2; 1975, c. 716, s. 5; 1977, c. 319; 2002-159, s. 31.5(b); 2002-190, s. 8.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 8, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Department of Crime Control and Public Safety" for "Division of Motor Vehicles" in the catchline and twice in the first paragraph, and deleted the former second paragraph, providing an appropriation.

Article 4.

State Highway Patrol.

§ 20-187.3. Quotas prohibited.

Editor's Note. — Session Laws 2002-12, s. 3, as amended by Session Laws 2002-54, s. 1, by Session Laws 2002-101, s. 1, and by Session Laws 2002-126, s. 31.4(c), effective July 1, 2002 and expiring September 30, 2002, provides: "State employees subject to G.S. 7A-102(c), 7A-171.1, or 20-187.3 shall not move up on salary schedules or receive automatic increases, including automatic step increases, until authorized by the General Assembly.

"Public school employees paid on the teacher salary schedule or the school-based administrator salary schedule shall not move up on salary schedules or receive automatic step increases until authorized by the General Assembly."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

§ 20-196.3. Who may hold supervisory positions over sworn members of the Patrol.

Notwithstanding any other provision of the General Statutes of North Carolina, it shall be unlawful for any person other than the Governor and the Secretary of Crime Control and Public Safety and other than a uniformed member of the North Carolina State Highway Patrol who has met all requirements for employment within the Patrol, including but not limited to completion of the basic Patrol school, to hold any supervisory position over sworn members of the Patrol. (1975, c. 47; 1977, c. 70, s. 14.1; 2002-159, ss. 31.5(a), (b); 2002-190, s. 9.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 9, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "sworn members of" for "uniformed personnel within."

Session Laws 2002-159, s. 31.5(a), effective October 11, 2002, rewrote the section heading, which formerly read: "Who may hold supervisory positions over uniformed personnel."

§ 20-196.4. Oversized and hazardous shipment escort fee.

(a) Every person, firm, corporation, or entity required by the North Carolina Department of Transportation or any federal agency or commission to have a law enforcement escort provided by the State Highway Patrol for the transport of any oversized load or hazardous shipment by road or rail shall pay to the Department of Crime Control and Public Safety a fee covering the full cost to administer, plan, and carry out the escort within this State.

(b) If the State Highway Patrol provides an escort to accompany the transport of oversized loads or hazardous shipments by road or rail at the request of any person, firm, corporation, or entity that is not required to have a law enforcement escort pursuant to subsection (a) of this section, then the requester shall pay to the Department of Crime Control and Public Safety a fee covering the full cost to administer, plan, and carry out the escort within this State.

(c) The Department of Crime Control and Public Safety shall comply with the provisions of G.S. 12-3.1(a)(2) when establishing fees to implement this section.

(d) All fees collected pursuant to this section shall be placed in a special Escort Fee Account and shall remain unencumbered and unexpended until appropriated by the General Assembly.

(e) The Department shall report quarterly on the funds in the special account to the Chairs of the Joint Legislative Transportation Oversight Committee, to the Chairs of the House of Representatives Appropriations Subcommittee on Transportation and the Senate Appropriations Subcommittee on Department of Transportation, and to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety. (2002-126, s. 26.17(a).)

Editor's Note. — Session Laws 2002-126, s. 26.17(b), made this section effective November 1, 2002.

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

ARTICLE 9A.

Motor Vehicle Safety and Financial Responsibility Act of 1953.

§ 20-279.21. "Motor vehicle liability policy" defined.

CASE NOTES

I. General Consideration.
III. Uninsured Motorist Coverage.
IV. Underinsured Motorist Coverage.

I. GENERAL CONSIDERATION.

"Using" a Vehicle. —

Where an insured was towing his disabled truck with his car, the insured was using the truck when an accident occurred, thereby giving rise to liability coverage under an insurance policy for both the truck and the car. Floyd v. Integon Gen. Ins. Corp., — N.C. App. —, 567 S.E.2d 823, 2002 N.C. App. LEXIS 916 (2002).

Plaintiff's Failure to Serve Insurer Did Not Render Judgment Against Insured Void. — Where a default judgment was entered against an insured in an individual's negligence action, the trial court did not abuse its discretion in denying the intervening insurer's motion to set aside the judgment as void under G.S. 1A-1, Rule 60(b)(4) on the ground that the individual who sued the insured had not given the insurer proper notification of the suit under

G.S. 20-279.21(b)(3), as the insurer failed to show that the lack of notice to the insurer deprived the trial court of jurisdiction or authority to enter the default judgment against the insured, or otherwise rendered the judgment void. Barton v. Sutton, — N.C. App. —, 568 S.E.2d 264, 2002 N.C. App. LEXIS 976 (2002).

III. UNINSURED MOTORIST COVERAGE.

Amendment of Policy Does Not Affect Rejection. — Where the husband refused uninsured motorist coverage and then added his wife to the insurance policy as a named insured party, this amendment did not require another offer of uninsured motorist coverage under G.S. 20-279.21(b)(3), because a new policy was not being issued. Weaver v. O'Neal, — N.C. App. —, 566 S.E.2d 146, 2002 N.C. App. LEXIS 769 (2002).

IV. UNDERINSURED MOTORIST COVERAGE.

Per Claimant or Per Accident Coverage. —

Where the injured parties' insurer provided $500,000 of underinsured motorist coverage in any single accident, and the injured parties were each paid $100,000 by the tortfeasor's insurer, in determining the amount due to the injured parties, the total amount paid by the tortfeasor's insurer to the injured parties, $200,000, was to be subtracted from the $500,000 policy limits of the injured parties' insurer. Nationwide Mut. Ins. Co. v. Haight, — N.C. App. —, 566 S.E.2d 835, 2002 N.C. App. LEXIS 891 (2002).

ARTICLE 12.

Motor Vehicle Dealers and Manufacturers Licensing Law.

§ 20-305.2. Unfair methods of competition.

(a) It is unlawful for any motor vehicle manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof, to directly or indirectly through any subsidiary or affiliated entity, own any ownership interest in, operate, or control any motor vehicle dealership in this State, provided that this section shall not be construed to prohibit:

(1) The operation by a manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof, of a dealership for a temporary period (not to exceed one year) during the transition from one owner or operator to another; or

(2) The ownership or control of a dealership by a manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof, while in a bona fide relationship with an economically disadvantaged or other independent person, other than a manufacturer, factory branch, distributor, distributor branch, or an agent or affiliate thereof, who has made a bona fide, unencumbered initial investment of at least six percent (6%) of the total sales price that is subject to loss in the dealership and who can reasonably expect to acquire full ownership of the dealership within a reasonable period of time, not to exceed 12 years, and on reasonable terms and conditions; or

(3) The ownership, operation or control of a dealership by a manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof, if such manufacturer, factory branch, distributor, distributor branch, or subsidiary has been engaged in the retail sale of motor vehicles through such dealership for a continuous period of three years prior to March 16, 1973, and if the Commissioner determines, after a hearing on the matter at the request of any party, that there is no independent dealer available in the relevant market area to own and operate the franchise in a manner consistent with the public interest; or

(4) The ownership, operation, or control of a dealership by a manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof, if the Commissioner determines after a hearing on the matter

at the request of any party, that there is no independent dealer available in the relevant market area to own and operate the franchise in a manner consistent with the public interest; or

(5) The ownership, operation, or control of any facility (location) of a new motor vehicle dealer in this State at which the dealer sells only new and used motor vehicles with a gross weight rating of 8,500 pounds or more, provided that both of the following conditions have been met:

a. The facility is located within 35 miles of manufacturing or assembling facilities existing as of January 1, 1999, and is owned or operated by the manufacturer, manufacturing branch, distributor, distributor branch, or any affiliate or subsidiary thereof which assembles, manufactures, or distributes new motor vehicles with a gross weight rating of 8,500 pounds or more by such dealer at said location; and

b. The facility is located in the largest Standard Metropolitan Statistical Area (SMSA) in the State; or

(6) As to any line make of motor vehicle for which there is in aggregate no more than 13 franchised new motor vehicle dealers (locations) licensed and in operation within the State as of January 1, 1999, the ownership, operation, or control of one or more new motor vehicle dealership trading solely in such line make of vehicle by the manufacturer, factory branch, distributor, distributor branch, or subsidiary or affiliate thereof, provided however, that all of the following conditions are met:

a. The manufacturer, factory branch, distributor, distributor branch, or subsidiary or affiliate thereof does not own directly or indirectly, in aggregate, in excess of forty-five percent (45%) interest in the dealership;

b. At the time the manufacturer, factory branch, distributor, distributor branch, or subsidiary or affiliate thereof first acquires ownership or assumes operation or control with respect to any such dealership, the distance between the dealership thus owned, operated, or controlled and the nearest other new motor vehicle dealership trading in the same line make of vehicle, is no less than 35 miles;

c. All the manufacturer's franchise agreements confer rights on the dealer of the line make to develop and operate within a defined geographic territory or area, as many dealership facilities as the dealer and manufacturer shall agree are appropriate; and

d. That as of July 1, 1999, not fewer than half of the dealers of the line make within the State own and operate two or more dealership facilities in the geographic territory or area covered by the franchise agreement with the manufacturer.

(7) The ownership, operation, or control of a dealership that sells primarily recreational vehicles as defined in [G.S.] 20-4.01 by a manufacturer, factory branch, distributor, or distributor branch, or subsidiary thereof, if the manufacturer, factory branch, distributor, or distributor branch, or subsidiary thereof, owned, operated, or controlled the dealership as of October 1, 2001.

(b) This section does not apply to manufacturers or distributors of trailers or semitrailers that are not recreational vehicles as defined in G.S. 20-4.01. (1973, c. 88, s. 3; 1983, c. 704, ss. 14, 15; 1999-335, s. 5; 2001-510, s. 3; 2002-72, ss. 19(d), 19(e).)

Effect of Amendments. — Session Laws 2002-72, s. 19(d), (e), effective August 12, 2002, in subdivision (a)(7), substituted "recreational vehicles as defined in [G.S.]

20-4.01" for "recreation vehicles as defined in G.S. 20-4.01(32a)"; and in subsection (b), substituted "does not apply" for "shall not apply," and "recreational vehicles as defined in G.S. 20-4.01" for "recreation vehicles as defined in G.S. 20-4.01(32a)."

Article 14.

Driver Training School Licensing Law.

§ 20-320. Definitions.

Editor's Note. — Session Laws 2002-126, s. 26.8, provides: "By January 1, 2003, the Division of Motor Vehicles shall issue rules authorizing certified Commercial Truck Driver Training Schools to offer an 80-hour curriculum appropriate to prepare a student to meet the requirements for a Class B Commercial Drivers License. These rules shall be consistent with existing rules governing Commercial Truck Driver Training Schools as provided for in G.S. 20-320 through G.S. 20-328 and applicable administrative code sections, except for the hours of instruction required."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Article 15.

Vehicle Mileage Act.

§ 20-348. Private civil action.

CASE NOTES

Intent to Defraud Essential to Action for Damages. —

In order to properly plead a cause of action under G.S. 20-71.4(a), and 20-348(a), a plaintiff must allege fraudulent intent in addition to a violation of the disclosure provisions of G.S. 20-71.4(a). Bowman v. Alan Vester Ford Lincoln Mercury, — N.C. App. —, 566 S.E.2d 818, 2002 N.C. App. LEXIS 886 (2002).

Article 15B.

North Carolina Motor Vehicle Repair Act.

§ 20-354.6. Invoice required of motor vehicle repair shop.

The motor vehicle repair shop shall provide each customer, upon completion of any repair, with a legible copy of an invoice for such repair. The invoice shall include the following information:

(1) A statement indicating what was done to correct the problem or a description of the service provided.

(2) An itemized description of all labor, parts, and merchandise supplied and the costs of all labor, parts, and merchandise supplied. No itemized description is required to be provided to the customer for labor, parts, and merchandise supplied when a third party has indicated to the motor vehicle repair shop that the repairs will be paid

for under a service contract, under a mechanical breakdown contract, or under a manufacturer's warranty, without charge to the customer.

(3) A statement identifying any replacement part as being used, rebuilt, or reconditioned, as the case may be. (1999-437, s. 1; 2001-298, s. 5; 2002-159, s. 32.)

Effect of Amendments. — Session Laws 2002-159, s. 32, effective October 11, 2002, in subdivision (2), substituted "customer" for "consumer" twice.

Article 17.

Motor Carrier Safety Regulation Unit.

Part 1. General Provisions.

§ 20-376. Definitions.

The following definitions apply in this Article:

(1) Federal safety and hazardous materials regulations. — The federal motor carrier safety regulations contained in 49 C.F.R. Parts 171 through 180, 382, and 390 through 398.

(2) Foreign commerce. — Commerce between any of the following:

a. A place in the United States and a place in a foreign country.

b. Places in the United States through any foreign country.

(3) Interstate commerce. — As defined in 49 C.F.R. Part 390.5.

(3a) Interstate motor carrier. — Any person, firm, or corporation that operates or controls a commercial motor vehicle as defined in 49 C.F.R. § 390.5 in interstate commerce.

(4) Intrastate commerce. — As defined in 49 C.F.R. Part 390.5.

(5) Intrastate motor carrier. — Any person, firm, or corporation that operates or controls a commercial motor vehicle as defined in G.S. 20-4.01(3d) in intrastate commerce. (1985, c. 454, s. 1; 1993 (Reg. Sess., 1994), c. 621, s. 5; 1995 (Reg. Sess., 1996), c. 756, s. 20; 1997-456, s. 36; 1998-149, s. 11; 1999-452, s. 21; 2002-152, s. 3.)

Editor's Note. — Session Laws 2002-152, s. 6, provides: "The Division shall adopt rules to implement the provisions of this act."

Effect of Amendments. — Session Laws 2002-152, s. 3, effective December 1, 2002, added subdivisions (3a) and (5).

Part 2. Authority and Powers of Department of Crime Control and Public Safety.

Effect of Amendments. — Session Laws 2002-190, s. 2, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Department of Crime Control and Public Safety" for "Division" in the Part head.

§ 20-377. General powers of Department of Crime Control and Public Safety.

The Department of Crime Control and Public Safety shall have and exercise such general power and authority to supervise and control the motor carriers of the State as may be necessary to carry out the laws providing for their regulation, and all such other powers and duties as may be necessary or

incident to the proper discharge of its duties. (1985, c. 454, s. 1; 2002-159, s. 31.5(b); 2002-190, s. 2.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 2, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Department of Crime Control and Public Safety" for "Division" in the section head and in the text.

§ 20-379. Department of Crime Control and Public Safety to audit motor carriers for compliance.

The Department of Crime Control and Public Safety must periodically audit each motor carrier to determine if the carrier is complying with this Article and, if the motor carrier is subject to regulation by the North Carolina Utilities Commission, with Chapter 62 of the General Statutes. In conducting the audit, the Department of Crime Control and Public Safety may examine a person under oath, compel the production of papers and the attendance of witnesses, and copy a paper for use in the audit. An employee of the Department of Crime Control and Public Safety may enter the premises of a motor carrier during reasonable hours to enforce this Article. When on the premises of a motor carrier, an employee of the Department of Crime Control and Public Safety may set up and use equipment needed to make the tests required by this Article. (1985, c. 454, s. 1; 1995 (Reg. Sess., 1996), c. 756, s. 22; 2002-159, s. 31.5(b); 2002-190, s. 2.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 2, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Department of Crime Control and Public Safety" for "Division" in the section head and in the text.

§ 20-380. Department of Crime Control and Public Safety may investigate accidents involving motor carriers and promote general safety program.

The Department of Crime Control and Public Safety may conduct a program of accident prevention and public safety covering all motor carriers with special emphasis on highway safety and transport safety and may investigate the causes of any accident on a highway involving a motor carrier. Any information obtained in an investigation shall be reduced to writing and a report thereof filed in the office of the Department of Crime Control and Public Safety, which shall be subject to public inspection but such report shall not be admissible in evidence in any civil or criminal proceeding arising from such accident. The Department of Crime Control and Public Safety may adopt rules for the safety of the public as affected by motor carriers and the safety of motor carrier employees. The Department of Crime Control and Public Safety shall cooperate with and coordinate its activities for motor carriers with other agencies and organizations engaged in the promotion of highway safety and employee safety. (1985, c. 454, s. 1; 1995 (Reg. Sess., 1996), c. 756, s. 23; 2002-159, s. 31.5(b); 2002-190, s. 2.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control

and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 2, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Department of Crime Control and Public Safety" for "Division" in the section head and in the text.

§ 20-381. Specific powers and duties of Department of Crime Control and Public Safety applicable to motor carriers; agricultural exemption.

(a) The Department of Crime Control and Public Safety has the following powers and duties concerning motor carriers:

(1) To prescribe qualifications and maximum hours of service of drivers and their helpers.

(1a) To set safety standards for vehicles of motor carriers engaged in foreign, interstate, or intrastate commerce over the highways of this State and for the safe operation of these vehicles. The Department of Crime Control and Public Safety may stop, enter upon, and perform inspections of motor carriers' vehicles in operation to determine compliance with these standards and may conduct any investigations and tests it finds necessary to promote the safety of equipment and the safe operation on the highway of these vehicles.

(1b) To enforce this Article, rules adopted under this Article, and the federal safety and hazardous materials regulations.

(2) To enter the premises of a motor carrier to inspect a motor vehicle or any equipment used by the motor carrier in transporting passengers or property.

(2a) To prohibit the use by a motor carrier of any motor vehicle or motor vehicle equipment the Department of Crime Control and Public Safety finds unsafe for use in the transportation of passengers or property on a highway. If an agent of the Department of Crime Control and Public Safety finds a motor vehicle of a motor carrier in actual use upon the highways in the transportation of passengers or property to be unsafe or any parts thereof or any equipment thereon to be unsafe and is of the opinion that further use of such vehicle, parts or equipment are imminently dangerous, the agent may require the operator thereof to discontinue its use and to substitute therefor a safe vehicle, parts or equipment at the earliest possible time and place, having regard for both the convenience and the safety of the passengers or property. When an inspector or agent stops a motor vehicle on the highway, under authority of this section, and the motor vehicle is in operative condition and its further movement is not dangerous to the passengers or property or to the users of the highways, it shall be the duty of the inspector or agent to guide the vehicle to the nearest point of substitution or correction of the defect. Such agents or inspectors shall also have the right to stop any motor vehicle which is being used upon the public highways for the transportation of passengers or property by a motor carrier subject to the provisions of this Article and to eject therefrom any driver or operator who shall be operating or be in charge of such motor vehicle while under the influence of alcoholic beverages or impairing substances. It shall be the duty of all inspectors and agents of the Department of Crime Control and Public Safety to make a written report, upon a form prescribed by the Department of Crime Control and Public Safety, of inspections of all motor equipment and a copy of each such written report, disclosing defects in such equipment, shall be served promptly upon the motor carrier operating the same, either in person

by the inspector or agent or by mail. Such agents and inspectors shall also make and serve a similar written report in cases where a motor vehicle is operated in violation of this Chapter or, if the motor vehicle is subject to regulation by the North Carolina Utilities Commission, of Chapter 62 of the General Statutes.

(3) To relieve the highways of all undue burdens and safeguard traffic thereon by adopting and enforcing rules and orders designed and calculated to minimize the dangers attending transportation on the highways of all hazardous materials and other commodities.

(4) To determine the safety fitness of intrastate motor carriers, to assign safety ratings to intrastate motor carriers as defined in 49 C.F.R. § 385.3, to direct intrastate motor carriers to take remedial action when required, to prohibit the operation of intrastate motor carriers rated unsatisfactory, to determine whether the continued operations of intrastate motor carriers pose an "imminent hazard" as defined in 49 C.F.R. § 386.72(b)(1), and to prohibit the operation of an intrastate motor carrier found to be an "imminent hazard" as defined in 49 C.F.R. § 386.72(b)(1).

(5) To prohibit the intrastate operation of a motor carrier subject to an order issued by the Federal Motor Carrier Safety Administration to cease all operations based on a finding that the continued operations of the motor carrier pose an "imminent hazard" as defined in 49 C.F.R. § 386.72(b)(1).

(b) The definitions set out in 49 Code of Federal Regulations § 171.8 apply to this subsection. The transportation of an agricultural product, other than a Class 2 material, over local roads between fields of the same farm by a farmer operating as an intrastate private motor carrier is exempt from the requirements of Parts 171 through 180 of 49 CFR as provided in 49 CFR § 173.5(a). The transportation of an agricultural product to or from a farm within 150 miles of the farm by a farmer operating as an intrastate private motor carrier is exempt from the requirements of Subparts G and H of Part 172 of 49 CFR as provided in 49 CFR § 173.5(b). (1985, c. 454, s. 1; 1995 (Reg. Sess., 1996), c. 756, s. 24; 1997-456, ss. 37, 38; 1998-149, s. 12; 1998-165, s. 1; 1999-452, s. 22; 2002-152, ss. 4, 5; 2002-159, s. 31.5(b); 2002-190, s. 2.)

Editor's Note. —

Session Laws 2002-152, s. 6, provides: "The Division shall adopt rules to implement the provisions of this act."

Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-152, ss. 4, 5, effective December 1, 2002, added subdivisions (a)(4) and (a)(5).

Session Laws 2002-190, s. 2, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Department of Crime Control and Public Safety" for "Division" in the section head and in the text.

§ 20-382.2. Penalty for failure to comply with registration or insurance verification requirements.

(a) Acts. — A motor carrier who does any of the following is subject to a civil penalty of one thousand dollars ($1,000):

(1) Operates a for-hire motor vehicle in this State without registering its operations, as required by this Part.

(2) Operates a for-hire motor vehicle in interstate commerce in this State that does not carry a copy of either an insurance registration receipt issued to the motor carrier or a cab card with an identification stamp issued for the vehicle, as required by G.S. 20-382.

(3) Operates a for-hire motor vehicle in intrastate commerce in this State for which it has not verified it has insurance, as required by G.S. 20-382.1.

(b) Payment. — When the Department of Crime Control and Public Safety finds that a for-hire motor vehicle is operated in this State in violation of the registration and insurance verification requirements of this Part, the motor vehicle may not be driven for a purpose other than to park the motor vehicle until the penalty imposed under this section is paid unless the officer that imposes the penalty determines that operation of the motor vehicle will not jeopardize collection of the penalty. A motor carrier that denies liability for a penalty imposed under this section may pay the penalty under protest and apply to the Department of Crime Control and Public Safety for a hearing.

(c) Hearing. — Upon receiving a request for a hearing, the Secretary of Crime Control and Public Safety shall schedule a hearing within 30 days after receipt of the request. If after the hearing the Secretary of Crime Control and Public Safety determines that the motor carrier was not liable for the penalty, the amount collected shall be refunded. If after the hearing the Department of Crime Control and Public Safety determines that the motor carrier was liable for the penalty, the motor carrier may bring an action in the Superior Court of Wake County against the Department of Crime Control and Public Safety for refund of the penalty. A court of this State may not issue a restraining order or an injunction to restrain or enjoin the collection of the penalty or to permit the operation of the vehicle without payment of the penalty.

(d) Proceeds. — A penalty imposed under this section is payable to the Department of Crime Control and Public Safety. Penalties collected under this section shall be credited to the Highway Fund as nontax revenue. (1993 (Reg. Sess., 1994), c. 621, s. 3; 1997-466, s. 3; 2002-159, s. 31.5(b); 2002-190, ss. 2, 3.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 2, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Department of Crime Control and Public Safety" for "Division" in subsections (b), (c), and (d).

Session Laws 2002-190, s. 3, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Secretary of Crime Control and Public Safety" for "Commissioner" in subsection (c).

§ 20-383. Inspectors and officers given enforcement authority.

Only designated inspectors and officers of the Department of Crime Control and Public Safety shall have the authority to enforce the provisions of this Article and provisions of Chapter 62 applicable to motor transportation, and they are empowered to make complaint for the issue of appropriate warrants, informations, presentments or other lawful process for the enforcement and prosecution of violations of the transportation laws against all offenders, whether they be regulated motor carriers or not, and to appear in court or before the North Carolina Utilities Commission and offer evidence at the trial pursuant to such processes. (1985, c. 454, s. 1; 2002-159, s. 31.5(b); 2002-190, s. 2.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 2, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Department of Crime Control and Public Safety" for "Division" in this section.

Part 4. Penalties and Actions.

§ 20-387. Motor carrier violating any provision of Article, rules or orders; penalty.

Any motor carrier which violates any of the provisions of this Article or refuses to conform to or obey any rule, order or regulation of the Division or Department of Crime Control and Public Safety shall, in addition to the other penalties prescribed in this Article forfeit and pay a sum up to one thousand dollars ($1,000) for each offense, to be recovered in an action to be instituted in the Superior Court of Wake County, in the name of the State of North Carolina on the relation of the Department of Crime Control and Public Safety; and each day such motor carrier continues to violate any provision of this Article or continues to refuse to obey or perform any rule, order or regulation prescribed by the Division or Department of Crime Control and Public Safety shall be a separate offense. (1985, c. 454, s. 1; 2002-159, s. 31.5(b); 2002-159, s. 31.5(b); 2002-190, s. 10.)

Editor's Note. — Session Laws 2002-190, s. 17, as amended by Session Laws 2002-159, s. 31.5, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 10, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Department of Crime Control and Public Safety" for "Division" once and inserted "or Department of Crime Control and Public Safety" twice.

§ 20-389. Actions to recover penalties.

Except as otherwise provided in this Article, an action for the recovery of any penalty under this Article shall be instituted in Wake County, and shall be instituted in the name of the State of North Carolina on the relation of the Department of Crime Control and Public Safety against the person incurring such penalty; or whenever such action is upon the complaint of any injured person, it shall be instituted in the name of the State of North Carolina on the relation of the Department of Crime Control and Public Safety upon the complaint of such injured person against the person incurring such penalty. Such action may be instituted and prosecuted by the Attorney General, the District Attorney of the Wake County Superior Court, or the injured person. The procedure in such actions, the right of appeal and the rules regulating appeals shall be the same as provided by law in other civil actions. (1985, c. 454, s. 1; 2002-159, s. 31.5(b); 2002-190, s. 2.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 2, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Department of Crime Control and Public Safety" for "Division" in two places.

§ 20-390. Refusal to permit Department of Crime Control and Public Safety to inspect records made misdemeanor.

Any motor carrier, its officers or agents in charge thereof, that fails or refuses upon the written demand of the Department of Crime Control and Public Safety to permit its authorized representatives or employees to examine and

inspect its books, records, accounts and documents, or its plant, property, or facilities, as provided for by law, shall be guilty of a Class 3 misdemeanor. Each day of such failure or refusal shall constitute a separate offense and each such offense shall be punishable only by a fine of not less than five hundred dollars ($500.00) and not more than five thousand dollars ($5,000). (1985, c. 454, s. 1; 1993, c. 539, s. 393; 1994, Ex. Sess., c. 24, s. 14(c); 2002-159, s. 31.5(b); 2002-190, s. 2.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 2, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Department of Crime Control and Public Safety" for the"Division" in the section head and in the text.

§ 20-391. Violating rules, with injury to others.

If any motor carrier doing business in this State by its agents or employees shall be guilty of the violations of the rules and regulations provided and prescribed by the Division or the Department of Crime Control and Public Safety, and if after due notice of such violation given to the principal officer thereof, if residing in the State, or, if not, to the manager or superintendent or secretary or treasurer if residing in the State, or, if not, then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person as may be directed by the Division or Department of Crime Control and Public Safety shall not be made within 30 days from the time of such notice, such motor carrier shall incur a penalty for each offense of five hundred dollars ($500.00). (1985, c. 454, s. 1; 2002-159, s. 31.5(b); 2002-190, s. 11.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 11, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, twice inserted references to the Department of Crime Control and Public Safety.

§ 20-392. Failure to make report; obstructing Division or Department of Crime Control and Public Safety.

Every officer, agent or employee of any motor carrier, who shall willfully neglect or refuse to make and furnish any report required by the Division or Department of Crime Control and Public Safety for the purposes of this Article,or who shall willfully or unlawfully hinder, delay or obstruct the Division or Department of Crime Control and Public Safety in the discharge of the duties hereby imposed upon it, shall forfeit and pay five hundred dollars ($500.00) for each offense, to be recovered in an action in the name of the state. A delay of 10 days to make and furnish such report shall raise the presumption that the same was willful. (1985, c. 454, s. 1; 2002-159, s. 31.5(b); 2002-190, s. 12.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 12, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, inserted "or Department of Crime Control and Public Safety" in the section head and twice in the statutory text.

§ 20-393. Disclosure of information by employee of Department of Crime Control and Public Safety unlawful.

It shall be unlawful for any agent or employee of the Department of Crime Control and Public Safety knowingly and willfully to divulge any fact or information which may come to his knowledge during the course of any examination or inspection made under authority of this Article, except to the Department of Crime Control and Public Safety or as may be directed by the Department of Crime Control and Public Safety or upon approval of a request to the Department of Crime Control and Public Safety by the Utilities Commission or by a court or judge thereof. (1985, c. 454, s. 1; 2002-159, s. 31.5(b); 2002-190, s. 2.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 2, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Department of Crime Control and Public Safety" for "Division" in the section head and in the text.

§ 20-396. Unlawful motor carrier operations.

(a) Any person, whether carrier, shipper, consignee, or any officer, employee, agent, or representative thereof, who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully seek to evade or defeat regulations as in this Article provided for motor carriers, shall be deemed guilty of a Class 3 misdemeanor and only punished by a fine of not more than five hundred dollars ($500.00) for the first offense and not more than two thousand dollars ($2,000) for any subsequent offense.

(b) Any motor carrier, or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Division or Department of Crime Control and Public Safety as required by this Article, or other applicable law, or to make specific and full, true, and correct answer to any question within 30 days from the time it is lawfully required by the Division or Department of Crime Control and Public Safety so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the Division or Department of Crime Control and Public Safety or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully neglect or fail to make true and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, or person required under this Article to keep the same, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Division or Department of Crime Control and Public Safety with respect thereto, shall be deemed guilty of a Class 3 misdemeanor and be punished for each offense only by a fine of not more than five thousand dollars ($5,000). As used in this subsection the words "kept" and "keep shall be construed to mean made, prepared or compiled as well as retained. (1985, c. 454, s. 1; 1993, c. 539, s. 395; 1994, Ex. Sess., c. 24, s. 14(c); 2002-159, s. 31.5(b); 2002-190, s. 13.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control

and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 13, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, inserted "or Department of Crime Control and Public Safety" throughout subsection (b).

§ 20-397. Furnishing false information to the Department of Crime Control and Public Safety; withholding information from the Department of Crime Control and Public Safety.

(a) Every person, firm or corporation operating under the jurisdiction of the Department of Crime Control and Public Safety or who is required by law to file reports with the Department of Crime Control and Public Safety who shall knowingly or willfully file or give false information to the Department of Crime Control and Public Safety in any report, reply, response, or other statement or document furnished to the Department of Crime Control and Public Safety shall be guilty of a Class 1 misdemeanor.

(b) Every person, firm, or corporation operating under the jurisdiction of the Department of Crime Control and Public Safety or who is required by law to file reports with the Department of Crime Control and Public Safety who shall willfully withhold clearly specified and reasonably obtainable information from the Department of Crime Control and Public Safety in any report, response, reply or statement filed with the Department of Crime Control and Public Safety in the performance of the duties of the Department of Crime Control and Public Safety or who shall fail or refuse to file any report, response, reply or statement required by the Department of Crime Control and Public Safety in the performance of the duties of the Department of Crime Control and Public Safety shall be guilty of a Class 1 misdemeanor. (1985, c. 454, s. 1; 1993, c. 539, s. 396; 1994, Ex. Sess., c. 24, s. 14(c); 2002-159, s. 31.5(b); 2002-190, s. 2.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act [Session Laws 2002-190]."

Effect of Amendments. — Session Laws 2002-190, s. 2, as amended by Session Laws 2002-159, s. 31.5, effective January 1, 2003, substituted "Department of Crime Control and Public Safety" for "Division" in the section head and throughout the section.

Chapter 22.

Contracts Requiring Writing.

§ 22-2. Contract for sale of land; leases.

CASE NOTES

III. Sufficiency of Compliance with Section.
A. In General.

III. SUFFICIENCY OF COMPLIANCE WITH SECTION.

A. In General.

It Is Not Necessary for All the Provisions of a Contract to Be Set Out in a Single Instrument. —

As the essential terms of a lease do not to be contained in one writing to be valid, a new lease incorporating the description of the land contained in the old lease satisfied the Statute of Frauds as to the description of the property leased. Purchase Nursery, Inc. v. Edgerton, — N.C. App. —, 568 S.E.2d 904, 2002 N.C. App. LEXIS 1073 (2002).

Chapter 22B.
Contracts Against Public Policy.

Article 1.
Invalid Agreements.

§ 22B-1. Construction indemnity agreements invalid.

CASE NOTES

Illegal Provision Held Not Severable. — Trial court correctly granted the subcontractor's motion for judgment on the pleadings because the indemnification provisions in its construction contract with the supplier violated G.S. 22B-1 and were not severable; therefore, the entire contract was void and there could be no breach of contract. Jackson v. Associated Scaffolders & Equip. Co., — N.C. App. —, 568 S.E.2d 666, 2002 N.C. App. LEXIS 961 (2002).

§ 22B-3. Contracts with forum selection provisions.

CASE NOTES

Preemption by Federal Law. — Trial court committed error by not dismissing a civil action as to one defendant that had executed an agreement with plaintiff that included an arbitration and forum selection clause requiring out-of-state arbitration; since the agreement involved interstate commerce, the Federal Arbitration Act preempted the North Carolina Uniform Arbitration Act's provision that voided any provision, regarding contracts entered into in North Carolina, that required prosecution or arbitration of any dispute arising from the contract to be instituted or heard in another state. Boynton v. ESC Med. Sys., — N.C. App. —, 566 S.E.2d 730, 2002 N.C. App. LEXIS 873 (2002).

Cited in Rice v. BellSouth Adver. & Publ'g Corp., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 13129 (W.D.N.C. July 18, 2002).

Chapter 24.

Interest.

Article 1.

General Provisions.

§ 24-5. Interest on judgments.

Editor's Note. —
For explanatory notes, see the main volume.

CASE NOTES

I. In General.
II. Contracts.
IV. Prejudgment Interest.

I. IN GENERAL.

Applied in Phillips v. Warren, — N.C. App. —, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

Cited in Singleton v. Haywood Elec. Membership Corp., — N.C. App. —, 565 S.E.2d 234, 2002 N.C. App. LEXIS 715 (2002); Phillips v. Warren, — N.C. App. —, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

II. CONTRACTS.

Prejudgment Interest from Breach of Contract. —

Trial court incorrectly ordered an employer to pay interest on an award to an employee only from the date of the judgment rather than the date of the breach of employment contract because there was no good faith exception to awarding interest from the date of the breach. Salvaggio v. New Breed Transfer Corp., — N.C. App. —, 564 S.E.2d 641, 2002 N.C. App. LEXIS 645 (2002).

IV. PREJUDGMENT INTEREST.

Legislative Intent. — Probable intent of the prejudgment interest statute, G.S. 24-5(b), is threefold: (1) to compensate plaintiffs for loss of the use of their money, (2) to prevent unjust enrichment of the defendant by having money he should not have, and (3) to promote settlement. Phillips v. Warren, — N.C. App. —, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

Chapter 25.

Uniform Commercial Code.

Article 3.

Negotiable Instruments.

Part 1. General Provisions and Definitions.

Article 1.

General Provisions.

PART 1.

Short Title, Construction, Application and Subject Matter of the Act.

§ 25-1-103. Supplementary general principles of law applicable.

CASE NOTES

Cited in United States v. Coleman, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 23682 (E.D.N.C. July 26, 2001).

PART 2.

General Definitions and Principles of Interpretation.

§ 25-1-203. Obligation of good faith.

Legal Periodicals. —

Application of the Uniform Commercial Code to Option Contracts for the Sale of Goods, and Implying Promises to Find Sufficient Consideration: Why and How the North Carolina Supreme Court Got It Wrong in Fordham v. Eason, 23 Campbell L. Rev. 49 (2000).

Article 2.

Sales.

PART 1.

Short Title, General Construction and Subject Matter.

§ 25-2-107. Goods to be severed from realty; recording.

Legal Periodicals. — Application of the Uniform Commercial Code to Option Contracts for the Sale of Goods, and Implying Promises to Find Sufficient Consideration: Why and How the North Carolina Supreme Court Got It Wrong in Fordham v. Eason, 23 Campbell L. Rev. 49 (2000).

PART 2.

Form, Formation and Readjustment of Contract.

§ 25-2-201. Formal requirements; statute of frauds.

CASE NOTES

Evidence of Alleged Oral Agreement Not Admissible. —

Alleged oral contract between the purchaser and the seller for the sale of motor fuel was unenforceable, as the price of fuel deliveries was over $500 and the contract was not in writing as required by G.S. 25-2-201; thus the purchaser did not establish that the contract was formed. Neugent v. Beroth Oil Co., 149 N.C. App. 38, 560 S.E.2d 829, 2002 N.C. App. LEXIS 143 (2002).

§ 25-2-204. Formation in general.

Legal Periodicals. —

Application of the Uniform Commercial Code to Option Contracts for the Sale of Goods, and Implying Promises to Find Sufficient Consideration: Why and How the North Carolina Supreme Court Got It Wrong in Fordham v. Eason, 23 Campbell L. Rev. 49 (2000).

PART 3.

General Obligation and Construction of Contract.

§ 25-2-305. Open price term.

CASE NOTES

Fixed Price Formula. — Once a buyer or a seller sets a formula or standard to determine the price in a contract pursuant to G.S. 25-2-305, both parties must abide by that formula or standard until mutually amended or changed. Neugent v. Beroth Oil Co., 149 N.C. App. 38, 560 S.E.2d 829, 2002 N.C. App. LEXIS 143 (2002).

Cited in Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp., 284 F.3d 1323, 2002 U.S. App. LEXIS 5006 (Fed. Cir. 2002).

§ 25-2-314. Implied warranty: Merchantability; usage of trade.

CASE NOTES

Action for breach of implied warranty of merchantability is established by G.S. 25-2-314 of the North Carolina Uniform Commercial Code and is a product liability action within the meaning of the Products Liability Act, G.S. 99B-1 et seq., if the action is for injury to a person resulting from a sale of a product. DeWitt v. Eveready Battery Co., 355 N.C. 672, 565 S.E.2d 140, 2002 N.C. LEXIS 548 (2002).

Merchantability Determined Time of Sale. — Where a worker sued a clamp manufacturer after the worker was injured when a clamp failed on an irrigation system, the trial court properly directed a verdict in favor of the manufacturer on the worker's claim that the manufacturer breached the implied warranty of merchantability under G.S. 25-2-314 where the worker failed to produce substantial evidence tending to establish that the clamp was defective at the time of sale, especially since the worker's evidence did not eliminate other possible causes of the accident and the worker's expert admitted that the clamp did not violate any industry standards and would have passed as merchantable in the industry. Evans v. Evans, — N.C. App. —, 569 S.E.2d 303, 2002 N.C. App. LEXIS 1082 (2002).

§ 25-2-316. Exclusion or modification of warranties.

CASE NOTES

Cited in DeWitt v. Eveready Battery Co., 355 N.C. 672, 565 S.E.2d 140, 2002 N.C. LEXIS 548 (2002).

Article 3.

Negotiable Instruments.

(Revised)

PART 1.

General Provisions and Definitions.

§ 25-3-102. Subject matter.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in Thompson v. First Citizens Bank & Trust Co., — N.C. App. —, 567 S.E.2d 184, 2002 N.C. App. LEXIS 889 (2002).

§ 25-3-104. Negotiable instrument.

CASE NOTES

II. Decisions Under Prior Version of Article 3.

II. DECISIONS UNDER PRIOR VERSION OF ARTICLE 3.

Not a Negotiable Instrument. — Under G.S.25-3-104(d), the certificate of deposit was not a negotiable instrument governed by the Uniform Commercial Code, because the certificate of deposit confirmation stated conspicuously in capital letters that the certificate of deposit was non-transferable. Thompson v. First Citizens Bank & Trust Co., — N.C. App. —, 567 S.E.2d 184, 2002 N.C. App. LEXIS 889 (2002).

§ 25-3-118. Statute of limitations.

(a) Except as provided in subsection (e) of this section, an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.

(b) Except as provided in subsection (d) or (e) of this section, if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of 10 years.

(c) Except as provided in subsection (d) of this section, an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within three years after dishonor of the draft or 10 years after the date of the draft, whichever period expires first.

(d) An action to enforce the obligation of the acceptor of a certified check or the issuer of a teller's check, cashier's check, or traveler's check must be commenced within three years after demand for payment is made to the acceptor or issuer, as the case may be.

(e) An action to enforce the obligation of a party to a certificate of deposit to pay the instrument must be commenced within six years after demand for payment is made to the maker, but if the instrument states a due date and the maker is not required to pay before that date, the six-year period begins when a demand for payment is in effect and the due date has passed.

(f) An action to enforce the obligation of a party to pay an accepted draft, other than a certified check, must be commenced (i) within six years after the due date or dates stated in the draft or acceptance if the obligation of the acceptor is payable at a definite time, or (ii) within six years after the date of the acceptance if the obligation of the acceptor is payable on demand.

(g) Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion, (ii) for breach of warranty, or (iii) to enforce an obligation, duty, or right arising under this Article and not governed by this section must be commenced within three years after the cause of action accrues.

(h) A sealed instrument otherwise subject to this Article is governed by the time limits of G.S. 1-47(2). (1995, c. 232, s. 1; 2002-159, s. 7.)

Effect of Amendments. — Session Laws 2002-159, s. 7, effective October 11, 2002, substituted "sealed instrument" for "seal instrument" in subsection (h).

ARTICLE 9.

Secured Transactions.

PART 2.

EFFECTIVENESS OF SECURITY AGREEMENT; ATTACHMENT OF SECURITY INTEREST; RIGHTS OF PARTIES TO SECURITY AGREEMENT.

SUBPART 1. Effectiveness and Attachment.

§ 25-9-204. After-acquired property; future advances.

CASE NOTES

Security Interest in "After-Acquired Property". — The fact that a security agreement does not use the exact term "after-acquired property" does not mean that no security interest is granted with respect to after-acquired property. There are no magic words which must be used in order to obtain a security interest in after-required property. All that is required under G.S. 25-9-204 is that the security agreement contain language reflecting an intention to create a security interest in after-acquired collateral. Magers v. Bonds, — Bankr. —, 2000 Bankr. LEXIS 1964 (Bankr. M.D.N.C. Mar. 31, 2000).

PART 3.

PERFECTION AND PRIORITY.

SUBPART 1. Law Governing Perfection and Priority.

§ 25-9-305. Law governing perfection and priority of security interests in investment property.

CASE NOTES

Bankruptcy Debtor's Counsel's Retainer. — Under G.S. 25-9-305, a security interest in the debtor's counsel's security retainer fund held in counsel's trust account was perfected due to possession; the monies could be used to pay the approved fees and expenses of counsel nothwithstanding the fact that the debtor's Chapter 11 had been converted to a Chapter 7. In re Carolina Premier Med. Group, P.A., — Bankr. —, 2001 Bankr. LEXIS 1845 (Bankr. M.D.N.C. Aug. 20, 2001).

PART 6.

DEFAULT.

SUBPART 1. Default and Enforcement of Security Interest.

§ 25-9-609. Secured party's right to take possession after default.

CASE NOTES

Statute Is Self-Executing. — Former G.S. 25-9-503 (see now G.S. 25-9-609), allowing self-help repossessions by secured parties, is wholly self-executing and takes no involvement by any state employee to fully effect its purpose; in enacting the section, the General Assembly codified a right existing at common law, and it did not delegate to private parties authority previously held by the State. Giles v. First Va. Credit Servs., Inc., 149 N.C. App. 89, 560 S.E.2d 557, 2002 N.C. App. LEXIS 127 (2002), cert denied, 355 N.C. 491, 563 S.E.2d 568 (2002).

Balancing Test to Determine Breach of the Peace. — A breach of the peace, in the context of a self-help repossession under former G.S. 25-9-503 (see now G.S. 25-9-609), is broader than the criminal law definition, and a confrontation is not always required; a breach of the peace analysis should be based upon the reasonableness of the time and manner of the repossession, and a balancing test using the five factors of (1) where the repossession took place, (2) the debtor's express or constructive consent, (3) the reactions of third parties, (4) the type of premises entered, and (5) the creditor's use of deception is adopted to determine whether a breach of the peace occurs when there is no confrontation. Giles v. First Va. Credit Servs., Inc., 149 N.C. App. 89, 560 S.E.2d 557, 2002 N.C. App. LEXIS 127 (2002), cert denied, 355 N.C. 491, 563 S.E.2d 568 (2002).

Chapter 28A.

Administration of Decedents' Estates.

Article 9.

Revocation of Letters.

§ 28A-9-1. Revocation after hearing.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Applied in In re Estate of Monk, 146 N.C. App. 695, 554 S.E.2d 370, 2001 N.C. App. LEXIS 1078 (2001), cert. denied, 355 N.C. 212, 559 S.E.2d 805 (2002).

Article 13.

Representative's Powers, Duties and Liabilities.

§ 28A-13-3. Powers of a personal representative or fiduciary.

(a) Except as qualified by express limitations imposed in a will of the decedent or a court order, and subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal representatives, a personal representative has the power to perform in a reasonable and prudent manner every act which a reasonable and prudent man would perform incident to the collection, preservation, liquidation or distribution of a decedent's estate so as to accomplish the desired result of settling and distributing the decedent's estate in a safe, orderly, accurate and expeditious manner as provided by law, including but not limited to the powers specified in the following subdivisions:

(1) To take possession, custody or control of the personal property of the decedent. If in the opinion of the personal representative his possession, custody or control of such property is not necessary for purposes of administration, such property may be left with or surrendered to the heir or devisee presumptively entitled thereto. He has the power to take possession, custody or control of the real property of the decedent if he determines such possession, custody or control is in the best interest of the administration of the estate. Prior to exercising such power over real property the procedure as set out in subsection

G.S. 28A-13-3(c) shall be followed. If the personal representative determines that such possession, custody or control is not in the best interest of the administration of the estate such property may be left with or surrendered to the heir or devisee presumptively entitled thereto.

(2) To retain assets owned by the decedent pending distribution or liquidation even though such assets may include items which are otherwise improper for investment of trust funds.

(3) To receive assets from other fiduciaries or other sources.

(4) To complete performance of contracts entered into by the decedent that continue as obligations of his estate, or to refuse to complete such contracts, as the personal representative may determine to be in the best interests of the estate, but such refusal shall not limit any cause of action which might have been maintained against decedent if he had refused to complete such contract. In respect to enforceable contracts by the decedent to convey an interest in land, the provisions of G.S. 28A-17-9 are controlling.

(5) To deposit, as a fiduciary, funds of the estate in a bank, including a bank operated by the personal representative upon compliance with the provisions of G.S. 36A-63.

(6) To make, as a fiduciary, any form of investment allowed by law to the State Treasurer under G.S. 147-69.1, with funds of the estate, when such are not needed to meet debts and expenses immediately payable and are not immediately distributable, including money received from the sale of other assets; or to enter into other short-term loan arrangements that may be appropriate for use by trustees or beneficiaries generally. Provided, that in addition to the types of investments hereby authorized, deposits in interest-bearing accounts of any credit union authorized to do business in this State, when such deposits are insured in the same manner as required by G.S. 147-69.1 for deposits in a savings and loan association, are hereby authorized.

(7) To abandon or relinquish all rights in any property when, in the opinion of the personal representative acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in such condition that it is of no benefit to the estate.

(8) To vote shares of stock or other securities in person or by general or limited proxy, and to execute waivers, consents or objections with respect to such stock or securities.

(9) To pay calls, assessments, and any other sums chargeable or accruing against or on account of securities.

(10) To hold shares of stock or other securities in the name of a nominee, without mention of the estate in the instrument representing stock or other securities or in registration records of the issuer thereof; provided, that

a. The estate records and all reports or accounts rendered by the personal representative clearly show the ownership of the stock or other securities by the personal representative and the facts regarding its holdings, and

b. The nominee shall not have possession of the stock or other securities or access thereto except under the immediate supervision of the personal representative or when such securities are deposited by the personal representative in a clearing corporation as defined in G.S. 25-8-102.

Such personal representative shall be personally liable for any acts or omissions of such nominee in connection with such stock or other securities so held, as if such personal representative had done such acts or been guilty of such omissions.

(11) To insure, at the expense of the estate, the assets of the estate in his possession, custody or control against damage or loss.

(12) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the personal representative shall deem advisable, including the power of a corporate personal representative to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the estate, and to mortgage, pledge or otherwise encumber such portion of the estate as may be required to secure such loan or loans. In respect to the borrowing of money on the security of the real property of the decedent, G.S. 28A-17-11 is controlling.

(13) To renew obligations of the decedent for the payment of money.

(14) To advance his own money for the protection of the estate, and for all expenses, losses and liabilities sustained in the administration of the estate or because of the holding or ownership of any estate assets. For such advances, with any interest, the personal representative shall have a lien on the assets of the estate as against a devisee or heir.

(15) To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate.

(16) To pay taxes, assessments, his own compensation, and other expenses incident to the collection, care, administration and protection of the assets of the estate in his possession, custody or control.

(17) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(18) To allocate items of income or expense to either estate income or principal, as permitted or provided by law.

(19) To employ persons, including attorneys, auditors, investment advisors, appraisers or agents to advise or assist him in the performance of his administrative duties.

(20) To continue any business or venture in which the decedent was engaged at the date of his death, where such continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the decedent's interest in such business. With respect to the use of the decedent's interest in a continuing partnership, the provisions of G.S. 59-71 and 59-72 qualify this power; and with respect to farming operations engaged in by the decedent at the time of his death, the provisions of G.S. 28A-13-4 qualify this power.

(21) To incorporate or participate in the incorporation of any business or venture in which the decedent was engaged at the time of his death.

(22) To provide for the exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate.

(23) To maintain actions for the wrongful death of the decedent according to the provisions of Article 18 of this Chapter and to compromise or settle any such claims, whether in litigation or not. Unless all persons who would be entitled to receive any damages recovered under G.S. 28A-18-2(b)(4) are competent adults and have consented in writing, any such settlement shall be subject to the approval of a judge of the court or tribunal exercising jurisdiction over the action or a judge of the district or superior court in cases where no action has previously been filed. If the claim is brought under Article 31 of Chapter 143 of the General Statutes, the settlement is subject to the approval of the Industrial Commission in accordance with that Article. It shall be the duty of the personal representative in distributing the proceeds of such settlement in any instance to take into consideration and to

make a fair allocation to those claimants for funeral, burial, hospital and medical expenses which would have been payable from damages which might have been recovered had a wrongful death action gone to judgment in favor of the plaintiff.

(24) To maintain any appropriate action or proceeding to recover possession of any property of the decedent, or to determine the title thereto; to recover damages for any injury done prior to the death of the decedent to any of his property; and to recover damages for any injury done subsequent to the death of the decedent to such property.

(25) To purchase at any public or private sale of any real or personal property belonging to the decedent's estate or securing an obligation of the estate as a fiduciary for the benefit of the estate when, in his opinion, it is necessary to prevent a loss to the estate.

(26) To sell or lease personal property of the estate in the manner prescribed by the provisions of Article 16 of this Chapter.

(27) To sell or lease real property of the estate in the manner prescribed by the provisions of Article 17 of this Chapter.

(28) To enter into agreements with taxing authorities to secure the benefit of the federal marital deduction pursuant to G.S. 28A-22-6.

(29) To pay or satisfy the debts and claims against the decedent's estate in the order and manner prescribed by Article 19 of this Chapter.

(30) To distribute any sum recovered for the wrongful death of the decedent according to the provisions of G.S. 28A-18-2; and to distribute all other assets available for distribution according to the provisions of this Chapter or as otherwise lawfully authorized.

(31) To exercise such additional lawful powers as are conferred upon him by the will.

(32) To execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the personal representative.

(33) To renounce in accordance with the provisions of Chapter 31B of the General Statutes.

(a1) Except as qualified by express limitations imposed in a will of the decedent, and subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal representatives, a personal representative shall have absolute discretion to make the election as to which items of the decedent's personal and household effects shall be excluded from the carry over basis provision of the federal income tax law and such election shall be conclusive and binding on all concerned.

(b) Any question arising out of the powers conferred by subsections (a) and (a1) above shall be determined in accordance with the provisions of Article 18 of this Chapter.

(c) Prior to the personal representative exercising possession, custody or control over real property of the estate he shall petition the clerk of court to obtain an order authorizing such possession, custody or control. The petition shall include:

(1) A description of the real property which is the subject of the petition;

(2) The names, ages, and addresses, if known, of the devisees and heirs of the decedent;

(3) A statement by the personal representative that he has determined that such possession, custody or control is in the best interest of the administration of the estate.

The devisees and heirs will be made parties to the proceeding by service of summons in the manner prescribed by law. If the clerk of court determines that it is in the best interest of the administration of the estate to authorize the personal representative to take possession, custody or control he shall grant an

order authorizing that power. If a special proceeding has been instituted by the personal representative pursuant to G.S. 28A-15-1(c), the personal representative may petition for possession, custody, or control of any real property as a part of that proceeding and is not required to institute a separate special proceeding. (1868-9, c. 113, ss. 73, 77; Code, ss. 1501, 1505; Rev., ss. 85, 159; C.S., ss. 170, 171; 1925, c. 86; 1933, cc. 161, 196, 498; 1973, c. 1329, s. 3; 1975, c. 19, s. 9; c. 371, s. 4; 1977, c. 556; 1979, c. 467, s. 21; c. 717, s. 3; 1985, c. 689, s. 8; 1991, c. 460, s. 3; 1995, c. 401, s. 1; 1997-181, s. 22; 2001-413, s. 2; 2002-159, s. 8.)

Effect of Amendments. — Session Laws 2002-159, s. 8, effective October 11, 2002, substituted "possession, custody, or control" for "sale, lease or mortgage" in the last sentence of subsection (c).

CASE NOTES

Cited in Olvera v. Edmundson, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 15284 (W.D.N.C. Sept. 21, 2001); Beyer v. N.C. Div. of Mental Health, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 16968 (W.D.N.C. Oct. 16, 2001).

Article 14.

Notice to Creditors.

§ 28A-14-1. Notice for claims.

CASE NOTES

Action Following Tortfeasor's Death Not Time Barred. — Action filed on October 20, 2000, two days after qualification of deceased driver's personal representative, for personal injuries arising out of an automobile accident that occurred on June 27, 1997, was not barred by G.S. 1-52, where deceased died on November 7, 1997, at which time the three year limitations period had not yet expired, as under G.S. 28A-18-1 plaintiff's cause of action survived his death, and thus, pursuant to G.S. 1-22, plaintiff was permitted to commence a cause of action against deceased's personal representative, provided that either the action was brought within the time specified for the presentation of claims in G.S. 28A-19-3, or that notice of the claim upon which the action was based was presented to the personal representative within the time specified for the presentation of claims in G.S. 28A-19-3. The personal representative's failure to establish in the record that she complied with G.S. 28A-19-3(a) regarding general notice to creditors precluded her from relying upon the statute of limitations as a bar; moreover, under G.S. 28A-14-1(a), the absolute earliest "deadline" date which could have been specified by the personal representative in the general notice to creditors was January 18, 2001, three months from the day of the first publication or posting of such notice. Mabry v. Huneycutt, 149 N.C. App. 630, 562 S.E.2d 292, 2002 N.C. App. LEXIS 271 (2002).

Article 15.

Assets; Discovery of Assets.

§ 28A-15-1. Assets of the estate generally.

(a) All of the real and personal property, both legal and equitable, of a decedent shall be assets available for the discharge of debts and other claims against his estate in the absence of a statute expressly excluding any such property. Provided that before real property is selected the personal representative must determine that such selection is in the best interest of the administration of the estate.

(b) In determining what property of the estate shall be sold, leased, pledged, mortgaged or exchanged for the payment of the debts of the decedent and other claims against his estate, the personal representative shall select the assets which in his judgment are calculated to promote the best interests of the estate. In the selection of assets for this purpose, there shall be no necessary distinction between real and personal property, absent any contrary provision in the will.

(c) If it shall be determined by the personal representative that it is in the best interest of the administration of the estate to sell, lease, or mortgage any real estate or interest therein to obtain money for the payment of debts and other claims against the decedent's estate, the personal representative shall institute a special proceeding before the clerk of superior court for such purpose pursuant to Article 17 of this Chapter, except that no such proceeding shall be required for a sale made pursuant to authority given by will. A general provision granting authority to the personal representative to sell the testator's real property, or incorporation by reference of the provisions of G.S. 32-27(2) shall be sufficient to eliminate the necessity for a proceeding under Article 17. If a special proceeding has been instituted by the personal representative pursuant to G.S. 28A-13-3(c), the personal representative may petition for sale, lease, or mortgage of any real property as a part of that proceeding and is not required to institute a separate special proceeding.

(d) The crops of every deceased person, remaining ungathered at his death, shall, in all cases, belong to the personal representative or collector, as part of the personal assets of the decedent's estate; and shall not pass to the devisee by virtue of any devise of the land, unless such intent be manifest and specified in the will. (1868-9, c. 113, ss. 14, 15; Code, ss. 1406, 1407; Rev., ss. 45, 47; C.S., ss. 52, 54; 1973, c. 1329, s. 3; 1975, c. 300, s. 5; 1985, c. 426; 2001-413, s. 2.1; 2002-159, s. 9.)

Editor's Note. — Session Laws 2002-180, s. 18.1, provides: "The General Statutes Commission is directed to study and report to the 2003 General Assembly on the question of the personal representative's authority to take possession of and dispose of real property of an estate without an order of the court. The study shall include the issues included in the provisions of House Bill 716, Second Edition, of the 2001 General Assembly, and an examination of the application of G.S. 28A-15-1, 28A-15-2, and 32-27(2). The report shall include any recommended legislation necessary to implement the Commission's recommendations."

Effect of Amendments. —

Session Laws 2002-159, s. 9, effective October 11, 2002, substituted "sale, lease, or mortgage" for "possession, custody or control" in the last sentence of subsection (c).

§ 28A-15-2. Title and possession of property.

Editor's Note. — Session Laws 2002-180, s. 18.1, provides: "The General Statutes Commission is directed to study and report to the 2003 General Assembly on the question of the personal representative's authority to take possession of and dispose of real property of an estate without an order of the court. The study shall include the issues included in the provisions of House Bill 716, Second Edition, of the 2001 General Assembly, and an examination of the application of G.S. 28A-15-1, 28A-15-2, and 32-27(2). The report shall include any recommended legislation necessary to implement the Commission's recommendations."

ARTICLE 18.

Actions and Proceedings.

§ 28A-18-1. Survival of actions to and against personal representative.

CASE NOTES

II. Revival and Survival of Actions.

II. REVIVAL AND SURVIVAL OF ACTIONS.

Action Not Time Barred. — Action filed on October 20, 2000, two days after qualification of deceased driver's personal representative, for personal injuries arising out of an automobile accident that occurred on June 27, 1997, was not barred by G.S. 1-52, where deceased died on November 7, 1997, at which time the three year limitations period had not yet expired, as under G.S. 28A-18-1 plaintiff's cause of action survived his death, and thus, pursuant to G.S. 1-22, plaintiff was permitted to commence a cause of action against deceased's personal representative, provided that either the action was brought within the time specified for the presentation of claims in G.S. 28A-19-3, or that notice of the claim upon which the action was based was presented to the personal representative within the time specified for the presentation of claims in G.S. 28A-19-3. The personal representative's failure to establish in the record that she complied with G.S. 28A-19-3(a) regarding general notice to creditors precluded her from relying upon the statute of limitations as a bar; moreover, under G.S. 28A-14-1(a), the absolute earliest "deadline" date which could have been specified by the personal representative in the general notice to creditors was January 18, 2001, three months from the day of the first publication or posting of such notice. Mabry v. Huneycutt, 149 N.C. App. 630, 562 S.E.2d 292, 2002 N.C. App. LEXIS 271 (2002).

§ 28A-18-2. Death by wrongful act of another; recovery not assets.

CASE NOTES

I. General Consideration.
V. Damages Recoverable.
D. Loss of Decedent's Income, Services, Society, etc.

I. GENERAL CONSIDERATION.

Cited in Olvera v. Edmundson, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 15284 (W.D.N.C. Sept. 21, 2001); Beyer v. N.C. Div. of Mental Health, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 16968 (W.D.N.C. Oct. 16, 2001); In re Estate of Lunsford, 143 N.C. App. 646, 547 S.E.2d 483, 2001 N.C. App. LEXIS 326 (2001), cert. granted, 353 N.C. 727, 550 S.E.2d 779 (2001).

V. DAMAGES RECOVERABLE.

D. Loss of Decedent's Income, Services, Society, etc.

No evidence was offered showing that the decedent, who died of accidental strangulation in a nursing home, was potentially capable of earning money in excess of that which would be required for her support, and the jury's award as to these damages, therefore, would necessarily be based on speculation and not supported by evidence; consequently, the trial court erred in instructing the jury that it could award damages for loss of the decedent's net income, pursuant to G.S. § 28A-18-2(b)(4), which required a new trial as to the issue of damages for the decedent's wrongful death. Estate of Hendrickson v. Genesis Health Venture, Inc., — N.C. App. —, 565 S.E.2d 254, 2002 N.C. App. LEXIS 722 (2002).

Article 19.

Claims Against the Estate.

§ 28A-19-1. Manner of presentation of claims.

CASE NOTES

Failure to Properly Present Claim. — Claimants' notice of claim against the decedent's estate was barred under G.S. 28A-19-3(a), where, among other things, the claimants failed to state the amount or item claimed, the particular basis for their claim, and the dates upon which services were rendered as was required under G.S. 28A-19-1(a). Holloman v. Harrelson, 149 N.C. App. 861, 561 S.E.2d 351, 2002 N.C. App. LEXIS 304 (2002), cert. denied, 355 N.C. 748, 565 S.E.2d 665 (2002).

§ 28A-19-3. Limitations on presentation of claims.

CASE NOTES

Action Not Time Barred. — Action filed on October 20, 2000, two days after qualification of deceased driver's personal representative, for personal injuries arising out of an automobile accident that occurred on June 27, 1997, was not barred by G.S. 1-52, where deceased died on November 7, 1997, at which time the three year limitations period had not yet expired, as under G.S. 28A-18-1 plaintiff's cause of action survived his death, and thus, pursuant to G.S. 1-22, plaintiff was permitted to commence a cause of action against deceased's personal representative, provided that either the action was brought within the time specified for the presentation of claims in G.S. 28A-19-3, or that notice of the claim upon which the action was based was presented to the personal representative within the time specified for the presentation of claims in G.S. 28A-19-3. The personal representative's failure to establish in the record that she complied with G.S. 28A-19-3(a) regarding general notice to creditors precluded her from relying upon the statute of limitations as a bar; moreover, under G.S. 28A-14-1(a), the absolute earliest "deadline" date which could have been specified by the personal representative in the general notice to creditors was January 18, 2001, three months from the day of the first publication or posting of such notice. Mabry v. Huneycutt, 149 N.C. App. 630, 562 S.E.2d 292, 2002 N.C. App. LEXIS 271 (2002).

Claim Not Barred If Personal Representative Appointed Before Limitations Period Expires. — If a personal representative is appointed to administer an estate before the expiration of the statute of limitations, G.S. 1-22 allows the time limit within which to file an action against the estate to be extended according to G.S. 28A-19-3. Shaw v. Mintz, — N.C. App. —, 564 S.E.2d 593, 2002 N.C. App. LEXIS 674 (2002).

Extension of Statute of Limitations After Appointment of Personal Representative. — If a personal representative is appointed to administer an estate before the statute of limitations lapses, G.S. 1-22 will allow the time limit within which to file an action against the estate to be extended according to G.S. 28A-19-3. Wright v. Smith, — N.C. App. —, 564 S.E.2d 613, 2002 N.C. App. LEXIS 681 (2002).

Failure to Properly Present Claim. — Claimants' notice of claim against the decedent's estate was barred under G.S. 28A-19-3(a), where, among other things, the claimants failed to state the amount or item claimed, the particular basis for their claim, and the dates upon which the services were rendered as was required under G.S. 28A-19-1(a). Holloman v. Harrelson, 149 N.C. App. 861, 561 S.E.2d 351, 2002 N.C. App. LEXIS 304 (2002), cert. denied, 355 N.C. 748, 565 S.E.2d 665 (2002).

Article 22.

Distribution.

§ 28A-22-1. Scheme of distribution; testate and intestate estates.

Editor's Note. — Session Laws 2002-180, c. 18.2, provides: "The General Statutes Commission may study and report to the 2003 General Assembly on the question of whether North Carolina should allow a method for the distribution of property coming to an estate after the estate is closed without the necessity of reopening the estate. As part of the study, the Commission may consider, among other things, the deed of distribution concept used in South Carolina as codified in the South Carolina General Statutes, Section 62-3-907, et seq., and other related statutes. The Commission may also consider recent statewide situations that have arisen from payments to closed estates arising from the Bailey and Smith/Shaver cases, and payments made to tobacco producers and allotment holders under Phase II of the Tobacco Master Settlement Agreement. The Commission may consult with the Estate Law Section of the North Carolina Bar Association and the Administrative Office of the Courts, in addition to any other interested persons. The report may include any recommended legislation necessary to implement the Commission's recommendations."

§ 28A-22-9. Distribution to known but unlocated devisees or heirs.

(a) If there are known but unlocated devisees or heirs of property held by the personal representative, the personal representative may deliver the share of such devisee or heir to the clerk of superior court immediately prior to filing of the final account. If the devisee or heir is located after the final account has been filed, he may present a claim for the share to the clerk. If the clerk determines that the claimant is entitled to the share, he shall deliver the share to the devisee or claimant. If the clerk denies the claim, the claimant may take an appeal as in a special proceeding.

(b) The clerk shall hold the share without liability for profit or interest. If no claim has been presented within a period of one year after the filing of the final account, the clerk shall deliver the share to the State Treasurer as abandoned property.

(c) The clerk shall not be required to publish any notice to such devisee or heir and shall not be required to report such share to the State Treasurer. If the devisee or heir is located, the clerk shall inform the devisee or heir that he is entitled to file a claim with the State Treasurer for the share under the provisions of G.S. 116B-67. (1979, 2nd Sess., c. 1311, s. 2; 2002-62, s. 1.)

Effect of Amendments. — Session Laws 2002-62, s. 1, effective October 1, 2002, in subsection (a), substituted "heirs of property held by ther personal representative" for "heirs"; in subsection (b), substituted "one year after the filing" for "five years after the filing"; and in subsection (c), substituted "G.S. 116B-67" for "G.S. 116B-38(a)."

ARTICLE 27.

Apportionment of Federal Estate Tax.

§ 28A-27-2. Apportionment.

CASE NOTES

Applied in Estate of Bradford v. Comm'r, T.C. Memo 2002-238, 2002 Tax Ct. Memo LEXIS 245 (Sept. 23, 2002).

§ 28A-27-5. Exemptions, deductions, and credits.

CASE NOTES

Applied in Estate of Bradford v. Comm'r, T.C. Memo 2002-238, 2002 Tax Ct. Memo LEXIS 245 (Sept. 23, 2002).

Chapter 29.

Intestate Succession.

Article 2.

Shares of Persons Who Take upon Intestacy.

§ 29-14. Share of surviving spouse.

Legal Periodicals. —
For recent development, "Death and the Partnership Principle: Interpreting Recent Abatement Amendments to North Carolina's Equitable Distribution Act," see 80 N.C.L. Rev. 1089 (2002).

CASE NOTES

Cited in Olvera v. Edmundson, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 15284 (W.D.N.C. Sept. 21, 2001).

§ 29-15. Shares of others than surviving spouse.

CASE NOTES

Cited in Olvera v. Edmundson, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 15284 (W.D.N.C. Sept. 21, 2001).

Article 8.

Election to Take Life Interest in Lieu of Intestate Share.

§ 29-30. Election of surviving spouse to take life interest in lieu of intestate share provided.

Legal Periodicals. —
For article, "Legislative Kudzu and the New Millennium: An Opportunity for Reflection and Reform," see 23 Campbell L. Rev. 157 (2001).

Chapter 30.

Surviving Spouses.

Article 1A.

Elective Share.

§ 30-3.1. Right of elective share.

Legal Periodicals. — North Carolina's New Elective Share Statute: Much Ado About Nothing?, 36 Wake Forest L. Rev. 795 (2001).

§ 30-3.2. Definitions.

Legal Periodicals. — For recent development, "Death and the Partnership Principle: Interpreting Recent Abatement Amendments to North Carolina's Equitable Distribution Act," see 80 N.C.L. Rev. 1089 (2002).

§ 30-3.3. Property Passing to Surviving Spouse.

Legal Periodicals. — For recent development, "Death and the Partnership Principle: Interpreting Recent Abatement Amendments to North Carolina's Equitable Distribution Act," see 80 N.C.L. Rev. 1089 (2002).

Chapter 31.

Wills.

Article 1.

Execution of Will.

§ 31-3.3. Attested written will.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in In re Will of McCauley, 356 N.C. 91, 565 S.E.2d 88, 2002 N.C. LEXIS 550 (2002).

§ 31-3.4. Holographic will.

CASE NOTES

I. General Consideration.
IV. Found Among Valuable Papers, etc.

I. GENERAL CONSIDERATION.

Margin Notes. — Additional words found on a holographic will, which were written in a different pen, were not sufficient to entitle caveators challenging the will to a directed verdict, and the jury was allowed to determine the will's authorship. In re Allen, 148 N.C. App. 526, 559 S.E.2d 556, 2002 N.C. App. LEXIS 33 (2002).

IV. FOUND AMONG VALUABLE PAPERS, ETC.

Writing Found with Other Papers. — Finding a holographic will in a wooden bowl on the testator's kitchen counter did not entitle caveators to a directed verdict because other documents of a financial nature were found in the same place, and the testator was a man of limited education. In re Allen, 148 N.C. App. 526, 559 S.E.2d 556, 2002 N.C. App. LEXIS 33 (2002).

Article 2.

Revocation of Will.

§ 31-5.1. Revocation of written will.

CASE NOTES

II. Subsequent Will or Codicil.

II. SUBSEQUENT WILL OR CODICIL.

Where caveators could not produce the revocatory writing, and where the decedent's attorney could not recall writing the will, the trial court erred in granting the caveators summary judgment on the ground that the will revoked an earlier will that had excluded the caveators as beneficiaries. In re Will of McCauley, 356 N.C. 91, 565 S.E.2d 88, 2002 N.C. LEXIS 550 (2002).

§ 31-5.8. Revival of revoked will.

CASE NOTES

Cited in In re Will of McCauley, 356 N.C. 91, 565 S.E.2d 88, 2002 N.C. LEXIS 550 (2002).

ARTICLE 4A.

Self-Proved Wills.

§ 31-11.6. How attested wills may be made self-proved.

CASE NOTES

Witness' Failure to Remember Witnessing Will. — Where the caveators could not produce the revocatory writing, and where one witness did not remember witnessing the will, the trial court erred in granting the caveators summary judgment on the ground that the will revoked an earlier will that had excluded the caveators as beneficiaries. In re Will of McCauley, 356 N.C. 91, 565 S.E.2d 88, 2002 N.C. LEXIS 550 (2002).

ARTICLE 6.

Caveat to Will.

§ 31-32. When and by whom caveat filed.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Scope of Subject Matter Jurisdiction. — Caveat filed by decedent's heirs challenging the validity of the will and codicil whereby decedent left her assets to a university barred a later complaint filed by the heirs to the extent the later filed complaint addressed the same issues as alleged in the caveat. Baars v. Campbell Univ., Inc., 148 N.C. App. 408, 558 S.E.2d 871, 2002 N.C. App. LEXIS 30 (2002), cert. denied, 355 N.C. 490, 563 S.E.2d 563 (2002).

Article 7.

Construction of Will.

§ 31-42. Failure of devises by lapse or otherwise; renunciation.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Intent to Prevent Lapse. —

Trial court improperly applied the anti-lapse statute, G.S. 31-42(a), to devises in a will to a son who predeceased the testatrix, because an article in the will specifically provided that any lapsed devises were to pass in the testatrix's residuary estate. Colombo v. Stevenson, 150 N.C. App. 163, 563 S.E.2d 591, 2002 N.C. App. LEXIS 365 (2002).

Chapter 31A.

Acts Barring Property Rights.

ARTICLE 3.

Willful and Unlawful Killing of Decedent.

§ 31A-3. Definitions.

Legal Periodicals. — For comment, "The Need for a New Slayer Statute in North Carolina," see 24 Campbell L. Rev. 295 (2002).

Chapter 32A.

Powers of Attorney.

ARTICLE 3.

Health Care Powers of Attorney.

§ 32A-15. General purpose of this Article.

Legal Periodicals. — Limiting a Surrogate's Authority to Terminate Life-Support for An Incompetent Adult, see 79 N.C.L. Rev. 1815 (2001).

Chapter 36A.

Trusts and Trustees.

Article 5.

Uniform Trusts Act.

§ 36A-66. Trustee buying from or selling to self.

Legal Periodicals. — The Punctilio of An Honor the Most "Cents"-itive: Trustees, Broker-Dealers, and North Carolina's Self-Dealing Ban, 78 N.C.L. Rev. 1965 (2000).

Chapter 38A.

Landowner Liability.

§ 38A-4. Limitation of liability.

CASE NOTES

Hidden Danger. — United States was entitled to summary judgment in visitor's personal injury suit; visitor did not allege, as required by G.S. 38A-4, made applicable by 28 U.S.C.S. § 1346(b), reckless indifference, willful or wanton infliction of injury, or even that the United States knew of the hidden danger that caused the visitor's fall in a national forest in Illinois. Johnston v. United States, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 12804 (W.D.N.C. July 11, 2002).

Chapter 39.

Conveyances.

Article 2.

Conveyances by Husband and Wife.

§ 39-13.6. Control of real property held in tenancy by the entirety.

CASE NOTES

Affirmative Defense. — Where neither the defendants' original nor amended answer included an affirmative defense, the defense was waived even though the lease for land held by a husband and wife was not signed by the wife. Purchase Nursery, Inc. v. Edgerton, — N.C. App. —, 568 S.E.2d 904, 2002 N.C. App. LEXIS 1073 (2002).

Chapter 40A.

Eminent Domain.

Article 1.

General.

Article 1.

General.

§ 40A-2. Definitions.

CASE NOTES

Inclusion of Equipment Within Definition of Property. — It was not error for trial court to allow testimony about the value of the property to be taken which included various equipment present on the property, as the authority proposing to take the property never specifically excluded this equipment from its taking, and it could be included within the definition of property in G.S. 40A-2(7). Piedmont Triad Reg'l Water Auth. v. Lamb, — N.C. App. —, 564 S.E.2d 71, 2002 N.C. App. LEXIS 584 (2002), cert. denied, 356 N.C. 166, 568 S.E.2d 608 (2002).

§ 40A-3. By whom right may be exercised.

(a) Private Condemnors. — For the public use or benefit, the persons or organizations listed below shall have the power of eminent domain and may acquire by purchase or condemnation property for the stated purposes and other works which are authorized by law.

(1) Corporations, bodies politic or persons have the power of eminent domain for the construction of railroads, power generating facilities, substations, switching stations, microwave towers, roads, alleys, access railroads, turnpikes, street railroads, plank roads, tramroads, canals, telegraphs, telephones, electric power lines, electric lights, public water supplies, public sewerage systems, flumes, bridges, and pipelines or mains originating in North Carolina for the transportation of petroleum products, coal, gas, limestone or minerals. Land condemned for any liquid pipelines shall:
a. Not be less than 50 feet nor more than 100 feet in width; and
b. Comply with the provisions of G.S. 62-190(b).
The width of land condemned for any natural gas pipelines shall not be more than 100 feet.

(2) School committees or boards of trustees or of directors of any corporation holding title to real estate upon which any private educational institution is situated, have the power of eminent domain in order to obtain a pure and adequate water supply for such institution.

(3) Franchised motor vehicle carriers or union bus station companies organized by authority of the Utilities Commission, have the power of eminent domain for the purpose of constructing and operating union bus stations: Provided, that this subdivision shall not apply to any city or town having a population of less than 60,000.

(4) Any railroad company has the power of eminent domain for the purposes of: constructing union depots; maintaining, operating, im-

proving or straightening lines or of altering its location; constructing double tracks; constructing and maintaining new yards and terminal facilities or enlarging its yard or terminal facilities; connecting two of its lines already in operation not more than six miles apart; or constructing an industrial siding.

(5) A condemnation in fee simple by a State-owned railroad company for the purposes specified in subdivision (4) of this subsection and as provided under G.S. 124-12(2).

The width of land condemned for any single or double track railroad purpose shall be not less than 80 feet nor more than 100 feet, except where the road may run through a town, where it may be of less width, or where there may be deep cuts or high embankments, where it may be of greater width.

No rights granted or acquired under this subsection shall in any way destroy or abridge the rights of the State to regulate or control any railroad company or to regulate foreign corporations doing business in this State. Whenever it is necessary for any railroad company doing business in this State to cross the street or streets in a town or city in order to carry out the orders of the Utilities Commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the State. Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city.

No such condemnor shall be allowed to have condemned to its use, without the consent of the owner, his burial ground, usual dwelling house and yard, kitchen and garden, unless condemnation of such property is expressly authorized by statute.

The power of eminent domain shall be exercised by private condemnors under the procedures of Article 2 of this Chapter.

(b) Local Public Condemnors [Standard Provision]. — For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property, either inside or outside its boundaries, for the following purposes.

(1) Opening, widening, extending, or improving roads, streets, alleys, and sidewalks. The authority contained in this subsection is in addition to the authority to acquire rights-of-way for streets, sidewalks and highways under Article 9 of Chapter 136. The provisions of this subdivision (1) shall not apply to counties.

(2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.

(3) Establishing, enlarging, or improving parks, playgrounds, and other recreational facilities.

(4) Establishing, extending, enlarging, or improving storm sewer and drainage systems and works, or sewer and septic tank lines and systems.

(5) Establishing, enlarging, or improving hospital facilities, cemeteries, or library facilities.

(6) Constructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency.

(7) Establishing drainage programs and programs to prevent obstructions to the natural flow of streams, creeks and natural water channels or improving drainage facilities. The authority contained in this subdivision is in addition to any authority contained in Chapter 156.

(8) Acquiring designated historic properties, designated as such before October 1, 1989, or acquiring a designated landmark designated as

such on or after October 1, 1989, for which an application has been made for a certificate of appropriateness for demolition, in pursuance of the purposes of G.S. 160A-399.3, Chapter 160A, Article 19, Part 3B, effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate.

(9) Opening, widening, extending, or improving public wharves.

The board of education of any municipality or county or a combined board may exercise the power of eminent domain under this Chapter for purposes authorized by other statutes.

The power of eminent domain shall be exercised by local public condemnors under the procedures of Article 3 of this Chapter.

(b1) Local Public Condemnors [Modified Provision for Certain Localities]. — For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property or interest therein, either inside or outside its boundaries, for the following purposes.

(1) Opening, widening, extending, or improving roads, streets, alleys, and sidewalks. The authority contained in this subsection is in addition to the authority to acquire rights-of-way for streets, sidewalks and highways under Article 9 of Chapter 136. The provisions of this subdivision (1) shall not apply to counties.

(2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.

(3) Establishing, enlarging, or improving parks, playgrounds, and other recreational facilities.

(4) Establishing, extending, enlarging, or improving storm sewer and drainage systems and works, or sewer and septic tank lines and systems.

(5) Establishing, enlarging, or improving hospital facilities, cemeteries, or library facilities.

(6) Constructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency.

(7) Establishing drainage programs and programs to prevent obstructions to the natural flow of streams, creeks and natural water channels or improving drainage facilities. The authority contained in this subdivision is in addition to any authority contained in Chapter 156.

(8) Acquiring designated historic properties, designated as such before October 1, 1989, or acquiring a designated landmark designated as such on or after October 1, 1989, for which an application has been made for a certificate of appropriateness for demolition, in pursuance of the purposes of G.S. 160A-399.3, Chapter 160A, Article 19, Part 3B, effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate.

(9) Opening, widening, extending, or improving public wharves.

(10) Engaging in or participating with other governmental entities in acquiring, constructing, reconstructing, extending, or otherwise building or improving beach erosion control or flood and hurricane protection works, including, but not limited to, the acquisition of any property that may be required as a source for beach renourishment.

(11) Establishing access for the public to public trust beaches and appurtenant parking areas.

The board of education of any municipality or county or a combined board may exercise the power of eminent domain under this Chapter for purposes authorized by other statutes.

The power of eminent domain shall be exercised by local public condemnors under the procedures of Article 3 of this chapter.

This subsection applies only to Carolina Beach, Carteret County, Dare County, and the Towns of Atlantic Beach, Emerald Isle, Holden Beach, Indian Beach, Kill Devil Hills, Kitty Hawk, Kure Beach, Nags Head, North Topsail Beach, Pine Knoll Shores, Surf City, Topsail Beach, and Wrightsville Beach

(c) Other Public Condemnors. — For the public use or benefit, the following political entities shall possess the power of eminent domain and may acquire property by purchase, gift, or condemnation for the stated purposes.

(1) A sanitary district board established under the provisions of Part 2 of Article 2 of Chapter 130A for the purposes stated in that Part.

(2) The board of commissioners of a mosquito control district established under the provisions of Part 2 of Article 12 of Chapter 130A for the purposes stated in that Part.

(3) A hospital authority established under the provisions of Part B of Article 2 of Chapter 131E for the purposes stated in that Part, provided, however, that the provisions of G.S. 131E-24(c) shall continue to apply.

(4) A watershed improvement district established under the provisions of Article 2 of Chapter 139 for the purposes stated in that Article, provided, however, that the provisions of G.S. 139-38 shall continue to apply.

(5) A housing authority established under the provisions of Article 1 of Chapter 157 for the purposes of that Article, provided, however, that the provisions of G.S. 157-11 shall continue to apply.

(6) A corporation as defined in G.S. 157-50 for the purposes of Article 3 of Chapter 157, provided, however, the provisions of G.S. 157-50 shall continue to apply.

(7) A commission established under the provisions of Article 22 of Chapter 160A for the purposes of that Article.

(8) An authority created under the provisions of Article 1 of Chapter 162A for the purposes of that Article.

(9) A district established under the provisions of Article 4 of Chapter 162A for the purposes of that Article.

(10) A district established under the provisions of Article 5 of Chapter 162A for purposes of that Article.

(11) The board of trustees of a community college established under the provisions of Article 2 of Chapter 115D for the purposes of that Article.

(12) A district established under the provisions of Article 6 of Chapter 162A for the purposes of that Article.

(13) A regional public transportation authority established under Article 26 of Chapter 160A of the General Statutes for the purposes of that Article.

The power of eminent domain shall be exercised by a public condemnor listed in this subsection under the procedures of Article 3 of this Chapter. (1852, c. 92, s. 1; R.C., c. 61, s. 9; 1874-5, c. 83; Code, s. 1698; Rev., s. 2575; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; C.S., s. 1706; 1923, c. 205; Ex. Sess. 1924, c. 118; 1937, c. 108, s. 1; 1939, c. 228, s. 4; 1941, c. 254; 1947, c. 806; 1951, c. 1002, ss. 1, 2; 1953, c. 1211; 1957, c. 65, s. 11; c. 1045, s. 1; 1961, c. 247; 1973, c. 507, s. 5; c. 1262, s. 86; 1977, c. 771, s. 4; 1981, c. 919, s. 1; 1983, c. 378, s. 2; 1983 (Reg. Sess., 1984), c. 1084; 1985, c. 689, s. 10; c. 696, s. 2; 1987, c. 2, s. 1; c. 564, s. 13; c. 783, s. 6; 1989, c. 706, s. 3; c. 740, s. 1.1; 2000-146, s. 8; 2001-36, ss. 1, 3; 2001-478, s. 2; 2001-487, s. 58; 2002-172, s. 4.1.)

Editor's Note. —
Session Laws 2002-172, s. 7.1, contains a severability clause.

Effect of Amendments. —
Session Laws 2002-172, s. 4.1, effective October 31, 2002, deleted "ordered by the Utilities Commission as provided in G.S. 62-232" at the end of subdivision (a)(4).

Article 3.

Condemnation by Public Condemnors.

§ 40A-42. Vesting of title and right of possession; injunction not precluded.

CASE NOTES

Cited in Piedmont Triad Reg'l Water Auth. v. Lamb, — N.C. App. —, 564 S.E.2d 71, 2002 N.C. App. LEXIS 584 (2002), cert. denied, 356 N.C. 166, 568 S.E.2d 608 (2002).

Chapter 41A.

State Fair Housing Act.

§ 41A-7. Enforcement.

CASE NOTES

Fair Housing. — Fair housing organization lacked standing as it was not a person injured by an unlawful discriminatory housing practice within the meaning of the State Fair Housing Act, specifically, G.S. 41A-7(a), or Durham, North Carolina City Code § 8.5-27(A). Lee Ray Bergman Real Estate Rentals v. N.C. Fair Hous. Ctr., — N.C. App. —, 568 S.E.2d 883, 2002 N.C. App. LEXIS 1089 (2002).

Chapter 42.

Landlord and Tenant.

Article 1.

General Provisions.

§ 42-11. Willful destruction by tenant misdemeanor.

Legal Periodicals. — For article, "Legislative Kudzu and the New Millennium: An Opportunity for Reflection and Reform," see 23 Campbell L. Rev. 157 (2001).

§ 42-13. Wrongful surrender to other than landlord misdemeanor.

Legal Periodicals. — For article, "Legislative Kudzu and the New Millennium: An Opportunity for Reflection and Reform," see 23 Campbell L. Rev. 157 (2001).

Chapter 43.
Land Registration.

ARTICLE 4.
Registration and Effect.

§ 43-13. Manner of registration.

Cross References. — As to the use and confidential nature of actual addresses of Address Confidentiality Program participants by boards of elections for election-related purposes, see G.S. 15C-8.

Chapter 44A.

Statutory Liens and Charges.

Article 1.

Possessory Liens on Personal Property.

§ 44A-1. Definitions.

CASE NOTES

Applied in Monteau v. Reis Trucking & Constr., Inc., 147 N.C. App. 121, 553 S.E.2d 709, 2001 N.C. App. LEXIS 1052 (2001).

§ 44A-2. Persons entitled to lien on personal property.

CASE NOTES

Cited in Triad Int'l Maint. Corp. v. Guernsey Air Leasing, Ltd., 178 F. Supp. 2d 547, 2001 U.S. Dist. LEXIS 23827 (M.D.N.C. 2001).

§ 44A-3. When lien arises and terminates.

CASE NOTES

Because an aircraft maintenance facility never acquired possession of the complete set of an aircraft's maintenance records, it never acquired a mechanic's lien on those items; when the maintenance facility returned the aircraft's engines to the owner, its interest in the engines terminated and it no longer held an enforceable interest in the engines. Triad Int'l Maint. Corp. v. Guernsey Air Leasing, Ltd., 178 F. Supp. 2d 547, 2001 U.S. Dist. LEXIS 23827 (M.D.N.C. 2001).

§ 44A-4. Enforcement of lien by sale.

CASE NOTES

Applied in Triad Int'l Maint. Corp. v. Guernsey Air Leasing, Ltd., 178 F. Supp. 2d 547, 2001 U.S. Dist. LEXIS 23827 (M.D.N.C. 2001).

Article 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

§ 44A-13. Action to enforce lien.

CASE NOTES

Cited in Piedmont Rebar, Inc. v. Sun Constr., Inc., — N.C. App. —, 564 S.E.2d 281, 2002 N.C. App. LEXIS 583 (2002).

Article 3.

Model Payment and Performance Bond.

§ 44A-27. Actions on payment bonds; service of notice.

CASE NOTES

Applied in Monteau v. Reis Trucking & Constr., Inc., 147 N.C. App. 121, 553 S.E.2d 709, 2001 N.C. App. LEXIS 1052 (2001).

Chapter 45.

Mortgages and Deeds of Trust.

Article 2A.

Sales Under Power of Sale.

Part 2. Procedure for Sale.

§ 45-21.31. Disposition of proceeds of sale; payment of surplus to clerk.

CASE NOTES

Trustee's Authority to Make Disbursements.

Application of the proceeds of a foreclosure sale were within the sole province of the trustee, who was not required to receive pre-approval from the clerk of the superior court, or the superior court, regarding the application of the proceeds. In re Webber, 148 N.C. App. 158, 557 S.E.2d 645, 2001 N.C. App. LEXIS 1272 (2001).

Obligation to Pay Costs and Expenses.

Statutory costs and expenses, including the trustee's commission, were simply obligations arising from the foreclosure sale which had to be paid by the trustee before the remainder of the proceeds could be distributed. In re Webber, 148 N.C. App. 158, 557 S.E.2d 645, 2001 N.C. App. LEXIS 1272 (2001).

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.

Legal Periodicals. —

For article, "Legislative Kudzu and the New Millennium: An Opportunity for Reflection and Reform," see 23 Campbell L. Rev. 157 (2001).

CASE NOTES

IV. Application.

IV. APPLICATION.

Section Held Inapplicable. —

Anti-deficiency statute did not apply to a lease agreement with an option to purchase, containing a liquidated damages provision, where none of the transaction documents purported to be an instrument of debt or securing instrument, and none of the documents stated that the subject property served as security for the balance of its purchase price. Green Park Inn, Inc. v. Moore, 149 N.C. App. 531, 562 S.E.2d 53, 2002 N.C. App. LEXIS 287 (2002).

Chapter 45A.

Good Funds Settlement Act.

§ 45A-7. Penalty.

OPINIONS OF ATTORNEY GENERAL

Agricultural Credit Association as Political Subdivision of United States. — Section 45A-7 is ambiguous as to whether an agricultural credit association is a political subdivision of the United States within the meaning of subdivision (2). See opinion of Attorney General to The Honorable Frank Mitchell, Member of the North Carolina House of Representatives, and The Honorable Charles W. Albertson, Member of the North Carolina Senate, 2001 N.C. AG LEXIS 31 (7/5/01).

Chapter 47.

Probate and Registration.

Article 2.

Registration.

§ 47-26. Deeds of gift.

CASE NOTES

Cited in Fulcher v. Golden, 147 N.C. App. 161, 554 S.E.2d 410, 2001 N.C. App. LEXIS 1069 (2001).

§ 47-30. Plats and subdivisions; mapping requirements.

Local Modification. — Ashe: 1979, c. 330, ss. 2, 3; Avery: 1973, c. 1050, ss. 1, 2; Cabarrus: 2002-115, s. 2; Davie, as to subsection (f)(3): 1961, c. 609; Mecklinburg: 2002-115, s. 2; Onslow: 1977, c. 305, s. 1; Wilson: 1957, c. 1137.

§ 47-32.2. Violation of § 47-30 or § 47-32 a misdemeanor.

Legal Periodicals. — For article, "Legislative Kudzu and the New Millennium: An Opportunity for Reflection and Reform," see 23 Campbell L. Rev. 157 (2001).

Article 3.

Forms of Acknowledgment, Probate and Order of Registration.

§ 47-42. Attestation of bank conveyances by secretary or cashier.

(a) Repealed by Session Laws 2002-26, s. 1.

(b) All deeds and conveyances executed prior to February 14, 1939, by banking corporations, where the cashier of said banking corporation has attested said instruments, which deeds and conveyances are otherwise regular, are hereby validated.

(c) All deeds and conveyances executed by a banking corporation on or after October 1, 1999, that complied with G.S. 47-18.3 are hereby validated. (1939, c. 20, s. 21/2; 1957, c. 783, s. 4; 2002-26, s. 1.)

Effect of Amendments. — Session Laws 2002-26, s. 1, effective July 22, 2002, and inapplicable to litigation pending on that date or to any instrument directly or indirectly involved in litigation pending on that date, repealed subsection (a); and added subsection (c).

Article 5.

Registration of Official Discharges from the Military and Naval Forces of the United States.

§ 47-113.1. (See Editor's note for effective date) Removal or review of discharge papers from files of the register of deeds.

(a) Any veteran of the United States armed forces or his or her widow or widower, attorney-in-fact, personal representative, executor, or court-appointed guardian may request that the register of deeds remove from the official records any of the following forms recorded before, on, or after the effective date of this act, by or on behalf of the requesting veteran: DD-214, DD-215, WD AGO 53, WD AGO 55, WD AGO 53-55, NAVMC 78-PD, and NAVPERS 553. The request shall specify the identification page number of the form to be removed. The request shall be made in person and with appropriate identification to allow determination of the identity of the requester. The register of deeds has no duty to inquire beyond the request to verify the identity of the person requesting the removal. No fee shall be charged for the removal. When the request for removal is made, the register of deeds shall provide a written notice to the requesting party that the removal of the document from the official records is permanent and only microfilm, microfiche, or a similar archived copy of the document remains. Any index of the microfilm, microfiche, or similar archived copy of the document shall be annotated concerning the request for removal.

(b) If any person not authorized to request removal of the discharge documents pursuant to subsection (a) of this section requests a certified copy of any of the discharge documents listed in subsection (a) of this section, the register of deeds shall review the discharge documents and the register of deed's index of archived copies of documents for any annotations required under subsection (a) of this section. Upon retrieving a record of a discharge document which is the subject of an annotation required under subsection (a) of this section, the register of deeds shall make a paper copy of the archived discharge document, redact the personal information on the paper copy before certifying or distributing the document or disclosing to the requester its contents, and provide the redacted certified copy of the record to the requester. For purposes of this section, the term "personal information" includes the social security number of the veteran. The certification shall indicate the nature of the personal information that was redacted. A request for a certified copy of a veteran's discharge document by a person authorized under subsection (a) of this section to request removal of the document shall be made in person so that the register of deeds may verify the identity of the requester. All documents sent in response to requests for certified copies of discharge documents not made in person shall have personal information redacted. The register of deeds may charge a fee for the actual cost of this procedure.

(c) The words "register of deeds" appearing in this section shall be interpreted to mean "register of deeds, assistant register of deeds, or deputy register of deeds".

(d) Theses procedures shall apply to the copies of the same records located in the State Archives. (2002-96, ss. 1, 2; 2002-159, s. 61.5; 2002-162, s. 1.1.)

Cross References. — As to public records and archives, see G.S. 121-5.

Editor's Note. — Session Laws 2002-96, s. 4, as amended by Session Laws 2002-159, s. 61.5, provides: "This act is effective when it becomes law [August 28, 2002] in Craven, Nash, and Pamlico counties. This act becomes effective July 1, 2003, in all other counties of the State, except that it may be implemented at an earlier date in any county by the Register of Deeds of that county."

Session Laws 2002-96, s. 3 had made this section applicable to Craven, Nash and Pamlico Counties only. Session Laws 2002-162, s. 1.1, repealed Session Laws 2002-96, s. 3, effective October 17, 2002, making this section generally applicable.

Chapter 47A.

Unit Ownership.

Article 1.

Unit Ownership Act.

Article 1.

Unit Ownership Act.

§ 47A-17. Termination of unit ownership; no bar to reestablishment.

The removal provided for in G.S. 47A-16 shall in no way bar the subsequent resubmission of the property to the provisions of this Article. (1963, c. 685, s. 17; 1983, c. 624, s. 2; 2002-159, s. 10.)

Effect of Amendments. — Session Laws 2002-159, s. 10, effective October 11, 2002, substituted "G.S. 47A-16" for "the preceding section."

Chapter 47C.

North Carolina Condominium Act.

Article 1.

General Provisions.

Article 1.

General Provisions.

§ 47C-1-102. Applicability.

(a) This Chapter applies to all condominiums created within this State after October 1, 1986. G.S. 47C-1-105 (Separate Titles and Taxation), 47C-1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), 47C-1-107 (Eminent Domain), 47C-2-103 (Construction and Validity of Declaration and Bylaws), 47C-2-104 (Description of Units), 47C-2-121 (Merger or Consolidation of Condominiums), 47C-3-102(a)(1) through (6) and (11) through (16) (Powers of Unit Owners' Association), 47C-3-107.1 (Charges for Late Payment, Fines), 47C-3-111 (Tort and Contract Liability), 47C-3-112 (Conveyance or Encumbrance of Common Elements), 47C-3-116 (Lien for Assessments), 47C-3-118 (Association Records), and 47C-4-117 (Effect of Violation on Rights of Action; Attorney's Fees), and G.S. 47C-1-103 (Definitions), to the extent necessary in construing any of those sections, apply to all condominiums created in this State on or before October 1, 1986; but those sections apply only with respect to events and circumstances occurring after October 1, 1986, and do not invalidate existing provisions of the declarations, bylaws, or plats or plans of those condominiums.

(b) The provisions of Chapter 47A, the Unit Ownership Act, do not apply to condominiums created after October 1, 1986 and do not invalidate any amendment to the declaration, bylaws, and plats and plans of any condominium created on or before October 1, 1986 if the amendment would be permitted by this chapter. The amendment must be adopted in conformity with the procedures and requirements specified by those instruments and by Chapter 47A, the Unit Ownership Act. If the amendment grants to any person any rights, powers, or privileges permitted by this chapter, all correlative obligations, liabilities, and restrictions in this chapter also apply to that person.

(c) This chapter does not apply to condominiums or units located outside this State, but the public offering statement provisions (G.S. 47C-4-102 through 47C-4-108) apply to all contracts for the dispositions thereof signed in this State by any party unless exempt under G.S. 47C-4-101(b). (1985 (Reg. Sess., 1986), c. 877, s. 1; 1995, c. 509, s. 135.1(h); 2002-112, s. 1.)

Effect of Amendments. — Session Laws 2002-112, s. 1, effective September 6, 2002, in subsection (a), inserted "47C-2-121 (Merger or Consolidation of Condominiums)," and made stylistic changes throughout.

Chapter 47F.

North Carolina Planned Community Act.

Article 1.

General Provisions.

Article 1.

General Provisions.

§ 47F-1-102. Applicability.

(a) This Chapter applies to all planned communities created within this State on or after January 1, 1999, except as otherwise provided in this section.

(b) This Chapter does not apply to a planned community created within this State on or after January 1, 1999:

(1) Which contains no more than 20 lots (including all lots which may be added or created by the exercise of development rights) unless the declaration provides or is amended to provide that this Chapter does apply to that planned community; or

(2) In which all lots are restricted exclusively to nonresidential purposes, unless the declaration provides or is amended to provide that this Chapter does apply to that planned community.

(c) Notwithstanding the provisions of subsection (a) of this section, G.S. 47F-3-102(1) through (6) and (11) through (17) (Powers of owners' association), G.S. 47F-3-107(a), (b), and (c) (Upkeep of planned community; responsibility and assessments for damages), G.S. 47F-3-115 (Assessments for common expenses), and G.S. 47F-3-116 (Lien for assessments), apply to all planned communities created in this State before January 1, 1999. These sections apply only with respect to events and circumstances occurring on or after January 1, 1999, and do not invalidate existing provisions of the declaration, bylaws, or plats and plans of those planned communities. G.S. 47F-1-103 (Definitions) also applies to all planned communities created in this State before January 1, 1999, to the extent necessary in construing any of the preceding sections.

(d) Notwithstanding the provisions of subsections (a) and (c) of this section, any planned community created prior to January 1, 1999, may elect to make the provisions of this Chapter applicable to it by amending its declaration to provide that this Chapter shall apply to that planned community. The amendment may be made by affirmative vote or written agreement signed by lot owners of lots to which at least sixty-seven percent (67%) of the votes in the association are allocated or any smaller majority the declaration specifies. To the extent the procedures and requirements for amendment in the declaration conflict with the provisions of this subsection, this subsection shall control with respect to any amendment to provide that this Chapter applies to that planned community.

(e) This Chapter does not apply to planned communities or lots located outside this State. (1998-199, s. 1; 2002-112, s. 2.)

Editor's Note. — Session Laws 1998-199, s. 3, provided: "This act [Session Laws 1998-199, which in s. 1 enacted Chapter 47F] becomes effective January 1, 1999, and applies to planned communities created on or after that date. G.S. 47F-3-102(1) through (6) and (11) through (17), G.S. 47F-3-107(a), (b), and (c), G.S. 47F-3-115, and G.S. 47F-3-116 as enacted

by Section 1 of this act apply to planned communities created prior to the effective date, except that the provisions of G.S. 47F-3-116(e) as enacted by Section 1 of this act, apply to actions arising on or after the effective date." Session Laws 2002-112, s. 3, amended Session Laws 1998-199 to read as follows: "This act becomes effective January 1, 1999."

Effect of Amendments. — Session Laws 2002-112, s. 2, effective September 6, 2002, rewrote the section.

Article 3.

Management of Planned Community.

§ 47F-3-102. Powers of owners' association.

CASE NOTES

Homeowners' Associations. — The trial court correctly held that the statute provided an association with power to impose reasonable fines against its members as nothing in the association's Articles of Incorporation or Declaration limited fining powers. Wise v. Harrington Grove Cmty. Ass'n, — N.C. App. —, 566 S.E.2d 499, 2002 N.C. App. LEXIS 780 (2002).

§ 47F-3-104. Transfer of special declarant rights.

CASE NOTES

Applied in Wise v. Harrington Grove Cmty. Ass'n, — N.C. App. —, 566 S.E.2d 499, 2002 N.C. App. LEXIS 780 (2002).

§ 47F-3-107. Upkeep of planned community; responsibility and assessments for damages.

CASE NOTES

Applied in Wise v. Harrington Grove Cmty. Ass'n, — N.C. App. —, 566 S.E.2d 499, 2002 N.C. App. LEXIS 780 (2002).

§ 47F-3-107.1. Procedures for fines and suspension of planned community privileges or services.

CASE NOTES

Applied in Wise v. Harrington Grove Cmty. Ass'n, — N.C. App. —, 566 S.E.2d 499, 2002 N.C. App. LEXIS 780 (2002).

§ 47F-3-115. Assessments for common expenses.

CASE NOTES

Applied in Wise v. Harrington Grove Cmty. Ass'n, — N.C. App. —, 566 S.E.2d 499, 2002 N.C. App. LEXIS 780 (2002).

§ 47F-3-116. Lien for assessments.

CASE NOTES

Applied in Wise v. Harrington Grove Cmty. Ass'n, — N.C. App. —, 566 S.E.2d 499, 2002 N.C. App. LEXIS 780 (2002).

Chapter 48.

Adoptions.

Article 1.

General Provisions.

§ 48-1-100. Legislative findings and intent; construction of Chapter.

CASE NOTES

Applied in In re Cunningham, — N.C. App. —, 567 S.E.2d 153, 2002 N.C. App. LEXIS 773 (2002).

Article 2.

General Adoption Procedure.

Part 2. General Procedural Provisions.

§ 48-2-206. Prebirth determination of right to consent.

(a) Anytime after six months from the date of conception as reasonably determined by a physician, the biological mother, agency, or adoptive parents chosen by the biological mother may file a special proceeding with the clerk requesting the court to determine whether consent of the biological father is required. The biological father shall be served with notice of the intent of the biological mother to place the child for adoption, allowing the biological father 15 days after service to assert a claim that his consent is required.

(b) The notice required under subsection (a) of this section shall contain the special proceeding case caption and file number and shall be substantially similar to the following language:

> "[Name of the biological mother], the biological mother, is expected to give birth to a child on or about [birth due date]. You have been identified as the biological father. It is the intention of the biological mother to place the child for adoption. It is her belief that your consent to the adoption is not required. If you believe your consent to the adoption of this child is required pursuant to G.S. 48-3-601, you must notify the court in writing no later than 15 days from the date you received this notice that you believe your consent is required. A copy of your notice to the court must also be sent to the person or agency that sent you this notice. If you fail to notify the court within 15 days that you believe your consent is required, the court will rule that your consent is not required."

(c) If the biological father fails to respond within the time required, the court shall enter an order that the biological father's consent is not required for the adoption. A biological father who fails to respond within the time required under this section is not entitled to notice under G.S. 48-2-401(c) of an adoption petition filed within three months of the birth of the minor.

(d) If the biological father notifies the court within 15 days of his receipt of the notice required by subsection (a) of this section that he believes his consent to the adoption is required, on motion of the petitioner, the court shall hold a hearing to determine whether the consent of the biological father is required. Promptly on receipt of the petitioner's motion, the court shall set a date for the hearing no earlier than 60 days nor later than 70 days after the biological father received the notice required by subsection (a) of this section and shall notify the petitioner and the biological father of the date, time, and place of the hearing. The notice of hearing to the biological father shall include a statement substantially similar to the following:

> "To the biological father named above: You have told the court that you believe your consent is necessary for the adoption of the child described in the notice sent to you earlier. This hearing is being held to decide whether your consent is in fact necessary. Before the date of the hearing, you must have taken steps under G.S. 48-3-601 to establish that your consent is necessary or this court will decide that your consent is not necessary and the child can be adopted without it."

During the hearing, the court may take such evidence as necessary and enter an order determining whether or not the consent of the biological father is necessary.

(e) The manner of service under this section shall be the same as set forth in G.S. 48-2-402.

(f) The jurisdiction provisions of Article 6A of Chapter 1 of the General Statutes and the venue provisions of Article 7 of Chapter 1 of the General Statutes rather than the provisions of Part 1 of this Article apply to proceedings under this section.

(g) Computation of periods of time provided for in this section shall be calculated as set forth in G.S. 1A-1, Rule 6.

(h) Transfer under G.S. 1-301.2 and appeal under G.S. 1-279.1 shall be as for an adoption proceeding.

(i) A determination by the court under this section that the consent of the biological father is not required shall only apply to an adoption petition filed within three months of the birth of the minor. (1997-215, s. 14; 2002-159, s. 11.)

Effect of Amendments. — Session Laws 2002-159, s. 11, effective October 11, 2002, substituted "G.S. 1-301.2" for "G.S. 1-272" in subsection (h).

Part 3. Petition for Adoption.

§ 48-2-305. Petition for adoption; additional documents.

CASE NOTES

Applied in In re Cunningham, — N.C. App. —, 567 S.E.2d 153, 2002 N.C. App. LEXIS 773 (2002).

Part 6. Dispositional Hearing; Decree of Adoption.

§ 48-2-601. Hearing on, or disposition of, adoption petition; transfer of adoption proceeding; timing.

(a) If it appears to the court that a petition to adopt a minor is not contested, the court may dispose of the petition without a formal hearing.

(a1) If an issue of fact, an equitable defense, or a request for equitable relief is raised before the clerk, the clerk shall transfer the proceeding to the district court under G.S. 1-301.2.

(b) No later than 90 days after a petition for adoption has been filed, the court shall set a date and time for hearing or disposing of the petition.

(c) The hearing or disposition must take place no later than six months after the petition is filed, but the court for cause may extend the time for the hearing or disposition. (1949, c. 300; 1953, c. 571; 1959, cc. 340, 561; 1961, cc. 186, 384; 1967, c. 19; c. 619, s. 4; 1969, c. 982; 1973, c. 1354, s. 6; 1989 (Reg. Sess., 1990), c. 977, s. 1; 1995, c. 457, s. 2; 1997-215, s. 10(a); 2002-159, s. 12.)

Effect of Amendments. — Session Laws 2002-159, s. 12, effective October 11, 2002, inserted "transfer of adoption proceeding" in the section heading; and added subsection (a1).

§ 48-2-603. Hearing on, or disposition of, petition to adopt a minor.

CASE NOTES

Applied in In re Cunningham, — N.C. App. —, 567 S.E.2d 153, 2002 N.C. App. LEXIS 773 (2002).

Article 3.

Adoption of Minors.

Part 5. Custody of Minors Pending Final Decree of Adoption.

§ 48-3-502. Agency entitled to custody in placement by agency.

CASE NOTES

Applied in In re Cunningham, — N.C. App. —, 567 S.E.2d 153, 2002 N.C. App. LEXIS 773 (2002).

Part 6. Consent to Adoption.

§ 48-3-601. Persons whose consent to adoption is required.

Legal Periodicals. —

For note, "Closing the Window of Opportunity: The Limited Rights of Putative Fathers Under G.S. 48-3-601 and In re Byrd," see 23 Campbell L. Rev. 305 (2001).

CASE NOTES

Applied in In re Cunningham, — N.C. App. —, 567 S.E.2d 153, 2002 N.C. App. LEXIS 773 (2002).

§ 48-3-604. Execution of consent: timing.

CASE NOTES

Authority of Court. — Trial court had full statutory authority to dismiss petitions for adoption based on the best interests of the three minor children regardless of whether an agency had previously consented to the adoptions. In re Cunningham, — N.C. App. —, 567 S.E.2d 153, 2002 N.C. App. LEXIS 773 (2002).

§ 48-3-605. Execution of consent: procedures.

CASE NOTES

Applied in In re Cunningham, — N.C. App. —, 567 S.E.2d 153, 2002 N.C. App. LEXIS 773 (2002).

Chapter 49.

Bastardy.

Article 3.

Civil Actions Regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.

CASE NOTES

Effect of Acknowledgment of Paternity Under G.S. 110-132. — There are significant differences between an acknowledgment of paternity under G.S. 110-132 in an agreement to provide child support and the procedures governing the legitimation of a child; where father had not taken any steps to legitimate the child, by statute or judicial determination, his execution of an acknowledgment of paternity under G.S. 110-132 did not erase the common law presumption in favor of mother's custody. Rosero v. Blake, 150 N.C. App. 250, 563 S.E.2d 248, 2002 N.C. App. LEXIS 509 (2002), cert. granted, 356 N.C. 166, — S.E.2d — (2002).

§ 49-15. Custody and support of illegitimate children when paternity established.

CASE NOTES

Effect of Acknowledgment of Paternity Under G.S. 110-132. — There are significant differences between an acknowledgment of paternity under G.S. 110-132 in an agreement to provide child support and the procedures governing the legitimation of a child; where father had not taken any steps to legitimate the child, by statute or judicial determination, his execution of an acknowledgment of paternity under G.S. 110-132 did not erase the common law presumption in favor of mother's custody. Rosero v. Blake, 150 N.C. App. 250, 563 S.E.2d 248, 2002 N.C. App. LEXIS 509 (2002), cert. granted, 356 N.C. 166, — S.E.2d — (2002).

Chapter 50.

Divorce and Alimony.

Article 1.

Divorce, Alimony, and Child Support, Generally.

Article 1.

Divorce, Alimony, and Child Support, Generally.

§ 50-6. Divorce after separation of one year on application of either party.

CASE NOTES

II. Separation.

II. SEPARATION.

Mutual Agreement to Separate Is Not Required. —

Husband's physical separation from his wife for the statutory one-year period of G.S. 50-6 and his accompanying intention to end the marriage were sufficient to entitle him to an absolute divorce, even though the wife did not know of his intention to end the marriage until less than a year before the husband filed for divorce; there was no requirement under G.S. 50-6 that the remaining spouse have knowledge of the other party's intention to cease cohabitation. Smith v. Smith, — N.C. App. —, 564 S.E.2d 591, 2002 N.C. App. LEXIS 676 (2002).

§ 50-13.1. Action or proceeding for custody of minor child.

Legal Periodicals. —

For article, "Re-Evaluating Grandparent Visitation in North Carolina in Light of Troxel v. Granville," see 23 Campbell L. Rev. 249 (2001).

CASE NOTES

Best Interests of Child. —

Regardless of the relationship between stepfather and child, the trial court erred when it granted stepfather visitation based on child's best interest without first determining if mother had acted inconsistently with her parental responsibilities. Seyboth v. Seyboth, 147 N.C. App. 63, 554 S.E.2d 378, 2001 N.C. App. LEXIS 1044 (2001).

§ 50-13.3. Enforcement of order for custody.

CASE NOTES

Cited in Rosero v. Blake, 150 N.C. App. 250, 563 S.E.2d 248, 2002 N.C. App. LEXIS 509 (2002), cert. granted, 356 N.C. 166, — S.E.2d — (2002).

§ 50-13.4. Action for support of minor child.

CASE NOTES

I. IN GENERAL.

Applied in Leary v. Leary, — N.C. App. —, 567 S.E.2d 834, 2002 N.C. App. LEXIS 912 (2002).

Cited in Miller v. Miller, — N.C. App. —, 568 S.E.2d 914, 2002 N.C. App. LEXIS 1070 (2002).

VII. FINDINGS AND CONCLUSIONS.

Remand for Further Findings. —

Trial court erred by failing to explain in its findings of fact why it did not award child support from the time of the filing of the paternity and child support complaint; judgment was reversed and case was remanded to trial court for further findings. State ex rel. Miller v. Hinton, 147 N.C. App. 700, 556 S.E.2d 634, 2001 N.C. App. LEXIS 1254 (2001).

IX. REMEDIES.

F. Retroactive Support and Reimbursement.

Retroactive Distinguished from Prospective. —

Trial court's award of child support was not retroactive in nature because prior consent order was not intended as a final determination on the issue of child support; thus, under G.S. 50-13.4(c), the trial court properly followed the guidelines in awarding prospective child support. Cole v. Cole, 149 N.C. App. 427, 562 S.E.2d 11, 2002 N.C. App. LEXIS 194 (2002).

Evidence Held Sufficient to Support Award. —

After the father had been found to be in contempt due to his failure to pay child support, the trial court made sufficient findings of fact to support an award of attorney's fees to the mother under G.S. 50-13.6, despite the fact that there was no finding that the mother was an interested party with insufficient means to defray the cost of the litigation; under G.S. 50-13.4(c), the children's ability to pay attorney's fees was at issue, not the mother's, and the mother was an interested party under G.S. 50-13.6, as she provided the financial support in the absence of the husband. Belcher v. Averette, — N.C. App. —, 568 S.E.2d 630, 2002 N.C. App. LEXIS 1069 (2002).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.

CASE NOTES

I. IN GENERAL.

Award of Fees Appropriate. —

Trial court could order the husband to pay the wife's attorney's fees incurred in seeking to have the husband held in contempt, even though he could not be held in civil contempt due to obeying the trial court's orders prior to the contempt hearing, where the trial court found: (1) the wife was acting in good faith; (2) she had insufficient means to pay her attorney's fees; and (3) the attorney's fees were reasonable. Reynolds v. Reynolds, 147 N.C. App. 566, 557 S.E.2d 126, 2001 N.C. App. LEXIS 1231 (2001), cert. denied, 355 N.C. 493, 563 S.E.2d 567 (2002).

There was sufficient evidence to support the trial court's finding of the wife's inability to defray the cost of litigation in a divorce proceeding as she had been paying all of the uninsured medical expenses for the past two years and had outstanding balances on those expenses at the time of the hearing. Leary v. Leary, — N.C. App. —, 567 S.E.2d 834, 2002 N.C. App. LEXIS 912 (2002).

II. ACTIONS FOR SUPPORT ONLY.

Findings Required in Action for Support. —

After the father had been found to be in contempt due to his failure to pay child support, the trial court made sufficient findings of fact to support an award of attorney's fees to the

mother under G.S. 50-13.6, despite the fact that there was no finding that the mother was an interested party with insufficient means to defray the cost of the litigation; under G.S. 50-13.4(c), the children's ability to pay attorney's fees was at issue, not the mother's, and the mother was an interested party under G.S. 50-13.6, as she provided the financial support in the absence of the husband. Belcher v. Averette, — N.C. App. —, 568 S.E.2d 630, 2002 N.C. App. LEXIS 1069 (2002).

§ 50-13.7. Modification of order for child support or custody.

CASE NOTES

II. Modification, Generally.
III. Change in Circumstances.

II. MODIFICATION, GENERALLY.

A court is without authority to sua sponte modify an existing support order. Court does not have the authority to sua sponte modify an existing support order, and modification of a support order cannot occur until the threshold issue of substantial change in circumstances has been shown. Miller v. Miller, — N.C. App. —, 568 S.E.2d 914, 2002 N.C. App. LEXIS 1070 (2002).

Burden in Seeking Modification of Separation Agreement Not Incorporated in Order. — Mother did not establish that she relied to her detriment on the parties' agreement to reduce child support; since the support order was not judicially modified, the separation agreement remained in full force and effect. Baker v. Showalter, — N.C. App. —, 566 S.E.2d 172, 2002 N.C. App. LEXIS 776 (2002).

III. CHANGE IN CIRCUMSTANCES.

Voluntary Decrease in Income. — Father was not entitled to reduction in child and post-separation support payments under G.S. 50-13.7 and G.S. 50-16.9 despite being fired from job; evidence indicated that the father's unemployment was voluntary and that the father disregarded marital and parental obligations, as the father was fired for engaging in several incidents of intentional misconduct. Wolf v. Wolf, — N.C. App. —, 566 S.E.2d 516, 2002 N.C. App. LEXIS 781 (2002).

Change in Circumstances Shown. — Order modifying custody was affirmed where trial court found, inter alia, that the mother's new fiancee was a convicted child abuser. McConnell v. McConnell, — N.C. App. —, 566 S.E.2d 801, 2002 N.C. App. LEXIS 879 (2002).

Interim Child Support Order. — An interim child support order is temporary and is subject to retroactive modification; the requisite showing of changed circumstances is not applicable until there is a final determination of child support based upon the merits of the case. Miller v. Miller, — N.C. App. —, 568 S.E.2d 914, 2002 N.C. App. LEXIS 1070 (2002).

§ 50-13.10. Past due child support vested; not subject to retroactive modification; entitled to full faith and credit.

CASE NOTES

Equitable Estoppel Did Not Bar Claim for Past Support. — Mother did not establish that she relied to her detriment on the parties' agreement to reduce child support; since the support order was not judicially modified, the separation agreement remained in full force and effect. Baker v. Showalter, — N.C. App. —, 566 S.E.2d 172, 2002 N.C. App. LEXIS 776 (2002).

§ 50-16.3A. Alimony.

CASE NOTES

Findings on Marital Misconduct. — Trial judge held that plaintiff wife's conduct constituted marital misconduct without just cause or excuse, and that the wife caused defendant husband to suffer indignities so that an award of alimony would not be equitable pursuant to G.S. 50-16.3A. The judgment was reversed and remanded where the appellate court found the trial court simply adopted the husband's testimony without making independent findings of fact adequate to support its conclusions of law. Schmeltzle v. Schmeltzle, 147 N.C. App. 127, 555 S.E.2d 326, 2001 N.C. App. LEXIS 1053 (2001).

Where the evidence of the post-separation sexual intercourse between defendant and plaintiff's husband corroborated the pre-separation relationship between these parties, the trial court properly denied defendant's motion for JNOV regarding plaintiff's alienation of affection claim. Pharr v. Beck, 147 N.C. App. 268, 554 S.E.2d 851, 2001 N.C. App. LEXIS 1144 (2001).

Modification. — Under former G.S. 50-16.5 (1987), in determining whether a change in circumstances had occurred for purposes of a motion to terminate alimony, a trial court was not allowed to reconsider a spouse's dependent spouse status, as that was adjudicated at initial alimony hearing; alimony could have been reduced to zero, but that did not result in loss of dependent spouse status. Honeycutt v. Honeycutt, — N.C. App. —, 568 S.E.2d 260, 2002 N.C. App. LEXIS 966 (2002).

§ 50-16.9. Modification of order.

CASE NOTES

II. Change of Circumstances.

II. CHANGE OF CIRCUMSTANCES.

Failure to Exercise Capacity to Earn. — Father was not entitled to reduction in child and post-separation support payments under G.S. 50-13.7 and G.S. 50-16.9 despite being fired from job; evidence indicated that the father's unemployment was voluntary and that the father disregarded marital and parental obligations, as the father was fired for engaging in several incidents of intentional misconduct. Wolf v. Wolf, — N.C. App. —, 566 S.E.2d 516, 2002 N.C. App. LEXIS 781 (2002).

Dependent Spouse Status. — In determining whether a change in circumstances had occurred for purposes of a motion to terminate alimony, a trial court was not allowed to reconsider a spouse's dependent spouse status, as that was adjudicated at initial alimony hearing; alimony could have been reduced to zero, but that did not result in loss of dependent spouse status. Honeycutt v. Honeycutt, — N.C. App. —, 568 S.E.2d 260, 2002 N.C. App. LEXIS 966 (2002).

§ 50-20. Distribution by court of marital and divisible property upon divorce.

(a) Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section.

(b) For purposes of this section:

(1) "Marital property" means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection. Marital property includes all vested and nonvested pension, retirement, and other deferred compensation rights, and vested and nonvested military pensions eligible under the federal Uniformed

Services Former Spouses' Protection Act. It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection. This presumption may be rebutted by the greater weight of the evidence.

(2) "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property. All professional licenses and business licenses which would terminate on transfer shall be considered separate property.

(3) "Distributive award" means payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include alimony payments or other similar payments for support and maintenance which are treated as ordinary income to the recipient under the Internal Revenue Code.

(4) "Divisible property" means all real and personal property as set forth below:

a. All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.

b. All property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.

c. Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends.

d. Increases and decreases in marital debt and financing charges and interest related to marital debt.

(c) There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. The court shall consider all of the following factors under this subsection:

(1) The income, property, and liabilities of each party at the time the division of property is to become effective.

(2) Any obligation for support arising out of a prior marriage.

(3) The duration of the marriage and the age and physical and mental health of both parties.

(4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects.

(5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property.

(6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.

(7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.

(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage.

(9) The liquid or nonliquid character of all marital property and divisible property.

(10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party.

(11) The tax consequences to each party.

(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution.

(11b) In the event of the death of either party prior to the entry of any order for the distribution of property made pursuant to this subsection:

a. Property passing to the surviving spouse by will or through intestacy due to the death of a spouse.

b. Property held as tenants by the entirety or as joint tenants with rights of survivorship passing to the surviving spouse due to the death of a spouse.

c. Property passing to the surviving spouse from life insurance, individual retirement accounts, pension or profit-sharing plans, any private or governmental retirement plan or annuity of which the decedent controlled the designation of beneficiary (excluding any benefits under the federal social security system), or any other retirement accounts or contracts, due to the death of a spouse.

d. The surviving spouse's right to claim an "elective share" pursuant to G.S. 30-3.1 through G.S. 30-33, unless otherwise waived.

(12) Any other factor which the court finds to be just and proper.

(c1) Notwithstanding any other provision of law, a second or subsequent spouse acquires no interest in the marital property and divisible property of his or her spouse from a former marriage until a final determination of equitable distribution is made in the marital property and divisible property of the spouse's former marriage.

(d) Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property or divisible property, or both, in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

(e) Subject to the presumption of subsection (c) of this section that an equal division is equitable, it shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable. This presumption may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind. In any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to

achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.

(f) The court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties. After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.

(g) If the court orders the transfer of real or personal property or an interest therein, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(h) If either party claims that any real property is marital property or divisible property, that party may cause a notice of lis pendens to be recorded pursuant to Article 11 of Chapter 1 of the General Statutes. Any person whose conveyance or encumbrance is recorded or whose interest is obtained by descent, prior to the filing of the lis pendens, shall take the real property free of any claim resulting from the equitable distribution proceeding. The court may cancel the notice of lis pendens upon substitution of a bond with surety in an amount determined by the court to be sufficient provided the court finds that the claim of the spouse against property subject to the notice of lis pendens can be satisfied by money damages.

(i) Upon filing an action or motion in the cause requesting an equitable distribution or alleging that an equitable distribution will be requested when it is timely to do so, a party may seek injunctive relief pursuant to G.S. 1A-1, Rule 65 and Chapter 1, Article 37, to prevent the disappearance, waste or conversion of property alleged to be marital property, divisible property, or separate property of the party seeking relief. The court, in lieu of granting an injunction, may require a bond or other assurance of sufficient amount to protect the interest of the other spouse in the property. Upon application by the owner of separate property which was removed from the marital home or possession of its owner by the other spouse, the court may enter an order for reasonable counsel fees and costs of court incurred to regain its possession, but such fees shall not exceed the fair market value of the separate property at the time it was removed.

(i1) Unless good cause is shown that there should not be an interim distribution, the court may, at any time after an action for equitable distribution has been filed and prior to the final judgment of equitable distribution, enter orders declaring what is separate property and may also enter orders dividing part of the marital property, divisible property or debt, or marital debt between the parties. The partial distribution may provide for a distributive award and may also provide for a distribution of marital property, marital debt, divisible property, or divisible debt. Any such orders entered shall be taken into consideration at trial and proper credit given.

Hearings held pursuant to this subsection may be held at sessions arranged by the chief district court judge pursuant to G.S. 7A-146 and, if held at such sessions, shall not be subject to the reporting requirements of G.S. 7A-198.

(j) In any order for the distribution of property made pursuant to this section, the court shall make written findings of fact that support the determination that the marital property and divisible property has been equitably divided.

(k) The rights of the parties to an equitable distribution of marital property and divisible property are a species of common ownership, the rights of the respective parties vesting at the time of the parties' separation.

(*l*) A pending action for equitable distribution shall not abate upon the death of a party. (1981, c. 815, s. 1; 1983, c. 309; c. 640, ss. 1, 2; c. 758, ss. 1-4; 1985,

c. 31, ss. 1-3; c. 143; c. 660, ss. 1-3; 1987, c. 663; c. 844, s. 2; 1991, c. 635, ss. 1, 1.1; 1991 (Reg. Sess., 1992), c. 960, s. 1; 1995, c. 240, s. 1; c. 245, s. 2; 1997-212, ss. 2-5; 1997-302, s. 1; 1998-217, s. 7(c); 2001-364, ss. 2, 3; 2002-159, s. 33.)

Effect of Amendments. —

Session Laws 2002-159, s. 33.5, effective October 11, 2002, inserted "and decreases" following "Increases" in subivision (b)(4)d.

Legal Periodicals. —

For recent development, "Death and the Partnership Principle: Interpreting Recent Abatement Amendments to North Carolina's Equitable Distribution Act," see 80 N.C.L. Rev. 1089 (2002).

CASE NOTES

II. MARITAL AND SEPARATE PROPERTY.

A. In General.

Dual Nature of Home Not Shown. — Trial court erred in concluding that the home purchased by the parties was only partly marital property, where the wife met her burden of showing that the home was marital property, by showing that it was acquired by the couple during the marriage, and was owned by them on the date of separation, and no evidence supported the trial court's conclusion that the husband had no intention of making a gift of his separate funds to acquire the home; however, the husband was entitled to have the gift of his separate property to the marital estate considered as a distributional factor. Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

B. Marital Property Generally.

Marital Property in Bankruptcy Proceedings. — Where a bankruptcy trustee objected to the use by a wife of her wild card exemption for property owned by her husband, a claim for equitable distribution was, under G.S. 50-20(b), a species of common ownership that vested at the time of the parties' separation; this vested right, however, did not create a property right in the marital property. In re Horstman, 276 Bankr. 80, 2002 Bankr. LEXIS 379 (Bankr. E.D.N.C. 2002).

C. Separate Property Generally.

Trial court did not err in classifying husband's various aircraft, and related income, as his separate property, under G.S. 50-20(b)(2), because it was all traceable to an airplane the husband purchased prior to the parties' marriage. Fountain v. Fountain, 148 N.C. App. 329, 559 S.E.2d 25, 2002 N.C. App. LEXIS 36 (2002).

III. DISTRIBUTION OF PROPERTY.

B. Factors to Be Considered.

Future Events Not Considered in Determining Marital Property Value. — While trial court had authority on remand to reassess the date of separation value of a logging company, the trial court erred in its consideration of estimated expenses associated with the possible future sale of the logging company since the sale of the logging company was a hypothetical future event uncertain in both occurrence and amount. Crowder v. Crowder, 147 N.C. App. 677, 556 S.E.2d 639, 2001 N.C. App. LEXIS 1233 (2001).

Increase in Value of Marital Property. — While the trial court made findings with respect to the value of the real property as of the date of separation, it made no findings with respect to the value of the tracts as of the date of distribution, notwithstanding some evidence that the values had changed and thus failed to identify and determine the value of the divisible property from the date of separation to the date of distribution and hence could not properly and equitably distribute the divisible property. Edwards v. Edwards, — N.C. App. —, 566 S.E.2d 847, 2002 N.C. App. LEXIS 890 (2002).

Post-Separation Payments for Upkeep on Property Awarded to Spouse Making Payments. — To accommodate post-separation payments for the benefit or use of marital property, the trial court may treat post-separation payments as distributional factors, or provide direct credits for the benefit of the spouse

making the payments; it was not an abuse of discretion to deny credits requested for the upkeep of marital property ultimately awarded to the spouse making the payments. Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

Payment by One of Spouses on Marital Home Mortgage. — It was not an abuse of discretion for the trial court to treat the husband's post-separation mortgage and other debt payments as distributional factors, under G.S. 50-20(c)(11a), (12), rather than giving the husband a dollar-for-dollar credit for them. Hay v. Hay, 148 N.C. App. 649, 559 S.E.2d 268, 2002 N.C. App. LEXIS 48 (2002).

Appreciation in the value of the marital home resulting from the husband's post-separation mortgage payments was not divisible property, as defined by G.S. 50-20(b)(4)a, because it resulted from the activities of one spouse. Hay v. Hay, 148 N.C. App. 649, 559 S.E.2d 268, 2002 N.C. App. LEXIS 48 (2002).

Wife's cosmetic surgeries and choice to reside in another state during the marriage were inappropriate distribution factors considered by the trial court in making its equitable distribution under G.S. 50-20(c). Fountain v. Fountain, 148 N.C. App. 329, 559 S.E.2d 25, 2002 N.C. App. LEXIS 36 (2002).

Sanctions for Marital Misconduct That Has No Economic Impact on Marital Estate. — Marital misconduct that has no resulting economic impact on the marital estate may nonetheless have other consequences; for instance, the spouse can be sanctioned for the willful obstruction of an equitable distribution proceeding, directed to pay for costs incurred for the return of the other spouse's separate property, or be subject to an inspection for the purpose of inventory and valuation. Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

Removal of Property Awarded to Spouse Who Removed It. — Wife's removal of truckloads of marital property from the marital home immediately pursuant to the parties' separation constituted marital misconduct, but the trial court erred in considering this as a distributional factor; as the property removed was awarded to the wife, there was no economic effect on the marital estate. Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

C. Distributive Awards.

Real Property. — While a hunting land and lodge had the potential to be a money-making business, neither party had the financial ability to "buy-out" the other party's share by paying a sizeable distributive award, thus, while economically desirable to keep the land and hunting lodge together, such a division was not possible, and the real estate had to be substantially split in order to achieve an equitable distribution. Edwards v. Edwards, — N.C. App. —, 566 S.E.2d 847, 2002 N.C. App. LEXIS 890 (2002).

V. AGREEMENTS.

Equitable Distribution Barred Where Separation Agreement Dividing Property Has Been Executed. —

Premarital agreements that exhibit a clear intention on the part of the parties to dispose of their property upon dissolution of their marriage through the provisions of their premarital agreement rather than through equitable distribution are expressly allowed; the ability to control the disposition of property upon the dissolution of a marriage appears to be the primary purpose of most, if not all, premarital agreements. Harllee v. Harllee, — N.C. App. —, 565 S.E.2d 678, 2002 N.C. App. LEXIS 687 (2002).

§ 50-21. Procedures in actions for equitable distribution of property; sanctions for purposeful and prejudicial delay.

Legal Periodicals. —

For recent development, "Death and the Partnership Principle: Interpreting Recent Abatement Amendments to North Carolina's Equitable Distribution Act," see 80 N.C.L. Rev. 1089 (2002).

CASE NOTES

Marital Property Is Valued as of the Date of the Parties' Separation. —

In an action for equitable distribution of marital property, the trial court was required to value the marital property as of the date of separation. Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

Trial court's valuation of vested and nonvested stock options using the "intrinsic value

method," was not error under G.S. 50-21(b). Fountain v. Fountain, 148 N.C. App. 329, 559 S.E.2d 25, 2002 N.C. App. LEXIS 36 (2002).

Sanctions for Marital Misconduct That Has No Economic Impact on Marital Estate. — Marital misconduct that has no resulting economic impact on the marital estate may nonetheless have other consequences; for instance, the spouse can be sanctioned for the willful obstruction of an equitable distribution proceeding, directed to pay for costs incurred for the return of the other spouse's separate property, or be subject to an inspection for the purpose of inventory and valuation. Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

Chapter 50A.

Uniform Child-Custody Jurisdiction and Enforcement Act.

Article 2.

Uniform Child-Custody Jurisdiction and Enforcement Act.

Part 1. General Provisions.

§ 50A-102. Definitions.

CASE NOTES

Cited in In re Poole, — N.C. App. —, 568 S.E.2d 200, 2002 N.C. App. LEXIS 775 (2002).

Part 2. Jurisdiction.

§ 50A-201. Initial child-custody jurisdiction.

CASE NOTES

Cited in In re Poole, — N.C. App. —, 568 S.E.2d 200, 2002 N.C. App. LEXIS 775 (2002).

§ 50A-205. Notice; opportunity to be heard; joinder.

CASE NOTES

Jurisdiction. — Because a summons was not issued to or served on the father, the trial court did not have authority to enter an order adjudicating his child to be a dependent juvenile and granting permanent legal and physical custody to relatives. In re Poole, — N.C. App. —, 568 S.E.2d 200, 2002 N.C. App. LEXIS 775 (2002).

Chapter 50B.

Domestic Violence.

§ 50B-1. Domestic violence; definition.

Cross References. — For the Address Confidentiality Program, see G.S. 15C-1 et seq.

§ 50B-2. Institution of civil action; motion for emergency relief; temporary orders.

(a) Any person residing in this State may seek relief under this Chapter by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person. Any aggrieved party entitled to relief under this Chapter may file a civil action and proceed pro se, without the assistance of legal counsel. The district court division of the General Court of Justice shall have original jurisdiction over actions instituted under this Chapter. No court costs shall be assessed for the filing, issuance, registration, or service of a protective order or petition for a protective order or witness subpoena in compliance with the Violence Against Women Act, 42 U.S.C. § 3796gg-5.

(b) Emergency Relief. — A party may move the court for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself or a minor child. A hearing on a motion for emergency relief, where no ex parte order is entered, shall be held after five days' notice of the hearing to the other party or after five days from the date of service of process on the other party, whichever occurs first, provided, however, that no hearing shall be required if the service of process is not completed on the other party. If the party is proceeding pro se and does not request an ex parte hearing, the clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection, and shall effect service of the summons, complaint, notice, and other papers through the appropriate law enforcement agency where the defendant is to be served.

(c) Ex Parte Orders. — Prior to the hearing, if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the court may enter such orders as it deems necessary to protect the aggrieved party or minor children from such acts provided, however, that a temporary order for custody ex parte and prior to service of process and notice shall not be entered unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse. Upon the issuance of an ex parte order under this subsection, a hearing shall be held within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later. If an aggrieved party acting pro se requests ex parte relief, the clerk of superior court shall schedule an ex parte hearing with the district court division of the General Court of Justice within 72 hours of the filing for said relief, or by the end of the next day on which the district court is in session in the county in which the action was filed, whichever shall first occur. If the district court is not in session in said county, the aggrieved party may contact

the clerk of superior court in any other county within the same judicial district who shall schedule an ex parte hearing with the district court division of the General Court of Justice by the end of the next day on which said court division is in session in that county. Upon the issuance of an ex parte order under this subsection, if the party is proceeding pro se, the Clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection, and shall effect service of the summons, complaint, notice, order and other papers through the appropriate law enforcement agency where the defendant is to be served.

(c1) Ex Parte Orders by Authorized Magistrate. — The chief district court judge may authorize a magistrate or magistrates to hear any motions for emergency relief ex parte. Prior to the hearing, if the magistrate determines that at the time the party is seeking emergency relief ex parte the district court is not in session and a district court judge is not and will not be available to hear the motion for a period of four or more hours, the motion may be heard by the magistrate. If it clearly appears to the magistrate from specific facts shown that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the magistrate may enter such orders as it deems necessary to protect the aggrieved party or minor children from such acts, except that a temporary order for custody ex parte and prior to service of process and notice shall not be entered unless the magistrate finds that the child is exposed to a substantial risk of bodily injury or sexual abuse. An ex parte order entered under this subsection shall expire and the magistrate shall schedule an ex parte hearing before a district court judge by the end of the next day on which the district court is in session in the county in which the action was filed. Ex parte orders entered by the district court judge pursuant to this subsection shall be entered and scheduled in accordance with subsection (c) of this section.

(c2) The authority granted to authorized magistrates to award temporary child custody to pursuant subsection (c1) of this section and pursuant to G.S. 50B-3(a)(4) is granted subject to custody rules to be established by the supervising chief district judge of each judicial district.

(d) Pro Se Forms. — The clerk of superior court of each county shall provide to pro se complainants all forms which are necessary or appropriate to enable them to proceed pro se pursuant to this section. The Clerk shall provide a supply of pro se forms to authorized magistrates who shall make the forms available to complainants seeking relief under subsection (c1) of this section. (1979, c. 561, s. 1; 1985, c. 113, ss. 2, 3; 1987 (Reg. Sess., 1988), c. 893, s. 2; 1989, c. 461, s. 1; 1994, Ex. Sess., c. 4, s. 1; 1997-471, s. 2; 2001-518, s. 4; 2002-126, s. 29A.6(a).)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, s. 29A.6(a), effective October 1, 2002, added the last sentence in subsection (a); in subsection (b), deleted "upon payment of the required service fees" at the end of the last sentence; and in subsection (c), deleted "upon payment of the required service fees" at the end of the last sentence.

§ 50B-3. Relief.

(a) The court, including magistrates as authorized under G.S. 50B-2(c1), may grant any protective order or approve any consent agreement to bring about a cessation of acts of domestic violence. The orders or agreements may:

(1) Direct a party to refrain from such acts;

(2) Grant to a party possession of the residence or household of the parties and exclude the other party from the residence or household;

(3) Require a party to provide a spouse and his or her children suitable alternate housing;
(4) Award temporary custody of minor children and establish temporary visitation rights;
(5) Order the eviction of a party from the residence or household and assistance to the victim in returning to it;
(6) Order either party to make payments for the support of a minor child as required by law;
(7) Order either party to make payments for the support of a spouse as required by law;
(8) Provide for possession of personal property of the parties;
(9) Order a party to refrain from doing any or all of the following:
a. Threatening, abusing, or following the other party,
b. Harassing the other party, including by telephone, visiting the home or workplace, or other means, or
c. Otherwise interfering with the other party;
(10) Award attorney's fees to either party;
(11) Prohibit a party from purchasing a firearm for a time fixed in the order;
(12) Order any party the court finds is responsible for acts of domestic violence to attend and complete an abuser treatment program if the program is approved by the Domestic Violence Commission; and
(13) Include any additional prohibitions or requirements the court deems necessary to protect any party or any minor child.

(b) Protective orders entered or consent orders approved pursuant to this Chapter shall be for a fixed period of time not to exceed one year. Upon application of the aggrieved party, a judge may renew the original or any succeeding order for up to one additional year. Protective orders entered or consent orders approved shall not be mutual in nature except where both parties file a claim and the court makes detailed findings of fact indicating that both parties acted as aggressors, that neither party acted primarily in self-defense, and that the right of each party to due process is preserved.

(c) A copy of any order entered and filed under this Article shall be issued to each party. In addition, a copy of the order shall be issued promptly to and retained by the police department of the city of the victim's residence. If the victim does not reside in a city or resides in a city with no police department, copies shall be issued promptly to and retained by the sheriff, and the county police department, if any, of the county in which the victim resides.

(d) The sheriff of the county where a domestic violence order is entered shall provide for prompt entry of the order into the National Crime Information Center registry and shall provide for access of such orders to magistrates on a 24-hour-a-day basis. Modifications, terminations, and dismissals of the order shall also be promptly entered. (1979, c. 561, s. 1; 1985, c. 463; 1994, Ex. Sess., c. 4, s. 2; 1995, c. 527, s. 1; 1995 (Reg. Sess., 1996), c. 591, s. 2; c. 742, s. 42.1.; 1999-23, s. 1; 2000-125, s. 9; 2002-105, s. 2; 2002-126, s. 29A.6(b).)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-105, s. 2, effective September 6, 2002, substituted "Domestic Violence Commission" for "Department of Administration" in subdivision (a)(12).

Session Laws 2002-126, s. 29A.6(b), effective October 1, 2002, deleted "costs and" following "Award" in subdivision (a)(10).

§ 50B-4. Enforcement of orders.

(a) A party may file a motion for contempt for violation of any order entered pursuant to this Chapter. This party may file and proceed with that motion pro se, using forms provided by the clerk of superior court or a magistrate authorized under G.S. 50B-2(c1). Upon the filing pro se of a motion for contempt under this subsection, the clerk, or the authorized magistrate, if the facts show clearly that there is danger of acts of domestic violence against the aggrieved party or a minor child and the motion is made at a time when the clerk is not available, shall schedule and issue notice of a show cause hearing with the district court division of the General Court of Justice at the earliest possible date pursuant to G.S. 5A-23. The Clerk, or the magistrate in the case of notice issued by the magistrate pursuant to this subsection, shall effect service of the motion, notice, and other papers through the appropriate law enforcement agency where the defendant is to be served.

(b) Repealed by Session Laws 1999-23, s. 2, effective February 1, 2000.

(c) A valid protective order entered pursuant to this section shall be enforced by all North Carolina law enforcement agencies without further order of the court.

(d) A valid protective order entered by the courts of another state or the courts of an Indian tribe shall be accorded full faith and credit by the courts of North Carolina whether or not the order has been registered and shall be enforced by the courts and the law enforcement agencies of North Carolina as if it were an order issued by a North Carolina court. In determining the validity of an out-of-state order for purposes of enforcement, a law enforcement officer may rely upon a copy of the protective order issued by another state or the courts of an Indian tribe that is provided to the officer and on the statement of a person protected by the order that the order remains in effect. Even though registration is not required, a copy of a protective order may be registered in North Carolina by filing with the clerk of superior court in any county a copy of the order and an affidavit by a person protected by the order that to the best of that person's knowledge the order is presently in effect as written. Notice of the registration shall not be given to the defendant. Upon registration of the order, the clerk shall promptly forward a copy to the sheriff of that county. Unless the issuing state has already entered the order, the sheriff shall provide for prompt entry of the order into the National Crime Information Center registry pursuant to G.S. 50B-3(d).

(e) Upon application or motion by a party to the court, the court shall determine whether an out-of-state order remains in full force and effect. (1979, c. 561, s. 1; 1985, c. 113, s. 4; 1987, c. 739, s. 6; 1989, c. 461, s. 2; 1994, Ex. Sess., c. 4, s. 3; 1995 (Reg. Sess., 1996), c. 591, s. 3; 1999-23, s. 2; 2002-126, s. 29A.6(c).)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, s. 29A.6(c), effective October 1, 2002, in subsection (a), deleted "upon payment of the required service fees" at the end of the last sentence.

§ 50B-4.1. Violation of valid protective order.

CASE NOTES

Cited in State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001).

Chapter 51.

Marriage.

Article 1.

General Provisions.

Article 2.

Marriage Licenses.

Article 1.

General Provisions.

§ 51-1. Requisites of marriage; solemnization.

A valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, either:

(1)a. In the presence of an ordained minister of any religious denomination, a minister authorized by a church, or a magistrate; and

b. With the consequent declaration by the minister or magistrate that the persons are husband and wife; or

(2) In accordance with any mode of solemnization recognized by any religious denomination, or federally or State recognized Indian Nation or Tribe.

Marriages solemnized before March 9, 1909, by ministers of the gospel licensed, but not ordained, are validated from their consummation. (1871-2, c. 193, s. 3; Code, s. 1812; Rev., s. 2081; 1908, c. 47; 1909, c. 704, s. 2; c. 897; C.S., s. 2493; 1945, c. 839; 1965, c. 152; 1971, c. 1185, s. 26; 1977, c. 592, s. 1; 2000-58, ss. 1, 2; 2001-14, ss. 1, 2; 2001-62, ss. 1, 17; 2002-115, ss. 5, 6; 2002-159, s. 13(a).)

Editor's Note. —

Session Laws 2002-115, s. 5, effective November 25, 2002, and expiring December 1, 2002, inserted "a resident superior court judge, or an emergency superior court judge of this State" following "minister authorized by a church" in subdivision (1)a; and substituted "declaration by the minister, judge" for "declaration by the minister" in subdivision (1)b.

Session Laws 2002-115, s. 6, effective September 19, 2002, and expiring September 22, 2002, inserted "district court judge" following "minister authorized by a church" in subdivision (1)a; and substituted "declaration by the minister, judge" for "declaration by such minister" in subdivision (1)b.

Session Laws 2002-159, s. 13(b) provides: "Any marriage solemnized on or after October 1, 2001, and before the effective date of this act [approved October 11, 2002] and otherwise valid is not invalid because the minister or magistrate failed to declare the persons husband and wife."

Effect of Amendments. —

Session Laws 2002-159, s. 13(a), effective October 11, 2002, rewrote subdivision (1)b.

§ 51-2. Capacity to marry.

OPINIONS OF ATTORNEY GENERAL

Effective Date of 2001 Amendment. — A pregnant female who is less than 14 and who obtained a marriage license before October 1, 2001, may not lawfully marry after that date.

See opinion of Attorney General to Ann Shaw, Randolph County Register of Deeds, 2001 N.C. AG LEXIS 36 (10/9/01).

Written Consent for Marriage of Person Who Is over 16 Years of Age and Under 18 Years of Age. — When a 14/15 year old is marrying a 16/17 year old, the register of deeds must require a court order from the 14/15 year old and the appropriate written consent from the 16/17 year old. See opinion of Attorney General to Ann Shaw, Randolph County Register of Deeds, 2001 N.C. AG LEXIS 36 (10/9/01).

§ 51-2.1. Marriage of certain underage parties.

OPINIONS OF ATTORNEY GENERAL

Court Order for Marriage of 14 or 15 Year Old. — When a 14/15 year old is marrying a 16/17 year old, the register of deeds must require a court order from the 14/15 year old and the appropriate written consent from the 16/17 year old. See opinion of Attorney General to Ann Shaw, Randolph County Register of Deeds, 2001 N.C. AG LEXIS 36 (10/9/01).

ARTICLE 2.

Marriage Licenses.

§ 51-8. License issued by register of deeds.

Every register of deeds shall, upon proper application, issue a license for the marriage of any two persons who are able to answer the questions regarding age, marital status, and intention to marry, and, based on the answers, the register of deeds determines the persons are authorized to be married in accordance with the laws of this State. In making a determination as to whether or not the parties are authorized to be married under the laws of this State, the register of deeds may require the applicants for the license to marry to present certified copies of birth certificates or such other evidence as the register of deeds deems necessary to the determination. The register of deeds may administer an oath to any person presenting evidence relating to whether or not parties applying for a marriage license are eligible to be married pursuant to the laws of this State. Each applicant for a marriage license shall provide on the application the applicant's social security number. If an applicant does not have a social security number and is ineligible to obtain one, the applicant shall present a statement to that effect, sworn to or affirmed before an officer authorized to administer oaths. Upon presentation of a sworn or affirmed statement, the register of deeds shall issue the license, provided all other requirements are met, and retain the statement with the register's copy of the license. The register of deeds shall not issue a marriage license unless all of the requirements of this section have been met. (1871-2, c. 193, s. 5; Code, s. 1814; 1887, c. 331; Rev., s. 2088; C.S., s. 2500; 1957, c. 506, s. 1; 1967, c. 957, s. 2; 1997-433, s. 4.5; 1998-17, s. 1; 1999-375, s. 1; 2001-62, s. 8; 2002-159, s. 14.)

Effect of Amendments. —

Session Laws 2002-159, s. 14, effective October 11, 2002, in the second sentence, deleted "or birth registration cards provided for in G.S. 130-73" following "certified copies of birth certificates" and substituted "the determination" for "such determination."

§ 51-16.1. Form of license for Address Confidentiality Program participant.

If a person submits to the local register of deeds a current and valid Address Confidentiality Program authorization card issued pursuant to the provisions of Chapter 15C of the General Statutes, the local register of deeds shall use the substitute address designated by the Address Confidentiality Program when creating a new marriage license. (2002-171, s. 3.)

Editor's Note. — Session Laws 2002-171, s. 10, made this section effective January 1, 2003.

Chapter 52.

Powers and Liabilities of Married Persons.

§ 52-4. Earnings and damages.

CASE NOTES

Cited in State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544, 2001 N.C. App. LEXIS 1234 (2001).

§ 52-5. Torts between husband and wife.

CASE NOTES

Cited in State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544, 2001 N.C. App. LEXIS 1234 (2001).

§ 52-10. Contracts between husband and wife generally; releases.

CASE NOTES

Agreement as Bar to Pension Rights. — Husband's failure to pay his wife money on the day of their marriage as stipulated in a premarital agreement was not a failure to meet a condition precedent and did not invalidate the premarital agreement entered into between the parties; equitable distribution of marital property was therefore inappropriate. Harllee v. Harllee, — N.C. App. —, 565 S.E.2d 678, 2002 N.C. App. LEXIS 687 (2002).

Cited in State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544, 2001 N.C. App. LEXIS 1234 (2001).

§ 52-12. Postnuptial crimes and torts.

CASE NOTES

Cited in State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544, 2001 N.C. App. LEXIS 1234 (2001).

Chapter 52B.

Uniform Premarital Agreement Act.

§ 52B-3. Formalities.

CASE NOTES

Cited in Harllee v. Harllee, — N.C. App. —, 565 S.E.2d 678, 2002 N.C. App. LEXIS 687 (2002).

Chapter 52C.

Uniform Interstate Family Support Act.

Article 2.

Jurisdiction.

Part 1. Extended Personal Jurisdiction.

§ 52C-2-201. Bases for jurisdiction over nonresident.

CASE NOTES

Jurisdiction over Parties. —
In an action for child support, alimony, and equitable distribution, trial court properly ruled that the non-resident ex-husband had sufficient minimum contacts with North Carolina to establish personal jurisdiction, as the ex-husband had bought a house in North Carolina with his then-wife so his child could be schooled there, for two years he lived in that marital residence for three days each month, and used the residence's equity line for business purposes. Butler v. Butler, — N.C. App. —, 566 S.E.2d 707, 2002 N.C. App. LEXIS 858 (2002).

§ 52C-2-202. Procedure when exercising jurisdiction over nonresident.

CASE NOTES

Cited in Butler v. Butler, — N.C. App. —, 566 S.E.2d 707, 2002 N.C. App. LEXIS 858 (2002).

Article 3.

Civil Provisions of General Application.

§ 52C-3-301. Proceedings under this Chapter.

CASE NOTES

Cited in Butler v. Butler, — N.C. App. —, 566 S.E.2d 707, 2002 N.C. App. LEXIS 858 (2002).

§ 52C-3-315. Special rules of evidence and procedure.

CASE NOTES

Cited in Butler v. Butler, — N.C. App. —, 566 S.E.2d 707, 2002 N.C. App. LEXIS 858 (2002).

§ 52C-3-317. Assistance with discovery.

CASE NOTES

Cited in Butler v. Butler, — N.C. App. —, 566 S.E.2d 707, 2002 N.C. App. LEXIS 858 (2002).

Chapter 53.

Banks.

Article 6.

Powers and Duties.

§ 53-62. Establishment of branches; limited service facilities; and off-premises customer-bank communications terminals.

(a) The word "capital" as used in this section means capital stock and unimpaired surplus.

(b) A bank doing business under this Chapter may establish branches or limited service facilities within this State after having first obtained the written approval of the Commissioner of Banks, which approval may be given or withheld by the Commissioner of Banks, in his discretion. The Commissioner of Banks, in exercising such discretion, shall take into account, but not by way of limitation, such factors as the financial history and condition of the applicant bank, the adequacy of its capital structure, its future earnings prospects, and the general character of its management. Such approval shall not be given until he shall find (i) that the establishment of such branch or limited service facility will meet the needs and promote the convenience of the community to be served by the bank, and (ii) that the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch or limited service facility and of the existing bank or banks in said community.

(c)(1) A branch or limited service facility of a bank shall be operated as a branch or office of and under the name of the bank, and under the control and direction of the board of directors and executive officers of the bank. The board of directors of the bank shall elect such officers as may be required to properly conduct the business of any branch or limited service facility.

(2) The Commissioner of Banks shall not authorize the establishment of a branch until he is satisfied that the applicant bank has sufficient capital to maintain a minimum capital to asset ratio as the Commissioner of Banks, in his discretion, may require. In determining such ratio the Commissioner of Banks shall give due consideration to (i) the amount of capital required to support the bank's projected growth, (ii)

the bank's earnings history and projected earnings, (iii) the quality of the bank's assets, (iv) compliance with the fixed asset limitation contained in G.S. 53-43(3), and (v) the business experience and reputation of bank management.

(3) The Commissioner of Banks may, on written application by a bank, in his discretion authorize the bank to establish a limited service facility after considering the criteria and making the findings required in subsection (b).

(d) A limited service facility, upon written request to the Commissioner of Banks, and after meeting the requirements of subsection (c) may convert to a branch. If branch status is granted then the branch shall be subject to all of the conditions and requirements of that type of banking office.

Upon 30 days written notice to the Commissioner of Banks, a bank may discontinue any limited service facility operation; provided, however, if a limited service facility has within five years preceding the proposed closing date been a branch of any bank, it shall comply with the requirements of subsection (e) below before closing.

(d1) Subject to such rules and regulations as may be prescribed by the State Banking Commission with regard to their use, maintenance and supervision, any bank may establish off the premises of any principal office, branch or limited service facility a customer-bank communications terminal, point-of-sale terminal, automated teller machine, automated banking facility or other direct or remote information-processing device or machine, whether manned or unmanned, through or by means of which information relating to any financial service or transaction rendered to the public is stored and transmitted, instantaneously or otherwise, to or from a bank or other nonbank terminal; and the establishment and use of such a device or machine shall not be deemed a branch or limited service facility, and the capital requirements and standards for approval of a branch or limited service facility, all as set forth in subsections (b) and (c) of this section, shall not be applicable to the establishment of any such off-premises terminal device or machine.

(e) A bank may, upon resolution by the board of directors, discontinue a branch office subject to the following:

(1) The bank shall notify the Commissioner in writing of its intent to close a branch not later than 90 days prior to the proposed closing date. Such notice shall include a detailed statement of the reasons for the decision to close a branch and statistical or other information in support of such reasons.

(2) The bank shall provide a notice of its intent to close a branch to its customers. Such notice shall be posted in a conspicuous manner on the branch premises for a period of 30 days prior to the proposed closing date, and shall either be included in at least one of any regular account statements mailed to customers of such branch, or in a separate mailing to such customers. The later notice shall be given at least 90 days prior to the proposed closing date.

No branch shall be closed until approved by the Commissioner of Banks, provided, however, the consolidation of two or more branches into a single location in the same vicinity shall not be considered a closure subject to the provisions of this subsection.

(f) Any action taken by the Commissioner of Banks pursuant to this section shall be subject to review by the State Banking Commission which shall have the authority to approve, modify or disapprove any action taken or recommended by the Commissioner of Banks. (1921, c. 4, s. 43; Ex. Sess. 1921, c. 56, s. 2; C.S., s. 220(r); 1927, c. 47, s. 8; 1931, c. 243, s. 5; 1933, c. 451, s. 1; 1935, c. 139; 1947, c. 990; 1953, c. 1209, ss. 2, 5; 1963, c. 793, s. 3; 1967, c. 789, s. 11; 1975, cc. 553, 850; 1983, c. 214, s. 5; 1989, c. 187, s. 7; 1995, c. 129, s. 13; 2002-29, s. 1.)

Effect of Amendments. — Session Laws 2002-29, s. 1, effective July 22, 2002, at the end of (d1), substituted "subsections (b) and (c) of this section, shall not be applicable to the establishment of any such off-premises terminal device or machine" for "subsections (b) and (c) above, shall not be applicable to the establishment of any such off-premises terminal device or machine; provided, however, that no bank, savings and loan association, savings bank, credit union or any other financial institution which is not domiciled in North Carolina may establish in North Carolina any information processing device or machine described in this subsection."

ARTICLE 19A.

Mortgage Lending Act.

§ 53-243.01. Definitions.

The following definitions apply in this Article:

(1) Act as a mortgage broker. — To act, for compensation or gain, or in the expectation of compensation or gain, either directly or indirectly, by accepting or offering to accept an application for a mortgage loan, soliciting or offering to solicit a mortgage loan, negotiating the terms or conditions of a mortgage loan, issuing mortgage loan commitments or interest rate guarantee agreements to borrowers, or engaging in tablefunding of mortgage loans, whether such acts are done through contact by telephone, by electronic means, by mail, or in person with the borrowers or potential borrowers.

(2) Act as a mortgage lender. — To engage in the business of making mortgage loans for compensation or gain.

(3) Branch manager. — The individual whose principal office is physically located in, who is in charge of, and who is responsible for the business operations of a branch office of a mortgage broker or mortgage banker.

(4) Branch office. — An office of the licensee acting as a mortgage broker or mortgage banker that is separate and distinct from the licensee's principal office.

(5) Commissioner. — The North Carolina Commissioner of Banks and the Commissioner's designees. For purposes of compliance with this Article by credit unions, Commissioner means the Administrator of the Credit Union Division of the Department of Commerce.

(6) Control. — The power to vote more than twenty percent (20%) of outstanding voting shares or other interests of a corporation, partnership, limited liability company, association, or trust.

(7) Employee. — An individual, who has an employment relationship, acknowledged by both the individual and the mortgage broker or mortgage banker and is treated as an employee for purposes of compliance with the federal income tax laws.

(7a) Exclusive mortgage broker. — An individual who acts as a mortgage broker exclusively for a single mortgage banker or single exempt person and who is licensed under the provisions of G.S. 53-243.05(c)(1a).

(8) Exempt person. — The term includes any of the following:

a. Any agency of the federal government or any state or municipal government granting mortgage loans under specific authority of the laws of any state or the United States.

b. Any employee of a licensee whose responsibilities are limited to clerical and administrative tasks for his or her employer and who does not solicit borrowers, accept applications, or negotiate the terms of loans on behalf of the employer.

c. Any person authorized to engage in business as a bank or a wholly owned subsidiary of a bank, a farm credit system, savings institution, or a wholly owned subsidiary of a savings institution, or credit union or a wholly owned subsidiary of a credit union, under the laws of the United States, this State, or any other state. Except for G.S. 53-243.11 and G.S. 53-243.15, this Article does not apply to the exempt persons set forth in this sub-subdivision (8)c.

d. Any licensed real estate agent or broker who is performing those activities subject to the regulation of the North Carolina Real Estate Commission. Notwithstanding the above, an exempt person does not include a real estate agent or broker who receives compensation of any kind in connection with the referral, placement, or origination of a mortgage loan.

e. Any officer or employee of an exempt person described in sub-subdivision c. of this subdivision when acting in the scope of employment for the exempt person.

f. Any person who, as seller, receives in one calendar year no more than five mortgages, deeds of trust, or other security instruments on real estate as security for a purchase money obligation.

g. The North Carolina Housing Finance Agency as established by Article 122A of the General Statutes and the North Carolina Agricultural Finance Authority as established by Article 122D of the General Statutes.

h. Any nonprofit corporation qualifying under section 501(c)(3) of the Internal Revenue Code which makes mortgage loans to promote home ownership or home improvements for the disadvantaged, provided that such corporation is not primarily in the business of soliciting or brokering mortgage loans.

i. Any life insurance companies licensed to do business in North Carolina with regard to provisions concerning mortgage lenders.

(9) Licensee. — A loan officer, mortgage broker, or mortgage banker who is licensed pursuant to this Article.

(10) Loan officer. — An individual who, in exchange for compensation as an employee of another person, accepts or offers to accept applications for mortgage loans. The definition of loan officer shall not include any exempt person described in sub-subdivision (8)b. of this section.

(11) Make a mortgage loan. — To close a mortgage loan, to advance funds, to offer to advance funds, or to make a commitment to advance funds to a borrower under a mortgage loan.

(12) Managing principal. — A person who meets the requirements of G.S. 53-243.05(c) and who agrees to be primarily responsible for the operations of a licensed mortgage broker or mortgage banker.

(13) Mortgage banker. — A person who acts as a mortgage lender as that term is defined in subdivision (2) of this section. However, the definition does not include a person who acts as a mortgage lender only in tablefunding transactions.

(14) Mortgage broker. — A person who acts as a mortgage broker as that term is defined in subdivision (1) of this section. The term "mortgage broker" includes an exclusive mortgage broker, except when expressly provided otherwise.

(15) Mortgage loan. — A loan made to a natural person or persons primarily for personal, family, or household use, primarily secured by either a mortgage or a deed of trust on residential real property located in North Carolina.

(16) Person. — An individual, partnership, limited liability company, limited partnership, corporation, association, or other group engaged in joint business activities, however organized.

(17) Qualified lender. — A person who is engaged as a mortgage lender in North Carolina and is either a supervised or a nonsupervised institution, as these terms are defined in 24 C.F.R. § 202.2, approved by the United States Department of Housing and Urban Development.

(18) Qualified person. — A person who is employed as a loan officer by a qualified lender, or by a mortgage banker or broker registered with the Commissioner under former Article 19 of this Chapter, or who is a general partner, manager, or officer of a qualified lender, registered mortgage banker, or registered mortgage broker.

(19) Residential real property. — Real property located in the State of North Carolina upon which there is located or is to be located one or more single-family dwellings or dwelling units.

(20) Tablefunding. — A transaction where a licensee closes a loan in its own name with funds provided by others, and the loan is assigned simultaneously to the mortgage lender providing the funding within one business day of the funding of the loan. (2001-393, s. 2; 2002-169, ss. 1, 2.)

Effect of Amendments. — Session Laws 2002-169, ss. 1 and 2, effective October 23, 2002, and applicable to persons who apply for licensure or licensure renewal under Article 19A of Chapter 53 of the General Statutes on or after that date, added subdivision (7a); and added the last sentence in subdivision (14).

§ 53-243.05. Qualifications for licensure; issuance.

(a) Any person, other than an exempt person, desiring to obtain a license pursuant to this Article shall make written application for licensure to the Commissioner on forms prescribed by the Commissioner. In accordance with rules adopted by the Commission, the application shall contain any information the Commissioner deems necessary regarding the following:

(1) The applicant's name and address and social security number.

(2) The applicant's form and place of organization, if applicable.

(3) The applicant's proposed method of and locations for doing business, if applicable.

(4) The qualifications and business history of the applicant and, if applicable, the business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the applicant, including: (i) a description of any injunction or administrative order by any state or federal authority to which the person is or has been subject; (ii) a conviction of a misdemeanor involving fraudulent dealings or moral turpitude or relating to any aspect of the residential mortgage lending business; (iii) any felony convictions.

(5) With respect to an application for licensing as a mortgage banker or broker, the applicant's financial condition, credit history, and business history; and with respect to the application for licensing as a loan officer, the applicant's credit history and business history.

(6) The applicant's consent to a criminal history record check and a set of the applicant's fingerprints in a form acceptable to the Commissioner. Refusal to consent to a criminal history record check may constitute grounds for the Commissioner to deny licensure to the applicant.

(b) In addition to the requirements imposed by the Commissioner under subsection (a) of this section, each individual applicant for licensure as a loan officer shall:

(1) Be at least 18 years of age.

(2) Have satisfactorily completed, within the three years immediately preceding the date application is made, a mortgage lending funda-

mentals course approved by the Commissioner. The course shall consist of at least eight hours of classroom instruction in subjects related to mortgage lending approved by the Commissioner. In addition, the applicant shall have satisfactorily completed a written examination approved by the Commissioner or possess residential mortgage lending education or experience in residential mortgage lending transactions that the Commissioner deems equivalent to the course.

(c) In addition to the requirements under subsection (a) of this section, each applicant for licensure as a mortgage broker or mortgage banker at the time of application and at all times thereafter shall comply with the following requirements:

(1) Except as provided for in subdivision (1a) of this subsection, if the applicant is a sole proprietor, the applicant shall have at least three years of experience in residential mortgage lending or other experience or competency requirements as the Commissioner may impose. Experience as an exclusive mortgage broker shall not constitute mortgage-lending experience under this subdivision.

(1a) If an individual applicant to be licensed as a mortgage broker meets all other requirements for licensure under this section but does not meet the requirements of subdivision (1) of this subsection, the individual applicant may be licensed as an exclusive mortgage broker upon compliance with all of the following:

a. Successfully complete both a residential mortgage-lending course approved by the Commissioner of not less than 40 hours of classroom instruction, and a written examination approved by the Commissioner.

b. Act exclusively as a mortgage broker for a single mortgage banker licensee or single exempt mortgage banker for whom the broker shall be deemed an agent, who shall be responsible for supervising the broker as required by this Article, who shall sign the license application of the applicant, and who shall be jointly and severally liable with the broker for any claims arising out of the broker's mortgage lending activities.

c. Shall be compensated for the broker's mortgage brokering activities on a basis that is not dependent upon the loan amount, interest rate, fees, or other terms of the loans brokered.

d. Shall not handle borrower or other third-party funds in connection with the brokering or closing of mortgage loans.

(2) If the applicant is a general or limited partnership, at least one of its general partners shall have the experience as described under subdivision (1) of this subsection.

(3) If the applicant is a corporation, at least one of its principal officers shall have the experience as described under subdivision (1) of this subsection.

(4) If the applicant is a limited liability company, at least one of its managers shall have the experience as described under subdivision (1) of this subsection.

(d) Each applicant shall identify one person meeting the requirements of subsection (c) of this section to serve as the applicant's managing principal.

(e) Every applicant for initial licensure shall pay a filing fee of one thousand dollars ($1,000) for licensure as a mortgage broker or mortgage banker or fifty dollars ($50.00) for licensure as a loan officer, in addition to the actual cost of obtaining credit reports and State and national criminal history record checks.

(f) A mortgage banker shall post a surety bond in the amount of one hundred fifty thousand dollars ($150,000), and a mortgage broker shall post a surety

bond in the amount of fifty thousand dollars ($50,000). The surety bond shall be in a form satisfactory to the Commissioner and shall run to the State for the benefit of any claimants against the licensee to secure the faithful performance of the obligations of the licensee under this Article. The aggregate liability of the surety shall not exceed the principal sum of the bond. A party having a claim against the licensee may bring suit directly on the surety bond, or the Commissioner may bring suit on behalf of any claimants, either in one action or in successive actions. Consumer claims shall be given priority in recovering from the bond. Any appropriate deposit of cash or securities shall be accepted in lieu of any bond that is required. An audited financial statement from a qualified lender showing a net worth of two hundred fifty thousand dollars ($250,000) or more shall be accepted in lieu of any bond required.

(g) Any general partner, manager of a limited liability company, or officer of a corporation who individually meets the requirements under subsection (b) of this section shall, upon payment of the applicable fee, meet the qualifications for licensure as a loan officer subject to the provisions of subsection (i) of this section.

(h) Each principal office and each branch office of a mortgage broker or mortgage banker licensed under the provisions of this Article shall be issued a separate license. A licensed mortgage broker or mortgage banker shall file with the Commissioner an application on a form prescribed by the Commissioner that identifies the address of the principal office and each branch office and branch manager. A filing fee of one hundred dollars ($100.00) shall be assessed by the Commissioner for each office issued a license.

(i) If the Commissioner determines that an applicant meets the qualifications for licensure and finds that the financial responsibility, character, and general fitness of the applicant are such as to command the confidence of the community and to warrant belief that the business will be operated honestly and fairly, the Commissioner shall issue a license to the applicant. In addition, for an applicant qualifying as an exclusive mortgage broker, the Commissioner shall determine if the mortgage broker/mortgage banker relationship is in the public interest. (2001-393, s. 2; 2002-169, ss. 3-6.)

Effect of Amendments. — Session Laws 2002-169, ss. 3-6, effective October 23, 2002, and applicable to persons who apply for licensure or licensure renewal under Article 19A of Chapter 53 of the General Statutes on or after that date, in (a), substituted "pursuant to this Article" for "as a loan officer, mortgage banker, or mortgage broker" in the first sentence, and added subdivision (6); in (c), added "Except as provided for in subdivision (1a) of this subsection" at the beginning and added the last sentence in subdivision (1), and added subdivision (1a); added "in addition to the actual cost of obtaining credit reports and State and national criminal history record checks" to the end of subsection (e); and added the last sentence in subsection (i).

§ 53-243.06. License renewal; termination.

(a) All licenses issued by the Commissioner under the provisions of this Article shall expire annually on the 30th day of June following issuance or on any other date that the Commissioner may determine. The license shall become invalid after that date unless renewed. A license may be renewed 45 days prior to the expiration date by compliance with subsection (b1) of this section and by paying to the Commissioner, in addition to the actual cost of obtaining credit reports and State and national criminal history record checks as the Commissioner may require, a renewal fee as follows:

(1) Licensed mortgage bankers shall pay an annual fee of five hundred dollars ($500.00) and one hundred dollars ($100.00) for each branch office.

(2) Licensed mortgage brokers shall pay an annual fee of five hundred dollars ($500.00) and one hundred dollars ($100.00) for each branch office. Licensed exclusive mortgage brokers shall pay an annual fee of five hundred dollars ($500.00).

(3) Licensed loan officers shall pay an annual fee of fifty dollars ($50.00).

(b) If a license is not renewed prior to the applicable expiration date, then an additional two hundred fifty dollars ($250.00) in addition to the renewal fee under subsection (a) of this section shall be assessed as a late fee to any renewal. In the event a licensee fails to obtain a reinstatement of the license within 90 days after the date the license expires, the Commissioner may require the licensee to comply with the requirements for the initial issuance of a license under the provisions of this Article.

(b1) When required by the Commissioner, the licensee shall furnish to the Commissioner the licensee's consent to a criminal history record check and a set of the licensee's fingerprints in a form acceptable to the Commissioner. Refusal to consent to a criminal history record check may constitute grounds for the Commissioner to deny renewal of licensure to the licensee.

(c) Licenses issued under this Article are not assignable. Control of a licensee shall not be acquired through a stock purchase or other device without the prior written consent of the Commissioner. The Commissioner shall not give written consent if the Commissioner finds that any of the grounds for denial, revocation, or suspension of a license pursuant to G.S. 53-243.12 are applicable to the acquiring person. (2001-393, s. 2; 2002-169, s. 7.)

Effect of Amendments. — Session Laws 2002-169, s. 7, effective October 23, 2002, and applicable to persons who apply for licensure or licensure renewal under Article 19A of Chapter 53 of the General Statutes on or after that date, in (a), inserted "compliance with subsection (b1) of this section and by" and "in addition to ... may require" in the introductory paragraph, and added the second sentence in subdivision (2); and added subsection (b1).

§ 53-243.07. Continuing education.

(a) As a condition of license renewal, the Commissioner may adopt rules to require continuing education of licensees under this Article for the purpose of enhancing the professional competence and professional responsibility of all licensees. The rules may include criteria for:

(1) The content of continuing education courses.

(2) Accreditation of continuing education sponsors and programs.

(3) Accreditation of videotape or other audiovisual programs.

(4) Computation of credit.

(5) Special cases and exemptions.

(6) General compliance procedures.

(7) Sanctions for noncompliance.

(b) Annual continuing professional education requirements shall be determined by the Commissioner. However, the requirements shall not exceed eight credit hours within a one-year period.

(c) The Commissioner may require education providers of the fundamentals mortgage lending course required under the provisions of G.S. 53-243.05(b)(2) and the continuing education courses required under this section to file information regarding the contents and materials of proposed courses to satisfy the education requirements with the Commissioner for review and approval. The Commissioner may set fees for the initial and continuing review of courses for which credit hours will be granted. The initial filing fee for review of materials shall not exceed five hundred dollars ($500.00) and the fee for continued review shall not exceed two hundred fifty dollars ($250.00) per annum per course offered. (2001-393, s. 2; 2002-169, s. 8.)

Effect of Amendments. — Session Laws 2002-169, s. 8, effective October 23, 2002, and applicable to persons who apply for licensure or licensure renewal under Article 19A of Chapter 53 of the General Statutes on or after that date, substituted "all licensees" for "mortgage bankers, mortgage brokers, and loan officers" in (a); and added subsection (c).

§ 53-243.08. Managing principals and branch managers.

Each mortgage broker or mortgage banker licensed under this Article shall have a managing principal who operates the business under that person's full charge, control, and supervision. Mortgage bankers and mortgage brokers, other than exclusive mortgage brokers, may operate branch offices subject to the requirements of this Article. Each principal and branch office of a mortgage broker or mortgage banker licensed under this Article, other than an exclusive mortgage broker qualifying under G.S. 53-243.05(c)(1a), shall have a manager who meets the experience requirements under G.S. 53-243.05(c)(1). The managing principal for a licensee's business may also serve as the branch manager of one of the licensee's branch offices. Each mortgage broker or mortgage banker licensed under this Article shall file a form as prescribed by the Commissioner indicating the business's designation of managing principal and branch manager for each branch and each individual's acceptance of the responsibility. Each mortgage broker or mortgage banker licensed under this Article shall notify the Commissioner of any change in its managing principal or branch manager designated for each branch. Any licensee who does not comply with this provision shall have the licensee's license suspended pursuant to G.S. 53-243.12 until the licensee, other than an exclusive mortgage broker, complies with this section. Any individual licensee who operates as a sole proprietorship shall be considered a managing principal for the purposes of this Article. (2001-393, s. 2; 2002-169, s. 9.)

Effect of Amendments. — Session Laws 2002-169, s. 9, effective October 23, 2002, and applicable to persons who apply for licensure or licensure renewal under Article 19A of Chapter 53 of the General Statutes on or after that date, inserted the second sentence, inserted "other than an exclusive mortgage broker qualifying under G.S. 53-243.05(c)(1a)" in the third sentence, and inserted "other than an exclusive mortgage broker" in the next to last sentence.

§ 53-243.12. Disciplinary authority.

(a) The Commissioner may, by order, deny, suspend, revoke, or refuse to issue or renew a license of a licensee or applicant under this Article or may restrict or limit the activities relating to mortgage loans of any licensee or any person who owns an interest in or participates in the business of a licensee, if the Commissioner finds both of the following:

(1) That the order is in the public interest.

(2) That any of the following circumstances apply to the applicant, licensee, or any partner, member, manager, officer, director, loan officer, managing broker, or any person occupying a similar status or performing similar functions or any person directly or indirectly controlling the applicant or licensee. The person:

a. Has filed an application for license that, as of its effective date or as of any date after filing, contained any statement that, in light of the circumstances under which it was made, is false or misleading with respect to any material fact.

b. Has violated or failed to comply with any provision of this Article, rule adopted by the Commissioner, or order of the Commissioner.

c. Has been convicted of any felony, or, within the past 10 years, has been convicted of any misdemeanor involving mortgage lending or any aspect of the mortgage lending business, or any offense

involving breach of trust, moral turpitude, or fraudulent or dishonest dealing.

d. Is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the mortgage lending business.

e. Is the subject of an order of the Commissioner denying, suspending, or revoking that person's license as a mortgage broker or mortgage banker.

f. Is the subject of an order entered within the past five years by the authority of any state with jurisdiction over that state's mortgage brokerage or mortgage banking industry denying or revoking that person's license as a mortgage broker or mortgage banking industry or denying or revoking that person's license as a mortgage broker or mortgage banker.

g. Does not meet the qualifications or the financial responsibility, character, or general fitness requirements under G.S. 53-243.05 or any bond or capital requirements under this Article.

h. Has been the executive officer or controlling shareholder or owned a controlling interest in any mortgage broker or mortgage banker who has been subject to an order or injunction described in sub-subdivision d., e., or f. of this subdivision.

i. Has failed to pay the proper filing or renewal fee under this Article. However, the Commissioner may enter only a denial order under this sub-subdivision, and the Commissioner shall vacate the order when the deficiency has been corrected.

(b) The Commissioner may, by order, summarily postpone or suspend the license of a licensee pending final determination of any proceeding under this section. Upon entering the order, the Commissioner shall promptly notify the applicant or licensee that the order has been entered and the reasons for the order. The Commissioner shall calendar a hearing within 15 days after the Commissioner receives a written request for a hearing. If a licensee does not request a hearing and the Commissioner does not request a hearing, the order will remain in effect until it is modified or vacated by the Commissioner. If a hearing is requested or ordered by the Commissioner, after notice of and opportunity for hearing, the Commissioner may modify or vacate the order or extend it until final determination.

(c) The Commissioner may, by order, impose a civil penalty upon a licensee or any partner, officer, director, or other person occupying a similar status or performing similar functions on behalf of a licensee for any violation of this Article. The civil penalty shall not exceed ten thousand dollars ($10,000) for each violation of this Article by a mortgage broker or mortgage banker. The Commissioner may impose a civil penalty of up to ten thousand dollars ($10,000) for each violation of this Article by a person other than a licensee or exempt person.

(d) In addition to other powers under this Article, upon finding that any action of a person is in violation of this Article, the Commissioner may order the person to cease from the prohibited action. If the person subject to the order fails to appeal the order of the Commissioner in accordance with G.S. 53-243.03, or if the person appeals and the appeal is denied or dismissed, and the person continues to engage in the prohibited action in violation of the Commissioner's order, the person shall be subject to a civil penalty of up to twenty-five thousand dollars ($25,000) for each violation of the Commissioner's order. The penalty provision of this section shall be in addition to and not in lieu of any other provision of law applicable to a licensee for the licensee's failure to comply with an order of the Commissioner.

(e) Unless otherwise provided, all actions and hearings under this Article shall be governed by Chapter 150B of the General Statutes.

(f) When a licensee is accused of any act, omission, or misconduct that would subject the licensee to disciplinary action, the licensee, with the consent and approval of the Commissioner, may surrender the license and all the rights and privileges pertaining to it for a period of time established by the Commissioner. A person who surrenders a license shall not be eligible for or submit any application for licensure under this Article.

(g) If the Commissioner has reasonable grounds to believe that a licensee or other person has violated the provisions of this Article or that facts exist that would be the basis for an order against a licensee or other person, the Commissioner may at any time, either personally or by a person duly designated by the Commissioner, investigate or examine the loans and business of the licensee and examine the books, accounts, records, and files of any licensee or other person relating to the complaint or matter under investigation. The reasonable cost of this investigation or examination shall be charged against the licensee.

(h) The Commissioner may issue subpoenas to require the attendance of and to examine under oath all persons whose testimony the Commissioner deems relative to the person's business.

(i) The Commissioner may from time to time, at the expense of the Commissioner's office, conduct routine examinations of the books and records of any licensee in order to determine the compliance with this Article and any rules adopted pursuant to the authority of G.S. 53-243.04.

(j) In addition to the rights described under this section, the Commissioner may require a licensee to pay to a borrower or other individual any amounts received by the licensee or its employees in violation of Chapter 24 of the General Statutes.

(k) If the Commissioner finds that the managing principal, branch manager, or loan officer of a licensee had knowledge of or reasonably should have had knowledge of, or participated in, any activity that results in the entry of an order under this section suspending or withdrawing the license of a licensee, the Commissioner may prohibit the managing broker or loan officer from serving as a managing broker or loan officer for any period of time the Commissioner deems necessary.

(*l*) In addition to the authority to require criminal history background checks as set forth in G.S. 53-243.05 and G.S. 53-243.06, the Commissioner shall have the authority to require a criminal history background check at any other time as a condition of continued licensure. Upon the request of the Commissioner, a licensee shall furnish to the Commissioner the licensee's consent to a criminal history record check and a set of the licensee's fingerprints in a form acceptable to the Commissioner. Refusal to consent to a criminal history record check under this subsection may constitute grounds for the Commissioner to suspend or revoke the license of the licensee. (2001-393, s. 2; 2002-169, s. 10.)

Effect of Amendments. — Session Laws 2002-169, s. 10, effective October 23, 2002, and applicable to persons who apply for licensure or licensure renewal under Article 19A of Chapter 53 of the General Statutes on or after that date, added subsection (*l*).

§ 53-243.16. Criminal history record checks.

The Department of Justice may provide a criminal record check to the Commissioner for a person who has applied for or holds a mortgage broker, exclusive mortgage broker, or loan officer license through the Commissioner under this Article. The Commissioner shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by

the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Commissioner shall keep all information pursuant to this section privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge a fee for each applicant for conducting the checks of criminal history records authorized by this section. (2002-169, s. 11.)

Editor's Note. — Session Laws 2002-169, s. 11, made this section effective October 23, 2002, and applicable to persons who apply for licensure or licensure renewal under Article 19A of Chapter 53 of the General Statutes on or after that date.

Article 25.

Asset-Backed Securities Facilitation.

§ 53-425. Definitions.

The following definitions apply in this Article:

(1) Beneficial interest. — Debt or equity interests or obligations of any type that are issued by a special purpose entity and entitle the holder of the interest or obligation to receive payments that depend primarily on the cash flow from financial assets owned by the special purpose entity.

(2) Financial asset. — Cash or a contract or instrument that conveys to an entity a contractual right to receive cash or another financial instrument from another entity.

(3) Securitization. — The issuance by a special purpose entity of evidences of beneficial interest that meets one of the following criteria:

a. Its most senior class at the time of issuance is rated in one of the four highest categories assigned to long-term debt or in an equivalent short-term category (within either of which there may be sub-categories or graduations indicating relative standing) by one or more nationally recognized rating organizations.

b. It is sold in transactions by an issuer not involving any public offering under section 4 of the Securities Act of 1933 (15 U.S.C. 77d), as amended, or in transactions exempt from registration under the Securities Act of 1933 pursuant to Regulation S issued in accordance with the Act, or any successor regulations issued under the Act.

(4) Special purpose entity. — A trust, corporation, limited liability company, or other entity demonstrably distinct from the transferor that is primarily engaged in acquiring and holding (or transferring to another special purpose entity) financial assets, and in activities related or incidental thereto, in connection with the issuance by the special purpose entity (or by another special purpose entity that acquires financial assets directly or indirectly from the special purpose entity) of evidences of beneficial interests.

(5) Transferor. — A financial institution insured by the Federal Deposit Insurance Corporation. (2002-88, s. 1; 2002-159, s. 33.)

Editor's Note. — Session Laws 2002-88, s. 3, made this Article effective August 22, 2002.

Session Laws 2002-159, s. 33, effective October 11, 2002, recodified Article 9A of Chapter 25 (G.S. 25-9A-101 through G.S. 25-9A-102), enacted by Session Laws 2002-88, s. 1, as Article 25 of Chapter 53 (G.S. 53-425 through G.S. 53-426).

Session Laws 2002-88, s. 2, provides: "The General Statutes Commission is directed to study and report to the 2003 General Assembly on the question of whether the waiver of the equity of redemption, as permitted under this act for certain financial institutions, should be extended to apply to other business entities in other commercial transactions. The report should include any recommended legislation necessary to implement the Commission's recommendations."

§ 53-426. Waiver of equity of redemption.

(a) Notwithstanding any other provision of law, except to the extent otherwise set forth in the transaction documents relating to a securitization, all of the following apply:

(1) Any property, assets, or rights purported to be transferred, in whole or in part, in a securitization or in connection with a securitization are considered no longer the property, assets, or rights of the transferor, to the extent purported to be transferred.

(2) A transferor in the securitization, its creditors, and, in any insolvency proceeding with respect to the transferor or the transferor's property, a bankruptcy trustee, receiver, debtor, debtor in possession, or similar person, to the extent the transfer is governed by State law, has no rights, legal or equitable, to reacquire, reclaim, recover, repudiate, disaffirm, redeem, or recharacterize as property of the transferor any property, assets, or rights purported to be transferred to the special purpose entity, in whole or in part, by the transferor.

(3) In the event of a bankruptcy, receivership, or other insolvency proceeding with respect to the transferor or the transferor's property, to the extent the transfer of property, assets, and rights are governed by State law, the property, assets, and rights are not considered part of the transferor's property, assets, rights, or estate.

(b) Nothing in this Article:

(1) Requires any securitization to be treated as a sale for federal or state tax purposes;

(2) Precludes the treatment of any securitization as debt for federal or state tax purposes; or

(3) Changes any applicable laws relating to the perfection and priority of security or ownership interests of persons other than the transferor, any hypothetical lien creditor of the transferor, or, in the event of a bankruptcy, receivership, or other insolvency proceeding with respect to the transferor or its property, a bankruptcy trustee, receiver, debtor, debtor in possession, or other similar person. (2002-88, s. 1; 2002-159, s. 33.)

Chapter 55.

North Carolina Business Corporation Act.

Article 1.

General Provisions.

Part 2. Filing Documents.

§ 55-1-20. Filing requirements.

(a) A document required or permitted by this Chapter to be filed by the Secretary of State must be filed under Chapter 55D of the General Statutes.

(b) A document submitted on behalf of a domestic or foreign corporation must be executed:

(1) By the chair of its board of directors, by its president, or by another of its officers;

(2) If directors have not been selected or the corporation has not been formed, by an incorporator; or

(3) If the corporation is in the hands of a receiver, trustee, or other court-appointed fiduciary, by that fiduciary.

(c) through (i). Reserved.

(j) Repealed by Session Laws 2002-159, s. 15 effective October 11, 2002. (1955, c. 1371, s. 1; 1967, c. 13, s. 1; c. 823, s. 16; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.1(a); 1991, c. 645, s. 15; 1999-369, s. 1.1; 2001-358, ss. 3(a), 6(a); 2001-387, ss. 1, 155, 173; 2001-413, s. 6; 2002-159, s. 15.)

Effect of Amendments. —
Session Laws 2002-159, s. 15, effective October 11, 2002, repealed subsection (j).

§ 55-1-22. Filing, service, and copying fees.

(a) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to the Secretary for filing:

	Document	Fee
(1)	Articles of incorporation	$125.00
(2)	Application for reserved name	30.00
(3)	Notice of transfer of reserved name	10.00

	Document	Fee
(4)	Application for registered name	10.00
(5)	Application for renewal of registered name	10.00
(6)	Corporation's statement of change of registered agent or registered office or both	5.00
(7)	Agent's statement of change of registered office for each affected corporation	5.00
(8)	Agent's statement of resignation	No fee
(9)	Designation of registered agent or registered office or both	5.00
(10)	Amendment of articles of incorporation	50.00
(11)	Restated articles of incorporation	10.00
	with amendment of articles	50.00
(12)	Articles of merger or share exchange	50.00
(12a)	Articles of conversion (other than articles of conversion included as part of another document)	50.00
(13)	Articles of dissolution	30.00
(14)	Articles of revocation of dissolution	10.00
(15)	Certificate of administrative dissolution	No fee
(16)	Application for reinstatement following administrative dissolution	100.00
(17)	Certificate of reinstatement	No fee
(18)	Certificate of judicial dissolution	No fee
(19)	Application for certificate of authority	250.00
(20)	Application for amended certificate of authority	75.00
(21)	Application for certificate of withdrawal	25.00
(22)	Certificate of revocation of authority to transact business	No fee
(23)	Annual report	20.00
(24)	Articles of correction	10.00
(25)	Application for certificate of existence or authorization (paper)	15.00
(25a)	Application for certificate of existence or authorization (electronic)	10.00
(26)	Any other document required or permitted to be filed by this Chapter	10.00
(27)	Repealed by Session Laws 2001-358, s. 6(b), effective January 1, 2002.	

(b) The Secretary of State shall collect a fee of ten dollars ($10.00) each time process is served on the Secretary under this Chapter. The party to a proceeding causing service of process is entitled to recover this fee as costs if the party prevails in the proceeding.

(c) The Secretary of State shall collect the following fees for copying, comparing, and certifying a copy of any filed document relating to a domestic or foreign corporation:

(1) One dollar ($1.00) a page for copying or comparing a copy to the original.

(2) Fifteen dollars ($15.00) for a paper certificate.

(3) Ten dollars ($10.00) for an electronic certificate. (1957, c. 1180; 1967, c. 823, s. 20; 1969, c. 751, ss. 42, 43, 45; c. 797, ss. 4, 5; 1975, 2nd Sess., c. 981, s. 1; 1983, c. 713, ss. 32-38; 1989, c. 265, s. 1; c. 714; 1989 (Reg. Sess., 1990), c. 1057; 1991, c. 574, s. 1; 1997-456, s. 55.3; 1997-475, s. 5.1; 1997-485, s. 10; 2001-358, s. 6(b); 2001-387, ss. 2, 173; 2001-413, s. 6; 2002-126, ss. 29A.25, 29A.26.)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, ss. 29A.25 and 29A.26, effective November 1, 2002, substituted "30.00" for "10.00" in subdivision (a)(2); substituted "75.00" for "50.00" in subdivision (a)(20); substituted "25.00" for "10.00" in subdivision (a)(21); substituted "(paper) 15.00" for "5.00" in subdivision (a)(25); added subdivision (a)(25a); rewrote subdivision (c)(2), which formerly read: "Five dollars ($5.00) for the certificate."; and added subdivision (c)(3).

Article 6.

Shares and Distribution.

Part 2. Issuance of Shares.

§ 55-6-22. Liability of shareholders.

CASE NOTES

Shareholders Not Personally Liable for Corporation's Acts. — Third-party plaintiff developer's indemnity complaint against third-party defendant shareholders concerning actions taken by their corporation in arranging for the excavation of a certain ditch failed because, pursuant to G.S. 55-6-22(b), and absent the application of certain exceptions that did not apply to the facts, the shareholders could not be personally liable for the corporation's acts. BNT Co. v. Baker Precythe Dev. Co., — N.C. App. —, 564 S.E.2d 891, 2002 N.C. App. LEXIS 677 (2002), cert. denied, 356 N.C. 159, 569 S.E.2d 283 (2002).

Article 7.

Shareholders.

Part 1. Meetings.

§ 55-7-02. Special meeting.

(a) A corporation shall hold a special meeting of shareholders:

(1) On call of its board of directors or the person or persons authorized to do so by the articles of incorporation or the bylaws; or

(2) In the case of a corporation that is not a public corporation, within 30 days after the holders of at least ten percent (10%) of all the votes entitled to be cast on any issue proposed to be considered at the proposed special meeting sign, date, and deliver to the corporation's secretary one or more written demands for the meeting describing the purpose or purposes for which it is to be held. The written demand shall cease to be effective on the sixty-first day after the date of signature appearing on the demand unless prior to the sixty-first day the corporation has received effective written demands from holders sufficient to call the special meeting.

(b) If not otherwise fixed under G.S. 55-7-03 or G.S. 55-7-07, the record date for determining shareholders entitled to demand a special meeting is the date the first shareholder signs the demand.

(c) Special shareholders' meetings may be held in or out of this State at the place stated in or fixed in accordance with the bylaws. If no place is stated or fixed in accordance with the bylaws, special meetings shall be held at the corporation's principal office.

(d) Only business within the purpose or purposes described in the meeting notice required by G.S. 55-7-05(c) may be conducted at a special shareholders' meeting. (1901, c. 2, ss. 46, 49, 51; Rev., ss. 1179, 1188, 1190; C.S., ss. 1168, 1169, 1176; G.S., ss. 55-105, 55-106, 55-113; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 21, 22; 1985 (Reg. Sess., 1986), c. 801, s. 44; 1989, c. 265, s. 1; 1991, c. 645, s. 17(a); 2001-201, s. 15; 2002-58, s. 1.)

Effect of Amendments. —
Session Laws 2002-58, s. 1, effective August 1, 2002, rewrote subsection (a).

Part 4. Derivative Proceedings.

§ 55-7-40.1. Definitions.

CASE NOTES

Standing. — As 50% shareholder failed to show that her damages differed from those sustained by her corporation, by reason of some special circumstances or special relationship to the defendants, she lacked standing to maintain a direct action against defendants on claims of fraud, constructive fraud, and unfair and deceptive practices. Aubin v. Susi, 149 N.C. App. 320, 560 S.E.2d 875, 2002 N.C. App. LEXIS 190 (2002).

§ 55-7-46. Payment of expenses.

CASE NOTES

Award of Fees to Non-Prevailing Party. — Under G.S. 55-7-46(1), the party seeking attorney's fees need not necessarily be the prevailing party, nor must the derivative claim have proceeded to a final judgment or order; upon a plaintiff's motion, the trial court is at least required to consider whether the proceeding resulted in a substantial benefit to the corporation, and whether such benefit warranted any award of fees. Aubin v. Susi, 149 N.C. App. 320, 560 S.E.2d 875, 2002 N.C. App. LEXIS 190 (2002).

Article 8.

Directors and Officers.

Part 3. Standards of Conduct.

§ 55-8-30. General standards for directors.

CASE NOTES

Director's Fiduciary Duty to Creditors. — As a general rule, directors of a corporation do not owe a fiduciary duty to creditors of the corporation under G.S. 55-8-30, but a corporate director can breach a fiduciary duty to a creditor if the transaction at issue occurs under circumstances amounting to a winding-up or dissolution of the corporation. Oberlin Capital, L.P. v. Slavin, 147 N.C. App. 52, 554 S.E.2d 840, 2001 N.C. App. LEXIS 1047 (2001).

Fiduciary Duty. — Directors of a corporation generally owed a fiduciary duty to their corporation and the complaint adequately stated a cause of action for breach of the fidu-

ciary duty against a corporation's directors. Governor's Club, Inc. v. Governors Club Ltd. P'ship., — N.C. App. —, 567 S.E.2d 781, 2002 N.C. App. LEXIS 926 (2002).

§ 55-8-31. Director conflict of interest.

CASE NOTES

Corporate director and majority shareholder of closely held corporation did not breach a fiduciary duty to minority shareholder and director when the corporate director purchased the corporation's sole property at a foreclosure on a mortgage the corporate director had personally guaranteed without telling the minority shareholder he intended to do so in advance. Boyd v. Howard, 147 N.C. App. 491, 556 S.E.2d 337, 2001 N.C. App. LEXIS 1187 (2001).

Article 13.

Dissenters' Rights.

Part 2. Procedure for Exercise of Dissenters' Rights.

§ 55-13-20. Notice of dissenters' rights.

(a) If proposed corporate action creating dissenters' rights under G.S. 55-13-02 is submitted to a vote at a shareholders' meeting, the meeting notice must state that shareholders are or may be entitled to assert dissenters' rights under this Article and be accompanied by a copy of this Article.

(b) If corporate action creating dissenters' rights under G.S. 55-13-02 is taken without a vote of shareholders or is taken by shareholder action without meeting under G.S. 55-7-04, the corporation shall no later than 10 days thereafter notify in writing all shareholders entitled to assert dissenters' rights that the action was taken and send them the dissenters' notice described in G.S. 55-13-22. A shareholder who consents to shareholder action taken without meeting under G.S. 55-7-04 approving a corporate action is not entitled to payment for the shareholder's shares under this Article with respect to that corporate action.

(c) If a corporation fails to comply with the requirements of this section, such failure shall not invalidate any corporate action taken; but any shareholder may recover from the corporation any damage which he suffered from such failure in a civil action brought in his own name within three years after the taking of the corporate action creating dissenters' rights under G.S. 55-13-02 unless he voted for such corporate action. (1925, c. 77, s. 1; c. 235; 1929, c. 269; 1939, c. 5; c. 279; 1943, c. 270; G.S., ss. 55-26, 55-165, 55-167; 1955, c. 1371, s. 1; 1969, c. 751, s. 39; 1973, c. 469, ss. 36, 37; 1989, c. 265, s. 1; 2002-58, s. 2.)

Effect of Amendments. — Session Laws 2002-58, s. 2, effective January 1, 2002, rewrote subsection (b).

§ 55-13-22. Dissenters' notice.

(a) If proposed corporate action creating dissenters' rights under G.S. 55-13-02 is approved at a shareholders' meeting, the corporation shall mail by registered or certified mail, return receipt requested, a written dissenters' notice to all shareholders who satisfied the requirements of G.S. 55-13-21.

(b) The dissenters' notice must be sent no later than 10 days after shareholder approval, or if no shareholder approval is required, after the approval of the board of directors, of the corporate action creating dissenters' rights under G.S. 55-13-02, and must:

(1) State where the payment demand must be sent and where and when certificates for certificated shares must be deposited;

(2) Inform holders of uncertificated shares to what extent transfer of the shares will be restricted after the payment demand is received;

(3) Supply a form for demanding payment;

(4) Set a date by which the corporation must receive the payment demand, which date may not be fewer than 30 nor more than 60 days after the date the subsection (a) notice is mailed; and

(5) Be accompanied by a copy of this Article. (1925, c. 77, s. 1; 1943, c. 270; G.S., s. 55-167; 1955, c. 1371, s. 1; 1969, c. 751, s. 39; 1973, c. 469, ss. 36, 37; 1989, c. 265, s. 1; 1997-485, s. 4; 2001-387, s. 27; 2002-58, s. 3.)

Effect of Amendments. — Session Laws 2002-58, s. 3, effective January 1, 2002, deleted the former last two sentences of subsection (a), which pertained to proposed corporate action creating dissenters' rights approved by shareholder action without meeting.

Article 14.

Dissolution.

Part 1. Voluntary Dissolution.

§ 55-14-05. Effect of dissolution.

CASE NOTES

Applied in Becker v. Graber Bldrs., Inc., 149 N.C. App. 787, 561 S.E.2d 905, 2002 N.C. App. LEXIS 308 (2002).

§ 55-14-07. Unknown and certain other claims against dissolved corporation.

CASE NOTES

Applied in Becker v. Graber Bldrs., Inc., 149 N.C. App. 787, 561 S.E.2d 905, 2002 N.C. App. LEXIS 308 (2002).

§ 55-14-08. Enforcement of claims.

CASE NOTES

Cited in BNT Co. v. Baker Precythe Dev. Co., — N.C. App. —, 564 S.E.2d 891, 2002 N.C. App. LEXIS 677 (2002), cert. denied, 356 N.C. 159, 569 S.E.2d 283 (2002).

Chapter 55A.

North Carolina Nonprofit Corporation Act.

Article 1.

General Provisions.

Part 2. Filing Documents.

§ 55A-1-22. Filing, service, and copying fees.

(a) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to the Secretary for filing:

	Document	Fee
(1)	Articles of incorporation	$60.00
(2)	Application for reserved name	$10.00
(3)	Notice of transfer of reserved name	$10.00
(4)	Application for registered name	$10.00
(5)	Application for renewal of registered name	$10.00
(6)	Corporation's statement of change of registered agent or registered office or both	$ 5.00
(7)	Agent's statement of change of registered office for each affected corporation	$ 5.00
(8)	Agent's statement of resignation	No fee
(9)	Designation of registered agent or registered office or both	$ 5.00
(10)	Amendment of articles of incorporation	$25.00
(11)	Restated articles of incorporation without amendment of articles	$10.00
(12)	Restated articles of incorporation with amendment of articles	$25.00
(13)	Articles of merger	$25.00
(14)	Articles of dissolution	$15.00
(15)	Articles of revocation of dissolution	$10.00
(16)	Certificate of administrative dissolution	No fee
(17)	Application for reinstatement following administrative dissolution	$100.00
(18)	Certificate of reinstatement	No fee
(19)	Certificate of judicial dissolution	No fee
(20)	Application for certificate of authority	$125.00
(21)	Application for amended certificate of authority	$25.00
(22)	Application for certificate of withdrawal	$10.00

	Document	Fee
(23)	Certificate of revocation of authority to conduct affairs	No fee
(24)	Corporation's Statement of Change of Principal Office	$5.00
(24a)	Designation of Principal Office Address	$5.00
(25)	Articles of correction	$10.00
(26)	Application for certificate of existence or authorization (paper)	$15.00
(26a)	Application for certificate of existence or authorization (electronic)	$10.00
(27)	Any other document required or permitted to be filed by this Chapter	$10.00
(28)	Repealed by Session Laws 2001-358, s. 7(c), effective January 1, 2002.	

(b) The Secretary of State shall collect a fee of ten dollars ($10.00) each time process is served on the Secretary under this Chapter. The party to a proceeding causing service of process is entitled to recover this fee as costs if the party prevails in the proceeding.

(c) The Secretary of State shall collect the following fees for copying, comparing, and certifying a copy of any filed document relating to a domestic or foreign corporation:

(1) One dollar ($1.00) a page for copying or comparing a copy to the original.

(2) Fifteen dollars ($15.00) for a paper certificate.

(3) Ten dollars ($10.00) for an electronic certificate.

(1957, c. 1179; 1967, c. 823, s. 24; 1969, c. 875, s. 10; 1975, 2nd Sess., c. 981, s. 2; 1983, c. 713, ss. 39-42; 1991, c. 574, s. 2; 1993, c. 398, s. 1; 1995, c. 539, s. 10; 1997-456, s. 55.3; 1997-475, s. 5.2; 1997-485, s. 11; 2001-358, s. 7(c); 2001-387, ss. 173, 175(a); 2001-413, s. 6; 2002-126, ss. 29A.27, 29A.28.)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, ss. 29A.27 and 29A.28, effective November 1, 2002, substituted "(paper) $15.00" for "$5.00" in subdivision (a)(26); added subdivision (a)(26a); deleted "and" at the end of subdivision (c)(1); rewrote subdivision (c)(2), which formerly read: "Five dollars ($5.00) for the certificate"; and added subdivision (c)(3).

Article 3.

Purposes and Powers.

§ 55A-3-01. Purposes.

CASE NOTES

Lending by Hospital Authorized. — The proposal of a county hospital system to lend money to a separately licensed acute care hospital was authorized by law. See opinion of Attorney General to Granger R. Barrett, Cumberland County Attorney, and Wilson Hayman, Poyner & Spruill, L.L.P., 2002 N.C. AG LEXIS 14 (2/19/02).

Article 8.

Directors and Officers.

Part 3. Standards of Conduct.

§ 55A-8-31. Director conflict of interest.

OPINIONS OF ATTORNEY GENERAL

The statute applied to a process whereby a regional medical center made a grant to a nonprofit corporation, where one member of the board of trustees of the regional medical center was a member of the board of directors of the nonprofit corporation and another was executive director of the nonprofit corporation. See opinion of Attorney General to A. Dumay Gorham, Jr., Marshall, Williams & Gorham, L.L.P., 1999 N.C. AG LEXIS 42 (9/1/99).

Article 10.

Amendment of Articles of Incorporation and Bylaws.

Part 2. Bylaws.

§ 55A-10-21. Amendment by directors and members.

(a) If the corporation has members entitled to vote thereon, then, unless this Chapter, the articles of incorporation, bylaws, the members (acting pursuant to subsection (b) of this section), or the board of directors (acting pursuant to subsection (c) of this section) require a greater vote or voting by class, an amendment to a corporation's bylaws to be adopted shall be approved:

(1) By the board or in lieu thereof in writing by the number or proportion of members entitled under G.S. 55A-7-02(a) (2) to call a special meeting to consider such amendment;

(2) By the members entitled to vote thereon by two-thirds of the votes cast or a majority of the votes entitled to be cast on the amendment, whichever is less; and

(3) In writing by any person or persons whose approval is required by a provision of the articles of incorporation authorized by G.S. 55A-10-30.

(b) The members entitled to vote thereon may condition the amendment's adoption on its receipt of a higher percentage of affirmative votes or on any other basis.

(c) If the board initiates an amendment to the bylaws or board approval is required by subsection (a) of this section to adopt an amendment to the bylaws, the board may condition the amendment's adoption on receipt of a higher percentage of affirmative votes or on any other basis.

(d) If the board or the members seek to have the amendment approved by the members entitled to vote thereon at a membership meeting, the corporation shall give notice of the membership meeting to those members in accordance with G.S. 55A-7-05. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment.

(e) If the board or the members seek to have the amendment approved by the members entitled to vote thereon by written consent or written ballot, the

material soliciting the approval shall contain or be accompanied by a copy or summary of the amendment. (1955, c. 1230; 1993, c. 398, s. 1; 2002-27, s. 1.)

Effect of Amendments. — Session Laws 2002-27, s. 1, effective July 22, 2002, rewrote subdivision (a)(2).

Chapter 55D.

Filings, Names, and Registered Agents for Corporations, Nonprofit Corporations, and Partnerships.

Article 3.

Names.

Article 3.

Names.

§ 55D-21. Entity names on the records of the Secretary of State; availability.

(a) The following entities are subject to this section:

(1) Domestic corporations, nonprofit corporations, limited liability companies, limited partnerships, and registered limited liability partnerships.

(2) Foreign corporations, foreign nonprofit corporations, foreign limited liability companies, and foreign limited partnerships applying for or maintaining a certificate of authority to transact business or conduct affairs in this State.

(3) Foreign limited liability partnerships applying for or maintaining a statement of foreign registration.

(b) Except as authorized by subsection (c) of this section, the name of an entity subject to this section, including a fictitious name for a foreign entity, must be distinguishable upon the records of the Secretary of State from:

(1) The name of a domestic corporation, nonprofit corporation, limited liability company, limited partnership, or registered limited liability partnership, or of a foreign corporation, foreign nonprofit corporation, foreign limited liability company, or foreign limited partnership authorized to transact business or conduct affairs in this State, or a foreign limited liability partnership maintaining a statement of foreign registration in this State;

(2) A name reserved or registered under G.S. 55D-23 or registered under G.S. 55D-24; and

(3) The fictitious name adopted by a foreign corporation, foreign nonprofit corporation, foreign limited liability company, or foreign limited partnership authorized to transact business or conduct affairs, or a foreign limited liability partnership maintaining a statement of foreign registration in this State because its real name is unavailable.

(c) A person may apply to the Secretary of State for authorization to use a name that is not distinguishable upon the Secretary of State's records from one or more of the names described in subsection (b) of this section. The Secretary of State shall authorize use of the name applied for if:

(1) The other person who has or uses the name or who has reserved or registered the name consents in writing to the use and submits an undertaking in form satisfactory to the Secretary of State to change its name to a name that is distinguishable upon the records of the Secretary of State from the name of the applicant; or

(2) The applicant delivers to the Secretary of State a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this State.

(d) Except as otherwise provided in this subsection, the name of a corporation dissolved under Article 14 of Chapter 55 of the General Statutes, of a nonprofit corporation dissolved under Article 14 of Chapter 55A of the General Statutes, of a limited liability company dissolved under Article 6 of Chapter 57C of the General Statutes, of a limited partnership dissolved under Part 8 of Article 5 of Chapter 59 of the General Statutes, or of a limited liability partnership whose registration as a limited liability partnership has been cancelled under G.S. 59-84.2 or revoked under G.S. 59-84.4, may not be used by another entity until one of the following occurs:

(1) In the case of a nonjudicial dissolution other than an administrative dissolution or cancellation of registration as a limited liability partnership, 120 days after the effective date of the dissolution or cancellation.

(2) In the case of an administrative dissolution or revocation of registration as a limited liability partnership, the expiration of five years after the effective date of the administrative dissolution or revocation.

(3) In the case of a judicial dissolution, 120 days after the later of the date the judgment has become final or the effective date of the dissolution. The person applying for the name must certify to the Secretary of State that no appeal or other judicial review of the judgment directing dissolution is pending.

(4) The dissolved entity changes its name to a name that is distinguishable upon the records of the Secretary of State from the names of other domestic corporations, nonprofit corporations, limited liability companies, limited partnerships, or registered limited liability partnerships or foreign corporations, foreign nonprofit corporations, foreign limited liability companies, or foreign limited partnerships authorized to transact business or conduct affairs in this State, or foreign limited liability partnerships maintaining a statement of foreign registration in this State. (1901, c. 2, s. 8; 1903, c. 453; Rev., s. 1137; 1913, c. 5, s. 1; C.S., s. 1114; 1935, cc. 166, 320; 1939, c. 222; G.S., s. 55-2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 28; 1969, c. 751, ss. 4-6; 1973, c. 469, s. 45.3; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.5; 1995, c. 539, ss. 4, 5; 2001-358, ss. 14(a), 15; 2001-387, ss. 163, 173, 175(a); 2001-390, s. 15; 2001-413, s. 6; 2001-487, s. 62(h); 2002-159, s. 23; 2002-159, s. 23.)

Editor's Note. —

Session Laws 2001-390, s. 8, effective August 26, 2001, and applicable retroactively to applications for reinstatement made on or after December 1, 1999, amending former G.S. 55-4-01(g) before the recodification to subsection (d) of this section, added "until one of the following occurs" at the end of the introductory language of subsection (g); deleted "or" at the end of subdivision (g)(1); substituted "five years after the effective date of the administrative dissolution" for "the period within which the corporation may be reinstated pursuant to G.S. 55-14-21" at the end of subdivision (g)(2); inserted the subdivision (g)(3) designation, and deleted "unless" at the beginning of that subdivision. Session Laws 2002-159, s. 23, repealed Session Law 2001-390, s. 8, effective January 1, 2002.

Chapter 57C.

North Carolina Limited Liability Company Act.

Article 1.

General Provisions.

Part 2. Filing Documents.

§ 57C-1-22. Filing, service, and copying fees.

(a) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to the Secretary of State for filing:

Document		Fee
(1)	Articles of organization	$125.00
(2)	Application for reserved name	10.00
(3)	Notice of transfer of reserved name	10.00
(4)	Application for registered name	10.00
(5)	Application for renewal of registered name	10.00
(6)	Limited liability company's statement of change of registered agent or registered office or both	5.00
(7)	Agent's statement of change of registered office for each affected limited liability company	5.00
(8)	Agent's statement of resignation	No fee
(9)	Designation of registered agent or registered office or both	5.00
(10)	Amendment of articles of organization	50.00
(11)	Restated articles of organization without amendment of articles	10.00
(12)	Restated articles of organization with amendment of articles	50.00
(12a)	Articles of conversion (other than articles of conversion included as part of another document)	50.00
(13)	Articles of merger	50.00
(14)	Articles of dissolution	30.00
(15)	Cancellation of articles of dissolution	10.00
(16)	Certificate of administrative dissolution	No fee
(16a)	Application for reinstatement following administrative dissolution	100.00
(17)	Certificate of reinstatement	No fee

Document		Fee
(18)	Certificate of judicial dissolution	No fee
(19)	Application for certificate of authority	250.00
(20)	Application for amended certificate of authority	50.00
(21)	Application for certificate of withdrawal	10.00
(22)	Certificate of revocation of authority to transact business	No fee
(23)	Articles of correction	10.00
(24)	Application for certificate of existence or authorization (paper)	15.00
(24a)	Application for certificate of existence or authorization (electronic)	10.00
(25)	Annual report	200.00
(26)	Any other document required or permitted to be filed by this Chapter	10.00
(27)	Repealed by Session Laws 2001-358, s. 8(c), effective January 1, 2002.	

(b) The Secretary of State shall collect a fee of ten dollars ($10.00) each time process is served on the Secretary of State under this Chapter. The party to a proceeding causing service of process is entitled to recover this fee as costs if the party prevails in the proceeding.

(c) The Secretary of State shall collect the following fees for copying, comparing, and certifying a copy of any filed document relating to a domestic or foreign limited liability company:

(1) One dollar ($1.00) a page for copying or comparing a copy to the original; and

(2) Fifteen dollars ($15.00) for a paper certificate.

(3) Ten dollars ($10.00) for an electronic certificate. (1993, c. 354, s. 1; 1997-456, s. 55.3; 1997-475, s. 5.3; 1997-485, ss. 12, 20; 2001-358, s. 8(c); 2001-387, ss. 54, 173, 175(a); 2001-413, s. 6; 2002-126, ss. 29A.29, 29A.30.)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, ss. 29A.29 and 29A.30, effective November 1, 2002, substituted "(paper) 15.00" for "5.00" in subdivision (a)(24); added subdivision (a)(24a); rewrote subdivision (c)(2), which formerly read: "Five dollars ($5.00) for the certificate"; and added subdivision (c)(3).

Article 3.

Membership and Management.

Part 1. Membership.

§ 57C-3-03. Voting of members.

CASE NOTES

Applied in Herring v. Keasler, — N.C. App. —, 563 S.E.2d 614, 2002 N.C. App. LEXIS 585 (2002).

Article 5.

Assignment of Membership Interests; Withdrawal.

§ 57C-5-02. Assignment of membership interest.

CASE NOTES

Applied in Herring v. Keasler, — N.C. App. —, 563 S.E.2d 614, 2002 N.C. App. LEXIS 585 (2002).

§ 57C-5-03. Rights of judgment creditor.

CASE NOTES

Forced Sale of Judgment Debtor's Membership Interests Properly Refused. — Trial court properly ordered defendant debtor's distributions and allocations from certain limited liability companies in which the debtor had membership interests to be applied to satisfy a judgment, and properly denied plaintiff assignee's motion to order the membership interests to be seized and sold, because pursuant to G.S. 57C-5-03, the trial court was allowed to charge the membership interests with payment of the judgment. Nevertheless, such charging did not entitle the assignee to become a member or exercise a member's rights, and therefore, because forcing the sale of the membership interests to satisfy the debt would have entailed the assignee becoming a member of the limited liability companies, a forced sale like that otherwise allowed by G.S. 1-362 was prohibited. Herring v. Keasler, — N.C. App. —, 563 S.E.2d 614, 2002 N.C. App. LEXIS 585 (2002).

Chapter 58.

Insurance.

Article 2.

Commissioner of Insurance.

Article 3.

General Regulations for Insurance.

Article 5.

Deposits and Bonds by Insurance Companies.

Article 6.

License Fees and Taxes.

Article 7.

General Domestic Companies.

Article 9.

Reinsurance Intermediaries.

Article 13.

Asset Protection Act.

Article 26.

Real Estate Title Insurance Companies.

Article 30.

Insurers Supervision, Rehabilitation, and Liquidation.

Article 33.

Licensing of Agents, Brokers, Limited Representatives, and Adjusters.

Article 35.

Insurance Premium Financing.

Article 36.

North Carolina Rate Bureau.

Article 2.

Commissioner of Insurance.

§ 58-2-105. Confidentiality of medical and credentialing records.

(a) All patient medical records in the possession of the Department are confidential and are not public records pursuant to G.S. 58-2-100 or G.S. 132-1. As used in this section, "patient medical records" includes personal information that relates to an individual's physical or mental condition, medical history, or medical treatment, and that has been obtained from the individual patient, a health care provider, or from the patient's spouse, parent, or legal guardian.

(b) Under Part 4 of Article 50 of this Chapter, the Department may disclose patient medical records to an independent review organization, and the organization shall maintain the confidentiality of those records as required by this section, except as allowed by G.S. 58-39-75 and G.S. 58-39-76.

(c) Under Part 4 of Article 50 of this Chapter, all information related to the credentialing of medical professionals that is in the possession of the Commissioner is confidential and is a public record neither under this section nor under Chapter 132 of the General Statutes. (1989 (Reg. Sess., 1990), c. 1021, s. 4; 1993 (Reg. Sess., 1994), c. 678, s. 3; 2001-446, s. 5(a); 2002-187, s. 3.4.)

Effect of Amendments. — Session Laws 2002-187, s. 3.4, effective October 31, 2002, in the catchline inserted "and credentialing"; and added subsection (c).

§ 58-2-131. Examinations to be made; authority, scope, scheduling, and conduct of examinations.

(a) This section and G.S. 58-2-132 through G.S. 58-2-134 shall be known and may be cited as the Examination Law. The purpose of the Examination Law is to provide an effective and efficient system for examining the activities, operations, financial condition, and affairs of all persons transacting the business of insurance in this State and all persons otherwise subject to the Commissioner's jurisdiction; and to enable the Commissioner to use a flexible system of examinations that directs resources that are appropriate and necessary for the administration of the insurance statutes and rules of this State.

(b) As used in this section and G.S. 58-2-132 through G.S. 58-2-134, unless the context clearly indicates otherwise:

(1) "Commissioner" includes an authorized representative or designee of the Commissioner.

(2) "Examination" means an examination conducted under the Examination Law.

(3) "Examiner" means any person authorized by the Commissioner to conduct an examination.

(4) "Insurance regulator" means the official or agency of another jurisdiction that is responsible for the regulation of a foreign or alien insurer.

(5) "Person" includes a trust or any affiliate of a person.

(c) Before licensing any person to write insurance in this State, the Commissioner shall be satisfied, by such examination and evidence as the Commissioner decides to make and require, that the person is otherwise duly qualified under the laws of this State to transact business in this State.

(d) The Commissioner may conduct an examination of any entity whenever the Commissioner deems it to be prudent for the protection of policyholders or the public, but shall at a minimum conduct a financial examination of every domestic insurer not less frequently than once every five years. In scheduling and determining the nature, scope, and frequency of examinations, the Commissioner shall consider such matters as the results of financial statement analyses and ratios, changes in management or ownership, actuarial opinions, reports of independent certified public accountants, and other criteria as set forth in the NAIC Examiners' Handbook.

(e) To complete an examination of any entity, the Commissioner may authorize an examination or investigation of any person, or the business of any person, insofar as the examination or investigation is necessary or material to the entity under examination.

(f) Instead of examining any foreign or alien insurer licensed in this State, the Commissioner may accept an examination report on that insurer prepared by the insurer's domiciliary insurance regulator. In making a determination to

accept the domiciliary insurance regulator's report, the Commissioner may consider whether (i) the insurance regulator was at the time of the examination accredited under NAIC Financial Regulation Standards and Accreditation Program, or (ii) the examination is performed under the supervision of an NAIC-accredited insurance regulator or with the participation of one or more examiners who are employed by the regulator and who, after a review of the examination work papers and report, state under oath that the examination was performed in a manner consistent with the standards and procedures required by the regulator.

(g) If it appears that the insurer is of good financial and business standing and is solvent, and it is certified in writing and attested by the seal, if any, of the insurer's insurance regulator that it has been examined by the regulator in the manner prescribed by its laws, and was by the examination found to be in sound condition, that there is no reason to doubt its solvency, and that it is still permitted under the laws of such jurisdiction to do business therein, then, in the Commissioner's discretion, further examination may be dispensed with, and the obtained information and the furnished certificate may be accepted as sufficient evidence of the solvency of the insurer.

(h) Upon determining that an examination should be conducted, the Commissioner shall issue a notice of examination appointing one or more examiners to perform the examination and instructing them about the scope of the examination. In conducting the examination, an examiner shall observe the guidelines and procedures in the NAIC Examiners' Handbook. The Commissioner may also use such other guidelines or procedures as the Commissioner deems to be appropriate.

(i) Every person from whom information is sought and its officers, directors, and agents must provide to the Commissioner timely, convenient, and free access, at all reasonable hours at its offices, to all data relating to the property, assets, business, and affairs of the entity being examined. The officers, directors, employees, and agents of the entity must facilitate and aid in the examination. The refusal of any entity, by its officers, directors, employees, or agents, to submit to examination or to comply with any reasonable written request of the Commissioner or to knowingly or willfully make any false statement in regard to the examination or written request, is grounds for revocation, suspension, refusal, or nonrenewal of any license or authority held by the entity to engage in an insurance or other business subject to the Commissioner's jurisdiction.

(j) The Commissioner may issue subpoenas, administer oaths, and examine under oath any person about any matter pertinent to the examination. Upon the failure or refusal of any person to obey a subpoena, the Commissioner may petition the Superior Court of Wake County, and upon proper showing the Court may enter any order compelling the witness to appear and testify or produce documentary evidence. Failure to obey the Court order is punishable as contempt of court.

(k) **(Effective until June 30, 2003)** When making an examination, the Commissioner may retain attorneys, appraisers, independent actuaries, independent certified public accountants, or other professionals and specialists as examiners. In the case of an examination of an insurer, the insurer shall bear the cost of retaining those persons.

(k) **(Effective June 30, 2003)** When making an examination, the Commissioner may retain attorneys, appraisers, independent actuaries, independent certified public accountants, or other professionals and specialists as examiners.

(*l*) Pending, during, and after the examination of any entity, the Commissioner shall not make public the financial statement, findings, or examination report, or any report affecting the status or standing of the entity examined,

until the entity examined has either accepted and approved the final examination report or has been given a reasonable opportunity to be heard on the report and to answer or rebut any statements or findings in the report. The hearing, if requested, shall be informal and private.

(m) Nothing in the Examination Law limits the Commissioner's authority to terminate or suspend any examination in order to pursue other legal or regulatory action under the laws and rules of this State and to use any final or preliminary examination report, any examiner or insurer work papers or other documents, or any other information discovered or developed during any examination in the furtherance of any legal or regulatory action that the Commissioner may consider to be appropriate. Findings of fact and conclusions made pursuant to any examination are prima facie evidence in any legal or regulator action. (1991, c. 681, s. 2; 1995, c. 360, s. 2(c); c. 517, s. 1; 1998-212, s. 26B(b), (c), (f); 2001-180, ss. 1, 2, 3; 2002-144, s. 6; 2002-187, ss. 2.1, 2.2.)

Subsection (k) Set Out Twice. — The first version of subsection (k) set out above is effective until June 30, 2003. The second version of subsection (k) set out above is effective June 30, 2003.

Editor's Note. —

Session Laws 2002-144, s. 11, contains a severability clause.

Effect of Amendments. —

Session Laws 2002-144, s. 6, effective July 1, 2002 and expiring June 30, 2003, added the second sentence of subsection (k).

Session Laws 2002-187, ss. 2.1 and 2.2, effective October 31, 2002, in the first sentence of subsection (d) substituted "financial examination" for "regular examination"; in the second sentence of subsection (i) substituted "entity" for "person"; and substituted "entity" for "insurer" throughout.

§ 58-2-133. Conflict of interest; cost of examinations; immunity from liability.

(a) No person may be appointed as an examiner by the Commissioner if that person, either directly or indirectly, has a conflict of interest or is affiliated with the management of or owns a pecuniary interest in any person subject to examination. This section does not preclude an examiner from being:

(1) A policyholder or claimant under an insurance policy;

(2) A grantor of a mortgage or similar instrument on the examiner's residence to an insurer if done under customary terms and in the ordinary course of business;

(3) An investment owner in shares of regulated diversified investment companies; or

(4) A settler or beneficiary of a blind trust into which any otherwise nonpermissible holdings have been placed.

(b) **(Effective until June 30, 2003)** Notwithstanding the requirements of G.S. 58-2-131, the Commissioner may retain from time to time, on an individual basis, qualified actuaries, certified public accountants, or other similar individuals who are independently practicing their professions, even though they may from time to time be similarly employed or retained by persons subject to examination under the Examination Law. In the case of an examination of an insurer, the insurer shall bear the cost of retaining those persons.

(b) **(Effective June 30, 2003)** Notwithstanding the requirements of G.S. 58-2-131, the Commissioner may retain from time to time, on an individual basis, qualified actuaries, certified public accountants, or other similar individuals who are independently practicing their professions, even though they may from time to time be similarly employed or retained by persons subject to examination under the Examination Law.

(c) The refusal of any insurer to submit to examination is grounds for the revocation, suspension, or refusal of a license. The Commissioner may make

G.S. 58-2-133(b) is set out twice. See notes.

public any such revocation, suspension, or refusal of license and may give reasons for that action.

(d) The provisions of G.S. 58-2-160 apply to examinations conducted under the Examination Law. (1991, c. 681, s. 2; 1995, c. 360, s. 2(d); 2002-144, s. 7.)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until June 30, 2003. The second version of subsection (b) set out above is effective June 30, 2003.

Editor's Note. — Session Laws 2002-144, s. 11, contains a severability clause.

Effect of Amendments. — Session Laws 2002-144, s. 7, effective July 1, 2002 and expiring June 30, 2003, added the second sentence of subsection (b).

§ 58-2-134. Cost of certain examinations.

(a) An insurer shall reimburse the State Treasurer for the actual expenses incurred by the Department in any examination of those records or assets conducted under G.S. 58-2-131, 58-2-132, or 58-2-133 under any of the following circumstances:

(1) The insurer maintains part of its records or assets outside this State under G.S. 58-7-50 or G.S. 58-7-55 and the examination is of the records or assets outside this State.

(2) The insurer requests an examination of its records or assets.

(3) The Commissioner examines an insurer that is impaired or insolvent or is unlikely to be able to meet obligations with respect to known or anticipated claims or to pay other obligations in the normal course of business.

(4) The examination involves analysis of the company's investment portfolio, a material portion of which comprises a sophisticated derivatives program, material holdings of collateralized mortgage obligations with high flux scores, unusual real estate or limited partnership holdings, high or unusual portfolio turnover, material asset movement between related parties, or unusual securities lending activities.

(b) The amount paid by an insurer for an examination of records or assets under this section shall not exceed one hundred thousand dollars ($100,000), unless the insurer and the Commissioner agree on a higher amount. The State Treasurer shall deposit all funds received under this section in the Insurance Regulatory Fund established under G.S. 58-6-25. Funds received under this section shall be used by the Department for offsetting the actual expenses incurred by the Department for examinations under this section. (1998-212, s. 26B(d); 1999-435, s. 7; 2002-187, s. 2.3.)

Effect of Amendments. — Session Laws 2002-187, s. 2.3, effective October 31, 2002, in subsection (a) substituted "under any of the following circumstances" for "when"; and added subdivision (a)(4).

§ 58-2-136. (Expires June 30, 2003) Insurer records sent to Department for examination; expenses.

(a) As used in this section, "records" means all data relating to the property, assets, business, and affairs of the insurer being examined.

(b) In addition to the Commissioner's authority in G.S. 58-2-185 through G.S. 58-2-200 to compel the production of records, in lieu of sending examiners to the location of an insurer's records to conduct an examination under the Examination Law, the Commissioner may require the insurer to send copies of

its records to the Department. The chief executive or financial officer of the insurer shall certify under oath that the copies are true and accurate copies of the insurer's records. The insurer being examined shall pay all expenses associated with the examination. The insurer is not liable for the salaries and benefits of Department employees. The refusal by an insurer to pay for expenses under this subsection is grounds for the suspension, revocation, or refusal of a license.

(c) If the Commissioner sends examiners to the location of an insurer's records to conduct an examination under the Examination Law, the insurer shall pay for the travel and subsistence expenses and other administrative expenses associated with the examination. The insurer is not liable for the salaries and benefits of Department employees. The refusal by an insurer to pay for expenses under this subsection is grounds for the suspension, revocation, or refusal of a license. (2002-144, s. 8.)

Editor's Note. — Session Laws 2002-144, s. 12, made this section effective July 1, 2002, and provided that this section shall expire on June 30, 2003.

Session Laws 2002-144, s. 11, contains a severability clause.

§ 58-2-161. False statement to procure or deny benefit of insurance policy or certificate.

CASE NOTES

Aggravation of Sentence. — Fact that insurance fraud involved property of great monetary value was not an element of the offense, and could therefore be used to aggravate defendant's sentence. State v. Payne, 149 N.C. App. 421, 561 S.E.2d 507, 2002 N.C. App. LEXIS 218 (2002).

Article 3.

General Regulations for Insurance.

§ 58-3-230. Uniform provider credentialing.

(a) An insurer that provides a health benefit plan and that credentials providers for its networks shall maintain a process to assess and verify the qualifications of a licensed health care practitioner, or applicant for licensure as a health care practitioner, within 60 days of receipt of a completed provider credentialing application form approved by the Commissioner. When a health care practitioner joins a practice that is under contract with an insurer to participate in a health benefit plan, the effective date of the health care practitioner's participation in the health benefit plan network shall be the date the insurer approves the practitioner's credentialing application.

(b) The Commissioner shall by rule adopt a uniform provider credentialing application form that will provide health benefit plans with the information necessary to adequately assess and verify the qualifications of an applicant. The Commissioner may update the uniform provider credentialing application form, as necessary. No insurer that provides a health benefit plan may require an applicant to submit information that is not required by the uniform provider credentialing application form.

(c) As used in this section, the terms "health benefit plan" and "insurer" shall have the meaning provided under G.S. 58-3-167. (2001-172, s. 1; 2002-126, s. 6.9(a).)

Editor's Note. —
Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 6.9(a), effective October 1, 2002, added the last sentence of subsection (a).

Article 5.

Deposits and Bonds by Insurance Companies.

§ 58-5-63. Interest; liquidation of deposits for liabilities.

(a) All insurance companies making deposits under this Article are entitled to interest on those deposits. The right to interest is subject to a company paying its insurance policy liabilities. If any company fails to pay those liabilities, interest accruing after the failure is payable to the Commissioner for the payment of those liabilities under subsection (b) of this section.

(b) If any company fails to pay its insurance policy liabilities after those liabilities have been established by settlement or final adjudication, the Commissioner may liquidate the amount of the company's deposit and accrued interest specified in subsection (a) of this section that will satisfy the company's policy liabilities and make payment to the person to whom the liability is owed. After payment has been made, the Commissioner may require the company to deposit the amount paid out under this subsection. As used in this section, "insurance policy" includes a policy written by a surety bondsman under Article 71 of this Chapter.

(c) Notwithstanding the provisions of G.S. 58-5-70, if any company that is or has been the subject of supervision or rehabilitation proceedings fails to pay its liabilities for temporary disability payments or emergency medical expenses under policies of workers' compensation insurance, the Commissioner shall liquidate the company's deposits and accrued interest and shall use the proceeds to pay such liabilities until that company becomes the subject of a final order of liquidation with a finding of insolvency that has not been stayed or been the subject of a writ of supersedeas or other comparable order. The Commissioner also may enter into one or more contracts to handle the administration of the identification and payment of such liabilities, and to the extent such a contract is entered into, the contractor and its employees, agents, and attorneys, shall have immunity of the same scope and extent as an employee of the State acting in the course and scope of the public duties of such employment. After an order of liquidation with a finding of insolvency has been entered by a court of competent jurisdiction that has not been stayed or been the subject of a writ of supersedeas or other comparable order, then the balance of the proceeds, if any, shall be delivered to the North Carolina Insurance Guaranty Association in accordance with G.S. 58-48-95. To the extent that any payment made hereunder reduces the ratable amount payable to policyholders under G.S. 58-5-70, the liens obtained by the North Carolina Insurance Guaranty Association pursuant to Article 48 of this Chapter shall be reduced to such extent as necessary to permit the policyholders to be paid the ratable share that would have been due but for such payments. (1995, c. 193, s. 11; 1999-294, s. 8; 2001-223, s. 23.2; 2002-185, s. 8.)

Effect of Amendments. —
Session Laws 2002-185, s. 8, effective October 31, 2002, added subsection (c).

ARTICLE 6.

License Fees and Taxes.

§ 58-6-25. (Effective until taxable years beginning on or after January 1, 2003) Insurance regulatory charge.

(a) Charge Levied. — There is levied on each insurance company an annual charge for the purposes stated in subsection (d) of this section. The charge levied in this section is in addition to all other fees and taxes. The percentage rate of the charge is established pursuant to subsection (b) of this section. For each insurance company that is not an Article 65 corporation nor a health maintenance organization, the rate is applied to the company's premium tax liability for the taxable year. For Article 65 corporations and health maintenance organizations, the rate is applied to a presumed premium tax liability for the taxable year calculated as if the corporation or organization were an insurer providing health insurance. In determining an insuranc company's premium tax liability for a taxable year, the following shall be disregarded:

(1) Additional taxes imposed by G.S. 105-228.8.

(2) The additional local fire and lightning tax imposed by G.S. 105-228.5(d)(4).

(3) Any tax credits for guaranty or solvency fund assessments under G.S. 105-228.5A or G.S. 97-133(a).

(4) Any tax credits allowed under Chapter 105 of the General Statutes other than tax payments made by or on behalf of the taxpayer.

(b) Rates. — The rate of the charge for each taxable year shall be the percentage rate established by the General Assembly. When the Department prepares its budget request for each upcoming fiscal year, the Department shall propose a percentage rate of the charge levied in this section. The Governor shall submit that proposed rate to the General Assembly each fiscal year. The General Assembly shall set by law the percentage rate of the charge levied in this section. The percentage rate may not exceed the rate necessary to generate funds sufficient to defray the estimated cost of the operations of the Department for each upcoming fiscal year, including a reasonable margin for a reserve fund. The amount of the reserve may not exceed one-third of the estimated cost of operating the Department for eachupcoming fiscal year. In calculating the amount of the reserve, the General Assembly shall consider all relevant factors that may affect the cost of operating the Department or a possible unanticipated increase or decrease in North Carolina premiums or other charge revenue.

(c) Returns; When Payable. — The charge levied on each health maintenance organization is payable March 15 following the end of each calendar year. The charge levied on each insurance company other than a health maintenance organization is payable at the time the insurance company remits its premium tax. If the insurance company is required to remit installment payments of premiums tax under G.S. 105-228.5 for a taxable year, it shall also remit installment payments of the charge levied in this section for that taxable year at the same time and on the same basis as the premium tax installment payments. Each installment payment shall be equal to at least thirty-three and one-third percent (33.3%) of the insurance company's regulatory charge liability incurred in the immediately preceding taxable year.

Every insurance company shall, on or before the date the charge levied in this section is due, file a return on a form prescribed by the Secretary of Revenue. The return shall state the company's total North Carolina premiums

G.S. 58-6-25 is set out twice. See notes.

or presumed premiums for the taxable year and shall be accompanied by any supporting documentation that the Secretary of Revenue may by rule require.

(d) Use of Proceeds. — The Insurance Regulatory Fund is created in the State treasury, under the control of the Office of State Budget and Management. The proceeds of the charge levied in this section and all fees collected under Articles 69 through 71 of this Chapter and under Articles 9 and 9C of Chapter 143 of the General Statutes shall be credited to the Fund. The Fund shall be placed in an interest-bearing account and any interest or other income derived from the Fund shall be credited to the Fund. Moneys in the Fund may be spent only pursuant to appropriation by the General Assembly and in accordance with the line item budget enacted by the General Assembly. The Fund is subject to the provisions of the Executive Budget Act, except that no unexpended surplus of the Fund shall revert to the General Fund. All money credited to the Fund shall be used to reimburse the General Fund for the following:

(1) Money appropriated to the Department of Insurance to pay its expenses incurred in regulating the insurance industry and other industries in this State.

(2) Money appropriated to State agencies to pay the expenses incurred in regulating the insurance industry, in certifying statewide data processors under Article 11A of Chapter 131E of the General Statutes, and in purchasing reports of patient data from statewide data processors certified under that Article.

(3) Money appropriated to the Department of Revenue to pay the expenses incurred in collecting and administering the taxes on insurance companies levied in Article 8B of Chapter 105 of the General Statutes.

(4) Money appropriated for the office of Managed Care Patient Assistance Program established under G.S. 143-730 to pay the actual costs of administering the program.

(5) Money appropriated to the Department of Insurance for the implementation and administration of independent external review procedures required by Part 4 of Article 50 of this Chapter.

(6) Money appropriated to the Department of Justice to pay its expenses incurred in representing the Department of Insurance in its regulation of the insurance industry and other related programs and industries in this State that fall under the jurisdiction of the Department of Insurance.

(7) **(Effective until June 30, 2003)** Money appropriated to the Department of Insurance to pay its expenses incurred in connection with providing staff support for State boards and commissions, including the North Carolina Manufactured Housing Board, State Fire and Rescue Commission, North Carolina Building Code Council, North Carolina Code Officials Qualification Board, Public Officers and Employees Liability Insurance Commission, North Carolina Home Inspector Licensure Board, and the Volunteer Safety Workers' Compensation Board.

(8) **(Effective until June 30, 2003)** Money appropriated to the Department of Insurance to pay its expenses incurred in connection with continuing education programs under Article 33 of this Chapter and in connection with the purchase and sale of copies of the North Carolina State Building Code.

(e) Definitions. — The following definitions apply in this section:

(1) Article 65 corporation. — Defined in G.S. 105-228.3.

G.S. 58-6-25 is set out twice. See notes.

(2) Insurance company. — A company that pays the gross premiums tax levied in G.S. 105-228.5 and G.S. 105-228.8 or a health maintenance organization.

(3) Insurer. — Defined in G.S. 105-228.3. (1991, c. 689, s. 289; 1991 (Reg. Sess., 1992), c. 812, s. 6(e); 1995, c. 360, ss. 1(i), 3(a); c. 517, s. 39(f), (g); 1995 (Reg. Sess., 1996), c. 646, s. 19; c. 747, s. 3; 1997-443, s. 26.1; 1997-475, s. 2.2; 1998-212, s. 29A.7(b); 1999-413, s. 4; 2000-140, s. 93.1(a); 2001-424, ss. 12.2(b), 14E.1(a).)

Section Set Out Twice. — The section above is effective until taxable years beginning on or after January 1, 2003. For the section as amended for taxable years beginning on or after January 1, 2003, see the following section also numbered G.S. 58-6-25.

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 2.(i), provides: "The reimbursement from the Insurance Regulatory Fund to the General Fund includes an increase of six hundred thousand dollars ($600,000) for the 2002-2003 fiscal year for the costs and expenses incurred by the Department of Justice as provided in Section 15.5 of this act."

Session Laws 2002-126, s. 30E(a), provides: "The percentage rate to be used in calculating the insurance regulatory charge under G.S. 58-6-25 is six and one-half percent (6.5%) for the 2002 calendar year."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 contains a severability clause.

Session Laws 2002-144, s. 11, contains a severability clause.

Effect of Amendments. —

Session Laws 2002-126, ss. 15.5, effective July 1, 2002, added subdivision (d)(6).

Session Laws 2002-144, s. 1, effective July 1, 2002 and expiring June 30, 2003, added subdivisions (d)(6) and (d)(7) (subsequently recodified as (d)(7) and (d)(8)).

Editor's Note. — Session Laws 2002-159, s. 66.5, effective October 11, 2002, recodified subdivisions (d)(6) and (d)(7), as added by Session Laws 2002-144, s. 1, as subdivisions (d)(7) and (d)(8), respectively.

§ 58-6-25. (Effective for taxable years beginning on or after January 1, 2003) Insurance regulatory charge.

(a) Charge Levied. — There is levied on each insurance company an annual charge for the purposes stated in subsection (d) of this section. The charge levied in this section is in addition to all other fees and taxes. The percentage rate of the charge is established pursuant to subsection (b) of this section. For each insurance company that is not an Article 65 corporation nor a health maintenance organization, the rate is applied to the company's premium tax liability for the taxable year. For Article 65 corporations and health maintenance organizations, the rate is applied to a premium tax liability for the taxable year calculated as if the corporation or organization were paying tax at the rate in G.S. 105-228.5(d)(2). In determining an insurance company's premium tax liability for a taxable year, the following shall be disregarded:

(1) Additional taxes imposed by G.S. 105-228.8.

(2) The additional local fire and lightning tax imposed by G.S. 105-228.5(d)(4).

(3) Any tax credits for guaranty or solvency fund assessments under G.S. 105-228.5A or G.S. 97-133(a).

G.S. 58-6-25 is set out twice. See notes.

(4) Any tax credits allowed under Chapter 105 of the General Statutes other than tax payments made by or on behalf of the taxpayer.

(b) Rates. — The rate of the charge for each taxable year shall be the percentage rate established by the General Assembly. When the Department prepares its budget request for each upcoming fiscal year, the Department shall propose a percentage rate of the charge levied in this section. The Governor shall submit that proposed rate to the General Assembly each fiscal year. The General Assembly shall set by law the percentage rate of the charge levied in this section. The percentage rate may not exceed the rate necessary to generate funds sufficient to defray the estimated cost of the operations of the Department for each upcoming fiscal year, including a reasonable margin for a reserve fund. The amount of the reserve may not exceed one-third of the estimated cost of operating the Department for each upcoming fiscal year. In calculating the amount of the reserve, the General Assembly shall consider all relevant factors that may affect the cost of operating the Department or a possible unanticipated increase or decrease in North Carolina premiums or other charge revenue.

(c) Returns; When Payable. — The charge levied on each insurance company is payable at the time the insurance company remits its premium tax. If the insurance company is required to remit installment payments of premiums tax under G.S. 105-228.5 for a taxable year, it shall also remit installment payments of the charge levied in this section for that taxable year at the same time and on the same basis as the premium tax installment payments. Each installment payment shall be equal to at least thirty-three and one-third percent (33.3%) of the insurance company's regulatory charge liability incurred in the immediately preceding taxable year.

Every insurance company shall, on or before the date the charge levied in this section is due, file a return on a form prescribed by the Secretary of Revenue. The return shall state the company's total North Carolina premiums or presumed premiums for the taxable year and shall be accompanied by any supporting documentation that the Secretary of Revenue may by rule require.

(d) Use of Proceeds. — The Insurance Regulatory Fund is created in the State treasury, under the control of the Office of State Budget and Management. The proceeds of the charge levied in this section and all fees collected under Articles 69 through 71 of this Chapter and under Articles 9 and 9C of Chapter 143 of the General Statutes shall be credited to the Fund. The Fund shall be placed in an interest-bearing account and any interest or other income derived from the Fund shall be credited to the Fund. Moneys in the Fund may be spent only pursuant to appropriation by the General Assembly and in accordance with the line item budget enacted by the General Assembly. The Fund is subject to the provisions of the Executive Budget Act, except that no unexpended surplus of the Fund shall revert to the General Fund. All money credited to the Fund shall be used to reimburse the General Fund for the following:

(1) Money appropriated to the Department of Insurance to pay its expenses incurred in regulating the insurance industry and other industries in this State.

(2) Money appropriated to State agencies to pay the expenses incurred in regulating the insurance industry, in certifying statewide data processors under Article 11A of Chapter 131E of the General Statutes, and in purchasing reports of patient data from statewide data processors certified under that Article.

(3) Money appropriated to the Department of Revenue to pay the expenses incurred in collecting and administering the taxes on insur-

G.S. 58-6-25 is set out twice. See notes.

ance companies levied in Article 8B of Chapter 105 of the General Statutes.

(4) Money appropriated for the office of Managed Care Patient Assistance Program established under G.S. 143-730 to pay the actual costs of administering the program.

(5) Money appropriated to the Department of Insurance for the implementation and administration of independent external review procedures required by Part 4 of Article 50 of this Chapter.

(6) Money appropriated to the Department of Justice to pay its expenses incurred in representing the Department of Insurance in its regulation of the insurance industry and other related programs and industries in this State that fall under the jurisdiction of the Department of Insurance.

(7) **(Effective until June 30, 2003)** Money appropriated to the Department of Insurance to pay its expenses incurred in connection with providing staff support for State boards and commissions, including the North Carolina Manufactured Housing Board, State Fire and Rescue Commission, North Carolina Building Code Council, North Carolina Code Officials Qualification Board, Public Officers and Employees Liability Insurance Commission, North Carolina Home Inspector Licensure Board, and the Volunteer Safety Workers' Compensation Board.

(8) **(Effective until June 30, 2003)** Money appropriated to the Department of Insurance to pay its expenses incurred in connection with continuing education programs under Article 33 of this Chapter and in connection with the purchase and sale of copies of the North Carolina State Building Code.

(e) Definitions. — The following definitions apply in this section:

(1) Article 65 corporation. — Defined in G.S. 105-228.3.

(2) Insurance company. — A company that pays the gross premiums tax levied in G.S. 105-228.5 and G.S. 105-228.8.

(3) Insurer. — Defined in G.S. 105-228.3. (1991, c. 689, s. 289; 1991 (Reg. Sess., 1992), c. 812, s. 6(e); 1995, c. 360, ss. 1(i), 3(a); c. 517, s. 39(f), (g); 1995 (Reg. Sess., 1996), c. 646, s. 19; c. 747, s. 3; 1997-443, s. 26.1; 1997-475, s. 2.2; 1998-212, s. 29A.7(b); 1999-413, s. 4; 2000-140, s. 93.1(a); 2001-424, ss. 12.2(b), 14E.1(a), 34.22(b), 34.22(c); 2001-489, s. 2(d); 2002-72, s. 9(a); 2002-126, s. 15.5; 2002-144, s. 1; 2002-159, s. 66.5.)

Section Set Out Twice. — The section above is effective for taxable years beginning on or after January 1, 2003. For this section as effective until January 1, 2003, see the preceding version also numbered G.S. 58-6-25.

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 2.(i), provides: "The reimbursement from the Insurance Regulatory Fund to the General Fund includes an increase of six hundred thousand dollars ($600,000) for the 2002-2003 fiscal year for the costs and expenses incurred by the Department of Justice as provided in Section 15.5 of this act."

Session Laws 2002-126, s. 30E(a), provides: "The percentage rate to be used in calculating the insurance regulatory charge under G.S. 58-6-25 is six and one-half percent (6.5%) for the 2002 calendar year."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 contains a severability clause.

Session Laws 2002-144, s. 11, contains a severability clause.

Effect of Amendments. —

Session Laws 2002-72, s. 9(a), effective for taxable years beginning on or after January 1, 2003, in subsection (c), deleted the former first sentence, which read "The charge levied on each health maintenance organization is payable March 15 following the end of each calendar year," and deleted "other than a health maintenance organization" following "levied on each insurance company" in the present first sentence.

Session Laws 2002-144, s. 1, effective July 1, 2002 and expiring June 30, 2003, added subdivision (b)(6).

Session Laws 2002-159, s. 66.5, effective October 11, 2002, recodified subdivisions (d)(6) and (d)(7), as added by Session Laws 2002-144, s. 1, as subdivisions (d)(7) and (d)(8), respectively.

Article 7.

General Domestic Companies.

§ 58-7-73. Dissolutions of insurers.

Upon reaching a determination of intent to dissolve and before filing articles of dissolution with the Office of the Secretary of State, a domestic insurer organized under this Chapter shall file a plan of dissolution for approval by the Commissioner. At such time the Commissioner may restrict the license of the insurer. In order to proceed with a dissolution, the plan must be approved by the Commissioner. (2002-187, s. 2.4.)

Editor's Note. — Session Laws 2002-187, s. 9, makes this section effective October 31, 2002.

§ 58-7-130. Dividends and distributions to stockholders.

(a) Each domestic insurance company in North Carolina shall be restricted by the Commissioner from the payment of any dividends or other distributions to its stockholders whenever the Commissioner determines from examination of the company's financial condition that the payment of future dividends or other distributions would cause a hazardous financial condition, impair the financial soundness of the company or be detrimental to its policyholders, and those restrictions shall continue in force until the Commissioner specifically permits the payment of dividends or other distributions to stockholders by the company through a written authorization.

(b) No domestic stock insurance company shall declare or pay dividends to its stockholders except from the unassigned surplus of the company as reflected in the company's most recent financial statement filed with the Commissioner under G.S. 58-2-165.

(c) A transfer out of paid-in and contributed surplus to common or preferred capital stock will be permitted on a case-by-case basis, with the Commissioner's prior approval, depending on the necessity for a company to make the transfer.

(d) Nothing in this section and no action taken by the Commissioner in any way restricts the liability of stockholders under G.S. 58-7-125.

(e) Dividends and other distributions paid to stockholders are subject to the requirements and limitations of G.S. 58-19-25(d) and G.S. 58-19-30(c). (1945, c. 386; 1991, c. 720, s. 9; 2001-223, s. 5.2; 2002-187, s. 2.5.)

Effect of Amendments. —

Session Laws 2002-187, s. 2.5, effective October 31, 2002, inserted "or pay" following "declare" in subsection (b).

§ 58-7-178. Foreign or territorial investments.

(a) An insurer authorized to transact insurance in a foreign country or any U.S. territory may have funds invested in securities that may be required for that authority and for the transaction of that business, provided the funds and securities are substantially of the same kinds, classes, and investment grades as those otherwise eligible for investment under this Chapter. The aggregate amount of investments under this subsection shall not exceed the amount that the insurer is required by law to invest in the foreign country or United States territory, or one and one-half times the amount of reserves and other obligations under the contracts, whichever is greater.

(b) An insurer, whether or not it is authorized to do business or has outstanding insurance contracts on lives or risks in any foreign country, may invest in bonds, notes, or stocks of any foreign country or alien corporation that are substantially of the same kinds, classes, and investment grades as those otherwise eligible for investment under this Chapter. The aggregate cost of investments under this subsection shall not exceed ten percent (10%) of the insurer's admitted assets, provided that the cost of investments in any foreign country under this subsection shall not exceed three percent (3%) of the insurer's admitted assets.

(c) Canadian securities eligible for investment under other provisions of this Chapter are not subject to this section. (1991, c. 681, s. 29; 2001-223, s. 8.11; 2001-487, s. 103(b); 2002-187, s. 2.6.)

Effect of Amendments. — Session Laws 2002-187, s. 2.6, effective October 31, 2002, substituted "cost" for "amount" in the second sentence of subsection (b).

Article 9.

Reinsurance Intermediaries.

§ 58-9-2. Reinsurance intermediaries.

(a) As used in this Article:

(1) "Actuary" means a person who meets the standards of a qualified actuary, as specified in the NAIC Annual Statement Instructions, as amended or clarified by rule or order of the Commissioner, for the type of insurer for which an intermediary is establishing loss reserves.

(2) "Broker" means any person, other than an officer or employee of a ceding insurer, who solicits, negotiates, or places reinsurance cessions or retrocessions on behalf of a ceding insurer without the authority or power to bind reinsurance on behalf of the ceding insurer.

(3) "Commissioner" includes the Commissioner's authorized deputies and employees.

(4) "Controlling person" means any person who directly or indirectly has the power to direct or cause to be directed the management, control, or activities of an intermediary.

(5) "Intermediary" means any person who acts as a broker, as defined in G.S. 58-33-10(3), in soliciting, negotiating, or procuring the making of any reinsurance contract or binder on behalf of a ceding insurer; or acts as a broker, as defined in G.S. 58-33-10(3), in accepting any reinsurance contract on behalf of an assuming insurer. "Intermediary" includes a broker or a manager, as those terms are defined in this section.

(6) "Manager" means any person who has authority to bind or manages all or part of the assumed reinsurance business of a reinsurer (including

the management of a separate division, department, or underwriting office) and acts as an agent for the reinsurer. The following persons are not managers, with respect to a reinsurer:

a. An employee of a reinsurer;

b. A United States manager of the United States branch of an alien reinsurer;

c. An underwriting manager who, pursuant to contract, manages all the reinsurance operations of a reinsurer, is under common control with the reinsurer under Article 19 of this Chapter, and whose compensation is not based on the volume of premiums written;

d. The manager of a group, association, pool, or organization of insurers that engages in joint underwriting or joint reinsurance and that is subject to examination by the insurance regulator of the state in which the manager's principal business office is located.

(7) "Producer" means an insurance agent or insurance broker licensed under Article 33 of this Chapter or an intermediary licensed under this Article.

(8) "Qualified United States financial institution" means a bank that:

a. Is organized, or in the case of a United States office of a foreign banking organization is licensed, under the laws of the United States or any state;

b. Is regulated, supervised, and examined by federal or state authorities having regulatory authority over banks and trust companies; and

c. Has been determined by the Securities Valuation Office of the NAIC to meet its standards of financial condition and standing in order to issue letters of credit.

(9) "Reinsurer" means any insurer that is licensed by the Commissioner and that is authorized to assume reinsurance.

(b) No person shall act as a broker in this State if the broker maintains an office either directly, as a member or employee of a noncorporate entity, or as an officer, director, or employee of a corporation:

(1) In this State, unless the broker is a producer in this State; or

(2) In another state, unless the broker is a producer in this State or another state having a law or rule substantially similar to this Article or unless the broker is licensed under this Article as a nonresident intermediary.

(c) No person shall act as a manager:

(1) For a reinsurer domiciled in this State, unless the manager is a producer in this State;

(2) In this State, if the manager maintains an office directly, as a member or employee of a noncorporate entity, or as an officer, director, or employee of a corporation in this State, unless the manager is a producer in this State;

(3) In another state for a foreign insurer, unless the manager is a producer in this State or another state having a law or rule substantially similar to this Article, or the manager is licensed in this State as a nonresident intermediary.

(d) Every manager subject to subsection (c) of this section shall demonstrate to the Commissioner that he has evidence of financial responsibility in the form of fidelity bonds or liability insurance to cover the manager's contractual obligations. If any manager cannot demonstrate this evidence, the Commissioner shall require the manager to:

(1) Maintain a separate fidelity bond in favor of each reinsurer represented in an amount that will cover those obligations and which bond is issued by an authorized insurer; or

(2) Maintain an errors and omissions liability insurance policy in an amount that will cover those obligations and which policy is issued by a licensed insurer. (1993, c. 452, s. 19; 1995, c. 193, s. 20; 2001-203, s. 27; 2002-187, s. 2.7.)

Effect of Amendments. —
Session Laws 2002-187, s. 2.7, effective October 31, 2002, rewrote subdivision (a)(9).

Article 13.

Asset Protection Act.

§ 58-13-10. Scope.

This Article applies to all domestic insurers and to all kinds of insurance written by those insurers under Articles 1 through 68 of this Chapter. Foreign insurers shall comply in substance with the requirements and limitations of this Article. This Article does not apply to the following:

(1) Variable contracts or guaranteed investment contracts for which separate accounts are required to be maintained.

(2) Statutory deposits that are required by insurance regulatory agencies to be maintained as a requirement for doing business in such jurisdictions.

(3) Real estate, authorized under G.S. 58-7-187, encumbered by a mortgage loan with a first lien. (1985, c. 327, s. 1; 1991, c. 681, s. 30.2; 1993, c. 452, s. 25; 1993 (Reg. Sess., 1994), c. 678, s. 13; 1999-244, s. 4; 2001-223, s. 13.1; 2002-187, s. 2.8.)

Effect of Amendments. —
Session Laws 2002-187, s. 2.8, effective October 31, 2002, inserted "Articles 1 through 68 of" in the introductory paragraph.

§ 58-13-25. Prohibition of hypothecation.

(a) Every insurer subject to this Article shall at all times have and maintain free and unencumbered reserve assets equal to an amount that is the total of its policyholder-related liabilities and its required minimum capital and minimum surplus and shall not pledge, hypothecate, or otherwise encumber those reserve assets. The Commissioner, upon application made to the Commissioner, may issue a written order approving the pledging, hypothecation, or encumbrance of any of the assets of an insurer not otherwise prohibited upon a finding that the pledging, hypothecation, or encumbrance will not adversely affect the insurer's solvency.

(b) Every insurer shall file, along with any statement filed under G.S. 58-2-165, a statement sworn to by the chief executive officer of the insurer that: (i) Title to assets in an amount equal to the policyholder-related liabilities and minimum required capital and minimum required surplus of the insurer that are not pledged, hypothecated, or otherwise encumbered is vested in the insurer; (ii) the only assets of the insurer that are pledged, hypothecated, or otherwise encumbered are as identified and reported in the sworn statement and no other assets of the insurer are pledged, hypothecated, or otherwise encumbered; and (iii) the terms and provisions of the transaction of the pledge, hypothecation, or encumbrance are as reported in the sworn statement.

(c) Any person that accepts a pledge, hypothecation, or encumbrance of any asset of an insurer, as security for a debt or other obligation of the insurer, not in accordance with this Article, is deemed to have accepted the asset subject to a superior, preferential, and automatically perfected lien in favor of claimants:

Provided, that said lien does not apply to the assets of an insurer in a delinquency proceeding under Article 30 of this Chapter if the Commissioner or the court, whichever is appropriate, approves the pledge, hypothecation, or encumbrance of the assets.

(d) In the event of the liquidation of any insurer subject to this Article, claimants of the insurer shall have a prior and preferential claim against all assets of the insurer except those that have been pledged, hypothecated, or encumbered in accordance with this Article. Subject to Article 30 of this Chapter, all claimants have equal status; and their prior and preferential claims are superior to any claim or cause of action against the insurer by any other person. (1985, c. 327, s. 1; 1989, c. 452, s. 4; 1991, c. 681, s. 30.3; 1993, c. 504, s. 10; 2002-187, s. 2.9.)

Effect of Amendments. — Session Laws 2002-187, s. 2.9, effective October 31, 2002, deleted "at least ten percent (10%) more than" following "amount that is" in the first sentence of subsection (a).

Article 19.

Insurance Holding Company System Regulatory Act.

§ 58-19-15. Acquisition of control of or merger with domestic insurer.

OPINIONS OF ATTORNEY GENERAL

Contracts negotiated pursuant to G.S. 58-19-15(f) are not exempt from the requirements of Article 3C of Chapter 143. See opinion of Attorney General to Peter A. Kolbe, General Counsel, North Carolina Department of Insurance, 2001 N.C. AG LEXIS 29 (10/3/01).

Retention of Experts to Assist in Reviewing Proposed Acquisition of Control. — The Commissioner of Insurance is not required to adhere to a bid process in retaining experts to assist in reviewing a proposed acquisition of control if either of two conditions is met: (1) the Division of Purchase and Contract and the Governor have determined that performance or price competition is not available; and (2) the Division of Purchase and Contract and the Governor have determined that the contract price is too small to justify soliciting competitive proposals. See opinion of Attorney General to Peter A. Kolbe, General Counsel, North Carolina Department of Insurance, 2001 N.C. AG LEXIS 29 (10/3/01).

Prior to granting written approval for a contract for the Commissioner of Insurance to retain an expert to assist in reviewing a proposed acquisition of control, the Governor must find that the estimated cost is reasonable as compared with the likely benefits or results. See opinion of Attorney General to Peter A. Kolbe, General Counsel, North Carolina Department of Insurance, 2001 N.C. AG LEXIS 29 (10/3/01).

Payment of Travel Allowances to Experts Retained by Commissioner of Insurance. — Experts retained by the Commissioner of Insurance under G.S. 58-19-15(f) are not state employees and, therefore, G.S. 38-6 does not control the payment of travel allowances to such experts. See opinion of Attorney General to Peter A. Kolbe, General Counsel, North Carolina Department of Insurance, 2001 N.C. AG LEXIS 29 (10/3/01).

Article 26.

Real Estate Title Insurance Companies.

§ 58-26-1. Purpose of organization; formation; insuring closing services; premium rates; combined premiums for lenders' coverages.

(a) Companies may be formed in the manner provided in this Article for the purpose of furnishing information in relation to titles to real estate and of insuring owners and others interested therein against loss by reason of encumbrances and defective title; provided, however, that no such information shall be so furnished nor shall such insurance be so issued as to North Carolina real property unless and until the title insurance company has obtained the opinion of an attorney, licensed to practice law in North Carolina and not an employee or agent of the company, who has conducted or caused to be conducted under the attorney's direct supervision a reasonable examination of the title. The company shall cause to be made a determination of insurability of title in accordance with sound underwriting practices for title insurance companies. A company may also insure the proper performance of services necessary to conduct a real estate closing performed by an approved attorney licensed to practice in North Carolina. Provided, however, nothing in this section shall be construed to prohibit or preclude a title insurance company from insuring proper performance by its issuing agents.

(b) Repealed by Session Laws 2002-187, s. 7.1.

(b1) Domestic and foreign title insurance companies are subject to the same capital, surplus, and investment requirements that govern the formation and operation of domestic stock casualty companies. Domestic title insurance companies are subject to the same deposit requirements that govern the operation of other domestic casualty companies in this State. Foreign or alien title insurance companies are subject to an initial deposit pursuant to G.S. 58-26-31(b), based on the forecasted statutory premium reserve and the supplemental reserve for the first full year of operation in this State, but not less than two hundred thousand dollars ($200,000).

(c) This Article shall not be interpreted so as to imply the repeal or amendment of any of the provisions of Chapter 84 of the General Statutes of North Carolina nor of any other provisions of common law or statutory law governing the practice of law.

(d) The premium rates charged for insuring against loss by reason of encumbrances and defective title and for insuring real estate closing services shall be based on the purchase price of the real estate being conveyed or the loan amount and shall not be established as flat fees. If a title insurer has also issued title insurance protecting a lender or owner against loss by reason of encumbrances and defective title, the insurer shall charge one undivided premium for the combination of the title insurance and the closing services insurance.

(e) If the premium stated upon a policy of title insurance has been understated or overstated due to inadvertence, mistake, or miscalculation of the closing attorney or his employees, and the incident is not purposeful or part of a pattern, the Commissioner of Insurance shall not be required to impose a civil penalty or other sanction for the inadvertence, mistake, or miscalculation. (1899, c. 54, s. 38; 1901, c. 391, s. 3; Rev., s. 4745; C.S., s. 6395; 1923, c. 71; 1973, c. 128; 1985, c. 666, s. 43; 1987, c. 625, ss. 1-3; 1993, c. 129, s. 1; c. 504, s. 15; 2002-187, ss. 7.1, 7.2.)

Effect of Amendments. — Session Laws 2002-187, ss. 7.1 and 7.2, effective October 31, 2002, repealed former subsection (b), providing conditions for real estate title insurance companies, and added subsection (b1).

§ 58-26-20. Statutory premium reserve.

Every domestic title insurance company shall, in addition to other reserves, establish and maintain a reserve to be known as the "statutory premium reserve" for title insurance, which shall at all times and for all purposes be considered and constitute a reserve liability of the title insurance company in determining its financial condition. (1969, c. 897; 1973, c. 1035, s. 1; 1993, c. 504, s. 19; 2002-187, s. 7.3.)

Effect of Amendments. — Session Laws 2002-187, s. 7.3, effective October 31, 2002, rewrote the section, which formerly pertained to unearned premium reserves.

§ 58-26-25. Amount of unearned [statutory] premium reserve.

(a) The statutory premium reserve of every domestic title insurance company shall consist of the aggregate of:

(1) The amount of the unearned premium reserve held as of December 31, 1998.

(2) The amount of all additions required to be made to such reserve by this section, less the reduction of the aggregate amount required by this section.

(b) A domestic title insurance company on and after January 1, 1999, shall reserve initially as a statutory premium reserve a sum equal to ten percent (10%) of the following items set forth in the title insurer's most recent annual statement on file with the Commissioner:

(1) Direct premiums written.

(2) Premiums for reinsurance assumed less premiums for reinsurance ceded during the year.

(c) The aggregate of the amounts set aside in statutory premium reserves in any calendar year, under subsection (b) of this section, shall be reduced annually at the end of each calendar year following the year in which the policy is issued, over a period of 20 years, pursuant to the following: twenty percent (20%) the first year; ten percent (10%) for years two and three; five percent (5%) for years four through 10; three percent (3%) for years 11 through 15; and two percent (2%) for years 16 through 20.

(d) The entire amount of the unearned premium reserve held as of December 31, 1998, shall be accorded a fresh start and shall be released from said reserve and restored to net profits in accordance with the percentages set forth in subsection (c) of this section.

(e) A supplemental reserve shall be established in accordance with the instructions of the annual statement required by G.S. 58-2-165 and G.S. 58-26-10 consisting of the reserves necessary, when taken in combination with the reserves required by subsections (a) through (d) of this section to cover the company's liabilities with respect to all losses, claims, and loss adjustment expenses.

(f) Each title insurer subject to the provisions of this Article shall file with its annual statement required by G.S. 58-2-165 and G.S. 58-26-10 a certification of a member in good standing of the American Academy of Actuaries. The actuarial certification required of a title insurer must conform to the annual statement instructions for title insurers of the National Association of Insurance Commissioners. (1969, c. 897; 1973, c. 1035, ss. 2-4; 1999-383, s. 1; 2002-187, ss. 7.4, 7.5, 7.6.)

Editor's Note. — The word "[statutory]" has been inserted in the section heading at the direction of the Revisor of the Statutes.

Effect of Amendments. — Session Laws 2002-187, ss. 7.4 to 7.6, effective October 31, 2002, in subsections (a), (b) and (c), substituted "statutory" for "unearned"; and made stylistic changes.

§ 58-26-30: Repealed by Session Laws 2002-187, s. 7.7, effective October 31, 2002.

Cross References. — As to statutory premium reserve held in trust or as a deposit, see § 58-26-31.

§ 58-26-31. Statutory premium reserve held in trust or as a deposit.

(a) Each domestic title insurance company shall withdraw from use funds to be used by the Commissioner in the event of the insurer's insolvency, the funds being equal to the statutory premium reserve and the supplemental reserve pursuant to G.S. 58-26-25. The amount shall be held in a trust account, as approved by the Commissioner. The trust account will be held in favor of the holders of title policies in the event of the insolvency of the insurer. Nothing in this section precludes the insurer from investing the reserve in investments authorized by law for that insurer, and the income from the invested reserve shall be included in the general income of the insurer to be used by the insurer for any lawful purpose.

(b) Each foreign or alien title insurance company shall withdraw from use funds to be used by the Commissioner in the event of the insurer's insolvency, the funds being equal to the statutory premium reserve and the supplemental reserve as calculated under G.S. 58-26-25 for North Carolina risks. The Commissioner shall hold the funds as a deposit in accordance with G.S. 58-5-20. Annually, the company shall file a statement of actuarial opinion consistent with the annual statement instructions for North Carolina risks, issued by a qualified actuary, in support of this deposit.

(c) A title insurance company shall have 30 days after notification by the Commissioner to increase the amounts held on deposit. If the amount held on deposit is greater than the amount required under subsection (b) of this section, the Commissioner shall release the excess within 30 days after a request by the insurer. (2002-187, s. 7.8.)

Editor's Note. — Session Laws 2002-187, s. 9, makes this section effective October 31, 2002.

§ 58-26-35. Maintenance of the statutory premium reserve.

If the amount of the assets of a title insurance company held in trust or held by the Commissioner under G.S. 58-26-31 should on any date be less than the amount required to be maintained, and the deficiency is not promptly cured, the title insurance company shall immediately give written notice of the deficiency to the Commissioner and shall not write or assume any title insurance until the deficiency has been eliminated and until it has received written approval from the Commissioner authorizing it to again write and assume title insurance. (1969, c. 897; 2002-187, s. 7.9.)

Effect of Amendments. — Session Laws 2002-187, s. 7.9, effective October 31, 2002, rewrote the section, which formerly pertained to maintenance of unearned premium reserves.

§ 58-26-40: Repealed by Session Laws 2002-187, s. 7.10, effective October 31, 2002.

Article 30.

Insurers Supervision, Rehabilitation, and Liquidation.

§ 58-30-62. Administrative supervision of insurers.

(a) As used in this section, an insurer has "exceeded its powers" when it: has refused to permit examination of its books, papers, accounts, records or affairs by the Commissioner; has in violation of G.S. 58-7-50 removed from this State books, papers, accounts or records necessary for an examination of the insurer; has failed to comply promptly with applicable financial reporting statutes or rules and related Department requests; continues to transact the business of insurance after its license has been revoked, suspended, or not renewed by the Commissioner; by contract or otherwise, has unlawfully, or has in violation of an order of the Commissioner, or has without first having obtained any legally required written approval of the Commissioner, totally reinsured its entire outstanding business or merged or consolidated substantially its entire property or business with another insurer; has engaged in any transaction in which it is not authorized to engage under the laws of this State; has not complied with G.S. 58-7-73; or has refused to comply with a lawful order of the Commissioner. As used in this section, "Commissioner" includes an authorized representative or designee of the Commissioner.

(b) This section applies to all domestic insurers and any other insurer doing business in this State whose state of domicile has asked the Commissioner to apply the provisions of this section to that insurer.

(c) An insurer may be subject to administrative supervision by the Commissioner if upon examination or at any other time it appears to the Commissioner that the insurer: has exceeded its powers; has failed to comply with applicable provisions of this Chapter; is conducting its business in a manner that is hazardous to the public or to its insureds; or consents to administrative supervision.

(d) If the Commissioner determines that the conditions set forth in subsection (c) of this section exist, the Commissioner shall: notify the insurer of that determination; furnish to the insurer a written list of the requirements to abate those conditions; and notify the insurer that it is under the supervision of the Commissioner and that the Commissioner is applying and effectuating the provisions of this section.

(e) If placed under administrative supervision, the insurer shall have 60 days, or a different period of time determined by the Commissioner, to comply with the requirements of the Commissioner under this section. If the Commissioner determines after notice and hearing that the conditions giving rise to the supervision still exist at the end of the supervision period specified in this subsection, the Commissioner may extend the period; or if the Commissioner determines that none of the conditions giving rise to the supervision exist, the Commissioner shall release the insurer from supervision.

(f) Notwithstanding any other provision of law and except as set forth in this section, all proceedings, hearings, notices, correspondence, reports, records, and other information in the possession of the Commissioner or the Department relating to the supervision of any insurer are confidential. The Department shall have access to such proceedings, hearings, notices, correspondence, reports, records, or other information as permitted by the Commissioner. The Commissioner may open the proceedings or hearings, or disclose the notices,

correspondence, reports, records, or information to a department, agency or instrumentality of this or another state of the United States if the Commissioner determines that the disclosure is necessary or proper for the enforcement of the laws of this or another state of the United States. The Commissioner may open the proceedings or hearings or make public the notices, correspondence, reports, records, or other information if the Commissioner considers that it is in the best interest of the insurer, its insureds or creditors, or the general public. This section does not apply to hearings, notices, correspondence, reports, records, or other information obtained upon the appointment of a receiver for the insurer by a court of competent jurisdiction.

(g) During the period of supervision, the Commissioner shall serve as the administrative supervisor. The Commissioner may provide that the insurer shall not do any of the following during the period of supervision, without the Commissioner's prior approval: dispose of, convey, or encumber any of its assets or its business in force; withdraw from any of its bank accounts; lend or invest any of its funds; transfer any of its property; incur any debt, obligation, or liability; merge or consolidate with another company; establish new premiums or renew any policies; enter into any new reinsurance contract or treaty; terminate, surrender, forfeit, convert, or lapse any insurance coverage, except for nonpayment of premiums due; release, pay, or refund premium deposits, accrued cash, or loan values, unearned premiums, or other reserves on any insurance coverage; make any material change in management; increase salaries or benefits of officers or directors or make preferential payment of bonuses, dividends, or other payments considered preferential; or make any other change in its operations that the Commissioner considers to be material.

(h) During the period of supervision the insurer may contest an action taken or proposed to be taken by the Commissioner, specifying why the action being complained of would not result in improving the insurer's condition.

(i) This section does not limit powers granted to the Commissioner by any other provision of law. This section does not preclude the Commissioner from initiating judicial proceedings to place an insurer in a delinquency proceeding under this Article, regardless of whether the Commissioner has previously initiated administrative supervision proceedings under this section or under G.S. 58-30-60 against the insurer. The determination as to actions under this section is in the Commissioner's discretion.

(j) Notwithstanding any other provision of law, the Commissioner may meet with a supervisor appointed under this section and with the attorney or other representative of the supervisor, without the presence of any other person, at the time of any proceeding or during the pendency of any proceeding held under the authority of this section, to carry out the Commissioner's duties under this section or for the supervisor to carry out the supervisor's duties under this section.

(k) There is no liability by, and no cause of action of any nature arises against, the Commissioner for any acts or omissions by the Commissioner in the performance of the Commissioner's powers and duties under this section. (1991, c. 681, s. 44; 2002-187, s. 2.10.)

Effect of Amendments. — Session Laws 2002-187, s. 2.10, effective October 31, 2002, inserted "has not complied with G.S. 58-7-73" near the end of subsection (a).

Article 32.

Public Officers and Employees Liability Insurance Commission.

§ 58-32-15. Professional liability insurance for State officials.

Editor's Note. —

Session Laws 2001-505, s. 3, as amended by Session Laws 2002-159, s. 60, provides: "The Public Officers and Employees Liability Insurance Commission in the Department of Insurance shall effect and place professional liability insurance coverage under G.S. 58-32-15 for local health department sanitarians defended by the State under G.S. 143-300.8. For insurance purposes only under G.S. 58-32-15, local health department sanitarians are considered to be employees of the Department of Environment and Natural Resources."

Article 33.

Licensing of Agents, Brokers, Limited Representatives, and Adjusters.

§ 58-33-130. Continuing education program for licensees.

(a) The Commissioner may adopt rules to provide for a program of continuing education requirements for the purpose of enhancing the professional competence and professional responsibility of adjusters and motor vehicle damage appraisers. The rules may include criteria for:

(1) The content of continuing education courses;
(2) Accreditation of continuing education sponsors and programs;
(3) Accreditation of videotape or other audiovisual programs;
(4) Computation of credit;
(5) Special cases and exemptions;
(6) General compliance procedures; and
(7) Sanctions for noncompliance.

(b) The Commissioner may adopt rules to provide for the continuing professional education of all agents and brokers, including fraternal field marketers, but excluding limited representatives. In adopting the rules, the Commissioner may use the same criteria as specified in subsection (a) of this section and shall provide that agents holding more than one license under G.S. 58-33-25(c) are required to complete no more than 18 credit hours per year.

(c) The license of any person who fails to comply with the continuing education requirements under this section shall lapse. The Commissioner may, for good cause shown, grant extensions of time to licensees to comply with these requirements.

(d) Annual continuing professional education hour requirements shall be determined by the Commissioner, but shall not be more than 12 credit hours.

(e) No more than seventy-five percent (75%) of the requirement relating to life or health insurance agents or brokers may be met by taking courses offered by licensed life or health insurance companies with which those agents or brokers have appointments.

(f) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 678, s. 18, effective July 5, 1994.

(g) The Commissioner shall permit any licensee to carry over to a subsequent calendar year up to seventy-five percent (75%) of the required annual hours of continuing professional education.

(h) Any licensee who, after obtaining an extension under subsection (c) of this section, offers evidence satisfactory to the Commissioner that the licensee

has satisfactorily completed the required continuing professional education courses is in compliance with this section.

(i) The Commissioner is authorized to approve continuing professional education courses.

(j) **(Effective until June 30, 2003)** Repealed by Session Laws 2003-144, s. 3, effective July 1, 2002.

(j) **(Effective June 30, 2003)** The Commissioner is authorized to establish fees to be paid to the Commissioner by licensees who are required to comply with this section or by course vendors for the purpose of offsetting the cost of additional staff and resources to administer the program authorized by this section. To assure continued and proper administration of the program, any unexpended revenue from the fees shall not revert to the General Fund.

(k) Repealed by Session Laws 1993, c. 409, s. 4, effective July 1, 1993. (1989, c. 657, s. 1; 1989 (Reg. Sess., 1990), c. 941, s. 6; 1991, c. 476, s. 2; c. 554, s. 1; c. 720, s. 22; 1993, c. 409, s. 4; 1993 (Reg. Sess., 1994), c. 678, s. 18; 1998-211, ss. 20, 21; 2002-144, s. 3.)

Subsection (j) Set Out Twice. — Subsection (j) is repealed effective July 1, 2002, and expiring June 30, 2003, by Session Laws 2002-144, s. 3. The second version of subsection (j) is effective June 30, 2003.

Editor's Note. — Session Laws 2002-144, s. 11, contains a severability clause.

Effect of Amendments. — Session Laws 2002-144, s. 3, effective July 1, 2002 and expiring on June 30, 2003, repealed subsection (j).

§ 58-33-133. (Expires June 30, 2003) Continuing education course provider fees.

(a) Each course provider shall submit a fee of one dollar ($1.00) per approved credit hour per individual who successfully completes a course under G.S. 58-33-130.

(b) At the time a course provider submits an application to the Commissioner for approval of a course under G.S. 58-33-130, the provider shall pay to the Commissioner a filing fee of one hundred dollars ($100.00) per course up to a two thousand five hundred dollars ($2,500) per calendar year maximum.

(c) Fees collected by the Commissioner under this section shall be credited to the Department of Insurance Fund created under G.S. 58-6-25. (2002-144, s. 2.)

Editor's Note. — Session Laws 2002-144, s. 12, made this section effective July 1, 2002, and provided that this section shall expire on June 30, 2003.

Session Laws 2002-144, s. 11, contains a severability clause.

Article 35.

Insurance Premium Financing.

§ 58-35-85. Procedure for cancellation of insurance contract upon default; return of unearned premiums; collection of cash surrender value.

When an insurance premium finance agreement contains a power of attorney or other authority enabling the insurance premium finance company to cancel any insurance contract or contracts listed in the agreement, the insurance contract or contracts shall not be cancelled unless the cancellation is effectuated in accordance with the following provisions:

(1) Not less than 10 days' written notice is sent by personal delivery, first-class mail, electronic mail, or facsimile transmission to the last known address of the insured or insureds shown on the insurance premium finance agreement of the intent of the insurance premium finance company to cancel his or their insurance contract or contracts unless the defaulted installment payment is received. Notification thereof shall also be provided to the insurance agent.

(2) After expiration of the 10-day period, the insurance premium finance company shall send the insurer a request for cancellation and shall send notice of the requested cancellation to the insured by personal delivery, first-class mail, electronic mail, electronic transmission, or facsimile transmission at his last known address as shown on the records of the insurance premium finance company and to the agent. Upon written request of the insurance company, the premium finance company shall furnish a copy of the power of attorney to the insurance company. The written request shall be sent by mail, personal delivery, electronic mail, or facsimile transmission.

(3) Upon receipt of a copy of the request for cancellation notice by the insurer, the insurance contract shall be cancelled with the same force and effect as if the request for cancellation had been submitted by the insured, without requiring the return of the insurance contract or contracts.

(4) All statutory, regulatory, and contractual restrictions providing that the insured may not cancel the insurance contract unless the insurer first satisfies the restrictions by giving a prescribed notice to a governmental agency, the insurance carrier, an individual, or a person designated to receive the notice for said governmental agency, insurance carrier, or individual shall apply where cancellation is effected under the provisions of this section.

(4a) If an insurer receives notification from an insurance agent or premium finance company that the initial down payment for the premium being financed has been dishonored by a financial institution, or otherwise unpaid, there is no valid contract for insurance and the policy will be voided.

(5) When an insurance contract is cancelled in accordance with this section, the insurer shall promptly return the gross unearned premiums that are due under the contract to the insurance premium finance company effecting the cancellation, for the benefit of the insured or insureds, no later than 30 days after the effective date of cancellation. When the return premium is more than the amount the insured owes the insurance premium finance company under the agreement, the excess shall be promptly remitted to the order of the insured, as provided in subdivision (8) of this section, subject to the minimum service charge provided for in this Article. If a premium is subject to an audit to determine the final premium amount, the amount to be refunded to the premium finance company shall be calculated upon the deposit premium, and the insurer shall return that amount to the premium finance company no later than 90 days after the effective date of cancellation. This subdivision does not limit any other remedies the insurer may have against the insured for additional premiums.

(6) The provisions of this section relating to request for cancellation by the insurance premium finance company of an insurance contract and the return by an insurer of unearned premiums to the insurance premium finance company, also apply to the surrender by the insurance premium finance company of an insurance contract providing life

insurance and the payment by the insurer of the cash value of the contract to the insurance premium finance company, except that the insurer may require the surrender of the insurance contract.

(7) The insurer shall not deduct from any return premiums any amount owed to the insurer for any other indebtedness owed to the insurer by the insured on any policy or policies other than those being financed under the premium finance agreement.

(8) In the event that the crediting of return premiums to the account of the insured results in a surplus over the amount due from the insured, the premium finance company shall refund the excess to the insured as soon as possible, but in no event later than 30 days of receipt of the return premium, provided that no refund shall be required if it is in an amount less than one dollar ($1.00). This subdivision does not relieve the premium finance company of its duty to report and deliver these unrefunded monies to the State Treasurer in accordance with G.S. 116B-29(b).

(9) In the event that a balance due the premium finance company remains on the account after the cancellation of the agreement, the outstanding balance may earn interest at the rate stated in the agreement until paid in full.

(10) If a mortgagee or other loss payee is shown on the insurance contract, the insurer shall notify the mortgagee or loss payee of the cancellation. The written notice shall be sent by mail, personal delivery, electronic mail, or facsimile transmission to the designated mortgagee's or loss payee's last known address. Proof of mailing is sufficient proof of notice. Failure to send this notice to any designated mortgagee or loss payee shall not give rise to any claim on the part of the insured. (1963, c. 1118; 1967, c. 825; 1969, c. 941; 1987, c. 864, s. 22; 1995, c. 121, s. 1; 1999-157, s. 6; 2002-187, s. 6.)

Effect of Amendments. — Session Laws 2002-187, s. 6, effective October 31, 2002, in subdivision (5), substituted "90 days" for "30 days," and made stylistic changes.

Article 36.

North Carolina Rate Bureau.

§ 58-36-15. Filing loss costs, rates, plans with Commissioner; public inspection of filings.

(a) The Bureau shall file with the Commissioner copies of the rates, loss costs, classification plans, rating plans and rating systems used by its members. Each rate or loss costs filing shall become effective on the date specified in the filing, but not earlier than 210 days from the date the filing is received by the Commissioner: Provided that (1) rate or loss costs filings for workers' compensation insurance and employers' liability insurance written in connection therewith shall not become effective earlier than 210 days from the date the filing is received by the Commissioner or on the date as provided in G.S. 58-36-100, whichever is earlier; and (2) any filing may become effective on a date earlier than that specified in this subsection upon agreement between the Commissioner and the Bureau.

(b) A filing shall be open to public inspection immediately upon submission to the Commissioner.

(c) The Bureau shall maintain reasonable records, of the type and kind reasonably adapted to its method of operation, of the experience of its members and of the data, statistics or information collected or used by it in connection

with the rates, rating plans, rating systems, loss costs and other data as specified in G.S. 58-36-100, underwriting rules, policy or bond forms, surveys or inspections made or used by it.

(d) With respect to the filing of rates for nonfleet private passenger motor vehicle insurance, the Bureau shall, on or before February 1 of each year, or later with the approval of the Commissioner, file with the Commissioner the experience, data, statistics, and information referred to in subsection (c) of this section and any proposed adjustments in the rates for all member companies of the Bureau. The filing shall include, where deemed by the Commissioner to be necessary for proper review, the data specified in subsections (c), (e), (g) and (h) of this section. Any filing that does not contain the data required by this subsection may be returned to the Bureau and not be deemed a proper filing. Provided, however, that if the Commissioner concludes that a filing does not constitute a proper filing he shall promptly notify the Bureau in writing to that effect, which notification shall state in reasonable detail the basis of the Commissioner's conclusion. The Bureau shall then have a reasonable time to remedy the defects so specified. An otherwise defective filing thus remedied shall be deemed to be a proper and timely filing, except that all periods of time specified in this Article will run from the date the Commissioner receives additional or amended documents necessary to remedy all material defects in the original filing.

(e) The Commissioner may require the filing of supporting data including:

(1) The Bureau's interpretation of any statistical data relied upon;
(2) Descriptions of the methods employed in setting the rates;
(3) Analysis of the incurred losses submitted on an accident year or policy year basis into their component parts; to wit, paid losses, reserves for losses and loss expenses, and reserves for losses incurred but not reported;
(4) The total number and dollar amount of paid claims;
(5) The total number and dollar amount of case basis reserve claims;
(6) Earned and written premiums at current rates by rating territory;
(7) Earned premiums and incurred losses according to classification plan categories; and
(8) Income from investment of unearned premiums and loss and loss expense reserves generated by business within this State.

Provided, however, that with respect to business written prior to January 1, 1980, the Commissioner shall not require the filing of such supporting data which has not been required to be recorded under statistical plans approved by the Commissioner.

(f) On or before September 1 of each calendar year, or later with the approval of the Commissioner, the Bureau shall submit to the Commissioner the experience, data, statistics, and information referred to in subsection (c) of this section and required under G.S. 58-36-100 and a residual market rate or prospective loss costs review based on those data for workers' compensation insurance and employers' liability insurance written in connection therewith. Any rate or loss costs increase for that insurance that is implemented under this Article shall become effective solely to insurance with an inception date on or after the effective date of the rate or loss costs increase.

(g) The following information must be included in policy form, rule, and rate or loss costs filings under this Article and under Article 37 of this Chapter:

(1) A detailed list of the rates, loss costs, rules, and policy forms filed, accompanied by a list of those superseded; and
(2) A detailed description, properly referenced, of all changes in policy forms, rules, prospective loss costs, and rates, including the effect of each change.

(h) Except to the extent the Commissioner determines that this subsection is inapplicable to filings made under G.S. 58-36-100 and except for filings made

under G.S. 58-36-30, all policy form, rule, prospective loss costs, and rate filings under this Article and Article 37 of this Chapter that are based on statistical data must be accompanied by the following properly identified information:

(1) North Carolina earned premiums at the actual and current rate level; losses and loss adjustment expenses, each on paid and incurred bases without trending or other modification for the experience period, including the loss ratio anticipated at the time the rates were promulgated for the experience period;
(2) Credibility factor development and application;
(3) Loss development factor derivation and application on both paid and incurred bases and in both numbers and dollars of claims;
(4) Trending factor development and application;
(5) Changes in premium base resulting from rating exposure trends;
(6) Limiting factor development and application;
(7) Overhead expense development and application of commission and brokerage, other acquisition expenses, general expenses, taxes, licenses, and fees;
(8) Percent rate or prospective loss costs change;
(9) Final proposed rates;
(10) Investment earnings, consisting of investment income and realized plus unrealized capital gains, from loss, loss expense, and unearned premium reserves;
(11) Identification of applicable statistical plans and programs and a certification of compliance with them;
(12) Investment earnings on capital and surplus;
(13) Level of capital and surplus needed to support premium writings without endangering the solvency of member companies; and
(14) Such other information that may be required by any rule adopted by the Commissioner.

Provided, however, that no filing may be returned or disapproved on the grounds that such information has not been furnished if insurers have not been required to collect such information pursuant to statistical plans or programs or to report such information to the Bureau or to statistical agents, except where the Commissioner has given reasonable prior notice to the insurers to begin collecting and reporting such information, or except when the information is readily available to the insurers.

(i) The Bureau shall file with and at the time of any rate or prospective loss costs filing all testimony, exhibits, and other information on which the Bureau will rely at the hearing on the rate filing. The Department shall file all testimony, exhibits, and other information on which the Department will rely at the hearing on the rate filing 20 days in advance of the convening date of the hearing. Upon the issuance of a notice of hearing the Commissioner shall hold a meeting of the parties to provide for the scheduling of any additional testimony, including written testimony, exhibits or other information, in response to the notice of hearing and any potential rebuttal testimony, exhibits, or other information. This subsection also applies to rate filings made by the North Carolina Motor Vehicle Reinsurance Facility under Article 37 of this Chapter. (1977, c. 828, s. 6; 1979, c. 824, s. 2; 1981, c. 521, s. 1; 1985, c. 666, s. 3; 1985 (Reg. Sess., 1986), c. 1027, ss. 2, 3; 1993, c. 409, s. 10; 1995, c. 505, s. 2; 1999-132, ss. 3.4-3.6; 2002-187, s. 4.1.)

Effect of Amendments. — Session Laws 2002-187, s. 4.1, effective October 31, 2002, substituted "210 days" for "105 days" and "120 days" in subsection (a).

§ 58-36-20. Disapproval; hearing, order; adjustment of premium, review of filing.

(a) At any time within 50 days after the date of any filing, the Commissioner may give written notice to the Bureau specifying in what respect and to what extent the Commissioner contends the filing fails to comply with the requirements of this Article and fixing a date for hearing not less than 30 days from the date of mailing of such notice. At the hearing the factors specified in G.S. 58-36-10 shall be considered. If the Commissioner after hearing finds that the filing does not comply with the provisions of this Article, he may issue his order determining wherein and to what extent such filing is deemed to be improper and fixing a date thereafter, within a reasonable time, after which the filing shall no longer be effective. Any order of disapproval under this section must be entered within 210 days after the date the filing is received by the Commissioner.

(b) In the event that no notice of hearing shall be issued within 50 days from the date of any such filing, the filing shall be deemed to be approved. If the Commissioner disapproves such filing pursuant to subsection (a) as not being in compliance with G.S. 58-36-10, he may order an adjustment of the premium to be made with the policyholder either by collection of an additional premium or by refund, if the amount exceeds five dollars ($5.00). The Commissioner may thereafter review any filing in the manner provided; but if so reviewed, no adjustment of any premium on any policy then in force may be ordered.

(c) For workers' compensation insurance and employers' liability insurance written in connection therewith, the period between the date of any filing and the date the Commissioner may give written notice as described in subsection (a) of this section and the period between the date of any filing and the deadline for giving notice of hearing as described in subsection (b) of this section shall be 60 days. (1977, c. 828, s. 6; 1979, c. 824, s. 3; 1985, c. 666, s. 2; 1993, c. 409, s. 12; 2002-187, s. 4.2.)

Effect of Amendments. — Session Laws 2002-187, s. 4.2, effective October 31, 2002, in subsection (a), substituted "210 days" for "105 days," deleted the proviso at the end, pertaining to entry of an order of disapproval, and made stylistic changes.

§ 58-36-65. Classifications and Safe Driver Incentive Plan for nonfleet private passenger motor vehicle insurance.

(a) The Bureau shall file, subject to review, modification, and promulgation by the Commissioner, such rate classifications, schedules, or rules that the Commissioner deems to be desirable and equitable to classify drivers of nonfleet private passenger motor vehicles for insurance purposes. Subsequently, the Commissioner may require the Bureau to file modifications of the classifications, schedules, or rules. If the Bureau does not file the modifications within a reasonable time, the Commissioner may promulgate the modifications. In promulgating or modifying these classifications, schedules, or rules, the Commissioner may give consideration to the following:

(1) Uses of vehicles, including without limitation to farm use, pleasure use, driving to and from work, and business use;
(2) Principal and occasional operation of vehicles;
(3) Years of driving experience of insureds as licensed drivers;
(4) The characteristics of vehicles; or
(5) Any other factors, not in conflict with any law, deemed by the Commissioner to be appropriate.

(b) The Bureau shall file, subject to review, modification, and promulgation by the Commissioner, a Safe Driver Incentive Plan ("Plan") that adequately and factually distinguishes among various classes of drivers that have safe driving records and various classes of drivers that have a record of at-fault accidents; a record of convictions of major moving traffic violations; a record of convictions of minor moving traffic violations; or a combination thereof; and that provides for premium differentials among those classes of drivers. Subsequently, the Commissioner may require the Bureau to file modifications of the Plan. If the Bureau does not file the modifications within a reasonable time, the Commissioner may promulgate the modifications. The Commissioner is authorized to structure the Plan to provide for surcharges above and discounts below the rate otherwise charged.

(c) The classifications and Plan filed by the Bureau shall be subject to the filing, hearing, modification, approval, disapproval, review, and appeal procedures provided by law; provided that the 210-day disapproval period in G.S. 58-36-20(a) and the 50-day deemer period in G.S. 58-36-20(b) do not apply to filings or modifications made under this section. The classifications or Plan filed by the Bureau and promulgated by the Commissioner shall of itself not be designed to bring about any increase or decrease in the overall rate level.

(d) Whenever any policy loses any safe driver discount provided by the Plan or is surcharged due to an accumulation of points under the Plan, the insurer shall, pursuant to rules adopted by the Commissioner, prior to or simultaneously with the billing for additional premium, inform the named insured of the surcharge or loss of discount by mailing to such insured a notice that states the basis for the surcharge or loss of discount, and that advises that upon receipt of a written request from the named insured it will promptly mail to the named insured a statement of the amount of increased premium attributable to the surcharge or loss of discount. The statement of the basis of the surcharge or loss of discount is privileged, and does not constitute grounds for any cause of action for defamation or invasion of privacy against the insurer or its representatives, or against any person who furnishes to the insurer the information upon which the insurer's reasons are based, unless the statement or furnishing of information is made with malice or in bad faith.

(e) Records of convictions for moving traffic violations to be considered under this section shall be obtained at least annually from the Division of Motor Vehicles and applied by the Bureau's member companies in accordance with rules to be established by the Bureau.

(f) The Bureau is authorized to establish reasonable rules providing for the exchange of information among its member companies as to chargeable accidents and similar information involving persons to be insured under policies. Neither the Bureau, any employee of the Bureau, nor any company or individual serving on any committee of the Bureau has any liability for defamation or invasion of privacy to any person arising out of the adoption, implementation, or enforcement of any such rule. No insurer or individual requesting, furnishing, or otherwise using any information that such insurer or person reasonably believes to be for purposes authorized by this section has any liability for defamation or invasion of privacy to any person on account of any such requesting, furnishing, or use. The immunity provided by this subsection does not apply to any acts made with malice or in bad faith.

(g) If an applicant for the issuance or renewal of a nonfleet private passenger motor vehicle insurance policy knowingly makes a material misrepresentation of the years of driving experience or the driving record of any named insured or of any other operator who resides in the same household and who customarily operates a motor vehicle to be insured under the policy, the insurer may:

(1) Cancel or refuse to renew the policy;

(2) Surcharge the policy in accordance with rules to be adopted by the Bureau and approved by the Commissioner; or

(3) Recover from the applicant the appropriate amount of premium or surcharge that would have been collected by the insurer had the applicant furnished the correct information.

(h) If an insured disputes his insurer's determination that the operator of an insured vehicle was at fault in an accident, such dispute shall be resolved pursuant to G.S. 58-36-1(2), unless there has been an adjudication or admission of negligence of such operator.

(i) As used in this section, "conviction" means a conviction as defined in G.S. 20-279.1 and means an infraction as defined in G.S. 14-3.1.

(j) Subclassification plan surcharges shall be applied to a policy for a period of not less nor more than three policy years.

(k) The subclassification plan may provide for premium surcharges for insureds having less than three years' driving experience as licensed drivers.

(*l*) Except as provided in G.S. 58-36-30(d), no classification or subclassification plan for nonfleet private passenger motor vehicle insurance shall be based, in whole or in part, directly or indirectly, upon the age or gender of insureds.

(m) Notwithstanding any other provision of law, with respect to motorcycle insurance under the jurisdiction of the Bureau, any member of the Bureau may apply for and use in this State, subject to the Commissioner's approval, a downward deviation in the rates of insureds who show proof of satisfactory completion of the Motorcycle Safety Instruction Program. (1985 (Reg. Sess., 1986), c. 1027, s. 1; 1987, c. 864, ss. 28, 33; c. 869, s. 9; 1987 (Reg. Sess., 1988), c. 975, ss. 4, 5; 1989, c. 755, s. 3; 1993, c. 320, s. 5; 2002-187, s. 4.3.)

Editor's Note. — This section heading corrects an error appearing in the section heading in the main volume.

Effect of Amendments. — Session Laws 2002-187, s. 4.3, effective October 31, 2002, substituted "210-day" for "105 day" in the first sentence of subsection (c).

Article 37.

North Carolina Motor Vehicle Reinsurance Facility.

§ 58-37-1. Definitions.

As used in this Article:

(1) "Cede" or "cession" means the act of transferring the risk of loss from the individual insurer to all insurers through the operation of the facility.

(2) Repealed by Session Laws 1991, c. 720, s. 6.

(3) "Company" means each member of the Facility.

(4) "Eligible risk" means a person who is a resident of this State who owns a motor vehicle registered or principally garaged in this State or who has a valid driver's license in this State or who is required to file proof of financial responsibility pursuant to Article 9A or 13 of the North Carolina Motor Vehicle Code in order to register his motor vehicle or obtain a driver's license in this State; or a nonresident of this State who owns a motor vehicle registered or principally garaged in this State, or the State and its agencies and cities, counties, towns and municipal corporations in this State and their agencies, provided, however, that no person shall be deemed an eligible risk if timely payment of premium is not tendered or if there is a valid unsatisfied judgment of record against such person for recovery of amounts due for motor vehicle insurance premiums and such person has not been

discharged from paying said judgment, or if such person does not furnish the information necessary to effect insurance.

(5) "Facility" means the North Carolina Motor Vehicle Reinsurance Facility established pursuant to the provisions of this Article.

(6) "Motor vehicle" means every self-propelled vehicle that is designed for use upon a highway, including trailers and semitrailers designed for use with such vehicles (except traction engines, road rollers, farm tractors, tractor cranes, power shovels, and well drillers). "Motor vehicle" also means a motorcycle, as defined in G.S. 20-4.01(27)d.

(7) "Motor vehicle insurance" means direct insurance against liability arising out of the ownership, operation, maintenance or use of a motor vehicle for bodily injury including death and property damage and includes medical payments and uninsured and underinsured motorist coverages.

With respect to motor carriers who are subject to the financial responsibility requirements established under the Motor Carrier Act of 1980, the term, "motor vehicle insurance" includes coverage with respect to environmental restoration. As used in this subsection the term, "environmental restoration" means restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release, or escape into or upon the land, atmosphere, water course, or body of water of any commodity transported by a motor carrier. Environmental restoration includes the cost of removal and the cost of necessary measures taken to minimize or mitigate damage to human health, the natural environment, fish, shellfish, and wildlife.

(8) "Person" means every natural person, firm, partnership, association, trust, limited liability company, firm, corporation, government, or governmental agency.

(9) "Plan of operation" means the plan of operation approved pursuant to the provisions of this Article.

(10) Repealed by Session Laws 1977, c. 828, s. 10. (1973, c. 818, s. 1; 1977, c. 828, s. 10; 1981, c. 776, s. 1; 1985, c. 666, s. 48; 1989, c. 485, s. 48; 1991, c. 720, s. 6; 1999-132, s. 8.2; 2001-389, s. 4; 2002-187, s. 1.1.)

Effect of Amendments. —
Session Laws 2002-187, s. 1.1, effective October 31, 2002, rewrote subdivision (8).

§ 58-37-35. The Facility; functions; administration.

(a) The operation of the Facility shall assure the availability of motor vehicle insurance to any eligible risk and the Facility shall accept all placements made in accordance with this Article, the plan of operation adopted pursuant thereto, and any amendments to either.

(b) The Facility shall reinsure for each coverage available in the Facility to the standard percentage of one hundred percent (100%) or lesser equitable percentage established in the Facility's plan of operation as follows:

(1) For the following coverages of motor vehicle insurance and in at least the following amounts of insurance:

a. Bodily injury liability: thirty thousand dollars ($30,000) each person, sixty thousand dollars ($60,000) each accident;

b. Property damage liability: twenty-five thousand dollars ($25,000) each person;

c. Medical payments: one thousand dollars ($1,000) each person; except that this coverage shall not be available for motorcycles;

d. Uninsured motorist: thirty thousand dollars ($30,000) each person; sixty thousand dollars ($60,000) each accident for bodily injury;

twenty-five thousand dollars ($25,000) each accident property damage (one hundred dollars ($100.00) deductible);

e. Any other motor vehicle insurance or financial responsibility limits in the amounts required by any federal law or federal agency regulation; by any law of this State; or by any rule duly adopted under Chapter 150B of the General Statutes or by the North Carolina Utilities Commission.

(2) Additional ceding privileges for motor vehicle insurance shall be provided by the Board of Governors up to the following:

a. Bodily injury liability: one hundred thousand dollars ($100,000) each person, three hundred thousand dollars ($300,000) each accident;

b. Property damage liability: fifty thousand dollars ($50,000) each accident;

c. Medical payments: two thousand dollars ($2,000) each person; except that this coverage shall not be available for motorcycles;

d. Underinsured motorist: one million dollars ($1,000,000) each person and each accident for bodily injury liability; and

e. Uninsured motorist: one million dollars ($1,000,000) each person and each accident for bodily injury and fifty thousand dollars ($50,000) each accident for property damage (one hundred dollars ($100.00) deductible).

(2a) For persons who must maintain liability coverage limits above those available under subdivision (2) of this subsection in order to obtain or continue coverage under personal excess liability or personal "umbrella" insurance policies, additional ceding privileges for motor vehicle insurance shall be provided by the Board of Governors up to the following:

a. Bodily injury liability: two hundred fifty thousand dollars ($250,000) each person, five hundred thousand dollars ($500,000) each accident.

b. Property damage liability: one hundred thousand dollars ($100,000) each accident.

c. Medical payments: five thousand dollars ($5,000) each person; except that this coverage shall not be available for motorcycles.

d. Uninsured motorist: one hundred thousand dollars ($100,000) each accident for property damage (one hundred dollars ($100.00) deductible).

(3) Whenever the additional ceding privileges are provided as in G.S. 58-37-35(b)(2) for any component of motor vehicle insurance, the same additional ceding privileges shall be available to "all other" types of risks subject to the rating jurisdiction of the North Carolina Rate Bureau.

(c) The Facility shall require each member to adjust losses for ceded business fairly and efficiently in the same manner as voluntary business losses are adjusted and to effect settlement where settlement is appropriate.

(d) The Facility shall be administered by a Board of Governors. The Board of Governors shall consist of 12 members having one vote each from the classifications specified in this subsection and the Commissioner, who shall serve ex officio without vote. Each Facility insurance company member serving on the Board shall be represented by a senior officer of the company. Not more than one company in a group under the same ownership or management shall be represented on the Board at the same time. Five members of the Board shall be selected by the member insurers, which members shall be fairly representative of the industry. To insure representative member insurers, one each shall be selected from the following trade associations: the American Insurance

Association (or its successors), the Alliance of American Insurers (or its successors), the National Association of Independent Insurers (or its successors), all other stock insurers not affiliated with those trade associations, and all other nonstock insurers not affiliated with those trade associations. The Commissioner shall appoint two members of the Board who are Facility insurance company members domiciled in this State. The Commissioner shall appoint five members of the Board who shall be fire and casualty insurance agents licensed in this State and actively engaged in writing motor vehicle insurance in this State. The initial term of office of the Board members shall be two years. Following completion of initial terms, successors to the members of the original Board of Governors shall be selected to serve three years. All members of the Board of Governors shall serve until their successors are selected and qualified and the Commissioner may fill any vacancy on the Board from any of the classifications specified in this subsection until the vacancies are filled in accordance with this Article. The Board of Governors of the Facility shall also have as nonvoting members two persons who are not employed by or affiliated with any insurance company or the Department and who are appointed by the Governor to serve at the Governor's pleasure.

(e) The Commissioner and member companies shall provide for a Board of Governors. The Board of Governors shall elect from its membership a chair and shall meet at the call of the chair or at the request of four members of the Board of Governors. The chair shall retain the right to vote on all issues. Seven members of the Board of Governors shall constitute a quorum. The same member may not serve as chair for more than two consecutive years; provided, however, that a member may continue to serve as chair until a successor chair is elected and qualified.

(f) The Board of Governors shall have full power and administrative responsibility for the operation of the Facility. Such administrative responsibility shall include but not be limited to:

(1) Proper establishment and implementation of the Facility.

(2) Employment of a manager who shall be responsible for the continuous operation of the Facility and such other employees, officers and committees as it deems necessary.

(3) Provision for appropriate housing and equipment to assure the efficient operation of the Facility.

(4) Promulgation of reasonable rules and regulations for the administration and operation of the Facility and delegation to the manager of such authority as it deems necessary to insure the proper administration and operation thereof.

(g) Except as may be delegated specifically to others in the plan of operation or reserved to the members, power and responsibility for the establishment and operation of the Facility is vested in the Board of Governors, which power and responsibility include but is not limited to the following:

(1) To sue and be sued in the name of the Facility. No judgment against the Facility shall create any direct liability in the individual member companies of the Facility.

(2) To receive and record cessions.

(3) To assess members on the basis of participation ratios established in the plan of operation to cover anticipated or incurred costs of operation and administration of the Facility at such intervals as are established in the plan of operation.

(4) To contract for goods and services from others to assure the efficient operation of the Facility.

(5) To hear and determine complaints of any company, agent or other interested party concerning the operation of the Facility.

(6) Upon the request of any licensed fire and casualty agent meeting any two of the standards set forth below as determined by the Commis-

sioner within 10 days of the receipt of the application, the Facility shall contract with one or more members within 20 days of receipt of the determination to appoint such licensed fire and casualty agent as designated agents in accordance with reasonable rules as are established by the plan of operation. The standards shall be:

a. Whether the agent's evidence establishes that he has been conducting his business in a community for a period of at least one year;
b. Whether the agent's evidence establishes that he had a gross premium volume during the 13 months next preceding the date of his application of at least twenty thousand dollars ($20,000) from motor vehicle insurance;
c. Whether the agent's evidence establishes that the number of eligible risks served by him during the 13 months next preceding the date of application was 200 or more;
d. Whether the agent's evidence establishes a growth in eligible risks served and premium volume during his years of service as an agent;
e. Whether the agent's evidence establishes that he made available to eligible risks premium financing or any other plan for deferred payment of premiums.

With respect to business produced by designated agents, adequate provision shall be made by the Facility to assure that such business is rated using Facility rates. All business produced by designated agents may be ceded to the Facility, except designated agents appointed before September 1, 1987, may place liability insurance policies with a voluntary carrier, provided that all policies written by the voluntary carrier are retained by the voluntary carrier unless ceded to the Facility using Facility rates. Designated agents must provide the Facility with a list of such policies written by the voluntary carrier at least annually, or as requested by the Facility, on a form approved by the Facility. If no insurer is willing to contract with any such agent on terms acceptable to the Board, the Facility shall license such agent to write directly on behalf of the Facility. However, for this purpose the Facility does not act as an insurer, but acts only as the statutory agent of all of the members of the Facility, which shall be bound on risks written by the Facility's appointed agent. The Facility may contract with one or more servicing carriers and shall promulgate fair and reasonable underwriting procedures to require that business produced by Facility agents and written through those servicing carriers shall be rated using Facility rates. All business produced by Facility agents may be ceded to the Facility. Any designated agent who is disabled or retiring or the estate of any deceased designated agent may transfer the designation and the book of business to some other licensed fire and casualty agent meeting the requirements of this section and under rules established by the Facility, and a transfer from a designated agent appointed before September 1, 1987, shall entitle the transferee designated agent to place liability insurance policies with a voluntary carrier.

The Commissioner shall require, as a condition precedent to the issuance, renewal, or continuation of a resident agent's license to any designated agent to act for the company appointing such designated agent under contract with the Facility, that the designated agent file and thereafter maintain in force while so licensed a bond in favor of the State of North Carolina executed by an authorized corporate surety approved by the Commissioner, cash, mortgage on real prop-

erty, or other securities approved by the Commissioner, in the amount of ten thousand dollars ($10,000) for the use of aggrieved persons. Such bond, cash, mortgage, or other securities shall be conditioned on the accounting by the designated agent (i) to any person requesting the designated agent to obtain motor vehicle insurance for moneys or premiums collected in connection therewith, and (ii) to the company providing coverage with respect to any such moneys or premiums under contract with the Facility. Any such bond shall remain in force until the surety is released from liability by the Commissioner, or until the bond is cancelled by the surety. Without prejudice to any liability accrued prior to such cancellation, the surety may cancel the bond upon 30 days' advance notice in writing filed with the Commissioner.

No agent may be designated under this subdivision to any insurer that does not actively write voluntary market business.

(7) To maintain all loss, expense, and premium data relative to all risks reinsured in the Facility, and to require each member to furnish such statistics relative to insurance reinsured by the Facility at such times and in such form and detail as may be required.

(8) To establish fair and reasonable procedures for the sharing among members of any loss on Facility business that cannot be recouped under G.S. 58-37-40(e) and other costs, charges, expenses, liabilities, income, property and other assets of the Facility and for assessing or distributing to members their appropriate shares. The shares may be based on the member's premiums for voluntary business for the appropriate category of motor vehicle insurance or by any other fair and reasonable method.

(9) To receive or distribute all sums required by the operation of the Facility.

(10) To accept all risks submitted in accordance with this Article.

(11) To establish procedures for reviewing claims practices of member companies to the end that claims to the account of the Facility will be handled fairly and efficiently.

(12) To adopt and enforce all rules and to do anything else where the Board is not elsewhere herein specifically empowered which is otherwise necessary to accomplish the purpose of the Facility and is not in conflict with the other provisions of this Article.

(h) Each member company shall authorize the Facility to audit that part of the company's business which is written subject to the Facility in a manner and time prescribed by the Board of Governors.

(i) The Board of Governors shall fix a date for an annual meeting and shall annually meet on that date. Twenty days' notice of such meeting shall be given in writing to all members of the Board of Governors.

(j) There shall be furnished to each member an annual report of the operation of the Facility in such form and detail as may be determined by the Board of Governors.

(k) Each member shall furnish statistics in connection with insurance subject to the Facility as may be required by the Facility. Such statistics shall be furnished at such time and in such form and detail as may be required but at least will include premiums charged, expenses and losses.

(*l*) The classifications, rules, rates, rating plans and policy forms used on motor vehicle insurance policies reinsured by the Facility may be made by the Facility or by any licensed or statutory rating organization or bureau on its behalf and shall be filed with the Commissioner. The Board of Governors shall establish a separate subclassification within the Facility for "clean risks". For the purpose of this Article, a "clean risk" is any owner of a nonfleet private

passenger motor vehicle as defined in G.S. 58-40-10, if the owner, principal operator, and each licensed operator in the owner's household have two years' driving experience as licensed drivers and if none of the persons has been assigned any Safe Driver Incentive Plan points under Article 36 of this Chapter during the three-year period immediately preceding either (i) the date of application for a motor vehicle insurance policy or (ii) the date of preparation of a renewal of a motor vehicle insurance policy. The filings may incorporate by reference any other material on file with the Commissioner. Rates shall be neither excessive, inadequate nor unfairly discriminatory. If the Commissioner finds, after a hearing, that a rate is either excessive, inadequate or unfairly discriminatory, the Commissioner shall issue an order specifying in what respect it is deficient and stating when, within a reasonable period thereafter, the rate is no longer effective. The order is subject to judicial review as set out in Article 2 of this Chapter. Pending judicial review of said order, the filed classification plan and the filed rates may be used, charged and collected in the same manner as set out in G.S. 58-40-45 of this Chapter. The order shall not affect any contract or policy made or issued before the expiration of the period set forth in the order. All rates shall be on an actuarially sound basis and shall be calculated, insofar as is possible, to produce neither a profit nor a loss. However, the rates made by or on behalf of the Facility with respect to "clean risks" shall not exceed the rates charged "clean risks" who are not reinsured in the Facility. The difference between the actual rate charged and the actuarially sound and self-supporting rates for "clean risks" reinsured in the Facility may be recouped in similar manner as assessments under G.S. 58-37-40(f). Rates shall not include any factor for underwriting profit on Facility business, but shall provide an allowance for contingencies. There shall be a strong presumption that the rates and premiums for the business of the Facility are neither unreasonable nor excessive.

(m) In addition to annual premiums, the rules of the Facility shall allow semiannual and quarterly premium terms. (1973, c. 818, s. 1; 1977, c. 710; c. 828, ss. 14-19; 1977, 2nd Sess., c. 1135; 1979, c. 676, ss. 1, 2; 1981, c. 776, ss. 2, 3; c. 776, ss. 2, 3; 1983, c. 416, ss. 3, 4; c. 690; 1985, c. 666, s. 49; 1985 (Reg. Sess., 1986), c. 1027, ss. 7, 19, 33, 43; 1987, c. 869, ss. 3, 4(1), (2), 15; 1989, c. 67; 1991, c. 469, s. 7; c. 562, s. 2; c. 709, s. 1; c. 720, s. 4; 1999-132, ss. 6.2, 8.3, 8.4, 8.7, 8.8; 1999-228, s. 8; 2001-236, s. 1; 2001-423, s. 3; 2002-185, s. 6; 2002-187, ss. 1.2, 1.3.)

Effect of Amendments. —

Session Laws 2002-185, s. 6, effective October 31, 2002, rewrote subsection (d), substituting "trade associations" for "groups" throughout, deleting provisions that members be appointed from the Auto Insurance Agents of North Carolina, Inc., and the Independent Insurance Agents of North Carolina, Inc., increasing the number of fire and casualty insurance agent members to five, and making sytlistic changes.

Session Laws 2002-187, ss. 1.2 and 1.3, effective October 31, 2002, in subdivision (b)(2)c added "except that this coverage shall not be available for motorcycles"; in subdivision (b)(2)e inserted "each accident" following "($50,000)"; in subdivision (b)(2a)c added "except that this coverage shall not be available for motorcycles"; and added subdivision (b)(2a)d.

Article 42.

Mandatory or Voluntary Risk Sharing Plans.

§ 58-42-1. Establishment of plans.

OPINIONS OF ATTORNEY GENERAL

General Assembly Can Extend Statute. — There is no reason that the General Assembly cannot extend this article. See opinion of Attorney General to The Honorable E. David Redwine, North Carolina House of Representatives and The Honorable Patrick J. Ballantine, Senate Minority Leader, 2001 N.C. AG LEXIS 19 (6/18/2001).

Article 44.

Fire Insurance Policies.

§ 58-44-15. Fire insurance contract; standard policy provisions.

CASE NOTES

I. In General.
II. Conditions.
A. In General.

I. IN GENERAL.

Applicability. — In the context of a fire/homeowners policy, G.S. 58-44-15 is the controlling statute and any misrepresentation or concealment made in the insurance application process is governed by that statute, not G.S. 58-3-10. Crawford v. Commercial Union Midwest Ins. Co., 147 N.C. App. 455, 556 S.E.2d 30, 2001 N.C. App. LEXIS 1183 (2001).

II. CONDITIONS.

A. In General.

Willful Concealment or Misrepresentation. —

Summary judgment was improperly granted to insurance company that had claimed the insurance policy was void, following the destruction of the homeowner's property in a fire, because of homeowner's material misrepresentations; there was no evidence the homeowner knowingly or willfully made misrepresentations about encumbrances on his property to an insurance agent in applying for the homeowners policy. Crawford v. Commercial Union Midwest Ins. Co., 147 N.C. App. 455, 556 S.E.2d 30, 2001 N.C. App. LEXIS 1183 (2001).

Article 45.

Essential Property Insurance for Beach Area Property.

§ 58-45-1. Declarations and purpose of Article.

Editor's Note. — Session Laws 2002-185, s. 1, effective October 31, 2002, provides:

"The General Assembly of North Carolina finds that:

"(1) An adequate market for property insurance is necessary to the economic welfare of the beach and coastal counties of North Carolina.

"(2) The establishment of the North Carolina Insurance Underwriting Association ("Beach Plan") was designed to provide a residual property insurance market in our State's beach and coastal counties.

"(3) Despite the availability of property protection through the Beach Plan, the availability of homeowners' insurance policies continues to be inadequate in beach and coastal counties.

"(4) In an effort to address this ongoing problem, the Commissioner of Insurance has requested the Board of Directors of the Beach Plan to offer homeowners' insurance to residents in beach and coastal counties.

"(5) The Board of Directors of the Beach Plan has developed a homeowners' policy and has submitted this policy to the Commissioner of Insurance for approval.

"(6) The Commissioner of Insurance has the authority under G.S. 58-45-30 to direct and approve the offering of a homeowners' insurance policy through the Beach Plan.

"(7) The availability of a homeowners' insurance policy offered through the Beach Plan will assist in alleviating the lack of homeowners' insurance currently available in beach and coastal counties.

"(8) The General Assembly will await further recommendations by the Commissioner of Insurance on other options to increase the availability of homeowners' insurance both in beach and coastal counties and statewide, as directed in Section 3 of this act." (see Editor's Notes, G.S. 58-45-1 and 58-46-1)

Session Laws 2002-185, s. 3, effective October 31, 2002, provides: "The Commissioner of Insurance, in consultation with other governmental bodies specified below, shall study the provisions of Articles 45 and 46 of Chapter 58 of the General Statutes, other relevant portions of the General Statutes, and the plans and operations of the North Carolina Insurance Underwriting Association ('Beach Plan') and the North Carolina Joint Underwriting Association ('FAIR Plan'). In this study, the Commissioner may consider all issues and potential remedies related to the availability of homeowners' insurance coverage statewide, and specifically in the beach and coastal counties of the State. In conducting this study, the Commissioner may call upon any department, agency, institution, or officer of the State or of any political subdivision of the State, and the North Carolina Rate Bureau, the North Carolina Insurance Underwriting Association ('Beach Plan'), the North Carolina Joint Underwriting Association ('FAIR Plan'), and the North Carolina Motor Vehicle Reinsurance Facility, and representatives of property and casualty insurers and reinsurers, for such assistance and information, and these departments, agencies, institutions, officers, and other entities shall cooperate with the Commissioner to the fullest possible extent. The Commissioner shall report to the 2003 General Assembly on or before April 1, 2003, on the Commissioner's findings and may make any legislative or other recommendations he considers appropriate."

§ 58-45-6. Persons who can be insured by the Association.

As used in this Article, "person" includes the State of North Carolina and any county, city, or other political subdivision of the State of North Carolina. (2000-122, s. 5; 2002-187, s. 1.4.)

Effect of Amendments. — Session Laws 2002-187, s. 1.4, effective October 31, 2002, inserted "the State of North Carolina and."

§ 58-45-30. Directors to submit plan of operation to Commissioner; review and approval; amendments.

(a) The Directors shall submit to the Commissioner for his review and approval, a proposed plan of operation. The plan shall set forth the number, qualifications, terms of office, and manner of election of the members of the board of directors, and shall grant proper credit annually to each member of the Association for essential property insurance, farmowners, homeowners insurance, and the property portion of commercial multiple peril policies voluntarily written in the beach and coastal areas and shall provide for the efficient, economical, fair and nondiscriminatory administration of the Association and for the prompt and efficient provision of essential property insurance in the beach and coastal areas of North Carolina to promote orderly community development in those areas and to provide means for the adequate maintenance and improvement of the property in those areas. The plan may include the establishment of necessary facilities; management of the Association; the assessment of members to defray losses and expenses; underwriting stan-

dards; procedures for the acceptance and cession of reinsurance; procedures for determining the amounts of insurance to be provided to specific risks; time limits and procedures for processing applications for insurance; and any other provisions that are considered necessary by the Commissioner to carry out the purposes of this Article.

(b) The proposed plan shall be reviewed by the Commissioner and approved by him if he finds that such plan fulfills the purposes provided by G.S. 58-45-1. In the review of the proposed plan the Commissioner may, in his discretion, consult with the directors of the Association and may seek any further information which he deems necessary to his decision. If the Commissioner approves the proposed plan, he shall certify such approval to the directors and the plan shall become effective 10 days after such certification. If the Commissioner disapproves all or any part of the proposed plan of operation he shall return the same to the directors with his written statement for the reasons for disapproval and any recommendations he may wish to make. The directors may alter the plan in accordance with the Commissioner's recommendation or may within 30 days from the date of disapproval return a new plan to the Commissioner. Should the directors fail to submit a proposed plan of operation within 90 days of April 17, 1969, or a new plan which is acceptable to the Commissioner, or accept the recommendations of the Commissioner within 30 days after his disapproval of the plan, the Commissioner shall promulgate and place into effect a plan of operation certifying the same to the directors of the Association. Any such plan promulgated by the Commissioner shall take effect 10 days after certification to the directors: Provided, however, that until a plan of operation is in effect, pursuant to the provisions of this Article, any existing temporary placement facility may be continued in effect on a mandatory basis on such terms as the Commissioner may determine.

(c) The directors of the Association may, subject to the approval of the Commissioner, amend the plan of operation at any time. The Commissioner may review the plan of operation at any time the Commissioner deems expedient or prudent, but not less than once in each calendar year. After review of the plan the Commissioner may amend the plan after consultation with the directors and upon certification to the directors of the amendment.

(d) **(Effective until May 1, 2003)** The Commissioner may designate the kinds of property insurance policies on principal residences to be offered by the association, including insurance policies under Article 36 of this Chapter, and the commission rates to be paid to agents or brokers for these policies, if the Commissioner finds, after a hearing held in accordance with G.S. 58-2-50, that the public interest requires the designation. The provisions of Chapter 150B do not apply to any procedure under this paragraph, except that G.S. 150B-39 and G.S. 150B-41 shall apply to a hearing under this paragraph. Within 30 days after the receipt of notification from the Commissioner of a change in designation pursuant to this paragraph, the association shall submit a revised plan and articles of association for approval in accordance with this section.

(d) **(Effective May 1, 2003)** As used in this subsection, "homeowners' insurance policy" means a multiperil policy providing full coverage of residential property similar to the coverage provided under an HO-2, HO-3, HO-4, or HO-6 policy under Article 36 of this Chapter. The Association shall issue, for principal residences, homeowners' insurance policies approved by the Commissioner. Homeowners' insurance policies shall be available to persons who reside in the beach and coastal areas and who are unable to obtain homeowners' insurance policies from insurers that are authorized to transact and are actually writing homeowners' insurance policies in this State. The terms and conditions of the homeowners' insurance policies available under this subsection shall not be more favorable than those of homeowners'

G.S. 58-45-30(d) is set out twice. See notes.

insurance policies available in the voluntary market in beach and coastal counties. Rates for the homeowners' insurance policies authorized by this subsection shall be set pursuant to rate standards set forth in G.S. 58-40-20(a), and the provisions of G.S. 58-45-45(a) shall not apply.

(e) The Association shall, subject to the Commissioner's approval or modification, provide in the plan of operation for coverage for appropriate classes of manufacturing risks.

(f) As used in this section, "plan of operation" includes all written rules, practices, and procedures of the Association, except for staffing and personnel matters. (1967, c. 1111, s. 1; 1969, c. 249; 1986, Ex. Sess., c. 7, s. 8; 1987, c. 731, s. 1; c. 864, s. 41; 1991, c. 720, s. 59; 1991 (Reg. Sess., 1992), c. 784, s. 5; 1997-498, s. 3; 2002-185, s. 2.)

Subsection (d) Set Out Twice. — The first version of subsection (d) set out above is effective until May 1, 2003. The second version of subsection (d) is effective May 1, 2003.

Effect of Amendments. — Session Laws 2002-185, s. 2, effective May 1, 2003, rewrote subsection (d).

§ 58-45-35. Persons eligible to apply to Association for coverage; contents of application.

(a) Any person having an insurable interest in insurable property, may, on or after the effective date of the plan of operation, be entitled to apply to the Association for such coverage and for an inspection of the property. A broker or agent authorized by the applicant may apply on the applicant's behalf. Each application shall contain a statement as to whether or not there are any unpaid premiums due from the applicant for essential property insurance on the property.

The term "insurable interest" as used in this subsection shall include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage.

(b) If the Association determines that the property is insurable and that there is no unpaid premium due from the applicant for prior insurance on the property, the Association, upon receipt of the premium, or part of the premium, as is prescribed in the plan of operation, shall cause to be issued a policy of essential property insurance and shall offer additional extended coverage, optional perils endorsements, business income and extra expense coverage, crime insurance, separate policies of windstorm and hail insurance, or their successor forms of coverage, for a term of one year or three years. Short term policies may also be issued. Any policy issued under this section shall be renewed, upon application, as long as the property is insurable property.

(c) If the Association, for any reason, denies an application and refuses to cause to be issued an insurance policy on insurable property to any applicant or takes no action on an application within the time prescribed in the plan of operation, the applicant may appeal to the Commissioner and the Commissioner, or the Commissioner's designee from the Commissioner's staff, after reviewing the facts, may direct the Association to issue or cause to be issued an insurance policy to the applicant. In carrying out the Commissioner's duties under this section, the Commissioner may request, and the Association shall provide, any information the Commissioner deems necessary to a determination concerning the reason for the denial or delay of the application.

(d) An agent who is licensed under Article 33 of this Chapter as an agent of a company which is a member of the Association established under this Article shall not be deemed an agent of the Association. The foregoing notwithstand-

ing, an agent of a company which is a member of the Association shall have the authority, subject to the underwriting guidelines established by the Association, to temporarily bind coverage with the Association. The Association shall establish rules and procedures, including any limitations for binding authority, in the plan of operation.

Any unearned premium on the temporary binder shall be returned to the policyholder if the Association refuses to issue a policy. Nothing in this section shall prevent the Association from suspending binding authority in accordance with its plan of operation.

(e) Policies of windstorm and hail insurance provided for in subsection (b) of this section are available only for risks in the beach and coastal areas for which essential property insurance has been written by licensed insurers. Whenever such other essential property insurance written by licensed insurers includes replacement cost coverage, the Association shall also offer replacement cost coverage. In order to be eligible for a policy of windstorm and hail insurance, the applicant shall provide the Association, along with the premium payment for the windstorm and hail insurance, a certificate that the essential property insurance is in force. The policy forms for windstorm and hail insurance shall be filed by the Association with the Commissioner for the Commissioner's approval before they may be used. Catastrophic losses, as determined by the Association and approved by the Commissioner, that are covered under the windstorm and hail coverage in the beach and coastal areas shall be adjusted by the licensed insurer that issued the essential property insurance and not by the Association. The Association shall reimburse the insurer for reasonable expenses incurred by the insurer in adjusting windstorm and hail losses. (1967, c. 1111, s. 1; 1969, c. 249; 1985, c. 516, s. 2; 1985 (Reg. Sess., 1986), c. 1027, s. 22; 1987, c. 421, ss. 1, 2; c. 629, s. 11; c. 864, s. 24; 1987 (Reg. Sess., 1988), c. 975, ss. 21-23; 1989, c. 376; c. 485, s. 26; 1991, c. 720, s. 25; 1991 (Reg. Sess., 1992), c. 784, s. 1; 1995, c. 517, s. 28; 1995 (Reg. Sess., 1996), c. 740, s. 1; 1997-498, ss. 5, 6; 2001-421, s. 4.1; 2002-185, s. 4.1.)

Effect of Amendments. — Session Laws 2002-185, s. 4.1, effective January 1, 2002, in subsection (d), added the last two sentences in the first paragraph and added the last paragraph.

§ 58-45-36. Temporary contracts of insurance.

Consistent with G.S. 58-45-35(d), the Association shall be temporarily bound by a written temporary binder of insurance issued by any duly licensed insurance agent or broker. Coverage shall be effective upon payment to the agent or broker of the entire premium or part of the premium, as prescribed by the Association's plan of operation. Nothing in this section shall impair or restrict the rights of the Association under G.S. 58-45-35(b) to decline to issue a policy based upon a lack of insurability as determined by the Association or the existence of an unpaid premium due from the applicant. (2002-185, s. 4.2.)

Editor's Note. — Session Laws 2002-185, s. 9, makes the section effective January 1, 2003.

§ 58-45-46. Unearned premium, loss, and loss expense reserves.

The Association shall make provisions for reserving unearned premiums and reserving for losses, including incurred but not reported losses, and loss expenses, in accordance with G.S. 58-3-71, 58-3-75, and 58-3-81. (2002-185, s. 5.1.)

Editor's Note. — Session Laws 2002-185, s. 9, makes the section effective October 31, 2002.

Session Laws 2002-185, s. 5.3, directs the North Carolina Joint Underwriting Association and the North Carolina Insurance Underwriting Association to request from the United States Internal Revenue Service a ruling as to whether or not the reserves required by Sections 5.1 and 5.2 of this act are subject to federal taxation. If the ruling states that the reserves are subject to federal taxation, in whole or in part, the Associations is to pursue ways and means for an exemption from federal taxation.

§ 58-45-90. Open meetings.

The Association is subject to the Open Meetings Act, Article 33C of Chapter 143 of the General Statutes, as amended. (2002-185, s. 7.1.)

Editor's Note. — Session Laws 2002-185, s. 9, makes this section effective October 31, 2002.

Article 46.

Fair Access to Insurance Requirements.

§ 58-46-1. Purpose and geographic coverage of Article.

Editor's Note. — Session Laws 2002-185, s. 3, effective October 31, 2002, provides: "The Commissioner of Insurance, in consultation with other governmental bodies specified below, shall study the provisions of Articles 45 and 46 of Chapter 58 of the General Statutes, other relevant portions of the General Statutes, and the plans and operations of the North Carolina Insurance Underwriting Association ('Beach Plan') and the North Carolina Joint Underwriting Association ('FAIR Plan'). In this study, the Commissioner may consider all issues and potential remedies related to the availability of homeowners' insurance coverage statewide, and specifically in the beach and coastal counties of the State. In conducting this study, the Commissioner may call upon any department, agency, institution, or officer of the State or of any political subdivision of the State, and the North Carolina Rate Bureau, the North Carolina Insurance Underwriting Association ('Beach Plan'), the North Carolina Joint Underwriting Association ('FAIR Plan'), and the North Carolina Motor Vehicle Reinsurance Facility, and representatives of property and casualty insurers and reinsurers, for such assistance and information, and these departments, agencies, institutions, officers, and other entities shall cooperate with the Commissioner to the fullest possible extent. The Commissioner shall report to the 2003 General Assembly on or before April 1, 2003, on the Commissioner's findings and may make any legislative or other recommendations he considers appropriate."

§ 58-46-2. Persons who can be insured by the Association.

As used in this Article, "person" includes the State of North Carolina and any county, city, or other political subdivision of the State of North Carolina. (2000-122, s. 6; 2002-187, s. 1.5.)

Effect of Amendments. — Session Laws 2002-187, s. 1.5, effective October 31, 2002, inserted "the State of North Carolina and."

§ 58-46-41. Unearned premium, loss, and loss expense reserves.

The Association shall make provisions for reserving unearned premiums and reserving for losses, including incurred but not reported losses, and loss expenses, in accordance with G.S. 58-3-71, 58-3-75, and 58-3-81. (2002-185, s. 5.2.)

Editor's Note. — Session Laws 2002-185, s. 9, makes the section effective October 31, 2002.

Session Laws 2002-185, s. 5.3, directs the North Carolina Joint Underwriting Association and the North Carolina Insurance Underwriting Association to request from the United States Internal Revenue Service a ruling as to whether or not the reserves required by Sections 5.1 and 5.2 of this act are subject to federal taxation. If the ruling states that the reserves are subject to federal taxation, in whole or in part, the Associations is to pursue ways and means for an exemption from federal taxation.

§ 58-46-60. Open meetings.

The Association is subject to the Open Meetings Act, Article 33C of Chapter 143 of the General Statutes, as amended. (2002-185, s. 7.2.)

Editor's Note. — Session Laws 2002-185, s. 9, makes this section effective October 31, 2002.

ARTICLE 47.

Workers' Compensation Self-Insurance.

Part 1. Employer Groups.

§ 58-47-65. Licensing; qualification for approval.

OPINIONS OF ATTORNEY GENERAL

Application of Grandfather Clause of Subsection (c). — Grandfather clause set forth in subsection (c) applied to a particular worker's compensation self-insurance fund. See opinion of Attorney General to the Honorable Edd Nye, North Carolina General Assembly, 2002 NC AG LEXIS 18 (6/20/02).

ARTICLE 48.

Postassessment Insurance Guaranty Association.

§ 58-48-35. Powers and duties of the Association.

CASE NOTES

The Association Is An Insurer over Which Industrial Commission Has Jurisdiction. — Trial court lacked subject matter jurisdiction under N.C. R. Civ. P. 12(b)(1) over whether the insurance guaranty association was required by amendments to the Insurance Guaranty Association Act, G.S. 58-48-1 et seq., and the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., to defend and indemnify the workers' compensation claims against the insolvent insurers, as the industrial commission had jurisdiction over the matter; not only was the association an insurer under G.S. 58-48-35(a)(2) over which the industrial commission had jurisdiction, but also, under G.S. 97-91, the industrial commission had jurisdiction to hear all questions arising under the Workers' Compensation Act. N.C. Ins. Guar. Ass'n v. Int'l Paper Co., — N.C. App. —, 569 S.E.2d 285, 2002 N.C. App. LEXIS 1092 (2002).

ARTICLE 50.

General Accident and Health Insurance Regulations.

Part 4. Health Benefit Plan External Review.

§ 58-50-80. Standard external review.

(a) Within 60 days after the date of receipt of a notice under G.S. 58-50-77, a covered person may file a request for an external review with the Commissioner.

(b) Upon receipt of a request for an external review under subsection (a) of this section, the Commissioner shall, within 10 business days, complete all of the following:

(1) Notify and send a copy of the request to the insurer that made the decision which is the subject of the request. The notice shall include a request for any information that the Commissioner requires to conduct the preliminary review under subdivision (2) of this subsection and require that the insurer deliver the requested information to the Commissioner within three business days of receipt of the notice.

(2) Conduct a preliminary review of the request to determine whether:

a. The individual is or was a covered person in the health benefit plan at the time the health care service was requested or, in the case of a retrospective review, was a covered person in the health benefit plan at the time the health care service was provided.

b. The health care service that is the subject of the noncertification appeal decision or the second-level grievance review decision upholding a noncertification reasonably appears to be a covered service under the covered person's health benefit plan.

c. The covered person has exhausted the insurer's internal appeal and grievance processes under G.S. 58-50-61 and G.S. 58-50-62, unless the covered person is considered to have exhausted the insurer's internal appeal or grievance process under G.S. 58-50-79, or unless the insurer has waived its right to conduct an expedited review of the appeal decision.

d. The covered person has provided all the information and forms required by the Commissioner that are necessary to process an external review.

(3) Notify in writing the covered person and the covered person's provider who performed or requested the service whether the request is complete and whether the request has been accepted for external review. If the request is complete and accepted for external review, the notice shall include a copy of the information that the insurer provided to the Commissioner pursuant to subdivision (b)(1) of this section, and inform the covered person that the covered person may submit to the assigned independent review organization in writing, within seven days after the receipt of the notice, additional information and supporting documentation relevant to the initial denial for the organization to consider when conducting the external review. If the covered person chooses to send additional information to the assigned independent review organization, then the covered person shall at the same time and by the same means, send a copy of that information to the insurer.

(4) Notify the insurer in writing whether the request for external review has been accepted. If the request has been accepted, the notice shall

direct the insurer or its designee utilization review organization to provide to the assigned organization, within seven days of receipt of the notice, the documents and any information considered in making the noncertification appeal decision or the second-level grievance review decision.

(5) Assign the review to an independent review organization approved under G.S. 58-50-85. The assignment shall be made using an alphabetical list of the independent review organizations, systematically assigning reviews on a rotating basis to the next independent review organization on that list capable of performing the review to conduct the external review. After the last organization on the list has been assigned a review, the Commissioner shall return to the top of the list to continue assigning reviews.

(6) Forward to the review organization that was assigned by the Commissioner any documents that were received relating to the request for external review.

(c) If the finding of the preliminary review under subdivision (b)(2) of this section is that the request is not complete, the Commissioner shall request from the covered person the information or materials needed to make the request complete. The covered person shall furnish the Commissioner with the requested information or materials within 90 days after the date of the insurer's decision for which external review is requested.

(d) If the finding of the preliminary review under subdivision (b)(2) of this section is that the request is not accepted for external review, the Commissioner shall inform the covered person, the covered person's provider who performed or requested the service, and the insurer in writing of the reasons for its nonacceptance.

(e) Failure by the insurer or its designee utilization review organization to provide the documents and information within the time specified in this subsection shall not delay the conduct of the external review. However, if the insurer or its utilization review organization fails to provide the documents and information within the time specified in subdivision (b)(4) of this section, the assigned organization may terminate the external review and make a decision to reverse the noncertification appeal decision or the second-level grievance review decision. Within one business day of making the decision under this subsection, the organization shall notify the covered person, the insurer, and the Commissioner.

(f) If the covered person submits additional information to the Commissioner pursuant to subdivision (b)(3) of this section, the Commissioner shall forward the information to the assigned review organization within two business days of receiving it and shall forward a copy of the information to the insurer.

(g) Upon receipt of the information required to be forwarded under subsection (f) of this section, the insurer may reconsider its noncertification appeal decision or second-level grievance review decision that is the subject of the external review. Reconsideration by the insurer of its noncertification appeal decision or second-level grievance review decision under this subsection shall not delay or terminate the external review. The external review shall be terminated if the insurer decides, upon completion of its reconsideration, to reverse its noncertification appeal decision or second-level grievance review decision and provide coverage or payment for the requested health care service that is the subject of the noncertification appeal decision or second-level grievance review decision.

(h) Upon making the decision to reverse its noncertification appeal decision or second-level grievance review decision under subsection (g) of this section, the insurer shall notify the covered person, the organization, and the Commis-

sioner in writing of its decision. The organization shall terminate the external review upon receipt of the notice from the insurer sent under this subsection.

(i) The assigned organization shall review all of the information and documents received under subsections (b) and (f) of this section that have been forwarded to the organization by the Commissioner and the insurer. In addition, the assigned review organization, to the extent the documents or information are available, shall consider the following in reaching a decision:

(1) The covered person's medical records.
(2) The attending health care provider's recommendation.
(3) Consulting reports from appropriate health care providers and other documents submitted by the insurer, covered person, or the covered person's treating provider.
(4) The most appropriate practice guidelines that are based on sound clinical evidence and that are periodically evaluated to assure ongoing efficacy.
(5) Any applicable clinical review criteria developed and used by the insurer or its designee utilization review organization.
(6) Medical necessity, as defined in G.S. 58-3-200(b).
(7) Any documentation supporting the medical necessity and appropriateness of the provider's recommendation.

The assigned organization shall review the terms of coverage under the covered person's health benefit plan to ensure that the organization's decision shall not be contrary to the terms of coverage under the covered person's health benefit plan with the insurer.

The assigned organization's determination shall be based on the covered person's medical condition at the time of the initial noncertification decision.

(j) Within 45 days after the date of receipt by the Commissioner of the request for external review, the assigned organization shall provide written notice of its decision to uphold or reverse the noncertification appeal decision or second-level grievance review decision to the covered person, the insurer, the covered person's provider who performed or requested the service, and the Commissioner. In reaching a decision, the assigned review organization is not bound by any decisions or conclusions reached during the insurer's utilization review process or the insurer's internal grievance process under G.S. 58-50-61 and G.S. 58-50-62.

(k) The organization shall include in the notice sent under subsection (j) of this section:

(1) A general description of the reason for the request for external review.
(2) The date the organization received the assignment from the Commissioner to conduct the external review.
(3) The date the organization received information and documents submitted by the covered person and by the insurer.
(4) The date the external review was conducted.
(5) The date of its decision.
(6) The principal reason or reasons for its decision.
(7) The clinical rationale for its decision.
(8) References to the evidence or documentation, including the practice guidelines, considered in reaching its decision.
(9) The professional qualifications and licensure of the clinical peer reviewers.
(10) Notice to the covered person that he or she is not liable for the cost of the external review.

(*l*) Upon receipt of a notice of a decision under subsection (k) of this section reversing the noncertification appeal decision or second-level grievance review decision, the insurer shall within three business days reverse the noncertification appeal decision or second-level grievance review decision that

was the subject of the review and shall provide coverage or payment for the requested health care service or supply that was the subject of the noncertification appeal decision or second-level grievance review decision. In the event the covered person is no longer enrolled in the health benefit plan when the insurer receives notice of a decision under subsection (k) of this section reversing the noncertification appeal decision or second-level grievance review decision, the insurer that made the noncertification appeal decision or second-level grievance review decision shall be responsible under this section only for the costs of those services or supplies the covered person received or would have received prior to disenrollment if the service had not been denied when first requested.

(m) For the purposes of this section, a person is presumed to have received a written notice two days after the notice has been placed, first-class postage prepaid, in the United States mail addressed to the person. The presumption may be rebutted by sufficient evidence that the notice was received on another day or not received at all. (2001-446, s. 4.5; 2002-187, ss. 3.1, 3.2.)

Effect of Amendments. — Session Laws 2002-187, ss. 3.1 and 3.2, effective October 31, 2002, in the second sentence of subdivision (b)(3) substituted "receipt of the notice" for "date of the notice"; and added subsection (m).

§ 58-50-89. Hold harmless for Commissioner, medical professionals, and independent review organizations.

Neither the Commissioner, a medical professional rendering advice to the Commissioner under G.S. 58-50-82(b)(2), an independent review organization, nor a clinical peer reviewer working on behalf of an organization shall be liable for damages to any person for any opinions rendered during or upon completion of an external review conducted under this Part, unless the opinion was rendered in bad faith or involved gross negligence. (2001-446, s. 4.5; 2002-187, s. 3.3.)

Effect of Amendments. — Session Laws 2002-187, s. 3.3, effective October 31, 2002, inserted "a medical professional rendering advice to the Commissioner under G.S. 58-50-82(b)(2)," made a corresponding change in the catchline, and made stylistic changes.

Article 51.

Nature of Policies.

§ 58-51-15. Accident and health policy provisions.

(a) Required Provisions. — Except as provided in subsection (c) of this section each such policy delivered or issued for delivery to any person in this State shall contain the provisions specified in this subsection in the substance of the words that appear in this section. Such provisions shall be preceded individually by the caption appearing in this subsection or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the Commissioner may approve.

(1) A provision in the substance of the following language:

ENTIRE CONTRACT; CHANGES: This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the insurer and unless such

approval be endorsed hereon or attached hereto. No agent has authority to change this policy or waive any of its provisions.

(2) A provision in the substance of the following language:

TIME LIMIT ON CERTAIN DEFENSES:

a. After two years from the date of issue or reinstatement of this policy no misstatements except fraudulent misstatements made by the applicant in the application for such policy shall be used to void the policy or deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such two-year period.

The foregoing policy provision may be used in its entirety only in major or catastrophe hospitalization policies and major medical policies each affording benefits of five thousand dollars ($5,000) or more for any one sickness or injury; disability income policies affording benefits of one hundred dollars ($100.00) or more per month for not less than 12 months; and franchise policies. Other policies to which this section applies must delete the words "except fraudulent misstatements."

(The foregoing policy provision shall not be so construed as to affect any legal requirement for avoidance of a policy or denial of a claim during such initial two-year period, nor to limit the application of G.S. 58-51-15(b), (1), (2), (3), (4) and (5) in the event of misstatement with respect to age or occupation or other insurance.)

(A policy which the insured has the right to continue in force subject to its terms by the timely payment of premium:

1. Until at least age 50 or,
2. In the case of a policy issued after age 44, for at least five years from its date of issue, may contain in lieu of the foregoing the following provisions (from which the clause in parentheses may be omitted at the insurer's option) under the caption "INCONTESTABLE."

After this policy has been in force for a period of two years during the lifetime of the insured (excluding any period during which the insured is disabled), it shall become incontestable as to the statements contained in the application.)

b. This policy contains a provision limiting coverage for preexisting conditions. Preexisting conditions are covered under this policy _____ (insert number of months or days, not to exceed one year) after the effective date of coverage. Preexisting conditions mean "those conditions for which medical advice, diagnosis, care, or treatment was received or recommended within the one-year period immediately preceding the effective date of the person's coverage." Credit for having satisfied some or all of the preexisting condition waiting periods under previous health benefits coverage shall be given in accordance with G.S. 58-68-30.

(3) A provision in the substance of the following language:

GRACE PERIOD: A grace period of _____ (insert a number not less than "7" for weekly premium policies, "10" for monthly premium policies and "31" for all other policies) days will be granted for the payment of each premium falling due after the first premium, during which grace period the policy shall continue in force.

(A policy which contains a cancellation provision may add, at the end of the above provision, subject to the right of the insurer to cancel in accordance with the cancellation provision hereof.

A policy in which the insurer reserves the right to refuse any renewal shall have, at the beginning of the above provision,

Unless not less than five days prior to the premium due date the insurer has delivered to the insured or has mailed to his last address as shown by the record of the insurer written notice of its intention not to renew this policy beyond the period for which the premium has been accepted.)

(4) A provision in the substance of the following language:

REINSTATEMENT: If any renewal premium be not paid within the time granted the insured for payment, a subsequent acceptance of premium by the insurer or by any agent duly authorized by the insurer to accept such premium, without requiring in connection therewith an application for reinstatement, shall reinstate the policy; provided, however, that if the insurer or such agent requires an application for reinstatement and issues a conditional receipt for the premium tendered, the policy will be reinstated upon approval of such application by the insurer, or, lacking such approval, upon the forty-fifth day following the date of such conditional receipt unless the insurer has previously notified the insured in writing of its disapproval of such application. The reinstated policy shall cover only loss resulting from such accidental injury as may be sustained after the date of reinstatement and loss due to such sickness as may begin more than 10 days after such date. In all other respects the insured and insurer shall have the same rights thereunder as they had under the policy immediately before the due date of the defaulted premium, subject to any provisions endorsed hereon or attached hereto in connection with the reinstatement. Any premium accepted in connection with a reinstatement shall be applied to a period for which premium has not been previously paid, but not to any period more than 60 days prior to the date of reinstatement.

(The last sentence of the above provision may be omitted from any policy which the insured has the right to continue in force subject to its terms by the timely payment of premiums:

a. Until at least age 50 or,

b. In the case of a policy issued after age 44, for at least five years from its date of issue.)

(5) A provision in the substance of the following language:

NOTICE OF CLAIM: Written notice of claim must be given to the insurer within 20 days after the occurrence or commencement of any loss covered by the policy, or as soon thereafter as is reasonably possible. Notice given by or on behalf of the insured or the beneficiary to the insurer at _____ (insert the location of such office as the insurer may designate for the purpose), or to any authorized agent of the insurer, with information sufficient to identify the insured, shall be deemed notice to the insurer.

(In a policy providing a loss-of-time benefit which may be payable for at least two years, an insurer may at its option insert the following between the first and second sentences of the above provision:

Subject to the qualifications set forth below, if the insured suffers loss of time on account of disability for which indemnity may be payable for at least two years, he shall, at least once in every six months after having given notice of claim, give to the insurer notice of continuance of said disability, except in the event of legal incapacity. The period of six months following any filing of proof by the insured or any payment by the insurer on account of such claim or any denial of liability in whole or in part by the insurer shall be excluded in applying this provision. Delay in the giving of such notice shall not impair the insured's right to any indemnity which

would otherwise have accrued during the period of six months preceding the date on which such notice is actually given.)

(6) A provision in the substance of the following language:

CLAIM FORMS: The insurer, upon receipt of a notice of claim, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not furnished within 15 days after the giving of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting, within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, the character and the extent of the loss for which claim is made.

(7) A provision in the substance of the following language:

PROOFS OF LOSS: Written proof of loss must be furnished to the insurer at its said office in the case of a claim for loss for which this policy provides any periodic payment contingent upon continuing loss within 180 days after the termination of the period for which the insurer is liable and in case of a claim for any other loss within 180 days after the date of such loss. Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity of the insured, later than one year from the time proof is otherwise required.

(8) A provision in the substance of the following language:

TIME OF PAYMENT OF CLAIMS: Indemnities payable under this policy for any loss other than loss for which this policy provides any period payment will be paid immediately upon receipt of due written proof of such loss. Subject to due written proof of loss, all accrued indemnities for loss for which this policy provides periodic payment will be paid _____ (insert period for payment which must not be less frequently than monthly) and any balance remaining unpaid upon the termination of liability will be paid immediately upon receipt of due written proof.

(9) A provision in the substance of the following language:

PAYMENT OF CLAIMS: Indemnity for loss of life will be payable in accordance with the beneficiary designation and the provisions respecting such payment which may be prescribed herein and effective at the time of payment. If no such designation or provision is then effective, such indemnity shall be payable to the estate of the insured. Any other accrued indemnities unpaid at the insured's death may, at the option of the insurer, be paid either to such beneficiary or to such estate. All other indemnities will be payable to the insured.

(The following provisions, or either of them, may be included with the foregoing provision at the option of the insurer:

If any indemnity of this policy shall be payable to the estate of the insured, or to an insured or beneficiary who is a minor or otherwise not competent to give a valid release, the insurer may pay such indemnity, up to an amount not exceeding $ _____ (insert an amount which shall not exceed three thousand dollars ($3,000)), to any relative by blood or connection by marriage of the insured or beneficiary who is deemed by the insurer to be equitably entitled thereto. Any payment made by the insurer in good faith pursuant to this provision shall fully discharge the insurer to the extent of such payment.

Subject to any written direction of the insured in the application or otherwise all or a portion of any indemnities provided by this policy on

account of hospital, nursing, medical, or surgical services, may at the insurer's option and unless the insured requests otherwise in writing not later than the time of filing proofs of such loss, be paid directly to the hospital or person rendering such services; but it is not required that the service be rendered by a particular hospital or person.)

(10) A provision in the substance of the following language:

PHYSICAL EXAMINATIONS AND AUTOPSY: The insurer at its own expense shall have the right and opportunity to examine the person of the insured when and as often as it may reasonably require during the pendency of a claim hereunder and to make an autopsy in case of death where it is not forbidden by law.

(11) A provision in the substance of the following language:

LEGAL ACTIONS: No action at law or in equity shall be brought to recover on this policy prior to the expiration of 60 days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished.

(12) A provision in the substance of the following language:

CHANGE OF BENEFICIARY: Unless the insured makes an irrevocable designation of beneficiary, the right to change of beneficiary is reserved to the insured and the consent of the beneficiary or beneficiaries shall not be requisite to surrender or assignment of this policy or to any change of beneficiary or beneficiaries, or to any other changes in this policy.

(The first clause of this provision, relating to the irrevocable designation of beneficiary, may be omitted at the insurer's option.)

(b) Other Provisions. — Except as provided in subsection (c) of this section, no such policy delivered or issued for delivery to any person in this State shall contain provisions respecting the matters set forth below unless such provisions are in the substance of the words that appear in this section. Any such provision contained in the policy shall be preceded individually by the appropriate caption appearing in this subsection or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the Commissioner may approve.

(1) A provision in the substance of the following language:

CHANGE OF OCCUPATION: If the insured be injured or contract sickness after having changed his occupation to one classified by the insurer as more hazardous than that stated in this policy or while doing for compensation anything pertaining to an occupation so classified, the insurer will pay only such portion of the indemnities provided in this policy as the premium paid would have purchased at the rates and within the limits fixed by the insurer for such more hazardous occupation. If the insured changes his occupation to one classified by the insurer as less hazardous than that stated in this policy, the insurer, upon receipt of proof of such change of occupation, will reduce the premium rate accordingly, and will return the excess pro rata unearned premium from the date of change of occupation or from the policy anniversary date immediately preceding receipt of such proof, whichever is the more recent. In applying this provision, the classification of occupational risk and the premium rates shall be such as have been last filed by the insurer prior to the occurrence of the loss for which the insurer is liable or prior to date of proof of change in occupation with the state official having supervision of insurance in the state where the insured resided at the time this policy was issued; but if such filing was not required, then the

classification of occupational risk and the premium rates shall be those last made effective by the insurer in such state prior to the occurrence of the loss or prior to the date of proof of change in occupation.

(2) A provision in the substance of the following language:

MISSTATEMENT OF AGE: If the age of the insured has been misstated, all amounts payable under this policy shall be such as the premium paid would have purchased at the correct age.

(3) A provision in the substance of the following language:

OTHER INSURANCE IN THIS INSURER: If an accident or health or accident and health policy or policies previously issued by the insurer to the insured be in force concurrently herewith, making the aggregate indemnity for _____ (insert type of coverage or coverages) in excess of $ _____ (insert maximum limit of indemnity or indemnities) the excess insurance shall be void and all premiums paid for such excess shall be returned to the insured or to his estate.

Or, in lieu thereof:

Insurance effective at any one time on the insured under a like policy or policies in this insurer is limited to the one such policy elected by the insured, his beneficiary or his estate, as the case may be, and the insurer will return all premiums paid for all other such policies.

(4) A provision in the substance of the following language:

INSURANCE WITH OTHER INSURERS: If there be other valid coverage, not with this insurer, providing benefits for the same loss on a provision of service basis or on an expense incurred basis and of which this insurer has not been given written notice prior to the occurrence or commencement of loss, the only liability under any expense incurred coverage of this policy shall be for such proportion of the loss as the amount which would otherwise have been payable hereunder plus the total of the like amounts under all such other valid coverages for the same loss of which this insurer had notice bears to the total like amounts under all valid coverages for such loss, and for the return of such portion of the premiums paid as shall exceed the pro rata portion for the amount so determined. For the purpose of applying this provision when other coverage is on a provision of service basis, the "like amount" of such other coverage shall be taken as the amount which the services rendered would have cost in the absence of such coverage.

(If the foregoing policy provision is included in a policy which also contains the next following policy provision there shall be added to the caption of the foregoing provision the phrase "_____ EXPENSE INCURRED BENEFITS." The insurer may, at its option, include in this provision a definition of "other valid coverage," approved as to form by the Commissioner, which definition shall be limited in subject matter to coverage provided by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, and by hospital or medical service organizations, and to any other coverage the inclusion of which may be approved by the Commissioner. In the absence of such definition such term shall not include group insurance, automobile medical payments insurance, or coverage provided by hospital or medical service organizations or by union welfare plans or employer or employee benefit organizations. For the purpose of applying the foregoing policy provision with respect to any insured, any amount of benefit provided for such insured pursuant to any compulsory benefit

statute (including any workers' compensation or employer's liability statute) whether provided by a governmental agency or otherwise shall in all cases be deemed to be "other valid coverage" of which the insurer has had notice. In applying the foregoing policy provisions no third-party liability coverage shall be included as "other valid coverage.")

(5) A provision in the substance of the following language:

INSURANCE WITH OTHER INSURERS: If there be other valid coverage, not with this insurer, providing benefits for the same loss on other than an expense incurred basis and of which this insurer has not been given written notice prior to the occurrence or commencement of loss, the only liability for such benefits under this policy shall be for such proportion of the indemnities otherwise provided hereunder for such loss as the like indemnities of which the insurer had notice (including the indemnities under this policy) bear to the total amount of all like indemnities for such loss, and for the return of such portion of the premium paid as shall exceed the pro rata portion for the indemnities thus determined.

(If the foregoing policy provision is included in a policy which also contains the next preceding policy provision there shall be added to the caption of the foregoing provision the phrase "_____ OTHER BENEFITS." The insurer may, at its option, include in this provision a definition of "other valid coverage," approved as to form by the Commissioner, which definition shall be limited in subject matter to coverage provided by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, and to any other coverage the inclusion of which may be approved by the Commissioner. In the absence of such definition such term shall not include group insurance, or benefits provided by union welfare plans or by employer or employee benefit organizations. For the purpose of applying the foregoing policy provision with respect to any insured, any amount of benefit provided for such insured pursuant to any compulsory benefit statute (including any workers' compensation or employer's liability statute) whether provided by a governmental agency or otherwise shall in all cases be deemed to be "other valid coverage" of which the insurer has had notice. In applying the foregoing policy provision no third-party liability coverage shall be included as "other valid coverage.")

(6) A provision in the substance of the following language:

RELATION OF EARNINGS TO INSURANCE: If the total monthly amount of loss of time benefits promised for the same loss under all valid loss of time coverage upon the insured, whether payable on a weekly or monthly basis, shall exceed the monthly earnings of the insured at the time disability commenced or his average monthly earnings for the period of two years immediately preceding a disability for which claim is made, whichever is the greater, the insurer will be liable only for such proportionate amount of such benefits under this policy as the amount of such monthly earnings or such average monthly earnings of the insured bears to the total amount of monthly benefits for the same loss under all such coverage upon the insured at the time such disability commences and for the return of such part of the premiums paid during such two years as shall exceed the pro rata amount of the premiums for the benefits actually paid hereunder; but this shall not operate to reduce the total monthly amount of benefits payable under all such coverage upon the insured below the sum of

two hundred dollars ($200.00) or the sum of the monthly benefits specified in such coverages, whichever is the lesser, nor shall it operate to reduce benefits other than those payable for loss of time.

(The foregoing policy provision may be inserted only in a policy which the insured has the right to continue in force subject to its terms by the timely payment of premiums:

a. Until at least age 50 or,

b. In the case of a policy issued after age 44, for at least five years from its date of issue.

The insurer may, at its option, include in this provision a definition of "valid loss of time coverage," approved as to form by the Commissioner, which definition shall be limited in subject matter to coverage provided by governmental agencies or by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, or to any other coverage the inclusion of which may be approved by the Commissioner or any combination of such coverages. In the absence of such definition such term shall not include any coverage provided for such insured pursuant to any compulsory benefit statute (including any workers' compensation or employer's liability statute), or benefits provided by union welfare plans or by employer or employee benefit organizations.)

(7) A provision in the substance of the following language:

UNPAID PREMIUM: Upon the payment of a claim under this policy, any premium then due and unpaid or covered by any note or written order may be deducted therefrom.

(8) Repealed by Session Laws 1955, c. 886, s. 1.

(9) A provision in the substance of the following language:

CONFORMITY WITH STATE STATUTES: Any provision of this policy which, on its effective date, is in conflict with the statutes of the state in which the insured resides on such date is hereby amended to conform to the minimum requirements of such statutes.

(10) A provision in the substance of the following language:

ILLEGAL OCCUPATION: The insurer shall not be liable for any loss to which a contributing cause was the insured's commission of or attempt to commit a felony or to which a contributing cause was the insured's being engaged in an illegal occupation.

(11) Repealed by Session Laws 2001-334, s. 4.1, effective October 1, 2001.

(c) Inapplicable or Inconsistent Provisions. — If any provision of this section is in whole or in part inapplicable to or inconsistent with the coverage provided by a particular form of policy the insurer, with the approval of the Commissioner, shall omit from such policy any inapplicable provision or part of a provision, and shall modify any inconsistent provision or part of the provision in such manner as to make the provision as contained in the policy consistent with the coverage provided by the policy.

(d) Order of Certain Policy Provisions. — The provisions which are the subject of subsections (a) and (b) of this section, or any corresponding provisions which are used in lieu thereof in accordance with such subsections, shall be printed in the consecutive order of the provisions in such subsections or, at the option of the insurer, any such provision may appear as a unit in any part of the policy, with other provisions to which it may be logically related, provided the resulting policy shall not be in whole or in part unintelligible, uncertain, ambiguous, abstruse, or likely to mislead a person to whom the policy is offered, delivered or issued.

(e) Third-Party Ownership. — The word "insured," as used in Articles 50 through 55 of this Chapter shall not be construed as preventing a person other

than the insured with a proper insurable interest from making application for and owning a policy covering the insured or from being entitled under such a policy to any indemnities, benefits and rights provided therein.

(f) Requirements of Other Jurisdictions.

(1) Any policy of a foreign or alien insurer, when delivered or issued for delivery to any person in this State, may contain any provision which is not less favorable to the insured or the beneficiary than the provisions of Articles 50 through 55 of this Chapter and which is prescribed or required by the law of the state under which the insurer is organized.

(2) Any policy of a domestic insurer may, when issued for delivery in any other state or country, contain any provision permitted or required by the laws of such other state or country.

(g) Filing Procedure. — The Commissioner may make such reasonable rules and regulations concerning the procedure for the filing or submission of policies subject to Articles 50 through 55 of this Chapter as are necessary, proper or advisable to the administration of Articles 50 through 55 of this Chapter. This provision shall not abridge any other authority granted the Commissioner by law.

(h) Preexisting Condition Exclusion Clarification. — Sub-subdivision (a)(2) b. of this section does not apply to:

(1) Policies issued to eligible individuals under G.S. 58-68-60.

(2) Excepted benefits as described in G.S. 58-68-25(b). (1953, c. 1095, s. 2; 1955, c. 850, s. 8; c. 886, s. 1; 1961, c. 432; 1979, c. 755, ss. 9-12; 1983 (Reg. Sess., 1984), c. 1110, s. 13; 1987, c. 864, s. 42; 1987 (Reg. Sess., 1988), c. 975, s. 2; 1991, c. 636, s. 3; c. 720, s. 35; 1993, c. 506, s. 4; c. 553, s. 17; 1995, c. 507, s. 23A.1(g); 1995 (Reg. Sess., 1996), c. 742, s. 27; 1997-259, ss. 7, 7.1; 1999-351, s. 1; 2000-162, s. 4(d); 2001-334, s. 4.1; 2002-187, s. 5.2.)

Effect of Amendments. — Session Laws 2002-187, s. 5.2, effective October 31, 2002, substituted "G.S. 58-68-25(b)" for "G.S. 58-68-25(b)(1), (2), and (4)" in subdivision (h)(2).

Article 58.

Life Insurance and Viatical Settlements.

Part 2. Financial Provisions.

§ 58-58-60. Standard Nonforfeiture Law for Individual Deferred Annuities.

(a) This section shall be known as the Standard Nonforfeiture Law for Individual Deferred Annuities.

(b) This section shall not apply to any reinsurance, group annuity purchased under a retirement plan or plan of deferred compensation established or maintained by an employer (including a partnership or sole proprietorship) or by an employee organization, or by both, other than a plan providing individual retirement accounts or individual retirement annuities under section 408 of the Internal Revenue Code, as now or hereafter amended, premium deposit fund, variable annuity, investment annuity, immediate annuity, any deferred annuity contract after annuity payments have commenced, or reversionary annuity, nor to any contract which shall be delivered outside this State through an agent or other representative of the company issuing the contract.

(c) In the case of contracts issued on or after the operative date of this section as defined in subsection (1), no contract of annuity, except as stated in subsection (b), shall be delivered or issued for delivery in this State unless it contains in substance the following provisions, or corresponding provisions which in the opinion of the Commissioner are at least as favorable to the contract holder, upon cessation of payment of considerations under the contract.

(1) That upon cessation of payment of considerations under a contract, the company will grant a paid-up annuity benefit on a plan stipulated in the contract of such value as is specified in subsections (e), (f), (g), (h) and (j).

(2) If a contract provides for a lump sum settlement at maturity, or at any other time, that upon surrender of the contract at or prior to the commencement of any annuity payments, the company will pay in lieu of any paid-up annuity benefit a cash surrender benefit of such amount as is specified in subsections (e), (f), (h) and (j). The company shall reserve the right to defer the payment of such cash surrender benefit for a period of six months after demand therefor with surrender of the contract.

(3) A statement of the mortality table, if any, and interest rates used in calculating any minimum paid-up annuity, cash surrender or death benefits that are guaranteed under the contract, together with sufficient information to determine the amounts of such benefits.

(4) A statement that any paid-up annuity, cash surrender or death benefits that may be available under the contract are not less than the minimum benefits required by any statute of the state in which the contract is delivered and an explanation of the manner in which such benefits are altered by the existence of any additional amounts credited by the company to the contract, any indebtedness to the company on the contract or any prior withdrawals from or partial surrenders of the contract.

Notwithstanding the requirements of this section, any deferred annuity contract may provide that if no considerations have been received under a contract for a period of two full years and the portion of the paid-up annuity benefit at maturity on the plan stipulated in the contract arising from considerations paid prior to such period would be less than twenty dollars ($20.00) monthly, the company may at its option terminate contract by payment in cash of the then present value of such portion of the paid-up annuity benefit, calculated on the basis of the mortality table, if any, and interest rate specified in the contract for determining the paid-up annuity benefit, and by such payment shall be relieved of any further obligation under such contract.

(d) The minimum values as specified in subsections (e), (f), (g), (h) and (j) of any paid-up annuity, cash surrender or death benefits available under an annuity contract shall be based upon minimum nonforfeiture amounts as defined in this section.

(1) With respect to contracts providing for flexible considerations, the minimum nonforfeiture amount at any time at or prior to the commencement of any annuity payments shall be equal to an accumulation up to such time at a rate of interest of one and one-half percent (1½%) per annum of percentages of the net considerations (as hereinafter defined) paid prior to such time, decreased by the sum of:

(i) Any prior withdrawals from or partial surrenders of the contract accumulated at a rate of interest of one and one-half percent (1½%) per annum; and

(ii) The amount of any indebtedness to the company on the contract, including interest due and accrued, and increased by any existing additional amounts credited by the company to the contract.

The net considerations for a given contract year used to define the minimum nonforfeiture amount shall be an amount not less than zero and shall be equal to the corresponding gross considerations credited to the contract during that contract year less an annual contract charge of thirty dollars ($30.00) and less a collection charge of one dollar and twenty-five cents ($1.25) per consideration credited to the contract during that contract year. The percentages of net considerations shall be sixty-five percent (65%) of the net consideration for the first contract year and eighty-seven and one-half (87 ½%) of the net considerations for the second and later contract years. Notwithstanding the provisions of the preceding sentence, the percentage shall be sixty-five percent (65%) of the portion of the total net consideration for any renewal contract year which exceeds by not more than two times the sum of those portions of the net considerations in all prior contract years for which the percentage was sixty-five percent (65%).

(2) With respect to contracts providing for fixed scheduled considerations, minimum nonforfeiture amounts shall be calculated on the assumption that considerations are paid annually in advance and shall be defined as for contracts with flexible considerations which are paid annually with two exceptions:

(i) The portion of the net consideration for the first contract year to be accumulated shall be the sum of sixty-five percent (65%) of the net consideration for the first contract year plus twenty-two and one-half percent (22 ½%) of the excess of the net consideration for the first contract year over the lesser of the net considerations for the second and third contract years.

(ii) The annual contract charge shall be the lesser of (i) thirty dollars ($30.00) or (ii) ten percent (10%) of the gross annual considerations.

(3) With respect to contracts providing for a single consideration, minimum nonforfeiture amounts shall be defined as for contracts with flexible considerations except that the percentage of net consideration used to determine the minimum nonforfeiture amount shall be equal to ninety percent (90%) and the net consideration shall be the gross consideration less a contract charge of seventy-five dollars ($75.00).

(e) Any paid-up annuity benefit available under a contract shall be such that its present value on the date annuity payments are to commence is at least equal to the minimum nonforfeiture amount on that date. Such present value shall be computed using the mortality table, if any, and the interest rate specified in the contract for determining the minimum paid-up annuity benefits guaranteed in the contract.

(f) For contracts which provide cash surrender benefits, such cash surrender benefits available prior to maturity shall not be less than the present value as of the date of surrender of that portion of the maturity value of the paid-up annuity benefit which would be provided under the contract at maturity arising from considerations paid prior to the time of cash surrender reduced by the amount appropriate to reflect any prior withdrawals from or partial surrenders of the contract, such present value being calculated on the basis of an interest rate not more than one percent (1%) higher than the interest rate specified in the contract for accumulating the net considerations to determine such maturity value, decreased by the amount of any indebtedness to the company on the contract, including interest due and accrued, and increased by any existing additional amounts credited by the company to the contract. In no event shall any cash surrender benefit be less than the minimum nonforfeiture

amount at that time. The death benefit under such contracts shall be at least equal to the cash surrender benefit.

(g) For contracts which do not provide cash surrender benefits, the present value of any paid-up annuity benefit available as a nonforfeiture option at any time prior to maturity shall not be less than the present value of that portion of the maturity value of the paid-up annuity benefit provided under the contract arising from considerations paid prior to the time the contract is surrendered in exchange for, or changed to, a deferred paid-up annuity, such present value being calculated for the period prior to the maturity date on the basis of the interest rate specified in the contract for accumulating the net considerations to determine such maturity value, and increased by any existing additional amounts credited by the company to the contract. For contracts which do not provide any death benefits prior to the commencement of any annuity payments, such present values shall be calculated on the basis of such interest rate and the mortality table specified in the contract for determining the maturity value of the paid-up annuity benefit. However, in no event shall the present value of a paid-up annuity benefit be less than the minimum nonforfeiture amount at that time.

(h) For the purpose of determining the benefits calculated under subsections (f) and (g), in the case of annuity contracts under which an election may be made to have annuity payments commence at optional maturity dates, the maturity date shall be deemed to be the latest date for which election shall be permitted by the contract, but shall not be deemed to be later than the anniversary of the contract next following the annuitant's seventieth birthday or the tenth anniversary of the contract, whichever is later.

(i) Any contract which does not provide cash surrender benefits or does not provide death benefits at least equal to the minimum nonforfeiture amount prior to the commencement of any annuity payments shall include a statement in a prominent place in the contract that such benefits are not provided.

(j) Any paid-up annuity, cash surrender or death benefits available at any time, other than on the contract anniversary under any contract with fixed scheduled considerations, shall be calculated with allowance for the lapse of time and the payment of any scheduled considerations beyond the beginning of the contract year in which cessation of payment of considerations under the contract occurs.

(k) For any contract which provides, within the same contract by rider or supplemental contract provision, both annuity benefits and life insurance benefits that are in excess of the greater of cash surrender benefits or a return of the gross considerations with interest, the minimum nonforfeiture benefits shall be equal to the sum of the minimum nonforfeiture benefits for the annuity portion and the minimum nonforfeiture benefits, if any, for the life insurance portion computed as if each portion were a separate contract. Notwithstanding the provisions of subsections (e), (f), (g), (h) and (j), additional benefits payable (1) in the event of total and permanent disability, (2) as reversionary annuity or deferred reversionary annuity benefits, or (3) as other policy benefits additional to life insurance, endowment and annuity benefits, and considerations for all such additional benefits, shall be disregarded in ascertaining the minimum nonforfeiture amounts, paid-up annuity, cash surrender and death benefits that may be required by this section. The inclusion of such additional benefits shall not be required in any paid-up benefits, unless such additional benefits separately would require minimum nonforfeiture amounts, paid-up annuity, cash surrender and death benefits.

(*l*) After April 19, 1979, any company may file with the Commissioner a written notice of its election to comply with the provisions of this section after a specified date before the second anniversary of the effective date of this section. After the filing of such notice, then upon such specified date, which

shall be the operative date of this section for such company, this section shall become operative with respect to annuity contracts thereafter issued by such company. If a company makes no such election, the operative date of this section for such company shall be the second anniversary of the effective date of this section. (1979, c. 409, s. 11; 2002-187, s. 8.)

Effect of Amendments. — Session Laws 2002-187, s. 8, effective October 31, 2002 and applicable to policies issued on or after that date, substituted "one and one-half percent (1 1/2%)" for "three percent (3%)" twice in subsection (d).

Article 63.

Unfair Trade Practices.

§ 58-63-15. Unfair methods of competition and unfair or deceptive acts or practices defined.

CASE NOTES

A violation of this section as a matter of law constitutes an unfair or deceptive trade practice in violation of G.S. 75-1.1.

Unfair and deceptive acts in the insurance area are not regulated exclusively by Article 63 of Chapter 58, but are also actionable under G.S. 75-1.1; there is no requirement that a party bringing a claim for unfair or deceptive trade practices against an insurance company allege a violation of G.S. 58-63-15 in order to bring a claim pursuant to G.S. 75-1.1. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

General Business Practice Need Not Be Shown Under G.S. 75-1.1. — Acts listed in G.S. 58-63-15(11) constitute a violation of G.S. 75-1.1 without the necessity of an additional showing of frequency indicating a "general business practice," as is required under G.S. 58-63-15(11)(f). Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

This Section Furnishes Examples of Unfair and Deceptive Acts or Practices. — In order to establish a violation of G.S. 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs; a court may look to the types of conduct prohibited by G.S. 58-63-15(11) for examples of conduct which would constitute an unfair and deceptive act or practice. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Article 65.

Hospital, Medical and Dental Service Corporations.

Part 1. In General.

§ 58-65-131. Findings; definitions; conversion plan.

OPINIONS OF ATTORNEY GENERAL

Contracts with Experts, Consultants, or Other Professional Advisors to Review Conversion Plans Are Exempt from Articles 3 and 3C of Chapter 143 of the General Statutes. — The Commissioner of Insurance has statutory authority to contract with experts, consultants, or other professional advisors to review conversion plans without adhering to the requirements set forth in Articles 3 and 3C of Chapter 143 of the General Statutes; the only statutory requirement that must be met by the Commissioner is that the costs for the personal professional service contracts must not exceed an amount that is reasonable

and appropriate for the review of the plan. See opinion of Attorney General to Peter A. Kolbe, General Counsel, North Carolina Department of Insurance, 2001 N.C. AG LEXIS 28 (8/24/01).

ARTICLE 68.

Health Insurance Portability and Accountability.

Part A. Group Market Reforms.

SUBPART 1. Portability, Access, and Renewability Requirements.

§ 58-68-25. Definitions; excepted benefits; employer size rule.

(a) Definitions. — In addition to other definitions throughout this Article, the following definitions and their cognates apply in this Article:

(1) "Bona fide association". — With respect to health insurance coverage offered in this State, an association that:
   a. Has been actively in existence for at least five years.
   b. Has been formed and maintained in good faith for purposes other than obtaining insurance.
   c. Does not condition membership in the association on any health status-related factor relating to an individual (including an employee of an employer or a dependent of an employee).
   d. Makes health insurance coverage offered through the association available to all members regardless of any health status-related factor relating to the members (or individuals eligible for coverage through a member).
   e. Does not make health insurance coverage offered through the association available other than in connection with a member of the association.
   f. Meets the additional requirements as may be imposed under State law.

(2) "COBRA continuation provision". — Any of the following:
   a. Section 4980B of the Internal Revenue Code of 1986, other than subdivision (f)(1) of the section insofar as it relates to pediatric vaccines.
   b. Part 6 of subtitle B of title I of the Employee Retirement Income Security Act of 1974, other than section 609 of the Act.
   c. Title XXII of the Public Health Service Act (42 U.S.C.S. § 300bb, et seq.,) as requirements for certain group health plans for certain State and local employees.
   d. Article 53 of this Chapter or the health insurance continuation law of another state.

(3) "Employee". — The meaning given the term under section 3(6) of the Employee Retirement Income Security Act of 1974.

(4) "Employer". — The meaning given the term under section 3(5) of the Employee Retirement Income Security Act of 1974, except that the term shall include only employers of two or more employees.

(5) "Health insurance coverage" or "coverage" or "health insurance plan" or "plan". — Benefits consisting of medical care, provided directly through insurance or otherwise and including items and services paid for as medical care, under any accident and health insurance policy or

certificate, hospital or medical service plan contract, or health maintenance organization contract, written by a health insurer.

(6) "Health insurer". — An insurance company subject to this Chapter, a hospital or medical service corporation subject to Article 65 of this Chapter, a health maintenance organization subject to Article 67 of this Chapter, or a multiple employer welfare arrangement subject to Article 49 of this Chapter, that offers and issues health insurance coverage.

(7) "Health status-related factor". — Any of the factors described in G.S. 58-68-35(a)(1).

(8) "Individual health insurance coverage". — Health insurance coverage offered to individuals in the individual market, but not short-term limited duration insurance.

(9) "Individual market". — The market for health insurance coverage offered to individuals.

(10) "Large employer". — An employer who employed an average of at least 51 employees on business days during the preceding calendar year and who employs at least two employees on the first day of the health insurance plan year.

(11) "Large group market". — The health insurance market under which individuals obtain health insurance coverage, directly or through any arrangement, on behalf of themselves and their dependents through a group health insurance plan maintained by a large employer.

(12) "Medical care". — Amounts paid for:

a. The diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body.

b. Amounts paid for transportation primarily for and essential to medical care referred to in sub-subdivision a. of this subdivision.

c. Amounts paid for insurance covering medical care referred to in sub-subdivisions a. and b. of this subdivision.

(13) "Network plan". — Health insurance coverage of a health insurer under which the financing and delivery of medical care (including items and services paid for as medical care) are provided, in whole or in part, through a defined set of health care providers under contract with the health insurer.

(14) "Participant". — The meaning given the term under section 3(7) of the Employee Retirement Income Security Act of 1974.

(15) "Placed for adoption". — The assumption and retention by a person of a legal obligation for total or partial support of a child in anticipation of adoption of the child. The child's placement with the person terminates upon the termination of the legal obligation.

(16) "Small employer". — The meaning given to the term in G.S. 58-50-110(22).

(17) "Small group market". — The health insurance market under which individuals obtain health insurance coverage, directly or through any arrangement, on behalf of themselves and their dependents through a group health insurance plan maintained by a small employer.

(b) Excepted Benefits. — For the purposes of this Article, "excepted benefits" means benefits under one or more or any combination of the following:

(1) Benefits not subject to requirements. —

a. Coverage only for accident or disability income insurance or any combination of these.

b. Coverage issued as a supplement to liability insurance.

c. Liability insurance, including general liability insurance and automobile liability insurance.

d. Workers' compensation or similar insurance.
e. Automobile medical payment insurance.
f. Credit-only insurance.
g. Coverage for on-site medical clinics.
h. Other similar insurance coverage, specified in federal regulations, under which benefits for medical care are secondary or incidental to other insurance benefits.
i. Short-term limited-duration health insurance policies as defined in Part 144 of Title 45 of the Code of Federal Regulations.

(2) Benefits not subject to requirements if offered separately. —
a. Limited scope dental or vision benefits.
b. Benefits for long-term care, nursing care, home health care, community-based care, or any combination of these.
c. The other similar, limited benefits as are specified in federal regulations.

(3) Benefits not subject to requirements if offered as independent, noncoordinated benefits. —
a. Coverage only for a specified disease or illness.
b. Hospital indemnity or other fixed indemnity insurance.

(4) Benefits not subject to requirements if offered as separate insurance policy. — Medicare supplemental health insurance (as defined under section 1882(g)(1) of the Social Security Act), coverage supplemental to the coverage provided under chapter 55 of title 10, United States Code, and similar supplemental coverage provided to coverage under a group health insurance plan.

(c) Application of certain rules in determination of employer size. — For the purposes of this Article:

(1) Application of aggregation rule for employers. — All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as one employer.

(2) Employers not in existence in preceding year. — In the case of an employer that was not in existence throughout the preceding calendar year, the determination of whether the employer is a small or large employer shall be based on the average number of employees that it is reasonably expected the employer will employ on business days in the current calendar year.

(3) Predecessors. — Any reference in this subsection to an employer shall include a reference to any predecessor of the employer. (1997-259, s. 1(c); 2002-187, s. 5.1.)

Effect of Amendments. — Session Laws 2002-187, s. 5.1, effective October 31, 2002, added subdivision (b)(1)i.

Article 84.

Fund Derived from Insurance Companies.

§ 58-84-1. Fire and lightning insurance report.

Local Modification. — Forsyth: 1995, c. 160, s. 1; city of Hendersonville: 1993, c. 244, s. 1; city of Lenoir 1977, c. 118; 1981, c. 291; 1991 (Reg. Sess., 1992), cc. 800, 900; city of Lexington: 1981, c. 906, s. 6.1; 1983, c. 462; 1989 (Reg. Sess., 1990), c. 931; city of Reidsville: 1989 (Reg. Sess., 1990), c. 957, s. 1; city of Sanford: 1991 (Reg. Sess., 1992), c. 798, s. 10; town of Cary: 1989 (Reg. Sess., 1990), c. 924; 1991, c. 147, s. 1.

Local Supplemental Firemen's Retirement Fund. — Forsyth: 1969, c. 418; 1995, c.

160; Mount Airy: 2000-22, s. 1, 1995, c. 165, s.1; city of Asheboro: 1985, c. 186; city of Asheville: 1979, 2nd Sess., c. 1315, amending 1979, c. 208; city of Belhaven: 1981, c. 294; city of Burlington: 1969, c. 321; 1979, 2nd Sess., c. 1144; 1987, c. 612; city of Charlotte: 1947, c. 837; 1965, c. 210; city of Clinton: 1969, c. 177; 1973, c. 46; 1979, c. 264; city of Conover: 1977, c. 334; 1991, c. 260, s. 1; city of Durham: 1951, c. 576; 1973, c. 701; 1983, c. 463; 2002-114, ss. 1 and 2; city of Eden: 1977, c. 285; city of Fayetteville: 1979, c. 557, s. 8.3; 1987, c. 85; 1991, c. 149, s. 1; city of Greensboro: 1953, c. 899; 1979, c. 289; 1983, c. 466; 1987, c. 178; 1993, c. 431, s. 1; city of Greenville: 1967, c. 570; city of Henderson: 1959, c. 810; 1969, c. 374; 1977, c. 133; 1981, c. 111; 1987, c. 173; 1991 (Reg. Sess., 1992), c. 897, s. 1; 2001-71; city of Hendersonville: 1981, c. 341; city of Hickory: 1985, c. 139; 1999-128, s. 1; city of Kings Mountain: 1979, c. 209; city of Lenoir: 1973, c. 1261; city of Lexington: 1981, c. 906, s. 6.1; 1983 c. 462; 1989 (Reg. Sess., 1990), c. 931; city of Lumberton: 1955, c. 100; 1973, c. 960; 1989, c. 357, c. 770; 1991 (Reg. Sess., 1992), c. 792; 1995 (Reg. Sess., 1996), c. 699; city of Mayodan: 1985, c. 255; city of Monroe: 2000-35, s. 1; city of Mount Airy: 1995, c. 165, s. 1; 2000-22, s. 1; city of New Bern: 1969, c. 704; 1983, c. 551; city of Newton: 1969, c. 363; 1981, c. 298; 1983, c. 503; city of North Wilkesboro: 1969, c. 120; 1979, c. 366; city of Reidsville: 1979, c. 94; 1981 (Reg. Sess., 1982), c. 1235; 1989, c. 278; 1989 (Reg. Sess., 1990), c. 957, s. 1; 1977, c. 312; 1989, c. 247; city of Rocky Mount: 1969, c. 434; 1975, c. 353; 1983, c. 498; 1991, c. 497, s. 1; c. 761, s. 43; city of Sanford: 1991 (Reg. Sess., 1992), c. 798; city of Shelby: 1969, cc. 496, 552; 1985, c. 209; 1987 (Reg. Sess., 1988), c. 985; 1991 (Reg. Sess., 1992), c. 791; city of Washington: 1975, c. 418; city of Whiteville: 1971, c. 308; 1987 (Reg. Sess., 1988), c. 1018, s. 1; city of Williamston: 1985, c. 188; city of Wilmington: 1949, c. 684; 1973, c. 939; 1975, c. 247; 1983, cc. 504, 505, 906; 1987 (Reg. Sess., 1988), c. 904; city of Wilson: 1969, c. 138; 1995 (Reg. Sess., 1996), c. 678; city of Winston-Salem: 1973, c. 388; 1977, c. 15; 1979, c. 284; 1981, c. 647; 1983, c. 464; 1987, c. 508; 1989, c. 793; S.L. 1998-92; town of Black Mountain: 1965, c. 672; town of Canton: 1979, 2nd Sess., c. 1105; town of Edenton: 1981, cc. 286, 996; town of Elkin: 1969, c. 169; 1971, c. 391; 1987, c. 740, ss. 1 and 5; town of Farmville: 1981, c. 533; town of Lillington: 1981, c. 285; town of Mebane: 1979, c. 183; town of Mount Airy: 1967, c. 302, s. 9; 1973, c. 121; town of North Wilkesboro: 1981, c. 287; 1987, c. 176; town of Selma: 1987, c. 614; town of Smithfield: 1973, c. 941; town of Tarboro: 1973, c. 261; 1985, c. 157; 1987, c. 609; town of Valdese: 1983, c. 501; town of Wadesboro: 1967, c. 596; town of Waynesville: 1981, c. 288; town of Wilkesboro: 1985, c. 131; 1999-56, s. 1; village of Kannapolis: 1971, c. 408; 1973, c. 216; 1975, c. 423; 1983, c. 497.

§ 58-84-35. Disbursement of funds by trustees.

Local Modification. — City of Durham: 1951, c. 577; 2002-114, s. 3.

Article 86.

North Carolina Firemen's and Rescue Squad Workers' Pension Fund.

§ 58-86-55. Monthly pensions upon retirement.

Any member who has served 20 years as an "eligible fireman" or "eligible rescue squad worker" in the State of North Carolina, as provided in G.S. 58-86-25 and G.S. 58-86-30, and who has attained the age of 55 years is entitled to be paid a monthly pension from this fund. The monthly pension shall be in the amount of one hundred fifty-six dollars ($156.00) per month. Any retired fireman receiving a pension shall, effective July 1, 2002, receive a pension of one hundred fifty-six dollars ($156.00) per month.

Members shall pay ten dollars ($10.00) per month as required by G.S. 58-86-35 and G.S. 58-86-40 for a period of no longer than 20 years. No "eligible rescue squad member" shall receive a pension prior to July 1, 1983. No member shall be entitled to a pension hereunder until the member's official duties as a fireman or rescue squad worker for which the member is paid compensation

shall have been terminated and the member shall have retired as such according to standards or rules fixed by the board of trustees.

A member who is totally and permanently disabled while in the discharge of the member's official duties as a result of bodily injuries sustained or as a result of extreme exercise or extreme activity experienced in the course and scope of those official duties and who leaves the fire or rescue squad service because of this disability shall be entitled to be paid from the fund a monthly benefit in an amount of one hundred fifty-six dollars ($156.00) per month beginning the first month after the member's fifty-fifth birthday. All applications for disability are subject to the approval of the board who may appoint physicians to examine and evaluate the disabled member prior to approval of the application, and annually thereafter. Any disabled member shall not be required to make the monthly payment of ten dollars ($10.00) as required by G.S. 58-86-35 and G.S. 58-86-40.

A member who is totally and permanently disabled for any cause, other than line of duty, who leaves the fire or rescue squad service because of this disability and who has at least 10 years of service with the pension fund, may be permitted to continue making a monthly contribution of ten dollars ($10.00) to the fund until the member has made contributions for a total of 240 months. The member shall upon attaining the age of 55 years be entitled to receive a pension as provided by this section. All applications for disability are subject to the approval of the board who may appoint physicians to examine and evaluate the disabled member prior to approval of the application and annually thereafter.

A member who, because his residence is annexed by a city under Part 2 or Part 3 of Article 4 of Chapter 160A of the General Statutes, or whose department is closed because of an annexation by a city under Part 2 or Part 3 of Article 4 of Chapter 160A of the General Statutes, or whose volunteer department is taken over by a city or county, and because of such annexation or takeover is unable to perform as a fireman or rescue squad worker of any status, and if the member has at least 10 years of service with the pension fund, may be permitted to continue making a monthly contribution often dollars ($10.00) to the fund until the member has made contributions for a total of 240 months. The member upon attaining the age of 55 years and completion of such contributions shall be entitled to receive a pension as provided by this section. Any application to make monthly contributions under this section shall be subject to a finding of eligibility by the Board of Trustees upon application of the member.

The pensions provided shall be in addition to all other pensions or benefits under any other statutes of the State of North Carolina or the United States, notwithstanding any exclusionary provisions of other pensions or retirement systems provided by law. (1957, c. 1420, s. 1; 1959, c. 1212, s. 1; 1961, c. 980; 1971, c. 336; 1977, c. 926, s. 1; 1981, c. 1029, s. 1; 1983, c. 500, s. 2; c. 636, s. 24; 1985 (Reg. Sess., 1986), c. 1014, s. 49.1(b); 1987 (Reg. Sess., 1988), c. 1099, s. 1; 1991, c. 720, s. 48; 1993 (Reg. Sess., 1994), c. 653, s. 1; 1995, c. 507, s. 7.21A(g); 1997-443, s. 33.25(a); 1998-212, s. 28.21(a); 2000-67, s. 26.18; 2002-113, s. 1; 2002-126, s. 28.7.)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-113, s. 1, effective September 6, 2002, and applicable to members of the Firemen's and Rescue Squad Workers' Pension Fund with at least 10 years of service on or after January 1, 2002, substituted "or whose volunteer department is taken over by a city or county, and because of such annexation or takeover is unable to perform as a fireman or rescue squad worker" for "and because of such annex ation is unable to perform as a fireman" in the first sentence of the fifth paragraph.

Session Laws 2002-126, s. 28.7, effective July

1, 2002, substituted "one hundred fifty-six dollars ($156.00)" for "one hundred fifty-one dollars ($151.00)" throughout the section; and substituted "July 1, 2002" for "July 1, 2000" in the final sentence of the first paragraph.

§ 58-86-91. Deduction for payments to certain employees' or retirees' associations allowed.

Any member who is a member of a domiciled employees' or retirees' association that has at least 2,000 members, the majority of whom are active or retired employees of the State or public school employees, may authorize, in writing, the periodic deduction from the member's retirement benefits a designated lump sum to be paid to the employees' or retirees' association. The authorization shall remain in effect until revoked by the member. A plan of deductions pursuant to this section shall become void if the employees' or retirees' association engages in collective bargaining with the State, any political subdivision of the State, or any local school administrative unit. (2002-126, s. 6.4(f).)

Editor's Note. — Session Laws 2002-126, s. 31.7, made this section effective July 1, 2002.

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Article 89.

North Carolina Professional Employer Organization Act.

§ 58-89-1. Title.

This Article shall be known and may be cited as the "North Carolina Professional Employer Organization Act". (2002-168, s. 8.)

Editor's Note. — Session Laws 2002-168, s. 11, makes this article effective January 1, 2003, and applicable to any contracts entered into, any business conducted, and any actions taken on or after that date.

Session Laws 2002-168, s. 9, provides: "The Department of Insurance shall report to the 2005 General Assembly on the implementation, administration, and enforcement of Article 89 of Chapter 58 of the General Statutes, as enacted in Section 8 of this act. In its report, the Department shall recommend any statutory changes required to regulate professional employer organizations and enforce Article 89 of Chapter 58 of the General Statutes."

Session Laws 2002-168, s. 10, provides: "Notwithstanding G.S. 58-89-30, each professional employer organization operating within this State as of January 1, 2003, shall complete its initial registration not later than 180 days after January 1, 2003. Each professional employer organization not operating within this State as of January 1, 2003, shall complete its initial registration prior to commencement of operations within this State."

§ 58-89-5. Definitions.

In this Article:

(1) "Applicant" means a person applying for a registration under this Article.

(2) "Control", including the terms "controlling, "controlled by", and "under common control with", has the same meaning as in G.S. 58-19-5(2).

(3) "Managed services" means services provided by an organization that is the sole employer of employees whom it supplies to staff and to manage a specific portion of a company's workforce or a specific facility within a company on an ongoing basis. The managed services

organization has responsibility for ensuring the capabilities and skills of the employees it supplies or provides, for all employer functions, for supervisory responsibility over the employees, and for management accountability of the facility or function.

(4) "Person" has the same meaning as in G.S. 58-1-5(9).

(5) "Personnel placement services" means a service that offers job placement services in which the personnel placement service organization assists persons interested in finding a job with companies that are seeking employees. Companies that hire persons through a personnel placement service are the sole employers of the persons hired, and the personnel placement service does not have any responsibility as an employer.

(6) "Professional employer organization" means a person that offers professional employer services and includes "staff leasing services companies", "employee leasing companies", "staff leasing companies", and "administrative employers" who offer or propose to offer professional employer services in this State.

(7) "Professional employer organization group" means a combination of professional employer organizations that operates under a group registration issued under this Article.

(8) "Professional employer services" means an arrangement by which employees of a registrant are assigned to work at a client company and in which employment responsibilities are in fact shared by the registrant and the client company, the employee's assignment is intended to be of a long-term or continuing nature, rather than temporary or seasonal in nature, and a majority of the workforce at a client company work site or a majority of the personnel of a specialized group within that workforce consists of assigned employees of the registrant. "Professional employer services" does not include services that provide temporary employees or independent contractors, personnel placement services, managed services, payroll services that do not involve employee staffing or leasing, or similar groups that do not meet the requirements of this subdivision.

(9) "Temporary employees" means persons employed under an arrangement by which an organization hires its own employees and assigns them to a client company to support or supplement the client's workforce in a special work situation, including:

a. An employee absence;

b. A temporary skill shortage;

c. A seasonal workload; or

d. A special assignment or project. (2002-168, s. 8.)

§ 58-89-10. Rules.

(a) The Commissioner may adopt rules necessary to implement, administer, and enforce the provisions of this Article.

(b) Each registrant is subject to this Article and to the rules adopted by the Commissioner.

(c) Nothing in this Article preempts the existing statutory or rule-making authority of any other State agency or entity to regulate professional employer services in a manner consistent with the statutory authority of that State agency or entity. (2002-168, s. 8.)

§ 58-89-15. Registration required; professional employer organization groups.

(a) No person shall engage in or offer professional employer services in this State unless the person is registered with the Department of Insurance under this Article.

(b) Two or more professional employer organizations that are controlled by the same ultimate parent, entity, or persons may be registered as a professional employer organization group. A professional employer organization group may satisfy the requirements of this Article on a consolidated basis.

(c) An applicant for an initial professional employer organization registration shall file with the Commissioner the information required by subsection (d) of this section on a form prescribed by the Commissioner accompanied by the registration fee. No application is complete until the Commissioner has received all required information.

(d) The registration application shall, at a minimum, be comprised of all of the following information:

(1) The name, organizational structure, and date of organization of the applicant, the addresses of the principal office and all offices in this State, the name of the contact person, and the taxpayer or employer identification number.

(2) A list by jurisdiction of each name under which the applicant has operated in the preceding five years, including any alternative names, names of predecessors, and, if known, successor business entities. The list required by this subdivision shall include the parent company name and any trade name, trademark, or service mark of the applicant.

(3) A list of all officers and controlling persons of the applicant, their biographical information, including their management background, and an affidavit from each attesting to his or her good moral character and management competence.

(4) The location of the business records of the applicant.

(5) Evidence that the applicant has paid all of its obligations for payroll-related taxes, workers' compensation insurance, and employee benefits. All disputed amounts shall be disclosed in the application.

(6) Any other information the Commissioner deems necessary.

(e) An application for registration of a professional employer organization group shall contain the information required by this section for each member of the group.

(f) If the Commissioner finds that the applicant has not fully met the requirements for registration, the Commissioner shall refuse to register the applicant and shall notify the applicant in writing of the denial, stating the grounds for the denial. Within 30 days after service of the notification, the applicant may make a written demand upon the Commissioner for a review to determine the reasonableness of the Commissioner's action. The review shall be completed without undue delay, and the applicant shall be notified promptly in writing as to the outcome of the review. Within 30 days after service of the notification as to the outcome, the applicant may make a written demand upon the Commissioner for a hearing under Article 3A of Chapter 150B of the General Statutes if the applicant disagrees with the outcome. (2002-168, s. 8.)

Editor's Note. — Session Laws 2002-168, s. 10, provides: "Notwithstanding G.S. 58-89-30, each professional employer organization operating within this State as of January 1, 2003, shall complete its initial registration not later than 180 days after January 1, 2003. Each professional employer organization not operating within this State as of January 1, 2003, shall complete its initial registration prior to commencement of operations within this State."

§ 58-89-20. Fees.

(a) Each applicant for registration shall pay to the Commissioner, before the issuance of the registration, a nonrefundable application fee of two hundred fifty dollars ($250.00).

(b) Fees collected by the Commissioner under this Article shall be credited to the Department of Insurance Fund created under G.S. 58-6-25. (2002-168, s. 8.)

§ 58-89-25. Prohibited acts.

No person shall do any of the following:

(1) Engage in or offer professional employer services without being registered under this Article as a professional employer organization.

(2) Use the name or title "staff leasing company", "employee leasing company", "registered staff leasing company", "staff leasing services company", "professional employer organization", or "administrative employer" or otherwise represent that the person is registered under this Article unless the person is registered under this Article.

(3) Represent as the person's own the license of another person or represent that a person is registered if the person is not registered.

(4) Give materially false or forged evidence to the Commissioner in connection with obtaining a registration. (2002-168, s. 8.)

§ 58-89-30. Criminal penalty.

A person who violates G.S. 58-89-25 commits a Class H felony. Any officer or controlling person who willfully violates any provision of this Article may be subject to any and all criminal penalties available under State law. (2002-168, s. 8.)

Editor's Note. — Session Laws 2002-168, s. 10, provides: "Notwithstanding G.S. 58-89-30, each professional employer organization operating within this State as of January 1, 2003, shall complete its initial registration not later than 180 days after January 1, 2003. Each professional employer organization not operating within this State as of January 1, 2003, shall complete its initial registration prior to commencement of operations within this State."

Chapter 59.

Partnership.

Article 2.

Uniform Partnership Act.

Part 1. Preliminary Provisions.

§ 59-31. North Carolina Uniform Partnership Act.

CASE NOTES

Cited in Branch v. High Rock Realty, Inc., — N.C. App. —, 565 S.E.2d 248, 2002 N.C. App. LEXIS 727 (2002).

§ 59-35.1. Filing of documents.

(a) A document required or permitted by this Act to be filed by the Secretary of State must be filed under Chapter 55D of the General Statutes.

(b) A document submitted for filing by the Secretary of State on behalf of a general partnership must be executed by a general partner of the partnership.

(c) The Secretary of State may adopt and furnish on request forms for:

(1) An application for registration as a registered limited liability partnership;

(2) Cancellation of registration as a registered limited liability partnership;

(3) Application for registration as a foreign limited liability partnership; and

(4) Cancellation of registration as a foreign limited liability partnership.

If the Secretary of State so requires, use of these forms is mandatory.

(d) The Secretary of State may adopt and furnish on request forms for other documents required or permitted to be filed by this Act, but their use is not mandatory. (1999-369, s. 4.1; 2001-358, ss. 9, 38, 51(c); 2001-387, ss. 104, 105(c), 155, 170(a), 173, 175(a); 2001-413, s. 6; 2002-58, s. 4.)

Effect of Amendments. — Session Laws 2002-58, s. 4, effective January 1, 2002, in subsection (b), deleted "under this Act" following "submitted," and inserted "on behalf of a general partnership" following "Secretary of State."

§ 59-37. Rules for determining the existence of a partnership.

CASE NOTES

Cited in Trujillo v. N.C. Grange Mut. Ins. Co., 149 N.C. App. 811, 561 S.E.2d 590, 2002 N.C. App. LEXIS 301 (2002), cert. denied, 356 N.C. 176, — S.E.2d — (2002).

Part 3. Relations of Partners to Persons Dealing with the Partnership.

§ 59-39. Partner agent of partnership as to partnership business.

CASE NOTES

Authority of Partner to Bind Firm. — In a case brought by the United States under the National Housing Act against the owners of an apartment project, the court concluded that it had personal jurisdiction over the individual owners pursuant to G.S. 59-39(a) the individual owners were partners in a partnership, and one of the individual owners had signed several agreements as a general partner and as an agent for all other general partners, including the loan documents with a North Carolina bank and a regulatory agreement with the United States. United States v. Coleman, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 23682 (E.D.N.C. July 26, 2001).

Part 6. Dissolution and Winding Up.

§ 59-71. Liability of persons continuing the business in certain cases.

CASE NOTES

Continuation of Partnership Business. — The business of the parties' partnership was continued after the partnership's dissolution as contemplated by G.S. 59-71(c) when the business was continued without liquidation of the partnership affairs. Lewis v. Edwards, 147 N.C. App. 39, 554 S.E.2d 17, 2001 N.C. App. LEXIS 1060 (2001).

§ 59-72. Rights of retiring partner or estate of deceased partner when the business is continued.

CASE NOTES

Interest on Award for Judicial Accounting. — G.S. 59-72, which specifically addresses interest on an award for judicial accounting, upon a partner's retirement from a partner-

ship, controls over the general statute dealing with interest on judgments. Lewis v. Edwards, 147 N.C. App. 39, 554 S.E.2d 17, 2001 N.C. App. LEXIS 1060 (2001).

Article 2A.

Conversion and Merger.

Part 2. Conversion to Domestic Partnership.

§ 59-73.12. Filing of articles of conversion by converting business entity.

(a) After a plan of conversion has been approved by the converting business entity as provided in G.S. 59-73.11, the converting business entity shall deliver articles of conversion to the Secretary of State for filing. The articles of conversion shall state:

(1) That the domestic partnership is being formed pursuant to a conversion of another business entity;

(2) The name of the resulting domestic partnership, a designation of its mailing address, and a commitment to file with the Secretary of State a statement of any subsequent change in its mailing address;

(3) The name of the converting business entity, its type of business entity, and the state or country whose laws govern its organization and internal affairs; and

(4) That a plan of conversion has been approved by the converting business entity as required by law.

If the resulting domestic partnership is to be a registered limited liability partnership when the conversion takes effect, then instead of the converting business entity delivering the articles of conversion to the Secretary of State for filing, the articles of conversion shall be included as part of the application for registration filed pursuant to G.S. 59-84.2 in addition to the matters otherwise required or permitted by law.

If the plan of conversion is abandoned after the articles of conversion have been filed with the Secretary of State but before the articles of conversion become effective, an amendment to the articles of conversion withdrawing the articles of conversion shall be delivered to the Secretary of State for filing prior to the time the articles of conversion become effective.

(b) The conversion takes effect when the articles of conversion become effective.

(c) Certificates of conversion shall also be registered as provided in G.S. 47-18.1. (2001-387, s. 108; 2001-487, s. 62(s); 2002-159, s. 34(a).)

Effect of Amendments. — Session Laws 2002-159, s. 34(a), effective October 11, 2002, rewrote the last two paragraphs of subsection (a).

Part 3. Conversion of Domestic Partnership.

§ 59-73.22. Articles of conversion.

(a) After a plan of conversion has been approved by the converting domestic partnership as provided in G.S. 59-73.21, the converting domestic partnership shall deliver articles of conversion to the Secretary of State for filing. The articles of conversion shall state:

(1) The name of the converting domestic partnership;

(2) The name of the resulting business entity, its type of business entity, the state or country whose laws govern its organization and internal affairs, and, if the resulting business entity is not authorized to transact business or conduct affairs in this State, a designation of its mailing address and a commitment to file with the Secretary of State a statement of any subsequent change in its mailing address; and

(3) That a plan of conversion has been approved by the domestic partnership as required by law.

(b) If the domestic partnership is converting to a business entity whose formation requires the filing of a document with the Secretary of State, then notwithstanding subsection (a) of this section the articles of conversion shall be included as part of that document and shall contain the information required by the laws governing the organization and internal affairs of the resulting business entity.

(c) If the plan of conversion is abandoned after the articles of conversion have been filed with the Secretary of State but before the articles of conversion become effective, the converting domestic partnership shall deliver to the Secretary of State for filing prior to the time the articles of conversion become effective an amendment of the articles of conversion withdrawing the articles of conversion.

(d) The conversion takes effect when the articles of conversion become effective.

(e) Certificates of conversion shall also be registered as provided in G.S. 47-18.1. (2001-387, s. 111; 2001-487, s. 62(u).)

Editor's Note. — The section above is set out to correct an error in the main volume.

Part 4. Merger.

§ 59-73.33. Effects of merger.

(a) When a merger takes effect:

(1) Each other merging business entity merges into the surviving business entity, and the separate existence of each merging business entity except the surviving business entity ceases;

(2) The title to all real estate and other property owned by each merging business entity is vested in the surviving business entity without reversion or impairment;

(3) The surviving business entity has all liabilities of each merging business entity;

(4) A proceeding pending by or against any merging business entity may be continued as if the merger did not occur, or the surviving business entity may be substituted in the proceeding for a merging business entity whose separate existence ceases in the merger;

(5) The interests in each merging business entity that are to be converted into interests, obligations, or securities of the surviving business entity or into the right to receive cash or other property are thereupon so converted, and the former holders of the interests in each merging business entity are entitled only to the rights provided to them in the articles of merger or, in the case of former holders of shares in a domestic corporation (as defined in G.S. 55-1-40), any rights they may have under Article 13 of Chapter 55 of the General Statutes; and

(6) If the surviving business entity is not a domestic corporation, the surviving business entity is deemed to agree that it will promptly pay to the dissenting shareholders of any merging domestic corporation

the amount, if any, to which they are entitled under Article 13 of Chapter 55 of the General Statutes and otherwise to comply with the requirements of Article 13 as if it were a surviving domestic corporation in the merger.

The merger shall not affect the liability or absence of liability of any holder of an interest in a merging business entity for any acts, omissions, or obligations of any merging business entity made or incurred prior to the effectiveness of the merger. The cessation of separate existence of a merging business entity shall not constitute a dissolution or termination of the merging business entity.

(b) If the surviving business entity is not a domestic limited liability company, a domestic corporation, a domestic nonprofit corporation, or a domestic limited partnership, when the merger takes effect the surviving business entity is deemed:

(1) To agree that it may be served with process in this State in any proceeding for enforcement of (i) any obligation of any merging domestic limited liability company, domestic corporation, domestic nonprofit corporation, domestic limited partnership, or other partnership as defined in G.S. 59-36 that is formed under the laws of this State, (ii) the rights of dissenting shareholders of any merging domestic corporation under Article 13 of Chapter 55 of the General Statutes, and (iii) any obligation of the surviving business entity arising from the merger; and

(2) To have appointed the Secretary of State as its registered agent for service of process in any such proceeding. Service on the Secretary of State of any such process shall be made by delivering to and leaving with the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of such process and the fee required by G.S. 59-35.2. Upon receipt of service of process on behalf of a surviving business entity in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the surviving business entity. If the surviving business entity is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office or, if there is no principal office on file, its registered office. If the surviving business entity is not authorized to transact business or conduct affairs in this State, the address for mailing shall be the mailing address designated pursuant to G.S. 59-73.32(a)(3). (1999-369, s. 4.1; 2000-140, s. 52; 2001-358, s. 10(a); 2001-387, ss. 105(b), 112, 115, 170(c), 173, 175(a); 2002-159, s. 17.)

Effect of Amendments. — Session Laws 2002-159, s. 17, effective October 11, 2002, substituted "G.S. 59-35.2" for "G.S. 59-35.1(c)" in the second sentence of subdivision (b)(2).

Article 3B.

Registered Limited Liability Partnerships.

§ 59-84.2. Registered limited liability partnerships.

(a) A partnership whose internal affairs are governed by the laws of this State, other than a limited partnership, may become a registered limited liability partnership by filing with the Secretary of State an application stating all of the following:

(1) The name of the partnership.

(2) The street address, and the mailing address if different from the street address, of its principal office and the county in which the principal office is located.

(3) The name and street address, and the mailing address if different from the street address, of the partnership's registered agent and registered office for service of process.

(4) The county in this State in which the registered office is located.

(5) Repealed by Session Laws 2001-387, s. 156(b), effective January 1, 2002.

(6) Repealed by Session Laws 2001-387, s. 156(b), effective January 1, 2002.

(7) The fiscal year end of the partnership.

(a1) The terms and conditions on which a partnership becomes a limited liability partnership must be approved in the manner provided in the partnership agreement; provided, however, if the partnership agreement does not contain any such provision, the terms and conditions shall be approved (i) in the case of a partnership having a partnership agreement that expressly considers obligations to contribute to the partnership, in the manner necessary to amend those provisions, or (ii) in any other case, in the manner necessary to amend the partnership agreement.

(b) Repealed by Session Laws 2001-387, s. 156(b), effective January 1, 2002.

(c) Repealed by Session Laws 2001-387, s. 156(b), effective January 1, 2002.

(d) Repealed by Session Laws 2001-387, s. 156(b), effective January 1, 2002.

(e) Repealed by Session Laws 2001-387, s. 156(b), effective January 1, 2002.

(f) Repealed by Session Laws 2001-387, s. 156(b), effective January 1, 2002.

(f1) A partnership becomes a registered limited liability partnership when its application for registration becomes effective.

(g) The status of a registered limited liability partnership and the liability of its partners is not affected by errors or later changes in the information required to be contained in the application for registration.

(h) A partnership shall promptly amend its registration to reflect any change in the information contained in its application for registration, other than changes that are properly included in other documents filed with the Secretary of State. A registration is amended by filing a certificate of amendment with the Secretary of State. The certificate of amendment shall set forth:

(1) The name of the partnership as reflected on the application for registration.

(2) The date of filing of the application for registration.

(3) The amendment to the application for registration.

(i) Each registered limited liability partnership must maintain a registered office and registered agent as required by Article 4 of Chapter 55D of the General Statutes and is subject to service on the Secretary of State under that Article.

(j) A partnership may cancel its registration by filing a certificate of cancellation with the Secretary of State. The certificate of cancellation shall set forth:

(1) The name of the partnership as reflected on the application for registration;
(2) The date of filing of the application for registration;
(3) A mailing address to which the Secretary of State may mail a copy of any process served on the Secretary of State under this subsection;
(4) A commitment to file with the Secretary of State a statement of any subsequent change in its mailing address; and
(5) The effective date and time of cancellation if it is not to be effective at the time of filing the certificate.

Cancellation of registration terminates the authority of the partnership's registered agent to accept service of process, notice, or demand, and appoints the Secretary of State as agent to accept service on behalf of the partnership with respect to any action or proceeding based upon any cause of action arising in this State, or arising out of business transacted in this State, during the time the partnership was registered as a registered limited liability partnership. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of such process, notice, or demand and the fee required by G.S. 59-35.2. Upon receipt of process, notice, or demand in the manner provided in this section, the Secretary of State shall immediately mail a copy of the process, notice, or demand by registered or certified mail, return receipt requested, to the partnership at the mailing address designated pursuant to this subsection.

(k) If a registered limited liability partnership is dissolved but its business is continued by some of its partners with or without others in a new partnership under the same name, then (i) the new partnership shall automatically succeed to the registration of the dissolved original partnership as a registered limited liability partnership and (ii) the dissolved original partnership shall be deemed to be registered as a registered limited liability partnership until the winding up of its affairs is completed. (1993, c. 354, s. 5; 1999-362, ss. 6, 7; 2000-140, ss. 53, 101(p); 2001-358, s. 51(a); 2001-387, ss. 118, 156, 173, 175(a); 2001-413, s. 6; 2002-58, s. 5.)

Effect of Amendments. —
Session Laws 2002-58, s. 5, effective October 1, 1993, added subsection (k).

Article 5.

Revised Uniform Limited Partnership Act.

Part 10A. Conversion to Limited Partnership.

§ 59-1052. Filing of certificate of limited partnership.

(a) After a plan of conversion has been approved by the converting business entity as provided in G.S. 59-1051, a certificate of limited partnership shall be delivered to the Secretary of State for filing. In addition to the matters required or permitted by G.S. 59-201, the certificate of limited partnership shall contain articles of conversion stating:
(1) That the domestic limited partnership is being formed pursuant to a conversion of another business entity;
(2) The name of the converting business entity, its type of business entity, and the state or country whose laws govern its organization and internal affairs; and

(3) That a plan of conversion has been approved by the converting business entity in the manner required by law.

If the plan of conversion is abandoned after the certificate of limited partnership has been filed with the Secretary of State but before the certificate of limited partnership becomes effective, an amendment withdrawing the certificate of limited partnership shall be delivered to the Secretary of State for filing prior to the time the articles of organization become effective.

(b) The conversion takes effect when the certificate of limited partnership becomes effective.

(c) Repealed by Session Laws 2001-387, s. 141.

(d) Certificates of conversion shall also be registered as provided in G.S. 47-18.1. (1999-369, s. 4.8; 2001-387, s. 141; 2002-159, s. 34(b).)

Effect of Amendments. —

Session Laws 2002-159, s. 34(b), effective October 11, 2002, rewrote the section heading, which formerly read: "Filing of certificate of limited partnership by converting business entity"; substituted "a certificate of limited partnership shall be delivered to the Secretary of State" for "the converting business entity shall deliver a certificate of limited partnership to the Secretary of State" in the introductory paragraph of subsection (a); and rewrote the last paragraph of subsection (a).

Part 11. Miscellaneous.

§ 59-1106. Filing, service, and copying fees.

(a) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to the Secretary of State for filing:

Document	Fee
(1) Certificate of limited partnership which does not include an application for registration as a limited liability limited partnership	$50.00
(2) Certificate of limited partnership which includes an application for registration as a limited liability limited partnership	125.00
(3) Certificate of amendment	25.00
(4) Certificate of cancellation	25.00
(5) Application for reservation of name	10.00
(6) Notice of transfer of reserved name	10.00
(7) Application for registration of name	10.00
(8) Application for renewal of registration name	10.00
(9) Limited partnership's or foreign limited partnership's statement of change of registered agent or registered office or both	5.00
(10) Agent's statement of change of registered office for each affected partnership	5.00
(11) Agent's statement of resignation	No Fee
(12) Designation of registered agent or registered office or both	5.00
(13) Application for registration as foreign limited partnership	50.00
(14) Certificate of amendment of registration as foreign limited partnership	25.00
(15) Cancellation of registration as foreign limited partnership	25.00
(16) Application for certificate of withdrawal by reason of merger, consolidation, or conversion	10.00
(17) Articles of merger	50.00
(18) Articles of conversion (other than articles of conversion included as part of another document)	50.00

(19) Application for registration as a limited liability limited partnership (other than an application included in the certificate of limited partnership) 125.00
(20) Certificate of amendment of registration as a limited liability limited partnership 25.00
(21) Certificate of cancellation of registration as a limited liability limited partnership 25.00
(22) Annual report for a limited liability limited partnership 200.00
(23) Any other document required or permitted to be filed under this Article 10.00

(b) The Secretary of State shall collect a fee of ten dollars ($10.00) each time process is served on the Secretary under this Article. The party to a proceeding causing service of process is entitled to recover this fee as costs if the party prevails in the proceeding.

(c) The Secretary of State shall collect the following fees for copying, comparing, and certifying a copy of any filed document relating to a domestic or foreign limited partnership:

(1) One dollar ($1.00) a page for copying or comparing a copy to the original; and
(2) Fifteen dollars ($15.00) for a paper certificate.
(3) Ten dollars ($10.00) for an electronic certificate.

(d) Repealed by Session Laws 2001-387, s. 171(b), effective January 1, 2002.

(1985 (Reg. Sess., 1986), c. 989, s. 2; 1991, c. 574, s. 3; 1995, c. 539, s. 37; 1997-485, s. 13; 2001-358, ss. 10(f), 37; 2001-387, ss. 149, 171(a), 171(b), 173, 175(a); 2001-413, s. 6; 2002-126, s. 29A.31.)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, s. 29A.31, effective November 1, 2002, rewrote subdivision (c)(2), which formerly read: "Five dollars ($5.00) for the certificate"; and added subdivision (c)(3).

Chapter 62.

Public Utilities.

Article 1.

General Provisions.

§ 62-1. Short title.

Editor's Note. —

Session Laws 2002-167, ss. 6(a) to (c), provide: "(a) The North Carolina Utilities Commission shall include the following additional items in the study it is presently conducting for the Commission on the Future of Electronic Service in North Carolina referred to as 'Investigation of Green Power and Public Benefit Fund Voluntary Check-Off Programs':

"(1) Identification of funding mechanisms in addition to voluntary purchase of green power blocks that would stimulate green power production in the State.

"(2) Identification of incentives in addition to funding mechanisms that would stimulate green power production in the State.

"(3) Identification of barriers that would impede green power production in the State and strategies to address those barriers.

"(4) Identification of appropriate methods of promoting the purchase of green power by the various electric customer groups.

"(5) Identification of methods whereby the State can provide incentives and resources that would stimulate the production and use of green power that would protect water quality; promote water conservation and water reuse; protect air quality; protect public health, safety, welfare, and the environment; and provide for the safe and efficient disposal of animal waste in the State.

"(b) In making recommendations to address the additional items listed in subsection (a) of this section, the North Carolina Utilities Commission shall consider the impact of its recommendations on residential, commercial, and industrial consumers of electricity in the State.

"(c) The North Carolina Utilities Commission shall make its final report on its investigation of green power and public benefit fund voluntary check-off programs, including the additional items set forth in subsection (a) of this section, to the Commission on the Future of Electric Service in North Carolina and the Environmental Review Commission not later than 15 March 2003. The delivery of this report shall not preclude either of the receiving commissions from asking for additional information or reports on these subjects."

§ 62-37. Investigations.

OPINIONS OF ATTORNEY GENERAL

Issuance of Order Requiring Auditor to be Hired at Public Utility's Expense. — Where the Utilities Commission issues an order requiring an auditor to be hired at a public utility's expense, neither Article 3 (Purchases and Contracts) of Chapter 143, G.S. 143-48 et

seq., nor the rule promulgated thereunder, 1 N.C.A.C. 5B.0301, applies, as there is no expenditure of state funds to purchase contractual services. See opinion of Attorney General to Mr. Robert H. Bennink, Jr., General Counsel, Utilities Commission, 2001 N.C. AG LEXIS 41 (10/11/01).

ARTICLE 4.

Procedure before the Commission.

§ 62-65. Rules of evidence; judicial notice.

CASE NOTES

Cited in In re Petition of Utils., Inc., 147 N.C. App. 182, 555 S.E.2d 333, 2001 N.C. App. LEXIS 1141 (2001).

§ 62-79. Final orders and decisions; findings; service; compliance.

CASE NOTES

Cited in In re Petition of Utils., Inc., 147 N.C. App. 182, 555 S.E.2d 333, 2001 N.C. App. LEXIS 1141 (2001).

ARTICLE 5.

Review and Enforcement of Orders.

§ 62-94. Record on appeal; extent of review.

CASE NOTES

I. In General.
III. Limitations on Review.
A. In General.

I. IN GENERAL.

Cited in In re Petition of Utils., Inc., 147 N.C. App. 182, 555 S.E.2d 333, 2001 N.C. App. LEXIS 1141 (2001).

III. LIMITATIONS ON REVIEW.

A. In General.

Justiciable Controversy Must Be Shown. — While the Utilities Commission authorized itself to review a contract between water service and developers, there was no evidence of any justiciable controversy which would have warranted review of the contracts by the Commission; thus, the Commission did not have jurisdiction to review the contract provisions. State ex rel. Utils. Comm'n v. Carolina Water Serv., 149 N.C. App. 656, 562 S.E.2d 60, 2002 N.C. App. LEXIS 284 (2002), cert. granted, 355 N.C. 757, 566 S.E.2d 481, cert. granted, 356 N.C. 176, 567 S.E.2d 145 (2002).

Article 6.

The Utility Franchise.

§ 62-110. Certificate of convenience and necessity.

(a) Except as provided for bus companies in Article 12 of this Chapter, no public utility shall hereafter begin the construction or operation of any public utility plant or system or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation: Provided, that this section shall not apply to construction into territory contiguous to that already occupied and not receiving similar service from another public utility, nor to construction in the ordinary conduct of business.

(b) The Commission shall be authorized to issue a certificate to any person applying to the Commission to offer long distance services as a public utility as defined in G.S. 62-3(23)a.6., provided that such person is found to be fit, capable, and financially able to render such service, and that such additional service is required to serve the public interest effectively and adequately; provided further, that in such cases the Commission shall consider the impact on the local exchange customers and only permit such additional service if the Commission finds that it will not jeopardize reasonably affordable local exchange service.

Notwithstanding any other provision of law, the terms, conditions, rates, and interconnections for long distance services offered on a competitive basis shall be regulated by the Commission in accordance with the public interest. In promulgating rules necessary to implement this provision, the Commission shall consider whether uniform or nonuniform application of such rules is consistent with the public interest. Provided further that the Commission shall consider whether the charges for the provision of interconnections should be uniform.

For purposes of this section, long distance services shall include the transmission of messages or other communications between two or more central offices wherein such central offices are not connected on July 1, 1983, by any extended area service, local measured service, or other local calling arrangement.

(c) The Commission shall be authorized, consistent with the public interest, to adopt procedures for the issuance of a special certificate to any person for the limited purpose of offering telephone service to the public by means of coin, coinless, or key-operated pay telephone instruments. This service may be in addition to or in competition with public telephone services offered by the certificated telephone company in the service area. The access line from the pay instrument to the network may be obtained from the local exchange telephone company in the service area where the pay instrument is located, from any certificated competitive local provider, or any other provider authorized by the Commission. The Commission shall promulgate rules to implement the service authorized by this section, recognizing the competitive nature of the offerings and, notwithstanding any other provision of law, the Commission shall determine the extent to which such services shall be regulated and to the extent necessary to protect the public interest regulate the terms, conditions, and rates for such service and the terms and conditions for interconnection to the local exchange network.

(d) The Commission shall be authorized, consistent with the public interest and notwithstanding any other provision of law, to adopt procedures for the purpose of allowing shared use and/or resale of any telephone service provided

to persons who occupy the same contiguous premises (as such term shall be defined by the Commission); provided, however, that there shall be no "networking" of any services authorized under this subsection whereby two or more premises where such services are provided are connected, and provided further that any certificated local provider or any other provider authorized by the Commission may provide access lines or trunks connecting such authorized service to the telephone network, and that the local service rates permitted or approved by the Commission for local exchange lines or trunks being shared or resold shall be on a measured usage basis where facilities are available or on a message rate basis otherwise. Provided however, the Commission may permit or approve flat rates, measured rates, message rates, or some combination of those rates for shared or resold services whenever the service is offered to patrons of hotels or motels, occupants of timeshare or condominium complexes serving primarily transient occupants, to patrons of hospitals, nursing homes, rest homes, or licensed retirement centers, or to members of clubs or students living in quarters furnished by educational institutions, or to persons temporarily subleasing residential premises. The Commission shall issue rules to implement the service authorized by this subsection, considering the competitive nature of the offerings and, notwithstanding any other provision of law, the Commission shall determine the extent to which such services shall be regulated and, to the extent necessary to protect the public interest, regulate the terms, conditions, and rates charged for such services and the terms and conditions for interconnection to the local exchange network. The Commission shall require any person offering telephone service under this subsection by means of a Private Branch Exchange ("PBX") or key system to secure adequate local exchange trunks from any certificated local provider or any other provider authorized by the Commission so as to assure a quality of service equal to the quality of service generally found acceptable by the Commission. Unless otherwise ordered by the Commission for good cause shown by the company, the right and obligation of the certificated local provider or any other provider authorized by the Commission to provide local service directly to any person located within its certificated service area shall continue to apply to premises where shared or resold telephone service is available, provided however, the Commission shall be authorized to establish the terms and conditions under which such services should be provided.

(e) Notwithstanding subsection (d) of this section, the Commission may authorize any telephone services provided to a nonprofit college or university, and its affiliated medical centers, which is qualified under Sections 501 and 170 of the United States Internal Revenue Code of 1986 or which is a State-owned institution, to be shared or resold by that institution on both contiguous campus premises owned or leased by the institution and noncontiguous premises owned or leased exclusively by the institution, provided these services are offered to students or guests housed in quarters furnished by the institution, patrons of hospitals or medical centers of the institution, or persons or businesses providing educational, research, professional, consulting, food, or other support services directly to or for the institution, its students, or guests. The services of a certificated local provider or any other provider authorized by the Commission, when provided to said colleges, universities, and affiliated medical centers shall be rated in the same way as those provided for shared service offered to patrons of hospitals, nursing homes, rest homes, licensed retirement centers, members of clubs or students living in quarters furnished by educational institutions as provided for in subsection (d) of this section. The institutions regulated pursuant to this subsection shall not be prohibited from electing optional services from the certificated local provider or any other provider authorized by the Commission which include measured or message rate services. There shall be no "network-

ing" of any services authorized under this subsection whereby two or more different institutions where such services are provided are interconnected. Any certificated local provider or any other provider authorized by the Commission may provide access lines or trunks connecting such authorized services to the telephone network. The Commission shall require such institutions to secure adequate local exchange trunks from the certificated local provider or any other provider authorized by the Commission to assure a quality of service equal to the quality of service generally found acceptable by the Commission. Unless otherwise ordered by the Commission for good cause shown by the certificated local provider or any other provider authorized by the Commission, the right and obligation of that provider to provide local service directly to any person located within its certificated service area shall continue to apply to premises where shared or resold telephone service is available under this subsection, provided however, the Commission shall be authorized to establish the terms and conditions under which such service should be provided. The Commission shall issue rules to implement the services authorized by this subsection.

(f) Reserved.

(f1) Except as provided in subsection (f2) of this section, the Commission is authorized, following notice and an opportunity for interested parties to be heard, to issue a certificate to any person applying to provide local exchange or exchange access services as a public utility as defined in G.S. 62-3(23)a.6., without regard to whether local telephone service is already being provided in the territory for which the certificate is sought, provided that the person seeking to provide the service makes a satisfactory showing to the Commission that (i) the person is fit, capable, and financially able to render such service; (ii) the service to be provided will reasonably meet the service standards that the Commission may adopt; (iii) the provision of the service will not adversely impact the availability of reasonably affordable local exchange service; (iv) the person, to the extent it may be required to do so by the Commission, will participate in the support of universally available telephone service at affordable rates; and (v) the provision of the service does not otherwise adversely impact the public interest. In its application for certification, the person seeking to provide the service shall set forth with particularity the proposed geographic territory to be served and the types of local exchange and exchange access services to be provided. Except as provided in G.S. 62-133.5(f), any person receiving a certificate under this section shall, until otherwise determined by the Commission, file and maintain with the Commission a complete list of the local exchange and exchange access services to be provided and the prices charged for those services, and shall be subject to such reporting requirements as the Commission may require.

Any certificate issued by the Commission pursuant to this subsection shall not permit the provision of local exchange or exchange access service until July 1, 1996, unless the Commission shall have approved a price regulation plan pursuant to G.S. 62-133.5(a) for a local exchange company with an effective date prior to July 1, 1996. In the event a price regulation plan becomes effective prior to July 1, 1996, the Commission is authorized to permit the provision of local exchange or exchange access service by a competing local provider in the franchised area of such local exchange company.

The Commission is authorized to adopt rules it finds necessary (i) to provide for the reasonable interconnection of facilities between all providers of telecommunications services; (ii) to determine when necessary the rates for such interconnection; (iii) to provide for the reasonable unbundling of essential facilities where technically and economically feasible; (iv) to provide for the transfer of telephone numbers between providers in a manner that is technically and economically reasonable; (v) to provide for the continued develop-

ment and encouragement of universally available telephone service at reasonably affordable rates; and (vi) to carry out the provisions of this subsection in a manner consistent with the public interest, which will include a consideration of whether and to what extent resale should be permitted. In adopting rules to establish an appropriate definition of universal service, the Commission shall consider evolving trends in telecommunications services and the need for consumers to have access to high-speed communications networks, the Internet, and other services to the extent that those services provide social benefits to the public at a reasonable cost.

Local exchange companies and competing local providers shall negotiate the rates for local interconnection. In the event that the parties are unable to agree within 90 days of a bona fide request for interconnection on appropriate rates for interconnection, either party may petition the Commission for determination of the appropriate rates for interconnection. The Commission shall determine the appropriate rates for interconnection within 180 days from the filing of the petition.

Each local exchange company shall be the universal service provider in the area in which it is certificated to operate on July 1, 1995, until otherwise determined by the Commission. In continuing this State's commitment to universal service, the Commission shall, by December 31, 1996, adopt interim rules that designate the person that should be the universal service provider and to determine whether universal service should be funded through interconnection rates or through some other funding mechanism. By July 1, 2003, the Commission shall complete an investigation and adopt final rules concerning the provision of universal services, the person that should be the universal service provider, and whether universal service should be funded through interconnection rates or through some other funding mechanism.

The Commission shall make the determination required pursuant to this subsection in a manner that furthers this State's policy favoring universally available telephone service at reasonable rates.

(f2) The provisions of subsection (f1) of this section shall not be applicable to franchised areas within the State that are being served by local exchange companies with 200,000 access lines or less located within the State, and it is further provided that such local exchange company providing service to 200,000 access lines or less shall not be subject to the regulatory reform procedures outlined under the terms of G.S. 62-133.5(a) or permitted to compete in territory outside of its franchised area for local exchange and exchange access services until such time as the franchised area is opened to competing local providers as provided for in this subsection. Upon the filing of an application by a local exchange company with 200,000 access lines or less for regulation under the provisions of G.S. 62-133.5(a), the Commission shall apply the provisions of that section to such local exchange company, but only upon the condition that the provisions of subsection (f1) of this section are to be applicable to the franchised area and local exchange and exchange access services offered by such a local exchange company.

(f3) The provisions of subsection (f1) of this section shall not be applicable to areas served by telephone membership corporations formed and existing under Article 4 of Chapter 117 of the General Statutes and exempt from regulation as public utilities, pursuant to G.S. 62-3(23)d. and G.S. 117-35.

(g) For the purpose of encouraging water conservation, the Commission may, consistent with the public interest, adopt procedures that allow a lessor, pursuant to a written rental agreement, to allocate the costs for providing water and sewer service on a metered use basis to persons who occupy the same contiguous premises. A written rental agreement shall specify a monthly rent that shall be the sum of the base rent plus additional rent at a rate that does not exceed the actual purchase price of the water and sewer service to the provider plus a reasonable administrative fee. The Commission shall issue rules to define contiguous premises and to implement this subsection. Not-

withstanding any other provision of this Chapter, the Commission shall determine the extent to which the services shall be regulated and, to the extent necessary to protect the public interest, regulate the terms, conditions, and rates that may be allocated for the services. Nothing in this subsection shall be construed to alter the rights, obligations, or remedies of persons providing water and sewer services and their customers under any other provision of law. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1983 (Reg. Sess., 1984), c. 1043, s. 2; 1985, c. 676, s. 9; c. 680; 1987, c. 445, s. 1; 1989, c. 451, ss. 1, 2; 1995, c. 27, s. 4; 1995 (Reg. Sess., 1996), c. 753, s. 1; 1997-207, s. 1; 1998-180, ss. 1, 2; 1998-212, s. 15.8B; 1999-112, s. 1; 2001-252, s. 1; 2001-502, s. 1; 2002-14, s. 1.)

Effect of Amendments. —
Session Laws 2002-14, s. 1, effective July 11, 2002, added the last sentence to the third paragraph of subdivision (f1).

§ 62-110.1. Certificate for construction of generating facility; analysis of long-range needs for expansion of facilities.

Editor's Note. —
Session Laws 2002-167, ss. 6(a) to (c), provide: "(a) The North Carolina Utilities Commission shall include the following additional items in the study it is presently conducting for the Commission on the Future of Electronic Service in North Carolina referred to as 'Investigation of Green Power and Public Benefit Fund Voluntary Check-Off Programs':

"(1) Identification of funding mechanisms in addition to voluntary purchase of green power blocks that would stimulate green power production in the State.

"(2) Identification of incentives in addition to funding mechanisms that would stimulate green power production in the State.

"(3) Identification of barriers that would impede green power production in the State and strategies to address those barriers.

"(4) Identification of appropriate methods of promoting the purchase of green power by the various electric customer groups.

"(5) Identification of methods whereby the State can provide incentives and resources that would stimulate the production and use of green power that would protect water quality; promote water conservation and water reuse; protect air quality; protect public health, safety, welfare, and the environment; and provide for the safe and efficient disposal of animal waste in the State.

"(b) In making recommendations to address the additional items listed in subsection (a) of this section, the North Carolina Utilities Commission shall consider the impact of its recommendations on residential, commercial, and industrial consumers of electricity in the State.

"(c) The North Carolina Utilities Commission shall make its final report on its investigation of green power and public benefit fund voluntary check-off programs, including the additional items set forth in subsection (a) of this section, to the Commission on the Future of Electric Service in North Carolina and the Environmental Review Commission not later than 15 March 2003. The delivery of this report shall not preclude either of the receiving commissions from asking for additional information or reports on these subjects."

§ 62-111. Transfers of franchises; mergers, consolidations and combinations of public utilities.

CASE NOTES

Public Convenience and Necessity for Proposed Transfers of Water and Sewer Franchises. —
Utility commission did not err in approving acquisition of utility's certificate of public convenience and necessity, denying inclusion of acquired utility's purchase price in the base rate, and reducing connection fees. In re Petition of Utils., Inc., 147 N.C. App. 182, 555 S.E.2d 333, 2001 N.C. App. LEXIS 1141 (2001).

ARTICLE 7.

Rates of Public Utilities.

§ 62-133.6. Environmental compliance costs recovery.

(a) As used in this section:

(1) "Coal-fired generating unit" means a coal-fired generating unit, as defined by 40 Code of Federal Regulations § 96.2 (July 1, 2001 Edition), that is located in this State and has the capacity to generate 25 or more megawatts of electricity.

(2) "Environmental compliance costs" means only those capital costs incurred by an investor-owned public utility to comply with the emissions limitations set out in G.S. 143-215.107D that exceed the costs required to comply with 42 U.S.C. § 7410(a)(2)(D)(i)(I), as implemented by 40 Code of Federal Regulations § 51.121 (July 1, 2001 Edition), related federal regulations, and the associated State or Federal Implementation Plan, or with 42 U.S.C. § 7426, as implemented by 40 Code of Federal Regulations § 52.34 (July 1, 2001 Edition) and related federal regulations. The term "environmental compliance costs" does not include:

a. Costs required to comply with a final order or judgment rendered by a state or federal court under which an investor-owned public utility is found liable for a failure to comply with any federal or state law, rule, or regulation for the protection of the environment or public health.

b. The net increase in costs, above those proposed by the investor-owned public utility as part of its plan to achieve compliance with the emissions limitations set out in G.S. 143-215.107D, that are necessary to comply with a settlement agreement, consent decree, or similar resolution of litigation arising from any alleged failure to comply with any federal or state law, rule, or regulation for the protection of the environment or public health.

c. Any criminal or civil fine or penalty, including court costs imposed or assessed for a violation by an investor-owned public utility of any federal or state law, rule, or regulation for the protection of the environment or public health.

d. The net increase in costs, above those proposed by the investor-owned public utility as part of its plan to achieve the emissions limitations set out in G.S. 143-215.107D, that are necessary to comply with any limitation on emissions of oxides of nitrogen (NOx) or sulfur dioxide (SO2) that are imposed on an individual coal-fired generating unit by the Environmental Management Commission or the Department of Environment and Natural Resources to address any nonattainment of an air quality standard in any area of the State.

(3) "Investor-owned public utility" means an investor-owned public utility, as defined in G.S. 62-3.

(b) The investor-owned public utilities shall be allowed to accelerate the cost recovery of their estimated environmental compliance costs over a seven-year period, beginning January 1, 2003 and ending December 31, 2009. For purposes of this subsection, an investor-owned public utility subject to the provisions of subsections (b) and (d) of G.S. 143-215.107D shall amortize environmental compliance costs in the amount of one billion five hundred million dollars ($1,500,000,000) and an investor-owned public utility subject to the provisions of subsections (c) and (e) of G.S. 143-215.107D shall amortize

environmental compliance costs in the amount of eight hundred thirteen million dollars ($813,000,000). During the rate freeze period established in subsection (e) of this section, the investor-owned public utilities shall, at a minimum, recover through amortization seventy percent (70%) of the environmental compliance costs set out in this subsection. The maximum amount for each investor-owned public utility's annual accelerated cost recovery during the rate freeze period shall not exceed one hundred fifty percent (150%) of the annual levelized environmental compliance costs set out in this subsection. The amounts to be amortized pursuant to this subsection are estimates of the environmental compliance costs that may be adjusted as provided in this section. The General Assembly makes no judgment as to whether the actual environmental compliance costs will be greater than, less than, or equal to these estimated amounts. These estimated amounts do not define or limit the scope of the expenditures that may be necessary to comply with the emissions limitations set out in G.S. 143-215.107D.

(c) The investor-owned public utilities shall file their compliance plans, including initial cost estimates, with the Commission and the Department of Environment and Natural Resources not later than 10 days after the date on which this section becomes effective. The Commission shall consult with the Secretary of Environment and Natural Resources and shall consider the advice of the Secretary as to whether an investor-owned public utility's proposed compliance plan is adequate to achieve the emissions limitations set out in G.S. 143-215.107D.

(d) Subject to the provisions of subsection (f) of this section, the Commission shall hold a hearing to review the environmental compliance costs set out in subsection (b) of this section. The Commission may modify and revise those costs as necessary to ensure that they are just, reasonable, and prudent based on the most recent cost information available and determine the annual cost recovery amounts that each investor-owned public utility shall be required to record and recover during calendar years 2008 and 2009. In making its decisions pursuant to this subsection, the Commission shall consult with the Secretary of Environment and Natural Resources to receive advice as to whether the investor-owned public utility's actual and proposed modifications and permitting and construction schedule are adequate to achieve the emissions limitations set out in G.S. 143-215.107D. The Commission shall issue an order pursuant to this subsection no later than December 31, 2007.

(e) Notwithstanding G.S. 62-130(d) and G.S. 62-136(a), the base rates of the investor-owned public utilities shall remain unchanged from the date on which this section becomes effective through December 31, 2007. The Commission may, however, consistent with the public interest:

(1) Allow adjustments to base rates, or deferral of costs or revenues, due to one or more of the following conditions occurring during the rate freeze period:

a. Governmental action resulting in significant cost reductions or requiring major expenditures including, but not limited to, the cost of compliance with any law, regulation, or rule for the protection of the environment or public health, other than environmental compliance costs.

b. Major expenditures to restore or replace property damaged or destroyed by force majeure.

c. A severe threat to the financial stability of the investor-owned public utility resulting from other extraordinary causes beyond the reasonable control of the investor-owned public utility.

d. The investor-owned public utility persistently earns a return substantially in excess of the rate of return established and found reasonable by the Commission in the investor-owned public utility's last general rate case.

(2) Approve any reduction in a rate or rates applicable to a customer or class of customers during the rate freeze period, if requested to do so by an investor-owned public utility that is subject to the emissions limitations set out in G.S. 143-215.107D.

(f) In any general rate case initiated to adjust base rates effective on or after January 1, 2008, the investor-owned public utility shall be allowed to recover its actual environmental compliance costs in accordance with Article 7 of this Chapter less the cumulative amount of accelerated cost recovery recorded pursuant to subsection (b) of this section.

(g) Consistent with the public interest, the Commission is authorized to approve proposals submitted by an investor-owned public utility to implement optional, market-based rates and services, provided the proposal does not increase base rates during the period of time referred to in subsection (e) of this section.

(h) Nothing in this section shall prohibit the Commission from taking any actions otherwise appropriate to enforce investor-owned public utility compliance with applicable statutes or Commission rules or to order any appropriate remedy for such noncompliance allowed by law.

(i) An investor-owned public utility that is subject to the emissions limitations set out in G.S. 143-215.107D shall submit to the Commission and to the Department of Environment and Natural Resources on or before April 1 of each year a verified statement that contains all of the following:

(1) A detailed report on the investor-owned public utility's plans for meeting the emissions limitations set out in G.S. 143-215.107D.

(2) The actual environmental compliance costs incurred by the investor-owned public utility in the previous calendar year, including a description of the construction undertaken and completed during that year.

(3) The amount of the investor-owned public utility's environmental compliance costs amortized in the previous calendar year.

(4) An estimate of the investor-owned public utility's environmental compliance costs and the basis for any revisions of those estimates when compared to the estimates submitted during the previous year.

(5) A description of all permits required in order to comply with the provisions of G.S. 143-215.107D for which the investor-owned public utility has applied and the status of those permits or permit applications.

(6) A description of the construction related to compliance with the provisions of G.S. 143-215.107D that is anticipated during the following year.

(7) A description of the applications for permits required in order to comply with the provisions of G.S. 143-215.107D that are anticipated during the following year.

(8) The results of equipment testing related to compliance with G.S. 143-215.107D.

(9) The number of tons of oxides of nitrogen (NOx) and sulfur dioxide (SO2) emitted during the previous calendar year from the coal-fired generating units that are subject to the emissions limitations set out in G.S. 143-215.107D.

(10) The emissions allowances described in G.S. 143-215.107D(i) that are acquired by the investor-owned public utility that result from compliance with the emissions limitations set out in G.S. 143-215.107D.

(11) Any other information requested by the Commission or the Department of Environment and Natural Resources.

(j) The Secretary shall review the information submitted pursuant to subsection (i) of this section and determine whether the investor-owned public

utility's actual and proposed modifications and permitting and construction schedule are adequate to achieve the emissions limitations set out in G.S. 143-215.107D and shall advise the Commission as to the Secretary's findings and recommendations.

(k) Any information, advice, findings, recommendations, or determinations provided by the Secretary pursuant to this section shall not constitute a final agency decision within the meaning of Chapter 150B of the General Statutes and shall not be subject to review under that Chapter. (2002-4, s. 9.)

Cross References. — As to limitations on emissions of oxides of nitrogen and sulfur dioxide from certain coal-fired generating units, see G.S. 143-215.107D.

Editor's Note. — Session Laws 2002-4, s. 16, made this section effective June 20, 2002.

Session Laws 2002-4, ss. 10-14, provide: "It is the intent of the General Assembly that the State use all available resources and means, including negotiation, participation in interstate compacts and multistate and interagency agreements, petitions pursuant to 42 U.S.C. § 7426, and litigation to induce other states and entities, including the Tennessee Valley Authority, to achieve reductions in emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) comparable to those required by G.S. 143-215.107D, as enacted by Section 1 of this act, on a comparable schedule. The State shall give particular attention to those states and other entities whose emissions negatively impact air quality in North Carolina or whose failure to achieve comparable reductions would place the economy of North Carolina at a competitive disadvantage.

"The Environmental Management Commission shall study the desirability of requiring and the feasibility of obtaining reductions in emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) beyond those required by G.S. 143-215.107D, as enacted by Section 1 of this act. The Environmental Management Commission shall consider the availability of emissions reduction technologies, increased cost to consumers of electric power, reliability of electric power supply, actions to reduce emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) taken by states and other entities whose emissions negatively impact air quality in North Carolina or whose failure to achieve comparable reductions would place the economy of North Carolina at a competitive disadvantage, and the effects that these reductions would have on public health, the environment, and natural resources, including visibility. In its conduct of this study, the Environmental Management Commission may consult with the Utilities Commission and the Public Staff. The Environmental Management Commission shall report its findings and recommendations to the General Assembly and the Environmental Review Commission annually beginning 1 September 2005.

"The General Assembly anticipates that measures implemented to achieve the reductions in emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) required by G.S. 143-215.107D, as enacted by Section 1 of this act, will also result in significant reductions in the emissions of mercury from coal-fired generating units. The Division of Air Quality of the Department of Environment and Natural Resources shall study issues related to monitoring emissions of mercury and the development and implementation of standards and plans to implement programs to control emissions of mercury from coal-fired generating units. The Division shall evaluate available control technologies and shall estimate the benefits and costs of alternative strategies to reduce emissions of mercury. The Division shall annually report its interim findings and recommendations to the Environmental Management Commission and the Environmental Review Commission beginning 1 September 2003. The Division shall report its final findings and recommendations to the Environmental Management Commission and the Environmental Review Commission no later than 1 September 2005. The costs of implementing any air quality standards and plans to reduce the emission of mercury from coal-fired generating units below the standards in effect on the date this act becomes effective, except to the extent that the emission of mercury is reduced as a result of the reductions in the emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) required to achieve the emissions limitations set out in G.S. 143-215.107D, as enacted by Section 1 of this act, shall not be recoverable pursuant to G.S. 62-133.6, as enacted by Section 9 of this act.

"The Division of Air Quality of the Department of Environment and Natural Resources shall study issues related to the development and implementation of standards and plans to implement programs to control emissions of carbon dioxide (CO2) from coal-fired generating units and other stationary sources of air pollution. The Division shall evaluate available control technologies and shall estimate the benefits and costs of alternative strategies to reduce emissions of carbon dioxide (CO2). The Division shall annually report its interim findings and recommendations to the Environmental Man-

agement Commission and the Environmental Review Commission beginning 1 September 2003. The Division shall report its final findings and recommendations to the Environmental Management Commission and the Environmental Review Commission no later than 1 September 2005. The costs of implementing any air quality standards and plans to reduce the emission of carbon dioxide (CO2) from coal-fired generating units below the standards in effect on the date this act becomes effective, except to the extent that the emission of carbon dioxide (CO2) is reduced as a result of the reductions in the emissions of oxides of nitrogen (NOx) and sulfur dioxide (SO2) required to achieve the emissions limitations set out in G.S. 143-215.107D, as enacted by Section 1 of this act, shall not be recoverable pursuant to G.S. 62-133.6, as enacted by Section 9 of this act.

"On or before 1 June of each year, the Department of Environment and Natural Resources and the Utilities Commission shall report on the implementation of this act to the Environmental Review Commission and the Joint Legislative Utility Review Committee. The first report required by this section shall be submitted no later than 1 June 2003."

Session Laws 2002-4, s. 15, contains a severability clause.

§ 62-137. Scope of rate case.

CASE NOTES

Applied in In re Petition of Utils., Inc., 147 N.C. App. 182, 555 S.E.2d 333, 2001 N.C. App. LEXIS 1141 (2001).

Article 11.

Railroads.

§ 62-235: Repealed by Session Laws 1995 (Regular Session, 1996), c. 673, s. 3.

Editor's Note. — The section above is set out to correct its omission from the main volume.

Session Laws 1995 (Reg. Sess., 1996), c. 673, 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 Rail Safety Section of the Transportation Division of the North Carolina Utilities Commission, is transferred to the Department of Transportation."

§ 62-237: Recodified as G.S. 136-195 by Session Laws 1998-128, s. 14, effective September 4, 1998.

Editor's Note. — The section above is set out to correct its omission from the main volume.

Article 14.

Fees and Charges.

§ 62-302. Regulatory fee.

Editor's Note. —

Session Laws 2002-167, ss. 6(a) to (c), provide: "(a) The North Carolina Utilities Commission shall include the following additional items in the study it is presently conducting for the Commission on the Future of Electronic

Service in North Carolina referred to as 'Investigation of Green Power and Public Benefit Fund Voluntary Check-Off Programs':

"(1) Identification of funding mechanisms in addition to voluntary purchase of green power blocks that would stimulate green power production in the State.

"(2) Identification of incentives in addition to funding mechanisms that would stimulate green power production in the State.

"(3) Identification of barriers that would impede green power production in the State and strategies to address those barriers.

"(4) Identification of appropriate methods of promoting the purchase of green power by the various electric customer groups.

"(5) Identification of methods whereby the State can provide incentives and resources that would stimulate the production and use of green power that would protect water quality; promote water conservation and water reuse; protect air quality; protect public health, safety, welfare, and the environment; and provide for the safe and efficient disposal of animal waste in the State.

"(b) In making recommendations to address the additional items listed in subsection (a) of this section, the North Carolina Utilities Commission shall consider the impact of its recommendations on residential, commercial, and industrial consumers of electricity in the State.

"(c) The North Carolina Utilities Commission shall make its final report on its investigation of green power and public benefit fund voluntary check-off programs, including the additional items set forth in subsection (a) of this section, to the Commission on the Future of Electric Service in North Carolina and the Environmental Review Commission not later than 15 March 2003. The delivery of this report shall not preclude either of the receiving commissions from asking for additional information or reports on these subjects."

Session Laws 2002-126, s. 30F(a), provides: "The percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is one-tenth percent (0.1%) for each public utility's North Carolina jurisdictional revenues earned during each quarter that begins on or after July 1, 2002."

Session Laws 2002-126, s. 30F(b), provides: "The electric membership corporation regulatory fee imposed under G.S. 62-302(b1) for the 2002-2003 fiscal year is two hundred thousand dollars ($200,000)."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Chapter 62A.

Public Safety Telephone Service and Wireless Telephone Service.

Article 2.

Wireless Telephone Service.

Article 2.

Wireless Telephone Service.

§ 62A-21. Definitions.

As used in this Article:

(1) "Automatic location identification" or "ALI" means a wireless Enhanced 911 service capability that enables the automatic display of information defining the approximate geographic location of the wireless telephone used to place a 911 call in accordance with the FCC Order and includes pseudoautomatic number identification.

(2) "Automatic number identification" or "ANI" means a wireless Enhanced 911 service capability that enables the automatic display of a mobile handset telephone number used to place a 911 call.

(3) "CMRS" means "commercial mobile radio service" under sections 3(27) and 332(d) of the Federal Telecommunications Act of 1996, 47 U.S.C. § 151, et seq., and the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, August 10, 1993, 107 Stat. 312. It includes the term "wireless" and service provided by any wireless two-way voice communication device, including radio-telephone communications used in cellular telephone service, personal communications service, or the functional competitive equivalent of a radio-telephone communications line used in cellular telephone service, a personal communications service, SMR mobile service, or a network radio access line which has access to E911 service.

(4) "CMRS connection" means each mobile handset telephone number assigned to a CMRS customer with a place of primary use in North Carolina.

(5) "CMRS provider" means a person or entity who is licensed by the FCC to provide CMRS service or is reselling CMRS service.

(6) "Eligible PSAPs" means those public safety answering points that have opted to provide wireless Enhanced 911 service and have submitted written notice to their CMRS providers and to the Wireless 911 Board.

(7) "FCC Order" means the Order of the Federal Communications Commission, FCC Docket No. 94-102, adopted on December 1, 1997.

(8) "Local exchange carrier" means any entity that is authorized to engage in the provision of telephone exchange service or exchange access in North Carolina.

(9) "Mobile set telephone number" means the number assigned to a CMRS connection.

(10) "Proprietary information" means customer lists and other related information, technology descriptions, technical information, or trade

secrets, including the term "trade secrets" as defined by the North Carolina Trade Secrets Protection Act, G.S. 66-152, and the actual or developmental costs of wireless Enhanced 911 systems that are developed, produced, or received internally by a CMRS provider or by a CMRS provider's employees, directors, officers, or agents.

(11) "PSAP" ("public safety answering point") means the public safety agency that receives incoming 911 calls and dispatches appropriate public safety agencies to respond to such calls.

(12) "Pseudoautomatic number identification" or "Pseudo-ANI" means a wireless Enhanced 911 service capability that enables the automatic display of the number of the cell site or cell face.

(13) "Service supplier" means a person or entity who provides exchange telephone service to a telephone subscriber.

(14) "Wireless 911 system" means an emergency telephone system that provides the user of a CMRS connection the ability to reach a PSAP by dialing the digits 911.

(15) "Wireless Enhanced 911 system" means an emergency telephone system that provides the user of the CMRS connection with wireless 911 service and, in addition, directs 911 calls to appropriate PSAPs by selective routing based on the geographical location from which the call originated and provides the capability for ANI (or Pseudo-ANI) and ALI features, in accordance with the requirements of the FCC Order.

(16) "Wireless Fund" means the Wireless Emergency Telephone System Fund required to be established and maintained pursuant to G.S. 62A-22(c). (1998-158, s. 1; 2002-16, s. 15.)

Effect of Amendments. — Session Laws 2002-16, s. 15, effective August 1, 2002, and applicable to taxable services reflected on bills dated after August 1, 2002, substituted "place of primary use" for "billing address" in subdivision (4).

Chapter 63.

Aeronautics.

Article 1.

Municipal Airports.

§ 63-1. Definitions; singular and plural.

Editor's Note. — Session Laws 2002-180, ss. 11.1 through 11.12, established a Legislative Study Commission on the Horace Williams Airport, directing the Commission to submit a final report of its findings and recommendations to the 2003 General Assembly on or before its convening and mandating that, upon the earlier of its final report or the convening of the 2003 General Assembly, the Commission shall terminate.

Article 2.

State Regulation.

§ 63-18. Dangerous flying a misdemeanor.

OPINIONS OF ATTORNEY GENERAL

Impact of federal law on statute. — The prohibition against "flying at such a low level as to disturb the public peace or the rights of private persons in the enjoyment of their homes" contained in the statute should be read as a prohibition against flying contrary to that mandated by federal law. See opinion of Attorney General to Raymond D. Large, Jr., Hunter, Large & Sherrill, P.L.L.C., 2002 N.C. AG LEXIS 23 (7/10/02).

Chapter 66.

Commerce and Business.

Article 11.

Government in Business.

§ 66-58. Sale of merchandise or services by governmental units.

(a) Except as may be provided in this section, it shall be unlawful for any unit, department or agency of the State government, or any division or subdivision of the unit, department or agency, or any individual employee or employees of the unit, department or agency in his, or her, or their capacity as employee or employees thereof, to engage directly or indirectly in the sale of goods, wares or merchandise in competition with citizens of the State, or to engage in the operation of restaurants, cafeterias or other eating places in any building owned by or leased in the name of the State, or to maintain service establishments for the rendering of services to the public ordinarily and customarily rendered by private enterprises, or to provide transportation services, or to contract with any person, firm or corporation for the operation or rendering of the businesses or services on behalf of the unit, department or agency, or to purchase for or sell to any person, firm or corporation any article of merchandise in competition with private enterprise. The leasing or subleasing of space in any building owned, leased or operated by any unit, department or agency or division or subdivision thereof of the State for the purpose of operating or rendering of any of the businesses or services herein referred to is hereby prohibited.

(b) The provisions of subsection (a) of this section shall not apply to:

(1) Counties and municipalities.

(2) The Department of Health and Human Services or the Department of Agriculture and Consumer Services for the sale of serums, vaccines, and other like products.

(3) The Department of Administration, except that the agency shall not exceed the authority granted in the act creating the agency.

(4) The State hospitals for the mentally ill.

(5) The Department of Health and Human Services.

(6) The North Carolina School for the Blind at Raleigh.

(6a) The Department of Juvenile Justice and Delinquency Prevention.

(7) The North Carolina Schools for the Deaf.

(8) The Greater University of North Carolina with regard to its utilities and other services now operated by it nor to the sale of articles produced incident to the operation of instructional departments, articles incident to educational research, articles of merchandise incident to classroom work, meals, books, or to articles of merchandise not exceeding twenty-five cents (25¢) in value when sold to members of the educational staff or staff auxiliary to education or to duly enrolled students or occasionally to immediate members of the families of members of the educational staff or of duly enrolled students nor to the sale of meals or merchandise to persons attending meetings or conventions as invited guests nor to the operation by the University of North Carolina of an inn or hotel and dining and other facilities usually connected with a hotel or inn, nor to the hospital and Medical School of the University of North Carolina, nor to the Coliseum of North Carolina State University at Raleigh, and the other schools and colleges for higher education maintained or supported by the State, nor to the Centennial Campus of North Carolina State University at Raleigh, nor to the Horace Williams Campus of the University of North Carolina at Chapel Hill, nor to a Millennial Campus of a constituent institution of The University of North Carolina, nor to the comprehensive student health services or the comprehensive student infirmaries maintained by the constituent institutions of the University of North Carolina.

(8a) The University of North Carolina with regard to the operation of gift shops, snack bars, and food service facilities physically connected to any of The University of North Carolina's public exhibition spaces, including the North Carolina Arboretum, provided that the resulting profits are used to support the operation of the public exhibition space.

(9) The Department of Environment and Natural Resources, except that the Department shall not construct, maintain, operate or lease a hotel or tourist inn in any park over which it has jurisdiction. The North Carolina Wildlife Resources Commission may sell wildlife memorabilia as a service to members of the public interested in wildlife conservation.

(10) Child-caring institutions or orphanages receiving State aid.

(11) Highlands School in Macon County.

(12) The North Carolina State Fair.

(13) Rural electric memberships corporations.

(13a) State Farm Operations Commission.

(13b) The Department of Agriculture and Consumer Services with regard to its lessees at farmers' markets operated by the Department.

(13c) The Western North Carolina Agricultural Center.

(13d) Agricultural centers or livestock facilities operated by the Department of Agriculture and Consumer Services.

(14) Nothing herein contained shall be construed to prohibit the engagement in any of the activities described in subsection (a) hereof by a firm, corporation or person who or which is a lessee of space only of the State of North Carolina or any of its departments or agencies; provided the leases shall be awarded by the Department of Administration to the highest bidder, as provided by law in the case of State contracts and which lease shall be for a term of not less than one year and not more than five years.

(15) The State Department of Correction is authorized to purchase and install automobile license tag plant equipment for the purpose of manufacturing license tags for the State and local governments and for such other purposes as the Department may direct.

The Commissioner of Motor Vehicles, or such other authority as may exercise the authority to purchase automobile license tags is hereby directed to purchase from, and to contract with, the State Department of Correction for the State automobile license tag requirements from year to year.

The price to be paid to the State Department of Correction for the tags shall be fixed and agreed upon by the Governor, the State Department of Correction, and the Motor Vehicle Commissioner, or such authority as may be authorized to purchase the supplies.

(16) Laundry services performed by the Department of Correction may be provided only for agencies and instrumentalities of the State which are supported by State funds and for county or municipally controlled and supported hospitals presently being served by the Department of Correction, or for which services have been contracted or applied for in writing, as of May 22, 1973. In addition to the prior sentence, laundry services performed by the Department of Correction may be provided for the Governor Morehead School and the North Carolina School for the Deaf.

The services shall be limited to wet-washing, drying and ironing of flatwear or flat goods such as towels, sheets and bedding, linens and those uniforms prescribed for wear by the institutions and further limited to only flat goods or apparel owned, distributed or controlled entirely by the institutions and shall not include processing by any dry-cleaning methods; provided, however, those garments and items presently being serviced by wet-washing, drying and ironing may in the future, at the election of the Department of Correction, be processed by a dry-cleaning method.

(17) The North Carolina Global TransPark Authority or a lessee of the Authority.

(18) The activities and products of private enterprise carried on or manufactured within a State prison facility pursuant to G.S. 148-70.

(19) The North Carolina Justice Academy.

(20) The Department of Transportation, or any nonprofit lessee of the Department, for the sale of books, crafts, gifts, and other tourism-related items at visitor centers owned by the Department.

(21) The North Carolina Rural Redevelopment Authority or a lessee of the Authority.

(22) The North Carolina State Highway Patrol.

(c) The provisions of subsection (a) shall not prohibit:

(1) The sale of products of experiment stations or test farms.

(1a) The sale of products raised or produced incident to the operation of a community college viticulture/enology program as authorized by G.S. 18B-1114.4.

(2) The sale of learned journals, works of art, books or publications of the Department of Cultural Resources or other agencies, or the Supreme Court Reports or Session Laws of the General Assembly.

(3) The business operation of endowment funds established for the purpose of producing income for educational purposes; for purposes of this section, the phrase "operation of endowment funds" shall include the operation by public postsecondary educational institutions of campus stores, the profits from which are used exclusively for awarding scholarships to defray the expenses of students attending the institution; provided, that the operation of the stores must be approved by the board of trustees of the institution, and the merchandise sold shall be limited to educational materials and supplies, gift items and miscellaneous personal-use articles. Provided further that

sales at campus stores are limited to employees of the institution and members of their immediate families, to duly enrolled students of the campus at which a campus store is located and their immediate families, to duly enrolled students of other campuses of the University of North Carolina other than the campus at which the campus store is located, to other campus stores and to other persons who are on campus other than for the purpose of purchasing merchandise from campus stores. It is the intent of this subdivision that campus stores be established and operated for the purpose of assuring the availability of merchandise described in this Article for sale to persons enumerated herein and not for the purpose of competing with stores operated in the communities surrounding the campuses of the University of North Carolina.

(3a) The use of community college personnel or facilities, with the consent of the trustees of that college, in support of or by a private business enterprise located on a community college campus or in the service area of a community college for one or more of the following specific services in support of economic development:

a. Small business incubators. — As used in this sub-subdivision, the term "small business incubators" means sites for new business ventures in the service area of the community college that are in need of the support and assistance provided by the college; and, without which, the likelihood of success of the business would be greatly diminished. The services of the small business incubator shall not extend to any such new business venture for a period of more than 24 months.

b. Product testing services.

c. Videoconferencing services provided to the public for occasional use.

(4) The operation of lunch counters by the Department of Health and Human Services as blind enterprises of the type operated on January 1, 1951, in State buildings in the City of Raleigh.

(5) The operation of a snack bar and cafeteria in the State Legislative Building, and a snack bar in the Legislative Office Building.

(6) The maintenance by the prison system authorities of eating and sleeping facilities at units of the State prison system for prisoners and for members of the prison staff while on duty, or the maintenance by the highway system authorities of eating and sleeping facilities for working crews on highway construction or maintenance when actually engaged in such work on parts of the highway system.

(7) The operation by penal, correctional or facilities operated by the Department of Health and Human Services, the Department of Juvenile Justice and Delinquency Prevention, or by the Department of Agriculture and Consumer Services, of dining rooms for the inmates or clients or members of the staff while on duty and for the accommodation of persons visiting the inmates or clients, and other bona fide visitors.

(8) The sale by the Department of Agriculture and Consumer Services of livestock, poultry and publications in keeping with its present livestock and farm program.

(9) The operation by the public schools of school cafeterias.

(9a) The use of a public school bus or public school activity bus for a purpose allowed under G.S. 115C-242 or the use of a public school activity bus for a purpose authorized by G.S. 115C-247.

(9b) The use of a public school activity bus by a nonprofit corporation or a unit of local government to provide transportation services for school-

aged and preschool-aged children, their caretakers, and their instructors to or from activities being held on the property of a nonprofit corporation or a unit of local government. The local board of education that owns the bus shall ensure that the person driving the bus is licensed to operate the bus and that the lessee has adequate liability insurance to cover the use and operation of the leased bus.

(10) Sale by any State correctional or other institution of farm, dairy, livestock or poultry products raised or produced by it in its normal operations as authorized by the act creating it.

(11) The sale of textbooks, library books, forms, bulletins, and instructional supplies by the State Board of Education, State Department of Public Instruction, and local school authorities.

(12) The sale of North Carolina flags by or through the auspices of the Department of Administration, to the citizens of North Carolina.

(13) The operation by the Department of Correction of forestry management programs on State-owned lands, including the sale on the open market of timber cut as a part of the management program.

(14) The operation by the Department of Correction of facilities to manufacture and produce traffic and street name signs for use on the public streets and highways of the State.

(15) The operation by the Department of Correction of facilities to manufacture and produce paint for use on the public streets and highways of the State.

(16) The performance by the Department of Transportation of dredging services for a unit of local government.

(17) The sale by the State Board of Elections to political committees and candidate committees of computer software designed by or for the State Board of Elections to provide a uniform system of electronic filing of the campaign finance reports required by Article 22A of Chapter 163 of the General Statutes and to facilitate the State Board's monitoring of compliance with that Article. This computer software for electronic filing of campaign finance reports shall not exceed a cost of one hundred dollars ($100.00) to any political committee or candidate committee without the State Board of Elections first notifying in writing the Joint Legislative Commission on Governmental Operations.

(18) The leasing of no more than 50 acres within the North Carolina Zoological Park by the Department of Environment and Natural Resources to the North Carolina Zoological Society for the maintenance or operation, pursuant to a contract or otherwise, of an exhibition center, theater, conference center, and associated restaurants and lodging facilities.

(19) The use of the North Carolina Museum of Art's conservation lab by the Regional Conservation Services Program of the North Carolina Museum of Art Foundation for the provision of conservation treatment services on privately owned works of art. However, when providing this service, the Regional Conservation Services Program shall give priority to publicly owned works of art.

(d) A department, agency or educational unit named in subsection (b) shall not perform any of the prohibited acts for or on behalf of any other department, agency or educational unit.

(e) Any person, whether employee of the State of North Carolina or not, who shall violate, or participate in the violation of this section, shall be guilty of a Class 1 misdemeanor.

(f) Notwithstanding the provisions of G.S. 66-58(a), the operation by the Department of Correction of facilities for the manufacture of any product or the

providing of any service pursuant to G.S. 148-70 not regulated by the provisions of subsection (c) hereof, shall be subject to the prior approval of the Governor, with biennial review by the General Assembly, at the beginning of each fiscal year commencing after October 1, 1975. The Department of Correction shall file with the Director of the Budget quarterly reports detailing prison enterprise operations in such a format as shall be required by the Director of the Budget.

(g) The North Carolina School of Science and Mathematics may engage in any of the activities permitted by G.S. 66-58(b)(8) and (c)(3).

(h) Notwithstanding the provisions of G.S. 66-58(b)(8), The University of North Carolina, its constituent institutions, the Centennial Campus of North Carolina State University, the Horace Williams Campus of the University of North Carolina at Chapel Hill, a Millennial Campus of a constituent institution of The University of North Carolina, or any corporation or other legal entity created or directly controlled by and using land owned by The University of North Carolina shall consult with and provide the following information to the Joint Legislative Commission on Governmental Operations before issuing debt or executing a contract for a golf course or for any transient accommodations facility, including a hotel or motel:

(1) Architectural concepts.
(2) Financial and debt service projections.
(3) Business plans.
(4) Operating plans.
(5) Feasibility studies and consultant reports. (1929, c. 221, s. 1; 1933, c. 172, s. 18; 1939, c. 122; 1941, c. 36; 1951, c. 1090, s. 1; 1957, c. 349, ss. 6, 10; 1967, c. 996, s. 13; 1973, c. 476, ss. 48, 128, 143; c. 671, s. 1; c. 965; c. 1262, s. 86; c. 1294; c. 1457, s. 7; 1975, c. 730, ss. 2-5; c. 840; c. 879, s. 46; 1977, cc. 355, 715; c. 771, s. 4; 1979, c. 830, s. 4; 1981, c. 635, s. 3; 1983, c. 8; c. 476; c. 717, s. 13; c. 761, s. 168; 1985, c. 589, s. 28; c. 757, s. 206(d); 1989, c. 727, s. 218(9); 1989 (Reg. Sess., 1990), c. 1004, s. 1; 1991, c. 749, s. 7; 1991 (Reg. Sess., 1992), c. 902, s. 3; 1993, c. 539, s. 513; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 769, s. 17.15; c. 777, s. 4(e); 1995, c. 247, s. 2; c. 507, s. 13.1(a); 1997-258, s. 1; 1997-261, ss. 4-6; 1997-315, s. 1; 1997-443, s. 11A.21; 1997-456, s. 55.2A; 1997-527, s. 1; 1998-202, s. 4(d), (e); 1998-212, ss. 9.9, 13.3; 1999-234, s. 9; 1999-237, ss. 19.7, 27.23A; 2000-137, ss. 4(f), 4(g); 2000-148, s. 6; 2000-177, s. 10; 2001-41, s. 2; 2001-127, s. 1; 2001-368, s. 1; 2002-102, s. 3; 2002-109, s. 1; 2002-126, ss. 9.15(a), 18.5.)

Editor's Note. —

Session Laws 2002-126, ss. 9.10A(a) to 9.10A(c), provide: "(a) The Board of Governors of The University of North Carolina shall report to the Joint Legislative Commission on Governmental Operations prior to March 1, 2003, on activities undertaken under exemptions to the Umstead Act, which are set out in G.S. 66-58(b)(8), for the Centennial Campus of North Carolina State University at Raleigh, the Horace Williams Campus of the University of North Carolina at Chapel Hill, and a Millennial Campus of a constituent institution of The University of North Carolina.

"(b) The report shall include the following information on all such activities undertaken since July 1, 1999:

"(1) The reasons the exemptions were necessary for the development and operation of facilities on the Centennial Campus of North Carolina State University at Raleigh, the Horace Williams Campus of the University of North Carolina at Chapel Hill, or a Millennial Campus of a constituent institution of The University of North Carolina, and

"(2) A specific list of the activities that would have been prohibited without the exemptions.

"(c) The report shall also include:

"(1) A specific list of activities that are necessary to continue the development and operation of these facilities and that would be prohibited if the facilities were not exempt from the provisions of G.S. 66-58(a), and

"(2) A list of the specific exemptions from G.S. 66-58(a) that would be necessary to continue the development and operation of these

facilities prohibited if G.S. 66-58(a) applied to the facilities."

Session Laws 2002-126, s. 9.15, which added subsection (h), provides: "This section [s. 9.15 of Session Laws 2002-126] does not apply if the golf course or transient accommodations facility is owned, operated, or leased by The University of North Carolina or one of its constituent institutions on or before July 1, 2002. This section [s. 9.15 of Session Laws 2002-126] is effective when it becomes law."

Effect of Amendments. —

Session Laws 2002-102, s. 3, effective August 29, 2002, added subdivision (c)(1a).

Session Laws 2002-109, s. 1, effective September 6, 2002, added subdivision (b)(8a).

Session Laws 2002-126, ss. 9.15(a) and 18.5, effective July 1, 2002, added subdivision (b)(22); and added subsection (h).

OPINIONS OF ATTORNEY GENERAL

Hearing aid fitting services may be provided at UNC clinics. — Hearing aid fitting services provided in University of North Carolina (UNC) clinics by graduate students in the UNC Audiology Master Degree programs were an integral part of their professional education and training and, therefore, the constituent institutions of UNC did not violate the Umstead Act by operating clinics in which their graduate students provided hearing aid evaluation and fitting services to the public. See opinion of Attorney General to M. Jackson Nichols, Allen & Pinnex, P.A., 2002 N.C. AG LEXIS 2 (1/8/02).

Article 11A.

Electronic Commerce in Government.

§ 66-58.4. Use of electronic signatures.

Local Modification. — Cabarrus: 2002-115, s. 1; Mecklenburg: 2002-115, s. 1.

Article 17.

Closing-Out Sales.

§ 66-77. License required; contents of applications; inventory required; fees; bond; extension of licenses; records; false statements.

Local Modification. — City of Charlotte: 2002-33, s. 1.

Article 24.

Trade Secrets Protection Act.

§ 66-152. Definitions.

CASE NOTES

Establishing a Trade Secret. —

Plaintiff adequately defined its trade secrets for the purposes of summary judgment by identifying its customer list, vendor lists, and technical information as trade secrets accessed by defendant competitor; plaintiff produced the actual customer list and vendor information that it claimed were trade secrets and a list of employees who could explain in detail which technical information was classified as a trade secret. Static Control Components, Inc. v. Darkprint Imaging, Inc., 200 F. Supp. 2d 541,

2002 U.S. Dist. LEXIS 13271 (M.D.N.C. 2002).

Customer List Is Not Trade Secret. — Defendant former employees had the right to utilize information contained in plaintiff's customer lists, as a list of customer names and addresses is not a "trade secret" under this section. UBS PaineWebber, Inc. v. Aiken, 197 F. Supp. 2d 436, 2002 U.S. Dist. LEXIS 4510 (W.D.N.C. 2002).

Trade Secrets Not Shown. —

Employee did not misappropriate trade secrets, as defined by G.S. 66-152(3), when the information he communicated was not subject to reasonable efforts to maintain its secrecy, could have been compiled from public information, or originated with another party. Combs & Assocs., Inc. v. Kennedy, 147 N.C. App. 362, 555 S.E.2d 634, 2001 N.C. App. LEXIS 1169 (2001).

Cited in Precision Walls, Inc. v. Servie, — N.C. App. —, 568 S.E.2d 267, 2002 N.C. App. LEXIS 980 (2002).

§ 66-154. Remedies.

CASE NOTES

Measure of Damages. — Trial court properly looked to G.S. 66-154(b) of the North Carolina Trade Secrets Protection Act, G.S. 66-152 et seq., for guidance in fashioning a remedy for violation of a consent judgment because the consent judgment made it appear that, as between the parties, Substance X was considered a trade secret; appellants' unjust enrichment was an appropriate measure of damages, although attorney's fees were inappropriate since the misappropriation of Substance X was not malicious. Potter v. Hilemn Labs., Inc., 150 N.C. App. 326, 564 S.E.2d 259, 2002 N.C. App. LEXIS 492 (2002).

§ 66-155. Burden of proof.

CASE NOTES

Burden of Proof. —

Strong circumstantial evidence as to the misappropriation of trade secrets, which included hiring away plaintiff's employees including its top scientist and then developing competing products in a brief period of time, was sufficient to withstand defendant competitor's motion for summary judgment. Static Control Components, Inc. v. Darkprint Imaging, Inc., 200 F. Supp. 2d 541, 2002 U.S. Dist. LEXIS 13271 (M.D.N.C. 2002).

Article 25.

Regulation of Precious Metal Businesses.

§ 66-165. Permits required.

(a) Except as provided in subsection (c), it shall be unlawful for any person to engage as a dealer in the business of purchasing precious metals either as a separate business or in connection with other business operations without first obtaining a permit for the business from the local law-enforcement agency. The form of the permit and application therefor shall be as approved by the Department of Crime Control and Public Safety. The application shall be given under oath and shall be notarized. A 30-day waiting period from the date of filing of the application is required prior to initial issuance of a permit. A separate permit shall be issued for each location, place, or premises within the jurisdiction of the local law-enforcement agency which is used for the conduction of a precious metals business, and each permit shall designate the location, place or premises to which it applies. Such business shall not be conducted in any other place than that designated in the permit, and no business shall be conducted in a mobile home, trailer, camper, or other vehicle, or structure not permanently affixed to the ground or in any room customarily

used for lodging in any hotel, motel, tourist court, or tourist home as defined in G.S. 105-61. The permit shall be posted in a prominent place on the designated premises. Permits shall be valid for a period of 12 months from the date issued and may be renewed without a waiting period upon filing of an application and payment of the annual fee. The annual fee for each dealer's permits within each jurisdiction shall be ten dollars ($10.00) to provide for the administrative costs of the local law-enforcement agency, including purchase of required forms. The fee shall not be refundable even if the permits are denied or later suspended or revoked. Such permits shall be in addition to and not in lieu of other business licenses and are not transferable.

Any dealer applying to the local law-enforcement agency for a permit shall furnish the local law-enforcement agency with the following information:

(1) His full name, and any other names used by the applicant during the preceding five years. In the case of a partnership, association, or corporation, the applicant shall list any partnership, association, or corporate names used during the preceding five years;
(2) Current address, and all addresses used by the applicant during the preceding five years;
(3) Physical description;
(4) Age;
(5) Driver's license number, if any, and state of issuance;
(6) Recent photograph;
(7) Record of felony convictions;
(8) Record of other convictions during the preceding five years; and
(9) A full set of fingerprints of the applicant.

If the applicant for a dealer's permit is a partnership or association, all persons owning a ten percent (10%) or more interest in the partnership or association shall comply with the provisions of this subsection. Any such permits shall be issued in the name of the partnership or association.

If the applicant for a dealer's permit is a corporation, each officer, director and stockholder owning ten percent (10%) or more of the corporation's stock, of any class, shall comply with the provisions of this subsection. Any such permits shall be issued in the name of the corporation.

No permit shall be issued to an applicant who, within five years prior to the date of application, has been convicted of a felony involving a crime of moral turpitude, or larceny, or receiving stolen goods or of similar charges in any federal court or a court of this or any other state. In the case of a partnership, association, or corporation, no permit shall be issued to any applicant with an officer, partner, or director who has, within five years prior to the date of application, been convicted of a felony involving a crime of moral turpitude, or larceny, or receiving stolen goods or of similar charges in any federal court or a court of this or any other state.

The Department of Justice may provide a criminal record check to the local law-enforcement agency for a person who has applied for a permit through the agency. The agency shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The agency shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection.

(b) Every employee engaged in the precious metal business shall, within two days of being so engaged, register his name and address with the local law-enforcement agency and have his photograph taken by the agency. The agency shall issue to him a certificate of compliance with this section upon the applicant's payment of the sum of three dollars ($3.00) to the agency. The permit shall be posted in the work area of the permit holder.

(c) A special occasion permit authorizes the permittee to purchase precious metals as a dealer participating in any trade shows, antique shows, and crafts shows conducted within the State. A special occasion permit shall be issued by any local law-enforcement agency; provided, however, that a permittee under subsection (a) shall apply for a special occasion permit with the local law-enforcement agency which issued such dealer's permit. An application for a permit shall be on a form as approved by the Department of Crime Control and Public Safety and shall be given under oath and notarized. A 30-day waiting period from the date of filing of the application is required prior to initial issuance of a permit.

Any dealer applying to a local law-enforcement agency for a special occasion permit shall furnish the local law-enforcement agency with the information required in an application for a dealer's permit as set forth in (a).

If the applicant for a special occasion permit is a partnership or association, all persons owning a ten percent (10%) or more interest in the partnership or association shall comply with the provisions of this subsection. Any such permits shall be issued in the name of the partnership or association.

If the applicant for a special occasion permit is a corporation, each officer, director and stockholder owning ten percent (10%) or more of the corporation's stock, of any class, shall comply with the provisions of this subsection. Any such permits shall be issued in the name of the corporation.

No permit shall be issued to an applicant who, within five years prior to the date of application, has been convicted of a felony involving a crime of moral turpitude, or larceny, or receiving stolen goods or of similar charges in any federal court or a court of this or any other state. In the case of a partnership, association, or corporation, no permit shall be issued to any applicant with an officer, partner, or director who has, within five years prior to the date of application, been convicted of a felony involving a crime of moral turpitude, or larceny, or receiving stolen goods or of similar charges in any federal court or a court of this or any other state.

The Department of Justice may provide a criminal record check to the local law-enforcement agency for a person who has applied for a permit through the agency. The agency shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The agency shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection.

The fee for an application for a special occasion permit shall be ten dollars ($10.00) to provide for the administrative cost of the local law-enforcement

agency including purchase of required forms. The fee shall not be refundable even if the permit is denied or is later suspended or revoked. Such permits shall be in addition to and not in lieu of other business licenses and are not transferable.

A special occasion permit shall be valid for 12 months from the date issued, unless earlier surrendered, suspended, or revoked. Application for renewal of a permit for an additional 12 months shall be on a form as approved by the Department of Crime Control and Public Safety and shall be accompanied by an application fee of ten dollars ($10.00). A renewal fee shall not be refundable.

Each special occasion permit shall be posted in a prominent place on the premises of any show at which the permittee purchases precious metals. (1981, c. 956, s. 1; 2002-147, s. 2.)

Editor's Note. — Session Laws 2002-147, s. 15, provides: "If the Private Security Officer Employment Standards Act of 2002 [S. 2238, 107th Cong. (2002)] is enacted by the United States Congress, the State of North Carolina declines to participate in the background check system authorized by that act as a result of the enactment of this act."

Effect of Amendments. — Session Laws 2002-147, s. 2, effective October 9, 2002, in subsection (a), added "(9) A full set of fingerprints of the applicant" to the list of information in the second paragraph required to be furnished to the local law enforcement agency, and added the last two paragraphs; and in subsection (c), inserted the sixth and seventh paragraphs.

Article 37.

Tobacco Reserve Fund and Escrow Compliance.

Part 1. Tobacco Reserve Fund.

§ 66-290. Definitions.

As used in this Article:

(1) "Adjusted for inflation" means increased in accordance with the formula for inflation adjustment set forth in Exhibit C to the Master Settlement Agreement.

(2) "Affiliate" means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person. Solely for purposes of this definition, the terms "owns," "is owned," and "ownership" mean ownership of an equity interest, or the equivalent thereof, of ten percent (10%) or more, and the term "person" means an individual, partnership, committee, association, corporation, or any other organization or group of persons.

(3) "Allocable share" means Allocable Share as that term is defined in the Master Settlement Agreement.

(4) "Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (i) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (ii) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (iii) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (i) of this definition. The term "cigarette"

includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette," 0.09 ounces of "roll-your-own" tobacco shall constitute one individual "cigarette."

(5) "Master Settlement Agreement" means the settlement agreement (and related documents) entered into on November 23, 1998, by the State and leading United States tobacco product manufacturers.

(6) "Qualified escrow fund" means an escrow arrangement with a federally or State chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least one billion dollars ($1,000,000,000) where such arrangement requires that such financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing, or directing the use of the funds' principal except as consistent with G.S. 66-291(b).

(7) "Released claims" means Released Claims as that term is defined in the Master Settlement Agreement.

(8) "Releasing parties" means Releasing Parties as that term is defined in the Master Settlement Agreement.

(9) "Tobacco Product Manufacturer" means an entity that after the effective date of this Article directly (and not exclusively through any affiliate):

a. Manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where such importer is an original participating manufacturer, as that term is defined in the Master Settlement Agreement, that will be responsible for the payments under the Master Settlement Agreement with respect to such cigarettes as a result of the provisions of subsection II(mm) of the Master Settlement Agreement and that pays the taxes specified in subsection II(z) of the Master Settlement Agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States);

b. Is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

c. Becomes a successor of an entity described in sub-subdivision a. or b. of this subdivision.

The term "Tobacco Product Manufacturer" shall not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within any of sub-subdivisions a. through c. of this subdivision.

(10) "Units sold" means the number of individual cigarettes sold in the State by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) during the year in question, as measured by excise taxes collected by the State on packs (or "roll-your-own" tobacco containers). The Secretary of Revenue shall promulgate such rules as are necessary to ascertain the amount of State excise tax paid on the cigarettes of such tobacco product manufacturer for each year. In lieu of adopting rules, the Secretary of Revenue may issue bulletins or directives requiring taxpayers to submit to the Department of Revenue the information necessary to make the required determination under this subdivision. (1999-311, s. 1; 2002-145, s. 2.)

Editor's Note. — Session Laws 2002-145, s. 1, effective October 4, 2002, added "and Escrow Compliance" to the Article 37 heading.

Session Laws 2002-145, s. 2, effective October 4, 2002, redesignated G.S. 66-290 and G.S. 66-291 as Part 1 of Article 37 of Chapter 66, designated "Tobacco Reserve Fund."

§ 66-291. Requirements.

(a) Any tobacco product manufacturer selling cigarettes to consumers within the State (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) after the effective date of this Article shall do one of the following:

(1) Become a participating manufacturer (as that term is defined in section II(jj) of the Master Settlement Agreement) and generally perform its financial obligations under the Master Settlement Agreement; or

(2) Place into a qualified escrow fund by April 15 of the year following the year in question the following amounts (as such amounts are adjusted for inflation):

a. 1999: $.0094241 per unit sold after the effective date of this Article.

b. 2000: $.0104712 per unit sold.

c. For each of 2001 and 2002: $.0136125 per unit sold.

d. For each of 2003 through 2006: $.0167539 per unit sold.

e. For each of 2007 and each year thereafter: $.0188482 per unit sold.

(b) A tobacco product manufacturer that places funds into escrow pursuant to subdivision (2) of subsection (a) of this section shall receive the interest or other appreciation on such funds as earned. Such funds themselves shall be released from escrow only under the following circumstances:

(1) To pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the State or any releasing party located or residing in the State. Funds shall be released from escrow under this subdivision (i) in the order in which they were placed into escrow and (ii) only to the extent and at the time necessary to make payments required under such judgment or settlement;

(2) To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow in a particular year was greater than the State's allocable share of the total payments that such manufacturer would have been required to make in that year under the Master Settlement Agreement (as determined pursuant to section IX(i)(2) of the Master Settlement Agreement, and before any of the adjustments or offsets described in section IX(i)(3) of that Agreement other than the Inflation Adjustment) had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer; or

(3) To the extent not released from escrow under subdivisions (1) or (2) of this subsection, funds shall be released from escrow and revert back to such tobacco product manufacturer 25 years after the date on which they were placed into escrow.

(c) Each tobacco product manufacturer that elects to place funds into escrow pursuant to this section shall annually certify to the Attorney General that it is in compliance with this section. The Attorney General may bring a civil action on behalf of the State against any tobacco product manufacturer that fails to place into escrow the funds required under this section. Any tobacco product manufacturer that fails in any year to place into escrow the funds required under this section shall:

(1) Be required within 15 days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of

a violation either of subdivision (2) of subsection (a) of this section, of subsection (b) of this section, or of this section, may impose a civil penalty (the clear proceeds of which shall be paid to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2) in an amount not to exceed five percent (5%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed one hundred percent (100%) of the original amount improperly withheld from escrow;

(2) In the case of a knowing violation, be required within 15 days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a knowing violation either of subdivision (2) of subsection (a) of this section, of subsection (b) of this section, or of this section, may impose a civil penalty (the clear proceeds of which shall be paid to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2) in an amount not to exceed fifteen percent (15%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed three hundred percent (300%) of the original amount improperly withheld from escrow; and

(3) In the case of a second knowing violation, be prohibited from selling cigarettes to consumers within the State (whether directly or through a distributor, retailer, or similar intermediary) for a period not to exceed two years.

Each failure to make an annual deposit required under this section shall constitute a separate violation. (1999-311, s. 1; 2000-140, s. 58; 2002-145, s. 2.)

Part 2. Tobacco Escrow Compliance.

§ 66-292. Definitions.

The following definitions apply in this Part:

(1) Brand family. — All styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers including, but not limited to, "menthol", "lights", "kings", and "100s".

(2) Escrow agreement. — An agreement by which a qualified escrow fund is created and maintained.

(3) Nonparticipating manufacturer. — A tobacco product manufacturer that is not a participating manufacturer.

(4) Participating manufacturer. — Defined in subsection II(jj) of the Master Settlement Agreement. (2002-145, s. 3.)

Editor's Note. — Session Laws 2002-145, s. 6, made this Part, as enacted by s. 3, effective October 4, 2002, except for G.S. 66-293, which was made effective January 1, 2003.

§ 66-293. Sale of certain cigarettes prohibited.

(a) Civil Penalty. — It is unlawful for a person required to pay taxes pursuant to Part 2 or 3 of Article 2A of Chapter 105 of the General Statutes to sell or deliver cigarettes belonging to a brand family of a nonparticipating manufacturer if the sale of the cigarettes is subject to such taxes unless the cigarettes are included on the compliant nonparticipating manufacturer's list prepared and made public by the Office of the Attorney General under G.S. 66-295 as of the date the person sells or delivers the cigarettes. It is not a violation of this subsection if the brand family was on the compliant nonparticipating manufacturer's list when the person purchased the cigarettes and

the person sold or delivered the cigarettes within 60 days of the purchase. The Attorney General may impose a civil penalty on a person that it finds violates this subsection. The amount of the penalty may not exceed the greater of five hundred percent (500%) of the retail value of the cigarettes sold or five thousand dollars ($5,000).

(b) Contraband. — Cigarettes described in subsection (a) of this section are contraband and may be seized by a law enforcement officer. The procedure for seizure and disposition of this contraband is the same as the procedure under G.S. 105-113.31 and G.S. 105-113.32 for non-tax-paid cigarettes. (2002-145, s. 3.)

Editor's Note. — Session Laws 2002-145, s. 6, made this section effective January 1, 2003.

§ 66-294. Duties of manufacturers.

(a) Participating Manufacturers. — Unless the Office of the Attorney General provides a waiver, a participating manufacturer must submit to the Office of the Attorney General a list of all of the manufacturer's brand families by April 30th of each year. The participating manufacturer must notify the Office of the Attorney General of any changes to the list of brand families it offers for sale 30 days prior to the change.

(b) Nonparticipating Manufacturers. — A nonparticipating manufacturer must:

(1) Appoint and continuously maintain a process service agent within the State of North Carolina to accept service of any notification or enforcement of an action under this Article. The manufacturer shall file a certified copy of each instrument appointing a process service agent with the Secretary of State and the Office of the Attorney General.

(2) Submit an annual application to the Office of the Attorney General for inclusion of the nonparticipating manufacturer's products on the compliant nonparticipating manufacturer's list, in accordance with subsection (c) of this section.

(3) Notify the Office of the Attorney General of any changes to the list of brand families it offers for sale 30 days prior to the change.

(4) Have made the escrow payments required under G.S. 66-291(a)(2) for all cigarettes belonging to the brand families included in the list submitted in the application for inclusion and any brand families added to the list since it was submitted to the Office of the Attorney General.

(5) Submit an escrow agreement to the Office of the Attorney General.

(6) Not deliver cigarettes unless the cigarettes are included on the compliant nonparticipating manufacturer's list in effect on the date of delivery.

(c) Nonparticipating Manufacturer's Application. — A nonparticipating manufacturer must submit an application to the Office of the Attorney General by April 30th of each year for inclusion on the compliant nonparticipating manufacturers' list. The Attorney General may provide a waiver of the deadline for good cause. The application must include a certification that the nonparticipating manufacturer has fulfilled the duties listed in subsection (b) of this section and a list of the brand families of the manufacturer offered for sale in the State during either the current calendar year or the previous calendar year. The certification must be in the form required by the Office of the Attorney General. (2002-145, s. 3.)

Editor's Note. — Session Laws 2002-145, s. 5, provides: "Notwithstanding G.S. 66-294, as enacted by this act, the initial lists required to be submitted to the Office of the Attorney General must be submitted by November 1, 2002."

§ 66-294.1. Duties of Attorney General.

(a) Annual Lists. — The Office of the Attorney General shall prepare the following lists annually and shall make those lists available for public inspection:

(1) Participating manufacturers. — A list of the participating manufacturers and all brand families of each participating manufacturer that the manufacturer has identified to the Attorney General, in accordance with G.S. 66-294.

(2) Compliant nonparticipating manufacturers. — A list of the nonparticipating manufacturers whose applications for inclusion have been found to be complete and accurate and whose escrow agreements have been approved by the Office of the Attorney General. The list must include those brand families that the manufacturer has identified to the Attorney General, in accordance with G.S. 66-294.

(b) Supplemental Lists. — The Office of the Attorney General must supplement the annual lists as necessary to reflect additions to or deletions of manufacturers and brand families. The Attorney General shall delete a nonparticipating manufacturer and its brand families from the list if it determines that the manufacturer fails to comply with the duties listed in G.S. 66-294. The Attorney General must add a nonparticipating manufacturer and its brand families to the list if it determines all of the following:

(1) The nonparticipating manufacturer has submitted an application under G.S. 66-294, and it is found to be complete and accurate.

(2) The Office of the Attorney General has approved the manufacturer's escrow agreement.

(3) The manufacturer has made any past due payments owed to its escrow account for any of its listed brand families.

(4) The manufacturer has resolved any outstanding penalty demands or adjudicated penalties for its listed brand families. (2002-145, s. 3.)

Editor's Note. — The number of G.S. 66-294.1 was assigned by the revisor of statutes, the number in Session Laws 2002-145 having been G.S. 66-295.

Session Laws 2002-145, s. 5, provides: "Notwithstanding G.S. 66-294, as enacted by this act, the initial lists required to be submitted to the Office of the Attorney General must be submitted by November 1, 2002."

Chapter 69.

Fire Protection.

Article 3A.

Rural Fire Protection Districts.

Article 3A.

Rural Fire Protection Districts.

§ 69-25.1. Election to be held upon petition of voters.

Upon the petition of thirty-five percent (35%) of the resident freeholders living in an area lying outside the corporate limits of any city or town, which area is described in the petition and designated as "_____ (Here insert name) Fire District," the board of county commissioners of the county shall call an election in said district for the purpose of submitting to the qualified voters therein the question of levying and collecting a special tax on all taxable property in said district, of not exceeding fifteen cents (15¢) on the one hundred dollars ($100.00) valuation of property, for the purpose of providing fire protection in said district. The county tax office shall be responsible for checking the freeholder status of those individuals signing the petition and confirming the location of the property owned by those individuals. Unless specifically excluded by other law, the provisions of Chapter 163 of the General Statutes concerning petitions for referenda and elections shall apply. If the voters reject the special tax under the first paragraph of this section, then no new election may be held under the first paragraph of this section within two years on the question of levying and collecting a special tax under the first paragraph of this section in that district, or in any proposed district which includes a majority of the land within the district in which the tax was rejected.

Upon the petition of thirty-five percent (35%) of the resident freeholders living in an area which has previously been established as a fire protection district and in which there has been authorized by a vote of the people a special tax not exceeding ten cents (10¢) on the one hundred dollars ($100.00) valuation of property within the area, the board of county commissioners shall call an election in said area for the purpose of submitting to the qualified voters therein the question of increasing the allowable special tax for fire protection within said district from ten cents (10¢) on the one hundred dollars ($100.00) valuation to fifteen cents (15¢) on the one hundred dollars ($100.00) valuation on all taxable property within such district. Elections on the question of increasing the allowable tax rate for fire protection shall not be held within the same district at intervals less than two years. (1951, c. 820, s. 1; 1953, c. 453, s. 1; 1959, c. 805, ss. 1, 2; 1983, c. 388, ss. 1, 1.1; 2002-159, s. 55(g).)

Effect of Amendments. — Session Laws 2002-159, s. 55(g), effective January 1, 2003, and applicable to all primaries and elections held on and after that date, inserted the second sentence in the first paragraph.

Chapter 70.

Indian Antiquities, Archaeological Resources and Unmarked Human Skeletal Remains Protection.

Article 3.

Unmarked Human Burial and Human Skeletal Remains Protection Act.

Article 4.

North Carolina Archaeological Record Program.

Article 3.

Unmarked Human Burial and Human Skeletal Remains Protection Act.

§ 70-28. Definitions.

As used in this Article:

(1) "Chief Archaeologist" means the Chief of the Office of Archives and History, Department of Cultural Resources.

(2) "Executive Director" means the Executive Director of the North Carolina Commission of Indian Affairs.

(3) "Human skeletal remains" or "remains" means any part of the body of a deceased human being in any stage of decomposition.

(4) "Professional archaeologist" means a person having (i) a postgraduate degree in archaeology, anthropology, history, or another related field with a specialization in archaeology, (ii) a minimum of one year's experience in conducting basic archaeological field research, including the excavation and removal of human skeletal remains, and (iii) designed and executed an archaeological study and presented the written results and interpretations of such study.

(5) "Skeletal analyst" means any person having (i) a postgraduate degree in a field involving the study of the human skeleton such as skeletal biology, forensic osteology or other relevant aspects of physical anthropology or medicine, (ii) a minimum of one year's experience in conducting laboratory reconstruction and analysis of skeletal remains, including the differentiation of the physical characteristics denoting cultural or biological affinity, and (iii) designed and executed a skeletal analysis, and presented the written results and interpretations of such analysis.

(6) "Unmarked human burial" means any interment of human skeletal remains for which there exists no grave marker or any other historical documentation providing information as to the identity of the deceased. (1981, c. 853, s. 2; 2002-159, s. 35(a).)

Effect of Amendments. — Session Laws 2002-159, s. 35(a), effective October 11, 2002, substituted "Chief of the Office of Archives and History" for "Chief Archaeologist, Archaeology Branch, Archaeology and Historic Preservation Section, Division of Archives and History" in subdivision (1).

Article 4.

North Carolina Archaeological Record Program.

§ 70-48. Definitions.

As used in this Article, unless the context clearly indicates otherwise:

(1) "Archaeological investigation" means any surface collection, subsurface tests, excavation, or other activity that results in the disturbance or removal of archaeological resources.

(2) "Archaeological resource" means any material remains of past human life or activities which are at least 50 years old and which are of archaeological interest, including pieces of pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, rock paintings, rock carvings, intaglios, graves or human skeletal materials. Paleontological specimens are not to be considered archaeological resources unless found in an archaeological context.

(3) "Program" means the North Carolina Archaeological Record Program established under this Article.

(4) "Record" means the North Carolina Archaeological Record established under this Article.

(5) "State Archaeologist" means the head of the Archaeology Section of the Office of Archives and History, Department of Cultural Resources. (1991, c. 461, s. 2; c. 761, s. 12.1; 2002-159, s. 35(b).)

Effect of Amendments. — Session Laws 2002-159, s. 35(b), effective October 11, 2002, substituted "Archaeology Section of the Office of Archives and History" for "Archaeology Branch, Archaeology and Historic Preservation Section, Division of Archives and History" in subdivision (5).

§ 70-49. The North Carolina Archaeological Record Program.

(a) The Department of Cultural Resources, Office of Archives and History shall establish the North Carolina Archaeological Record Program. The purpose of the Program shall be to assist private owners of archaeological resources in the preservation and protection of those resources. Participation in the Program shall be voluntary.

(b) As part of the Program, the Department shall establish and maintain the North Carolina Archaeological Record. The North Carolina Archeological Record shall include a list of the archaeological resources owned privately by each person participating in the Program. No archaeological resource shall be enrolled in the Record without the permission of its owner.

(c) An archaeological resource that is enrolled in the North Carolina Archaeological Record shall be removed from the Record at the written request of either the State Archaeologist or the owner of the archaeological resource. The archaeological resource shall be removed from the Record 30 days after the receipt by the Department of Cultural Resources of the written request. (1991, c. 461, s. 2; 2002-159, s. 35(c).)

Effect of Amendments. — Session Laws 2002-159, s. 35(c), effective October 11, 2002, substituted "Office of Archives and History" for "Division of Archives and History" in subsection (a).

Chapter 74.

Mines and Quarries.

Article 7.

The Mining Act of 1971.

§ 74-49. Definitions.

Wherever used or referred to in this Article, unless a different meaning clearly appears from the context:

(1) "Affected land" means the surface area of land that is mined, the surface area of land associated with a mining activity so that soil is exposed to accelerated erosion, the surface area of land on which overburden and waste is deposited, and the surface area of land used for processing or treatment plant, stockpiles, nonpublic roads, and settling ponds.

(1a) "Affiliate" has the same meaning as in 17 Code of Federal Regulations § 240.12(b)-2 (1 April 1992 Edition), which defines "affiliate" as a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control of another person.

(2) "Borrow pit" means an area from which soil or other unconsolidated materials are removed to be used, without further processing, for highway construction and maintenance.

(3) "Commission" means the Mining Commission created by G.S. 143B-290.

(4) "Department" means the Department of Environment and Natural Resources. Whenever in this Article the Department is assigned duties, they may be performed by the Secretary or an employee of the Department designated by the Secretary.

(5) "Land" shall include submerged lands underlying any river, stream, lake, sound, or other body of water and shall specifically include, among others, estuarine and tidal lands.

(6) "Minerals" means soil, clay, coal, stone, gravel, sand, phosphate, rock, metallic ore, and any other solid material or substance of commercial value found in natural deposits on or in the earth.

(7) "Mining" means:

a. The breaking of the surface soil in order to facilitate or accomplish the extraction or removal of minerals, ores, or other solid matter.

b. Any activity or process constituting all or part of a process for the extraction or removal of minerals, ores, soils, and other solid matter from their original location.

c. The preparation, washing, cleaning, or other treatment of minerals, ores, or other solid matter so as to make them suitable for commercial, industrial, or construction use.

"Mining" does not include:

a. Those aspects of deep mining not having significant effect on the surface, where the affected land does not exceed one acre in area.
b. Mining operations where the affected land does not exceed one acre in area.
c. Plants engaged in processing minerals produced elsewhere and whose refuse does not affect more than one acre of land.
d. Excavation or grading when conducted solely in aid of on-site farming or of on-site construction for purposes other than mining.
e. Removal of overburden and mining of limited amounts of any ores or mineral solids when done only for the purpose and to the extent necessary to determine the location, quantity, or quality of any natural deposit, provided that no ores or mineral solids removed during exploratory excavation or mining are sold, processed for sale, or consumed in the regular operation of a business, and provided further that the affected land resulting from any exploratory excavation does not exceed one acre in area.
f. Excavation or grading where all of the following apply:
    1. The excavation or grading is conducted to provide soil or other unconsolidated material to be used without further processing for a single off-site construction project for which an erosion and sedimentation control plan has been approved in accordance with Article 4 of Chapter 113A of the General Statutes.
    2. The affected land, including nonpublic access roads, does not exceed five acres.
    3. The excavation or grading is completed within one year.
    4. The excavation or grading does not involve blasting, the removal of material from rivers or streams, the disposal of off-site waste on the affected land, or the surface disposal of groundwater beyond the affected land.
    5. The excavation or grading is not in violation of any local ordinance.
    6. An erosion and sedimentation control plan for the excavation or grading has been approved in accordance with Article 4 of Chapter 113A of the General Statutes.

(8) "Neighboring" means in close proximity, in the immediate vicinity, or in actual contact.

(9) "Operator" means any person or persons, any partnership, limited partnership, or corporation, or any association of persons, engaged in mining operations, whether individually, jointly, or through subsidiaries, agents, employees, or contractors.

(10) "Overburden" means the earth, rock, and other materials that lie above the natural deposit of minerals.

(10a) "Parent" has the same meaning as in 17 Code of Federal Regulations § 240.12(b)-2 (1 April 1992 Edition), which defines "parent" as an affiliate that directly, or indirectly through one or more intermediaries, controls another person.

(11) "Peak" means overburden removed from its natural position and deposited elsewhere in the shape of conical piles or projecting points.

(12) "Reclamation" means the reasonable rehabilitation of the affected land for useful purposes, and the protection of the natural resources of the surrounding area. Although both the need for and the practicability of reclamation will control the type and degree of reclamation in any specific instance, the basic objective will be to establish on a continuing basis the vegetative cover, soil stability, water conditions and safety conditions appropriate to the area.

(13) "Reclamation plan" means the operator's written proposal as required and approved by the Department for reclamation of the affected land, which shall include but not be limited to:
a. Proposed practices to protect adjacent surface resources;
b. Specifications for surface gradient restoration to a surface suitable for the proposed subsequent use of the land after reclamation is completed, and proposed method of accomplishment;
c. Manner and type of revegetation or other surface treatment of the affected areas;
d. Method of prevention or elimination of conditions that will be hazardous to animal or fish life in or adjacent to the area;
e. Method of compliance with State air and water pollution laws;
f. Method of rehabilitation of settling ponds;
g. Method of control of contaminants and disposal of mining refuse;
h. Method of restoration or establishment of stream channels and stream banks to a condition minimizing erosion, siltation, and other pollution;
i. Maps and other supporting documents as may be reasonably required by the Department; and
j. A time schedule that meets the requirements of G.S. 74-53.

(14) "Refuse" means all waste soil, rock, mineral, scrap, tailings, slimes, and other material directly connected with the mining, cleaning, and preparation of substances mined and shall include all waste materials deposited on or in the permit area from other sources.

(15) "Ridge" means overburden removed from its natural position and deposited elsewhere in the shape of a long, narrow elevation.

(16) "Spoil bank" means a deposit of excavated overburden or refuse.

(16a) "Subsidiary" has the same meaning as in 17 Code of Federal Regulations § 240.12(b)-2 (1 April 1992 Edition), which defines "subsidiary" as an affiliate that is directly, or indirectly through one or more intermediaries, controlled by another person.

(17) "Termination of mining" means cessation of mining operations with intent not to resume, or cessation of mining operations as a result of expiration or revocation of the permit of the operator. Whenever the Department shall have reason to believe that a mining operation has terminated, the Department shall give the operator written notice of its intention to declare the operation terminated, and the operator shall have an opportunity to appear within 30 days and present evidence that the operation is continuing; where the Department finds that the evidence is satisfactory, the Department shall not declare the mining operation terminated. (1971, c. 545, s. 4; 1973, c. 1262, ss. 33, 86; 1977, c. 771, s. 4; c. 845, s. 1; 1989, c. 727, s. 218(13); 1993 (Reg. Sess., 1994), c. 568, s. 1; 1997-443, s. 11A.119(a); 1999-82, s. 1; 2002-165, s. 2.1.)

Effect of Amendments. — Session Laws 2002-165, s. 2.1, effective October 23, 2002, substituted "erosion and sedimentation control plan" for "erosion control plan" in subparagraphs (7)f.1. and (7)f.6.

§ 74-50. Permits — General.

(a) No operator shall engage in mining without having first obtained from the Department an operating permit that covers the affected land and that has not been terminated, revoked, suspended for the period in question, or otherwise become invalid. An operating permit may be modified from time to time to include land neighboring the affected land, in accordance with

procedures set forth in G.S. 74-52. A separate permit shall be required for each mining operation that is not on land neighboring a mining operation for which the operator has a valid permit.

(b) As used in subsection (b1) of this section:

(1) "Land adjoining" means any parcel or tract of land that is not owned in whole or in part by, or that is not under the control of, the applicant or operator or any lessor, affiliate, parent, or subsidiary of the applicant or operator and that is contiguous to either: (i) any parcel or tract that includes the permitted area or (ii) any parcels or tracts of land that are owned in whole or in part by or under the control of the applicant or operator or any lessor, affiliate, parent, or subsidiary of the applicant or operator and that, taken together, are contiguous to the permitted area.

(2) "Permit boundaries" means the boundaries of a permitted area.

(3) "Permitted area" means affected land and all other land used for or designated as buffers or reserves, or used for other purposes, as delineated in a mining permit or an application for a mining permit.

(b1) At the time of an application for a new mining permit or for a modification of a mining permit to add land to the permitted area, the applicant or operator shall make a reasonable effort, satisfactory to the Department, to notify:

(1) The chief administrative officer of each county and municipality in which any part of the permitted area is located.

(2) The owners of record of land adjoining that lies within 1,000 feet of the permit boundaries.

(3) The owners of record of land that lies directly across and is contiguous to any highway; creek, stream, river, or other watercourse; railroad track; or utility or other public right-of-way and that lies within 1,000 feet of the permit boundaries. For purposes of this subdivision, "highway" means a highway, as defined in G.S. 20-4.01(13) that has four lanes of travel or less and that has not been designated a part of the Interstate Highway System.

(b2) The notice shall inform the owners of record and chief administrative officers of the opportunity to submit written comments to the Department regarding the proposed mining operation and the opportunity to request a public hearing regarding the proposed mining operation. Requests for public hearing shall be made within 30 days of issuance of the notice.

(b3) When the Department receives an application for a new mining permit or for a modification of a mining permit to add land to the permitted area, the Department shall send a notice of the application to each of the following agencies with a request that each agency review and provide written comment on the application within 30 days of the date on which the request is made:

(1) Division of Air Quality, Department of Environment and Natural Resources.

(2) Division of Parks and Recreation, Department of Environment and Natural Resources.

(3) Division of Water Quality, Department of Environment and Natural Resources.

(4) Division of Water Resources, Department of Environment and Natural Resources.

(5) North Carolina Geological Survey, Division of Land Resources, Department of Environment and Natural Resources.

(6) Wildlife Resources Commission, Department of Environment and Natural Resources.

(7) Office of Archives and History, Department of Cultural Resources.

(8) United States Fish and Wildlife Service, United States Department of the Interior.

(9) Any other federal or State agency that the Department determines to be appropriate, including the Division of Coastal Management, Department of Environment and Natural Resources; the Division of Marine Fisheries, Department of Environment and Natural Resources; the Division of Waste Management, Department of Environment and Natural Resources; and the Department of Transportation.

(c) No permit shall become effective until the operator has deposited with the Department an acceptable performance bond or other security pursuant to G.S. 74-54. If at any time the bond or other security, or any part thereof, shall lapse for any reason other than a release by the Department, and the lapsed bond or security is not replaced by the operator within 30 days after notice of the lapse, the permit to which the lapsed bond or security pertains shall be automatically revoked.

(d) An operating permit shall be granted for a period not exceeding 10 years. If the mining operation terminates and the reclamation required under the approved reclamation plan is completed prior to the end of the period, the permit shall terminate. Termination of a permit shall not have the effect of relieving the operator of any obligations that the operator has incurred under an approved reclamation plan or otherwise. Where the mining operation itself has terminated, no permit shall be required in order to carry out reclamation measures under the reclamation plan. (1971, c. 545, s. 5; 1973, c. 1262, s. 33; 1981, c. 787, s. 1; 1993 (Reg. Sess., 1994), c. 568, s. 2; 2000-116, s. 1; 2002-159, s. 35(d).)

Effect of Amendments. — Session Laws 2002-159, s. 35(d), effective October 11, 2002, substituted "Office of Archives and History" for "Division of Archives and History" in subdivision (b3)(7).

Chapter 74C.

Private Protective Services.

Article 1.

Private Protective Services Board.

Article 1.

Private Protective Services Board.

§ 74C-5. Powers of the Board.

OPINIONS OF ATTORNEY GENERAL

The Private Protective Services Board does not have authority to issue temporary private investigator trainee permits and cannot delegate authority to the Administrator to issue such a permit. See opinion of Attorney General to Mr. Wayne Woodard, Administrator, Private Protective Services Board, 1999 N.C. AG LEXIS 29 (11/22/99).

§ 74C-6. Position of Director created.

OPINIONS OF ATTORNEY GENERAL

The Private Protective Services Board cannot delegate its authority to a supervising private investigator to conduct a criminal background check, verify previous employment, check character references, and submit a report that is stapled to the request for a temporary permit. See opinion of Attorney General to Mr. Wayne Woodard, Administrator, Private Protective Services Board, 1999 N.C. AG LEXIS 29 (11/22/99).

§ 74C-8. Applications for an issuance of license.

(a) Any person, firm, association, or corporation desiring to carry on or engage in the private protective services profession in this State shall make a verified application in writing to the Board.

(b) The application shall include:

(1) Full name, home address, post office box, and the actual street address of the business of the applicant;

(2) The name under which the applicant intends to do business;

(3) A statement as to the general nature of the business in which the applicant intends to engage;

(4) The full name and address of any partners in the business and the principal officers, directors and business manager, if any;

(5) The names of not less than three unrelated and disinterested persons as references of whom inquiry can be made as to the character, standing, and reputation of the persons making the application;

(6) Such other information, evidence, statements, or documents as may be required by the Board; and

(7) Accompanying trainee permit applications only, a notarized statement signed by the applicant and his employer stating that the trainee applicant will at all times work with and under the direct supervision of a licensed private detective.

(c)(1) A business entity other than a sole proprietorship shall not do business under this Chapter unless the business entity has in its employ a designated resident qualifying agent who meets the requirements for a license issued under this Chapter and who is, in fact, licensed under the provisions of this Chapter, unless otherwise approved by the Board. Provided however, that this approval shall not be given unless the business entity has and continuously maintains in this State a registered agent who shall be an individual resident in this State. Service upon the registered agent appointed by the business entity of any process, notice, or demand required by or permitted to be served upon the business entity by the Private Protective Services Board shall be binding upon the business entity and the licensee. Nothing herein contained shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a business entity in any other manner now or hereafter permitted by law.

(2) For the purposes of the Chapter a qualifying agent means an individual in a management position who is licensed under this Chapter and whose name and address have been registered with the Director.

(3) In the event that the qualifying agent upon whom the business entity relies in order to do business ceases to perform his duties as qualifying agent, the business entity shall notify the Director within 10 working days. The business entity must obtain a substitute qualifying agent within 30 days after the original qualifying agent ceases to serve as qualifying agent unless the Board, in its discretion, extends this period, for good cause, for a period of time not to exceed three months.

(4) The certificate authorizing the business entity to engage in a private protective services profession shall list the name of at least one designated qualifying agent. No licensee shall serve as the qualifying agent for more than one business entity without prior approval of the Director, subject to the approval of the Board.

(5) The Department of Justice may provide a criminal record check to the Private Protective Services Board for a person who has applied for a new or renewal license, registration, certification, or permit through the Private Protective Services Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subdivision privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subdivision.

(d) Upon receipt of an application, the Board shall conduct a background investigation during the course of which the applicant shall be required to show that he meets all the following requirements and qualifications hereby made prerequisite to obtaining a license:

(1) That he is at least 18 years of age;

(2) That he is of good moral character and temperate habits. The following shall be prima facie evidence that the applicant does not have good moral character or temperate habits: conviction by any local, State, federal, or military court of any crime involving the illegal use, carrying, or possession of a firearm; conviction of any crime involving the illegal use, possession, sale, manufacture, distribution, or transportation of a controlled substance, drug, narcotic, or alcoholic beverage; conviction of a crime involving felonious assault or an act of violence; conviction of a crime involving unlawful breaking or entering, burglary, larceny, or any offense involving moral turpitude; or a history of addiction to alcohol or a narcotic drug; provided that, for purposes of this subsection, "conviction" means and includes the entry of a plea of guilty or no contest or a verdict rendered in open court by a judge or jury;

(3) Repealed by Session Laws 1989, c. 759, s. 6.

(4) That he has the necessary training, qualifications, and experience in order to determine the applicant's competency and fitness as the Board may determine by rule for all licenses to be issued by the Board.

(e) The Board may require the applicant to demonstrate his qualifications by oral or written examination or by successful completion of a Board-approved training program, or all three.

(f) Upon a finding that the application is in proper form, the completion of the background investigation, and the completion of an examination required by the Board, the Director shall submit to the Board the application and his recommendations. Upon completion of the background investigation, the Director may in his discretion issue a temporary license pending approval of the application by the Board at the next regularly scheduled meeting. The Board shall determine whether to approve or deny the application for a license. Upon approval by the Board, a license will be issued to the applicant upon payment by the applicant of the initial license fee and the required contribution to the Private Protective Services Recovery Fund, and certificate of liability insurance.

(1) through (5) Repealed by Session Laws 1989, c. 759, s. 6.

(g) Except for purposes of administering the provisions of this section and for law enforcement purposes, the home address or telephone number of an applicant, licensee, or the spouse, children, or parents of an applicant or licensee is confidential under G.S. 132-1.2, and the Board shall not disclose this information unless the applicant or licensee consents to such disclosure. The provisions of this subsection shall not apply when a licensee's home address or telephone number is also his or her business address and telephone number. Violation of this subsection shall constitute a Class 3 misdemeanor. (1973, c. 47, s. 2; c. 528, s. 1; 1975, c. 592, s. 1; 1977, c. 570, s. 2; 1979, c. 818, s. 2; 1983, c. 673, s. 3; c. 794, ss. 3, 11; 1985, c. 560; 1987, c. 657, ss. 2, 2.1; 1989, c. 759, s. 6; 1999-446, s. 1; 2001-487, s. 64(c); 2002-147, s. 3.)

Editor's Note. — Session Laws 2002-147, s. 15, provides: "If the Private Security Officer Employment Standards Act of 2002 [S. 2238, 107th Cong. (2002)] is enacted by the United States Congress, the State of North Carolina declines to participate in the background check system authorized by that act as a result of the enactment of this act."

Effect of Amendments. —

Session Laws 2002-147, s. 3, effective October 9, 2002, added subdivision (c)(5).

OPINIONS OF ATTORNEY GENERAL

The Private Protective Services Board does not have authority to issue temporary private investigator trainee permits and cannot delegate authority to the Administrator to issue such a permit. See opinion of Attorney General to Mr. Wayne Woodard, Administrator, Private Protective Services Board, 1999 N.C. AG LEXIS 29 (11/22/99).

Chapter 74D.

Alarm Systems.

Article 1.

Alarm Systems Licensing Act.

Article 1.

Alarm Systems Licensing Act.

§ 74D-2. Licenses required.

(a) No person, firm, association, corporation, or department or division of a firm, association or corporation, shall engage in or hold itself out as engaging in an alarm systems business without first being licensed in accordance with this Chapter. For purposes of this Chapter an "alarm systems business" is defined as any person, firm, association or corporation which sells or attempts to sell by engaging in a personal solicitation at a residence or business when combined with personal inspection of the interior of the residence or business to advise on specific types and specific locations of alarm system devices, installs, services, monitors or responds to electrical, electronic or mechanical alarm signal devices, burglar alarms, television cameras or still cameras used to detect burglary, breaking or entering, intrusion, shoplifting, pilferage, or theft. A department or division of a firm, association or corporation may be separately licensed under this Chapter if the distinct department or division, as opposed to the firm, association or corporation as a whole, engages in an alarm systems business. Such a department or division shall ensure strict confidentiality of private security information, and the private security information of the department or division must, at a minimum, be physically separated from other premises of the firm, association or corporation.

(b) Repealed by Session Laws 1989, c. 730, s. 1.

(c)(1) No business entity shall do business under this Chapter unless the business entity has in its employ a designated resident qualifying agent who meets the requirements for a license issued under and who is, in fact, licensed under the provisions of this Chapter, unless otherwise approved by the Board. Provided, however, that this approval shall not be given unless the business entity has and continuously maintains in this State a registered agent who shall be an individual resident in this State. Service upon the registered agent appointed by the business entity of any process, notice or demand required by or permitted by law to be served upon the business entity by the Alarm Systems Licensing Board shall be binding upon the business entity and the licensee. Nothing herein contained shall limit or affect the right to serve any process, notice or demand required or permitted by law to be served upon a business entity in any other manner or hereafter permitted by law.

(2) For the purposes of this Chapter, a "qualifying agent" means an individual in a management position who is licensed under this Chapter and whose name and address have been registered with the board.

(3) In the event that the qualifying agent upon whom the business entity relies in order to do business ceases to perform his duties as qualifying

agent, the business entity shall notify the board in writing within 10 working days. The business entity must obtain a substitute qualifying agent within 30 days after the original qualifying agent ceases to serve as qualifying agent unless the board, in its discretion, and upon written request of the business entity, extends this period for good cause for a period of time not to exceed three months.

(4) The license certificate shall list the name of at least one designated qualifying agent. No licensee shall serve as the qualifying agent for more than one business entity without the prior approval of the Board.

(5) The Department of Justice may provide a criminal record check to the Alarm Systems Licensing Board for a person who has applied for a new or renewal license, registration, certification, or permit through the Alarm Systems Licensing Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subdivision privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subdivision.

(d) Upon receipt of an application, the board shall cause a background investigation to be made during which the applicant shall be required to show that he meets all the following requirements and qualifications prerequisite to obtaining a license:

(1) That the applicant is at least 18 years of age;

(2) That the applicant is of good moral character and temperate habits. The following shall be prima facie evidence that the applicant does not have good moral character or temperate habits: conviction by any local, State, federal, or military court of any crime involving the illegal use, carrying, or possession of a firearm; conviction of any crime involving the illegal use, possession, sale, manufacture, distribution or transportation of a controlled substance, drug, narcotic, or alcoholic beverages; conviction of a crime involving felonious assault or an act of violence; conviction of a crime involving unlawful breaking or entering, burglary, larceny, or of any offense involving moral turpitude; or a history of addiction to alcohol or a narcotic drug; provided that, for purposes of this subsection, "conviction" means and includes the entry of a plea of guilty, plea of no contest, or a verdict rendered in open court by a judge or jury;

(3) That the applicant has the necessary training, qualifications and experience to be licensed.

(e) The board may require the applicant to demonstrate his qualifications by oral or written examination, or both.

(f) Except for purposes of administering the provisions of this section and for law enforcement purposes, the home address or telephone number of an

applicant, licensee, or the spouse, children, or parents of an applicant or licensee is confidential under G.S. 132-1.2, and the Board shall not disclose this information unless the applicant or licensee consents to such disclosure. The provisions of this subsection shall not apply when a licensee's home address or telephone number is also his or her business address and telephone number. Violation of this subsection shall constitute a Class 3 misdemeanor. (1983, c. 786, s. 1; 1985, c. 561, s. 1; 1989, c. 730, s. 1; 1991 (Reg. Sess., 1992), c. 953, s. 1; 1999-446, s. 2; 2002-147, s. 4.)

Editor's Note. — Session Laws 2002-147, s. 15, provides: "If the Private Security Officer Employment Standards Act of 2002 [S. 2238, 107th Cong. (2002)] is enacted by the United States Congress, the State of North Carolina declines to participate in the background check system authorized by that act as a result of the enactment of this act."

Effect of Amendments. — Session Laws 2002-147, s. 4, effective October 9, 2002, added subdivision (c)(5).

Chapter 74E.

Company Police Act.

§ 74E-6. Oaths, powers, and authority of company police officers.

OPINIONS OF ATTORNEY GENERAL

Jurisdiction of Company Police Officers Limited to Real Property of Employer. — Company police officers are limited to exercising law enforcement authority only on the real property of their employer; unless the company police officers are in continuous and immediate pursuit of a person for an offense committed upon this real property, the officers lack the territorial jurisdiction to take law enforcement actions on the streets and highways in and around this real property; thus, assuming an agreement between North Carolina Special Police (NCSP) and a town was lawful, the NCSP officers lacked law enforcement authority on the streets and private businesses in the town. See opinion of Attorney General to Mr. G. Dewey Hudson, District Attorney, Fourth Prosecutorial District, 2001 N.C. AG LEXIS 4 (2/23/2001).

Chapter 74F.

Locksmith Licensing Act.

§ 74F-1. Short title.

Editor's Note. —

Session Laws 2001-369, s. 3, as amended by Session Laws 2002-63, s. 1, provides that G.S. 74F-5 and G.S. 74F-6, as enacted in Section 1 of the act, are effective when the act becomes law. The remainder of the act becomes effective January 1, 2003.

Session Laws 2002-63, s. 2, provides: "Notwithstanding G.S. 150B-21.1(a)(2), the North Carolina Locksmith Licensing Board may adopt temporary rules to implement S.L. 2001-369 until January 1, 2003."

§ 74F-9. Fees.

Editor's Note. —

Session Laws 2002-159, s. 88, provides: "Notwithstanding G.S. 12-3.1(a)(2), the North Carolina Locksmith Licensing Board may adopt its initial fees as authorized by G.S. 74F-9 without prior consultation with the Joint Legislative Commission on Governmental Operations. The North Carolina Locksmith Licensing Board shall report on the amount and purpose of its initial fees to the Joint Legislative Commission on Governmental Operations prior to the next meeting of the Joint Legislative Commission on Governmental Operations following the adoption of the initial fees."

Chapter 75.

Monopolies, Trusts and Consumer Protection.

Article 1.

General Provisions.

§ 75-1. Combinations in restraint of trade illegal.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Terminated Negotiations. — District court declined to reconsider its decision awarding the chemical and oil companies summary judgment on the polymer manufacturer's unfair and deceptive trade practices claim arising from the parties' terminated contract negotiations where the manufacturer failed to establish negligent misrepresentation or any other conduct that was immoral, unethical, oppressive, unscrupulous, or substantially injurious. Tolaram Polymers, Inc. v. Shell Chem. Co., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 16058 (M.D.N.C. Aug. 16, 2002).

Cited in R.J. Reynolds Tobacco Co. v. Philip Morris, Inc., 199 F. Supp. 2d 362, 2002 U.S. Dist. LEXIS 8180 (M.D.N.C. 2002).

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

CASE NOTES

I. General Consideration.
II. Trade or Commerce.
III. Unfair and Deceptive Acts.
A. In General.
B. Illustrative Cases.
IV. Pleading and Practice.

I. GENERAL CONSIDERATION.

Political Advertisement. — Political campaign committee was not insulated from an unfair trade practices claim by a law firm for publishing a political advertisement defaming the firm and one of its members because of the fact that the ad was published during a political campaign. Boyce & Isley, PLLC v. Cooper, — N.C. App. —, 568 S.E.2d 803, 2002 N.C. App. LEXIS 1088 (2002).

Applied in Becker v. Graber Bldrs., Inc., 149 N.C. App. 787, 561 S.E.2d 905, 2002 N.C. App. LEXIS 308 (2002); Tucker v. The Blvd. at Piper Glen LLC, 150 N.C. App. 150, 564 S.E.2d 248, 2002 N.C. App. LEXIS 409 (2002); S. Atl. Ltd. P'ship of Tenn., LP v. Riese, 284 F.3d 518, 2002 U.S. App. LEXIS 4747 (4th. Cir. 2002).

Cited in Basnight v. Diamond Developers, Inc., 178 F. Supp. 2d 589, 2001 U.S. Dist. LEXIS 23826 (M.D.N.C. 2001); Bell v. E. Davis Int'l, Inc., 197 F. Supp. 2d 449, 2002 U.S. Dist. LEXIS 5969 (W.D.N.C. 2002); Static Control Components, Inc. v. Darkprint Imaging, Inc., 200 F. Supp. 2d 541, 2002 U.S. Dist. LEXIS 13271 (M.D.N.C. 2002).

II. TRADE OR COMMERCE.

Claims by Law Firm Not Barred. — While professional services rendered by an attorney were not included in the definition of "commerce" in G.S. 75-1.1(b), a law firm was not precluded from pursuing an unfair or deceptive trade practices claim against a political campaign committee which published a political advertisement containing allegedly defamatory statements about the firm and one of its members. Boyce & Isley, PLLC v. Cooper, — N.C. App. —, 568 S.E.2d 803, 2002 N.C. App. LEXIS 1088 (2002).

The parties' agreement, whereby the creditor loaned the debtor funds in ex-

change for the right to purchase stock in the debtor in the future, was a capital-raising device that did not pertain to trade or commerce, thus disallowing a claim for unfair or deceptive trade practices. Oberlin Capital, L.P. v. Slavin, 147 N.C. App. 52, 554 S.E.2d 840, 2001 N.C. App. LEXIS 1047 (2001).

III. UNFAIR AND DECEPTIVE ACTS.

A. In General.

Breach of Contract. — Mere breach of contract did not constitute an unfair or deceptive trade practice. Horack v. S. Real Estate Co. of Charlotte, Inc., 150 N.C. App. 305, 563 S.E.2d 47, 2002 N.C. App. LEXIS 487 (2002).

Unfair and deceptive acts in the insurance area are not regulated exclusively by Article 63 of Chapter 58, but are also actionable under G.S. 75-1.1; there is no requirement, however, that a party bringing a claim for unfair or deceptive trade practices against an insurance company allege a violation of G.S. 58-63-15 in order to bring a claim pursuant to G.S. 75-1.1. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

A violation of former G.S. 58-54.4 (see now G.S. 58-63-15)

In order to establish a violation of G.S. 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs; a court may look to the types of conduct prohibited by G.S. 58-63-15(11) for examples of conduct which would constitute an unfair and deceptive act or practice. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Acts listed in G.S. 58-63-15(11) constitute a violation of G.S. 75-1.1 without the necessity of an additional showing of frequency indicating a "general business practice," as is required under G.S. 58-63-15(11)(f). Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

B. Illustrative Cases.

Fraud on Part of Realtors. —

Business of buying, developing and selling real estate was an activity "in or affecting commerce" for the purposes of unfair or deceptive trade practices claim. Governor's Club, Inc. v. Governors Club Ltd. P'ship., — N.C. App. —, 567 S.E.2d 781, 2002 N.C. App. LEXIS 926 (2002).

Builders' intentional breach of contract and implied warranty of habitability did not constitute unfair and deceptive trade practices. Mitchell v. Linville, 148 N.C. App. 71, 557 S.E.2d 620, 2001 N.C. App. LEXIS 1277 (2001).

Builders' failure to notify the buyers that their home would actually be built by another company, and the builders' transfer of the home and lot to the actual builder without notice to the buyers, while potentially misleading and unfair, were not unfair and deceptive trade practices because they did not cause the buyers' damages, which were the result of structural defects in the home. Mitchell v. Linville, 148 N.C. App. 71, 557 S.E.2d 620, 2001 N.C. App. LEXIS 1277 (2001).

Denial of Insurance Claim. —

Jury's verdict that an insurer "improperly" determined that it would deny coverage, "misrepresented" the nature of its investigation to the insured, and "unfairly" and "improperly" cited a policy provision as its basis to send a reservation of rights letter supported the conclusion that the insurer's acts were unethical, involved an unfair assertion of its power, and violated G.S. 75-1.1. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Violation Not Found. —

Technology company was unlikely to succeed on its claim under the North Carolina Unfair and Deceptive Trade Practices Act, G.S. 75-1.1(a), where a software company who used a similar mark and domain name did not "siphon off" the technology company's customers by using its mark, nor did it intend to do so; thus, the software company did not act deceptively or unfairly in adopting its domain name or its mark. Yellowbrix, Inc. v. Yellowbrick Solutions, Inc., 181 F. Supp. 2d 575, 2001 U.S. Dist. LEXIS 23354 (E.D.N.C. 2001).

Tobacco companies' claim that a competitor's retail merchandising program violated G.S. 75-1, 75-1.1, 75-2, and 75-2.1, failed where they did not show any antitrust injury on their federal claims under the Sherman Act, did not show that the competitor possessed market power or that the merchandising program was coercive, and did not present any further evidence of unfair and deceptive trade practices. R.J. Reynolds Tobacco Co. v. Philip Morris, Inc., 199 F. Supp. 2d 362, 2002 U.S. Dist. LEXIS 8180 (M.D.N.C. 2002).

IV. PLEADING AND PRACTICE.

Constructive Fraud. — Allegations sufficient to allege constructive fraud were likewise sufficient to allege unfair and deceptive trade practices. Governor's Club, Inc. v. Governors Club Ltd. P'ship., — N.C. App. —, 567 S.E.2d 781, 2002 N.C. App. LEXIS 926 (2002).

§ 75-2. Any restraint in violation of common law included.

CASE NOTES

Cited in R.J. Reynolds Tobacco Co. v. Philip Morris, Inc., 199 F. Supp. 2d 362, 2002 U.S. Dist. LEXIS 8180 (M.D.N.C. 2002).

§ 75-2.1. Monopolizing and attempting to monopolize prohibited.

CASE NOTES

Cited in R.J. Reynolds Tobacco Co. v. Philip Morris, Inc., 199 F. Supp. 2d 362, 2002 U.S. Dist. LEXIS 8180 (M.D.N.C. 2002).

§ 75-16. Civil action by person injured; treble damages.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in S. Atl. Ltd. P'ship of Tenn., LP v. Riese, 284 F.3d 518, 2002 U.S. App. LEXIS 4747 (4th. Cir. 2002); Bell v. E. Davis Int'l, Inc., 197 F. Supp. 2d 449, 2002 U.S. Dist. LEXIS 5969 (W.D.N.C. 2002).

§ 75-16.1. Attorney fee.

CASE NOTES

Discretion of Court. —

Under G.S. 75-16.1(1), a trial court has discretion in actions based upon a violation of G.S. 75-1.1 to award attorney's fees where the trial court determines that the party charged with the violation has willfully engaged in the act or practice, and that there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; an award or denial of attorney's fees under this section is within the sound discretion of the trial court. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Defendant Not Entitled Even Though Plaintiff's Claim Dismissed. —

Because plaintiff customer could have reasonably thought that both defendant company and defendant individual officer should have been named in the G.S. 75-1.1 allegations, the court was not willing to state that the unfair and deceptive trade practices claim against defendant individual was frivolous and malicious; also, the requested fee was unreasonable where the legal services were rendered with the intent that they benefit both the individual and the company defendants. Basnight v. Diamond Developers, Inc., 178 F. Supp. 2d 589, 2001 U.S. Dist. LEXIS 23826 (M.D.N.C. 2001).

Attorney's Fees Upheld. —

Where trial court made extensive findings that the insurer had both willfully engaged in the acts at issue and engaged in an unwarranted refusal to fully resolve the insured's claims before awarding attorney's fees after a jury verdict found that the insurer had committed acts supporting a judgment for unfair business practices, the appellate court could not conclude that the trial court's findings and conclusion were wholly unsupported or that the decision to award fees was either "manifestly unsupported by reason" or so arbitrary that it could not have been the result of a reasoned decision. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Findings of Fact Held Sufficient. —

The trial court made appropriate findings before awarding attorney's fees for an insured's

unfair business practices, including those addressed to the time and labor expended by the attorney, the skill required to perform the services rendered, the experience and ability of the attorney, and the customary fee for like work. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Chapter 75A.

Boating and Water Safety.

Article 1.

Boating Safety Act.

§ 75A-14.1. Lake Norman No-Wake Zone.

Editor's Note. —

For similar provisions regarding the establishment of no-wake zones, see Session Laws 1987 (Reg. Sess., 1988), c. 1045 (no-wake zone in Brunswick County); Session Laws 1993, c. 67 (no-wake zone in city of Southport); Session Laws 1993, c. 434, as amended by 1993, c. 637 (no-wake zone on Waccamaw and Pamlico Rivers in Columbus County and city of Washington); Session Laws 1995 (Reg. Sess., 1996), c. 559 (no-wake zone on Lake Hickory in Catawba County); Session Laws 2001-65 (no-wake zone in town of Cedar Point); Session Laws 2002-23 (no-wake zone around Eagle Point Nature Preserve on High Rock Reservoir in Rowan County); Session Laws 2002-39 (no-wake zone in vicinity of Roanoke River Bridge on Highway 17 in Bertie County); Session Laws 2002-141, s. 9.1(a)-(f) (no-wake zone on the Roanoke River in Bertie County).

Chapter 75D.

Racketeer Influenced and Corrupt Organizations.

§ 75D-2. Findings and intent of General Assembly.

CASE NOTES

Cited in Delk v. ArvinMeritor, Inc., 179 F. Supp. 2d 615, 2002 U.S. Dist. LEXIS 98 (W.D.N.C. 2001).

§ 75D-3. Definitions.

CASE NOTES

Racketeering Activity. — In an action arising from unwanted sexual advances toward the plaintiff at her workplace, the court dismissed a state RICO claim on the basis that none of the conduct alleged by the plaintiff, even viewed in a light most favorable to her, constituted organized unlawful conduct. Delk v. ArvinMeritor, Inc., 179 F. Supp. 2d 615, 2002 U.S. Dist. LEXIS 98 (W.D.N.C. 2001).

§ 75D-4. Prohibited activities.

CASE NOTES

Cited in Delk v. ArvinMeritor, Inc., 179 F. Supp. 2d 615, 2002 U.S. Dist. LEXIS 98 (W.D.N.C. 2001).

§ 75D-8. Available RICO civil remedies.

CASE NOTES

Cited in Delk v. ArvinMeritor, Inc., 179 F. Supp. 2d 615, 2002 U.S. Dist. LEXIS 98 (W.D.N.C. 2001).

Chapter 77.

Rivers, Creeks, and Coastal Waters.

Article 3.

Lands Adjoining Coastal Waters.

§ 77-20. Seaward boundary of coastal lands.

Legal Periodicals. — The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina, 78 N.C.L. Rev. 1869 (2000).

Article 6.

Mountain Island Lake Marine Commission.

§§ 77-79 through 77-89: Reserved for future codification purposes.

Article 7.

Roanoke River Basin Bi-State Commission; Roanoke River Basin Advisory Committee.

Part 1. Roanoke River Basin Bi-State Commission.

§ 77-90. Definitions.

The following definitions apply in this Article:

(1) "Commission" means the Roanoke River Basin Bi-State Commission.

(2) "Roanoke River Basin" or "Basin" means that land area designated as the Roanoke River Basin by the North Carolina Department of Environment and Natural Resources pursuant to G.S. 143-215.8B and the Virginia State Water Control Board pursuant to Code of Virginia § 62.1-44.38. (2002-177, s. 1.)

Editor's Note. — Session Laws 2002-177, s. 3, makes this Article effective October 1, 2002.

§ 77-91. Commission established; purposes.

There is established the Roanoke River Basin Bi-State Commission. The Commission shall be composed of members from the State of North Carolina and the Commonwealth of Virginia. The purposes of the Commission shall be to:

(1) Provide guidance and make recommendations to local, state, and federal legislative and administrative bodies, and to others as it deems necessary and appropriate, for the use, stewardship, and enhancement of the water, and other natural resources, for all citizens within the Basin.

(2) Provide a forum for discussion of issues affecting the Basin's water quantity and water quality and issues affecting other natural resources.

(3) Promote communication, coordination, and education among stakeholders within the Basin.

(4) Identify problems and recommend appropriate solutions.

(5) Undertake studies and prepare, publish, and disseminate information through reports, and in other forms, related to water quantity, water quality, and other natural resources of the Basin. (2002-177, s. 1.)

§ 77-92. Membership; terms of office; eligibility for appointment.

(a) The Roanoke River Basin Bi-State Commission shall consist of 18 members with each state appointing nine members. The North Carolina delegation to the Commission shall consist of the six members of the General Assembly of North Carolina appointed to the North Carolina Roanoke River Basin Advisory Committee and three nonlegislative members of the North Carolina Roanoke River Basin Advisory Committee, established pursuant to G.S. 77-103, who represent different geographical areas of the North Carolina portion of the Basin, to be appointed by the Governor of North Carolina. The Virginia delegation to the Commission shall be appointed as determined by the Commonwealth of Virginia.

(b) All members appointed to the Commission from the State of North Carolina and the Commonwealth of Virginia shall reside within the Basin's watershed. Members of the North Carolina House of Representatives, the North Carolina Senate, the Virginia House of Delegates, the Virginia Senate, and federal legislators, who have not been appointed to the Commission and whose districts include any portion of the Basin, may serve as nonvoting ex officio members of the Commission.

(c) Except as provided in this subsection, members of the North Carolina delegation to the Commission shall serve at the pleasure of the Governor of North Carolina. The Governor of North Carolina may not remove a legislative member of the North Carolina delegation to the Commission during the legislator's term of office, except that the Governor may remove any member of the North Carolina delegation to the Commission for misfeasance, malfeasance, or nonfeasance as provided in G.S. 143B-13. A legislative member of the North Carolina delegation to the Commission who ceases to be a member of the General Assembly of North Carolina shall cease to be a member of the Commission. The terms of members of the Virginia delegation to the Commission shall be determined by the Commonwealth of Virginia.

(d) Each state's delegation to the Commission may meet separately to discuss Basin-related issues affecting their state and may report their findings independently of the Commission. (2002-177, s. 1.)

§ 77-93. Powers and duties.

(a) The Commission shall have no regulatory authority.

(b) To perform its duties and objectives, the Commission shall have the following powers:

(1) To develop rules and procedures for the conduct of its business or as may be necessary to perform its duties and carry out its objectives, including, but not limited to, selecting a chairman and vice-chairman, rotating chairmanships, calling meetings, and establishing voting procedures. Rules and procedures developed pursuant to this subdivision shall be effective upon an affirmative vote by a majority of the Commission members.

(2) To establish standing and ad hoc advisory committees pursuant to G.S. 77-94 in addition to the North Carolina Roanoke River Basin Advisory Committee established pursuant to Part 2 of this Article and the Virginia Roanoke River Basin Advisory Committee established pursuant to Chapter 5.4 of Title 62.1 of the Code of Virginia, which shall be constituted in a manner to ensure a balance between recognized interests. The Commission shall determine the purpose of each advisory committee.

(3) To seek, apply for, accept, and expend gifts, grants and donations, services, and other aid from public or private sources. With the exception of funds provided by the planning district commissions, councils of governments, and commissions and funds appropriated by the General Assemblies of Virginia and North Carolina, the Commission may accept funds only after an affirmative vote by a majority of the members of the Commission or by following any other procedures that are established by the Commission for the conduct of its business.

(4) To establish a nonprofit corporation to assist in the details of administering its affairs and in raising funds.

(5) To enter into contracts and execute all instruments necessary or appropriate.

(6) To perform any lawful acts necessary or appropriate for the furtherance of its work. (2002-177, s. 1.)

§ 77-94. Standing and ad hoc committees.

To facilitate communication among stakeholders in the Basin, and to maximize participation by all interested parties, the Commission shall establish both standing and ad hoc committees. The Commission shall appoint the members of the standing and ad hoc committees in accordance with guidelines adopted by the Commission. The standing committees shall include all of the following:

(1) Permit holders. — The Commission shall identify those entities that hold permits issued by a federal, state, or local regulatory agency pertaining to the water of the Basin. The entities may recommend representatives to be appointed to the committees by the Commission.

(2) Roanoke River Basin interest groups. — The Commission shall identify interest groups that may recommend representatives to be appointed to the committees by the Commission.

(3) Public officials and governmental entities. — The committees shall be composed of representatives of each county, city, and town located completely or partially within the Basin. Also, other governmental entities that the Commission deems appropriate may recommend one member to be appointed to the committees by the Commission. The committees may also include the United States Senators from North

Carolina and Virginia or their designees, and any member of the United States House of Representatives or the Representative's designee, whose district includes any portion of the Basin, if the members elect to serve on the committees.

(4) Agriculture, forestry, and soil and water conservation districts. — The Commission shall identify persons who represent agricultural and forestry interests throughout the Basin and representatives from the soil and water conservation districts within the Basin and shall appoint representatives from these groups to the committees. (2002-177, s. 1.)

§ 77-95. Staffing and support.

(a) The North Carolina Department of Environment and Natural Resources and the Virginia Department of Environmental Quality shall provide staff support to the Commission. Additional staff may be hired or contracted by the Commission through funds raised by or provided to it. The duties and compensation of any additional staff shall be determined and fixed by the Commission, within available resources.

(b) All agencies of the State of North Carolina and the Commonwealth of Virginia shall cooperate with the Commission and, upon request, shall assist the Commission in fulfilling its responsibilities. The North Carolina Secretary of Environment and Natural Resources and the Virginia Secretary of Natural Resources or their designees shall each serve as the liaison between their respective state agencies and the Commission. (2002-177, s. 1.)

§ 77-96. Funding.

(a) The Commission shall annually adopt a budget that shall include the Commission's estimated expenses. Funding for the Commission shall be shared and apportioned between the State of North Carolina and the Commonwealth of Virginia. The appropriation of public funds to the Commission shall be provided through each state's regular process for appropriating public funds. The North Carolina councils of governments and commissions named in G.S. 77-103(b)(5) shall bear a proportion of North Carolina's share of the expenses, which may be in the form of in-kind contributions.

(b) The Commission shall designate a fiscal agent.

(c) The accounts and records of the Commission showing the receipt and disbursement of funds from whatever source derived shall be in the form that the North Carolina Auditor and the Virginia Auditor of Public Accounts prescribe, provided that the accounts shall correspond as nearly as possible to the accounts and records for such matters maintained by similar enterprises. The accounts and records of the Commission shall be subject to an annual audit by the North Carolina Auditor and the Virginia Auditor of Public Accounts or their legal representatives, and the costs of the audit services shall be borne by the Commission. The results of the audits shall be delivered to the Joint Legislative Commission on Governmental Operations of the General Assembly of North Carolina and as provided by the Commonwealth of Virginia. (2002-177, s. 1.)

§ 77-97. Compensation and expenses of Commission members.

(a) The appointed members of the North Carolina delegation to the Commission shall receive per diem, subsistence, and travel expenses as follows:

(1) Commission members who are members of the General Assembly at the rate established in G.S. 120-3.1.

(2) Commission members who are officials or employees of the State or of local government agencies at the rate established in G.S. 138-6.

(3) All other Commission members at the rate established in G.S. 138-5.

(b) The members of the Virginia delegation to the Commission shall receive compensation as provided by the Commonwealth of Virginia.

(c) All expenses shall be paid from funds appropriated or otherwise available to the Commission. (2002-177, s. 1.)

§ 77-98. Annual report.

The Commission shall submit an annual report, including any recommendations, to the Governor of North Carolina, the Environmental Review Commission of the General Assembly of North Carolina, the Governor of Virginia, and the General Assembly of Virginia. (2002-177, s. 1.)

§ 77-99. Termination.

The General Assembly of North Carolina may terminate the Commission by repealing this Part. The Commission shall terminate if the General Assembly of Virginia repeals the provisions of the Code of Virginia that are comparable to this Part. (2002-177, s. 1.)

§§ 77-100 through 77-102: Reserved for future codification purposes.

Part 2. Roanoke River Basin Advisory Committee.

§ 77-103. Committee established; membership; terms; vacancies.

(a) The North Carolina Roanoke River Basin Advisory Committee is established as an advisory committee to the North Carolina delegation to the Roanoke River Basin Bi-State Commission. The purpose of the Advisory Committee is to assist the delegation in achieving the purposes of the Commission as set out in G.S. 77-91 and in fulfilling the powers and duties set out in G.S. 77-93.

(b) The Advisory Committee shall be composed of 21 members as follows:

(1) Three members of the House of Representatives whose districts include a part of the North Carolina portion of the Basin, to be appointed by the Speaker of the House of Representatives.

(2) Three members of the Senate whose districts include a part of the North Carolina portion of the Basin, to be appointed by the President Pro Tempore of the Senate.

(3) The member of the United States House of Representatives who represents North Carolina Congressional District 1, if the Representative elects to serve on the Advisory Committee, or that Representative's designee.

(4) The member of the United States House of Representatives who represents North Carolina Congressional District 13, if the Representative elects to serve on the Advisory Committee, or that Representative's designee.

(5) Twelve persons who reside within the North Carolina portion of the Basin, who represent the diversity of interests in the Basin, and who have demonstrated interest, experience, or expertise in water-related Basin issues, appointed as provided in this subdivision. The chief executive officer of each of the following councils and commissions

shall each appoint two persons, one of whom may be the chief executive officer and at least one of whom shall reside in the area served by the council or commission, as members of the Advisory Committee:

a. Piedmont Triad Council of Governments.
b. Northwest Piedmont Council of Governments.
c. Kerr-Tar Regional Council of Governments.
d. Upper Coastal Plain Council of Governments.
e. Mid-East Commission.
f. Albemarle Economic Development Commission.

(6) The Secretary of Environment and Natural Resources or the Secretary's designee.

(c) The terms of each member of the Advisory Committee appointed as provided in subdivision (5) of subsection (b) of this section shall be two years. The term of one of these members shall expire on 1 January of even-numbered years, and the term of the other member shall expire on 1 January of odd-numbered years. A member who is appointed pursuant to subdivision (5) of subsection (b) of this section who attends at least one-half of the meetings of the Advisory Committee held during the member's term may be reappointed to another term, but no member shall serve more than three consecutive terms. The terms of all other members of the Advisory Committee shall begin when the member is appointed and end when the member's term as Representative, Senator, United States Representative, or Secretary ends. An appointment to fill a vacancy on the Advisory Committee shall be for the unexpired balance of the term. A vacancy on the Advisory Committee shall be filled in the same manner as the original appointment. (2002-177, s. 1.)

Editor's Note. — Session Laws 2002-177, s. 2, provides: "In making initial appointments to the Roanoke River Basin Advisory Committee pursuant to G.S. 77-103(b)(5), as enacted by Section 1 of this act, the chief executive officer of each council and commission listed in G.S. 77-103(b)(5) shall designate one member to serve a term that begins at the time of appointment and expires on 1 January 2004 and another member to serve a term that begins at the time of appointment and expires on 1 January 2005. Thereafter, all appointments shall be for terms of two years and shall expire as provided in G.S. 77-103(c)."

§ 77-104. Cochairs; meetings.

The Speaker of the House of Representatives and the President Pro Tempore of the Senate shall each appoint one member of the Advisory Committee as Cochair. The Advisory Committee shall meet upon the call of the Cochairs. (2002-177, s. 1.)

§ 77-105. Expenses of members.

Members of the Advisory Committee shall receive no salary or per diem as a result of service on the Advisory Committee but shall receive necessary subsistence and travel expenses in accordance with the provisions of G.S. 120-3.1, 138-5, and 138-6, as applicable. (2002-177, s. 1.)

§ 77-106. Staffing; meeting facilities; assistance by agencies.

The Department of Environment and Natural Resources shall provide staffing and meeting facilities for the Advisory Committee. All agencies of the State shall cooperate with the Advisory Committee and, upon request, shall assist the Advisory Committee in fulfilling its responsibilities. (2002-177, s. 1.)

Chapter 78A.

North Carolina Securities Act.

Article 1.

Title and Definitions.

§ 78A-1. Title.

Editor's Note. —
Session Laws 2002-180, ss. 16.1 through 16.9, established the Legislative Study Commission on Securities Fraud Enforcement Laws, directed that the Commission submit a final written report of its findings and recommendations on or before March 15, 2003, and mandated that, upon filing its final report, the Commission shall terminate.

Session Laws 2002-189, s. 7, provides: "The State Treasurer, in consultation with the Secretary of State, shall study the best methods for creating and funding a Pension Assurance Fund, including the use of damages awarded in actions involving securities fraud brought by the State or by private individuals, and for paying claims from the Fund. The Legislative Research Commission may also study this issue. The State Treasurer and the Secretary of State shall develop legislative recommendations based on the study and report their recommendations to the General Assembly on or before March 1, 2003, and if the Legislative Research Commission authorizes a study of this issue, the State Treasurer shall also forward a copy of its report to that committee."

Article 3.

Exemptions.

§ 78A-17. Exempt transactions.

Except as otherwise provided in this Chapter, the following transactions are exempted from G.S. 78A-24 and [G.S.] 78A-49(d):

(1) Any isolated nonissuer transaction, whether effected through a dealer or not;

(2) Any nonissuer distribution other than by a controlling person of an outstanding security if

a. A recognized securities manual contains the names of the issuer's officers and directors, a balance sheet of the issuer as of a date within 18 months, and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations, or

b. A registered dealer files with the Administrator such information relating to the issuer as the Administrator may by rule or order require, or

c. The security has a fixed maturity or a fixed interest or dividend provision and there has been no default during the current fiscal year or within the three preceding fiscal years, or during the existence of the issuer and any predecessors if less than three years, in the payment of principal, interest, or dividends on the security;

(3) Any nonissuer transaction effected by or through a registered dealer pursuant to an unsolicited order or offer to buy; but the Administrator may by rule require that the customer acknowledge upon a specified form that the sale was unsolicited, and that a signed copy of each such form be preserved by the dealer for a specified period;

(4) Any transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters;

(5) Any transaction in a bond or other evidence of indebtedness secured by a lien or security interest in real or personal property, or by an agreement for the sale of real estate or chattels, if the entire security interest or agreement, together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit;

(6) Any transaction by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;

(7) Any transaction executed by a person holding a bona fide security interest without any purpose of evading this Chapter;

(8) Any offer or sale to an entity which has a net worth in excess of one million dollars ($1,000,000) as determined by generally accepted accounting principles, bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a dealer, whether the purchaser is acting for itself or in some fiduciary capacity;

(9) Any transaction pursuant to an offer directed by the offeror to not more than 25 persons, other than those persons designated in subdivision (8), in this State during any period of 12 consecutive months, whether or not the offeror or any of the offerees is then present in this State, if the seller reasonably believes that all the buyers in this State are purchasing for investment. The Administrator may by rule or order withdraw, amend, or further condition this exemption for any security or security transaction. There is established a fee of one hundred fifty dollars ($150.00) to recover costs for any filing required.

(10) Any offer or sale of a preorganizational certificate or subscription if: (i) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber; (ii) no public advertising or solicitation is used in connection with the offer or sale; (iii) the number of subscribers does not exceed 10 and the number of offerees does not exceed 25; and (iv) no payment is made by any subscriber.

(11) Any transaction pursuant to an offer to existing security holders of the issuer, including persons who at the time of the transaction are holders of convertible securities, nontransferable warrants, or transferable warrants exercisable within not more than 90 days of their issuance, if (i) no commission or other remuneration (other than a standby commission) is paid or given directly or indirectly for soliciting any security holder in this State, or (ii) the issuer first files a notice specifying the terms of the offer and the Administrator does not by order disallow the exemption within the next 10 full business days;

(12) Any offer (but not a sale) of a security for which registration statements have been filed under both this Chapter and the Securities

Act of 1933 if no stop order or refusal order is in effect and no public proceeding or examination looking toward such an order is pending under either act;

(13) Any offer or sale by a domestic entity of its own securities if (i) the entity was organized for the purpose of promoting community, agricultural or industrial development of the area in which the principal office is located, (ii) the offer or sale has been approved by resolution of the county commissioners of the county in which its principal office is located, and, if located in a municipality or within two miles of the boundaries thereof, by resolution of the governing body of such municipality, (iii) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer in this State, and (iv) the corporation is both organized and operated principally to promote some community, industrial, or agricultural development that confers a public benefit rather than organized and operated principally to generate a pecuniary profit;

(14) Any offer, sale or issuance of securities pursuant to an employees' stock or equity purchase, option, savings, pension, profit-sharing, or other similar benefit plan that is exempt under the provisions of G.S. 78A-16(11);

(15) Any offer or sale of limited partnership interests in a partnership organized under the North Carolina Uniform Limited Partnership Act for the sole purpose of constructing, owning and operating a low and moderate income rental housing project located in North Carolina if the total amount of the offering and the total number of limited partners, both within and without this State for each such partnership, does not exceed five hundred thousand dollars ($500,000) and 100 respectively. This exemption shall be allowed without limitation as to (i) the number, either in total or within any time period, of separate partnerships which may be formed by the same general partner or partners, sponsors or individuals in which partnership interests are offered; (ii) the period over which such offerings can be made; (iii) the amount of each limited partner's investment; or (iv) the period over which such investment is payable to the partnership. For purposes of this subdivision (15), the term "low and moderate rental housing project" means:

a. Any housing project with respect to which a mortgage is insured or guaranteed under section 221(d)(3) or 221(d)(4) or 236 of the National Housing Act, or any housing project financed or assisted by direct loan, mortgage insurance or guaranty, or tax abatement under similar provisions of federal, State or local laws, whether now existing or hereafter enacted; or

b. Any housing project, some or all of the units of which are available for occupancy by families or individuals eligible to receive subsidies under section 8 of the United States Housing Act of 1937, as amended, or under the provisions of other federal, State or local law authorizing similar levels of subsidy for lower income families, whether now existing or hereafter enacted; or

c. Any housing project with respect to which a loan is made, insured or guaranteed under Title V, section 515, of the Housing Act of 1949, or under similar provisions of other federal, State or local laws, whether now existing or hereafter enacted.

(16) Any offer to purchase or to sell or any sale or issuance of a security, other than a security covered under federal law, pursuant to a plan approved by the Administrator after a hearing conducted pursuant to the provisions of G.S. 78A-30 or any transaction incident to any other

judicially or governmentally approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims or property interests, or partly in such exchange and partly cash.

(17) Any transaction that is exempt pursuant to rules established by the Administrator creating limited offering transactional exemptions that are consistent with the objectives of compatibility with federal limited offering exemptions and uniformity among the states. There is established a fee of one hundred fifty dollars ($150.00) to recover costs for any filing required by such rules.

(18) Any transaction incident to a class vote by security holders, pursuant to the articles of incorporation or similar organizational document or the applicable statute governing the internal affairs of the entity, on a merger, conversion, consolidation, share exchange, reclassification of securities, or sale of an entity's assets in consideration of the issuance of securities of entity.

(19) Any offer or sale of any viatical settlement contract or any fractionalized or pooled interest therein by the issuer in a transaction that meets all of the following criteria:

a. The underlying viatical settlement transaction with the viator was not in violation of any applicable state or federal law; and

b. The offer and sale of such contract or interest therein is conducted in accordance with such conditions as the Administrator requires by rule or order, including conditions governing advertising, suitability standards, financial statements, the investor's right of rescission, and the disclosure of information to offerees and purchasers.

The Administrator may establish a fee to recover costs for any filing required by such rules, not to exceed five hundred dollars ($500.00). (1925, c. 190, s. 4; 1927, c. 149, s. 4; 1935, cc. 90, 154; 1955, c. 436, s. 3; 1959, c. 1185; 1967, c. 1233, ss. 2, 3; 1971, c. 572, s. 1; 1973, c. 1380; 1977, c. 162; c. 610, s. 1; 1979, c. 647, s. 1; 1981, c. 624, s. 2; 1981 (Reg. Sess., 1982), c. 1263, ss. 1, 2; 1983, c. 509, ss. 1, 2; c. 817, ss. 6, 7; 1997-419, s. 5; 2001-197, s. 1; 2001-201, ss. 8, 9, 10, 11, 12; 2001-436, s. 8; 2002-126, ss. 29A.22, 29A.23.)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, ss. 29A.22 and 29A.23, effective November 1, 2002, substituted "transaction. There is established a fee of one hundred fifty dollars ($150.00) to recover costs for any filing required" for "transaction and establish a fee to recover costs for any filing required, not to exceed one hundred fifty dollars ($150.00)" at the end of subdivision (9); and rewrote the last sentence of subdivision (17), which formerly read: "The Administrator may establish a fee to recover costs for any filing required by such rules, not to exceed one hundred fifty dollars ($150.00)."

Article 4.

Registration and Notice Filing Procedures of Securities.

§ 78A-31. Notice filings for securities covered under federal law.

(a) The Administrator, by rule or order, may require the filing of any of the following documents with regard to a security covered under section 18(b)(2) of the Securities Act of 1933 (15 U.S.C. § 77r(b)(2)):

(1) Prior to the initial offer of the security in this State, all documents that are part of a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933, or, in lieu thereof, a form prescribed by the Administrator, together with a consent to service of process signed by the issuer and with the payment of a notice filing fee of two thousand dollars ($2,000).

(2) After the initial offer of the security in this State, all documents that are part of an amendment to a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933, or, in lieu thereof, a form prescribed by the Administrator, which shall be filed concurrently with the Administrator.

(3) A report of the value of securities covered under federal law that are offered or sold in this State.

(4) A notice filing pursuant to this section shall expire on December 31 of each year or some other date not more than one year from its effective date as the Administrator may by rule or order provide. A notice filing of the offer of securities covered under federal law that are to be offered for a period in excess of one year shall be renewed annually by payment of a renewal fee of two hundred fifty dollars ($250.00) and by filing any documents and reports that the Administrator may by rule or order require consistent with this section. The renewal shall be effective upon the expiration of the prior notice period.

(5) A notice filed in accordance with this section may be amended after its effective date to increase the securities specified as proposed to be offered. An amendment becomes effective upon receipt by the Administrator. Every person submitting an amended notice filing shall pay a filing fee of fifty dollars ($50.00) with respect to the additional securities proposed to be offered.

(b) With regard to any security that is covered under section 18(b)(4)(D) of the Securities Act of 1933 (15 U.S.C. § 77r(b)(4)(d)), the Administrator, by rule or order, may require the issuer to file a notice on SEC Form D (17 C.F.R. § 239.500) and a consent to service of process signed by the issuer no later than 15 days after the first sale of the security in this State. There is established a fee of one hundred fifty dollars ($150.00) to recover costs for filing required by this section.

(c) The Administrator, by rule or order, may require the filing of any document filed with the Securities and Exchange Commission under the Securities Act of 1933, with respect to a security covered under section 18(b)(3) or (4) of the Securities Act of 1933 (15 U.S.C. § 77r(b)(3) or (4)). The Administrator may, by rule, establish a fee to recover costs for any filing required under this section, not to exceed one hundred fifty dollars ($150.00).

(d) The Administrator may suspend the offer and sale of a covered security, except a covered security under section 18(b)(1) of the Securities Act of 1933 (15 U.S.C. § 77r(b)(1)), if the Administrator finds that (i) the order is in the public interest, and (ii) there is a failure to comply with any condition established under this section.

(e) The Administrator, by rule or order, may waive any of the requirements set by this section. (1997-419, s. 9; 1998-212, s. 29A.9(d); 2002-126, ss. 29A.24, 29A.37; 2002-189, s. 4.)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, ss. 29A.24 and 29A.37, effective November 1, 2002, substituted "two hundred dollars ($200.00)" for "one hundred dollars ($100.00)" in subdivision (a)(4); and rewrote the last sentence of subsection (b), which formerly read: "The Administrator may, by rule, establish a fee to recover costs for filing required by this section, not to exceed one hundred fifty dollars ($150.00)."

Session Laws 2002-189, s. 4, effective November 1, 2002, and applicable to fees assessed on or after that date, in subdivision (a)(4) as amended by Session Laws 2002-126, s. 29A.37, substituted "two hundred fifty dollars ($250.00)" for "two hundred dollars ($200.00)."

Article 5.

Registration of Dealers and Salesmen.

§ 78A-37. Registration procedure.

(a) A dealer or salesman may obtain an initial or renewal registration by filing with the Administrator an application together with a consent to service of process pursuant to G.S. 78A-63(f). The application shall contain whatever information the Administrator by rule requires concerning such matters as (i) the applicant's form and place of organization; (ii) the applicant's proposed method of doing business; (iii) the qualifications and business history of the applicant; in the case of a dealer, the qualifications and business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the dealer, and a representation that the applicant dealer is duly registered as a dealer under the Securities Exchange Act of 1934; (iv) any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony; and (v) the applicant's financial condition and history. If no denial order is in effect and no proceeding is pending under G.S. 78A-39, registration becomes effective at noon of the thirtieth day after an application is filed. The Administrator may by rule or order specify an earlier effective date, and he may by order defer the effective date until noon of the thirtieth day after the filing of any amendment. Registration of a dealer automatically constitutes registration of any salesman who is a partner, executive officer, or director, or a person occupying a similar status or performing similar functions.

(b) Every applicant for initial or renewal registration shall pay a filing fee of three hundred dollars ($300.00) in the case of a dealer and seventy-five dollars ($75.00) in the case of a salesman. The Administrator may by rule reduce the registration fee proportionately when the registration will be in effect for less than a full year.

(c) A registered dealer may file an application for registration of a successor, whether or not the successor is then in existence, for the unexpired portion of the year. There shall be no filing fee.

(d) The Administrator may by rule require registered dealers to post surety bonds in amounts up to one hundred thousand dollars ($100,000) and salesmen to post surety bonds in amounts up to ten thousand dollars ($10,000), and may determine their conditions. Any appropriate deposit of cash or securities shall be accepted in lieu of any bond so required. No bond may be required of

any registrant whose net capital, which may be defined by rule, exceeds one hundred thousand dollars ($100,000). Every bond shall provide for suit thereon by any person who has a cause of action under G.S. 78A-56 and, if the Administrator by rule or order requires, by any person who has a cause of action not arising under this Chapter. Every bond shall provide that no suit may be maintained to enforce any liability on the bond unless brought within two years after the sale or other act upon which it is based. (1925, c. 190, s. 19; 1927, c. 149, s. 19; 1955, c. 436, s. 9; 1959, c. 1122; 1971, c. 831, s. 1; 1973, c. 1380; 1983, c. 713, s. 48; c. 817, ss. 9, 10; 1987, c. 566, s. 1; 1991 (Reg. Sess., 1992), c. 965, s. 2; 2002-126, s. 29A.34.)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 29A.34, effective November 1, 2002, in subsection (b), substituted "three hundred dollars ($300.00)" for "two hundred dollars ($200.00)" and "seventy-five dollars ($75.00)" for "fifty-five dollars ($55.00)" in the first sentence.

Chapter 78C.

Investment Advisers.

Article 1.

Title and Definitions.

§ 78C-1. Title.

Editor's Note. — Session Laws 2002-180, ss. 16.1 through 16.9, established the Legislative Study Commission on Securities Fraud Enforcement Laws, directed that the Commission submit a final written report of its findings and recommendations on or before March 15, 2003, and mandated that, upon filing its final report, the Commission shall terminate.

Session Laws 2002-189, s. 7, provides: "The State Treasurer, in consultation with the Secretary of State, shall study the best methods for creating and funding a Pension Assurance Fund, including the use of damages awarded in actions involving securities fraud brought by the State or by private individuals, and for paying claims from the Fund. The Legislative Research Commission may also study this issue. The State Treasurer and the Secretary of State shall develop legislative recommendations based on the study and report their recommendations to the General Assembly on or before March 1, 2003, and if the Legislative Research Commission authorizes a study of this issue, the State Treasurer shall also forward a copy of its report to that committee."

Article 3.

Registration and Notice Filing Procedures of Investment Advisers and Investment Adviser Representatives.

§ 78C-17. Registration and notice filing procedures.

(a) An investment adviser, or investment adviser representative may obtain an initial or renewal registration by filing with the Administrator or the Administrator's designee an application together with a consent to service of process pursuant to G.S. 78C-46(b) and paying any reasonable costs charged by the designee for processing the filings. The application shall contain whatever information the Administrator by rule requires concerning such matters as:

(1) The applicant's form and place of organization;
(2) The applicant's proposed method of doing business;
(3) The qualifications and business history of the applicant; in the case of an investment adviser, the qualifications and business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the investment adviser;

(4) Any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony;
(5) The applicant's financial condition and history; and
(6) Any information to be furnished or disseminated to any client or prospective client.

If no denial order is in effect and no proceeding is pending under G.S. 78C-19, registration becomes effective at noon of the 30th day after an application is filed. The Administrator may by rule or order specify an earlier effective date, and he may by order defer the effective date until noon of the 30th day after the filing of any amendment. Registration of an investment adviser automatically constitutes registration of any investment adviser representative who is a partner, executive officer, or director, or a person occupying a similar status or performing similar functions.

(a1) The Administrator may require investment advisers covered under federal law to file with the Administrator any documentation filed with the Securities and Exchange Commission as a condition of doing business in this State. This subsection does not apply to (i) an investment adviser covered under federal law whose only clients are those described in G.S. 78C-16(a)(2), or (ii) an investment adviser covered under federal law who has no place of business in this State, and during the preceding 12-month period has had not more than five clients, other than those described in G.S. 78C-16(a)(2), who are residents of this State. A notice filing under this section may be renewed by (i) filing documents required by the Administrator and filed with the Securities and Exchange Commission, prior to the expiration of the notice filing, and (ii) paying the fee required under subsection (b1) of this section. A notice filed under this section may be terminated by the investment adviser by providing the Administrator notice of the termination, which shall be effective upon receipt by the Administrator.

(b) Every applicant for initial or renewal registration shall pay a filing fee of three hundred dollars ($300.00) in the case of an investment adviser, and seventy-five dollars ($75.00) in the case of an investment adviser representative. When an application is denied or withdrawn, the Administrator shall retain the fee.

(b1) Every person acting as an investment adviser covered under federal law in this State shall pay an initial filing fee of three hundred dollars ($300.00) and a renewal notice filing fee of three hundred dollars ($300.00).

(b2) Any person required to pay a fee under this section may transmit through any designee any fee required by this section or by the rules adopted pursuant to this section.

(c) A registered investment adviser may file an application for registration of a successor, whether or not the successor is then in existence, for the unexpired portion of the year. There shall be no filing fee.

(d) The Administrator may by rule establish minimum net capital requirements not to exceed one hundred thousand dollars ($100,000) for registered investment advisers, subject to the limitations of section 222 of the Investment Advisers Act of 1940 (15 U.S.C. § 80(b)-18a), which may include different requirements for those investment advisers who maintain custody of clients' funds or securities or who have discretionary authority over same and those investment advisers who do not.

(e) The Administrator may by rule require registered investment advisers who have custody of or discretionary authority over client funds or securities to post surety bonds in amounts up to one hundred thousand dollars ($100,000), subject to the limitations of section 222 of the Investment Advisers Act of 1940 (15 U.S.C. § 80(b)-18a), and may determine their conditions. Any appropriate deposit of cash or securities shall be accepted in lieu of any bond

so required. No bond may be required of any investment adviser whose minimum net capital, which may be defined by rule, exceeds one hundred thousand dollars ($100,000). Every bond shall provide for suit thereon by any person who has a cause of action under G.S. 78C-38 and, if the Administrator by rule or order requires, by any person who has a cause of action not arising under this Chapter. Every bond shall provide that no suit may be maintained to enforce any liability on the bond unless brought within the time limitations of G.S. 78C-38(d). (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1997-419, s. 17; 2001-273, s. 3; 2002-126, s. 29A.35; 2002-189, ss. 2, 3.)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, s. 29A.35, effective November 1, 2002, substituted "seventy-five dollars ($75.00)" for "forty-five dollars ($45.00)" in subsection (b).

Session Laws 2002-189, ss. 2 and 3, effective November 1, 2002, and applicable to fees assessed on or after that date, substituted "three hundred dollars ($300.00)" for "two hundred dollars ($200.00)" in subsections (b) and (b1).

§ 78C-20. Methods of registration.

(a) All applications for initial and renewal registrations or notice filings required under G.S. 78C-17 shall be filed with the Investment Adviser Registration Depository (IARD) operated by the National Association of Securities Dealers.

(b) Repealed by Session Laws 2001-273, s. 4, effective October 1, 2001.

(c) Nothing in this section shall be construed to prevent the exercise of the authority of the Administrator as provided in G.S. 78C-19. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 2001-273, s. 4; 2002-159, s. 16.)

Effect of Amendments. —

Session Laws 2002-159, s. 16, effective October 11, 2002, rewrote the section heading, which formerly read "Alternative methods of registration."

Chapter 80.

Trademarks, Brands, etc.

Article 1.

Trademark Registration Act.

Article 1.

Trademark Registration Act.

§ 80-3. Application for registration.

(a) Subject to the limitations set forth in this Article, any person who uses a mark, or any person who controls the nature and quality of the goods or services in connection with which a mark is used by another, in this State may file in the office of the Secretary in a format to be prescribed by the Secretary, an application for registration of that mark setting forth, but not limited to, the following information:

(1) The name and business address of the person applying for registration; and, if a corporation, the state of incorporation. If the application for registration relates to a mark used in connection with goods, the applicant shall list either the address of the applicant's principal place of business in North Carolina or a place of distribution and usage of the goods in this State. If the application for registration relates to a mark used in connection with services, the applicant shall list a physical location at which the services are being rendered or offered in this State;

(2) The goods or services in connection with which the mark is used and the mode or manner in which the mark is used in connection with the goods or services and the class in which the goods or services fall;

(3) The date when the mark was first used anywhere and the date when it was first used in this State by the applicant, the applicant's predecessor in business or by another under the control of the applicant; and

(4) A statement that the applicant is the owner of the mark, that the mark is in use, and that to the best of the knowledge of the person verifying the application, no other person has registered in this State, or has the right to use the mark in this State either in the identical form thereof or in such near resemblance thereto as to be likely, when applied to the goods or services of the other person, to cause confusion, or to cause mistake, or to deceive.

(b) The application shall be signed and verified by the applicant, by a partner, by a member of the firm, or an officer of the corporation or association applying for registration. In states in which a notary is not required by law to obtain a notary's stamp or seal, an original certificate of authority of the notary issued by the appropriate State agency shall be submitted with the application. If the application is signed by a person acting pursuant to a power of attorney from the applicant, an original power of attorney or a certified copy of the power of attorney shall accompany the application.

The application shall be accompanied by three specimens of the mark as currently used and by a filing fee of seventy-five dollars ($75.00), payable to the Secretary.

(c) The Secretary may require a statement as to whether an application to register the mark, or portions or a component of the mark, has been filed by the applicant or a predecessor in interest in the United States Patent and Trademark Office and, if so, the applicant shall provide any relevant information required by the Secretary, including the filing date and serial number of the application and the status of the application. If any application was finally refused registration or has otherwise not resulted in a registration, the Secretary may require the applicant to provide in the statement the reason the application was not registered. The Secretary may also require that a drawing of the mark accompany the application in a form specified by the Secretary. (1903, c. 271, s. 3; Rev., s. 3014; C.S., s. 3973; 1935, c. 60; 1941, c. 255, s. 2; 1967, c. 1007, s. 1; 1983, c. 713, s. 49; 1991, c. 626, s. 3; 1997-476, s. 4; 2002-126, s. 29A.36.)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 29A.36, effective November 1, 2002, in subsection (b), substituted "seventy-five dollars ($75.00)" for "fifty dollars ($50.00)" in the last paragraph.

Chapter 84.

Attorneys-at-Law.

Article 4.

North Carolina State Bar.

Article 1.

Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-4. Persons other than members of State Bar prohibited from practicing law.

CASE NOTES

Cited in Beyer v. N.C. Div. of Mental Health, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 16968 (W.D.N.C. Oct. 16, 2001); Olvera v. Edmundson, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 15284 (W.D.N.C. Sept. 21, 2001).

§ 84-4.1. Limited practice of out-of-state attorneys.

CASE NOTES

Cited in Smith v. Richmond County Bd. of Educ., 150 N.C. App. 291, 563 S.E.2d 258, 2002 N.C. App. LEXIS 488 (2002).

§ 84-5. Prohibition as to practice of law by corporation.

CASE NOTES

A private cause of action did not exist for an alleged unauthorized practice of law by a corporation; therefore, decedent's heirs could not recover for an alleged breach of fiduciary duty by a university that had drafted a will for the decedent whereby the decedent transferred her assets to the university. Baars v. Campbell Univ., Inc., 148 N.C. App. 408, 558 S.E.2d 871, 2002 N.C. App. LEXIS 30 (2002), cert. denied, 355 N.C. 490, 563 S.E.2d 563 (2002).

§ 84-8. Punishment for violations; legal clinics of law schools excepted.

CASE NOTES

Cited in Beyer v. N.C. Div. of Mental Health, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 16968 (W.D.N.C. Oct. 16, 2001); Olvera v. Edmundson, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 15284 (W.D.N.C. Sept. 21, 2001).

ARTICLE 4.

North Carolina State Bar.

§ 84-15. Creation of North Carolina State Bar as an agency of the State.

CASE NOTES

Cited in In re Beasley, — N.C. App. —, 566 S.E.2d 125, 2002 N.C. App. LEXIS 760 (2002).

§ 84-17. Government.

CASE NOTES

Cited in In re Beasley, — N.C. App. —, 566 S.E.2d 125, 2002 N.C. App. LEXIS 760 (2002).

§ 84-18.1. Membership and fees of district bars.

OPINIONS OF ATTORNEY GENERAL

The BarCARES Program could be a lawful use of mandatory bar dues imposed by local district bar organizations as long as the program was restricted to attorney members of the bar and was directly related to addressing identifiable problems that were affecting, or that might in the future affect, an attorney's competence to practice law or professional conduct. See opinion of Attorney General to L. Thomas Lunsford, II, Executive Director, North Carolina State Bar, 2001 N.C. AG LEXIS 24 (8/16/01).

§ 84-21. Organization of Council; publication of rules, regulations and bylaws.

CASE NOTES

Cited in In re Beasley, — N.C. App. —, 566 S.E.2d 125, 2002 N.C. App. LEXIS 760 (2002).

§ 84-23. Powers of Council.

CASE NOTES

Cited in In re Beasley, — N.C. App. —, 566 S.E.2d 125, 2002 N.C. App. LEXIS 760 (2002).

§ 84-24. Admission to practice.

For the purpose of examining applicants and providing rules and regulations for admission to the Bar including the issuance of license therefor, there is hereby created the Board of Law Examiners, which shall consist of 11 members of the Bar, elected by the Council, who need not be members of the Council. No teacher in any law school, however, shall be eligible. The members of the Board

of Law Examiners elected from the Bar shall each hold office for a term of three years.

The Board of Law Examiners shall elect a member of the Board as chair thereof, and the Board may employ an executive secretary and provide such assistance as may be required to enable the Board to perform its duties promptly and properly. The chair and any employees shall serve for a period of time determined by the Board.

The examination shall be held in the manner and at the times as the Board of Law Examiners may determine.

The Board of Law Examiners shall have full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law and to this end the Board of Law Examiners shall have the power of subpoena and to summons and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the inquiry and shall also have authority to employ and provide assistance as may be required to enable it to perform its duties promptly and properly. Records, papers, and other documents containing information collected and compiled by the Board or its members or employees as a result of investigations, inquiries, or interviews conducted in connection with examinations or licensing matters, are not public records within the meaning of Chapter 132 of the General Statutes.

All applicants for admission to the Bar shall be fingerprinted to determine whether the applicant has a record of criminal conviction in this State or in any other state or jurisdiction. The information obtained as a result of the fingerprinting of an applicant shall be limited to the official use of the Board of Law Examiners in determining the character and general fitness of the applicant.

The Department of Justice may provide a criminal record check to the Board of Law Examiners for a person who has applied for a license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this section.

The Board of Law Examiners, subject to the approval of the Council, shall by majority vote, from time to time, make, alter, and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession: Provided, that any change in the educational requirements for admission to the Bar shall not become effective within two years from the date of the adoption of the change.

All rules and regulations, and modifications, alterations and amendments thereof, shall be recorded and promulgated as provided in G.S. 84-21 in relation to the certificate of organization and the rules and regulations of the Council.

Whenever the Council shall order the restoration of license to any person as authorized by G.S. 84-32, it shall be the duty of the Board of Law Examiners to issue a written license to the person, noting thereon that the license is issued in compliance with an order of the Council, whether the license to practice law was issued by the Board of Law Examiners or the Supreme Court in the first instance.

Appeals from the Board shall be had in accordance with rules or procedures as may be approved by the Supreme Court as may be submitted under G.S. 84-21 or as may be promulgated by the Supreme Court. (1933, c. 210, s. 10; c. 331; 1935, cc. 33, 61; 1941, c. 344, s. 6; 1947, c. 77; 1951, c. 991, s. 1; 1953, c. 1012; 1965, cc. 65, 725; 1973, c. 13; 1977, c. 841, s. 2; 1983, c. 177; 1991, c. 210, s. 4; 1995, c. 431, s. 17; 2002-147, s. 5.)

Editor's Note. — Session Laws 2002-147, s. 15, provides: "If the Private Security Officer Employment Standards Act of 2002 [S. 2238, 107th Cong. (2002)] is enacted by the United States Congress, the State of North Carolina declines to participate in the background check system authorized by that act as a result of the enactment of this act."

Effect of Amendments. — Session Laws 2002-147, s. 5, effective October 9, 2002, added the present sixth, seventh, and eighth paragraphs, and deleted a former sixth paragraph, which was almost the same as the present eighth paragraph.

§ 84-28. Discipline and disbarment.

CASE NOTES

I. General Consideration.
II. Sanctions.

I. GENERAL CONSIDERATION.

Applied in N.C. State Bar v. Gilbert, — N.C. App. —, 566 S.E.2d 685, 2002 N.C. App. LEXIS 782 (2002).

Cited in In re Beasley, — N.C. App. —, 566 S.E.2d 125, 2002 N.C. App. LEXIS 760 (2002).

II. SANCTIONS.

Disbarment Held Not Appropriate. — Though an attorney violated the disciplinary rules regarding trust accounts by commingling funds and failing to keep proper records, as there was no evidence that he benefitted from this misconduct, or that any client was harmed by it, the order disbarring him was reversed as an abuse of discretion. North Carolina State Bar v. Talford, 147 N.C. App. 581, 556 S.E.2d 344, 2001 N.C. App. LEXIS 1243 (2001).

Trial court sanctioned a lawyer for characterizing her opposing counsel and their witnesses as liars; its order that she be suspended from practicing law pro hac vice in North Carolina for one year was not an abuse of discretion. Couch v. Private Diagnostic Clinic, 146 N.C. App. 658, 554 S.E.2d 356, 2001 N.C. App. LEXIS 1059 (2001).

§ 84-28.1. Disciplinary hearing commission.

CASE NOTES

State bar disciplinary hearing commission did not have authority to discipline previously disbarred attorney or find him in criminal contempt for unauthorized practice of law because its authority was extinguished following disbarment; the process of seeking criminal sanctions for the unlawful practice of law was under the exclusive control of district attorneys. Disciplinary Hearing Comm'n v. Frazier, 354 N.C. 555, 556 S.E.2d 262, 2001 N.C. LEXIS 1242 (2001).

§ 84-36. Inherent powers of courts unaffected.

CASE NOTES

Cited in In re Beasley, — N.C. App. —, 566 S.E.2d 125, 2002 N.C. App. LEXIS 760 (2002).

§ 84-38. Solicitation of retainer or contract for legal services prohibited; division of fees.

CASE NOTES

No Civil Cause of Action. — Legislative codification of the common law offense of barratry in G.S. 84-38 does not provide a civil cause of action for the offense. DaimlerChrysler Corp. v. Kirkhart, 148 N.C. App. 572, 561 S.E.2d 276, 2002 N.C. App. LEXIS 60 (2002).

Chapter 87.

Contractors.

Article 2.

Plumbing and Heating Contractors.

§ 87-21. Definitions; contractors licensed by Board; examination; posting license, etc.

(a) Definitions. — For the purpose of this Article:

(1) The word "plumbing" is hereby defined to be the system of pipes, fixtures, apparatus and appurtenances, installed upon the premises, or in a building, to supply water thereto and to convey sewage or other waste therefrom.

(2) The phrase "heating, group number one" shall be deemed and held to be the heating system of a building, which requires the use of high or low pressure steam, vapor or hot water, including all piping, ducts, and mechanical equipment appurtenant thereto, within, adjacent to or connected with a building, for comfort heating.

(3) The phrase "heating, group number two" means an integral system for heating or cooling a building consisting of an assemblage of interacting components producing conditioned air to raise or lower the temperature, and having a mechanical refrigeration capacity in excess of fifteen tons, and which circulates air. Systems installed in single-family residences are included under heating group number three, regardless of size. Holders of a heating group number three license who have heretofore installed systems classified as heating group number two systems may nevertheless service, replace, or make alterations to those installed systems until June 30, 2004.

(4) The phrase "heating, group number three" shall be deemed and held to be a direct heating or cooling system of a building that raises or lowers the temperature of the space within the building for the purpose of comfort in which electric heating elements or products of combustion exchange heat either directly with the building supply air or indirectly through a heat exchanger using an air distribution system of ducts and having a mechanical refrigeration capacity of 15 tons or less. A heating system requiring air distribution ducts and supplied by ground water or utilizing a coil supplied by water from a domestic hot water heater not exceeding 150 degrees Fahrenheit requires either plumbing or heating group number one license to extend piping from valved connections in the domestic hot water system to the heating coil and requires either heating group number one or heating group number three license for installation of coil, duct work, controls, drains and related appurtenances.

(5) Any person, firm or corporation, who for a valuable consideration, (i) installs, alters or restores, or offers to install, alter or restore, either

plumbing, heating group number one, or heating group number two, or heating group number three, or (ii) lays out, fabricates, installs, alters or restores, or offers to lay out, fabricate, install, alter or restore fire sprinklers, or any combination thereof, as defined in this Article, shall be deemed and held to be engaged in the business of plumbing, heating, or fire sprinkler contracting; provided, however, that nothing herein shall be deemed to restrict the practice of qualified registered professional engineers. Any person who installs a plumbing, heating, or fire sprinkler system on property which at the time of installation was intended for sale or to be used primarily for rental is deemed to be engaged in the business of plumbing, heating, or fire sprinkler contracting without regard to receipt of consideration, unless exempted elsewhere in this Article.

(6) The word "contractor" is hereby defined to be a person, firm or corporation engaged in the business of plumbing, heating, or fire sprinkler contracting.

(7) The word "heating" shall be deemed and held to mean heating group number one, heating group number two, heating group number three, or any combination thereof.

(8) Repealed by Session Laws 1997-298, s. 1.

(9) The word "Board" means the State Board of Examiners of Plumbing, Heating, and Fire Sprinkler Contractors.

(10) The word "experience" means actual and practical work directly related to the category of plumbing, heating group number one, heating group number two, heating group number three, or fire sprinkler contracting, and includes related work for which a license is not required.

(11) The phrase "fire sprinkler" means an automatic or manual sprinkler system designed to protect the interior or exterior of a building or structure from fire, and where the primary extinguishing agent is water. These systems include wet pipe and dry pipe systems, preaction systems, water spray systems, foam water sprinkler systems, foam water spray systems, nonfreeze systems, and circulating closed-loop systems. These systems also include the overhead piping, combination standpipes, inside hose connections, thermal systems used in connection with the sprinklers, tanks, and pumps connected to the sprinklers, and controlling valves and devices for actuating an alarm when the system is in operation. This subsection shall not apply to owners of property who are building or improving farm outbuildings. This subsection shall not include water and standpipe systems having no connection with a fire sprinkler system. Nothing herein shall prevent licensed plumbing contractors, utility contractors, or fire sprinkler contractors from installing underground water supplies for fire sprinkler systems.

(b) Classes of Licenses; Eligibility and Examination of Applicant; Necessity for License. —

(1) In order to protect the public health, comfort and safety, the Board shall establish two classes of licenses: Class I covering all plumbing, heating, and fire sprinkler systems for all structures, and Class II covering plumbing and heating systems in single-family detached residential dwellings.

(2) The Board shall establish and issue a fuel piping license for use by persons who do not possess the required Class I or Class II plumbing or heating license, but desire to engage in the contracting or installing of fuel piping extending from an approved fuel source at or near the premises, which piping is used or may be used to supply fuel to any systems, equipment, or appliances located inside the premises.

The Board may also establish additional restricted classifications to provide for: (i) the licensing of any person, partnership, firm, or corporation desiring to engage in a specific phase of heating, plumbing, or fire sprinkling contracting; (ii) the licensing of any person, partnership, firm, or corporation desiring to engage in a specific phase of heating, plumbing, or fire sprinkling contracting that is an incidental part of their primary business, which is a lawful business other than heating, plumbing, or fire sprinkling contracting; or (iii) the licensing of persons desiring to engage in contracting and installing fuel piping from an approved fuel source on the premises to a point inside the residence.

(3) The Board shall prescribe the standard of competence, experience and efficiency to be required of an applicant for license of each class, and shall give an examination designed to ascertain the technical and practical knowledge of the applicant concerning the analysis of plans and specifications, estimating costs, fundamentals of installation and design, codes, fire hazards, and related subjects as these subjects pertain to plumbing, heating, or fire sprinkler systems. The examination for a fire sprinkler contractor's license shall include such materials as would test the competency of the applicant and which may include the minimum requirements of certification for Level III, subfield of Automatic Sprinkler System Layout, National Institute for Certification of Engineering Technologies (NICET). As a result of the examination, the Board shall issue a certificate of license of the appropriate class in plumbing, heating, or fire sprinkler contracting, and a license shall be obtained, in accordance with the provisions of this Article, before any person, firm or corporation shall engage in, or offer to engage in, the business of plumbing, heating, or fire sprinkler contracting, or any combination thereof. The obtaining of a license, as required by this Article, shall not of itself authorize the practice of another profession or trade for which a State qualification license is required. Prior to taking the examination, the applicant may be required by the Board to establish that the applicant is at least 18 years of age and is of good moral character. The Board may require experience as a condition of examination, provided that (i) the experience required may not exceed two years, (ii) that up to one-half the experience may be in the form of academic or technical courses of study, and (iii) that registration is not required at the commencement of the period of experience.

(4) Conditions of examination set by the Board shall be uniformly applied to each applicant within each license classification. It is the purpose and intent of this section that the Board shall provide an examination for plumbing, heating group number one, or heating group number two, or heating group number three, or each restricted classification, and may provide an examination for fire sprinkler contracting or may accept a current certification of the National Institute for Certification in Engineering Technologies for Fire Protection Engineering Technician, Level III, subfield of Automatic Sprinkler System Layout.

(5) The Board is authorized to issue a certificate of license limited to either plumbing or heating group number one, or heating group number two, or heating group number three, or fire sprinkler contracting, or any combination thereof. The Board is also authorized to issue a certificate of license limited to one or more restricted classifications that are established pursuant to this section.

(6) Examinations shall be given at least twice each year, and additional examinations may be given as the Board deems wise and necessary.

The Board may offer written examinations or administer examinations by computer within 30 days after approving an application. Upon passing the examination and paying the annual license fee, the applicant shall be issued a license. A person who fails to pass any examination shall not be reexamined until after 90 days from the date the person was last examined. The Board may require applicants who fail the examination three times to receive additional education before the applicant is allowed to retake the examination.

(c) To Whom Article Applies. — The provisions of this Article shall apply to all persons, firms, or corporations who engage in, or attempt to engage in, the business of plumbing, heating, or fire sprinkler contracting, or any combination thereof as defined in this Article. The provisions of this Article shall not apply to those who make minor repairs or minor replacements to an already installed system of plumbing or heating, but shall apply to those who make repairs, replacements, or modifications to an already installed fire sprinkler system.

(c1) Exemption. — The provisions of this Article shall not apply to a person who performs the on-site assembly of a factory designed drain line system for a manufactured home, as defined in G.S. 143-143.9(6), if the person (i) is a licensed manufactured home retailer, a licensed manufactured home set-up contractor, or a full-time employee of either, (ii) obtains an inspection by the local inspections department and (iii) performs the assembly according to the State Plumbing Code.

(d) Repealed by Session Laws 1979, c. 834, s. 7.

(d1) Expired December 31, 1991.

(e) Posting License; License Number on Contracts, etc. — The current license issued in accordance with the provisions of this Article shall be posted in the business location of the licensee, and its number shall appear on all proposals or contracts and requests for permits issued by municipalities. The initial qualified licensee on a license is the permanent possessor of the license number under which that license is issued, except that a licensee, or the licensee's legal agent, personal representative, heirs or assigns, may designate in writing to the Board a qualified licensee to whom the Board shall assign the license number upon the payment of a ten dollar ($10.00) assignment fee. Upon such assignment, the qualified licensee becomes the permanent possessor of the assigned license number. Notwithstanding the foregoing, the license number may be assigned only to a qualified licensee who has been employed by the initial licensee's plumbing and heating company for at least 10 years or is a lineal relative, sibling, first cousin, nephew, niece, daughter-in-law, son-in-law, brother-in-law, or sister-in-law of the initial licensee. Each successive licensee to whom a license number is assigned under this subsection may assign the license number in the same manner as provided in this subsection.

(f) Repealed by Session Laws 1971, c. 768, s. 4.

(g) The Board may, in its discretion, grant to plumbing, heating, or fire sprinkler contractors licensed by other states license of the same or equivalent classification without written examination upon receipt of satisfactory proof that the qualifications of such applicants are substantially equivalent to the qualifications of holders of similar licenses in North Carolina and upon payment of the usual license fee.

(h) Expired December 31, 1993.

(i) **(Effective March 1, 2003)** The provisions of this Article shall not apply to a retailer, as defined in G.S. 105-164.3(35), who, in the ordinary course of business, enters into a transaction with a buyer in which the retailer of a good and the services necessary for the installation of the good, contracts with a licensee under this Article to provide the installation services if the contract,

containing the licensee's license number, is signed by the buyer, the retailer, and the licensee. All services rendered pursuant to this section by the licensee must be performed in compliance with all local permit and inspection requirements. (1931, c. 52, s. 6; 1939, c. 224, s. 3; 1951, c. 953, ss. 1, 2; 1953, c. 254, s. 2; 1967, c. 770, ss. 1-6; 1971, c. 768, ss. 2-4; 1973, c. 1204; 1979, c. 834, ss. 4-7; 1981, c. 332, s. 1; 1983, c. 569, ss. 1, 2; 1989, c. 623, s. 1; 1989 (Reg. Sess., 1990), c. 842, s. 3; c. 978, s. 2; 1991, c. 355, s. 1; c. 507, s. 1; c. 761, s. 13; 1993, c. 78, s. 1; 1997-298, s. 1; 1997-382, ss. 1, 4; 2001-270, s. 2; 2002-159, s. 36(a).)

Effect of Amendments. — Session Laws 2002-159, s. 36(a), effective March 1, 2003, added subsection (i).

Article 7A.

Well Contractors Certification.

§ 87-98.2. Definitions.

The definitions in G.S. 87-85 and the following definitions apply in this Article:

(1) Commission. — The Well Contractors Certification Commission, as established by G.S. 143B-301.11.

(2) Department. — The Department of Environment and Natural Resources.

(3) Person. — A natural person.

(4) Secretary. — The Secretary of Environment and Natural Resources.

(5) Well contractor. — A person in trade or business who undertakes to perform a well contractor activity or who undertakes to personally supervise or personally manage the performance of a well contractor activity on the person's own behalf or for any person, firm, or corporation.

(6) Well contractor activity. — The construction, installation, repair, alteration, or abandonment of any well. (1997-358, s. 2; 1997-443, s. 11A.119(b); 2002-165, s. 1.1.)

Effect of Amendments. — Session Laws 2002-165, s. 1.1, effective October 23, 2002, added "as established by G.S. 143B-301.11" to the end of subdivision (1).

Chapter 89A.

Landscape Architects.

§ 89A-1. Definitions.

OPINIONS OF ATTORNEY GENERAL

Street Design and Storm Drainage Systems. — The detailed drawings and accompanying calculations of street design and storm drainage systems, including subsurface systems and component structures, fall within the definition of the practice of engineering and not within the definition of landscape architecture. See opinion of Attorney General to Jerry T. Carter, Executive Director, N.C. Board of Examiners for Engineers and Surveyors, 2001 N.C. AG LEXIS 8 (3/22/2001).

§ 89A-3.1. Board's powers and duties.

The Board shall have the following powers and duties:

(1) Administer and enforce the provisions of this Chapter.
(2) Adopt rules to administer and enforce the provisions of this Chapter.
(3) Examine and determine the qualifications and fitness of applicants for registration and renewal of registration.
(4) Determine the qualifications of firms, partnerships, or corporations applying for a certificate of registration.
(5) Issue, renew, deny, suspend, or revoke certificates of registration and conduct any disciplinary actions authorized by this Chapter.
(6) Establish and approve continuing education requirements for persons registered under this Chapter.
(7) Receive and investigate complaints from members of the public.
(8) Conduct investigations for the purpose of determining whether violations of this Chapter or grounds for disciplining registrants exist.
(9) Conduct administrative hearings in accordance with Article 3 of Chapter 150B of the General Statutes.
(10) Maintain a record of all proceedings conducted by the Board and make available to registrants and other concerned parties an annual report of all Board action.
(11) Employ and fix the compensation of personnel that the Board determines is necessary to carry out the provisions of this Chapter and incur other expenses necessary to perform the duties of the Board.
(12) Adopt and publish a code of professional conduct for all registrants.
(13) Adopt a seal containing the name of the Board for use on all certificates of registration and official reports issued by the Board.
(14) Retain private counsel subject to G.S. 114-2.3. (1997-406, s. 4; 1997-456, s. 27; 2002-168, s. 7.)

Effect of Amendments. — Session Laws 2002-168, s. 7, effective October 1, 2002, added subdivision (14).

Chapter 89C.

Engineering and Land Surveying.

§ 89C-3. Definitions.

OPINIONS OF ATTORNEY GENERAL

Street Design and Storm Drainage Systems. — The detailed drawings and accompanying calculations of street design and storm drainage systems, including subsurface systems and component structures, fall within the definition of the practice of engineering and not within the definition of landscape architecture. See opinion of Attorney General to Jerry T. Carter, Executive Director, N.C. Board of Examiners for Engineers and Surveyors, 2001 N.C. AG LEXIS 8 (3/22/2001).

§ 89C-24. Licensure of corporations and business firms that engage in the practice of engineering or land surveying.

OPINIONS OF ATTORNEY GENERAL

Registration Requirement Applies to Non-Profit Corporations. — The registration requirement contained in this section applies to any corporation, including a non-profit corporation, if the corporation is engaged in the practice of engineering as defined by the statute. See opinion of Attorney General to Mr. Jerry T. Carter, Executive Director, North Carolina Board of Examiners for Engineers and Surveyors, 1999 N.C. AG LEXIS 25 (11/16/99).

Chapter 90.

Medicine and Allied Occupations.

Article 1.

Practice of Medicine.

§ 90-1. North Carolina Medical Society incorporated.

Editor's Note. — Session Laws 2002-180, ss. 15.1 to 15.9, establishes the Statewide Emergency Preparedness Study Commission, to study the delivery of emergency medical services in this State. The Commission is to examine the funding of the State Trauma System, analyze impediments to the seamless delivery of care to trauma victims, examine ways of improving the quality and delivery of care to trauma and emergency victims, as well as the need for additional trauma centers and improved coordination of existing centers, and examine methods of improving North Carolina's readiness to handle trauma resulting from massive disasters. The Commission is to submit a final report to the 2005 General Assembly and may submit progress reports to the 2003 General Assembly.

§ 90-11. Qualifications of applicant for license.

(a) Every applicant for a license to practice medicine or to perform medical acts, tasks, and functions as a physician assistant in the State shall satisfy the North Carolina Medical Board that the applicant is of good moral character and meets the other qualifications for the issuance of a license before any such license is granted by the Board to the applicant.

(b) The Department of Justice may provide a criminal record check to the Board for a person who has applied for a license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection. (C.S., s. 6615; 1921, c. 47, s. 3; Ex. Sess. 1921, c. 44, s. 5; 1971, c. 1150, s. 3; 1981, c. 573, s. 7; 1995, c. 94, s. 12; 1997-511, s. 2; 2002-147, s. 6.)

Editor's Note. — Session Laws 2002-147, s. 15, provides: "If the Private Security Officer Employment Standards Act of 2002 [S. 2238, 107th Cong. (2002)] is enacted by the United States Congress, the State of North Carolina declines to participate in the background check system authorized by that act as a result of the enactment of this act."

Effect of Amendments. — Session Laws 2002-147, s. 6, effective October 9, 2002, designated the formerly undesignated provisions as subsection (a); and added subsection (b).

§ 90-12.2. Disasters and emergencies.

In the event of an occurrence which the Governor of the State of North Carolina has declared a disaster or when the Governor has declared a state of emergency, or in the event of an occurrence for which a county or municipality has enacted an ordinance to deal with states of emergency under G.S. 14-288.12, 14-288.13, or 14-288.14, or to protect the public health, safety, or welfare of its citizens under Article 22 of Chapter 130A of the General Statutes, G.S. 160A-174(a) or G.S. 153A-121(a), as applicable, the Board may waive the requirements of this Article in order to permit the provision of emergency health services to the public. (2002-179, s. 20(a).)

Editor's Note. — Session Laws 2002-179, s. 22, makes this section effective October 1, 2002.

Article 1A.

Treatment of Minors.

Part 1. General Provisions.

§ 90-21.5. Minor's consent sufficient for certain medical health services.

OPINIONS OF ATTORNEY GENERAL

This Section Does Not Conflict with G.S. 7B-3400. — Section 7B-3400, which provides that minors are subject to the supervision and control of their parents "notwithstanding any other provision of law," does not abrogate G.S. 90-21.5, which specifies the circumstances under which minors can consent to health services as the statutes address different issues and do not conflict with one another. See opinion of Attorney General to Dr. David King, Chairman, Rowan Board of Health, 1999 N.C. AG LEXIS 27 (8/25/99).

Article 1B.

Medical Malpractice Actions.

§ 90-21.11. Definitions.

CASE NOTES

Cited in Iodice v. United States, 289 F.3d 270, 2002 U.S. App. LEXIS 8388 (4th Cir. 2002).

§ 90-21.12. Standard of health care.

CASE NOTES

Showing Required in Malpractice Cases. —

Parents of baby who suffered an injury during delivery established the applicable standard of care through the expert testimony of an obstetrician gynecologist with a subspecialty in perinatology who was licensed to practice in South Carolina and Alabama; the expert testified as to the proper procedures the doctor should have utilized in delivering the baby, the proper local standard of care, and the failure of the doctor to correctly perform the procedures. Leatherwood v. Ehlinger, — N.C. App. —, 564 S.E.2d 883, 2002 N.C. App. LEXIS 678 (2002).

Cited in Iodice v. United States, 289 F.3d 270, 2002 U.S. App. LEXIS 8388 (4th Cir. 2002).

§ 90-21.13. Informed consent to health care treatment or procedure.

CASE NOTES

Subsection (b) Does Not Encompass Innocent or Negligent Misrepresentation. — The General Assembly, in enacting G.S. 90-21.13(b), intended the word "misrepresentation" to refer only to intentional misrepresentation, and not to encompass innocent or negligent misrepresentation. Liborio v. King, — N.C. App. —, 564 S.E.2d 272, 2002 N.C. App. LEXIS 573 (2002).

Article 1D.

Peer Review.

§ 90-21.22A. Medical review committees.

(a) As used in this section, "medical review committee" means a committee composed of health care providers licensed under this Chapter that is formed for the purpose of evaluating the quality of, cost of, or necessity for health care services, including provider credentialing. "Medical review committee" does not mean a medical review committee established under G.S. 131E-95.

(b) A member of a duly appointed medical review committee who acts without malice or fraud shall not be subject to liability for damages in any civil action on account of any act, statement, or proceeding undertaken, made, or performed within the scope of the functions of the committee.

(c) The proceedings of a medical review committee, the records and materials it produces, and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1, 131E-309, or 58-2-100; and shall not be subject to discovery or introduction into evidence in any civil action against a provider of health care services who directly provides services and is licensed under this Chapter, a PSO licensed under Article 17 of Chapter 131E of the General Statutes, an ambulatory surgical facility licensed under Chapter 131E of the General Statutes, or a hospital licensed under Chapter 122C or Chapter 131E of the General Statutes or that is owned or operated by the State, which civil action results from matters that are the subject of evaluation and review by the committee. No person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. A member of the committee may testify in a civil action but cannot be asked about his or her testimony before the committee or any opinions formed as a result of the committee hearings.

(d) This section applies to a medical review committee, including a medical review committee appointed by one of the entities licensed under Articles 1 through 67 of Chapter 58 of the General Statutes.

(e) Subsection (c) of this section does not apply to proceedings initiated under G.S. 58-50-61 or G.S. 58-50-62. (1997-519, s. 4.3; 1998-227, s. 3; 2002-179, s. 18.)

Effect of Amendments. — Session Laws 2002-179, s. 18, effective October 1, 2002, inserted "an ambulatory surgical facility licensed under Chapter 131E of the General Statutes" in the first sentence of subsection (c).

Article 2.

Dentistry.

§ 90-29. Necessity for license; dentistry defined; exemptions.

(a) No person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license or

certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners.

(b) A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry:

(1) Diagnoses, treats, operates, or prescribes for any disease, disorder, pain, deformity, injury, deficiency, defect, or other physical condition of the human teeth, gums, alveolar process, jaws, maxilla, mandible, or adjacent tissues or structures of the oral cavity;

(2) Removes stains, accretions or deposits from the human teeth;

(3) Extracts a human tooth or teeth;

(4) Performs any phase of any operation relative or incident to the replacement or restoration of all or a part of a human tooth or teeth with any artificial substance, material or device;

(5) Corrects the malposition or malformation of the human teeth;

(6) Administers an anesthetic of any kind in the treatment of dental or oral diseases or physical conditions, or in preparation for or incident to any operation within the oral cavity; provided, however, that this subsection shall not apply to a lawfully qualified nurse anesthetist who administers such anesthetic under the supervision and direction of a licensed dentist or physician;

(6a) Expired pursuant to Session Laws 1991, c. 678, s. 2.

(7) Takes or makes an impression of the human teeth, gums or jaws;

(8) Makes, builds, constructs, furnishes, processes, reproduces, repairs, adjusts, supplies or professionally places in the human mouth any prosthetic denture, bridge, appliance, corrective device, or other structure designed or constructed as a substitute for a natural human tooth or teeth or as an aid in the treatment of the malposition or malformation of a tooth or teeth, except to the extent the same may lawfully be performed in accordance with the provisions of G.S. 90-29.1 and 90-29.2;

(9) Uses a Roentgen or X-ray machine or device for dental treatment or diagnostic purposes, or gives interpretations or readings of dental Roentgenograms or X rays;

(10) Performs or engages in any of the clinical practices included in the curricula of recognized dental schools or colleges;

(11) Owns, manages, supervises, controls or conducts, either himself or by and through another person or other persons, any enterprise wherein any one or more of the acts or practices set forth in subdivisions (1) through (10) above are done, attempted to be done, or represented to be done;

(12) Uses, in connection with his name, any title or designation, such as "dentist," "dental surgeon," "doctor of dental surgery," "D.D.S.," "D.M.D.," or any other letters, words or descriptive matter which, in any manner, represents him as being a dentist able or qualified to do or perform any one or more of the acts or practices set forth in subdivisions (1) through (10) above;

(13) Represents to the public, by any advertisement or announcement, by or through any media, the ability or qualification to do or perform any of the acts or practices set forth in subdivisions (1) through (10) above.

(c) The following acts, practices, or operations, however, shall not constitute the unlawful practice of dentistry:

(1) Any act by a duly licensed physician or surgeon performed in the practice of his profession;

(2) The practice of dentistry, in the discharge of their official duties, by dentists in any branch of the military service of the United States or in the full-time employ of any agency of the United States;

(3) The teaching or practice of dentistry, in dental schools or colleges operated and conducted in this State and approved by the North Carolina State Board of Dental Examiners, by any person or persons licensed to practice dentistry anywhere in the United States or in any country, territory or other recognized jurisdiction until December 31, 2002. On or after January 1, 2003, all dentists previously practicing under G.S. 90-29(c)(3) shall be granted an instructor's license upon application to the Board and payment of the required fee.

(4) The practice of dentistry in dental schools or colleges in this State approved by the North Carolina State Board of Dental Examiners by students enrolled in such schools or colleges as candidates for a doctoral degree in dentistry when such practice is performed as a part of their course of instruction and is under direct supervision of a dentist who is either duly licensed in North Carolina or qualified under subdivision (3) above as a teacher; additionally, the practice of dentistry by such students at State or county institutions with resident populations, hospitals, State or county health departments, area health education centers, nonprofit health care facilities serving low-income populations and approved by the State Health Director or his designee and approved by the Board of Dental Examiners, and State or county-owned nursing homes; subject to review and approval or disapproval by the said Board of Dental Examiners when in the opinion of the dean of such dental school or college or his designee, the students' dental education and experience are adequate therefor, and such practice is a part of the course of instruction of such students, is performed under the direct supervision of a duly licensed dentist acting as a teacher or instructor, and is without remuneration except for expenses and subsistence all as defined and permitted by the rules and regulations of said Board of Dental Examiners. Should the Board disapprove a specific program, the Board shall within 90 days inform the dean of its actions. Nothing herein shall be construed to permit the teaching of, delegation to or performance by any dental hygienist, dental assistant, or other auxiliary relative to any program of extramural rotation, of any function not heretofore permitted by the Dental Practice Act, the Dental Hygiene Act or by the rules and regulations of the Board;

(5) The temporary practice of dentistry by licensed dentists of another state or of any territory or country when the same is performed, as clinicians, at meetings of organized dental societies, associations, colleges or similar dental organizations, or when such dentists appear in emergency cases upon the specific call of a dentist duly licensed to practice in this State;

(6) The practice of dentistry by a person who is a graduate of a dental school or college approved by the North Carolina State Board of Dental Examiners and who is not licensed to practice dentistry in this State, when such person is the holder of a valid intern permit, or provisional license, issued to him by the North Carolina State Board of Dental Examiners pursuant to the terms and provisions of this Article, and when such practice of dentistry complies with the conditions of said intern permit, or provisional license;

(7) Any act or acts performed by a dental hygienist when such act or acts are lawfully performed pursuant to the authority of Article 16 of this Chapter 90 or the rules and regulations of the Board promulgated thereunder;

(8) Activity which would otherwise be considered the practice of dental hygiene performed by students enrolled in a school or college ap-

proved by the Board in a board-approved dental hygiene program under the direct supervision of a dental hygienist or a dentist duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of subdivision (3) above;

(9) Any act or acts performed by an assistant to a dentist licensed to practice in this State when said act or acts are authorized and permitted by and performed in accordance with rules and regulations promulgated by the Board;

(10) Dental assisting and related functions as a part of their instructions by students enrolled in a course in dental assisting conducted in this State and approved by the Board, when such functions are performed under the supervision of a dentist acting as a teacher or instructor who is either duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of subdivision (3) above;

(11) The extraoral construction, manufacture, fabrication or repair of prosthetic dentures, bridges, appliances, corrective devices, or other structures designed or constructed as a substitute for a natural human tooth or teeth or as an aid in the treatment of the malposition or malformation of a tooth or teeth, by a person or entity not licensed to practice dentistry in this State, when the same is done or performed solely upon a written work order in strict compliance with the terms, provisions, conditions and requirements of G.S. 90-29.1 and 90-29.2.

(12) The use of a dental x-ray machine in the taking of dental radiographs by a dental hygienist, certified dental assistant, or a dental assistant who can show evidence of satisfactory performance on an equivalency examination, recognized by the Board of Dental Examiners, based on seven hours of instruction in the production and use of dental x rays and an educational program of not less than seven hours in clinical dental radiology.

(13) A dental assistant, or dental hygienist who shows evidence of education and training in Nitrous Oxide — Oxygen Inhalant Conscious Sedation within a formal educational program may aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation. Any dental assistant who can show evidence of having completed an educational program recognized by the Board of not less than seven clock hours on Nitrous Oxide — Oxygen Inhalant Conscious Sedation may also aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation. Any dental hygienist or dental assistant who has been employed in a dental office where Nitrous Oxide — Oxygen Inhalant Conscious Sedation was utilized, and who can show evidence of performance and instruction of not less than one year prior to July 1, 1980, qualifies to aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation.

(14) The operation of a nonprofit health care facility serving low-income populations and approved by the State Health Director or his designee and approved by the North Carolina State Board of Dental Examiners. (1935, c. 66, s. 6; 1953, c. 564, s. 3; 1957, c. 592, s. 2; 1961, c. 446, s. 2; 1965, c. 163, ss. 1, 2; 1971, c. 755, s. 2; 1977, c. 368; 1979, 2nd Sess., c. 1195, ss. 10, 15; 1991, c. 658, s. 1; c. 678, ss. 1, 2; 1997-481, ss. 5, 6; 2002-37, s. 8.)

Editor's Note. — Session Laws 2002-37, s. 11, contains a severability clause.

Effect of Amendments. — Session Laws 2002-37, s. 8, effective January 1, 2003, in

subdivision (c)(3), substituted "jurisdiction until December 31, 2002" for "jurisdiction" at the end of the first sentence, and added the second sentence.

OPINIONS OF ATTORNEY GENERAL

Provision of Services to Dental Practice Based on Revenues of Practice or Dentist Prohibited. — An arrangement whereby a business entity provides services to a dental practice constitutes the unlawful practice of dentistry if payment to the business entity under such arrangement is based in whole or in part on the revenues of the dental practice or one or more individual dentists. See opinion of Attorney General to Stanley L. Fleming, D.D.S., President, Delma H. Kinlaw, D.D.S., Secretary/Treasurer, and Christine Lockwood, Executive Director, N.C. State Board of Dental Examiners, 1999 N.C. AG LEXIS 32 (9/3/99).

§ 90-29.4. Intern permit.

The North Carolina State Board of Dental Examiners may, in the exercise of the discretion of said Board, issue to a person who is not licensed to practice dentistry in this State and who is a graduate of a dental school, college, or institution approved by said Board, an intern permit authorizing such person to practice dentistry under the supervision or direction of a dentist duly licensed to practice in this State, subject to the following particular conditions:

(1) An intern permit shall be valid for no more than one year from the date of issue thereof; provided, however, that the Board may, in its discretion, renew such permit for not more than five additional one-year periods; and, provided, further, that no person shall be granted an intern permit or intern permits embracing or covering an aggregate time span of more than 72 calendar months;

(2) The holder of a valid intern permit may practice dentistry only under the supervision or direction of one or more dentists duly licensed to practice in this State;

(3) The holder of a valid intern permit may practice dentistry only (i) as an employee in a hospital, sanatorium, or a like institution which is licensed or approved by the State of North Carolina and approved by the North Carolina State Board of Dental Examiners; (ii) as an employee of a nonprofit health care facility serving low-income populations and approved by the State Health Director or his designee and approved by the North Carolina State Board of Dental Examiners; or (iii) as an employee of the State of North Carolina or an agency or political subdivision thereof, or any other governmental entity within the State of North Carolina, when said employment is approved by the North Carolina State Board of Dental Examiners;

(4) The holder of a valid intern permit shall receive no fee or fees or compensation of any kind or nature for dental services rendered by him other than such salary or compensation as might be paid to him by the entity specified in subdivision (3) above wherein or for which said services are rendered;

(5) The holder of a valid intern permit shall not, during the term of said permit or any renewal thereof, change the place of his internship without first securing the written approval of the North Carolina State Board of Dental Examiners;

(6) The practice of dentistry by the holder of a valid intern permit shall be strictly limited to the confines of and to the registered patients of the hospital, sanatorium or institution to which he is attached or to the persons officially served by the governmental entity by whom he is employed;

(7) Any person seeking an intern permit shall first file with the North Carolina State Board of Dental Examiners such papers and docu-

ments as are required by said Board, together with the application fee authorized by G.S. 90-39. A fee authorized by G.S. 90-39 shall be paid for any renewal of said intern permit. Such person shall further supply to the Board such other documents, materials or information as the Board may request;

(8) Any person seeking an intern permit or who is the holder of a valid intern permit shall comply with such limitations as the North Carolina State Board of Dental Examiners may place or cause to be placed, in writing, upon such permit, and shall comply with such rules and regulations as the Board might promulgate relative to the issuance and maintenance of said permit in the practice of dentistry relative to the same;

(9) The holder of an intern permit shall be subject to the provisions of G.S. 90-41. (1971, c. 755, s. 3; 1997-481, s. 7; 2002-37, s. 10.)

Editor's Note. — Session Laws 2002-37, s. 11, contains a severability clause.

Effect of Amendments. — Session Laws 2002-37, s. 10, effective January 1, 2003, substituted "five additional one-year periods" for "three additional one-year periods" and "72 calendar months" for "48 calendar months" in subdivision (1).

§ 90-29.5. Instructor's license.

(a) The Board may issue an instructor's license to a person who is not otherwise licensed to practice dentistry in this State if the person meets both of the following conditions:

(1) Is licensed to practice dentistry anywhere in the United States or in any country, territory, or other recognized jurisdiction.

(2) Has met or been approved under the credentialing standards of a dental school or an academic medical center with which the person is to be affiliated; such dental school or academic medical center shall be accredited by the American Dental Association's Commission on Accreditation or the Joint Commission on Accreditation of Health Care Organizations.

(b) The holder of an instructor's license may teach and practice dentistry:

(1) In or on behalf of a dental school or college offering a doctoral degree in dentistry operated and conducted in this State and approved by the North Carolina State Board of Dental Examiners;

(2) In connection with an academic medical center; and

(3) At any teaching hospital adjacent to a dental school or an academic medical center.

(c) Application for an instructor's license shall be made in accordance with the rules of the North Carolina State Board of Dental Examiners. On or after January 1, 2003, all dentists previously practicing under G.S. 90-29(c)(3) shall be granted an instructor's license upon application to the Board and payment of the required fee. The holder of an instructor's license shall be subject to the provisions of this Article. (1979, 2nd Sess., c. 1195, s. 11; 2002-37, s. 7.)

Editor's Note. — Session Laws 2002-37, s. 11, contains a severability clause.

Effect of Amendments. — Session Laws 2002-37, s. 7, effective January 1, 2003, rewrote the section.

§ 90-30. Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses.

(a) The North Carolina State Board of Dental Examiners shall grant licenses to practice dentistry to such applicants who are graduates of a

reputable dental institution, who, in the opinion of a majority of the Board, shall undergo a satisfactory examination of proficiency in the knowledge and practice of dentistry, subject, however, to the further provisions of this section and of the provisions of this Article.

The applicant shall be of good moral character, at least 18 years of age at the time the application for examination is filed. The application shall be made to the said Board in writing and shall be accompanied by evidence satisfactory to said Board that the applicant is a person of good moral character, has an academic education, the standard of which shall be determined by the said Board; that he is a graduate of and has a diploma from a reputable dental college or the dental department of a reputable university or college recognized, accredited and approved as such by the said Board.

The North Carolina State Board of Dental Examiners is authorized to conduct both written or oral and clinical examinations of such character as to thoroughly test the qualifications of the applicant, and may refuse to grant license to any person who, in its discretion, is found deficient in said examination, or to any person guilty of cheating, deception or fraud during such examination, or whose examination discloses to the satisfaction of the Board, a deficiency in academic education. The Board may employ such dentists found qualified therefor by the Board, in examining applicants for licenses as it deems appropriate.

The North Carolina State Board of Dental Examiners may refuse to grant a license to any person guilty of a crime involving moral turpitude, or gross immorality, or to any person addicted to the use of alcoholic liquors or narcotic drugs to such an extent as, in the opinion of the Board, renders the applicant unfit to practice dentistry.

Any license obtained through fraud or by any false representation shall be void ab initio and of no effect.

(b) The Department of Justice may provide a criminal record check to the North Carolina State Board of Dental Examiners for a person who has applied for a license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection. (1935, c. 66, s. 7; 1971, c. 755, s. 4; 1981, c. 751, s. 5; 2002-147, s. 7.)

Editor's Note. — Session Laws 2002-147, s. 15, provides: "If the Private Security Officer Employment Standards Act of 2002 [S. 2238, 107th Cong. (2002)] is enacted by the United States Congress, the State of North Carolina declines to participate in the background check system authorized by that act as a result of the enactment of this act."

Effect of Amendments. — Session Laws 2002-147, s. 7, effective October 9, 2002, designated the formerly undesignated provisions as subsection (a); and added subsection (b).

§ 90-36. Licensing practitioners of other states.

(a) The North Carolina State Board of Dental Examiners may issue a license by credentials to an applicant who has been licensed to practice dentistry in any state or territory of the United States if the applicant produces satisfactory evidence to the Board that the applicant has the required education, training, and qualifications, is in good standing with the licensing jurisdiction, has passed satisfactory examinations of proficiency in the knowledge and practice of dentistry as determined by the Board, and meets all other requirements of this section and rules adopted by the Board. The Board may conduct examinations and interviews to test the qualifications of the applicant and may require additional information that would affect the applicant's ability to render competent dental care. The Board may, in its discretion, refuse to issue a license by credentials to an applicant who the Board determines is unfit to practice dentistry.

(b) The applicant for licensure by credentials shall be of good moral character and shall have graduated from and have a DDS or DMD degree from a program of dentistry in a school or college accredited by the Commission on Dental Accreditation of the American Dental Association and approved by the Board.

(c) The applicant must meet all of the following conditions:

(1) Has been actively practicing dentistry, as defined in G.S. 90-29(b)(1) through (b)(9), for a minimum of five years immediately preceding the date of application.

(2) Has not been the subject of final or pending disciplinary action in the military, in any state or territory in which the applicant is or has ever been licensed to practice dentistry, or in any state or territory in which the applicant has held any other professional license.

(3) Presents evidence that the applicant has no felony convictions and that the applicant has no other criminal convictions that would affect the applicant's ability to render competent dental care.

(4) Has not failed an examination conducted by the North Carolina State Board of Dental Examiners.

(d) The applicant for licensure by credentials shall submit an application to the North Carolina State Board of Dental Examiners, the form of which shall be determined by the Board, pay the fee required by G.S. 90-39, successfully complete examinations in Jurisprudence and Sterilization and Infection Control, and meet the criteria or requirements established by the Board.

(e) The holder of a license issued under this section shall establish a practice location and actively practice dentistry, as defined in G.S. 90-29(b) (1) through (b) (9) , in North Carolina within one year from the date the license is issued. The license issued under this section shall be void upon a finding by the Board that the licensee fails to limit the licensee's practice to North Carolina or that the licensee no longer actively practices dentistry in North Carolina. (1935, c. 66, s. 9; 1971, c. 755, s. 7; 1981, c. 751, s. 6; 2002-37, s. 2.)

Cross References. — As to licensure by credentials, generally, see G.S. 90-224.1.

Editor's Note. — Session Laws 2002-37, s. 11, contains a severability clause.

Effect of Amendments. — Session Laws 2002-37, s. 2, effective January 1, 2003, rewrote the section.

§ 90-37.1. Limited volunteer dental license.

(a) The North Carolina State Board of Dental Examiners may issue to an applicant a "Limited Volunteer Dental License" to practice dentistry only in nonprofit health care facilities serving low-income populations in the State. Holders of a limited volunteer dental license may volunteer their professional

services, without compensation, only for the purpose of helping to meet the dental health needs of these persons served by these facilities. The Board may issue a limited license to an applicant under this section who:

(1) Has an out-of-state current or expired license, or an expired license in this State, or is authorized to treat veterans or personnel enlisted in the United States armed services; and

(2) Has actively practiced dentistry, as defined in G.S. 90-29(b)(1) through (b)(9), within the past five years.

(b) The limited license may be issued to an applicant who produces satisfactory evidence to the Board that the applicant has the required education, training, and qualifications; is in good standing with the licensing jurisdiction; has passed satisfactory examinations of proficiency in the knowledge and practice of dentistry as determined by the Board; and meets all other requirements of this section and rules adopted by the Board. The Board may conduct examinations and interviews to test the qualifications of the applicant and may require additional information that would affect the applicant's ability to render competent dental care. The Board may, in its discretion, refuse to issue a "limited volunteer dental license" to an applicant who the Board determines is unfit to practice dentistry.

(c) The applicant shall be of good moral character and shall have graduated from and have a DDS or DMD degree from a program of dentistry in a school or college accredited by the Commission on Dental Accreditation of the American Dental Association and approved by the Board.

(d) The applicant shall meet all of the following conditions:

(1) Show that the applicant has actively practiced dentistry, as defined in G.S. 90-29(b)(1) through (b)(9), for a minimum of five years.

(2) Show that the applicant has not been the subject of final or pending disciplinary action in any state in which the applicant has ever been licensed to practice dentistry or in any state in which the applicant has held any other professional license.

(3) Present evidence that the applicant has no felony convictions and that the applicant has no other criminal convictions that would affect the applicant's ability to render competent care.

(4) Present evidence that the applicant has no pending Veterans Administration or military disciplinary actions or any history of such disciplinary action.

(5) Show that the applicant has not failed an examination conducted by the North Carolina State Board of Dental Examiners.

(e) The applicant shall submit an application, the form of which shall be determined by the Board, pay the fee required under G.S. 90-39, and successfully complete examinations in Jurisprudence and Sterilization and Infection Control. The Board may charge and collect fees for license application and annual renewal as required under G.S. 90-39, except that credentialing fees applicable under G.S. 90-39(13) are waived for holders of a limited volunteer dental license.

(f) Holders of a limited volunteer dental license shall comply with the continuing dental education requirements adopted by the Board including CPR training.

(g) The holder of a limited license under this section who practices dentistry other than as authorized in this section shall be guilty of a Class 1 misdemeanor with each day's violation constituting a separate offense. Upon proof of practice other than as authorized in this section, the Board may suspend or revoke the limited license after notice to the licensee. For violations of the dental practice act or rules adopted under the act that are applicable to a limited license practice, the Board has the same authority to investigate and impose sanctions on limited license holders as it has for those holding an unlimited license.

(h) The Board shall maintain a nonexclusive list of nonprofit health care facilities serving the dental health needs of low-income populations in the State. Upon request, the Board shall consider adding other facilities to the list.

(i) The Board may adopt rules in accordance with Chapter 150B of the General Statutes to implement this section. (2002-37, s. 4.)

Cross References. — As to dental providers for problem access areas, see G.S. 130A-367.

Editor's Note. — Session Laws 2002-37, s. 12, makes this section effective January 1, 2003.

Session Laws 2002-37, s. 11, contains a severability clause.

§ 90-39. Fees.

In order to provide the means of carrying out and enforcing the provisions of this Article and the duties devolving upon the North Carolina State Board of Dental Examiners, it is authorized to charge and collect fees established by its rules not exceeding the following:

(1) Each application for general dentistry examination $500.00

(2) Each general dentistry license renewal, which fee shall be annually fixed by the Board and not later than November 30 of each year it shall give written notice of the amount of the renewal fee to each dentist licensed to practice in this State by mailing such notice to the last address of record with the Board of each such dentist ... 140.00

(2a) Penalty for late renewal of any license or permit 50.00

(3) Each provisional license 150.00

(4) Each intern permit or renewal thereof 150.00

(5) Each certificate of license to a resident dentist desiring to change to another state or territory 30.00

(6) Repealed by Session Laws 1995, (Reg. Sess., 1996) , c. 584, s. 1.

(7) Each license to resume the practice issued to a dentist who has retired from and returned to this State 300.00

(8) Each instructor's license or renewal thereof 140.00

(9) With each renewal of a dentistry license, an annual fee to help fund special peer review organizations for impaired dentists 50.00

(10) Each duplicate of any license, permit, or certificate issued by the Board 25.00

(11) Each office inspection for general anesthesia and parenteral sedation permits 350.00

(12) Each general anesthesia and parenteral sedation permit application or renewal of permit 50.00

(13) Each application for license by cred entials 2,000.00

(14) Each application for limited volunteer dental license 100.00

(15) Each limited volunteer dental license annual renewal ..... 25.00.

(1935, c. 66, s. 12; 1953, c. 564, s. 1; 1961, c. 446, s. 8; 1965, c. 163, s. 3; 1971, c. 755, s. 8; 1979, 2nd Sess., c. 1195, s. 12; 1987, c. 555, s. 1; 1993, c. 420, s. 1; 1995 (Reg. Sess., 1996), c. 584, s. 1; 2002-37, s. 5.)

Editor's Note. — Session Laws 2002-37, s. 11, contains a severability clause.

Effect of Amendments. — Session Laws 2002-37, s. 5, effective January 1, 2003, deleted "and regulations" following "rules" in the introductory paragraph; and added subdivisions (13) through (15).

§ 90-41. Disciplinary action.

(a) The North Carolina State Board of Dental Examiners shall have the power and authority to (i) Refuse to issue a license to practice dentistry; (ii) Refuse to issue a certificate of renewal of a license to practice dentistry; (iii) Revoke or suspend a license to practice dentistry; and (iv) Invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper;
in any instance or instances in which the Board is satisfied that such applicant or licensee:

(1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;
(2) Is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs his ability to practice dentistry;
(3) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;
(4) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;
(5) Has been convicted of or entered a plea of guilty or nolo contendere to any charge of violation of any state or federal narcotic or barbiturate law;
(6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;
(7) Is mentally, emotionally, or physically unfit to practice dentistry or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of his patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice dentistry unless or until such person shall have been subsequently lawfully declared to be mentally competent;
(8) Has conducted in-person solicitation of professional patronage or has employed or procured any person to conduct such solicitation by personal contact with potential patients, except to the extent that informal advice may be permitted by regulations issued by the Board of Dental Examiners;
(9) Has permitted the use of his name, diploma or license by another person either in the illegal practice of dentistry or in attempting to fraudulently obtain a license to practice dentistry;
(10) Has engaged in such immoral conduct as to discredit the dental profession;
(11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;
(12) Has been negligent in the practice of dentistry;
(13) Has employed a person not licensed in this State to do or perform any act or service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under this Article or under Article 16 of this Chapter, can lawfully be done or performed only by a dentist or a dental hygienist licensed in this State;
(14) Is incompetent in the practice of dentistry;
(15) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients;

(16) Has made fraudulent or misleading statements pertaining to his skill, knowledge, or method of treatment or practice;
(17) Has committed any fraudulent or misleading acts in the practice of dentistry;
(18) Has, directly or indirectly, published or caused to be published or disseminated any advertisement for professional patronage or business which is untruthful, fraudulent, misleading, or in any way inconsistent with rules and regulations issued by the Board of Dental Examiners governing the time, place, or manner of such advertisements;
(19) Has, in the practice of dentistry, committed an act or acts constituting malpractice;
(20) Repealed by Session Laws 1981, c. 751, s. 7.
(21) Has permitted a dental hygienist or a dental assistant in his employ or under his supervision to do or perform any act or acts violative of this Article, or of Article 16 of this Chapter, or of the rules and regulations promulgated by the Board;
(22) Has wrongfully or fraudulently or falsely held himself out to be or represented himself to be qualified as a specialist in any branch of dentistry;
(23) Has persistently maintained, in the practice of dentistry, unsanitary offices, practices, or techniques;
(24) Is a menace to the public health by reason of having a serious communicable disease;
(25) Has distributed or caused to be distributed any intoxicant, drug or narcotic for any other than a lawful purpose; or
(26) Has engaged in any unprofessional conduct as the same may be, from time to time, defined by the rules and regulations of the Board.

(b) If any person engages in or attempts to engage in the practice of dentistry while his license is suspended, his license to practice dentistry in the State of North Carolina may be permanently revoked.

(c) The Board may, on its own motion, initiate the appropriate legal proceedings against any person, firm or corporation when it is made to appear to the Board that such person, firm or corporation has violated any of the provisions of this Article or of Article 16.

(d) The Board may appoint, employ or retain an investigator or investigators for the purpose of examining or inquiring into any practices committed in this State that might violate any of the provisions of this Article or of Article 16 or any of the rules and regulations promulgated by the Board.

(e) The Board may employ or retain legal counsel for such matters and purposes as may seem fit and proper to said Board.

(f) As used in this section the term "licensee" includes licensees, provisional licensees and holders of intern permits, and the term "license" includes license, provisional license, instructor's license, and intern permit.

(g) Records, papers, and other documents containing information collected or compiled by the Board, or its members or employees, as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter, shall not be considered public records within the meaning of Chapter 132 of the General Statutes; provided, however, that any notice or statement of charges against any licensee, or any notice to any licensee of a hearing in any proceeding, shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of any investigation, inquiry, or interview; and provided, further, that if any record, paper, or other document containing information collected and compiled by the Board is received and admitted into evidence in any hearing before the Board, it shall

then be a public record within the meaning of Chapter 132 of the General Statutes. (1935, c. 66, s. 14; 1957, c. 592, s. 7; 1965, c. 163, s. 4; 1967, c. 451, s. 1; 1971, c. 755, s. 9; 1979, 2nd Sess., c. 1195, ss. 7, 8; 1981, c. 751, s. 7; 1989, c. 442; 1997-456, s. 27; 2002-37, s. 9.)

Editor's Note. — Session Laws 2002-37, s. 11, contains a severability clause.

Effect of Amendments. — Session Laws 2002-37, s. 9, effective January 1, 2003, substituted "provisional license, instructor's license, and intern permit" for "provisional license and intern permit" in subsection (f).

Article 4A.

North Carolina Pharmacy Practice Act.

§ 90-85.2. Legislative findings.

CASE NOTES

Authority of the Board. — Because the North Carolina Pharmacy Practice Act, G.S. 90-85.2 et seq. aims to insure minimum standards of competency and to protect the public, the State Board of Pharmacy had authority to discipline a pharmacy for the conduct of one of its licensed pharmacists. Sunscript Pharm. Corp. v. N.C. Bd. of Pharm., 147 N.C. App. 446, 555 S.E.2d 629, 2001 N.C. App. LEXIS 1172 (2001), cert. denied, 355 N.C. 292, 561 S.E.2d 506 (2002).

§ 90-85.3. Definitions.

(a) "Administer" means the direct application of a drug to the body of a patient by injection, inhalation, ingestion or other means.

(b) "Board" means the North Carolina Board of Pharmacy.

(b1) "Clinical pharmacist practitioner" means a licensed pharmacist who meets the guidelines and criteria for such title established by the joint subcommittee of the North Carolina Medical Board and the North Carolina Board of Pharmacy and is authorized to enter into drug therapy management agreements with physicians in accordance with the provisions of G.S. 90-18.4.

(c) "Compounding" means taking two or more ingredients and combining them into a dosage form of a drug, exclusive of compounding by a drug manufacturer, distributor, or packer.

(d) "Deliver" means the actual, constructive or attempted transfer of a drug, a device, or medical equipment from one person to another.

(e) "Device" means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent or other similar or related article including any component part or accessory, whose label or labeling bears the statement "Caution: federal law requires dispensing by or on the order of a physician." The term does not include:

(1) Devices used in the normal course of treating patients by health care facilities and agencies licensed under Chapter 131E or Article 2 of Chapter 122C of the General Statutes;

(2) Devices used or provided in the treatment of patients by medical doctors, dentists, physical therapists, occupational therapists, speech pathologists, optometrists, chiropractors, podiatrists, and nurses licensed under Chapter 90 of the General Statutes, provided they do not dispense devices used to administer or dispense drugs.

(f) "Dispense" means preparing and packaging a prescription drug or device in a container and labeling the container with information required by State and federal law. Filling or refilling drug containers with prescription drugs for

subsequent use by a patient is "dispensing". Providing quantities of unit dose prescription drugs for subsequent administration is "dispensing".

(g) "Drug" means:

(1) Any article recognized as a drug in the United States Pharmacopeia, or in any other drug compendium or any supplement thereto, or an article recognized as a drug by the United States Food and Drug Administration;

(2) Any article, other than food or devices, intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals;

(3) Any article, other than food or devices, intended to affect the structure or any function of the body of man or other animals; and

(4) Any article intended for use as a component of any articles specified in clause (1), (2) or (3) of this subsection.

(h) "Emancipated minor" means any person under the age of 18 who is or has been married or who is or has been a parent; or whose parents or guardians have surrendered their rights to the minor's services and earnings as well as their right to custody and control of the minor's person; or who has been emancipated by an appropriate court order.

(i) "Health care provider" means any licensed health care professional; any agent or employee of any health care institution, health care insurer, health care professional school; or a member of any allied health profession.

(j) "Label" means a display of written, printed or graphic matter upon the immediate or outside container of any drug.

(k) "Labeling" means preparing and affixing a label to any drug container, exclusive of labeling by a manufacturer, packer or distributor of a nonprescription drug or a commercially packaged prescription drug or device.

(*l*) "License" means a license to practice pharmacy including a renewal license issued by the Board.

(*l*1) "Medical equipment" means any of the following items that are intended for use by the consumer in the consumer's place of residence:

(1) A device.

(2) Ambulation assistance equipment.

(3) Mobility equipment.

(4) Rehabilitation seating.

(5) Oxygen and respiratory care equipment.

(6) Rehabilitation environmental control equipment.

(7) Diagnostic equipment.

(8) A bed prescribed by a physician to treat or alleviate a medical condition.

The term "medical equipment" does not include (i) medical equipment used or dispensed in the normal course of treating patients by or on behalf of home care agencies, hospitals, and nursing facilities licensed under Chapter 131E of the General Statutes or hospitals or agencies licensed under Article 2 of Chapter 122C of the General Statutes; (ii) medical equipment used or dispensed by professionals licensed under Chapters 90 or 93D of the General Statutes, provided the professional is practicing within the scope of that professional's practice act; (iii) upper and lower extremity prosthetics and related orthotics; or (iv) canes, crutches, walkers, and bathtub grab bars.

(*l*2) "Mobile pharmacy" means a pharmacy that meets all of the following conditions:

(1) Is either self-propelled or moveable by another vehicle that is self-propelled.

(2) Is operated by a nonprofit corporation.

(3) Dispenses prescription drugs at no charge or at a reduced charge to persons whose family income is less than two hundred percent (200%)

of the federal poverty level and who do not receive reimbursement for the cost of the dispensed prescription drugs from Medicare, Medicaid, a private insurance company, or a governmental unit.

(m) "Permit" means a permit to operate a pharmacy, deliver medical equipment, or dispense devices, including a renewal license issued by the Board.

(n) "Person" means an individual, corporation, partnership, association, unit of government, or other legal entity.

(o) "Person in loco parentis" means the person who has assumed parental responsibilities for a child.

(p) "Pharmacist" means a person licensed under this Article to practice pharmacy.

(q) "Pharmacy" means any place where prescription drugs are dispensed or compounded.

(q1) "Pharmacy personnel" means pharmacists and pharmacy technicians.

(q2) "Pharmacy technician" means a person who may, under the supervision of a pharmacist, perform technical functions to assist the pharmacist in preparing and dispensing prescription medications.

(r) "Practice of pharmacy" means the responsibility for: interpreting and evaluating drug orders, including prescription orders; compounding, dispensing and labeling prescription drugs and devices; properly and safely storing drugs and devices; maintaining proper records; and controlling pharmacy goods and services. A pharmacist may advise and educate patients and health care providers concerning therapeutic values, content, uses and significant problems of drugs and devices; assess, record and report adverse drug and device reactions; take and record patient histories relating to drug and device therapy; monitor, record and report drug therapy and device usage; perform drug utilization reviews; and participate in drug and drug source selection and device and device source selection as provided in G.S. 90-85.27 through G.S. 90-85.31. A pharmacist who has received special training may be authorized and permitted to administer drugs pursuant to a specific prescription order in accordance with rules adopted by each of the Boards of Pharmacy, the Board of Nursing, and the North Carolina Medical Board. The rules shall be designed to ensure the safety and health of the patients for whom such drugs are administered. An approved clinical pharmacist practitioner may collaborate with physicians in determining the appropriate health care for a patient, subject to the provisions of G.S. 90-18.4.

(s) "Prescription drug" means a drug that under federal law is required, prior to being dispensed or delivered, to be labeled with the following statement:

"Caution: Federal law prohibits dispensing without prescription."

(t) "Prescription order" means a written or verbal order for a prescription drug, prescription device, or pharmaceutical service from a person authorized by law to prescribe such drug, device, or service. A prescription order includes an order entered in a chart or other medical record of a patient.

(u) "Unit dose medication system" means a system in which each dose of medication is individually packaged in a properly sealed and properly labeled container. (1981 (Reg. Sess., 1982), c. 1188, s. 1; 1983, c. 196, ss. 1-3; 1991, c. 578, s. 1; 1993 (Reg. Sess., 1994), c. 692, s. 2; 1995, c. 94, s. 24; 1999-246, s. 1; 1999-290, ss. 4, 5; 2001-375, s. 1; 2002-159, s. 37.)

Effect of Amendments. — Session Laws 2002-159, s. 37, effective October 11, 2002, substituted "G.S. 90-18.4" for "G.S. 90-18.3" in subsections (b1) and (r).

§ 90-85.15. Application and examination for licensure as a pharmacist; prerequisites.

(a) Any person who desires to be licensed as a pharmacist shall file an application with the Executive Director on the form furnished by the Board, verified under oath, setting forth the applicant's name, age, the place at which and the time that he has spent in the study of pharmacy, and his experience in compounding and dispensing prescriptions under the supervision of a pharmacist. The applicant shall also appear at a time and place designated by the Board and submit to an examination as to his qualifications for being licensed. The applicant must demonstrate to the Board his physical and mental competency to practice pharmacy.

(b) On or after July 1, 1982, all applicants shall have received an undergraduate degree from a school of pharmacy approved by the Board. Applicants shall be required to have had up to one year of experience, approved by the Board, under the supervision of a pharmacist and shall pass the required examination offered by the Board. Upon completing these requirements and upon paying the required fee, the applicant shall be licensed.

(c) The Department of Justice may provide a criminal record check to the Board for a person who has applied for a license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection. (1905, c. 108, s. 13; Rev., ss. 4479, 4480; 1915, c. 165; C.S., s. 6658; 1921, c. 52; 1933, c. 206, ss. 1, 2; 1935, c. 181; 1937, c. 94; 1971, c. 481; 1981, c. 717, s. 4; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 1983, c. 196, s. 5; 2002-147, s. 8.)

Editor's Note. — Session Laws 2002-147, s. 15, provides: "If the Private Security Officer Employment Standards Act of 2002 [S. 2238, 107th Cong. (2002)] is enacted by the United States Congress, the State of North Carolina declines to participate in the background check system authorized by that act as a result of the enactment of this act."

Effect of Amendments. — Session Laws 2002-147, s. 8, effective October 9, 2002, added subsection (c).

§ 90-85.27. Definitions.

Dispensing of Generic Drugs. — Session Laws 2001-424, s. 21.19(h), as amended by Session Laws 2002-126, s. 10.11(a), provides: "Dispensing of Generic Drugs.— Notwithstanding G.S. 90-85.27 through G.S. 90-85.31, or any other law to the contrary, under the Medical Assistance Program (Title XIX of the Social Security Act), and except as otherwise provided in this subsection for atypical antipsychotic drugs and drugs listed in the narrow therapeutic index, a prescription order for a drug designated by a trade or brand name shall be considered to be an order for the drug by its established or generic name, except when the prescriber has determined, at the time the drug is prescribed, that the brand name drug is medically necessary and has written on the prescription order the phrase 'medically necessary'. An initial prescription order for an atypical antipsychotic drug or a drug listed in the

narrow therapeutic drug index that does not contain the phrase 'medically necessary' shall be considered an order for the drug by its established or generic name, except that a pharmacy shall not substitute a generic or established name prescription drug for subsequent brand or trade name prescription orders of the same prescription drug without explicit oral or written approval of the prescriber given at the time the order is filled. Generic drugs shall be dispensed at a lower cost to the Medical Assistance Program rather than trade or brand name drugs. Asused in this subsection, 'brand name' means the proprietary name the manufacturer places upon a drug product or on its container, label, or wrapping at the time of packaging; and 'established name' has the same meaning as in section 502(e)(3) of the Federal Food, Drug, and Cosmetic Act as amended, 21 U.S.C. § 352(e)(3)."

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Article 5.

North Carolina Controlled Substances Act.

§ 90-87. Definitions.

CASE NOTES

II. "Deliver" or "Delivery."

II. "DELIVER" OR "DELIVERY."

Evidence of Constructive Delivery Held Sufficient. —

Evidence that defendant agreed to sell marijuana to an informant, drove around the agreed scene of the marijuana's delivery to inspect the scene, and left the delivery scene before a person working for him arrived to deliver the marijuana was sufficient to show constructive delivery of the marijuana. State v. Lorenzo, 147 N.C. App. 728, 556 S.E.2d 625, 2001 N.C. App. LEXIS 1251 (2001).

§ 90-95. Violations; penalties.

CASE NOTES

I. General Consideration.
IV. Possession.
A. In General.
VI. Evidentiary Chain of Custody.

I. GENERAL CONSIDERATION.

Possession of Drug Paraphernalia Does Not Trigger Felony Enhancement. — Felonious possession of drug charge should have been dismissed where G.S. 90-95(e)(3) was the basis for the State's enhancement of the offense to a felony because the offense prior to enhancement, possession of drug paraphernalia is a misdemeanor punishable under G.S. 90-113.22, and did not fall within G.S. 90-95(e)(3). State v. Stevens, — N.C. App. —, 566 S.E.2d 149, 2002 N.C. App. LEXIS 771 (2002).

Cited in State v. Martinez, 150 N.C. App. 364, 562 S.E.2d 914, 2002 N.C. App. LEXIS 485 (2002).

IV. POSSESSION.

A. In General.

Amount of Substance Irrelevant. — Statute makes it unlawful for any person to possess a controlled substance without regard to the amount involved. State v. Williams, 149 N.C. App. 795, 561 S.E.2d 925, 2002 N.C. App. LEXIS 300 (2002), cert. denied, 355 N.C. 757, 566 S.E.2d 481 (2002).

VI. EVIDENTIARY CHAIN OF CUSTODY.

Testimony of Individuals. — A statement pursuant to G.S. 90-95(g1) is not the exclusive method for authenticating a laboratory report. The chain of custody may also be established by the testimony of the individuals in the chain of custody. State v. Lorenzo, 147 N.C. App. 728, 556 S.E.2d 625, 2001 N.C. App. LEXIS 1251 (2001).

§ 90-95.3. Restitution to law-enforcement agencies for undercover purchases; restitution for drug analyses; restitution for seizure and cleanup of clandestine laboratories.

(a) When any person is convicted of an offense under this Article, the court may order him to make restitution to any law-enforcement agency for reasonable expenditures made in purchasing controlled substances from him or his agent as part of an investigation leading to his conviction.

(b) Repealed by Session Laws 2002-126, s. 29A.8(b), effective October 1, 2002. See Editor's Note.

(c) When any person is convicted of an offense under this Article involving the manufacture of controlled substances, the court must order the person to make restitution for the actual cost of cleanup to the law enforcement agency that cleaned up any clandestine laboratory used to manufacture the controlled substances, including personnel overtime, equipment, and supplies. (1975, c. 782, s. 2; 1989 (Reg. Sess., 1990), c. 1039, s. 3; 1999-370, s. 2; 2002-126, s. 29A.8(b).)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 29A.8(c), provides in part: "Subsection (b) of this section becomes effective October 1, 2002, but the provisions of G.S. 90-95.3(b) continue to apply to any defendant who was ordered to make restitution under the provisions of that subsection prior to October 1, 2002."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 29A.8(b), repealed subsection (b) pertaining to restitution costs for controlled substances analysis. See Editor's Note for effective date and applicability. For present similar provisions to those repealed, see G.S. 7A-304(a)(7).

§ 90-96. Conditional discharge and expunction of records for first offense.

(a) Whenever any person who has not previously been convicted of any offense under this Article or under any statute of the United States or any state relating to those substances included in Article 5 or 5A of Chapter 90 or to that paraphernalia included in Article 5B of Chapter 90 pleads guilty to or is found guilty of (i) a misdemeanor under this Article by possessing a controlled

substance included within Schedules II through VI of this Article or by possessing drug paraphernalia as prohibited by G.S. 90-113.21, or (ii) a felony under G.S. 90-95(a)(3) by possessing less than one gram of cocaine, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require. Notwithstanding the provisions of G.S. 15A-1342(c) or any other statute or law, probation may be imposed under this section for an offense under this Article for which the prescribed punishment includes only a fine. To fulfill the terms and conditions of probation the court may allow the defendant to participate in a drug education program approved for this purpose by the Department of Health and Human Services. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions under this Article. Discharge and dismissal under this section or G.S. 90-113.14 may occur only once with respect to any person. Disposition of a case to determine discharge and dismissal under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal. Prior to taking any action to discharge and dismiss under this section the court shall make a finding that the defendant has no record of previous convictions under the "North Carolina Controlled Substances Act", Article 5, Chapter 90, the "North Carolina Toxic Vapors Act", Article 5A, Chapter 90, or the "Drug Paraphernalia Act", Article 5B, Chapter 90.

(a1) Upon the first conviction only of any offense included in G.S. 90-95(a)(3) or G.S. 90-113.21 and subject to the provisions of this subsection (a1), the court may place defendant on probation under this section for an offense under this Article including an offense for which the prescribed punishment includes only a fine. The probation, if imposed, shall be for not less than one year and shall contain a minimum condition that the defendant who was found guilty or pleads guilty enroll in and successfully complete, within 150 days of the date of the imposition of said probation, the program of instruction at the drug education school approved by the Department of Health and Human Services pursuant to G.S. 90-96.01. The court may impose probation that does not contain a condition that defendant successfully complete the program of instruction at a drug education school if:

(1) There is no drug education school within a reasonable distance of the defendant's residence; or

(2) There are specific, extenuating circumstances which make it likely that defendant will not benefit from the program of instruction.

The court shall enter such specific findings in the record; provided that in the case of subdivision (2) above, such findings shall include the specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction.

For the purposes of determining whether the conviction is a first conviction or whether a person has already had discharge and dismissal, no prior offense occurring more than seven years before the date of the current offense shall be considered. In addition, convictions for violations of a provision of G.S. 90-95(a)(1) or 90-95(a)(2) or 90-95(a)(3), or 90-113.10, or 90-113.11, or 90-113.12, or 90-113.21 shall be considered previous convictions.

Failure to complete successfully an approved program of instruction at a drug education school shall constitute grounds to revoke probation and deny

application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. For purposes of this subsection, the phrase "failure to complete successfully the prescribed program of instruction at a drug education school" includes failure to attend scheduled classes without a valid excuse, failure to complete the course within 150 days of imposition of probation, willful failure to pay the required fee for the course, or any other manner in which the person fails to complete the course successfully. The instructor of the course to which a person is assigned shall report any failure of a person to complete successfully the program of instruction to the court which imposed probation. Upon receipt of the instructor's report that the person failed to complete the program successfully, the court shall revoke probation and/or deny application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. A person may obtain a hearing before the court of original jurisdiction prior to revocation of probation or denial of application for expunction.

This subsection is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina.

(b) Upon the dismissal of such person, and discharge of the proceedings against him under subsection (a) of this section, such person, if he were not over 21 years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. The applicant shall attach to the application the following:

(1) An affidavit by the applicant that he has been of good behavior during the period of probation since the decision to defer further proceedings on the offense in question and has not been convicted of any felony, or misdemeanor, other than a traffic violation, under the laws of the United States or the laws of this State or any other state;

(2) Verified affidavits by two persons who are not related to the applicant or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives, and that his character and reputation are good;

(3) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted, and, if different, the county of which the petitioner is a resident, showing that the applicant has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the offense in question or during the period of probation following the decision to defer further proceedings on the offense in question.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the probationary period deemed desirable.

If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over 21 years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person in the contemplation of the law to the status he occupied before such arrest or indictment or information. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

The court shall also order that said conviction and the records relating thereto be expunged from the records of the court, and direct all law-enforcement agencies bearing records of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police or other arresting agency, as appropriate, and the sheriff, chief of police or other arresting agency, as appropriate, shall forward such order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

(c) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons granted a conditional discharge under the provisions of this Article, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in the file shall be disclosed only to Judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under this Article has been previously granted a conditional discharge.

(d) Whenever any person is charged with a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article or a felony under G.S. 90-95(a)(3) by possessing less than one gram of cocaine, upon dismissal by the State of the charges against him, upon entry of a nolle prosequi, or upon a finding of not guilty or other adjudication of innocence, such person may apply to the court for an order to expunge from all official records all recordation relating to his arrest, indictment or information, or trial. If the court determines, after hearing that such person was not over 21 years of age at the time any of the proceedings against him occurred, it shall enter such order. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

(e) Whenever any person who has not previously been convicted of an offense under this Article or under any statute of the United States or any state relating to controlled substances included in any schedule of this Article or to that paraphernalia included in Article 5B of Chapter 90 pleads guilty to or has been found guilty of (i) a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article, or by possessing drug paraphernalia as prohibited by G.S. 90-113.21, or (ii) a felony under G.S. 90-95(a)(3) by possessing less than one gram of cocaine, the court may, upon application of the person not sooner than 12 months after conviction, order cancellation of the judgment of conviction and expunction of the records of his arrest, indictment, or information, trial and conviction. A conviction in which the judgment of conviction has been canceled and the records expunged pursuant to this section shall not be thereafter deemed a conviction for purposes of this section or for purposes of disqualifications or liabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions of this Article. Cancellation and expunction under this section may occur only once with respect to any person. Disposition of a case under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal.

The granting of an application filed under this section shall cause the issue of an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to the petitioner's arrest, indictment, or information, trial, finding of guilty, judgment of conviction, cancellation of the judgment, and expunction of records pursuant to this section.

The judge to whom the petition is presented is authorized to call upon a probation officer for additional investigation or verification of the petitioner's conduct since conviction. If the court determines that the petitioner was convicted of (i) a misdemeanor under this Article for possessing a controlled substance included within Schedules II through VI of this Article, or for possessing drug paraphernalia as prohibited in G.S. 90-113.21, or (ii) a felony under G.S. 90-95(a)(3) for possession of less than one gram of cocaine, that he was not over 21 years of age at the time of the offense, that he has been of good behavior since his conviction, that he has successfully completed a drug education program approved for this purpose by the Department of Health and Human Services, and that he has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to or since the conviction for the offense in question, it shall enter an order of expunction of the petitioner's court record. The effect of such order shall be to restore the petitioner in the contemplation of the law to the status he occupied before arrest or indictment or information or conviction. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or conviction, or trial in response to any inquiry made of him for any purpose. The judge may waive the condition that the petitioner attend the drug education school if the judge makes a specific finding that there was no drug education school within a reasonable distance of the defendant's residence or that there were specific extenuating circumstances which made it likely that the petitioner would not benefit from the program of instruction.

The court shall also order that all law-enforcement agencies bearing records of the conviction and records relating thereto to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency, as appropriate, and the arresting agency shall forward the order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons whose judgments of convictions have been canceled and expunged under the provisions of this Article, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons whose judgments of convictions have been canceled and expunged. The information contained in the file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under this Article has been previously granted cancellation and expunction of a judgment of conviction pursuant to the terms of this Article.

(f) A person who files a petition for expunction of a criminal record under this section must pay the clerk of superior court a fee of sixty-five dollars ($65.00) at the time the petition is filed. Fees collected under this subsection shall be deposited in the General Fund. This subsection does not apply to petitions filed by an indigent. (1971, c. 919, s. 1; 1973, c. 654, s. 2; c. 1066; 1977, 2nd Sess., c. 1147, s. 11B; 1979, c. 431, ss. 3, 4; c. 550; 1981, c. 922, ss. 1-4; 1994, Ex. Sess., c. 11, s. 1.1; 1997-443, s. 11A.118(a); 2002-126, s. 29A.5(d).)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 29A.5(d), effective October 1, 2002, and applicable to petitions filed on or after that date, added subsection (f).

§ 90-108. Prohibited acts; penalties.

CASE NOTES

Evidence Held Insufficient. — Where a motel room was rented by a person other than defendant, who apparently attended a party in the motel room and stayed in the room after the party had ended, the evidence was insufficient to show defendant maintained the room to keep controlled substances that were found in the room. State v. Kraus, 147 N.C. App. 766, 557 S.E.2d 144, 2001 N.C. App. LEXIS 1247 (2001).

Applied in State v. Brady, 147 N.C. App. 755, 557 S.E.2d 148, 2001 N.C. App. LEXIS 1245 (2001).

Cited in State v. Dickerson, — N.C. App. —, 568 S.E.2d 281, 2002 N.C. App. LEXIS 968 (2002).

§ 90-112. Forfeitures.

CASE NOTES

Defendant's vehicle was subject to forfeiture, etc. —

There is no requirement in G.S. 90-112, regarding the forfeiture of property incident to its connection to a controlled substance offense, for a state conviction. State v. Woods, 146 N.C. App. 686, 554 S.E.2d 383, 2001 N.C. App. LEXIS 1046 (2001), aff'd, 356 N.C. 121, 564 S.E.2d 881 (2002).

North Carolina's forfeiture statute, G.S. 90-112, merely requires that the forfeiting party be convicted of a crime that is a felony under N.C. Gen. Stat. art. 5, ch. 90. State v. Woods, 146 N.C. App. 686, 554 S.E.2d 383, 2001 N.C. App. LEXIS 1046 (2001), aff'd, 356 N.C. 121, 564 S.E.2d 881 (2002).

Article 8.

Chiropractic.

§ 90-143.2. Certification of diagnostic imaging technicians.

(a) The State Board of Chiropractic Examiners shall certify the competence of any person employed by a licensed chiropractor practicing in the State if the employee's duties include the production of diagnostic images, whether by X ray or other imaging technology. Applicants for certification must demonstrate proficiency in the following subjects:

(1) Physics and equipment of radiographic imaging;
(2) Principles of radiographic exposure;
(3) Radiographic protection;
(4) Anatomy and physiology;
(5) Radiographic positioning and procedure.

The State Board of Chiropractic Examiners may adopt rules pertaining to initial educational requirements, examination of applicants, and continuing education requirements as are reasonably required to enforce this provision.

(b) Any person seeking to renew a certification of competence previously issued by the Board shall pay to the secretary of the Board a fee as prescribed and set by the Board which fee shall not be more than fifty dollars ($50.00). (1991, c. 633, s. 1; 2002-59, s. 1.)

Effect of Amendments. — Session Laws 2002-59, s. 1, effective August 1, 2002, designated the existing provisions as subsection (a), and added subsection (b).

Article 13A.

Practice of Funeral Service.

§ 90-210.25. Licensing.

(a) Qualifications, Examinations, Resident Traineeship and Licensure. —

(1) To be licensed for the practice of funeral directing under this Article, a person must:

a. Be at least 18 years of age.

b. Be of good moral character.

c. Have completed a minimum of 32 semester hours or 48 quarter hours of instruction, including the subjects set out in sub-part e.1. of this subdivision, as prescribed by a mortuary science college approved by the Board or a school of mortuary science accredited by the American Board of Funeral Service Education.

d. Have completed 12 months of resident traineeship as a funeral director, pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after satisfying the educational requirement under sub-subdivision c. of this subdivision.

e. Have passed an oral or written funeral director examination on the following subjects:

1. Psychology, sociology, funeral directing, business law, funeral law, funeral management, and accounting.

2. Repealed by 1997-399, s. 5.

3. Laws of North Carolina and rules of the Board of Mortuary Science and other agencies dealing with the care, transportation and disposition of dead human bodies.

(2) To be licensed for the practice of embalming under this Article, a person must:

a. Be at least 18 years of age.

b. Be of good moral character.

c. Be a graduate of a mortuary science college approved by the Board.

d. Have completed 12 months of resident traineeship as an embalmer pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after satisfying the educational requirement under sub-subdivision c. of this subdivision.

e. Have passed an oral or written embalmer examination on the following subjects:

1. Embalming, restorative arts, chemistry, pathology, microbiology, and anatomy.

2. Repealed by 1997-399, s. 6.

3. Laws of North Carolina and rules of the Board of Mortuary Science and other agencies dealing with the care, transportation and disposition of dead human bodies.

(3) To be licensed for the practice of funeral service under this Article, a person must:

a. Be at least 18 years of age.

b. Be of good moral character.

c. Be a graduate of a mortuary science college approved by the Board or a school of mortuary science accredited by the American Board of Funeral Service Education. Have completed a minimum of 32 semester hours or 48 quarter hours of instruction, including the

subjects set out in sub-part e.1. of this subdivision, as prescribed by a mortuary science college approved by the Board or a school of mortuary science accredited by the American Board of Funeral Service Education.

d. Have completed 12 months of resident traineeship as a funeral service licensee, pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after satisfying the educational requirement under sub-subdivison c. of this subdivision.

e. Have passed an oral or written funeral service examination on the following subjects:

1. Psychology, sociology, funeral directing, business law, funeral law, funeral management, and accounting.
2. Embalming, restorative arts, chemistry, pathology, microbiology, and anatomy.
3. Repealed by 1997-399, s. 7.
4. Laws of North Carolina and rules of the Board of Mortuary Science and other agencies dealing with the care, transportation and disposition of dead human bodies.

(4)a. A person desiring to become a resident trainee shall apply to the Board on a form provided by the Board. The application shall state that the applicant is not less than 18 years of age, of good moral character, and is the graduate of a high school or the equivalent thereof, and shall indicate the licensee under whom the applicant expects to train. A person training to become an embalmer may serve under either a licensed embalmer or a funeral service licensee. A person training to become a funeral director may serve under either a licensed funeral director or a funeral service licensee. A person training to become a funeral service licensee shall serve under a funeral service licensee. The application must be sustained by oath of the applicant and be accompanied by the appropriate fee. When the Board is satisfied as to the qualifications of an applicant it shall instruct the secretary to issue a certificate of resident traineeship.

b. When a resident trainee leaves the proctorship of the licensee under whom the trainee has worked, the licensee shall file with the Board an affidavit showing the length of time served with the licensee by the trainee, and the affidavit shall be made a matter of record in the Board's office. The licensee shall deliver a copy of the affidavit to the trainee.

c. A person who has not completed the traineeship and wishes to do so under a licensee other than the one whose name appears on the original certificate may reapply to the Board for approval, without payment of an additional fee.

d. A certificate of resident traineeship shall be signed by the resident trainee and upon payment of the renewal fee shall be renewable one year after the date of original registration; but the certificate may not be renewed more than one time. The Board shall mail to each registered trainee at his last known address a notice that the renewal fee is due and that, if not paid within 30 days of the notice, the certificate will be canceled. A penalty, in addition to the renewal fee, shall be charged for a late renewal, but the renewal of the registration of any resident trainee who is engaged in the active military service of the United States at the time renewal is due may, at the discretion of the Board, be held in abeyance for the duration of that service without penalties. No credit shall be

allowed for the 12-month period of resident traineeship that shall have been completed more than three years preceding the examination for a license.

e. All registered resident trainees shall report to the Board at least once every month during traineeship upon forms provided by the Board listing the work which has been completed during the preceding month of resident traineeship. The data contained in the reports shall be certified as correct by the licensee under whom the trainee has served during the period and by the licensed person who is managing the funeral service establishment. Each report shall list the following:
   1. For funeral director trainees, the conduct of any funerals during the relevant time period,
   2. For embalming trainees, the embalming of any bodies during the relevant time period,
   3. For funeral service trainees, both of the activities named in 1 and 2 of this subsection, engaged in during the relevant time period.

f. To meet the resident traineeship requirements of G.S. 90-210.25(a)(1), G.S. 90-210.25(a)(2) and G.S. 90-210.25(a)(3) the following must be shown by the affidavit(s) of the licensee(s) under whom the trainee worked:
   1. That the funeral director trainee has, under supervision, assisted in directing at least 25 funerals during the resident traineeship,
   2. That the embalmer trainee has, under supervision, assisted in embalming at least 25 bodies during the resident traineeship,
   3. That the funeral service trainee has, under supervision assisted in directing at least 25 funerals and, under supervision, assisted in embalming at least 25 bodies during the resident traineeship.

g. The Board may suspend or revoke a certificate of resident traineeship for violation of any provision of this Article.

h. Each sponsor for a registered resident trainee must during the period of sponsorship be actively employed with a funeral establishment. The traineeship shall be a primary vocation of the trainee.

i. Only one resident trainee may register and serve at any one time under any one person licensed under this Article.

j., k. Repealed by Session Laws 1991, c. 528, s. 4.

l. The Board shall register no more than one resident trainee at a funeral establishment that served 100 or fewer families during the 12 months immediately preceding the date of the application, and shall register no more than one resident trainee for each additional 100 families served at the funeral establishment during the 12 months immediately preceding the date of the application.

(5) The Board by regulation may recognize other examinations that the Board deems equivalent to its own.

a. All licenses shall be signed by the president and secretary of the Board and the seal of the Board affixed thereto. All licenses shall be issued, renewed or duplicated for a period not exceeding one year upon payment of the renewal fee, and all licenses, renewals or duplicates thereof shall expire and terminate the thirty-first day of December following the date of their issue unless sooner

revoked and canceled; provided, that the date of expiration may be changed by unanimous consent of the Board and upon 90 days' written notice of such change to all persons licensed for the practice of funeral directing, embalming and funeral service in this State.

b. The holder of any license issued by the Board who shall fail to renew the same on or before January 31 of the calendar year for which the license is to be renewed shall have forfeited and surrendered the license as of that date. No license forfeited or surrendered pursuant to the preceding sentence shall be reinstated by the Board unless it is shown to the Board that the applicant has, throughout the period of forfeiture, engaged full time in another state of the United States or the District of Columbia in the practice to which his North Carolina license applies and has completed for each such year continuing education substantially equivalent in the opinion of the Board to that required of North Carolina licensees; or has completed in North Carolina a total number of hours of accredited continuing education computed by multiplying five times the number of years of forfeiture; or has passed the North Carolina examination for the forfeited license. No additional resident traineeship shall be required. The applicant shall be required to pay all delinquent annual renewal fees and a reinstatement fee. The Board may waive the provisions of this section for an applicant for a forfeiture which occurred during his service in the armed forces of the United States provided he applies within six months following severance therefrom.

c. All licensees now or hereafter licensed in North Carolina shall take courses of study in subjects relating to the practice of the profession for which they are licensed, to the end that new techniques, scientific and clinical advances, the achievements of research and the benefits of learning and reviewing skills will be utilized and applied to assure proper service to the public.

d. As a prerequisite to the annual renewal of a license, the licensee must complete, during the year immediately preceding renewal, at least five hours of continuing education courses, approved by the Board prior to enrollment. A licensee who completes more than five hours in a year may carry over a maximum of five hours as a credit to the following year's requirement. A licensee who is issued an initial license on or after July 1 does not have to satisfy the continuing education requirement for that year.

e. The Board shall not renew a license unless fulfillment of the continuing education requirement has been certified to it on a form provided by the Board, but the Board may waive this requirement for renewal in cases of certified illness or undue hardship or where the licensee lives outside of North Carolina and does not practice in North Carolina, and the Board shall waive the requirement for all licensees who have been licensed in North Carolina for a continuous period of 25 years or more, and for all licensees who are, at the time of renewal, members of the General Assembly.

f. The Board shall cause to be established and offered to the licensees, each calendar year, at least five hours of continuing education courses in subjects encompassing the license categories of embalming, funeral directing and funeral service. The Board may charge licensees attending these courses a reasonable registra-

tion fee in order to meet the expenses thereof and may also meet those expenses from other funds received under the provisions of this Article.

g. Any person who having been previously licensed by the Board as a funeral director or embalmer prior to July 1, 1975, shall not be required to satisfy the requirements herein for licensure as a funeral service licensee, but shall be entitled to have such license renewed upon making proper application therefor and upon payment of the renewal fee provided by the provisions of this Article. Persons previously licensed by the Board as a funeral director may engage in funeral directing, and persons previously licensed by the Board as an embalmer may engage in embalming. Any person having been previously licensed by the Board as both a funeral director and an embalmer may upon application therefor receive a license as a funeral service licensee.

h. The Department of Justice may provide a criminal record check to the Board for a person who has applied for a new or renewal license, or certification through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subdivision privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subdivision.

(a1) Inactive Licenses. — Any person holding a license issued by the Board for funeral directing, for embalming, or for the practice of funeral service may apply for an inactive license in the same category as the active license held. The inactive license is renewable annually. Continuing education is not required for the renewal of an inactive license. The only activity that a holder of an inactive license may engage in is to vote pursuant to G.S. 90-210.18(c)(2). The holder of an inactive license may apply for an active license in the same category, and the Board shall issue an active license if the applicant has completed in North Carolina a total number of hours of accredited continuing education equal to five times the number of years the applicant held the inactive license. No application fee is required for the reinstatement of an active license pursuant to this subsection. The holder of an inactive license who returns to active status shall surrender the inactive license to the Board.

(b) Persons Licensed under the Laws of Other Jurisdictions. —

(1) The Board shall grant licenses to funeral directors, embalmers and funeral service licensees, licensed in other states, territories, the District of Columbia, and foreign countries, when it is shown that the applicant holds a valid license as a funeral director, embalmer or funeral service licensee issued by the other jurisdiction, has demonstrated knowledge of the laws and regulations governing the profession in North Carolina and has submitted proof of his good moral

character; and either that the applicant has continuously practiced the profession in the other jurisdiction for at least three years immediately preceding his application, or the Board has determined that the licensing requirements for the other jurisdiction are substantially similar to those of North Carolina.

(2) The Board shall periodically review the mortuary science licensing requirements of other jurisdictions and shall determine which licensing requirements are substantially similar to the requirements of North Carolina.

(3) The Board may issue special permits, to be known as courtesy cards, permitting nonresident funeral directors, embalmers and funeral service licensees to remove bodies from and to arrange and direct funerals and embalm bodies in this State, but these privileges shall not include the right to establish a place of business in or engage generally in the business of funeral directing and embalming in this State. Except for special permits issued by the Board for teaching continuing education programs and for work in connection with disasters, no special permits may be issued to nonresident funeral directors, embalmers, and funeral service licensees from states that do not issue similar courtesy cards to persons licensed in North Carolina pursuant to this Article.

(c) Registration, Filing and Transportation. —

(1) The holder of any license granted by this State for those within the funeral service profession or renewal thereof provided for in this Article shall cause registration to be filed in the office of the board of health of the county or city in which he practices his profession, or if there be no board of health in such county or city, at the office of the clerk of the superior court of such county. All such licenses, certificates, duplicates and renewals thereof shall be displayed in a conspicuous place in the funeral establishment where the holder renders service.

(2) It shall be unlawful for any railway agent, express agency, baggage master, conductor or other person acting as such, to receive the dead body of any person for shipment or transportation by railway or other public conveyance, to a point outside of this State, unless the body is accompanied by a burial-transit permit.

(3) The "transportation or removal of a dead human body" shall mean the removal of a dead human body for a fee from the location of the place of death or discovery of death or the transportation of the body to or from a medical facility, funeral establishment or facility, crematory or related holding facility, place of final disposition, or place designated by the Medical Examiner for examination or autopsy of the dead human body.

(4) Any individual, not otherwise exempt from this subsection, shall apply for and receive a permit from the Board before engaging in the transportation or removal of a dead human body in this State. Unless otherwise exempt from this subsection, no corporation or other business entity shall engage in the transportation or removal of a dead human body unless it has in its employ at least one individual who holds a permit issued under this section. No individual permit holder shall engage in the transportation or removal of a dead human body for more than one person, firm, or corporation without first providing the Board with written notification of the name and physical address of each such employer.

(5) The following persons shall be exempt from the permit requirements of this section but shall otherwise be subject to subdivision (9) of this

subsection and any rules relating to the proper handling, care, removal, or transportation of a dead human body:

a. Licensees under this Article and their employees.
b. Employees of common carriers.
c. Except as provided in sub-subdivision (6)c. of this section, employees of the State and its agencies and employees of local governments and their agencies.
d. Funeral directors licensed in another state and their employees.

(6) The following persons shall be exempt from this section:

a. Emergency medical technicians, rescue squad workers, volunteer and paid firemen, and law enforcement officers.
b. Employees of public or private hospitals, nursing homes, or long-term care facilities, while handling a dead human body within such facility or while acting within the scope of their employment.
c. State and county medical examiners and their investigators.
d. Any individual transporting cremated remains.
e. Any individual transporting or removing a dead human body of their immediate family or next of kin.
f. Any individual who has exhibited special care and concern for the decedent.

(7) Individuals eligible to receive a permit under this section for the transportation or removal of a dead human body for a fee, shall:

a. Be at least 18 years of age.
b. Possess and maintain a valid drivers license issued by this State and provide proof of all liability insurance required for the registration of any vehicle in which the person intends to engage in the business of the removal or transportation of a dead human body.
c. Affirmatively state under oath that the person has read and understands the statutes and rules relating to the removal and transportation of dead human bodies and any guidelines as may be adopted by the Board.
d. Provide three written character references on a form prescribed by the Board, one of which must be from a licensed funeral director.
e. Be of good moral character.

(8) The permit issued under this section shall expire on December 31 of each year. The application fee for the individual permit shall not exceed one hundred twenty-five dollars ($125.00). A fee, not to exceed one hundred dollars ($100.00), in addition to the renewal fee not to exceed seventy-five dollars ($75.00), shall be charged for any application for renewal received by the Board after February 1 of each year.

(9) No person shall transport a dead human body in the open cargo area or passenger area of a vehicle or in any vehicle in which the body may be viewed by the public. Any person removing or transporting a dead human body shall either cover the body, place it upon a stretcher designed for the purpose of transporting humans or dead human bodies in a vehicle, and secure such stretcher in the vehicle used for transportation, or shall enclose the body in a casket or container designed for common carrier transportation, and secure the casket or container in the vehicle used for transportation. No person shall use profanity, indecent, or obscene language in the presence of a dead human body. No person shall take a photograph or video recording of a dead human body without the consent of a member of the deceased's immediate family or next of kin.

(10) The Board may adopt rules under this section including permit application procedures and the proper procedures for the removal,

handling, and transportation of dead human bodies. The Board shall consult with the Office of the Chief Medical Examiner before initiating rule making under this section and before adopting any rules pursuant to this section. Nothing in this section prohibits the Office of the Chief Medical Examiner from adopting policies and procedures regarding the removal, transportation, or handling of a dead human body under the jurisdiction of that office that are more stringent than the laws in this section or any rules adopted under this section. Any violation of this section or rules adopted under this section may be punished by the Board by a suspension or revocation of the permit to transport or remove dead human bodies or by a term of probation. The Board may, in lieu of any disciplinary measure, accept a penalty not to exceed five thousand dollars ($5,000) per violation.

(11) Each applicant for a permit shall provide the Board with the applicant's home address, name and address of any corporation or business entity employing such individual for the removal or transportation of dead human bodies, and the make, year, model, and license plate number of any vehicle in which a dead human body is transported. A permittee shall provide written notification to the Board of any change in the information required to be provided to the Board by this section or by the application for a permit within 30 days after such change takes place.

(12) If any person shall engage in or hold himself out as engaging in the business of transportation or removal of a dead human body without first having received a permit under this section, the person shall be guilty of a Class 2 misdemeanor.

(13) The Board shall have the authority to inspect any place or premises that the business of removing or transporting a dead human body is carried out and shall also have the right of inspection of any vehicle and equipment used by a permittee for the removal or transportation of a dead human body.

(d) Establishment Permit. —

(1) No person, firm or corporation shall conduct, maintain, manage or operate a funeral establishment unless a permit for that establishment has been issued by the Board and is conspicuously displayed in the establishment. Each funeral establishment at a specific location shall be deemed to be a separate entity and shall require a separate permit and compliance with the requirements of this Article.

(2) A permit shall be issued when:

a. It is shown that the funeral establishment has in charge a person, known as a manager, licensed for the practice of funeral directing or funeral service, who shall not be permitted to manage more than one funeral establishment.

b. The Board receives a list of the names of all part-time and full-time licensees employed by the establishment.

c. It is shown that the funeral establishment satisfies the requirements of G.S. 90-210.27A.

d. The Board receives payment of the permit fee.

(3) Applications for funeral establishment permits shall be made on forms provided by the Board and filed with the Board by the owner, a partner, a member of the limited liability company, or an officer of the corporation by January 1 of each year, and shall be accompanied by the application fee or renewal fee, as the case may be. All permits shall expire on December 31 of each year. A penalty for late renewal, in addition to the regular renewal fee, shall be charged for renewal of registration received after the first day of February.

(4) The Board may suspend or revoke a permit when an owner, partner, manager, member, operator, or officer of the funeral establishment violates any provision of this Article or any regulations of the Board, or when any agent or employee of the funeral establishment, with the consent of any person, firm or corporation operating the funeral establishment, violates any of those provisions, rules or regulations.

(5) Funeral establishment permits are not transferable. A new application for a permit shall be made to the Board within 30 days of a change of ownership of a funeral establishment.

(d1) Embalming Outside Establishment. — An embalmer who engages in embalming in a facility other than a funeral establishment or in the residence of the deceased person shall, no later than January 1 of each year, register the facility with the Board on forms provided by the Board.

(e) Revocation; Suspension; Compromise; Disclosure. —

(1) Whenever the Board finds that an applicant for a license or a person to whom a license has been issued by the Board is guilty of any of the following acts or omissions and the Board also finds that the person has thereby become unfit to practice, the Board may suspend or revoke the license or refuse to issue or renew the license, in accordance with the procedures set out in Chapter 150B:

a. Conviction of a felony or a crime involving fraud or moral turpitude.

b. Fraud or misrepresentation in obtaining or renewing a license or in the practice of funeral service.

c. False or misleading advertising as the holder of a license.

d. Solicitation of dead human bodies by the licensee, his agents, assistants, or employees; but this paragraph shall not be construed to prohibit general advertising by the licensee.

e. Employment directly or indirectly of any resident trainee agent, assistant or other person, on a part-time or full-time basis, or on commission, for the purpose of calling upon individuals or institutions by whose influence dead human bodies may be turned over to a particular licensee.

f. The direct or indirect giving of certificates of credit or the payment or offer of payment of a commission by the licensee, his agents, assistants or employees for the purpose of securing business.

g. Gross immorality, including being under the influence of alcohol or drugs while practicing funeral service.

h. Aiding or abetting an unlicensed person to perform services under this Article, including the use of a picture or name in connection with advertisements or other written material published or caused to be published by the licensee.

i. Using profane, indecent or obscene language in the presence of a dead human body, and within the immediate hearing of the family or relatives of a deceased, whose body has not yet been interred or otherwise disposed of.

j. Violating or cooperating with others to violate any of the provisions of this Article, the rules and regulations of the Board, or the standards set forth in Funeral Industry Practices, 16 C.F.R. 453 (1984), as amended from time to time.

k. Violation of any State law or municipal or county ordinance or regulation affecting the handling, custody, care or transportation of dead human bodies.

l. Refusing to surrender promptly the custody of a dead human body upon the express order of the person lawfully entitled to the custody thereof.

m. Knowingly making any false statement on a certificate of death.

n. Indecent exposure or exhibition of a dead human body while in the custody or control of a licensee.

In any case in which the Board is entitled to suspend, revoke or refuse to renew a license, the Board may accept from the licensee an offer to pay a penalty of not more than five thousand dollars ($5,000). The Board may either accept a penalty or revoke or refuse to renew a license, but not both.

(2) Where the Board finds that a licensee is guilty of one or more of the acts or omissions listed in subdivision (e)(1) of this section but it is determined by the Board that the licensee has not thereby become unfit to practice, the Board may place the licensee on a term of probation in accordance with the procedures set out in Chapter 150B. In any case in which the Board is entitled to place a licensee on a term of probation, the Board may also impose a penalty of not more than five thousand dollars ($5,000) in conjunction with the probation.

No person licensed under this Article shall remove or cause to be embalmed a dead human body when he or she has information indicating crime or violence of any sort in connection with the cause of death, nor shall a dead human body be cremated, until permission of the State or county medical examiner has first been obtained. However, nothing in this Article shall be construed to alter the duties and authority now vested in the office of the coroner.

No funeral service establishment shall accept a dead human body from any public officer (excluding the State or county medical examiner or his agent), or employee or from the official of any institution, hospital or nursing home, or from a physician or any person having a professional relationship with a decedent, without having first made due inquiry as to the desires of the persons who have the legal authority to direct the disposition of the decedent's body. If any persons are found, their authority and directions shall govern the disposal of the remains of the decedent. Any funeral service establishment receiving the remains in violation of this subsection shall make no charge for any service in connection with the remains prior to delivery of the remains as stipulated by the persons having legal authority to direct the disposition of the body. This section shall not prevent any funeral service establishment from charging and being reimbursed for services rendered in connection with the removal of the remains of any deceased person in case of accidental or violent death, and rendering necessary professional services required until the persons having legal authority to direct the disposition of the body have been notified.

When and where a licensee presents a selection of funeral merchandise to the public to be used in connection with the service to be provided by the licensee or an establishment as licensed under this Article, a card or brochure shall be directly associated with each item of merchandise setting forth the price of the service using said merchandise and listing the services and other merchandise included in the price, if any. When there are separate prices for the merchandise and services, such cards or brochures shall indicate the price of the merchandise and of the items separately priced.

At the time funeral arrangements are made and prior to the time of rendering the service and providing the merchandise, a funeral director or funeral service licensee shall give or cause to be given to the person or persons making such arrangements a written statement duly signed by a licensee of said funeral establishment showing the price of the service as selected and what services are included therein, the price of each of the supplemental items of services or merchandise requested, and the amounts involved for each of the items for which the funeral establishment will advance moneys as an accom-

modation to the person making arrangements, insofar as any of the above items can be specified at that time. The statement shall have printed, typed or stamped on the face thereof: "This statement of disclosure is provided under the requirements of North Carolina G.S. 90-210.25(e)."

(f) Unlawful Practices. — If any person shall practice or hold himself out as practicing the profession or art of embalming, funeral directing or practice of funeral service without having complied with the licensing provisions of this Article, he shall be guilty of a Class 2 misdemeanor.

(g) Whenever it shall appear to the Board that any person, firm or corporation has violated, threatens to violate or is violating any provisions of this Article, the Board may apply to the courts of the State for a restraining order and injunction to restrain these practices. If upon application the court finds that any provision of this Article is being violated, or a violation is threatened, the court shall issue an order restraining and enjoining the violations, and this relief may be granted regardless of whether criminal prosecution is instituted under the provisions of this subsection. The venue for actions brought under this subsection shall be the superior court of any county in which the acts are alleged to have been committed or in the county where the defendant in the action resides. (1901, c. 338, ss. 9, 10, 14; Rev., ss. 3644, 4388; 1917, c. 36; 1919, c. 88; C.S., ss. 6781, 6782; 1949, c. 951, s. 4; 1951, c. 413; 1957, c. 1240, ss. 2, 21/2; 1965, cc. 719, 720; 1967, c. 691, s. 48; c. 1154, s. 2; 1969, c. 584, ss. 3, 3a, 4; 1975, c. 571; 1979, c. 461, ss. 11-21; 1981, c. 619, ss. 1-4; 1983, c. 69, s. 5; 1985, c. 242; 1987, c. 430, ss. 4-11; c. 827, s. 1; c. 879, s. 6.2; 1991, c. 528, ss. 4, 5; 1993, c. 539, s. 638; 1994, Ex. Sess., c. 24, s. 14(c); 1997-399, ss. 5-13; 2001-294, s. 3; 2002-147, s. 9.)

Editor's Note. — Session Laws 2002-147, s. 15, provides: "If the Private Security Officer Employment Standards Act of 2002 [S. 2238, 107th Cong. (2002)] is enacted by the United States Congress, the State of North Carolina declines to participate in the background check system authorized by that act as a result of the enactment of this act."

Effect of Amendments. —

Session Laws 2002-147, s. 9, effective October 9, 2002, added subdivision (a)(5)h.

OPINIONS OF ATTORNEY GENERAL

Advertising of Discounts or Promotions. — To the extent that the Board of Mortuary Science interprets and applies subdivision (e)(1)f to ban advertising of discounts or promotions, it can do so lawfully only as permitted by the First Amendment. See opinion of Attorney General to Michael L. Weisel, Counsel to the North Carolina State Board of Mortuary Science, 2000 N.C. AG LEXIS 8 (12/15/2000).

Article 16.

Dental Hygiene Act.

§ 90-224. Examination.

(a) The applicant for licensure must be of good moral character, have graduated from an accredited high school or hold a high school equivalency certificate duly issued by a governmental agency or unit authorized to issue the same, and be a graduate of a program of dental hygiene in a school or college approved by the Board.

(b) The Board shall have the authority to establish in its rules and regulations:

(1) The form of application;

(2) The time and place of examination;

(3) The type of examination;

(4) The qualifications for passing the examination.

(c) The Department of Justice may provide a criminal record check to the Board for a person who has applied for a new or renewal license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection. (1945, c. 639, s. 4; 1971, c. 756, s. 3; 2002-147, s. 10.)

Editor's Note. — Session Laws 2002-147, s. 15, provides: "If the Private Security Officer Employment Standards Act of 2002 [S. 2238, 107th Cong. (2002)] is enacted by the United States Congress, the State of North Carolina declines to participate in the background check system authorized by that act as a result of the enactment of this act."

Effect of Amendments. — Session Laws 2002-147, s. 10, effective October 9, 2002, added subsection (c).

§ 90-224.1. Licensure by credentials.

(a) The Board may issue a license by credentials to an applicant who has been licensed to practice dental hygiene in any state or territory of the United States if the applicant produces satisfactory evidence to the Board that the applicant has the required education, training, and qualifications; is in good standing with the licensing jurisdiction; has passed the National Board Dental Hygiene Examination administered by the Joint Commission on National Dental Examinations; has passed satisfactory examinations of proficiency in the knowledge and practice of dental hygiene as determined by the Board; and meets all other requirements of this section and rules adopted by the Board. The Board may, in its discretion, refuse to issue a license by credentials to an applicant who the Board determines is unfit to practice dental hygiene.

(b) The applicant for licensure shall be of good moral character, have graduated from an accredited high school or hold a high school equivalency certificate duly issued by a governmental agency or authorized unit, and have graduated from a dental hygiene program or school accredited by the Commission on Dental Accreditation of the American Dental Association and approved by the Board.

(c) The applicant must meet all of the following conditions:

(1) Has been actively practicing dental hygiene, as defined in G.S. 90-221, under the supervision of a licensed dentist for a minimum of two years immediately preceding the date of application.

(2) Has no history of disciplinary action or pending disciplinary action in the military or in any state or territory in which the applicant is or has ever been licensed.

(3) Has no felony convictions and has no other criminal convictions that would affect the applicant's ability to render competent dental hygiene care.

(4) Has not failed a licensure examination administered by the North Carolina State Board of Dental Examiners.

(d) The applicant for licensure by credentials shall submit an application, the form of which shall be determined by the Board, pay the fee required by G.S. 90-232, successfully complete examinations in Jurisprudence and Sterilization and Infection Control, and meet other criteria or requirements established by the Board, which may include an examination or interview before the Board or its authorized agents.

(e) This section shall not be construed to include licensure by reciprocity, which is prohibited. (2002-37, s. 3.)

Cross References. — As to licensing practitioners of other states by credentials, see G.S. 90-36.

Editor's Note. — Session Laws 2002-37, s. 12, makes this section effective January 1, 2003.

§ 90-232. Fees.

In order to provide the means of carrying out and enforcing the provisions of this Article and the duties devolving upon the North Carolina State Board of Dental Examiners, it is authorized to charge and collect fees established by its rules not exceeding the following:

(1) Each applicant for examination $125.00
(2) Each renewal certificate, which fee shall be annually fixed by the Board and not later than November 30 of each year it shall give written notice of the amount of the renewal fee to each dental hygienist licensed to practice in this State by mailing such notice to the last address of record with the Board of each such dental hygienist 60.00
(3) Each restoration of license 60.00
(4) Each provisional license 60.00
(5) Each certificate of license to a resident dental hygienist desiring to change to another state or territory 25.00
(6) Annual fee to be paid upon license renewal to assist in funding programs for impaired dental hygienists 40.00
(7) Each license by credentials ..... 1,000.00.

In no event may the annual fee imposed on dental hygienists to fund the impaired dental hygienists program exceed the annual fee imposed on dentists to fund the impaired dentist program. All fees shall be payable in advance to the Board and shall be disposed of by the Board in the discharge of its duties under this Article. (1945, c. 639, s. 11; 1965, c. 163, s. 7; 1967, c. 489, s. 2; 1971, c. 756, s. 12; 1987, c. 555, s. 2; 1999-382, s. 3; 2002-37, s. 6.)

Editor's Note. — Session Laws 2002-37, s. 11, contains a severability clause.

Effect of Amendments. — Session Laws 2002-37, s. 6, effective January 1, 2003, deleted "and regulations" following "rules" in the introductory paragraph; and added subdivision (7).

Article 18A.

Psychology Practice Act.

§ 90-270.9. Election of officers; meetings; adoption of seal and appropriate rules; powers of the Board.

CASE NOTES

Power to Investigate. — North Carolina Psychology Board is statutorily empowered to investigate as well as to adjudicate complaints against its licensees under G.S. 90-270.9 and

G.S. 90-270.15. Farber v. N.C. Psychology Bd., — N.C. App. —, 569 S.E.2d 287, 2002 N.C. App. LEXIS 1085 (2002).

§ 90-270.15. Denial, suspension, or revocation of licenses and health services provider certification, and other disciplinary and remedial actions for violations of the Code of Conduct; relinquishing of license.

CASE NOTES

Constitutionality of Ethical Principles of Psychologists. —

Section 90-270.15(a)(10), incorporating the American Psychological Association's ethical standards, does not contain an unconstitutional delegation of legislative authority. Farber v. N.C. Psychology Bd., — N.C. App. —, 569 S.E.2d 287, 2002 N.C. App. LEXIS 1085 (2002).

Trial court did not abuse its discretion in refusing to issue a declaratory judgment regarding the constitutionality of G.S. 90-270.15(a)(10) where it decided that further grounds for relief were unnecessary and would serve no useful purpose. Farber v. N.C. Psychology Bd., — N.C. App. —, 569 S.E.2d 287, 2002 N.C. App. LEXIS 1085 (2002).

Authority. —

North Carolina Psychology Board is statutorily empowered to investigate as well as to adjudicate complaints against its licensees under G.S. 90-270.9 and G.S. 90-270.15. Farber v. N.C. Psychology Bd., — N.C. App. —, 569 S.E.2d 287, 2002 N.C. App. LEXIS 1085 (2002).

Under G.S. 90-270.15(a), the North Carolina Psychology Board is responsible for overseeing licensed psychologists practicing in the state, and it may discipline licensees who violate ethical or professional standards; under G.S. 90-270.15(e), disciplinary actions by the Board are governed by the Administrative Procedure Act, G.S. 150B-1 et seq. Farber v. N.C. Psychology Bd., — N.C. App. —, 569 S.E.2d 287, 2002 N.C. App. LEXIS 1085 (2002).

Violation found. — Where the evidence showed that a psychologist entered into a personal relationship with a patient in order to meet his own emotional needs, the North Carolina Psychology Board properly concluded that the psychologist violated G.S. 90-270.15(a)(10). Farber v. N.C. Psychology Bd., — N.C. App. —, 569 S.E.2d 287, 2002 N.C. App. LEXIS 1085 (2002).

Where a psychologist allowed a patient to end her therapy in order to pursue a personal relationship with him, and such behavior ultimately caused the patient to suffer severe depression, thereby endangering her welfare, the North Carolina Psychology Board properly found that the psychologist violated G.S. 90-270.15(a)(11). Farber v. N.C. Psychology Bd., — N.C. App. —, 569 S.E.2d 287, 2002 N.C. App. LEXIS 1085 (2002).

Where a psychologist entered into a relationship with his patient to gratify his own personal needs, and the patient would not have ended her therapy but for her relationship with the psychologist, the North Carolina Psychology Board properly found that the psychologist violated G.S. 90-270.15(a)(20). Farber v. N.C. Psychology Bd., — N.C. App. —, 569 S.E.2d 287, 2002 N.C. App. LEXIS 1085 (2002).

Costs Properly Assessed. — Trial court erred in finding that there was no evidence in the record to support the North Carolina Psychology Board's assessment of costs against a psychologist; the transcript clearly and undisputedly recited the total number of hours spent on the disciplinary proceeding, and the costs were mandated by N.C. Admin. Code tit. 21, r. 54.1605(11)(c) (June 2002). Farber v. N.C. Psychology Bd., — N.C. App. —, 569 S.E.2d 287, 2002 N.C. App. LEXIS 1085 (2002).

Article 18B.

Physical Therapy.

§ 90-270.36. Grounds for disciplinary action.

CASE NOTES

Statute Not Unconstitutionally Vague. — Language of G.S. 90-270.36(7) and (9) was not unconstitutionally vague and was sufficiently specific to provide the North Carolina Board of Physical Therapy Examiners with the authority to determine that a physical therapist's actions violated acceptable standards of practice in the physical therapy field. Sibley v. N.C. Bd. of Therapy Exam'rs, — N.C. App. —, 566 S.E.2d 486, 2002 N.C. App. LEXIS 746 (2002).

Article 23.

Right to Natural Death; Brain Death.

§ 90-322. Procedures for natural death in the absence of a declaration.

Legal Periodicals. — Limiting a Surrogate's Authority to Terminate Life-Support for An Incompetent Adult, see 79 N.C.L. Rev. 1815 (2001).

Article 36.

Massage and Bodywork Therapy Practice.

§ 90-626. Powers and duties.

OPINIONS OF ATTORNEY GENERAL

Board of Massage and Bodywork Therapy Can Charge Reasonable Fee. — The Board of Massage and Bodywork Therapy can charge a reasonable fee for its auditing and approval of massage and bodywork therapy schools. See opinion of Attorney General to Charles P. Wilkins, Counsel, North Carolina Board of Massage and Bodywork Therapy, 2000 N.C. AG LEXIS 7 (6/14/2000).

§ 90-631. Massage and bodywork therapy schools.

OPINIONS OF ATTORNEY GENERAL

Board of Massage and Bodywork Therapy Cannot Require Bond. — The Board of Massage and Bodywork Therapy cannot require a massage and bodywork therapy school, which it approves, to have a guaranty bond. See opinion of Attorney General to Charles P. Wilkins, Counsel, North Carolina Board of Massage and Bodywork Therapy, 2000 N.C. AG LEXIS 7 (6/14/2000).

Community Colleges. — Community colleges offering massage and bodywork therapy courses need not be licensed by the State Board of Community Colleges, although these community colleges presumably are already subject to oversight by the State Board of Community Colleges; however, community colleges offering massage and bodywork therapy courses must obtain approval from the North Carolina Board of Massage and Bodywork Therapy if these community colleges want the students who complete these courses to qualify for licenses from the North Carolina Board of Massage and

Bodywork Therapy. See opinion of Attorney General to Charles P. Wilkins, Counsel, North Carolina Board of Massage and Bodywork Therapy, 2000 N.C. AG LEXIS 27 (3/15/2000).

Chapter 90D.

Interpreters and Transliterators.

(For effective date see notes)

§ 90D-1. (Effective July 1, 2003) Title.

This Chapter may be cited as the "Interpreter and Transliterator Licensure Act". (2002-182, s. 1.)

Cross References. — As to interpreters for deaf persons, see § 8B-1 et seq.

Editor's Note. — Session Laws 2002-182, s. 10, makes this Chapter effective July 1, 2003, with the exception of G.S. 90D-5 and 90D-6, which are effective October 31, 2002.

Session Laws 2002-182, s. 8, provides: "The Department of Public Instruction must provide the Board with a copy of the State Board of Education's approved educational requirements and standards for interpreters and transliterators employed by the local educational agencies, who provide support services for hearing-impaired students."

§ 90D-2. (Effective July 1, 2003) Declaration of purpose.

The practice of manual or oral interpreting and transliterating services affects the public health, safety, and welfare, and therefore the licensure of these practices is necessary to ensure minimum standards of competency and to provide the public with safe and accurate manual or oral interpreting or transliterating services. It is the purpose of this Chapter to provide for the regulation of persons offering manual or oral interpreting or transliterating services to individuals who are deaf, hard-of-hearing, or dependent on the use of manual modes of communication in this State. (2002-182, s. 1.)

§ 90D-3. (Effective July 1, 2003) Definitions.

The following definitions apply in this Chapter:

(1) Board. — The North Carolina Interpreter and Transliterator Licensing Board.

(2) Cued speech. — A tool that utilizes a phonetically based system to enable spoken language to appear visibly through the use of eight handshapes in four locations in combination with natural mouth movements to allow sounds of spoken language to appear differently.

(3) Educational interpreter or transliterator. — A person who provides accessible communication, using the most understandable language model, to individuals in prekindergarten through grade 12 or in any institution of higher education.

(4) Interpreter. — A person who practices the act of interpreting as defined in this section.
(5) Interpreting. — The process of providing accessible communication, between and among persons who are deaf or hard-of-hearing and those who are hearing. This process includes, but is not limited to, communication between American Sign Language and English. It may also involve various other modalities that involve visual, gestural, and tactile methods.
(6) License. — A certificate that evidences approval by the Board that a person has successfully completed the requirements set forth in G.S. 90D-7 entitling the person to perform the functions and duties of an interpreter or transliterator.
(7) Provisional license. — A certificate issued by the Board under G.S. 90D-8 enabling a person to perform the functions and duties of an interpreter or transliterator until the person has successfully completed all of the requirements set forth in G.S. 90D-7.
(8) Transliterating. — The process of providing accessible communication between one or more hearing persons and one or more deaf or hard-of-hearing persons using a form of manually coded English.
(9) Transliterator. — A person who practices the act of transliterating as defined in this section. (2002-182, s. 1.)

§ 90D-4. (Effective July 1, 2003) License required; exemptions.

(a) Except as provided in Chapter 8B of the General Statutes, no person shall practice or offer to practice as an interpreter or transliterator for a fee or other consideration, represent himself or herself as a licensed interpreter or transliterator, or use the title "Licensed Interpreter for the Deaf", "Licensed Transliterator for the Deaf", or any other title or abbreviation to indicate that the person is a licensed interpreter or transliterator unless that person is currently licensed under this Chapter.
(b) The provisions of this Chapter do not apply to:
(1) Persons providing interpreting or transliterating services in religious proceedings.
(2) Persons providing interpreting or transliterating services in mentoring or training programs approved by the Board.
(3) An intern under the supervision of a person licensed under this Chapter to provide interpreting or transliterating services.
(4) Persons providing interpreting or transliterating services in an emergency situation until a licensed interpreter or transliterator can be obtained. An emergency situation is one where the deaf or hard-of-hearing person is in substantial danger of death or irreparable harm if interpreting or transliterating services are not provided immediately.
(5) Educational interpreters or transliterators. (2002-182, s. 1.)

§ 90D-5. Creation of the Board.

(a) The North Carolina Interpreter and Transliterator Licensing Board is created.
(b) Composition and Terms. — The Board shall consist of nine members who shall serve staggered terms. The initial Board members shall be selected on or before January 1, 2003, as follows:
(1) A member of the North Carolina Association of the Deaf (NCAD) who is deaf and familiar with the interpreting process. This member shall be appointed by the Governor and serve for a term of two years.

(2) An interpreter who is a member of the North Carolina Registry of Interpreters for the Deaf, Inc., (NCRID) with five years experience in a community setting and who is licensed to practice as an interpreter or transliterator under this Chapter. This member shall be appointed by the Governor and serve for a term of three years.

(3) An employee of the North Carolina Department of Health and Human Services. This member shall be appointed by the Governor, upon recommendation of the Secretary of the Department, and serve a term of three years.

(4) An interpreter or transliterator for deaf-blind individuals who is licensed to practice as an interpreter or transliterator under this Chapter or a deaf-blind individual who is a member of the North Carolina Deaf-Blind Association and who has knowledge of the interpreting process. This member shall be appointed by the General Assembly, upon recommendation of the President Pro Tempore of the Senate, and serve for a term of three years.

(5) A cued speech or oral transliterator licensed to practice as an interpreter or transliterator under this Chapter. This member shall be appointed by the General Assembly, upon recommendation of the President Pro Tempore of the Senate, and serve for a term of two years.

(6) A member of Self Help for Hard of Hearing (SHHH) with knowledge of the interpreting process and deafness. This member shall be appointed by the General Assembly, upon recommendation of the President Pro Tempore of the Senate, and serve for a term of three years.

(7) An interpreter who is a member of the North Carolina Registry of Interpreters for the Deaf, Inc., (NCRID) with five years experience in an educational setting in grades K-12 and who is licensed to practice as an interpreter or transliterator under this Chapter. This member shall be appointed by the General Assembly, upon recommendation of the Speaker of the House of Representatives, and serve for a term of two years.

(8) A faculty member of an Interpreter Training Program (ITP), an Interpreter Preparation Program (IPP), or a qualified or professional certified instructor of the American Sign Language Teachers Association (ASLTA). This member shall be appointed by the General Assembly, upon recommendation of the Speaker of the House of Representatives, and serve for a term of two years.

(9) A public member. This member shall be appointed by the General Assembly, upon recommendation of the Speaker of the House of Representatives, and serve a term of two years. For purposes of this section, a public member shall not be licensed under this Chapter or have an immediate family member who is deaf or hard-of-hearing.

Upon the expiration of the terms of the initial Board members, each member shall be appointed for a term of three years and shall serve until a successor is appointed and qualified. No member may serve more than two consecutive full terms.

(c) Qualifications. — All members of the Board who are required to be licensed under this Chapter shall reside or be employed in North Carolina and shall remain in active practice and in good standing with the Board as a licensee during their terms.

(d) Vacancies. — A vacancy shall be filled in the same manner as the original appointment. Appointees to fill vacancies shall serve the remainder of the unexpired term and until their successors have been duly appointed and qualified.

(e) Removal. — The Board may remove any of its members for neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplin-

ary proceedings as a licensee shall be disqualified from participating in the official business of the Board until the charges have been resolved.

(f) Compensation. — Each member of the Board shall receive per diem and reimbursement for travel and subsistence as provided in G.S. 93B-5.

(g) Officers. — The officers of the Board shall be a chair, a vice-chair, and other officers deemed necessary by the Board to carry out the purposes of this Chapter. All officers shall be elected by the Board for two-year terms and shall serve until their successors are elected and qualified.

(h) Meetings. — The Board shall hold at least two meetings each year to conduct business. The Board shall establish procedures governing the calling, holding, and conducting of regular and special meetings. A majority of the Board shall constitute a quorum. (2002-182, s. 1.)

Editor's Note. — Session Laws 2002-182, s. 10, made this section effective October 31, 2002.

Session Laws 2002-182, s. 9, provides: "Notwithstanding the language in G.S. 90D-5, as enacted in Section 1 of this act, the initial Board members who are required to be licensed under that section, must only have satisfied the requirements for licensure in G.S. 90D-7(a)(1) and (3) of this act."

§ 90D-6. Powers of the Board.

The Board shall have the power and duty to:

(1) Administer this Chapter.

(2) Adopt, amend, or repeal rules necessary to carry out the provisions of this Chapter, subject to the provisions of Chapter 150B of the General Statutes.

(3) Employ and fix the compensation of personnel that the Board determines is necessary to carry into effect the provisions of this Chapter and to incur other expenses necessary to effectuate this Chapter.

(4) Examine and determine the qualifications and fitness of applicants for licensure, renewal of licensure, and reciprocal licensure.

(5) Issue, renew, deny, suspend, or revoke licenses and carry out any disciplinary actions authorized by this Chapter.

(6) Set fees as authorized in G.S. 90D-10.

(7) Conduct investigations for the purpose of determining whether violations of this Chapter or grounds for disciplining licensees exist.

(8) Maintain a record of all proceedings and make available to licensees and other concerned parties an annual report of all Board action.

(9) Keep on file in its office at all times a complete record of the names, addresses, license numbers, and renewal license numbers of all persons entitled to practice under this Chapter.

(10) Adopt a seal containing the name of the Board for use on all licenses and official reports issued by the Board.

(11) Adopt rules for continuing education requirements. (2002-182, s. 1.)

Editor's Note. — Session Laws 2002-182, s. 10, made this section effective October 31, 2002.

§ 90D-7. (Effective July 1, 2003) Requirements for licensure.

(a) Upon application to the Board and the payment of the required fees, an applicant may be licensed as an interpreter or transliterator if the applicant meets all of the following qualifications:

(1) Is 18 years of age or older.

(2) Is of good moral character as determined by the Board.

(3) Meets one of the following criteria:

a. Holds a valid National Association of the Deaf (NAD), level 4 or 5 certification.

b. Is nationally certified by the Registry of Interpreters for the Deaf, Inc., (RID).

c. Has a national certification recognized by the National Cued Speech Association (NCSA).

d. Holds a quality assurance North Carolina Interpreter Classification System (NCICS) level A or B classification in effect on January 1, 2000.

(b) Effective July 1, 2008, any person who applies for initial licensure as an interpreter or transliterator shall hold at least a two-year degree from a regionally accredited institution.

(c) The Department of Justice may provide a criminal record check to the Board for a person who has applied for a new, provisional, or renewal license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subdivision privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection. (2002-182, s. 1.)

Editor's Note. — Session Laws 2002-182, s. 7, provides: "A person practicing interpreter or transliterator services on the effective date of this act who submits the following evidence to the Board and pays the required fee within 18 months of the effective date of this act, shall be licensed without having to satisfy the requirements of subdivision (a)(3) of G.S. 90D-7 as enacted in Section 1 of this act:

"(1) Evidence that the person meets the qualifications in subdivisions (a)(1) and (a)(2) of G.S. 90D-7.

"(2) Evidence that the person has been actively engaged as an interpreter or transliterator in this State for at least 200 hours for each of the two years immediately preceding the effective date of this act. The evidence must be verified in writing by sources approved by the Board.

"(3) Two letters of recommendation from sources approved by the Board.

"(4) A fee of seventy-five dollars ($75.00) for the registration. This fee shall be in lieu of the fee for a license authorized in G.S. 90D-10 of the act. A person who obtains a license by meeting the requirements of this section must comply with the continuing education requirements set by the Board. Any practicing person who does not register with the Board within 18 months of the effective date of this act shall be required to complete all requirements prescribed by the Board and to otherwise comply with the provisions of Chapter 90D, enacted by Section 1 of this act."

Session Laws 2002-182, s. 10, makes s. 7 of the act effective October 31, 2002.

Session Laws 2002-182, s. 9, provides: "Notwithstanding the language in G.S. 90D-5, as enacted in Section 1 of this act, the initial Board members who are required to be licensed under that section, must only have satisfied the requirements for licensure in G.S. 90D-7(a)(1) and (3) of this act."

§ 90D-8. (Effective July 1, 2003) Provisional license.

(a) Upon application to the Board and the payment of the required fees, an applicant may be issued a one-time provisional license as an interpreter or transliterator if the applicant meets all of the following qualifications:

(1) Is at least 18 years of age.
(2) Is of good moral character as determined by the Board.
(3) Completes two continuing education units approved by the Board. These units must be completed for each renewable year.
(4) Satisfies one of the following:
a. Holds a quality assurance North Carolina Interpreter Classification System (NCICS) level C classification.
b. Holds a valid National Association of the Deaf (NAD) level 2 or 3 certification.
c. Holds a current Educational Interpreter Performance Assessment (EIPA) level 3 or above classification.
d. Holds the following certificates for cued language transliterating coursework: Educational Interpreting Defined, Cued Language Transliterator (CLT) Skill Development I, II, and III, and Ethical Decision Making I.
e. Holds at least a two-year interpreting degree from a regionally accredited institution.

(b) A provisional license issued under this section shall be valid for one year. Upon expiration, a provisional license may be renewed for an additional one-year period in the discretion of the Board. However, a provisional license shall not be renewed more than three times. The Board may, in its discretion, grant an extension after the third time the provisional license has been renewed under circumstances to be established in rules adopted by the Board.

(c) Effective July 1, 2008, any person who applies for initial licensure on a provisional basis as an interpreter or transliterator shall hold at least a two-year degree from a regionally accredited institution. (2002-182, s. 1.)

§ 90D-9. (Effective July 1, 2003) Reciprocity; licensure of nonresident.

(a) The Board may issue a license to a qualified applicant who resides in this State and holds an interpreter or transliterator license in another state if that state has standards of competency that are substantially equivalent to those provided in this Chapter.

(b) The Board may issue a license to a nonresident if the person meets the requirements of this Chapter or the person resides in a state that recognizes licenses issued by the Board. (2002-182, s. 1.)

§ 90D-10. (Effective July 1, 2003) Expenses and fees.

(a) All salaries, compensation, and expenses incurred or allowed for the purposes of this Chapter shall be paid by the Board exclusively out of the fees received by the Board as authorized by this Chapter or from funds received from other sources. In no case shall any salary, expense, or other obligations of the Board be charged against the General Fund.

(b) The Board may impose the following fees not to exceed the amounts listed below:

(1) License	$225.00
(2) Provisional license	$225.00
(3) License renewal	$150.00
(4) Provisional license renewal	$150.00
(5) Duplicate license	$10.00.

(2002-182, s. 1.)

§ 90D-11. (Effective July 1, 2003) License renewal.

Each license issued under this Chapter shall be renewed on or before October 1 of each year. All applications for renewal shall be filed with the Board and shall be accompanied by the renewal fee as required by G.S. 90D-10 and written proof of satisfactory completion of continuing education requirements adopted by the Board. Licenses that are not renewed shall automatically lapse, and the licensee shall be required to reapply for licensure in accordance with rules adopted by the Board. (2002-182, s. 1.)

§ 90D-12. (Effective July 1, 2003) Disciplinary action.

The Board may deny, suspend, revoke, or refuse to license an interpreter or transliterator or applicant for any of the following:

(1) Giving false information to or withholding information from the Board in procuring or attempting to procure a license.
(2) Having been convicted of or pled guilty or no contest to a crime that indicates the person is unfit or incompetent to perform interpreter or transliterator services or that indicates the person has deceived or defrauded the public.
(3) Having been disciplined by the Registry of Interpreters for the Deaf, Inc., (RID).
(4) Demonstrating gross negligence, incompetency, or misconduct in performing interpreter or transliterator services.
(5) Failing to pay child support after having been ordered to do so by a court of competent jurisdiction.
(6) Willfully violating any provisions of this Chapter or rules adopted by the Board. (2002-182, s. 1.)

§ 90D-13. (Effective July 1, 2003) Injunctive relief.

If the Board finds that a person who does not have a license issued under this Chapter claims to be a licensed interpreter or transliterator or is engaging in practice as an interpreter or transliterator in violation of this Chapter, the Board may apply in its own name to the superior court for a temporary restraining order or other injunctive relief to prevent the person from continuing illegal practices. The action may be brought in the county where the illegal or unlawful acts are alleged to have been committed, in the county where the defendant resides, or in the county where the Board maintains its offices and records. The court may grant injunctions regardless of whether criminal prosecution or other action has been or may be instituted as a result of a violation. (2002-182, s. 1.)

Chapter 93A.

Real Estate License Law.

Article 1.

Real Estate Brokers and Salespersons.

Article 1.

Real Estate Brokers and Salespersons.

§ 93A-3. Commission created; compensation; organization.

(a) There is hereby created the North Carolina Real Estate Commission, hereinafter called the Commission. The Commission shall consist of nine members, seven members to be appointed by the Governor, one member to be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121, and one member to be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121. At least three members of the Commission shall be licensed real estate brokers or real estate salespersons. At least two members of the Commission shall be persons who are not involved directly or indirectly in the real estate or real estate appraisal business. Members of the Commission shall serve three-year terms, so staggered that the terms of three members expire in one year, the terms of three members expire in the next year, and the terms of three members expire in the third year of each three-year period. The members of the Commission shall elect one of their members to serve as chairman of the Commission for a term of one year. The Governor may remove any member of the Commission for misconduct, incompetency, or willful neglect of duty. The Governor shall have the power to fill all vacancies occurring on the Commission, except vacancies in legislative appointments shall be filled under G.S. 120-122.

(b) Members of the Commission shall receive as compensation for each day spent on work for the Commission the per diem, subsistence and travel allowances as provided in G.S. 93B-5. The total expense of the administration of this Chapter shall not exceed the total income therefrom; and none of the expenses of said Commission or the compensation or expenses of any office thereof or any employee shall ever be paid or payable out of the treasury of the State of North Carolina; and neither the Commission nor any officer or employee thereof shall have any power or authority to make or incur any expense, debt or other financial obligation binding upon the State of North Carolina. After all expenses of operation, the Commission may set aside an expense reserve each year not to exceed ten percent (10%) of the previous year's gross income; then any surplus shall go to the general fund of the State of North Carolina.

(c) The Commission shall have power to make reasonable bylaws, rules and regulations that are not inconsistent with the provisions of this Chapter and the General Statutes; provided, however, the Commission shall not make rules

or regulations regulating commissions, salaries, or fees to be charged by licensees under this Chapter.

(c1) The provisions of G.S. 93A-1 and G.S. 93A-2 notwithstanding, the Commission may adopt rules to permit a real estate broker to pay a fee or other valuable consideration to a travel agent for the introduction or procurement of tenants or potential tenants in vacation rentals as defined in G.S. 42A-4. Rules adopted pursuant to this subsection may include a definition of the term "travel agent", may regulate the conduct of permitted transactions, and may limit the amount of the fee or the value of the consideration that may be paid to the travel agent. However, the Commission may not authorize a person or entity not licensed as a broker or salesperson to negotiate any real estate transaction on behalf of another.

(c2) The Commission shall adopt a seal for its use, which shall bear thereon the words "North Carolina Real Estate Commission." Copies of all records and papers in the office of the Commission duly certified and authenticated by the seal of the Commission shall be received in evidence in all courts and with like effect as the originals.

(d) The Commission may employ an Executive Director and professional and clerical staff as may be necessary to carry out the provisions of this Chapter and to put into effect the rules and regulations that the Commission may promulgate. The Commission shall fix salaries and shall require employees to make good and sufficient surety bond for the faithful performance of their duties. The Commission may, when it deems it necessary or convenient, delegate to the Executive Director, legal counsel for the Commission, or other Commission staff, professional or clerical, the Commission's authority and duties under this Chapter, but the Commission may not delegate its authority to make rules or its duty to act as a hearing panel in accordance with the provisions of G.S. 150B-40(b).

(e) The Commission shall be entitled to the services of the Attorney General of North Carolina, in connection with the affairs of the Commission or may on approval of the Attorney General, employ an attorney to assist or represent it in the enforcement of this Chapter, as to specific matters, but the fee paid for such service shall be approved by the Attorney General. The Commission may prefer a complaint for violation of this Chapter before any court of competent jurisdiction, and it may take the necessary legal steps through the proper legal offices of the State to enforce the provisions of this Chapter and collect the penalties provided therein.

(f) The Commission is authorized to acquire, hold, convey, rent, encumber, alienate, and otherwise deal with real property in the same manner as a private person or corporation, subject only to the approval of the Governor and Council of State. The rents, proceeds, and other revenues and benefits of the ownership of real property shall inure to the Commission. Collateral pledged by the Commission for any encumbrance of real property shall be limited to the assets, income, and revenues of the Commission. Leases, deeds, and other instruments relating to the Commission's interest in real property shall be valid when executed by the executive director of the Commission. The Commission may create and conduct education and information programs relating to the real estate business for the information, education, guidance and protection of the general public, licensees, and applicants for license. The education and information programs may include preparation, printing and distribution of publications and articles and the conduct of conferences, seminars, and lectures. The Commission may claim the copyright to written materials it creates and may charge fees for publications and programs. (1957, c. 744, s. 3; 1967, c. 281, s. 2; c. 853, s. 1; 1971, c. 86, s. 1; 1979, c. 616, ss. 1, 2; 1983, c. 81, ss. 1, 2, 6-8; 1989, c. 563, s. 1; 1993, c. 419, s. 9; 1999-229, s. 4; 1999-405, s. 2; 1999-431, s. 3.4(a); 2000-140, s. 19(a); 2001-293, ss. 1, 2; 2002-168, s. 3.)

Effect of Amendments. —
Session Laws 2002-168, s. 3, effective October 1, 2002, in (f), rewrote the first sentence, inserted the second through fourth sentences, added "The Commission may create and conduct" to the beginning of the fifth sentence, and added the last sentence.

§ 93A-4. Applications for licenses; fees; qualifications; examinations; privilege licenses; renewal or reinstatement of license; power to enforce provisions.

(a) Any person, partnership, corporation, limited liability company, association, or other business entity hereafter desiring to enter into business of and obtain a license as a real estate broker or real estate salesperson shall make written application for such license to the Commission in the form and manner prescribed by the Commission. Each applicant for a license as a real estate broker or real estate salesperson shall be at least 18 years of age. Each applicant for a license as a real estate salesperson shall, within three years preceding the date application is made, have satisfactorily completed, at a school approved by the Commission, a real estate fundamentals course consisting of at least 67 hours of classroom instruction in subjects determined by the Commission, or shall possess real estate education or experience in real estate transactions which the Commission shall find equivalent to the course. Each applicant for a license as a real estate broker shall, within three years preceding the date the application is made, have satisfactorily completed, at a school approved by the Commission, an education program consisting of at least 60 hours of classroom instruction in subjects determined by the Commission, which shall be in addition to the course required for a real estate salesperson license, or shall possess real estate education or experience in real estate transactions which the Commission shall find equivalent to the education program. Each applicant for a license as a real estate broker or real estate salesperson shall be required to pay a fee, fixed by the Commission but not to exceed thirty dollars ($30.00).

(b) Except as otherwise provided in this Chapter, any person who submits an application to the Commission in proper manner for a license as real estate broker or a license as real estate salesperson shall be required to take an oral or written examination. The Commission may allow an applicant to elect to take the examination by computer as an alternative to the written or oral examination and may require the applicant to pay the Commission or a provider contracted by the Commission the actual cost of administering the computerized examination. The cost of the computerized examination shall be in addition to any other fees the applicant is required to pay under subsection (a) of this section. The examination shall determine the applicant's qualifications with due regard to the paramount interests of the public as to the applicant's competency. A person holding a real estate salesperson license in this State and applying for a real estate broker license shall not be required to take an additional examination under this subsection. A person who fails the license examination shall be entitled to know the result and score. A person who passes the exam shall be notified only that the person passed the examination. Whether a person passed or failed the examination shall be a matter of public record; however, the scores for license examinations shall not be considered public records. Nothing in this subsection shall limit the rights granted to any person under G.S. 93B-8.

An applicant for licensure under this Chapter shall satisfy the Commission that he or she possesses the competency, honesty, truthfulness, integrity, and general moral character necessary to protect the public interest and promote public confidence in the real estate brokerage business. If the results of any

required competency examination and investigation of the applicant's moral character shall be satisfactory to the Commission, then the Commission shall issue to the applicant a license, authorizing the applicant to act as a real estate broker or real estate salesperson in the State of North Carolina, upon the payment of privilege taxes now required by law or that may hereafter be required by law.

(b1) The Department of Justice may provide a criminal record check to the Commission for a person who has applied for a license through the Commission. The Commission shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Commission shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection.

(c) All licenses issued by the Commission under the provisions of this Chapter shall expire on the 30th day of June following issuance or on any other date that the Commission may determine and shall become invalid after that date unless reinstated. A license may be renewed 45 days prior to the expiration date by filing an application with and paying to the Executive Director of the Commission the license renewal fee. The license renewal fee is thirty dollars ($30.00) unless the Commission sets the fee at a higher amount. The Commission may set the license renewal fee at an amount that does not exceed fifty dollars ($50.00). The license renewal fee may not increase by more than five dollars ($5.00) during a 12-month period. The Commission may adopt rules establishing a system of license renewal in which the licenses expire annually with varying expiration dates. These rules shall provide for prorating the annual fee to cover the initial renewal period so that no licensee shall be charged an amount greater than the annual fee for any 12-month period. The fee for reinstatement of an expired license shall be fifty-five dollars ($55.00). In the event a licensee fails to obtain a reinstatement of such license within six months after the expiration date thereof, the Commission may, in its discretion, consider such person as not having been previously licensed, and thereby subject to the provisions of this Chapter relating to the issuance of an original license, including the examination requirements set forth herein. Duplicate licenses may be issued by the Commission upon payment of a fee of five dollars ($5.00) by the licensee. Commission certification of a licensee's license history shall be made only after the payment of a fee of ten dollars ($10.00).

(d) The Commission is expressly vested with the power and authority to make and enforce any and all reasonable rules and regulations connected with license application, examination, renewal, and reinstatement as shall be deemed necessary to administer and enforce the provisions of this Chapter. The Commission is further authorized to adopt reasonable rules and regulations necessary for the approval of real estate schools, instructors, and textbooks and rules that prescribe specific requirements pertaining to instruction, administration, and content of required education courses and programs.

(e) Nothing contained in this Chapter shall be construed as giving any authority to the Commission nor any licensee of the Commission as authoriz-

ing any licensee to engage in the practice of law or to render any legal service as specifically set out in G.S. 84-2.1 or any other legal service not specifically referred to in said section. (1957, c. 744, s. 4; 1967, c. 281, s. 3; c. 853, s. 2; 1969, c. 191, s. 3; 1973, c. 1390; 1975, c. 112; 1979, c. 614, ss. 2, 3, 6; c. 616, ss. 2-5; 1983, c. 81, ss. 2, 9, 11; c. 384; 1985, c. 535, ss. 2-5; 1995, c. 22, s. 1; 1999-200, s. 1.; 2000-140, s. 19(b); 2002-147, s. 11; 2002-168, s. 4.)

Editor's Note. — Session Laws 2002-147, s. 15, provides: "If the Private Security Officer Employment Standards Act of 2002 [S. 2238, 107th Cong. (2002)] is enacted by the United States Congress, the State of North Carolina declines to participate in the background check system authorized by that act as a result of the enactment of this act."

Effect of Amendments. —

Session Laws 2002-147, s. 11, effective October 9, 2002, added subsection (b1).

Session Laws 2002-168, s. 4, effective October 1, 2002, added the last four sentences in subsection (b); and in subsection (c), substituted "The fee for reinstatement of an expired license shall be fifty-five dollars ($55.00)" for "All licenses reinstated after the expiration date thereof shall be subject to a late filing fee of five dollars ($5.00) in addition to the required renewal fee" in the eighth sentence, and substituted "six months" for "12 months" in the ninth sentence.

§ 93A-6. Disciplinary action by Commission.

(a) The Commission has power to take disciplinary action. Upon its own initiative, or on the complaint of any person, the Commission may investigate the actions of any person or entity licensed under this Chapter, or any other person or entity who shall assume to act in such capacity. If the Commission finds probable cause that a licensee has violated any of the provisions of this Chapter, the Commission may hold a hearing on the allegations of misconduct.

The Commission has power to suspend or revoke at any time a license issued under the provisions of this Chapter, or to reprimand or censure any licensee, if, following a hearing, the Commission adjudges the licensee to be guilty of:

(1) Making any willful or negligent misrepresentation or any willful or negligent omission of material fact.

(2) Making any false promises of a character likely to influence, persuade, or induce.

(3) Pursuing a course of misrepresentation or making of false promises through agents, salespersons, advertising or otherwise.

(4) Acting for more than one party in a transaction without the knowledge of all parties for whom he or she acts.

(5) Accepting a commission or valuable consideration as a real estate salesperson for the performance of any of the acts specified in this Article or Article 4 of this Chapter, from any person except his or her broker-in-charge or licensed broker by whom he or she is employed.

(6) Representing or attempting to represent a real estate broker other than the broker by whom he or she is engaged or associated, without the express knowledge and consent of the broker with whom he or she is associated.

(7) Failing, within a reasonable time, to account for or to remit any monies coming into his or her possession which belong to others.

(8) Being unworthy or incompetent to act as a real estate broker or salesperson in a manner as to endanger the interest of the public.

(9) Paying a commission or valuable consideration to any person for acts or services performed in violation of this Chapter.

(10) Any other conduct which constitutes improper, fraudulent or dishonest dealing.

(11) Performing or undertaking to perform any legal service, as set forth in G.S. 84-2.1, or any other acts constituting the practice of law.

(12) Commingling the money or other property of his or her principals with his or her own or failure to maintain and deposit in a trust or

escrow account in an insured bank or savings and loan association in North Carolina all money received by him or her as a real estate licensee acting in that capacity, or an escrow agent, or the temporary custodian of the funds of others, in a real estate transaction; provided, these accounts shall not bear interest unless the principals authorize in writing the deposit be made in an interest bearing account and also provide for the disbursement of the interest accrued.

(13) Failing to deliver, within a reasonable time, a completed copy of any purchase agreement or offer to buy and sell real estate to the buyer and to the seller.

(14) Failing, at the time the transaction is consummated, to deliver to the seller in every real estate transaction, a complete detailed closing statement showing all of the receipts and disbursements handled by him or her for the seller or failing to deliver to the buyer a complete statement showing all money received in the transaction from the buyer and how and for what it was disbursed.

(15) Violating any rule or regulation promulgated by the Commission.

The Executive Director shall transmit a certified copy of all final orders of the Commission suspending or revoking licenses issued under this Chapter to the clerk of superior court of the county in which the licensee maintains his or her principal place of business. The clerk shall enter these orders upon the judgment docket of the county.

(b) Following a hearing, the Commission shall also have power to suspend or revoke any license issued under the provisions of this Chapter or to reprimand or censure any licensee when:

(1) The licensee has obtained a license by false or fraudulent representation;

(2) The licensee has been convicted or has entered a plea of guilty or no contest upon which final judgment is entered by a court of competent jurisdiction in this State, or any other state, of the criminal offenses of: embezzlement, obtaining money under false pretense, fraud, forgery, conspiracy to defraud, or any other offense involving moral turpitude which would reasonably affect the licensee's performance in the real estate business;

(3) The licensee has violated any of the provisions of G.S. 93A-6(a) when selling, leasing, or buying the licensee's own property;

(4) The broker's unlicensed employee, who is exempt from the provisions of this Chapter under G.S. 93A-2(c)(6), has committed, in the regular course of business, any act which, if committed by the broker, would constitute a violation of G.S. 93A-6(a) for which the broker could be disciplined; or

(5) The licensee, who is also a State-licensed or State-certified real estate appraiser pursuant to Chapter 93E of the General Statutes, has violated any provisions of Chapter 93E of the General Statutes and has been reprimanded or has had an appraiser license or certificate suspended or revoked by the Appraisal Board.

(c) The Commission may appear in its own name in superior court in actions for injunctive relief to prevent any person from violating the provisions of this Chapter or rules promulgated by the Commission. The superior court shall have the power to grant these injunctions even if criminal prosecution has been or may be instituted as a result of the violations, or whether the person is a licensee of the Commission.

(d) Each broker shall maintain complete records showing the deposit, maintenance, and withdrawal of money or other property owned by the broker's principals or held in escrow or in trust for the broker's principals. The Commission may inspect these records periodically, without prior notice and

may also inspect these records whenever the Commission determines that they are pertinent to an investigation of any specific complaint against a licensee.

(e) When a person or entity licensed under this Chapter is accused of any act, omission, or misconduct which would subject the licensee to disciplinary action, the licensee, with the consent and approval of the Commission, may surrender the license and all the rights and privileges pertaining to it for a period of time established by the Commission. A person or entity who surrenders a license shall not thereafter be eligible for or submit any application for licensure as a real estate broker or salesperson during the period of license surrender.

(f) In any contested case in which the Commission takes disciplinary action authorized by any provision of this Chapter, the Commission may also impose reasonable conditions, restrictions, and limitations upon the license, registration, or approval issued to the disciplined person or entity. In any contested case concerning an application for licensure, time share project registration, or school, sponsor, instructor, or course approval, the Commission may impose reasonable conditions, restrictions, and limitations on any license, registration, or approval it may issue as a part of its final decision. (1957, c. 744, s. 6; 1967, c. 281, s. 4; c. 853, s. 3; 1969, c. 191, s. 5; 1971, c. 86, s. 2; 1973, c. 1112; c. 1331, s. 3; 1975, c. 28; 1979, c. 616, ss. 6, 7; 1981, c. 682, s. 15; 1983, c. 81, s. 13; 1987, c. 516, ss. 1, 2; 1989, c. 563, s. 2; 1993, c. 419, s. 10; 1999-229, s. 6; 2000-149, s. 19(b); 2001-487, s. 23(b); 2002-168, s. 5.)

Effect of Amendments. —

Session Laws 2002-168, s. 5, effective October 1, 2002, added subsection (f).

CASE NOTES

Cited in McDonald v. Skeen, — N.C. App. —, 567 S.E.2d 209, 2002 N.C. App. LEXIS 895 (2002).

Chapter 93B.

Occupational Licensing Boards.

§ 93B-16. Occupational board liability for negligent acts.

(a) An occupational licensing board may purchase commercial insurance of any kind to cover all risks or potential liability of the board, its members, officers, employees, and agents, including the board's liability under Articles 31 and 31A of Chapter 143 of the General Statutes.

(b) Occupational licensing boards shall be deemed State agencies for purposes of Articles 31 and 31A of Chapter 143 of the General Statutes, and board members and employees of occupational licensing boards shall be considered State employees for purposes of Articles 31 and 31A of Chapter 143 of the General Statutes. To the extent an occupational licensing board purchases commercial liability insurance coverage in excess of one hundred fifty thousand dollars ($150,000) per claim for liability arising under Article 31 or 31A of Chapter 143 of the General Statutes, the provisions of G.S. 143-299.4 shall not apply. To the extent that an occupational licensing board purchases commercial insurance coverage for liability arising under Article 31 or 31A of Chapter 143 of the General Statutes, the provisions of G.S. 143-300.6(c) shall not apply.

(c) The purchase of insurance by an occupational licensing board under this section shall not be construed to waive sovereign immunity or any other defense available to the board, its members, officers, employees, or agents in an action or contested matter in any court, agency, or tribunal. The purchase of insurance by an occupational licensing board shall not be construed to alter or expand the limitations on claims or payments established in G.S. 143-299.2 or limit the right of board members, officers, employees, or agents to defense by the State as provided by G.S. 143-300.3. (2002-168, s. 1.)

Editor's Note. — Session Laws 2002-168, s. 1, made this section effective October 1, 2002.

Chapter 95.

Department of Labor and Labor Regulations.

Article 2A.

Wage and Hour Act.

§ 95-25.1. Short title and legislative purpose.

CASE NOTES

Applied in Beltran-Benitez v. Sea Safari, Ltd., 180 F. Supp. 2d 772, 2001 U.S. Dist. LEXIS 23710 (E.D.N.C. 2001).

§ 95-25.2. Definitions.

CASE NOTES

Employee Status Not Shown. — A directed verdict on a wage and hour claim would be affirmed where there was no evidence that real estate broker was an "employee"; the parties had entered into a separate agreement regarding a commission after the broker had resigned, and at most, broker was an independent contractor. Horack v. S. Real Estate Co. of Charlotte, Inc., 150 N.C. App. 305, 563 S.E.2d 47, 2002 N.C. App. LEXIS 487 (2002).

§ 95-25.14. Exemptions.

(a) The provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), and G.S. 95-25.5 (Youth Employment), and the provisions of G.S. 95-25.15(b) (Record Keeping) as they relate to these exemptions, do not apply to:

(1) Any person employed in an enterprise engaged in commerce or in the production of goods for commerce as defined in the Fair Labor Standards Act:

a. Except as otherwise specifically provided in G.S. 95-25.5;

b. Notwithstanding the above, any employee other than a learner, apprentice, student, or handicapped worker as defined in the Fair Labor Standards Act who is not otherwise exempt under the other provisions of this section, and for whom the applicable minimum wage under the Fair Labor Standards Act is less than the minimum wage provided in G.S. 95-25.3, is not exempt from the provisions of G.S. 95-25.3 or G.S. 95-25.4;

c. Notwithstanding the above, any employer or employee exempt from the minimum wage, overtime, or child labor requirements of the Fair Labor Standards Act for whom there is no comparable exemption under this Article shall not be exempt under this subsection except that where an exemption in the Fair Labor Standards Act provides a method of computing overtime which is an alternative to the method required in 29 U.S.C.S. § 207(a), the employer or employee subject to that alternate method shall be exempt from the provisions of G.S. 95-25.4(a); provided that, persons not employed at an enterprise described in subdivision (1) of this subsection shall also be subject to the same alternative methods of overtime calculation in the circumstances described in the Fair Labor Standards Act exemptions providing those alternative methods;

(2) Any person employed in agriculture, as defined under the Fair Labor Standards Act;

(3) Any person employed as a domestic, including baby sitters and companions, as defined under the Fair Labor Standards Act;

(4) Any person employed as a page in the North Carolina General Assembly or in the Governor's Office;

(5) Bona fide volunteers in medical, educational, religious, or nonprofit organizations where an employer-employee relationship does not exist;

(6) Persons confined in and working for any penal, correctional or mental institution of the State or local government;

(7) Any person employed as a model, or as an actor or performer in motion pictures or theatrical, radio or television productions, as defined under the Fair Labor Standards Act, except as otherwise specifically provided in G.S. 95-25.5;

(8) Any person employed by an outdoor drama in a production role, including lighting, costumes, properties and special effects, except as otherwise specifically provided in G.S. 95-25.5; but this exemption does not include such positions as office workers, ticket takers, ushers and parking lot attendants.

(b) The provisions of G.S. 95-25.3 (Minimum Wage) and G.S. 95-25.4 (Overtime), and the provisions of G.S. 95-25.15(b) (Record Keeping) as they relate to these exemptions, do not apply to:

(1) Any employee of a boys' or girls' summer camp or of a seasonal religious or nonprofit educational conference center;

(2) Any person employed in the catching, processing or first sale of seafood, as defined under the Fair Labor Standards Act;

(3) The spouse, child, or parent of the employer or any person qualifying as a dependent of the employer under the income tax laws of North Carolina;

(4) Any person employed in a bona fide executive, administrative, professional or outside sales capacity, as defined under the Fair Labor Standards Act;

(5) Repealed by Session Laws 1989, c. 687, s. 2.

(6) Any person while participating in a ridesharing arrangement as defined in G.S. 136-44.21;

(7) Any person who is employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, as defined in the Fair Labor Standards Act.

(b1) The provisions of G.S. 95-25.3 (Minimum Wage) and G.S. 95-25.4 (Overtime), and the provisions of G.S. 95- 25.15(b) (Record Keeping) as they relate to the exemptions provided for in this subsection, do not apply to any of the following:

(1) Hours worked as a bona fide volunteer firefighter in an incorporated, nonprofit volunteer or community fire department.

(2) Hours worked as a bona fide volunteer rescue and emergency medical services personnel in an incorporated, nonprofit volunteer or community fire department, or an incorporated, nonprofit rescue squad.

Hours worked in accordance with this subsection shall not be considered hours worked for purposes of G.S. 95-25.3 or G.S. 95-25.4.

(c) The provisions of G.S. 95-25.4 (Overtime), and the provisions of G.S. 95-25.15(b) (Record Keeping) as they relate to this exemption, do not apply to:

(1) Drivers, drivers' helpers, loaders and mechanics, as defined under the Fair Labor Standards Act;

(2) Taxicab drivers;

(3) Seamen, employees of railroads, and employees of air carriers, as defined under the Fair Labor Standards Act;

(4) Salespersons, mechanics and partsmen employed by automotive, truck, and farm implement dealers, as defined under the Fair Labor Standards Act;

(5) Salespersons employed by trailer, boat, and aircraft dealers, as defined under the Fair Labor Standards Act;

(6) Live-in child care workers or other live-in employees in homes for dependent children;

(7) Radio and television announcers, news editors, and chief engineers, as defined under the Fair Labor Standards Act.

(d) The provisions of this Article do not apply to the State of North Carolina, any city, town, county, or municipality, or any State or local agency or instrumentality of government, except for the following provisions, which do apply:

(1) The minimum wage provisions of G.S. 95-25.3;

(2) The definition provisions of G.S. 95-25.2 necessary to interpret the applicable provisions;

(3) The exemptions of subsections (a) and (b) of this section;

(4) The complainant protection provisions of G.S. 95-25.20.

(e) Employment in a seasonal recreation program by the State of North Carolina, any city, town, county, or municipality, or any State or local agency or instrumentality of government, is exempt from all provisions of this Article, including G.S. 95-25.3 (Minimum Wage). (1937, c. 406; c. 409, s. 3; 1939, c. 312, s. 1; 1943, c. 59; 1947, c. 825; 1949, c. 1057; 1959, cc. 475, 629; 1961, cc. 602, 1070; 1963, c. 1123; 1965, c. 724; 1967, c. 998; 1973, c. 600, s. 1; 1975, c. 19, s. 26; c. 413, s. 2; 1977, c. 146; 1979, c. 839, s. 1; 1981, c. 493, s. 2; c. 606, s. 2; c. 663, s. 7; 1983, c. 708, s. 2; 1989, c. 687, s. 2; 1991, c. 330, s. 3; 1993, c. 214, s. 2; 1995, c. 509, s. 47; 1997-146, s. 2; 2002-113, s. 2.)

Effect of Amendments. — Session Laws 2002-113, s. 2, effective September 6, 2002, and applicable to hours worked on or after July 31, 2002, added subsection (b1).

Article 5A.

Regulation of Private Personnel Services.

§ 95-47.2. Licensing procedures.

(a) No person shall open, keep, maintain, own, operate or carry on a private personnel service unless the person has first procured a license therefor as provided in this Article.

(b) An application for license shall be made to the Commissioner. If the private personnel service is owned by an individual, the application shall be

made by that individual; if the service is owned by a partnership, the application shall be made by all partners; if the service is owned by a corporation, the application shall be made by all stockholders who own at least twenty percent (20%) of the issued and outstanding voting stock of the corporation, or if the service is owned by an association, society, or corporation in which no one individual owns at least twenty percent (20%) of the issued and outstanding voting stock, the application shall be made by the president, vice-president, secretary and treasurer of the owner, by whatever title designated. The application shall state the name and address of the individual who is responsible for the direction and operation of the placement activities of the private personnel service whether that individual be one of the applicants or another person; whether or not that individual has ever been employed in a private personnel service; the name and address of each of the license applicant's prior employers during the five years immediately preceding the license application; and such other information relating to the good moral character of that individual as the Commissioner may require. No change in such persons shall take place without prior notification to the Commissioner.

(c) Each application for license shall be in writing and in the form prescribed by the Commissioner, and shall state truthfully the name under which the business is to be conducted; the street and number of the building or place where the business is to be conducted.

(d) Upon the receipt of an application for a license the Commissioner:

(1) Shall publish a notice of the pending application in a newspaper of general circulation in the area of the proposed location of the employment agency and may publish the notice in a newspaper of general circulation in each area in which the applicant (or if a corporation, the president and majority shareholder) has resided during the five years preceding the time of the application. The notice shall include a statement informing individuals of their right to protest the issuance of a license by filing within 10 days written comments with the Commissioner. The protest shall be in writing and signed by the person filing the protest or by his authorized agent or attorney, and shall state reasons why the license should not be granted. Upon the filing of a protest, the Commissioner, if he determines the protest to be of such a nature that a hearing should be conducted and that the protest is for a cause on which denial of a license may properly be based, shall appoint a time and place for a hearing on the application and shall give at least seven days' notice of that time and place to the license applicant and to the person filing the protest. The hearing shall be conducted in accordance with the provisions of the rules of the Administrative Procedure Act;

(2) Shall investigate the character, criminal record and business integrity of each applicant for agency license and shall investigate the criminal records of all persons listed as agency owners, officers, directors or managers. The applicant and all agency owners, officers, directors and managers shall assist the department in obtaining necessary information by authorizing the release of all relevant information;

(2a) The Department of Justice may provide a criminal record check to the Commissioner for a person or agency who has applied for a license through the Commissioner. The Commissioner shall provide to the Department of Justice, along with the request, the fingerprints of all applicants, any additional information required by the Department of Justice, and a form signed by the applicants consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicants' fingerprints shall be forwarded to the State Bureau of

Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Commissioner shall keep all information pursuant to this subdivision privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subdivision.

(3) Upon completion of the investigation, or 30 days after the application was received, whichever is later, but in no case more than 45 days after the application was received, shall determine whether or not a license should be issued. The license shall be denied for any of the following reasons:

a. If the applicant for agency license, or the president or majority shareholder of a corporate applicant, omits or falsifies any material information asked for in the application and required by the Commissioner;

b. If any owner, officer, director or manager of the employment agency:

1. Has been convicted in any state of the criminal offense of embezzlement, obtaining money under false pretenses, forgery, conspiracy to defraud or any similar offense involving fraud or moral turpitude;

2. Was an owner, officer, director or manager of an employment agency or other business whose license was revoked or that was otherwise caused to cease operation by action of any State or federal agency or court because of violations of law or regulation relating to deceptive or unfair practices in the conduct of business;

3. As an owner or manager of an employment agency or other business or as an employment counselor was found by any State or federal agency or court to have violated any law or regulation relating to deceptive or unfair practices in the conduct of business; or

4. In any other demonstrable way engaged in deceptive or unfair practices in the conduct of business;

c. If the employment agency will be operated on the same premises as a loan agency (as defined in G.S. 105-88) or collection agency (as defined in G.S. 58-70-15).

(e) If it appears upon the hearing or from the inspection, examination or investigation made by the Commissioner that the owners, partners, corporation officers or the agency manager are not persons of good moral character or that the license applicant has not complied with the provisions of this Article, the application shall be denied and a license shall not be granted. The Commissioner shall find facts to substantiate his denial of the issuance of a license. Each application shall be granted or refused within 30 days from the date of its filing, or if a hearing is held, within 45 days. Any license heretofore or hereafter issued shall expire 12 months from the date of its issuance, and shall be renewed as hereinafter provided unless sooner revoked by the Commissioner.

(f) No license shall be granted to a person to operate as a private personnel service where the name of the business is similar or identical to that of any existing licensed business (except where a franchiser has licensed two or more

persons to use the same name within the State) or directly or indirectly expresses or connotes any limitation, specification or discrimination contrary to current State or federal laws against discrimination in employment.

(g) Every license shall contain the name of the person licensed and shall designate the city in which the license is issued, the name of the manager and date of the license. The license shall be displayed in a conspicuous place in the area where job applicants are received by the agency.

(h) A license granted as provided in this Article shall not be valid for any person other than the person to whom it is issued or for any place other than that designated in the license and shall not be assigned or transferred without the consent of the Commissioner, whose consent must be based on the standards contained in this Article. Applications for consent to assign or transfer shall be made in the same manner as an application for a license, and all the provisions of this Article shall apply to applications for consent. The location of a private personnel service shall not be changed without notice to the Commissioner, and any change of location shall be endorsed upon the license. A person who has obtained a license in accordance with the provisions of this Article may apply for additional licenses to conduct additional private personnel services in accordance with the provisions of this Article. The manner of application, and the conditions and terms applicable to the issuance of the additional licenses shall be the same as for an original license. The same agency manager may be designated in all such licenses.

(i) Temporary license. — If ownership of a licensed private personnel service is transferred, the department shall issue a temporary license to any new owner or successor if it appears to the department that issuance of such a license would serve the public interest. A temporary license shall be effective for a period of 90 days and shall not be renewed.

(j) Each licensee shall, before the license is issued or renewed, deposit with the department a bond payable to the State of North Carolina and executed by a surety company duly authorized to transact business in the State of North Carolina in the amount of ten thousand dollars ($10,000) and upon condition that the private personnel service will pay to applicants all refunds due under this Article and regulations adopted hereunder if the private personnel service terminates its business. (1929, c. 178, ss. 2, 3; 1931, c. 312, s. 3; 1979, c. 780, s. 1; 1987, c. 282, s. 12; 1989, c. 414, s. 2; 2002-147, s. 12.)

Editor's Note. — Session Laws 2002-147, s. 15, provides: "If the Private Security Officer Employment Standards Act of 2002 [S. 2238, 107th Cong. (2002)] is enacted by the United States Congress, the State of North Carolina declines to participate in the background check system authorized by that act as a result of the enactment of this act."

Effect of Amendments. — Session Laws 2002-147, s. 12, effective October 9, 2002, added subdivision (d)(2a).

Article 10.

Declaration of Policy as to Labor Organizations.

§ 95-78. Declaration of public policy.

CASE NOTES

Cited in Sesco v. Dana World Trade Corp., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 3072 (W.D.N.C. Feb. 7, 2002).

Article 18.

Identification of Toxic or Hazardous Substances.

Part 2. Public Safety and Emergency Response Right to Know.

§ 95-194. Emergency information.

(a) An employer who normally stores at a facility any hazardous chemical in an amount of at least 55 gallons or 500 pounds, whichever is greater, shall provide the Fire Chief of the Fire Department having jurisdiction over the facility, in writing, (i) the name(s) and telephone number(s) of knowledgeable representative(s) of the employer who can be contacted for further information or in case of an emergency and (ii) a copy of the Hazardous Substance List.

(b) Each employer shall provide a copy of the Hazardous Substance List to the Fire Chief. The employer shall notify the Fire Chief in writing of any updates that occur in the previously submitted Hazardous Substance List as provided in G.S. 95-191(b).

(c) The Fire Chief or his representative, upon request, shall be permitted on-site inspections at reasonable times of the chemicals located at the facility on the Hazardous Substance List for the sole purpose of preplanning Fire Department activities in the case of an emergency and insuring by inspection the usefulness and accuracy of the Hazardous Substance List and labels.

(d) Employers shall provide to the Fire Chief, upon written request of the Fire Chief, a copy of the MSDS for any chemical on the Hazardous Substance List.

(e) Upon written request of the Fire Chief, an employer shall prepare an emergency response plan for the facility that includes facility evacuation procedures, a list of emergency equipment available at the facility, and copies of other emergency response plans, such as the contingency plan required under rules governing the management of hazardous waste adopted pursuant to Article 9 of Chapter 130A of the General Statutes. A copy of the emergency response plan or any prefire plan or emergency response plan required under applicable North Carolina or federal statute or rule or regulation shall, upon written request by the Fire Chief, be given to the Fire Chief.

(f) The Fire Chief shall make information from the Hazardous Substance List, the emergency response plan, and MSDS's available to members of the Fire Department having jurisdiction over the facility and to personnel responsible for preplanning emergency response, police, medical or fire activities, but shall not otherwise distribute or disclose (or allow the disclosure of) information not available to the public under G.S. 95-208. Such persons receiving such information shall not disclose the information received and shall use such information only for the purpose of preplanning emergency response, police, medical or fire activities.

(g) Any knowing distribution or disclosure (or permitted disclosure) of any information referred to in subsection (f) of this section in any manner except as specifically permitted under that subsection (f) shall be punishable as a Class 1 misdemeanor. Restrictions concerning confidentiality or nondisclosure of information under this Article 18 shall be exemptions from the Public Records Act contained in Chapter 132 of the General Statutes, and such information shall not be disclosed notwithstanding the provisions of Chapter 132 of the General Statutes. (1985, c. 775, s. 1; 1987, c. 489, ss. 4-6; 1993, c. 539, s. 672; 1994, Ex. Sess., c. 24, s. 14(c); 2002-165, s. 1.2.)

Effect of Amendments. — Session Laws 2002-165, s. 1.2, effective October 23, 2002, in subsection (e), substituted "facility that includes" for "facility which shall include, but not be limited to," and substituted "under rules governing the management of hazardous waste adopted pursuant to Article 9 of Chapter 130A of the General Statutes" for "under North Carolina Hazardous Waste Management Rules."

Article 21.

Retaliatory Employment Discrimination.

§ 95-240. Definitions.

CASE NOTES

Cited in Pineda-Lopez v. N.C. Growers Ass'n, — N.C. App. —, 566 S.E.2d 162, 2002 N.C. App. LEXIS 759 (2002).

§ 95-241. Discrimination prohibited.

CASE NOTES

Treatment of Similarly Situated Employees. —

Even if the former employee raised an inference of a causal connection between the employee's workers' compensation claims and the termination of employment, the employer established its affirmative defense under G.S. 95-241(b) that the employee would have been terminated regardless of the workers' compensation claims, based on the evidence indicating that the employer's policy of terminating employees after a year's absence, of which the employee was aware, was consistently applied. Wilkerson v. Pilkington N. Am., Inc., 211 F. Supp. 2d 700, 2002 U.S. Dist. LEXIS 13360 (M.D.N.C. 2002).

Removal to Federal Court Improper. — The provisions of this section relating to worker's compensation "arise under" the worker's compensation laws for purposes of 28 U.S.C.S. § 1445(c) and, therefore, the removal to federal court of a case alleging a violation of this section was improper. Arnett v. Leviton Mfg., Inc., 174 F. Supp. 2d 410, 2001 U.S. Dist. LEXIS 16464 (W.D.N.C. 2001).

No Violation of Section Found. —

Former employee failed to show any causal connection between the workers' compensation claims and the employee's termination, since the substantial period between the employee's final claim and the termination lacked the temporal proximity required to raise an inference that the termination was retaliatory. Wilkerson v. Pilkington N. Am., Inc., 211 F. Supp. 2d 700, 2002 U.S. Dist. LEXIS 13360 (M.D.N.C. 2002).

§ 95-242. Complaint; investigation; conciliation.

CASE NOTES

Timeliness of Claims. — Acts of the employer alleged by the former employee to be retaliatory which did not occur within 180 days of filing the written complaint as required under G.S. 95-242(a) could only be considered as evidence that the employee's termination was retaliatory and not as separate retaliatory acts in their own right. Wilkerson v. Pilkington N. Am., Inc., 211 F. Supp. 2d 700, 2002 U.S. Dist. LEXIS 13360 (M.D.N.C. 2002).

Cited in Arnett v. Leviton Mfg., Inc., 174 F. Supp. 2d 410, 2001 U.S. Dist. LEXIS 16464 (W.D.N.C. 2001).

§ 95-243. Civil action.

CASE NOTES

Cited in Arnett v. Leviton Mfg., Inc., 174 F. Supp. 2d 410, 2001 U.S. Dist. LEXIS 16464 (W.D.N.C. 2001).

Chapter 96.

Employment Security.

Article 2.

Unemployment Insurance Division.

Article 1.

Employment Security Commission.

§ 96-5. Employment Security Administration Fund.

Editor's Note. —

Session Laws 2002-126, s. 13.3(b), provides: "Notwithstanding the provisions of G.S. 96-5(f), there is appropriated from the Worker Training Trust Fund to the following agencies the following sums for the 2002-2003 fiscal year for the following purposes:

"(1) Nine hundred eleven thousand one hundred twenty-one dollars ($911,121) for the 2002-2003 fiscal year to the Department of Commerce, Division of Employment and Training, for the Employment and Training Grant Program;

"(2) Eight hundred ninety-seven thousand five hundred eighty-seven dollars ($897,587) for the 2002-2003 fiscal year to the Community Colleges System Office for customized training of the unemployed and the working poor for specific jobs needed by employers through the Training Initiatives Program;

"(3) One million four hundred fifty thousand dollars ($1,450,000) for the 2002-2003 fiscal year to the Community Colleges System Office to continue the Focused Industrial Training Program;

"(4) Two hundred one thousand nine hundred fifty-seven dollars ($201,957) for the 2002-2003 fiscal year to the Employment Security Commission for the State Occupational Information Coordinating Committee to develop and operate an interagency system to track former participants in State education and training programs;

"(5) Three hundred fifty-nine thousand thirty-five dollars ($359,035) for the 2002-2003 fiscal year to the Community Colleges System Office for a training program in entrepreneurial skills to be operated by North Carolina REAL Enterprises;

"(6) Fifty-three thousand eight hundred fifty-six dollars ($53,856) for the 2002-2003 fiscal year to the Employment Security Commission to maintain compliance with Chapter 96 of the General Statutes, which directs the Commission to employ the Common Follow-Up Management Information System to evaluate the effectiveness of the State's job training, education, and placement programs;

"(7) Eight hundred ninety-seven thousand five hundred eighty-seven dollars ($897,587) for the 2002-2003 fiscal year to the Department of Labor to continue the Apprenticeship Program; and

"(8) Two hundred fifty thousand dollars ($250,000) for the 2002-2003 fiscal year to the Community Colleges System Office for the operation of the Hosiery Technology Center."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

ARTICLE 2.

Unemployment Insurance Division.

§ 96-12.01. Extended benefits.

(a) Extended benefits shall be paid under this Chapter as provided in this section.

(a1) Definitions. — As used in this section, unless the context clearly requires otherwise —

(1) "Extended benefit period" means a period which:

a. Begins the third week after a week for which there is an "on" indicator; and

b. Ends with either of the following weeks, whichever occurs later:

1. The third week after the first week for which there is an "off" indicator; or

2. The 13th consecutive week of such period.

Provided, that no extended benefit period may begin before the 14th week following the end of a prior extended benefit period which was in effect with respect to this State.

(2) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1178, s. 4.

(3) Repealed by Session Laws 1982 (Regular Session, 1982), c. 1178, s. 5.

(4) There is an "on indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediate preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter:

a. Equalled or exceeded one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and equalled or exceeded five percent (5%), or

b. Equalled or exceeded six percent (6%), or

c. With respect to benefits for weeks of unemployment in North Carolina beginning after May 1, 2002.

1. The average rate of total unemployment (seasonally adjusted), as determined by the United States Secretary of Labor, for the period consisting of the most recent three months for which data for all states are published before the close of such week equals or exceeds a six and one-half percent (6.5%), and

2. The average rate of total unemployment in the State (seasonally adjusted), as determined by the United States Secretary of Labor, for the three-month period referred to in sub-subdivision c.1. of this subdivision, equals or exceeds one hundred ten percent (110%) of such average for either or both of the corresponding three-month periods ending in the two preceding calendar years.

d. There is a State "off indicator" for a week with respect to sub-subdivision c. of this subdivision, only if, for the period consisting of such week and the immediately preceding 12 weeks, the option specified in sub-subdivision c. does not result in an "on indicator".

e. Total extended benefit amount.

1. The total extended benefit amount payment to any eligible individual with respect to the applicable benefit year shall be the least of the following amounts:

I. Fifty percent (50%) of the total amount of regular benefits which were payable to the individual under this Chapter in the individual's applicable benefit year; or

II. Thirteen times the individual's weekly benefit amount that was payable to the individual under this Chapter for a week of total unemployment in the applicable benefit year.

2.I. Effective with respect to weeks beginning in a high unemployment period, sub-subdivision e.1. of this subdivision shall be applied by substituting:

A. "Eighty percent (80%)" for "fifty percent (50%)" in sub-subdivision e.1.I., and

B. "Twenty" for "thirteen" in sub-subdivision e.1.II.

II. For purposes of sub-subdivision 2.I., the term "high unemployment period" means any period during which an extended benefit period would be in effect if sub-subdivision c. of this subdivision were applied by substituting "eight percent (8%)" for six and one-half percent (6.5%)".

(5) There is an "off indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter:

a. Was less than one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and was less than six percent (6%), or

b. Was less than five percent (5%).

(6) "Rate of insured unemployment," for the purposes of subparagraphs (4) and (5) of this subsection, means the percentage derived by dividing

a. The average weekly number of individuals filing claims for regular compensation in this State for weeks of unemployment with respect to the most recent 13 consecutive-week period, as determined by the Commission on the basis of its reports to the United States Secretary of Labor, by

b. The average monthly employment covered under this Chapter for the first four of the most recent six completed calendar quarters ending before the end of such 13-week period.

(7) "Regular benefits" means benefits payable to an individual under this Chapter or any other State law (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) other than extended benefits.

(8) "Extended benefits" means benefits (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) payable to an individual under the provisions of this section for weeks of unemployment in his eligibility period.

(9) "Eligibility period" of an individual means the period consisting of the weeks in his benefit year which begin in an extended benefit period and if his benefit year ends within such extended benefit period, any weeks thereafter which begin in such period.

(10) "Exhaustee" means an individual who, with respect to any week of unemployment in his eligibility period:

a. Has received, prior to such week, all of the regular benefits that were available to him under this Chapter or any other State law

(including dependents' allowances and benefits payable to federal civilian employees and ex-servicemen under 5 U.S.C. Chapter 85) in his current benefit year that includes such week;

Provided, that, for the purposes of this subdivision, an individual shall be deemed to have received all of the regular benefits that were available to him although (1) as a result of a pending appeal with respect to wages that were not considered in the original monetary determination in his benefit year, he may subsequently be determined to be entitled to added regular benefits, or (2) he may be entitled to regular benefits with respect to future weeks of unemployment, but such benefits are not payable with respect to such week of unemployment by reason of the provisions in G.S. 96-16; or

b. His benefit year having expired prior to such week, has no, or insufficient, wages on the basis of which he could establish a new benefit year that would include such week; and

c.1. Has no right to unemployment benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act, the Trade Expansion Act of 1962, the Automotive Products Trade Act of 1965 and such other federal laws as are specified in regulations issued by the United States Secretary of Labor; and

2. Has not received and is not seeking unemployment benefits under the unemployment compensation law of Canada; but if he is seeking such benefits and the appropriate agency finally determines that he is not entitled to benefits under such law, he is considered an exhaustee.

(11) "State law" means the unemployment insurance law of any state approved by the United States Secretary of Labor under section 3304 of the Internal Revenue Code.

(b) Effect of State Law Provisions Relating to Regular Benefits on Claims for, and for Payment of, Extended Benefits. — Except when the result would be inconsistent with the other provisions of this section and in matters of eligibility determination, as provided in the regulations of the Commission, the provisions of this Chapter which apply to claims for, or the payment of, regular benefits shall apply to claims for, and the payment of, extended benefits.

(c) Eligibility Requirements for Extended Benefits. — An individual shall be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period only if the Commission finds that with respect to such week:

(1) He is an "exhaustee" as defined in subsection (a)(10).

(2) He has satisfied the requirements of this Chapter for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits. Provided, however, that for purposes of disqualification for extended benefits for weeks of unemployment beginning after March 31, 1981, the term "suitable work" means any work which is within the individual's capabilities to perform if: (i) The gross average weekly remuneration payable for the work exceeds the sum of the individual's weekly extended benefit amount plus the amount, if any, of supplemental unemployment benefits (as defined in section 501(C)(17)(D) of the Internal Revenue Code of 1954) payable to such individual for such week; and (ii) the gross wages payable for the work equal the higher of the minimum wages provided by section 6(a)(1) of the Fair Labor Standards Act of 1938 as amended (without regard to any exemption), or the State minimum wage; and (iii) the work is

offered to the individual in writing and is listed with the State employment service; and (iv) the considerations contained in G.S. 96-14(3) for determining whether or not work is suitable are applied to the extent that they are not inconsistent with the specific requirements of this subdivision; and (v) the individual cannot furnish evidence satisfactory to the Commission that his prospects for obtaining work in his customary occupation within a reasonably short period of time are good, but if the individual submits evidence which the Commission deems satisfactory for this purpose, the determination of whether or not work is suitable with respect to such individual shall be made in accordance with G.S. 96-14(3) without regard to the definition contained in this subdivision. Provided, further, that no work shall be deemed to be suitable work for an individual which does not accord with the labor standard provisions set forth in this subdivision, but the employment service shall refer any individual claiming extended benefits to any work which is deemed suitable hereunder. Provided, further, that any individual who has been disqualified for voluntarily leaving employment, being discharged for misconduct or substantial fault, or refusing suitable work under G.S. 96-14 and who has had the disqualification terminated, shall have such disqualification reinstated when claiming extended benefits unless the termination of the disqualification was based upon employment subsequent to the date of the disqualification.

(3) After March 31, 1981, he has not failed either to apply for or to accept an offer of suitable work, as defined in G.S. 96-12.01(c)(2), to which he was referred by an employment office of the Commission, and he has furnished the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work. If an individual is found to be ineligible hereunder, he shall be ineligible beginning with the week in which he either failed to apply for or to accept the offer of suitable work or failed to furnish the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work and such individual shall continue to be ineligible for extended benefits until he has been employed in each of four subsequent weeks (whether or not consecutive) and has earned remuneration equal to not less than four times his weekly benefit amount.

(4) Pursuant to section 202(a)(7) of the Federal-State Extended Unemployment Compensation Act of 1970 (P.L. 91-373), as amended by section 202(b)(1) of the Unemployment Compensation Amendments of 1992 (Public Law 102-318), for any week of unemployment beginning after March 6, 1993, and before January 1, 1995, the individual is an exhaustee as defined by federal law and has satisfied the requirements of this Chapter for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits. Provided, the terms and conditions of State law that apply to claims for regular compensation and to the payment thereof shall apply to claims for extended benefits and to the payment thereof.

(5) An individual shall not be eligible for extended compensation unless the individual had 20 weeks of full-time insured employment, or the equivalent in insured wages, as determined by a calculation of base period wages based upon total hours worked during each quarter of the base period and the hourly wage rate for each quarter of the base period. For the purposes of this paragraph, the equivalent in insured wages shall be earnings covered by the State law for compensation

purposes which exceed 40 times the individual's most recent weekly benefit amount or one and one-half times the individual's insured wages in that calendar quarter of the base period in which the individual's insured wages were the highest.

(d) Weekly Extended Benefit Amount. — The weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be an amount equal to the weekly benefit amount payable to him during his applicable benefit year. For any individual who was paid benefits during the applicable benefit year in accordance with more than one weekly benefit amount, the weekly extended benefit amount shall be the average of such weekly benefit amounts rounded to the nearest lower full dollar amount (if not a full dollar amount). Provided, that for any week during a period in which federal payments to states under Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970, P.L. 91-373, are reduced under an order issued under Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985, P.L. 99-177, the weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be reduced by a percentage equivalent to the percentage of the reduction in the federal payment. The reduced weekly extended benefit amount, if not a full dollar amount, shall be rounded to the nearest lower full dollar amount.

(e)(1) Total Extended Benefit Amount. — Except as provided in subdivision (2) hereof, the total extended benefit amount payable to any eligible individual with respect to his applicable benefit year shall be the least of the following amounts:

a. Fifty percent (50%) of the total amount of regular benefits which were payable to him under this Chapter in his applicable benefit year; or

b. Thirteen times his weekly benefit amount which was payable to him under this Chapter for a week of total unemployment in the applicable benefit year.

Provided, that during any fiscal year in which federal payments to states under Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970, P.L. 91-373, are reduced under an order issued under Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985, P.L. 99-177, the total extended benefit amount payable to an individual with respect to his applicable benefit year shall be reduced by an amount equal to the aggregate of the reductions under G.S. 96-12.01(d) and the weekly amounts paid to the individual.

(2) Notwithstanding any other provisions of this Chapter, if the benefit year of any individual ends within an extended benefit period, the remaining balance of extended benefits that such individual would, but for this subdivision, be entitled to receive in that extended benefit period, with respect to weeks of unemployment beginning after the end of the benefit year, shall be reduced (but not below zero) by the product of the number of weeks for which the individual received any amounts as trade readjustment allowances within that benefit year, multiplied by the individual's weekly benefit amount for extended benefits.

(f) Beginning and Termination of Extended Benefit Period. —

(1) Whenever an extended benefit period is to become effective in this State as a result of an "on" indicator, or an extended benefit period is to be terminated in this State as a result of an "off" indicator, the Commission shall make an appropriate public announcement; and

(2) Computations required by the provisions of subsection (a)(6) shall be made by the Commission, in accordance with regulations prescribed by the United States Secretary of Labor.

(g) Prior to January 1, 1978, any extended benefits paid to any claimant under G.S. 96-12.01 shall not be charged to the account of the base period employer(s) who pay taxes as required by this Chapter. However, fifty percent (50%) of any such benefits paid shall be allocated as provided in G.S. 96-9(c)(2) a (except that G.S. 96-9(c)(2) b shall not apply), and the applicable amount shall be charged to the account of the appropriate employer paying on a reimbursement basis in lieu of taxes.

On and after January 1, 1978, the federal portion of any extended benefits shall not be charged to the account of any employer who pays taxes as required by this Chapter but the State portion of such extended benefits shall be:

(1) Charged to the account of such employer; or

(2) Not charged to the account of the employer under the provisions of G.S. 96-9(c)(2).

All state portions of the extended benefits paid shall be charged to the account of governmental entities or other employers not liable for FUTA taxes who are the base period employers.

(h) Notwithstanding the provisions of G.S. 96-9(d)(1)a, 96-9(d)(2)c, 96-12.01(g), or any other provision of this Chapter, any extended benefits paid which are one hundred percent (100%) federally financed shall not be charged in any percentage to any employer's account.

(i) For weeks of unemployment beginning on or after June 1, 1981, a claimant who is filing an interstate claim under the interstate benefit payment plan shall be eligible for extended benefits for no more than two weeks when there is an "off indicator" in the state where the claimant files. (Ex. Sess. 1936, c. 1, s. 3; 1937, c. 448, s. 1; 1939, c. 27, ss. 1-3, 14; c. 141; 1941, c. 108, s. 1; c. 276; 1943, c. 377, ss. 1-4; 1945, c. 522, ss. 24-26; 1947, c. 326, s. 21; 1949, c. 424, ss. 19-21; 1951, c. 332, ss. 10-12; 1953, c. 401, ss. 17, 18; 1957, c. 1059, ss. 12, 13; c. 1339; 1959, c. 362, ss. 12-15; 1961, c. 454, ss. 17, 18; 1965, c. 795, ss. 15, 16; 1969, c. 575, s. 9; 1971, c. 673, ss. 25, 26; 1973, c. 1138, ss. 3-7; 1975, c. 2, ss. 1-5; 1977, c. 727, s. 52; 1979, c. 660, ss. 18, 19; 1981, c. 160, ss. 17-23; 1981 (Reg. Sess., 1982), c. 1178, ss. 3-14; 1983, c. 585, ss. 12-16; c. 625, ss. 1, 7; 1985, c. 552, s. 9; 1985 (Reg. Sess., 1986), c. 918; 1987, c. 17, s. 8; 1993, c. 122, s. 2; 1993 (Reg. Sess., 1994), c. 680, ss. 1-3; 1995 (Reg. Sess., 1996), c. 646, s. 25(a); 1997-456, s. 27; 1999-340, ss. 4, 5; 2001-414, ss. 42, 43, 44; 2002-143, ss. 1, 1.1.)

Effect of Amendments. —

Session Laws 2002-143, ss. 1 and 1.1, effective October 4, 2002, in subdivision (a1)(4), added sub-subdivisions c. through e.; and added subdivision (g)(2), making related changes.

Chapter 97.

Workers' Compensation Act.

Article 1.

Workers' Compensation Act.

§ 97-1. Short title.

Legal Periodicals. —

Survey of Developments in North Carolina Law and the Fourth Circuit, 1999: Revisiting Rutledge: A Survey of Recent Developments in Occupational Disease Law Under the North Carolina Workers' Compensation Act, 78 N.C.L. Rev. 2083 (2000).

§ 97-2. Definitions.

CASE NOTES

I. IN GENERAL.

Applied in Zimmerman v. Eagle Elec. Mfg. Co., 147 N.C. App. 748, 556 S.E.2d 678, 2001 N.C. App. LEXIS 1255 (2001); Bailey v. W. Staff Servs., — N.C. App. —, 566 S.E.2d 509, 2002 N.C. App. LEXIS 747 (2002).

Cited in Landry v. US Airways, Inc., 150 N.C. App. 121, 563 S.E.2d 23, 2002 N.C. App. LEXIS 385 (2002); Foster v. U.S. Airways, Inc., 149 N.C. App. 913, 563 S.E.2d 235, 2002 N.C. App. LEXIS 406 (2002); Shoemaker v. Creative Builders, — N.C. App. —, 562 S.E.2d 622, 2002 N.C. App. LEXIS 588 (2002); Pomeroy v. Tanner Masonry, — N.C. App. —, 565 S.E.2d 209, 2002 N.C. App. LEXIS 709 (2002); Nix v. Collins & Aikman, Co., — N.C. App. —, 566 S.E.2d 176, 2002 N.C. App. LEXIS 751 (2002); Johnson v. S. Tire Sales & Serv., — N.C. App. —, 567 S.E.2d 773, 2002 N.C. App. LEXIS 920 (2002).

II. EMPLOYMENT, EMPLOYEES, AND EMPLOYERS.

A. In General.

Aliens. —

Illegal alien, who obtained his employment with falsified documents, was entitled to workers' compensation benefits following injuries in a fall. Ruiz v. Belk Masonry Co., 148 N.C. App. 675, 559 S.E.2d 249, 2002 N.C. App. LEXIS 50 (2002).

IV. COMPENSABLE INJURIES, GENERALLY.

Injury Must Occur at a Judicially Cognizable Point in Time. — The specific traumatic incident provision of G.S. 97-2(6) requires plaintiff to prove an injury at a judicially cognizable point in time. Judicially cognizable does not mean "ascertainable on an exact date," but instead should be read to describe a showing by plaintiff which enables the Commission to determine when, within a reasonable period, the specific injury occurred; the evidence must show that there was some event that caused the injury, not a gradual deterioration, and if the window during which the injury occurred can be narrowed to a judicially cognizable period, then the statute is satisfied. Ruffin v. Compass Group USA, — N.C. App. —, 563 S.E.2d 633, 2002 N.C. App. LEXIS 592 (2002).

V. ACCIDENT.

An Injury, to be Compensable, Must Result From an Accident. — Industrial commission properly denied the employee's workers' compensation claim, as the meeting at which the employee received a performance rating, did not constitute a workplace accident; the meeting was not an unexpected, unusual or untoward occurrence, and was not an interruption of the work routine and the introduction of unusual conditions likely to result in unexpected consequences. Pitillo v. N.C. Dep't of Envtl. Health & Natural Res., — N.C. App. —, 556 S.E.2d 807, 2002 N.C. App. LEXIS 882 (2002).

VI. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.

C. In the Course of.

Performance of Special Errand. — Employee who was injured when thrown from a pick-up truck while riding from residence to a site where supervisor wanted employee to pick up a dump truck was on a special errand for employer and was covered under North Carolina's Workers' Compensation Act. Osmond v. Carolina Concrete Specialties, — N.C. App. —, 568 S.E.2d 204, 2002 N.C. App. LEXIS 906 (2002).

VIII. INJURIES WHILE GOING TO AND FROM WORK.

A. In General.

But Injury on Employer's Premises May Be Compensable. —

Employee who waited almost 30 minutes to get a ride home from another employee and who was injured when the other employee caused a vehicle accident in the employer's parking lot was covered by the North Carolina Workers' Compensation Act and the trial court properly dismissed a lawsuit which the injured employee filed against the employee who gave the injured employee a ride. Ragland v. Harris, — N.C. App. —, 566 S.E.2d 827, 2002 N.C. App. LEXIS 894 (2002).

Attempt to Climb Locked Parking Lot Gate. — Employee's negligence in attempting to climb employer's locked parking lot gate after his shift ended so as to reach his ride did not defeat the applicability of the "premises exception" to the "coming and going rule"; since the full Commission was the ultimate fact finder, it did not have to make specific findings of fact when it modified hearing commissioner's findings. Arp v. Parkdale Mills, Inc., 150 N.C. App. 266, 563 S.E.2d 62, 2002 N.C. App. LEXIS 510 (2002).

X. ASSAULTS AND FIGHTS.

No Compensation Where Cause of Assault Is Personal. —

Injuries which an employee suffered when the employee's ex-boyfriend entered the employee's workplace and shot the employee three times were not compensable under North Carolina's Workers' Compensation Act even though the employee's supervisor knew that the the ex-boyfriend had assaulted the employee and threatened to kill the employee and the supervisor might have prevented the incident by calling police. Dildy v. MBW Invs., Inc., — N.C. App. —, 566 S.E.2d 759, 2002 N.C. App. LEXIS 875 (2002).

XVII. DISABILITY.

Capacity of Particular Employee Must Be Considered. —

Employee failed to meet her burden of showing a continuing disability for workers' compensation purposes where: (1) the employee's doctor released her to return to work, with few restrictions other than a limitation on prolonged standing; (2) although the employee's condition prevented her from dance instruction, the employee's physical limitations were not so restrictive as to render the employee incapable of performing well in alternate employment; and (3) the employer's expert testified that with the employee's level of education and transferable skills, she would be able to find comparable employment at a commensurate wage. Gilberto v. Wake Forest Univ., — N.C. App. —, 566 S.E.2d 788, 2002 N.C. App. LEXIS 864 (2002).

Evidence of Temporary Total Disability Held Sufficient. —

Though employee's medical evidence was insufficient to show his temporary total disability, he proved such disability through evidence that, while capable of some work, he was, after reasonable efforts, unsuccessful in his effort to obtain employment. Bridwell v. Golden Corral Steak House, 149 N.C. App. 338, 561 S.E.2d 298, 2002 N.C. App. LEXIS 186 (2002), cert. denied, 355 N.C. 747, 565 S.W.3d 193 (2002).

XIX. COMPENSATION.

Determination of Compensation for Former Employee Diagnosed with Asbestosis. — Since the North Carolina General Assembly has made no specific provision for determining compensation pursuant to G.S. 97-64 when a former employee is diagnosed with asbestosis some time after his removal from the employment, the only statutory provision which was in fairness to be used was the "final method," contained in the second full paragraph of G.S. 97-2(5). Abernathy v. Sandoz Chemicals/Clariant Corp., — N.C. App. —, 565 S.E.2d 218, 2002 N.C. App. LEXIS 724 (2002).

§ 97-9. Employer to secure payment of compensation.

CASE NOTES

Cited in Wood v. Guilford County, 355 N.C. 161, 558 S.E.2d 490, 2002 N.C. LEXIS 16 (2002).

§ 97-10.1. Other rights and remedies against employer excluded.

Legal Periodicals. —

Survey of Developments in North Carolina Law and the Fourth Circuit, 1999: Potential Violence to the Bottom Line — Expanding Employer Liability for Acts of Workplace Violence in North Carolina, 78 N.C.L. Rev. 2053 (2000).

CASE NOTES

An employee cannot elect to pursue an alternate avenue of recovery,

Employee who waited almost 30 minutes to get a ride home from another employee and who was injured when the other employee caused a vehicle accident in the employer's parking lot was covered by the North Carolina Workers' Compensation Act and the trial court properly dismissed a lawsuit which the injured employee filed against the employee who gave the injured employee a ride. Ragland v. Harris, — N.C. App. —, 566 S.E.2d 827, 2002 N.C. App. LEXIS 894 (2002).

Assault by Fellow Employee. —

Robbery was a risk associated with night manager's job because she was required to count money as the end of the day, and the court held that the night manager could not sue her employer for negligently hiring another employee who assaulted her because, under the circumstances, the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., provided an exclusive remedy for obtaining compensation. Caple v. Bullard Rests., Inc., — N.C. App. —, 567 S.E.2d 828, 2002 N.C. App. LEXIS 919 (2002).

And Does Not Extend to Claim Against Employer Disconnected With Employment. —

North Carolina Workers' Compensation Act did not provide the exclusive remedy to a state employee who was sexually assaulted in a county courthouse where the county had employed a security firm to provide security in the courthouse. Wood v. Guilford County, 355 N.C. 161, 558 S.E.2d 490, 2002 N.C. LEXIS 16 (2002).

§ 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.

CASE NOTES

III. Parties and Procedure.

III. PARTIES AND PROCEDURE.

Employer's Third Party Negligence Claim Time-Barred. — In the employer and employee's third party negligence claim against the general contractor and subcontractor, where the requirements of G.S. 97-10.2(c) were not met, as the employee and employer did not settle with the general contractor or subcontractor within 12 months of the employee's injuries, and the employer did not file a written admission of liability with the industrial commission, under G.S. 97-10.2(b), the employee had the sole right to proceed after the employer did not file suit within 12 months of the injuries. Blair Concrete Servs., Inc. v. Van-Allen Steel Co., — N.C. App. —, 566 S.E.2d 766, 2002 N.C. App. LEXIS 869 (2002).

§ 97-12. Use of intoxicant or controlled substance; willful neglect; willful disobedience of statutory duty, safety regulation or rule.

CASE NOTES

I. In General.
II. Illustrative Cases.

I. IN GENERAL.

Presumption from Use of Controlled Substances. — Once an employer proves employee's use of a non-prescribed controlled substance, it is presumed that the employee was impaired; once the employer presents competent evidence that the impairment was a proximate cause of the accident, the burden shifts to the employee to rebut the presumption of impairment or to show that the impairment was not a contributing proximate cause of the accident. Willey v. Williamson Produce, 149 N.C. App. 74, 562 S.E.2d 1, 2002 N.C. App. LEXIS 139 (2002).

II. ILLUSTRATIVE CASES.

Impairment by Cocaine. — As the employer produced substantial competent evidence to show that its employee was impaired by cocaine before his fatal truck crash, the Commission's award of workers' compensation death benefits to the employee's dependant would be reversed. Willey v. Williamson Produce, 149 N.C. App. 74, 562 S.E.2d 1, 2002 N.C. App. LEXIS 139 (2002).

Employee who injured himself when a crane he was improperly operating toppled over was not barred from workers' compensation award because there was no evidence that his injuries were the result of a willful intention to injure himself, or a willful breach of a safety rule or procedure adopted by his employer. Harris v. Thompson Contractors, 148 N.C. App. 472, 558 S.E.2d 894, 2002 N.C. App. LEXIS 26 (2002).

§ 97-13. Exceptions from provisions of Article.

CASE NOTES

VI. Prisoners.

VI. PRISONERS.

Work Release Injury. — Workers' compensation claim by prison inmate who was injured while working for a private employer on work release was not barred by statute. Harris v. Thompson Contractors, 148 N.C. App. 472, 558 S.E.2d 894, 2002 N.C. App. LEXIS 26 (2002).

§ 97-18. Prompt payment of compensation required; installments; payment without prejudice; notice to Commission; penalties.

CASE NOTES

Penalties. —

Injured employee was entitled to 10% penalty the North Carolina Industrial Commission assessed against his employer's insurance carrier for late payment of undisputed medical expenses. Stevenson v. Noel Williams Masonry, Inc., 148 N.C. App. 90, 557 S.E.2d 554, 2001 N.C. App. LEXIS 1268 (2001).

Findings on Issue of Newly Discovered Evidence Required. — Where employer who was paying benefits to employee for an occupational disease based on exposure to harmful materials sought to contest its liability after the 90 day period for contesting benefits under G.S. 97-18(d) had expired, based on the fact that after leaving its employ the employee had worked for another employer where he was exposed to the same harmful materials, the Commission had the obligation to make findings as to whether the employee's subsequent

exposure was newly discovered evidence allowing the employer to contest the payment of benefits after 90 days, under G.S. 97-18(d). Shockley v. Cairn Studios Ltd., 149 N.C. App. 961, 563 S.E.2d 207, 2002 N.C. App. LEXIS 363 (2002).

Failure to Use Form 60. — Where employer's letter, which it claimed was a sufficient substitute for Form 60, was untimely and did not contain the information required by Form 60, and defendants never rescinded their Form 61 denying the employee's claim, the employer failed to admit liability prior to the hearing and thus could not direct the employee's medical treatment. Bailey v. W. Staff Servs., — N.C. App. —, 566 S.E.2d 509, 2002 N.C. App. LEXIS 747 (2002).

§ 97-25. Medical treatment and supplies.

CASE NOTES

I. In General.
V. Selection of Physician by Employee.

I. IN GENERAL.

Construction with G.S. 97-2(19). — Inherent in a North Carolina Industrial Commission's award granted pursuant to G.S. 97-25 (1999) is that the compensation will incorporate the parameters of G.S. 97-2(19). Johnson v. S. Tire Sales & Serv., — N.C. App. —, 567 S.E.2d 773, 2002 N.C. App. LEXIS 920 (2002).

Employee Not Required to Undergo Rehabilitation When Not Beneficial. — Competent evidence in the form of testimony by doctors and psychologists supported the Commission's decision that an employee who suffered psychological disorders as a result of encephalitis from surgery to correct a back injury from work did not have to undergo rehabilitation, because he would not be able to become employable again in spite of the rehabilitation. Shoemaker v. Creative Builders, — N.C. App. —, 562 S.E.2d 622, 2002 N.C. App. LEXIS 588 (2002).

Return to College for Vocational Rehabilitation. — The Commission did not err in approving of employee's return to college as a proper form of vocational rehabilitation under G.S. 97-25 where the evidence showed that further schooling was the employee's only hope of securing wages comparable to the employee's pre-injury flight attendant wages. Foster v. U.S. Airways, Inc., 149 N.C. App. 913, 563 S.E.2d 235, 2002 N.C. App. LEXIS 406 (2002).

Cited in Pomeroy v. Tanner Masonry, — N.C. App. —, 565 S.E.2d 209, 2002 N.C. App. LEXIS 709 (2002); Skillin v. Magna Corporation/Greene's Tree Serv., Inc., — N.C. App. —, 566 S.E.2d 717, 2002 N.C. App. LEXIS 877 (2002).

V. SELECTION OF PHYSICIAN BY EMPLOYEE.

Employee May Choose Physician Even in Absence of Emergency. —

Employer was required to pay medical expenses for treatment at a hospital of an injured employee with psychological disorders, where the employee without prior authorization admitted himself to the hospital, as an emergency was not required and the hospitalization was necessary to treat the employee's depression and suicidal feelings. Shoemaker v. Creative Builders, — N.C. App. —, 562 S.E.2d 622, 2002 N.C. App. LEXIS 588 (2002).

§ 97-25.1. Limitation of duration of medical compensation.

CASE NOTES

Cited in Pomeroy v. Tanner Masonry, — N.C. App. —, 565 S.E.2d 209, 2002 N.C. App. LEXIS 709 (2002).

Illustrative Cases. — North Carolina Industrial Commission's order that employer was obligated to pay "for all related medical expenses incurred" was overly broad because it did not set a time limit on payments. Johnson v. S. Tire Sales & Serv., — N.C. App. —, 567 S.E.2d 773, 2002 N.C. App. LEXIS 920 (2002).

§ 97-27. Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.

CASE NOTES

Cited in Skillin v. Magna Corporation/Greene's Tree Serv., Inc., — N.C. App. —, 566 S.E.2d 717, 2002 N.C. App. LEXIS 877 (2002).

§ 97-28. Seven-day waiting period; exceptions.

CASE NOTES

Cited in Kanipe v. Lane Upholstery, — N.C. App. —, 566 S.E.2d 167, 2002 N.C. App. LEXIS 755 (2002).

§ 97-29. Compensation rates for total incapacity.

CASE NOTES

I. In General.
II. Permanent and Total Disability.

I. IN GENERAL.

For discussion of the two lines of case law relating to the concept of Maximum Medical Improvement and its applicability to G.S. 97-29, 97-30 and 97-31, see Effingham v. Kroger Co., 149 N.C. App. 105, 561 S.E.2d 287, 2002 N.C. App. LEXIS 141 (2002).

Concept of Maximum Medical Improvement Is Not Applicable to § 97-29 or § 97-30. — While G.S. 97-31 contemplates a "healing period" followed by a statutory period of time corresponding to the specific physical injury, and allows an employee to receive scheduled benefits for a specific physical impairment only once "the healing period" ends, neither G.S. 97-29 nor G.S. 97-30 contemplates a framework similar to that established by G.S. 97-31. Under G.S. 97-29 or G.S. 97-30, an employee may receive compensation once the employee has established a total or partial loss of wage-earning capacity, and the employee may receive such compensation for as long as the loss of wage-earning capacity continues, for a maximum of 300 weeks in cases of partial loss of wage-earning capacity. Hence, the primary significance of the concept of Maximum Medical Improvement (MMI) is to delineate a crucial point in time only within the context of a claim for scheduled benefits under G.S. 97-31; the concept of MMI does not have any direct bearing upon an employee's right to continue to receive temporary disability benefits once the employee has established a loss of wage-earning capacity pursuant to G.S. 97-29 or G.S. 97-30. Knight v. Wal-Mart Stores, Inc., 149 N.C. App. 1, 562 S.E.2d 434, 2002 N.C. App. LEXIS 140 (2002), cert. denied, 355 N.C. 749, 565 S.E.2d 667 (2002).

Maximum Medical Improvement as Prerequisite to Permanent Disability. — An employee may seek a determination of her entitlement to permanent disability under G.S. 97-29, 97-30, or 97-31 only after reaching maximum medical improvement. Effingham v. Kroger Co., 149 N.C. App. 105, 561 S.E.2d 287, 2002 N.C. App. LEXIS 141 (2002).

II. PERMANENT AND TOTAL DISABILITY.

Temporary Total Disability Benefits Allowed in Light of Agreements. — The Commission did not err in awarding employee temporary total disability (TTD) benefits, given that the parties had entered into a Form 21 agreement and a Form 26 supplemental agreement stipulating to TTD benefits. Foster v. U.S. Airways, Inc., 149 N.C. App. 913, 563 S.E.2d 235, 2002 N.C. App. LEXIS 406 (2002).

Plaintiff could prove total loss of wage-earning capacity by producing evidence that he was capable of some work but, after a reasonable effort on his part, was unsuccessful in his effort to obtain employment. Zimmerman v. Eagle Elec. Mfg. Co., 147 N.C. App. 748, 556 S.E.2d 678, 2001 N.C. App. LEXIS 1255 (2001).

Evidence of Total Disability Held Insufficient. —

No finding of fact supported the Commission's conclusion of law that an injured employee was entitled to permanent and total disability where because of an accident the employee may have aggravated her preexisting condition, but all the evidence showed that she was not totally incapable of earning wages, and instead the competent evidence showed that her wage earning capacity was greater than or equal to that prior to her fall at work. Frazier v. McDonald's, 149 N.C. App. 745, 562 S.E.2d 295, 2002 N.C. App. LEXIS 293 (2002).

§ 97-30. Partial incapacity.

CASE NOTES

For discussion of the two lines of case law relating to the concept of Maximum Medical Improvement and its applicability to G.S. 97-29, 97-30 and 97-31, see Effingham v. Kroger Co., 149 N.C. App. 105, 561 S.E.2d 287, 2002 N.C. App. LEXIS 141 (2002).

Concept of Maximum Medical Improvement Is Not Applicable to § 97-29 or § 97-30. — While G.S. 97-31 contemplates a "healing period" followed by a statutory period of time corresponding to the specific physical injury, and allows an employee to receive scheduled benefits for a specific physical impairment only once "the healing period" ends, neither G.S. 97-29 nor G.S. 97-30 contemplates a framework similar to that established by G.S. 97-31. Under G.S. 97-29 or G.S. 97-30, an employee may receive compensation once the employee has established a total or partial loss of wage-earning capacity, and the employee may receive such compensation for as long as the loss of wage-earning capacity continues, for a maximum of 300 weeks in cases of partial loss of wage-earning capacity. Hence, the primary significance of the concept of Maximum Medical Improvement (MMI) is to delineate a crucial point in time only within the context of a claim for scheduled benefits under G.S. 97-31; the concept of MMI does not have any direct bearing upon an employee's right to continue to receive temporary disability benefits once the employee has established a loss of wage-earning capacity pursuant to G.S. 97-29 or G.S. 97-30. Knight v. Wal-Mart Stores, Inc., 149 N.C. App. 1, 562 S.E.2d 434, 2002 N.C. App. LEXIS 140 (2002), cert. denied, 355 N.C. 749, 565 S.E.2d 667 (2002).

Maximum Medical Improvements Prerequisite to Permanent Disability. — An employee may seek a determination of her entitlement to permanent disability under G.S. 97-29, 97-30, or 97-31 only after reaching maximum medical improvement. Effingham v. Kroger Co., 149 N.C. App. 105, 561 S.E.2d 287, 2002 N.C. App. LEXIS 141 (2002).

Entitlement to Partial Disability Compensation Shown. —

Employee met burden of proving employment at a diminished capacity after a work-related injury by showing employment at a wage lower than pre-injury employment wage and because employer did not prove that the employee was able to earn higher wages, the North Carolina Industrial Commission did not err by finding that the employee was eligible to receive partial disability compensation. Osmond v. Carolina Concrete Specialties, — N.C. App. —, 568 S.E.2d 204, 2002 N.C. App. LEXIS 906 (2002).

§ 97-31. Schedule of injuries; rate and period of compensation.

CASE NOTES

I. IN GENERAL.

For discussion of the two lines of case law relating to the concept of Maximum Medical Improvement and its applicability to G.S. 97-29, 97-30 and 97-31, see Effingham v. Kroger Co., 149 N.C. App. 105, 561 S.E.2d 287, 2002 N.C. App. LEXIS 141 (2002).

Concept of Maximum Medical Improvement Is Not Applicable to § 97-29 or § 97-30. — While G.S. 97-31 contemplates a "healing period" followed by a statutory period of time corresponding to the specific physical injury, and allows an employee to receive scheduled benefits for a specific physical impairment only once "the healing period" ends, neither G.S.

97-29 nor G.S. 97-30 contemplates a framework similar to that established by G.S. 97-31. Under G.S. 97-29 or G.S. 97-30, an employee may receive compensation once the employee has established a total or partial loss of wage-earning capacity, and the employee may receive such compensation for as long as the loss of wage-earning capacity continues, for a maximum of 300 weeks in cases of partial loss of wage-earning capacity. Hence, the primary significance of the concept of Maximum Medical Improvement (MMI) is to delineate a crucial point in time only within the context of a claim for scheduled benefits under G.S. 97-31; the concept of MMI does not have any direct bearing upon an employee's right to continue to receive temporary disability benefits once the employee has established a loss of wage-earning capacity pursuant to G.S. 97-29 or G.S. 97-30. Effingham v. Kroger Co., 149 N.C. App. 105, 561 S.E.2d 287, 2002 N.C. App. LEXIS 141 (2002).

Maximum Medical Improvement Is Prerequisite to Determine Disability. —

Employee may seek a determination of her entitlement to permanent disability under G.S. 97-29, 97-30, or 97-31 only after reaching maximum medical improvement. Effingham v. Kroger Co., 149 N.C. App. 105, 561 S.E.2d 287, 2002 N.C. App. LEXIS 141 (2002).

VII. DISFIGUREMENT.

Employee's chipped teeth and tooth abscess did not diminish her future earning capacity and, thus, did not rise to the level of a serious disfigurement entitling her to compensation under G.S. 97-31(21). Russell v. Lab. Corp. of Am., — N.C. App. —, 564 S.E.2d 634, 2002 N.C. App. LEXIS 644 (2002).

IX. IMPORTANT ORGANS.

Remand for Determination of Whether Venous Thrombosis Is Injury to Legs or Other Important Organ. — Medical testimony that there was a reasonable possibility that employee's deep venous thrombosis resulted from an injury which the employee sustained at work was sufficient to support North Carolina Industrial Commission's decision awarding workers' compensation benefits, but the appellate court remanded the case to the Commission for further proceedings because the record did not establish that the Commission considered and rejected an award of benefits under G.S. 97-31(15) before it awarded benefits under G.S. 97-31(24). Holley v. ACTS, Inc., — N.C. App. —, 567 S.E.2d 457, 2002 N.C. App. LEXIS 924 (2002).

Denial of Claim Under Subdivision (24) Held Proper. —

Given the lack of any objective testing, such as x-rays, CT scans, MRI and EEG tests, showing that the employee had any injury to her brain, combined with her active lifestyle, enrollment in college, and articulate and alert demeanor at the hearing, the Industrial Commission's decision that she had not suffered an impairment to an important organ, entitling her to compensation under G.S. 97-31(24), was adequately supported. Russell v. Lab. Corp. of Am., — N.C. App. —, 564 S.E.2d 634, 2002 N.C. App. LEXIS 644 (2002).

§ 97-32. Refusal of injured employee to accept suitable employment as suspending compensation.

CASE NOTES

Justifiable Rejection of Employment Offer Shown. —

Commission properly found that maintenance worker position which employer offered employee, who could no longer drive a truck, was "make work" that did not exist in the marketplace and was not suitable employment for the employee, and that employee's refusal thereof was justified and did not disqualify him from benefits. Moore v. Concrete Supply Co., 149 N.C. App. 381, 561 S.E.2d 315, 2002 N.C. App. LEXIS 195 (2002).

Considering the employee's physical restrictions, which her doctor opined prevented her from working, and the vague description of the temporary, modified position her employer offered her, her rejection of the position was reasonable and did not preclude her from receiving wage compensation. Bailey v. W. Staff Servs., — N.C. App. —, 566 S.E.2d 509, 2002 N.C. App. LEXIS 747 (2002).

§ 97-32.1. Trial return to work.

CASE NOTES

Right to Continuing Compensation. — Where a trial return to work is unsuccessful, the employee's right to continuing compensation under G.S. 97-29 is unimpaired unless terminated or suspended thereafter pursuant to the provisions of the Workers' Compensation Act. Burchette v. E. Coast Millwork Distribs., Inc., 149 N.C. App. 802, 562 S.E.2d 459, 2002 N.C. App. LEXIS 302 (2002).

§ 97-40. Commutation and payment of compensation in absence of dependents; "next of kin" defined; commutation and distribution of compensation to partially dependent next of kin; payment in absence of both dependents and next of kin.

CASE NOTES

Abandoning Parent Loses Share of Death Benefits of Child. —

Words "care and maintenance" were not to be read separately but instead combined to define a parent's overall responsibilities; in order to rehabilitate, a parent had to resume the care and maintenance of the child, not just one or the other. Davis v. Trus Joist MacMillan, 148 N.C. App. 248, 558 S.E.2d 210, 2002 N.C. App. LEXIS 3 (2002), cert. denied, 355 N.C. 490, 563 S.E.2d 564 (2002).

§ 97-42. Deduction of payments.

CASE NOTES

The defendant employer was entitled to a credit, etc.

There was no basis for denying first employer a credit for benefits overpaid to an employee where the employee's disability was attributable to the exacerbation of his occupational disease, first contracted while working for the first employer, while working for a second employer. Shockley v. Cairn Studios Ltd., 149 N.C. App. 961, 563 S.E.2d 207, 2002 N.C. App. LEXIS 363 (2002).

Defendants Held Not Entitled to Deduction. —

Employer was not entitled to a credit against the workers' compensation that employer was obligated to pay an employee for royalty income employee received from another source. Jenkins v. Piedmont Aviation Servs., 147 N.C. App. 419, 557 S.E.2d 104, 2001 N.C. App. LEXIS 1192 (2001).

§ 97-47. Change of condition; modification of award.

CASE NOTES

I. In General.
II. Change of Condition.

I. IN GENERAL.

Cited in Pomeroy v. Tanner Masonry, — N.C. App. —, 565 S.E.2d 209, 2002 N.C. App. LEXIS 709 (2002).

II. CHANGE OF CONDITION.

Evidence Held Sufficient. —

Assertion of injured employee who had previously received an award of benefits and med-

ical expenses that she was wholly incapable of employment was not sufficient evidence to meet her burden of showing a substantial change in condition at her rehearing because her opinion was contrary to the unanimous and unchanged medical evidence that she was capable of performing light duty work, and because her testimony about her physical restrictions was virtually identical to that of the prior hearing at which she had been awarded benefits and medical expenses. Shingleton v. Kobacker Group, 148 N.C. App. 667, 559 S.E.2d 277, 2002 N.C. App. LEXIS 52 (2002).

Record supported Industrial Commission's decision that the employee's current unemployment was not related to prior compensable injury where employee had returned to employment without restrictions after his injury and, subsequently, certified that he was able to work. Pomeroy v. Tanner Masonry, — N.C. App. —, 565 S.E.2d 209, 2002 N.C. App. LEXIS 709 (2002).

§ 97-53. Occupational diseases enumerated; when due to exposure to chemicals.

CASE NOTES

I. IN GENERAL.

"Occupational Disease" Defined. — There was no evidence that the employee's nervous breakdown was (1) characteristic of and peculiar to the employee's employment; (2) not an ordinary disease to which the public was exposed; or (3) that there was a causal connection between the disease and the employee's employment; thus, the industrial commission properly denied the employee's workers' compensation claim. Pitillo v. N.C. Dep't of Envtl. Health & Natural Res., — N.C. App. —, 556 S.E.2d 807, 2002 N.C. App. LEXIS 882 (2002).

Cited in Nix v. Collins & Aikman, Co., — N.C. App. —, 566 S.E.2d 176, 2002 N.C. App. LEXIS 751 (2002); Robbins v. Wake County Bd. of Educ., — N.C. App. —, 566 S.E.2d 139, 2002 N.C. App. LEXIS 762 (2002).

II. SUBDIVISION (13).

What Constitutes Occupational Disease. — Competent evidence supported the Industrial Commission's conclusion that a workers' compensation claimant did not prove he developed an occupational disease due to conditions characteristic of his employment because his hyperactive airways disease was caused by his personal, unusual sensitivity to small amounts of certain chemicals. Nix v. Collins & Aikman, Co., — N.C. App. —, 566 S.E.2d 176, 2002 N.C. App. LEXIS 751 (2002).

What Plaintiff Must Show Under Subdivision (13). — Competent evidence supported the industrial commission's finding that (1) while the nature of the claimant's work as a secretary and graphic artist did not place her at greater risk for contracting mesothelioma, the requirement that she work in a building with higher-than-normal asbestos levels did; (2) mesothelioma was not an ordinary disease of life to which the public was exposed equally as the claimant; (3) there was a causal connection between mesothelioma and the claimant's employment; and (4) the claimant sustained a compensable occupational disease as a result of her employment, pursuant to G.S. 97-53(13). Robbins v. Wake County Bd. of Educ., — N.C. App. —, 566 S.E.2d 139, 2002 N.C. App. LEXIS 762 (2002).

III. PARTICULAR DISEASES.

Hepatitis C Virus. — Habilitation aide presented no evidence that she was exposed to the hepatitis C virus at work as the aide relied on alleged blood-to-blood exposure with residents at the facility as sufficient proof of causation; however, exposure to blood, standing alone, was not sufficient evidence of exposure to the hepatitis C virus as proof of exposure to the disease or disease-causing agents during employment was required and uninfected blood could not be characterized as a disease-causing agent. Poole v. Center, — N.C. App. —, 566 S.E.2d 839, 2002 N.C. App. LEXIS 902 (2002).

Carpal Tunnel Syndrome. — Employee did not prove the presence of a compensable occupational disease under G.S. 97-53(13), as the employee's job was high impact/low repetition which could not cause carpal tunnel syndrome, and did not place the employee at a greater risk for developing carpal tunnel syndrome than the general public. Futrell v. Resinall Corp., — N.C. App. —, 566 S.E.2d 181, 2002 N.C. App. LEXIS 779 (2002).

§ 97-54. "Disablement" defined.

CASE NOTES

Disablement from Asbestosis or Silicosis. — Employee becoming disabled by asbestosis or silicosis within the terms of the specific definition embodied in G.S. 97-54, and who was no longer employed by the employer and had not been "removed" by the employer as required by G.S. 97-61.5(b), was entitled to be considered for ordinary compensation measured by the general provisions of the North Carolina Workmen's Compensation Act and not G.S. 97-61.5(b). Abernathy v. Sandoz Chemicals/Clariant Corp., — N.C. App. —, 565 S.E.2d 218, 2002 N.C. App. LEXIS 724 (2002).

Disablement from asbestosis under G.S. 97-54 was defined as the event of becoming actually incapacitated because of asbestosis to earn, in the same or any other employment, the wages that the employee was receiving at the time of his last injurious exposure to asbestos. Abernathy v. Sandoz Chemicals/Clariant Corp., — N.C. App. —, 565 S.E.2d 218, 2002 N.C. App. LEXIS 724 (2002).

§ 97-57. Employer liable.

CASE NOTES

Applied in Shockley v. Cairn Studios Ltd., 149 N.C. App. 961, 563 S.E.2d 207, 2002 N.C. App. LEXIS 363 (2002).

Cited in Abernathy v. Sandoz Chemicals/Clariant Corp., — N.C. App. —, 565 S.E.2d 218, 2002 N.C. App. LEXIS 724 (2002).

§ 97-61.5. Hearing after first examination and report; removal of employee from hazardous occupation; compensation upon removal from hazardous occupation.

CASE NOTES

Removal by Employer a Prerequisite. — Employee becoming disabled by asbestosis or silicosis within the terms of the specific definition embodied in G.S. 97-54, and who was no longer employed by the employer and had not been "removed" by the employer as required by G.S. 97-61.5(b), was entitled to be considered for ordinary compensation measured by the general provisions of the North Carolina Workmen's Compensation Act and not G.S.97-61.5(b). Abernathy v. Sandoz Chemicals/Clariant Corp., — N.C. App. —, 565 S.E.2d 218, 2002 N.C. App. LEXIS 724 (2002).

§ 97-64. General provisions of act to control as regards benefits.

CASE NOTES

Disablement from Asbestosis or Silicosis. — Employee becoming disabled by asbestosis or silicosis within the terms of the specific definition embodied in G.S. 97-54, and who was no longer employed by the employer and had not been "removed" by the employer as required by G.S. 97-61.5(b), was, under G.S. 97-64 entitled to be considered for ordinary compensation measured by the general provisions of the North Carolina Workmen's Compensation Act and not G.S. 97-61.5(b). Abernathy v. Sandoz Chemicals/Clariant Corp., — N.C. App. —, 565 S.E.2d 218, 2002 N.C. App. LEXIS 724 (2002).

§ 97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.

CASE NOTES

Applied in N.C. Ins. Guar. Ass'n v. Int'l Paper Co., — N.C. App. —, 569 S.E.2d 285, 2002 N.C. App. LEXIS 1092 (2002).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The Opinion of the Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990), annotated under this section in the main volume, should be disregarded, in light of the 1991 amendment to this section.*

§ 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval; direct payment as award.

CASE NOTES

Cited in Shockley v. Cairn Studios Ltd., 149 N.C. App. 961, 563 S.E.2d 207, 2002 N.C. App. LEXIS 363 (2002).

§ 97-85. Review of award.

CASE NOTES

The Commission is the fact-finding body, etc.

As the full Commission is the ultimate fact finder, it does not have to make specific findings of fact when it modifies a hearing commissioner's findings. Arp v. Parkdale Mills, Inc., 150 N.C. App. 266, 563 S.E.2d 62, 2002 N.C. App. LEXIS 510 (2002).

Scope of Issues on Appeals to Full Commission. — When a matter is "appealed" to the full North Carolina Industrial Commission pursuant to to G.S. 97-85, it was the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties. Abernathy v. Sandoz Chemicals/Clariant Corp., — N.C. App. —, 565 S.E.2d 218, 2002 N.C. App. LEXIS 724 (2002).

Cited in Skillin v. Magna Corporation/Greene's Tree Serv., Inc., — N.C. App. —, 566 S.E.2d 717, 2002 N.C. App. LEXIS 877 (2002).

§ 97-86.1. Payment of award pending appeal in certain cases.

CASE NOTES

Credit for Overpayment. — There was no basis, under G.S. 97-86.1(d), for denying a first employer a credit for benefits overpaid to an employee where the employee's disability was attributable to the exacerbation of his occupational disease, first contracted while working for the first employer, while working for a second employer. Shockley v. Cairn Studios Ltd., 149 N.C. App. 961, 563 S.E.2d 207, 2002 N.C. App. LEXIS 363 (2002).

§ 97-88.1. Attorney's fees at original hearing.

CASE NOTES

Fees Upheld. —

The North Carolina Industrial Commission properly awarded employee attorneys' fees under G.S. 97-88.1 where there was no indication that the Commission relied upon unsupported findings of fact or improperly relied on its conclusions of law in an earlier award of attorneys' fees. Bryson v. Phil Cline Trucking, — N.C. App. —, 564 S.E.2d 591, 2002 N.C. App. LEXIS 675 (2002).

Cited in Pomeroy v. Tanner Masonry, — N.C. App. —, 565 S.E.2d 209, 2002 N.C. App. LEXIS 709 (2002).

§ 97-90. Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims; agreement for fee or compensation.

CASE NOTES

Pre-approval of Attendant Care Services by Employee's Brother Not Required. — Injured employee who was provided attendant care benefits by his brother was entitled to an award for the benefits in spite of the fact the employee did not seek pre-approval of the care by the North Carolina Industrial Commission before it was performed. Ruiz v. Belk Masonry Co., 148 N.C. App. 675, 559 S.E.2d 249, 2002 N.C. App. LEXIS 50 (2002).

Authority to Review Attorneys' Fees. —

Any disputes as to attorney's fees had to be appealed according to the procedures set out in this section. Davis v. Trus Joist MacMillan, 148 N.C. App. 248, 558 S.E.2d 210, 2002 N.C. App. LEXIS 3 (2002), cert. denied, 355 N.C. 490, 563 S.E.2d 564 (2002).

Attorney's failure to follow the procedures prescribed in G.S. 97-90(c) to seek review of the Industrial Commission's award of attorney's fees deprived the appellate court of jurisdiction to consider the issue. Russell v. Lab. Corp. of Am., — N.C. App. —, 564 S.E.2d 634, 2002 N.C. App. LEXIS 644 (2002).

§ 97-91. Commission to determine all questions.

CASE NOTES

"Questions arising under this Article"

The phrase in G.S. 97-91, "questions arising under this Article," refers primarily to questions relating to the rights asserted by or on behalf of an injured employee or the employee's dependents. N.C. State Bar v. Gilbert, — N.C. App. —, 566 S.E.2d 685, 2002 N.C. App. LEXIS 782 (2002).

Jurisdiction of Dispute as to Payment of Medical Expenses. —

A dispute pertaining to the payment of medical expenses and case management hours that arose from a "custodial agreement" made after and in furtherance of a settlement agreement that was approved by the Industrial Commission fell within the exclusive jurisdiction of that administrative body. Coleman v. Medi-Bill, Inc., — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 15285 (W.D.N.C. Sept. 21, 2001).

Questions Respecting Existence of Insurance and Liability of Insurance Carrier. —

Trial court lacked subject matter jurisdiction under N.C. R. Civ. P. 12(b)(1) over whether the insurance guaranty association was required by amendments to the Insurance Guaranty Association Act, G.S. 58-48-1 et seq., and the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., to defend and indemnify the workers' compensation claims against the insolvent insurers, as the industrial commission had jurisdiction over the matter; not only was the association an insurer under G.S. 58-48-35(a)(2) over which the industrial commission had jurisdiction, but also, under G.S. 97-91, the industrial commission had jurisdiction to hear all questions arising under the Workers' Compensation Act. N.C. Ins. Guar. Ass'n v. Int'l Paper Co., — N.C. App. —, 569 S.E.2d 285, 2002 N.C. App. LEXIS 1092 (2002).

Chapter 99B.

Products Liability.

§ 99B-1. Definitions.

CASE NOTES

Cited in DeWitt v. Eveready Battery Co., 355 N.C. 672, 565 S.E.2d 140, 2002 N.C. LEXIS 548 (2002).

§ 99B-1.1. Strict liability.

CASE NOTES

Cited in Ward v. Am. Med. Sys., 170 F. Supp. 2d 594, 2001 U.S. Dist. LEXIS 16969 (W.D.N.C. 2001); DeWitt v. Eveready Battery Co., 355 N.C. 672, 565 S.E.2d 140, 2002 N.C. LEXIS 548 (2002).

§ 99B-1.2. Breach of warranty.

CASE NOTES

Cited in DeWitt v. Eveready Battery Co., 355 N.C. 672, 565 S.E.2d 140, 2002 N.C. LEXIS 548 (2002).

§ 99B-2. Seller's opportunity to inspect; privity requirements for warranty claims.

CASE NOTES

Cited in DeWitt v. Eveready Battery Co., 355 N.C. 672, 565 S.E.2d 140, 2002 N.C. LEXIS 548 (2002).

§ 99B-5. Claims based on inadequate warning or instruction.

CASE NOTES

Failure to Warn Was Not Proven To Be the Proximate Cause of Worker's Injuries. — Where a worker sued a clamp manufacturer after the worker was injured when a clamp failed on an irrigation system, the trial court properly directed a verdict in favor of the manufacturer on the worker's claim that the manufacturer was liable for failing to provide adequate warnings regarding the clamp, as the worker proffered no evidence that the manufacturer's failure to provide the warnings that were suggested by the worker's expert was the proximate cause of the worker's injuries. Evans v. Evans, — N.C. App. —, 569 S.E.2d 303, 2002 N.C. App. LEXIS 1082 (2002).

§ 99B-6. Claims based on inadequate design or formulation.

CASE NOTES

Jury Instruction Regarding Product Design Was Properly Denied Absent Evidence That Manufacture Designed the Product in Issue. — In an action by a worker against a clamp manufacturer after the worker was injured when a clamp failed on an irrigation system, the trial court properly refused to give the worker's requested jury instruction that a manufacturer had a duty to exercise reasonable care in the design of a product, as there was no evidence that the manufacturer designed the clamp. Evans v. Evans, — N.C. App. —, 569 S.E.2d 303, 2002 N.C. App. LEXIS 1082 (2002).

Duty of Design. — G.S. 99B-6(a) does not impose a duty of design on a manufacturer; rather, if a manufacturer designs a product, then it has a duty to use reasonable care in the design. Evans v. Evans, — N.C. App. —, 569 S.E.2d 303, 2002 N.C. App. LEXIS 1082 (2002).

Chapter 99E.
Special Liability Provisions.

Article 1.
Equine Activity Liability.

§ 99E-1. Definitions.

Legal Periodicals. — For comment, "Saying 'Neigh' to North Carolina's Equine Activity Liability Act," see 24 N.C. Cent. L.J. 156 (2001).

§ 99E-2. Liability.

Legal Periodicals. — For comment, "Saying 'Neigh' to North Carolina's Equine Activity Liability Act," see 24 N.C. Cent. L.J. 156 (2001).

§ 99E-3. Warning required.

Legal Periodicals. — For comment, "Saying 'Neigh' to North Carolina's Equine Activity Liability Act," see 24 N.C. Cent. L.J. 156 (2001).

Chapter 104E.

North Carolina Radiation Protection Act.

§ 104E-8. Radiation Protection Commission — Members; selections; removal; compensation; quorum; services.

(a) The Commission shall consist of 11 voting public members and 10 nonvoting ex officio members. The 11 voting public members of the Commission shall be appointed by the Governor as follows:

(1) One member who shall be actively involved in the field of environmental protection;

(2) One member who shall be an employee of one of the licensed public utilities involved in the generation of power by atomic energy;

(3) One member who shall have experience in the field of atomic energy other than power generation;

(4) One member who shall be a scientist or engineer from the faculty of one of the institutions of higher learning in the State;

(5) One member who shall have recognized knowledge in the field of radiation and its biological effects from the North Carolina Medical Society;

(6) One member who shall have recognized knowledge in the field of radiation and its biological effects from the North Carolina Dental Society;

(7) One member who shall have recognized knowledge in the field of radiation and its biological effects from the State at large;

(8) One member who shall have recognized knowledge in the field of radiation and its biological effects and who shall be a practicing hospital administrator from the North Carolina Hospital Association;

(9) One member who shall have recognized knowledge in the field of radiation and its biological effects from the North Carolina Chiropractic Association;

(10) One member who shall have recognized knowledge in the clinical application of radiation, shall be a practicing radiologic technologist from the North Carolina Society of Radiologic Technologists, and shall be certified by the American Registry of Radiologic Technologists;

(11) One member who shall have recognized knowledge in the clinical application of radiation and shall be a practicing podiatrist licensed by the North Carolina State Board of Podiatry Examiners.

(b) Public members so appointed shall serve terms of office of four years. Four of the initial members shall be appointed for two years, three members for three years, and three members for four years. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death or disability of a public member shall be for the balance of the unexpired term. At the expiration of each public member's term, the Governor shall reappoint or replace the member with a member of like qualifications. At its first meeting on or after July first of each year, the Commission shall designate by election one of its public members as chairman and one of its public members as vice-chairman to serve through June thirtieth of the following year.

(c) The 10 ex officio members shall be appointed by the Governor, shall be members or employees of the following State agencies or their successors, and shall serve at the Governor's pleasure:

(1) The Utilities Commission.
(2) The Commission for Health Services.
(3) The Environmental Management Commission.
(4) The Board of Transportation.
(5) The Division of Emergency Management of the Department of Crime Control and Public Safety.
(6) The Division of Environmental Health of the Department.
(7) The Department of Labor.
(8) The Industrial Commission.
(9) The Department of Insurance.
(10) The Medical Care Commission.

(d) The Governor shall have the power to remove any member from the Commission for misfeasance, malfeasance, or nonfeasance in accordance with G.S. 143B-13.

(e) 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.

(f) A majority of the public members of the Commission shall constitute a quorum for the transaction of business.

(g) All clerical and other services required by the Commission shall be supplied by the Secretary. (1975, c. 718, s. 1; 1989, c. 727, s. 219(18); 1989 (Reg. Sess., 1990), c. 1004, ss. 19(b), 41; 1991, c. 342, ss. 2, 3; 2002-70, s. 2.)

Effect of Amendments. — Session Laws 2002-70, s. 2, effective July 1, 2002, substituted "Division of Environmental Health" for "Division of Radiation Protection" in subdivision (c)(6); and made minor stylistic changes throughout subsection (c).

§ 104E-9. Powers and functions of Department of Environment and Natural Resources.

(a) The Department of Environment and Natural Resources is authorized:

(1) To advise, consult and cooperate with other public agencies and with affected groups and industries.
(2) To encourage, participate in, or conduct studies, investigations, public hearings, training, research, and demonstrations relating to the control of sources of radiation, the measurement of radiation, the effect upon public health and safety of exposure to radiation and related problems.
(3) To require the submission of plans, specifications, and reports for new construction and material alterations on (i) the design and protective shielding of installations for radioactive material and radiation machines and (ii) systems for the disposal of radioactive waste materials, for the determination of any radiation hazard and may render opinions, approve or disapprove such plans and specifications.
(4) To collect and disseminate information relating to the sources of radiation, including but not limited to: (i) maintenance of a record of all license applications, issuances, denials, amendments, transfers, renewals, modifications, suspensions, and revocations; and (ii) maintenance of a record of registrants and licensees possessing sources of radiation requiring registration or licensure under the provisions of this Chapter, and regulations hereunder, and any administrative or judicial action pertaining thereto; and to develop and implement a responsible data management program for the purpose of collecting

and analyzing statistical information necessary to protect the public health and safety. The Department may refuse to make public dissemination of information relating to the source of radiation within this State after the Department first determines that the disclosure of such information will contravene the stated policy and purposes of this Chapter and such disclosure would be against the health, welfare and safety of the public.

(5) To respond to any emergency which involves possible or actual release of radioactive material; and to perform or supervise decontamination and otherwise protect the public health and safety in any manner deemed necessary. This section does not in any way alter or change the provisions of Chapter 166 of the North Carolina General Statutes concerning response during an emergency by the Department of Military and Veterans Affairs or its successor.

(6) To develop and maintain a statewide environmental radiation program for monitoring the radioactivity levels in air, water, soil, vegetation, animal life, milk, and food as necessary to ensure protection of the public and the environment from radiation hazards.

(7) To implement the provisions of this Chapter and the regulations duly promulgated under the Chapter.

(8) To establish annual fees for activities under this Chapter based on actual administrative costs to be applied to training, enforcement, and inspection pursuant to the provisions of this Chapter and to charge and collect fees from operators and users of low-level radioactive waste facilities pursuant to the provisions of this Chapter.

(9) To enter upon any lands and structures upon lands to make surveys, borings, soundings, and examinations as may be necessary to determine the suitability of a site for a low-level radioactive waste facility or low-level radioactive disposal facility. The Department shall give 30 days' notice of the intended entry authorized by this section in the manner prescribed for service of process by G.S. 1A-1, Rule 4. Entry under this section shall not be deemed a trespass or taking; provided, however, that the Department shall make reimbursement for any damage to such land or structures caused by such activities.

(10) To encourage research and development and disseminate information on state-of-the-art means of handling and disposing of low-level radioactive waste.

(11) To promote public education and public involvement in the decision-making process for the siting and permitting of proposed low-level radioactive waste facilities. The Department shall assist localities in which facilities are proposed in collecting and receiving information relating to the suitability of the proposed site. At the request of a local government in which facilities are proposed, the Department shall direct the appropriate agencies of State government to develop such relevant data as that locality shall reasonably request.

(b) The Division of Environmental Health of the Department shall develop a training program for tanning equipment operators that meets the training rules adopted by the Commission. If the training program is provided by the Department, the Department may charge each person trained a reasonable fee to recover the actual cost of the training program. (1975, c. 718, s. 1; 1979, c. 694, s. 4; 1981, c. 704, s. 10.1; 1987, c. 633, s. 7; 1987 (Reg. Sess., 1988), c. 993, s. 25; 1989, c. 727, s. 219(19); 1991, c. 735, s. 2; 1993, c. 501, s. 4; 1995, c. 509, s. 49; 1997-443, s. 11A.119(a); 2001-474, s. 3; 2002-70, s. 3.)

Effect of Amendments. — Session Laws 2002-70, s. 3, effective July 1, 2002, in subsection (b), substituted "Division of Environmental Health of the Department" for

"Radiation Protection Division of the Department of Environment and Natural Resources," and substituted "rules adopted by the Commission" for "rules adopted by the North Carolina Radiation Protection Commission."

Chapter 105.

Taxation.

SUBCHAPTER I. LEVY OF TAXES.

Article 1A.

Estate Taxes.

Sec.

105-32.2. Estate tax imposed in amount equal to federal state death tax credit.

Article 2.

Privilege Taxes.

105-41. Attorneys-at-law and other professionals.

Article 2C.

Alcoholic Beverage License And Excise Taxes.

Part 4. Excise Taxes, Distribution of Tax Revenue.

105-113.82. Distribution of part of beer and wine taxes.

Article 3.

Franchise Tax.

105-114. Nature of taxes; definitions.
105-114.1. Limited liability companies.
105-116. Franchise or privilege tax on electric power, water, and sewerage companies.
105-116.1. Distribution of gross receipts taxes to cities.
105-127. When franchise or privilege taxes payable.

Article 3A.

Tax Incentives for New and Expanding Businesses

[See Editor's note for repeal of this Article.]

105-129.2. (See Editor's note for repeal) Definitions.
105-129.2A. (See Editor's note for repeal) Sunset; studies.
105-129.3A. (See Editor's note for repeal) Development zone designation.
105-129.4. (See Editor's note for repeal) Eligibility; forfeiture.
105-129.5. (See Editor's note for repeal) Tax election; cap; carryforwards; limitations.
105-129.8. (See Editor's note for repeal) Credit for creating jobs.

Sec.

105-129.9. (See Editor's note for repeal) Credit for investing in machinery and equipment.
105-129.12A. (See Editor's note for repeal) Credit for substantial investment in other property.

Article 3B.

Business And Energy Tax Credits

[See Editor's note for repeal of this Article.]

105-129.15. (See Editor's note for repeal) Definitions.
105-129.15A. Sunset.
105-129.16. (See Editor's note for repeal) Credit for investing in business property.
105-129.16B. [Recodified.]
105-129.17. (See Editor's note for repeal) Tax election; cap.
105-129.19. (See Editor's note for repeal) Reports.

Article 3D.

Historic Rehabilitation Tax Credits.

105-129.36. Credit for rehabilitating nonincome-producing historic structure.
105-129.38, 105-129.39. [Reserved.]

Article 3E.

Low-Income Housing Tax Credits.

105-129.40. (See Editor's note for repeal) Definitions applicable to Article.
105-129.41. (See Editor's note for repeal) Credit for low-income housing awarded a federal credit allocation before January 1, 2003.
105-129.42. (See Editor's note for repeal) Credit for low-income housing awarded a federal credit allocation on or after January 1, 2003.
105-129.43. (See Editor's note for repeal) Substantiation.
105-129.44. (See Editor's note for repeal) Report.
105-129.45. Sunset.

Article 4.

Income Tax.

Part 1. Corporation Income Tax.

105-130.4. Allocation and apportionment of income for corporations.

SUBCHAPTER I. LEVY OF TAXES.

ARTICLE 1A.

Estate Taxes.

§ 105-32.2. Estate tax imposed in amount equal to federal state death tax credit.

(a) Tax. — An estate tax is imposed on the estate of a decedent when a federal estate tax is imposed on the estate under section 2001 of the Code and any of the following apply:

(1) The decedent was a resident of this State at death.

(2) The decedent was not a resident of this State at death and owned any of the following:

a. Real property or tangible personal property that is located in this State.

b. Intangible personal property that has a tax situs in this State.

(b) **(For effective date and expiration see note)** Amount. — The amount of the estate tax imposed by this section for estates of decedents dying on or after January 1, 2002, is the maximum credit for state death taxes allowed under section 2011 of the Code without regard to the phase-out of that credit under subdivision (b)(2) of that section. If any property in the estate is located in a state other than North Carolina, the amount of tax payable depends on whether the decedent was a resident of this State at death. If the decedent was a resident of this State at death, the amount of tax due under this section is reduced by the lesser of the amount of the death tax paid the other state or an amount computed by multiplying the credit by a fraction, the numerator of which is the gross value of the estate that has a tax situs in another state and the denominator of which is the value of the decedent's gross estate. If the decedent was not a resident of this State at death, the amount of tax due under this section is an amount computed by multiplying the credit by a fraction, the numerator of which is the gross value of real property that is located in North Carolina plus the gross value of any personal property that has a tax situs in North Carolina and the denominator of which is the value of the decedent's gross estate. For purpses of this section, the gross value of property is its gross value as finally determined in the federal estate tax proceedings.

G.S. 105-32.2(b) is set out twice. See notes.

(b) **(For effective date see note)** Amount. — The amount of the estate tax imposed by this section is the maximum credit for state death taxes allowed under section 2011 of the Code. If any property in the estate is located in a state other than North Carolina, the amount of tax payable depends on whether the decedent was a resident of this State at death. If the decedent was a resident of this State at death, the amount of tax due under this section is reduced by the lesser of the amount of the death tax paid the other state or an amount computed by multiplying the credit by a fraction, the numerator of which is the gross value of the estate that has a tax situs in another state and the denominator of which is the value of the decedent's gross estate. If the decedent was not a resident of this State at death, the amount of tax due under this section is an amount computed by multiplying the credit by a fraction, the numerator of which is the gross value of real property that is located in North Carolina plus the gross value of any personal property that has a tax situs in North Carolina and the denominator of which is the value of the decedent's gross estate. For purposes of this section, the gross value of property is its gross value as finally determined in the federal estate tax proceedings. (1998-212, s. 29A.2(b); 2002-87, s. 9; 2002-126, s. 30C.3(a).)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective on and after January 1, 2002, and applies to the estates of decedents dying on or after that date. The second version of subsection (b) set out above is effective for the estates of decedents dying on and after January 1, 2004.

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-87, s. 9, effective on and after January 1, 2002, and applicable to the estates of decedents dying on or after that date, rewrote subsection (b).

Session Laws 2002-126, s. 30C.3(a), effective on and after January 1, 2002, and applicable to the estates of decedents dying on or after that date, inserted "for estates of decedents dying on or after January 1, 2002" and "without regard to the phase-out of that credit under subdivision (b)(2) of that section" in the first sentence of subsection (b).

Article 2.

Privilege Taxes.

§ 105-37.1. Dances, athletic events, shows, exhibitions, and other entertainments.

CASE NOTES

Constitutionality. — Imposition of a privilege tax on a live entertainment business under, G.S. 105-37.1, after the application of this tax to movie theaters had been legislatively removed, without a rational basis, was unconstitutional. Deadwood, Inc. v. N.C. Dep't of Revenue, 148 N.C. App. 122, 557 S.E.2d 596, 2001 N.C. App. LEXIS 1275 (2001).

Taxpayer's payment of sales tax on admissions it received for entertainment did not relieve it of payment of a tax under this provision. Deadwood, Inc. v. N.C. Dep't of Revenue, 148 N.C. App. 122, 557 S.E.2d 596, 2001 N.C. App. LEXIS 1275 (2001).

§ 105-41. Attorneys-at-law and other professionals.

(a) Every individual in this State who practices a profession or engages in a business and is included in the list below must obtain from the Secretary a

statewide license for the privilege of practicing the profession or engaging in the business. A license required by this section is not transferable to another person. The tax for each license is fifty dollars ($50.00).

(1) **(Effective until July 1, 2003)** An attorney-at-law.

(1) **(Effective July 1, 2003)** An attorney-at-law. In addition to the tax, whenever an attorney pays the tax, the Department must give that attorney an opportunity to make a contribution of fifty dollars ($50.00) to support the North Carolina Public Campaign Financing Fund established by G.S. 163-278.63. Payment of the contribution is not required and is not considered part of the tax owed.

(2) A physician, a veterinarian, a surgeon, an osteopath, a chiropractor, a chiropodist, a dentist, an ophthalmologist, an optician, an optometrist, or another person who practices a professional art of healing.

(3) A professional engineer, as defined in G.S. 89C-3.

(4) A registered land surveyor, as defined in G.S. 89C-3.

(5) An architect.

(6) A landscape architect.

(7) A photographer, a canvasser for any photographer, or an agent of a photographer in transmitting photographs to be copied, enlarged, or colored.

(8) A real estate broker or a real estate salesman, as defined in G.S. 93A-2. A real estate broker or a real estate salesman who is also a real estate appraiser is required to obtain only one license under this section to cover both activities.

(9) A real estate appraiser, as defined in G.S. 93E-1-4. A real estate appraiser who is also a real estate broker or a real estate salesman is required to obtain only one license under this section to cover both activities.

(10) A person who solicits or negotiates loans on real estate as agent for another for a commission, brokerage, or other compensation.

(11) A mortician or embalmer licensed under G.S. 90-210.25.

(b) The following persons are exempt from the tax:

(1) A person who is at least 75 years old.

(2) A person practicing the professional art of healing for a fee or reward, if the person is an adherent of an established church or religious organization and confines the healing practice to prayer or spiritual means.

(3) A blind person engaging in a trade or profession as a sole proprietor. A "blind person" means any person who is totally blind or whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses, or where the widest diameter of visual field subtends an angle no greater than 20 degrees. This exemption shall not extend to any sole proprietor who permits more than one person other than the proprietor to work regularly in connection with the trade or profession for remuneration or recompense of any kind, unless the other person in excess of one so remunerated is a blind person.

(c) Every person engaged in the public practice of accounting as a principal, or as a manager of the business of public accountant, shall pay for such license fifty dollars ($50.00), and in addition shall pay a license of twelve dollars and fifty cents ($12.50) for each person employed who is engaged in the capacity of supervising or handling the work of auditing, devising or installing systems of accounts.

(d) Repealed by Session Laws 1998-95, s. 7, effective July 1, 1999.

(e) Licenses issued under this section are issued as personal privilege licenses and shall not be issued in the name of a firm or corporation. A licensed photographer having a located place of business in this State is liable for a

license tax on each agent or solicitor employed by the photographer for soliciting business. If any person engages in more than one of the activities for which a privilege tax is levied by this section, the person is liable for a privilege tax with respect to each activity engaged in.

(f) Repealed by Session Laws 1981, c. 17.

(g) Repealed by Session Laws 1998-95, s. 7, effective July 1, 1999.

(h) Counties and cities may not levy any license tax on the business or professions taxed under this section.

(i) Obtaining a license required by this Article does not of itself authorize the practice of a profession, business, or trade for which a State qualification license is required. (1939, c. 158, s. 109; 1941, c. 50, s. 3; 1943, c. 400, s. 2; 1949, c. 683; 1953, c. 1306; 1957, c. 1064; 1973, c. 476, s. 193; 1981, c. 17; c. 83, ss. 4, 5; 1989, c. 584, s. 7; 1991 (Reg. Sess., 1992), c. 974, s. 1; 1993, c. 419, s. 13.2; 1998-95, s. 7; 2002-158, s. 3.)

Subdivision (a)(1) Set Out Twice. — The first version of subdivision (a)(1) set out above is effective until July 1, 2003. The second version of subdivision (a)(1) set out above is effective July 1, 2003.

Editor's Note. — Session Laws 2002-158, s. 15, contains a severability clause.

Session Laws 2002-158, s. 15.1, provides that nothing in the act obligates the General Assembly to appropriate funds to implement the act now or in the future.

Effect of Amendments. —

Session Laws 2002-158, s. 3, effective July 1, 2003, added the language beginning "In addition to the tax" in subdivision (a)(1).

Article 2C.

Alcoholic Beverage License And Excise Taxes.

Part 4. Excise Taxes, Distribution of Tax Revenue.

§ 105-113.82. Distribution of part of beer and wine taxes.

(a) Amount, Method. — The Secretary shall distribute annually the following percentages of the net amount of excise taxes collected on the sale of malt beverages and wine during the preceding 12-month period ending March 31, less the amount of the net proceeds credited to the Department of Agriculture and Consumer Services under G.S. 105-113.81A, to the counties and cities in which the retail sale of these beverages is authorized in the entire county or city:

(1) Of the tax on malt beverages levied under G.S. 105-113.80(a), twenty-three and three-fourths percent (23¾%);

(2) Of the tax on unfortified wine levied under G.S. 105-113.80(b), sixty-two percent (62%); and

(3) Of the tax on fortified wine levied under G.S. 105-113.80(b), twenty-two percent (22%).

If malt beverages, unfortified wine, or fortified wine may be licensed to be sold at retail in both a county and a city located in the county, both the county and city shall receive a portion of the amount distributed, that portion to be determined on the basis of population. If one of these beverages may be licensed to be sold at retail in a city located in a county in which the sale of the beverage is otherwise prohibited, only the city shall receive a portion of the amount distributed, that portion to be determined on the basis of population. The amounts distributed under subdivisions (1), (2), and (3) shall be computed separately.

(b) Repealed by Session Laws 2000, c. 173, s. 3, effective August 2, 2000.

(c) Exception. — Notwithstanding subsection (a), in a county in which ABC stores have been established by petition, the revenue shall be distributed as though the entire county had approved the retail sale of a beverage whose retail sale is authorized in part of the county.

(d) Time. — The revenue shall be distributed to cities and counties within 60 days after March 31 of each year. The General Assembly finds that the revenue distributed under this section is local revenue, not a State expenditure, for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold the distribution.

(e) Population Estimates. — To determine the population of a city or county for purposes of the distribution required by this section, the Secretary shall use the most recent annual estimate of population certified by the State Planning Officer.

(f) City Defined. — As used in this section, the term "city" means a city as defined in G.S. 153A-1(1) or an urban service district defined by the governing body of a consolidated city-county.

(g) Use of Funds. — Funds distributed to a county or city under this section may be used for any public purpose.

(h) Disqualification. — No municipality may receive any funds under this section if it was incorporated with an effective date of on or after January 1, 2000, and is disqualified from receiving funds under G.S. 136-41.2. No municipality may receive any funds under this section, incorporated with an effective date on or after January 1, 2000, unless a majority of the mileage of its streets are open to the public. The previous sentence becomes effective with respect to distribution of funds on or after July 1, 1999. (1985, c. 114, s. 1; 1987, c. 836, s. 2; 1989 (Reg. Sess., 1990), c. 813, s. 5; 1991, c. 689, s. 28(b); 1993, c. 321, s. 26(g); c. 485, s. 2; 1995, c. 17, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 25.2(a); 1997-261, s. 109; 1999-458, s. 10; 2000-173, s. 3; 2002-120, s. 1.)

Editor's Note. —

Session Laws 2002-120, s. 9, contains a severability clause.

Session Laws 2002-159, s. 65, effective October 11, 2002, provides: "It is the intent of the General Assembly that Sections 1 through 7 of S.L. 2002-120 shall be effective prospectively only and shall not apply to pending litigation or claims that accrued before the effective date of S.L. 2002-120. Nothing in Section 1 through 7 of S.L. 2002-120 shall be construed as a waiver of the sovereign immunity of the State or any other defenses as to any claim for damages, other recovery of funds, including attorneys' fees, or injunctive relief from the State by any unit of local government or political subdivision of the State."

Effect of Amendments. —

Session Laws 2002-120, s. 1, effective September 24, 2002, added the last two sentences in subsection (d).

Part 5. Administration.

§ 105-113.83. Payment of excise taxes.

CASE NOTES

Constitutionality. — Provisions of North Carolina's alcoholic beverage code, which prohibited out-of-state wineries from selling wine directly to North Carolina residents but allowed North Carolina wineries to make direct sales, violated the Commerce Clause of the U.S. Constitution, and federal district court enjoined state officials from enforcing those provisions. Beskind v. Easley, 197 F. Supp. 2d 464, 2002 U.S. Dist. LEXIS 6045 (W.D.N.C. 2002).

ARTICLE 3.

Franchise Tax.

§ 105-114. Nature of taxes; definitions.

(a) Nature of Taxes. — The taxes levied in this Article upon persons and partnerships are for the privilege of engaging in business or doing the act named.

(a1) Scope. — The taxes levied in this Article upon corporations are privilege or excise taxes levied upon:

(1) Corporations organized under the laws of this State for the existence of the corporate rights and privileges granted by their charters, and the enjoyment, under the protection of the laws of this State, of the powers, rights, privileges and immunities derived from the State by the form of such existence; and

(2) Corporations not organized under the laws of this State for doing business in this State and for the benefit and protection which these corporations receive from the government and laws of this State in doing business in this State.

(a2) Condition for Doing Business. — If the corporation is organized under the laws of this State, the payment of the taxes levied by this Article is a condition precedent to the right to continue in the corporate form of organization. If the corporation is not organized under the laws of this State, payment of these taxes is a condition precedent to the right to continue to engage in doing business in this State.

(a3) Tax Year. — The taxes levied in this Article are for the fiscal year of the State in which the taxes become due, except that the taxes levied in G.S. 105-122 are for the income year of the corporation in which the taxes become due.

(a4) No Double Taxation. — G.S. 105-122 does not apply to holding companies taxed under G.S. 105-120.2. G.S. 105-122 applies to a corporation taxed under another section of this Article only to the extent the taxes levied on the corporation in G.S. 105-122 exceed the taxes levied on the corporation in other sections of this Article.

(b) Definitions. — The following definitions apply in this Article:

(1) City. — Defined in G.S. 105-228.90.

(1a) Code. — Defined in G.S. 105-228.90.

(2) Corporation. — A domestic corporation, a foreign corporation, an electric membership corporation organized under Chapter 117 of the General Statutes or doing business in this State, or an association that is organized for pecuniary gain, has capital stock represented by shares, whether with or without par value, and has privileges not possessed by individuals or partnerships. The term includes a mutual or capital stock savings and loan association or building and loan association chartered under the laws of any state or of the United States. The term does not include a limited liability company.

(3) Doing business. — Each and every act, power, or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges granted by the laws of this State.

(4) Income year. — Defined in G.S. 105-130.2(5).

(c) Recodified as G.S. 105-114.1 by Session Laws 2002-126, s. 30G.2.(b), effective January 1, 2003. (1939, c. 158, s. 201; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1965, c. 287, s. 16; 1967, c. 286; 1969, c. 541, s. 6; 1973, c. 1287, s. 3; 1983, c. 713, s. 66; 1985, c. 656, s. 7; 1985 (Reg. Sess., 1986), c. 853, s. 1; 1987, c. 778, s. 1; 1987 (Reg. Sess., 1988), c. 1015, s. 2; 1989, c. 36, s. 2; 1989 (Reg. Sess.,

1990), c. 981, s. 2; 1991, c. 30, s. 2; c. 689, s. 250; 1991 (Reg. Sess., 1992), c. 922, s. 3; 1993, c. 12, s. 4; c. 354, s. 11; c. 485, s. 5; 1997-118, s. 4; 1998-98, ss. 60, 76; 1999-337, s. 20; 2000-173, s. 8; 2001-327, s. 2(b); 2002-126, s. 30G.2(b).)

Editor's Note. —

Session Laws 2001-327, s. 2(a), as amended by Session Laws 2002-126, s. 30G.2(a), provides: "The General Assembly finds that most corporations engaged in business in this State comply with the State franchise tax on corporate assets. Some taxpayers, however, take advantage of an unintended loophole in the law and avoid franchise tax by transferring their assets to a controlled limited liability company. This tax avoidance creates an unfair burden on corporate citizens that pay the franchise tax on their assets. It is the intent of this section to apply the franchise tax equally to assets held by corporations and assets held by corporate-affiliated limited liability companies. It is also the intent of this section to provide that a criminal penalty applies to taxpayers who fraudulently evade the tax.

"The General Assembly further finds that, after this loophole was closed in 2001, some taxpayers continue to avoid franchise tax by manipulating ownership of assets. One method is to interpose a controlled partnership between the corporation and the controlled limited liability company. This tax avoidance creates an unfair burden on corporate citizens that pay the franchise tax on all their assets. It is the intent of the General Assembly to apply the franchise tax equally to assets held by corporations and assets held by corporate-controlled entities."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, s. 30G.2(b), effective January 1, 2003, and applicable to taxes due on or after that date, recodified subsection (c) of this section as G.S. 105-114.1.

§ 105-114.1. Limited liability companies.

(a) Definitions. — The definitions in G.S. 105-130.7A apply in this section. In addition, the following definitions apply in this section:

(1) Governing law. — A limited liability company's governing law is determined under G.S. 57C-6-05 or G.S. 57C-7-01, as applicable.

(2) Owned indirectly. — A person owns indirectly assets of a limited liability company if the limited liability company's governing law provides that seventy percent (70%) or more of its assets, after payments to creditors, must be distributed upon dissolution to the person as of the last day of the principal corporation's taxable year.

(3) Principal corporation. — A corporation that is a member of a limited liability company or has a related member that is a member of a limited liability company.

(b) Controlled Companies. — If a corporation or a related member of the corporation is a member of a limited liability company and the principal corporation and any related members of the principal corporation together own indirectly seventy percent (70%) or more of the limited liability company's assets, then the following provisions apply:

(1) A percentage of the limited liability company's income, assets, liabilities, and equity is attributed to that principal corporation and must be included in the principal corporation's computation of tax under this Article.

(2) The principal corporation's investment in the limited liability company is not included in the principal corporation's computation of tax under this Article.

(3) The attributable percentage is equal to the percentage of the limited liability company's assets owned indirectly by the principal corporation divided by the percentage of the limited liability company's assets owned indirectly by related members of the principal corporation that are corporations.

(c) Other Companies. — In all other cases, none of the limited liability company's income, assets, liabilities, or equity is attributed to a principal corporation under this Article.

(d) Penalty. — A taxpayer who, because of fraud with intent to evade tax, underpays the tax under this Article on assets attributable to it under this section is guilty of a Class H felony in accordance with G.S. 105-236(7). (2002-126, s. 30G.2(b); 2002-126, s. 30G.2(b).)

Editor's Note. — Session Laws 2002-126, s. 30G.2(b), effective January 1, 2003, and applicable to taxes due on or after that date, recodified subsection (c) of G.S. 105-114 as this section.

Session Laws 2002-126, s. 30G.2(a), provides: "The General Assembly finds that most corporations engaged in business in this State comply with the State franchise tax on corporate assets. Some taxpayers, however, take advantage of an unintended loophole in the law and avoid franchise tax by transferring their assets to a controlled limited liability company. This tax avoidance creates an unfair burden on corporate citizens that pay the franchise tax on their assets. It is the intent of this section to apply the franchise tax equally to assets held by corporations and assets held by corporate-affiliated limited liability companies. It is also the intent of this section to provide that a criminal penalty applies to taxpayers who fraudulently evade the tax.

"The General Assembly further finds that, after this loophole was closed in 2001, some taxpayers continue to avoid franchise tax by manipulating ownership of assets. One method is to interpose a controlled partnership between the corporation and the controlled limited liability company. This tax avoidance creates an unfair burden on corporate citizens that pay the franchise tax on their assets. It is the intent of the General Assembly to apply the franchise tax equally to assets held by corporations and assets held by corporate-controlled entities."

Session Laws 2002-126, s. 1.2, provides "This act shall be known as 'The Current Operations Capital Improvements and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 30G.2(b), effective January 1, 2003, and applicable to taxes due on and after that date, recodified G.S. 105-114(c) as this section, and rewrote the text thereof.

§ 105-116. Franchise or privilege tax on electric power, water, and sewerage companies.

(a) Tax. — An annual franchise or privilege tax is imposed on the following:

(1) An electric power company engaged in the business of furnishing electricity, electric lights, current, or power.

(2), (2a) Repealed by Session Laws 1998-22, s. 2, effective July 1, 1999.

(3) A water company engaged in owning or operating a water system subject to regulation by the North Carolina Utilities Commission.

(4) A public sewerage company engaged in owning or operating a public sewerage system.

The tax on an electric power company is three and twenty-two hundredths percent (3.22%) of the company's taxable gross receipts from the business of furnishing electricity, electric lights, current, or power. The tax on a water company is four percent (4%) of the company's taxable gross receipts from owning or operating a water system subject to regulation by the North Carolina Utilities Commission. The tax on a public sewerage company is six

percent (6%) of the company's taxable gross receipts from owning or operating a public sewerage company. A company's taxable gross receipts are its gross receipts from business inside the State less the amount of gross receipts from sales reported under subdivision (b)(2). A company that engages in more than one business taxed under this section shall pay tax on each business.

(b) Report and Payment. — The tax imposed by this section is payable quarterly, semimonthly, or monthly as specified in this subsection. A return is due quarterly.

A water company or public sewerage company must pay tax quarterly when filing a return. An electric power company must pay tax in accordance with the schedule that applies to its payments of sales and use tax under G.S. 105-164.16 and must file a return quarterly. An electric power company is not subject to interest on or penalties for an underpayment for a semimonthly or monthly payment period if the electric power company timely pays at least ninety-five percent (95%) of the amount due for each semimonthly or monthly payment period and includes the underpayment with the quarterly return for those semimonthly or monthly payment periods.

A quarterly return covers a calendar quarter and is due by the last day of the month that follows the quarter covered by the return. A taxpayer must submit a return on a form provided by the Secretary. The return must include the taxpayer's gross receipts from all property it owned or operated during the reporting period in connection with its business taxed under this section. A taxpayer must report its gross receipts on an accrual basis. A return must contain the following information:

(1) The taxpayer's gross receipts for the reporting period from business inside and outside this State, stated separately.

(2) The taxpayer's gross receipts from commodities or services described in subsection (a) that are sold to a vendee subject to the tax levied by this section or to a joint agency established under Chapter 159B of the General Statutes or a city having an ownership share in a project established under that Chapter.

(3) The amount of and price paid by the taxpayer for commodities or services described in subsection (a) that are purchased from others engaged in business in this State and the name of each vendor.

(4) For an electric power company the entity's gross receipts from the sale within each city of the commodities and services described in subsection (a).

(c) Repealed by Session Laws 1998-22, s. 2, effective July 1, 1999.

(d) Distribution. — Part of the taxes imposed by this section on electric power companies is distributed to cities under G.S. 105-116.1. If a taxpayer's return does not state the taxpayer's taxable gross receipts derived within a city, the Secretary must determine a practical method of allocating part of the taxpayer's taxable gross receipts to the city.

(e) Local Tax. — So long as there is a distribution to cities from the tax imposed by this section, no city shall impose or collect any greater franchise, privilege or license taxes, in the aggregate, on the businesses taxed under this section, than was imposed and collected on or before January 1, 1947.

(e1) An electric power company engaged in the business of furnishing electricity, electric lights, current, or power that collects the annual franchise or privilege tax pursuant to subsection (a) of this section and remits the tax collected to the Secretary shall not be subject to any additional franchise or privilege tax imposed upon it by any city or county.

(f) Repealed by Session Laws 1998-22, s. 2, effective July 1, 1999. (1939, c. 158, s. 203; 1949, c. 392, s. 2; 1951, c. 643, s. 3; 1955, c. 1313, s. 2; 1957, c. 1340, s. 3; 1959, c. 1259, s. 3; 1963, c. 1169, s. 1; 1965, c. 517; 1967, c. 519, ss. 1, 3; c. 1272, ss. 1, 3; 1971, c. 298, s. 1; c. 833, s. 1; 1973, c. 476, s. 193; c. 537, s. 3; c.

1287, s. 3; c. 1349; 1975, c. 812; 1983 (Reg. Sess., 1984), c. 1097, ss. 2, 16; 1987 (Reg. Sess., 1988), c. 882, s. 4.4; 1989 (Reg. Sess., 1990), c. 813, s. 3; c. 814, s. 10; c. 945, ss. 3, 17; 1991, c. 598, s. 4; c. 689, s. 28(c); 1991 (Reg. Sess., 1992), c. 1007, s. 2; 1993, c. 321, s. 26(h); 1997-118, s. 2; 1997-426, s. 3; 1998-22, s. 2; 1998-98, s. 72; 1998-217, s. 32(a); 2000-140, s. 62; 2001-427, s. 6(c), (d); 2002-72, s. 10; 2002-120, s. 8.)

Editor's Note. —
Session Laws 2002-120, s. 9, contains a severability clause.

Effect of Amendments. —
Session Laws 2002-72, s. 10, effective August 12, 2002, deleted the former last sentence in the last paragraph of subsection (a), which read "A company is allowed a credit against the tax imposed by this section for the company's investments in certain entities in accordance with Part 5 of Article 4 of this Chapter."

Session Laws 2002-120, s. 8, effective September 24, 2002, added subsection (e1).

OPINIONS OF ATTORNEY GENERAL

A city may not levy a local franchise tax upon electric power companies effective July 1, 2002 when it has "received some but not all of a distribution of the state franchise tax in fiscal year 2001-2002." See opinion of Attorney General to E. Norris Tolson, Secretary of Revenue, North Carolina Department of Revenue, 2002 N.C. AG LEXIS 21 (7/11/02).

§ 105-116.1. Distribution of gross receipts taxes to cities.

(a) Definitions. — The following definitions apply in this section:

(1) Freeze deduction. — The amount by which the percentage distribution amount of a city was required to be reduced in fiscal year 1995-96 in determining the amount to distribute to the city.

(2) Percentage distribution amount. — Three and nine hundredths percent (3.09%) of the gross receipts derived by an electric power company from sales within a city that are taxable under G.S. 105-116.

(b) Distribution. — The Secretary must distribute to the cities part of the taxes collected under this Article on electric power companies. Each city's share for a calendar quarter is the percentage distribution amount for that city for that quarter minus one-fourth of the city's hold-back amount and one-fourth of the city's proportionate share of the annual cost to the Department of administering the distribution. The Secretary must make the distribution within 75 days after the end of each calendar quarter. The General Assembly finds that the revenue distributed under this section is local revenue, not a State expenditure, for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold the distribution.

(c) Limited Hold-Harmless Adjustment. — The hold-back amount for a city that, in the 1995-96 fiscal year, received from gross receipts taxes on electric power companies and natural gas companies less than ninety-five percent (95%) of the amount it received in the 1990-91 fiscal year but at least sixty percent (60%) of the amount it received in the 1990-91 fiscal year is the amount determined by the following calculation:

(1) Adjust the city's 1995-96 distribution by adding the city's freeze deduction attributable to receipts from electric power companies and natural gas companies to the amount distributed to the city for that year.

(2) Compare the adjusted 1995-96 amount with the city's 1990-91 distribution.

(3) If the adjusted 1995-96 amount is less than or equal to the city's 1990-91 distribution, the hold-back amount for the city is zero.

(4) If the adjusted 1995-96 amount is more than the city's 1990-91 distribution, the hold-back amount for the city is the city's freeze

deduction attributable to receipts from electric power companies and natural gas companies minus the difference between the city's 1990-91 distribution and the city's 1995-96 distribution.

(c1) Additional Limited Hold-Harmless Adjustment. — The hold-back amount for a city that, in the 1995-96 fiscal year, received from gross receipts taxes on electric power companies and natural gas companies less than sixty percent (60%) of the amount it received in the 1990-91 fiscal year is the amount determined by the following calculation:

(1) Adjust the city's 1999-2000 distribution by adding the city's freeze deduction attributable to receipts from electric power companies and natural gas companies to the amount distributed to the city for that year.

(2) Compare the adjusted 1999-2000 amount with the city's 1990-91 distribution.

(3) If the adjusted 1999-2000 amount is less than or equal to the city's 1990-91 distribution, the hold-back amount for the city is zero.

(4) If the adjusted 1999-2000 amount is more than the city's 1990-91 distribution, the hold-back amount for the city is the city's freeze deduction attributable to receipts from electric power companies and natural gas companies minus the difference between the city's 1990-91 distribution and the city's 1999-2000 distribution.

(d) Allocation of Hold-Harmless Adjustment. — The hold-back amount for a city that, in the 1995-96 fiscal year, received from gross receipts taxes on electric power companies and natural gas companies at least ninety-five percent (95%) of the amount it received in the 1990-91 fiscal year is the amount determined by the following calculation:

(1) Determine the amount by which the freeze deduction attributable to receipts from electric power companies and natural gas companies is reduced for all cities whose hold-back amount is determined under subsections (c) and (c1) of this section. This amount is the total hold-harmless adjustment.

(2) Determine the amount of gross receipts taxes that would be distributed for the quarter to cities whose hold-back amount is determined under this subsection if these cities received their percentage distribution amount minus one-fourth of their freeze deduction attributable to receipts from electric power companies and natural gas companies.

(3) For each city included in the calculation in subdivision (2) of this subsection, determine that city's percentage share of the amount determined under that subdivision.

(4) Add to the city's freeze deduction attributable to receipts from electric power companies and natural gas companies an amount equal to the city's percentage share under subdivision (3) of this subsection multiplied by the total hold-harmless adjustment.

(e) Disqualification. — No municipality may receive any funds under this section if it was incorporated with an effective date of on or after January 1, 2000, and is disqualified from receiving funds under G.S. 136-41.2. No municipality may receive any funds under this section, incorporated with an effective date on or after January 1, 2000, unless a majority of the mileage of its streets are open to the public. The previous sentence becomes effective with respect to distribution of funds on or after July 1, 1999. (1997-118, s. 1; 1997-426, s. 3.1; 1997-439, s. 3; 1997-456, s. 55.5; 1998-22, s. 3; 1999-458, s. 11; 2000-128, s. 2; 2001-430, s. 11; 2002-120, s. 2.)

Editor's Note. —

Session Laws 2002-120, s. 9, contains a severability clause.

Session Laws 2002-159, s. 65, effective October 11, 2002, provides: "It is the intent of the General Assembly that Sections 1 through 7 of

S.L. 2002-120 shall be effective prospectively only and shall not apply to pending litigation or claims that accrued before the effective date of S.L. 2002-120. Nothing in Section 1 through 7 of S.L. 2002-120 shall be construed as a waiver of the sovereign immunity of the State or any other defenses as to any claim for damages, other recovery of funds, including attorneys' fees, or injunctive relief from the State by any unit of local government or political subdivision of the State."

Effect of Amendments. —

Session Laws 2002-120, s. 2, effective September 24, 2002, added the last two sentences in subsection (b).

OPINIONS OF ATTORNEY GENERAL

Power of City to Levy Tax. — A city may not levy a local franchise tax upon electric power companies effective July 1, 2002 when it has received some but not all of a distribution of the state franchise tax in fiscal year 2001-2002. See opinion of Attorney General to E. Norris Tolson, Secretary of Revenue, North Carolina Department of Revenue, 2002 N.C. AG LEXIS 21 (7/11/02).

§ 105-127. When franchise or privilege taxes payable.

(a) Every corporation, domestic or foreign, from which a report is required by law to be made to the Secretary of Revenue, shall, unless otherwise provided, pay to said Secretary annually the franchise tax as required by G.S. 105-122.

(b) Repealed by Session Laws 1998-98, s. 78, effective August 14, 1998.

(c) It shall be the duty of the treasurer or other officer having charge of any such corporation, domestic or foreign, upon which a tax is herein imposed, to transmit the amount of the tax due to the Secretary of Revenue within the time provided by law for payment of same.

(d), (e) Repealed by Session Laws 2002-72, s. 11, effective August 12, 2002.

(f) After the end of the income year in which a domestic corporation is dissolved pursuant to Article 14 of Chapter 55 of the General Statutes, the corporation is no longer subject to the tax levied in this Article unless the Secretary of Revenue finds that the corporation has engaged in business activities in this State not appropriate to winding up and liquidating its business and affairs. (1939, c. 158, s. 215; 1973, c. 476, s. 193; 1991, c. 30, s. 7; 1993, c. 485, s. 6; 1998-98, s. 78; 2002-72, s. 11.)

Effect of Amendments. — Session Laws 2002-72, s. 11, effective August 12, 2002, repealed subsections (d) and (e).

Article 3A.

Tax Incentives For New And Expanding Businesses.

(See Editor's note for repeal of this Article.)

§ 105-129.2. (See Editor's note for repeal) Definitions.

The following definitions apply in this Article:

(1) Air courier services. — The furnishing of air delivery of individually addressed letters and packages for compensation, except by the United States Postal Service.

(2) Central office or aircraft facility. — Any of the following:

a. A corporate, subsidiary, or regional managing office, as defined by NAICS.

Article 3A has a delayed repeal date. See notes.

b. An auxiliary subdivision of an interstate passenger air carrier engaged primarily in centralized training for the carrier at its hub.

c. An auxiliary subdivision of an interstate passenger air carrier engaged primarily in aircraft maintenance and repair services or aircraft rebuilding as defined by NAICS.

(3) Computer services. — Any of the following industries or industry groups, as defined by NAICS, if the taxpayer provides the services primarily to persons who are not related entities with respect to the taxpayer:

a. Computer systems design and related services.

b. Software publishing.

c. Software reproducing.

d. On-line information services.

(4) Cost. — In the case of property owned by the taxpayer, cost is determined pursuant to regulations adopted under section 1012 of the Code. In the case of property the taxpayer leases from another, cost is value as determined pursuant to G.S. 105-130.4(j)(2).

(5) Customer service center. — An establishment of a telecommunications or financial services company, as defined by NAICS, that is primarily engaged in providing support services to the company's customers by telephone to support products or services of the company. For the purpose of this definition, an establishment is primarily engaged in providing support services by telephone if at least sixty percent (60%) of its calls are incoming.

(6) Data processing. — Any combination of the services listed in this subdivision, if the taxpayer provides the services primarily to persons who are not related entities with respect to the taxpayer. The term does not include payroll services, text processing, desktop publishing, or financial transaction processing.

a. Data entry and preparation.

b. Database creation, conversion, and management, including warehousing, retrieval, and utilization of data in databases.

c. Data capture and imaging, including optical scanning and microfilm recording and imaging.

d. Computer processing time rental.

e. Data storage media conversion.

f. Data file format conversion.

(7) Development zone. — An area designated as a development zone pursuant to G.S. 105-129.3A.

(8) Electronic mail order house. — An electronic shopping and mail order house, as defined by NAICS.

(9) Enterprise tier. — The classification assigned to an area pursuant to G.S. 105-129.3.

(10) Establishment. — Defined by NAICS.

(11) Full-time job. — A position that requires at least 1,600 hours of work per year and is intended to be held by one employee during the entire year. A full-time employee is an employee who holds a full-time job.

(12) Hub. — Defined in G.S. 105-164.3.

(13) Interstate passenger air carrier. — Defined in G.S. 105-164.3.

(14) Large investment. — Defined in G.S. 105-129.4(b1).

(15) Machinery and equipment. — Engines, machinery, equipment, tools, and implements used or designed to be used in the business for which the credit is claimed. The term does not include real property as defined in G.S. 105-273 or rolling stock as defined in G.S. 105-333.

Article 3A has a delayed repeal date. See notes.

(16) Manufacturing. — An industry in manufacturing sectors 31 through 33, as defined by NAICS, but not including quick printing or retail bakeries.
(17) NAICS. — The North American Industry Classification System adopted by the United States Office of Management and Budget as of December 31, 1997.
(17a) Overdue tax debt. — Defined in G.S. 105-243.1.
(18) Purchase. — Defined in section 179 of the Code.
(19) Related entity. — Defined in G.S. 105-130.7A.
(20) Warehousing. — An industry in warehousing and storage subsector 493 as defined by NAICS.
(21) Wholesale trade. — An industry in wholesale trade sector 42 as defined by NAICS. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, s. 1; 1998-55, s. 1; 1999-360, ss. 1, 2; 2000-56, ss. 5(a), 5(b); 2000-173, s. 1(a); 2001-476, s. 1(a), (b); 2002-172, s. 1.5.)

Cross References. — For delayed repeal of Article 3A, see G.S. 105-129.2A(a) and (a1).

Editor's Note. —

Session Laws 2002-72, s. 1, effective August 12, 2002, provides: "Notwithstanding the provisions of Article 3A of Chapter 105 of the General Statutes to the contrary, if during January or February 2002 a taxpayer signed a letter of commitment with the Department of Commerce under G.S. 105-129.8 to create new jobs at a location or a letter of commitment with the Department of Commerce under G.S. 105-129.9 to place specific machinery and equipment in service at a location, then the taxpayer may calculate the credit for which the taxpayer qualifies based on the location's enterprise tier designation and development zone designation for 2001."

Session Laws 2002-172, s. 7.1 is a severability clause.

Effect of Amendments. —

Session Laws 2002-172, s. 1.5, effective for taxable years beginning on or after January 1, 2003, added subdivision (17a).

§ 105-129.2A. (See Editor's note for repeal) Sunset; studies.

(a) Sunset. — This Article is repealed effective for business activities that occur on or after January 1, 2006.

(a1) Sunset for Interstate Air Couriers. — Notwithstanding subsection (a) of this section, in the case of an interstate air courier that enters into a real estate lease on or before January 1, 2006, with an airport authority that provides for the lease of at least 100 acres of real property with a lease term in excess of 15 years, this Article is repealed effective for business activities that occur on or after January 1, 2010.

(b) Equity Study. — The Department of Commerce shall study the effect of the tax incentives provided in this Article on tax equity. This study shall include the following:

(1) Reexamining the formula in G.S. 105-129.3(b) used to define enterprise tiers, to include consideration of alternative measures for more equitable treatment of counties in similar economic circumstances.
(2) Considering whether the assignment of tiers and the applicable thresholds are equitable for smaller counties, for example those under 50,000 in population.
(3) Compiling any available data on whether expanding North Carolina businesses receive fewer benefits than out-of-State businesses that locate to North Carolina.

(c) Impact Study. — The Department of Commerce shall study the effectiveness of the tax incentives provided in this Article. This study shall include:

Article 3A has a delayed repeal date. See notes.

(1) Study of the distribution of tax incentives across new and expanding industries.
(2) Examination of data on economic recruitment for the period from 1994 through the most recent year for which data are available by county, by industry type, by size of investment, and by number of jobs, and other relevant information to determine the pattern of business locations and expansions before and after the enactment of the William S. Lee Act incentives.
(3) Measuring the direct costs and benefits of the tax incentives.
(4) Compiling available information on the current use of incentives by other states and whether that use is increasing or declining.

(d) Report. — The Department of Commerce shall report the results of these studies and its recommendations to the General Assembly biennially with the first report due by April 1, 2001. (1997-277, s. 4; 1999-360, s. 18.1; 2000-173, ss. 1(b), 1(c); 2001-476, s. 2(a); 2002-146, s. 2.)

Cross References. — For delayed repeal of Article 3A, see G.S. 105-129.2A(a) and (a1).

Editor's Note. —

Session Laws 2002-146, s. 9, provides: "It is the intent of the General Assembly that the provisions of this act not be expanded. If a court of competent jurisdiction holds any provision of this act invalid, the section containing that provision is repealed. The repeal of a section of this act under this section does not affect other provisions of this act that may be given affect without the invalid provision."

Effect of Amendments. —

Session Laws 2002-146, s. 2, effective for taxable years that begin on or after January 1, 2002, added subsection (a1).

§ 105-129.3A. (See Editor's note for repeal) Development zone designation.

(a) Development Zone Defined. — A development zone is an area comprised of one or more contiguous census tracts, census block groups, or both in the most recent federal decennial census that meets all of the following conditions:

(1) Every census tract and census block group in the zone is located in whole or in part within the primary corporate limits of a city with a population of more than 5,000 according to the most recent annual population estimates certified by the State Planning Officer.
(2) It has a population of 1,000 or more according to the most recent annual population estimates certified by the State Planning Officer.
(3) More than twenty percent (20%) of its population is below the poverty level according to the most recent federal decennial census.
(4) Every census tract and census block group in the zone meets at least one of the following conditions:
   a. More than ten percent (10%) of its population is below the poverty level according to the most recent federal decennial census.
   b. It is immediately adjacent to another census tract or census block group that is in the same zone and has more than twenty percent (20%) of its population below the poverty level according to the most recent federal decennial census.
(5) None of the census tracts or census block groups in the zone is located in another development zone designated by the Secretary of Commerce.

(b) Designation. — Upon request of a taxpayer or a local government, the Secretary of Commerce shall designate whether an area is a development zone that meets the conditions of subsection (a) of this section. If the applicant is a taxpayer, it must notify each city in which part of the zone is located. A development zone designation is effective for 24 months following the desig-

Article 3A has a delayed repealed date. See notes.

nation. The Department of Commerce must publish annually a list of all development zones with a description of their boundaries.

(c) Relationship With Enterprise Tiers. — For the purpose of the wage standard requirement of G.S. 105-129.4, the credit for investing in machinery and equipment allowed in G.S. 105-129.9, and the credit for worker training allowed in G.S. 105-129.11, a development zone is considered an enterprise tier one area. For all other purposes, a development zone has the same enterprise tier designation as the county in which it is located.

(d) Parcel of Property Partially in a Development Zone. — For the purposes of this section, a parcel of property that is located partially within a development zone is considered entirely within the development zone if all of the following conditions are satisfied:

(1) At least fifty percent (50%) of the parcel is located within the development zone.

(2) The parcel was in existence and under common ownership prior to the most recent federal decennial census.

(3) The parcel is a portion of land made up of one or more tracts or tax parcels of land that is surrounded by a continuous perimeter boundary. (1998-55, s. 1; 1999-360, ss. 1, 2; 2001-414, s. 6; 2001-476, s. 4(a); 2002-172, s. 1.4.)

Cross References. — For delayed repeal of Article 3A, see G.S. 105-129.2A(a) and (a1).

Editor's Note. —

Session Laws 2002-172, s. 7.1, contains a severability clause.

Effect of Amendments. —

Session Laws 2002-172, s. 1.4, effective for taxable years beginning on or after January 1, 2003, added subsection (d).

§ 105-129.4. (See Editor's note for repeal) Eligibility; forfeiture.

(a) Type of Business. — The following conditions apply in determining a taxpayer's eligibility for the credits in this Article:

(1) Central office or aircraft facility. — A taxpayer is eligible for the credits allowed by this Article if it operates a central office or aircraft facility that creates at least 40 new jobs and the jobs, investment, and activity with respect to which a credit is claimed are used in that office or facility.

(2) Single business. — A taxpayer is eligible for the credits allowed by this Article other than by G.S. 105-129.12 if the primary business of the taxpayer is one of the following types of businesses and the jobs, investment, and activity with respect to which a credit is claimed are used in that business:

a. Air courier services.

b. Data processing.

(3) Multiple business. — A taxpayer is eligible for the credits allowed by this Article other than by G.S. 105-129.12 if the primary business of the taxpayer is one of the following types of businesses and the jobs, investment, and activity with respect to which a credit is claimed are used in any of the following types of businesses:

a. Manufacturing.

b. Warehousing.

c. Wholesale trade.

(4) Single establishment. — A taxpayer is eligible for the credits allowed by this Article other than by G.S. 105-129.12 if the primary business of the taxpayer or the primary activity of an establishment of the taxpayer is one of the following types of businesses and the jobs,

Article 3A has a delayed repeal date. See notes.

investment, and activity with respect to which a credit is claimed are used in that business:

a. Computer services.

b. An electronic mail order house that creates at least 250 new jobs and is located in an enterprise tier one, two, or three area.

(5) Customer service center. — A taxpayer is eligible for the credits allowed by this Article other than by G.S. 105-129.12 if all of the following conditions are met:

a. The taxpayer's primary business is as a telecommunications or financial services company, as defined by NAICS.

b. The primary activity of an establishment of the taxpayer is a customer service center located in an enterprise tier one, two, or three area.

c. The jobs, investment, and activity with respect to which a credit is claimed are used in that activity.

(6) Warehousing. — A taxpayer is eligible for the credits allowed by this Article other than by G.S. 105-129.12 if all of the following conditions are met:

a. The primary activity of an establishment of the taxpayer is in warehousing.

b. The warehousing establishment is located in an enterprise tier one, two, or three area and serves 25 or more establishments of the taxpayer in at least five different counties in one or more states.

c. The jobs, investment, and activity with respect to which a credit is claimed are used in the warehousing establishment.

(a1) New Jobs Defined. — A central office or aircraft facility creates at least 40 new jobs if the taxpayer hires at least 40 additional full-time employees to fill new positions at the office either (i) within 12 months immediately following the date the taxpayer first uses the property as a central office or aircraft facility or (ii) within a 36-month period that includes the 24 months that immediately precede and the 12 months that immediately follow the first use of the property as a central office or aircraft facility property when the taxpayer uses temporary space for the central office or aircraft facility functions during completion of the central office or aircraft facility property. Other property creates at least 200 new jobs if the taxpayer hires at least 200 additional full-time employees to fill new positions at the location in a two-year period beginning when the property is first used in an eligible business. An electronic mail order house creates at least 250 new jobs if the taxpayer hires at least 250 additional full-time employees to fill new positions at the house in the two-year period ending on the last day of the taxable year the taxpayer first claims a credit under this Article. Jobs transferred from one area in the State to another area in the State are not considered new jobs for purposes of this subsection.

(a2) Expiration. — If, during the period that installments of a credit under this Article accrue, the taxpayer is no longer engaged in one of the types of business described in subsection (a) of this section, the credit expires. If, during the period that installments of a credit under this Article accrue, the number of jobs of an eligible business falls below the minimum number required under subsection (a) of this section, any credit associated with that business expires. When a credit expires, the taxpayer may not take any remaining installments of the credit. The taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.5. A change in the enterprise tier designation of

Article 3A has a delayed repeal date. See notes.

the location of an establishment does not result in expiration of a credit under this Article.

(b) Wage Standard. — A taxpayer is eligible for the credit for creating jobs in an enterprise tier three, four, or five area if, for the calendar year the jobs are created, the average wage of the jobs for which the credit is claimed meets the wage standard and the average wage of all jobs at the location with respect to which the credit is claimed meets the wage standard. No credit is allowed for jobs not included in the wage calculation. A taxpayer is eligible for the credit for investing in machinery and equipment, the credit for research and development, or the credit for investing in real property for a central office or aircraft facility in a tier three, four, or five area if, for the calendar year the taxpayer engages in the activity that qualifies for the credit, the average wage of all jobs at the location with respect to which the credit is claimed meets the wage standard. In making the wage calculation, the taxpayer must include any positions that were filled for at least 1,600 hours during the calendar year the taxpayer engages in the activity that qualifies for the credit even if those positions are not filled at the time the taxpayer claims the credit. For a taxpayer with a taxable year other than a calendar year, the taxpayer must use the wage standard for the calendar year in which the taxable year begins. No wage standard applies to credits for activities in an enterprise tier one or two area.

Part-time jobs for which the taxpayer provides health insurance as provided in subsection (b2) of this section are considered to have an average weekly wage at least equal to the applicable percentage times the applicable average weekly wage for the county in which the jobs will be located. There may be a period of up to 100 days between the time at which an employee begins a part-time job and the time at which the taxpayer begins to provide health insurance for that employee.

Jobs meet the wage standard if they pay an average weekly wage that is at least equal to one hundred ten percent (110%) of the applicable average weekly wage for the county in which the jobs will be located, as computed by the Secretary of Commerce from data compiled by the Employment Security Commission for the most recent period for which data are available. The applicable average weekly wage is the lowest of the following: (i) the average wage for all insured private employers in the county, (ii) the average wage for all insured private employers in the State, and (iii) the average wage for all insured private employers in the county multiplied by the county income/wage adjustment factor. The county income/wage adjustment factor is the county income/wage ratio divided by the State income/wage ratio. The county income/wage ratio is average per capita income in the county divided by the annualized average wage for all insured private employers in the county. The State income/wage ratio is the average per capita income in the State divided by the annualized average wage for all insured private employers in the State. The Department of Commerce must annually publish the wage standard for each county.

(b1) Large Investment. — A taxpayer who is otherwise eligible for a tax credit under this Article becomes eligible for the large investment enhancements provided for credits under this Article if the Secretary of Commerce makes a written determination that the taxpayer is expected to purchase or lease, and place in service in connection with the eligible business within a two-year period, at least one hundred fifty million dollars ($150,000,000) worth of one or more of the following: real property, machinery and equipment, or central office or aircraft facility property. In the case of an interstate air courier that has or is constructing a hub in this State, this investment may be placed

Article 3A has a delayed repeal date. See notes.

in service in connection with the eligible business within a seven-year period. If the taxpayer fails to make the required level of investment within the applicable period, the taxpayer forfeits the large investment enhancements as provided in subsection (d) of this section.

(b2) Health Insurance. — A taxpayer is eligible for a credit for creating jobs or for worker training under this Article if the taxpayer provides health insurance for the positions for which the credit is claimed each year it claims an installment or carryforward of the credit. A taxpayer is eligible for the other credits under this Article if the taxpayer provides health insurance for all of the full-time positions at the location with respect to which the credit is claimed each year it claims an installment or carryforward of the credit. For the purposes of this subsection, a taxpayer provides health insurance if it pays at least fifty percent (50%) of the premiums for health care coverage that equals or exceeds the minimum provisions of the basic health care plan of coverage recommended by the Small Employer Carrier Committee pursuant to G.S. 58-50-125.

Each year that a taxpayer claims an installment or carryforward of a credit allowed under this Article, the taxpayer must provide with the tax return the taxpayer's certification that the taxpayer continues to provide health insurance for the jobs for which the credit was claimed or the full-time jobs at the location with respect to which the credit was claimed. If the taxpayer ceases to provide health insurance for the jobs during a taxable year, the credit expires and the taxpayer may not take any remaining installment or carryforward of the credit.

(b3) Environmental Impact. — A taxpayer is eligible for a credit allowed under this Article only if the taxpayer certifies that, at the time the taxpayer first claims the credit, the taxpayer has no pending administrative, civil, or criminal enforcement action based on alleged significant violations of any program implemented by an agency of the Department of Environment and Natural Resources, and has had no final determination of responsibility for any significant administrative, civil, or criminal violation of any program implemented by an agency of the Department of Environment and Natural Resources within the last five years. A significant violation is a violation or alleged violation that does not satisfy any of the conditions of G.S. 143-215.6B(d). The Secretary of Environment and Natural Resources must notify the Department of Revenue annually of every person that currently has any of these pending actions and every person that has had any of these final determinations within the last five years.

(b4) Safety and Health Programs. — A taxpayer is eligible for a credit allowed under this Article only if the taxpayer certifies that, as of the time the taxpayer first claims the credit, at the business location with respect to which the credit is claimed, the taxpayer has no citations under the Occupational Safety and Health Act that have become a final order within the past three years for willful serious violations or for failing to abate serious violations. For the purposes of this subsection, "serious violation" has the same meaning as in G.S. 95-127. The Secretary of Labor must notify the Department of Revenue annually of all employers who have had these citations become final orders within the past three years.

(b5) Substantial Investment in Other Property. — A taxpayer is eligible for the credit for substantial investment in other property under G.S. 105-129.12A with respect to a location only if the Secretary of Commerce makes a written determination that the taxpayer is expected to purchase or lease and use in an eligible business at that location within a three-year period at least ten million dollars ($10,000,000) of real property and that the location that is the subject

Article 3A has a delayed repeal date. See notes.

of the credit will create at least 200 new jobs within two years of the time that the property is first used in an eligible business. If the taxpayer fails to timely make the required level of investment or fails to timely create the required number of new jobs, the taxpayer forfeits the credit as provided in subsection (d) of this section.

(b6) Overdue Tax Debts. — A taxpayer is not eligible for a credit allowed under this Article if, at the time the taxpayer claims an installment or carryforward of the credit, the taxpayer has received a notice of an overdue tax debt and that overdue tax debt has not been satisfied or otherwise resolved.

(c) Repealed by Session Laws 1998-55, s. 1, effective for taxable years beginning on or after January 1, 1999.

(d) Forfeiture. — A taxpayer forfeits a credit allowed under this Article if the taxpayer was not eligible for the credit for the calendar year in which the taxpayer engaged in the activity for which the credit was claimed. In addition, a taxpayer forfeits a large investment enhancement of a tax credit if the taxpayer fails to timely make the required level of investment under subsection (b1) of this section. A taxpayer forfeits the credit for substantial investment in other property allowed under G.S. 105-129.12A if the taxpayer fails to timely create the number of required new jobs or to timely make the required level of investment under subsection (b5) of this section. A taxpayer forfeits the technology commercialization credit allowed under G.S. 105-129.9A if the taxpayer fails to make the level of investment required by subsection (e) of that section within the required period or if the taxpayer fails to meet the terms of its licensing agreement with a research university. If a taxpayer claimed a twenty percent (20%) technology commercialization credit under G.S. 105-129.9A(d) and fails to make the level of investment required under that subsection within the required period, but does make the level of investment required under subsection (e) of that section within the required period, the taxpayer forfeits one-fourth of the twenty percent (20%) credit.

A taxpayer that forfeits a credit under this Article is liable for all past taxes avoided as a result of the credit plus interest at the rate established under G.S. 105-241.1(i), computed from the date the taxes would have been due if the credit had not been allowed. The past taxes and interest are due 30 days after the date the credit is forfeited; a taxpayer that fails to pay the past taxes and interest by the due date is subject to the penalties provided in G.S. 105-236. If a taxpayer forfeits the credit for creating jobs, the technology commercialization credit, or the credit for investing in machinery and equipment, the taxpayer also forfeits any credit for worker training claimed for the jobs for which the credit for creating jobs was claimed or the jobs at the location with respect to which the technology commercialization credit or the credit for investing in machinery and equipment was claimed.

(e) Change in Ownership of Business. — As used in this subsection, the term "business" means a taxpayer or an establishment. The sale, merger, consolidation, conversion, acquisition, or bankruptcy of a business, or any transaction by which an existing business reformulates itself as another business, does not create new eligibility in a succeeding business with respect to credits for which the predecessor was not eligible under this Article. A successor business may, however, take any installment of or carried-over portion of a credit that its predecessor could have taken if it had a tax liability. The acquisition of a business is a new investment that creates new eligibility in the acquiring taxpayer under this Article if any of the following conditions are met:

(1) The business closed before it was acquired.

(2) The business was required to file a notice of plant closing or mass layoff under the federal Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2102, before it was acquired.

Article 3A has a delayed repeal date. See notes.

(3) The business was acquired by its employees directly or indirectly through an acquisition company under an employee stock option transaction or another similar mechanism. For the purpose of this subdivision, "acquired" means that as part of the initial purchase of a business by the employees, the purchase included an agreement for the employees through the employee stock option transaction or another similar mechanism to obtain one of the following:

a. Ownership of more than fifty percent (50%) of the business.

b. Ownership of not less than forty percent (40%) of the business within seven years if the business has tangible assets with a net book value in excess of one hundred million dollars ($100,000,000) and has the majority of its operations located in an enterprise tier one, two, or three area.

(f) Development Zone Project Credit. — Subsections (a) through (b4) of this section do not apply to the credit for development zone projects provided in G.S. 105-129.13.

(g) Advisory Ruling. — A taxpayer may request in writing from the Secretary of Revenue specific advice regarding eligibility for a credit under this Article. G.S. 105-264 governs the effect of this advice. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, ss. 1, 2; 1998-55, s. 1; 1999-305, s. 3; 1999-360, ss. 1, 2; 1999-369, s. 5.2; 2000-56, ss. 5(c), 6, 8(c); 2000-140, ss. 92.A(a),(b); 2001-414, s. 7; 2001-476, ss. 5(a), 6(a); 2002-72, s. 12; 2002-146, ss. 3, 4; 2002-172, ss. 1.2, 1.3(b).)

Cross References. — For delayed repeal of Article 3A, see G.S. 105-129.2A(a) and (a1).

Editor's Note. —

Session Laws 2002-146, s. 9, provides: "It is the intent of the General Assembly that the provisions of this act not be expanded. If a court of competent jurisdiction holds any provision of this act invalid, the section containing that provision is repealed. The repeal of a section of this act under this section does not affect other provisions of this act that may be given affect without the invalid provision."

Session Laws 2002-172, s. 7.1, contains a severability clause.

Effect of Amendments. —

Session Laws 2002-72, s. 12, effective August 12, 2002, substituted "within the last five years" for "within this last five years" at the end of subsection (b3).

Session Laws 2002-146, ss. 3, 4, effective for taxable years that begin on or after January 1, 2002, inserted the second paragraph in subsection (b); and in subsection (b1), inserted the second sentence, and substituted "the applicable period" for "this two-year period" in the last sentence.

Session Laws 2002-172, ss. 1.2 and 1.3(b), effective for taxable years beginning on or after January 1, 2003, in the first paragraph of subsection (b), substituted "an enterprise tier three, four, or five area" for "or the credit for worker training" and deleted "or the worker training is provided" following "for the calendar year the jobs are created" in the first sentence, inserted "or" preceding "the credit for investing in real property" and substituted "in a tier three, four, or five area" for "or the credit for substantial investment in other property" in the third sentence, and added the last two sentences; in the third paragraph of subsection (b), substituted "one hundred ten percent (110%) of" for "the applicable percentage times" in the first sentence, and deleted the former second and third sentences, which read, "The applicable percentage for jobs located in an enterprise tier one area is one hundred percent (100%). The applicable percentage for all other jobs is one hundred ten percent (110%)"; and added subsection (b6).

§ 105-129.5. (See Editor's note for repeal) Tax election; cap; carryforwards; limitations.

(a) Tax Election. — The credits provided in this Article are allowed against the franchise tax levied in Article 3 of this Chapter, the income taxes levied in

Article 3A has a delayed repeal date. See notes.

Article 4 of this Chapter, and the gross premiums tax levied in Article 8B of this Chapter. The taxpayer may divide the technology commercialization credit allowed in G.S. 105-129.9A between the taxes against which it is allowed. The taxpayer shall elect the percentage of the credit that will be taken against each tax when filing the return on which the credit is first taken. This election is binding. The percentage of the credit elected to be taken against each tax may be carried forward only against the same tax.

The taxpayer must take any other credit allowed in this Article against only one of the taxes against which it is allowed. The taxpayer shall elect the tax against which a credit will be claimed when filing the return on which the first installment of the credit is claimed. This election is binding. Any carryforwards of the credit must be claimed against the same tax.

(b) Cap. — The credits allowed under this Article may not exceed fifty percent (50%) of the tax against which they are claimed for the taxable year, reduced by the sum of all other credits allowed against that tax, except tax payments made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of credit, including carryforwards, claimed by the taxpayer under this Article against each tax for the taxable year.

(c) Carryforward. — Any unused portion of a credit with respect to a large investment, with respect to the technology commercialization credit allowed in G.S. 105-129.9A, or with respect to substantial investment in other property under G.S. 105-129.12A may be carried forward for the succeeding 20 years. Any unused portion of a credit with respect to research and development activities under G.S. 105-129.10 may be carried forward for the succeeding 15 years. Any unused portion of a credit may be carried forward for the succeeding 10 years if, before the taxpayer claims the credit, the Secretary of Commerce makes a written determination that the taxpayer is expected to purchase or lease, and place in service in connection with the eligible business within a two-year period, at least fifty million dollars ($50,000,000) worth of one or more of the following: real property, machinery and equipment, or central office or aircraft facility property. In the case of an interstate air courier that has or is constructing a hub in this State, this investment may be placed in service in connection with the eligible business within a seven-year period. If the taxpayer fails to make the required level of investment within the applicable period, the taxpayer forfeits this enhanced carryforward period. Any unused portion of any other credit may be carried forward for the succeeding five years.

(d) Statute of Limitations. — Notwithstanding Article 9 of this Chapter, a taxpayer must claim a credit under this Article within six months after the date set by statute for the filing of the return, including any extensions of that date. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, s. 1; 1998-55, s. 1; 1999-305, s. 4; 1999-360, ss. 1, 2; 2000-56, s. 2; 2001-476, s. 7(b); 2002-146, s. 5.)

Cross References. — For delayed repeal of Article 3A, see G.S. 105-129.2A(a) and (a1).

Editor's Note. —

Session Laws 2002-146, s. 9, provides: "It is the intent of the General Assembly that the provisions of this act not be expanded. If a court of competent jurisdiction holds any provision of this act invalid, the section containing that provision is repealed. The repeal of a section of this act under this section does not affect other provisions of this act that may be given affect without the invalid provision."

Effect of Amendments. —

Session Laws 2002-146, s. 5, effective for taxable years that begin on or after January 1, 2002, in subsection (c), inserted the fourth sentence, and substituted "the applicable period" for "this two-year period" in the fifth sentence.

Article 3A has a delayed repeal date. See notes.

§ 105-129.8. (See Editor's note for repeal) Credit for creating jobs.

(a) Credit. — A taxpayer that meets the eligibility requirements set out in G.S. 105-129.4, has five or more full-time employees, and hires an additional full-time employee during the taxable year to fill a position located in this State is allowed a credit for creating a new full-time job. The amount of the credit for each new full-time job created is set out in the table below and is based on the enterprise tier of the area in which the position is located. In addition, if the position is located in a development zone, the amount of the credit is increased by four thousand dollars ($4,000) per job.

Area Enterprise Tier	*Amount of Credit*
Tier One	$12,500
Tier Two	4,000
Tier Three	3,000
Tier Four	1,000
Tier Five	500

A position is located in an area if more than fifty percent (50%) of the employee's duties are performed in the area. The credit may not be taken in the taxable year in which the additional employee is hired. Instead, the credit must be taken in equal installments over the four years following the taxable year in which the additional employee was hired and is conditioned on the continued employment by the taxpayer of the number of full-time employees the taxpayer had upon hiring the employee that caused the taxpayer to qualify for the credit.

If, in one of the four years in which the installment of a credit accrues, the number of the taxpayer's full-time employees falls below the number of full-time employees the taxpayer had in the year in which the taxpayer qualified for the credit, the credit expires and the taxpayer may not take any remaining installment of the credit. The taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.5.

Jobs transferred from one area in the State to another area in the State are not considered new jobs for purposes of this section. If, in one of the four years in which the installment of a credit accrues, the position filled by the employee is moved to an area in a higher- or lower-numbered enterprise tier, or is moved from a development zone to an area that is not a development zone, the remaining installments of the credit must be calculated as if the position had been created initially in the area to which it was moved.

(b) Repealed by Session Laws 1989, c. 111, s. 1.

(b1), (c) Repealed by Session Laws 1996, Second Extra Session, c. 13, s. 3.3.

(d) Planned Expansion. — A taxpayer that signs a letter of commitment with the Department of Commerce to create at least twenty new full-time jobs in a specific area within two years of the date the letter is signed qualifies for the credit in the amount allowed by this section based on the area's enterprise tier and development zone designation for that year even though the employees are not hired that year. In the case of an interstate air courier that has or is constructing a hub in this State, the applicable time period is seven years. The credit shall be available in the taxable year after at least twenty employees have been hired if the hirings are within the applicable commitment period. The conditions outlined in subsection (a) apply to a credit taken under this subsection except that if the area is redesignated to a higher-numbered enterprise tier or loses its development zone designation after the year the letter of commitment was signed, the credit is allowed based on the area's enterprise tier and development zone designation for the year the letter was signed. If the taxpayer does not hire the employees within the applicable

Article 3A has a delayed repeal date. See notes.

period, the taxpayer does not qualify for the credit. However, if the taxpayer qualifies for a credit under subsection (a) in the year any new employees are hired, the taxpayer may take the credit under that subsection.

(e), (f) Repealed by Session Laws 1996, Second Extra Session, c. 13, s. 3.3. (1987, c. 568, ss. 1, 2; 1989, c. 111, ss. 1, 2; c. 751, ss. 7(6), 7(7), 8(10), 8(11); c. 753, s. 4.1(a)-(d); 1989 (Reg. Sess., 1990), c. 814, s. 14; 1991, c. 517, ss. 1-3; 1991 (Reg. Sess., 1992), c. 959, ss. 20, 21; 1993, c. 45, ss. 1, 2; c. 485, ss. 7, 11; 1995, c. 370, ss. 5, 6; 1996, 2nd Ex. Sess., c. 13, ss. 3.2-3.4; 1997-277, s. 1; 1998-55, s. 1; 1999-360, s. 1; 2000-56, s. 8(a); 2000-140, s. 92.A(b); 2001-414, s. 8; 2002-146, s. 6.)

Cross References. — For delayed repeal of Article 3A, see G.S. 105-129.2A(a) and (a1).

Editor's Note. —

Session Laws 2002-72, s. 1, provides: "Notwithstanding the provisions of Article 3A of Chapter 105 of the General Statutes to the contrary, if during January or February 2002 a taxpayer signed a letter of commitment with the Department of Commerce under G.S. 105-129.8 to create new jobs at a location or a letter of commitment with the Department of Commerce under G.S. 105-129.9 to place specific machinery and equipment in service at a location, then the taxpayer may calculate the credit for which the taxpayer qualifies based on the location's enterprise tier designation and development zone designation for 2001."

Session Laws 2002-146, s. 9, provides: "It is the intent of the General Assembly that the provisions of this act not be expanded. If a court of competent jurisdiction holds any provision of this act invalid, the section containing that provision is repealed. The repeal of a section of this act under this section does not affect other provisions of this act that may be given affect without the invalid provision."

Effect of Amendments. —

Session Laws 2002-146, s. 6, effective for taxable years that begin on or after January 1, 2002, in subsection (d), inserted the second sentence, substituted "applicable commitment period" for "two-year commitment period" in the third sentence, and substituted "applicable period" for "two-year period" in the next-to-last sentence.

§ 105-129.9. (See Editor's note for repeal) Credit for investing in machinery and equipment.

(a) **(See editor's note)** General Credit. — If a taxpayer that has purchased or leased eligible machinery and equipment places them in service in this State during the taxable year, the taxpayer is allowed a credit equal to the applicable percentage of the excess of the eligible investment amount over the applicable threshold. Machinery and equipment are eligible if they are capitalized by the taxpayer for tax purposes under the Code and not leased to another party. In addition, in the case of a large investment, machinery and equipment that are not capitalized by the taxpayer are eligible if the taxpayer leases them from another party. The credit may not be taken for the taxable year in which the machinery and equipment are placed in service but shall be taken in equal installments over the seven years following the taxable year in which they are placed in service. The applicable percentage is as follows:

Area Enterprise Tier	*Applicable Percentage*
Tier One	7%
Tier Two	7%
Tier Three	6%
Tier Four	5%
Tier Five	4%

(a1) Technology Commercialization Credit. — If a taxpayer is eligible for the credit allowed in this section with respect to eligible machinery and equipment and qualifies for one of the credits allowed in G.S. 105-129.9A with respect to the same machinery and equipment, the taxpayer may choose to take one of those credits instead of the credit allowed in this section. A taxpayer may take

Article 3A has a delayed repeal date. See notes.

the credit allowed in this section or one of the credits allowed in G.S. 105-129.9A during a taxable year with respect to eligible machinery and equipment, but may not take more than one of these credits with respect to the same machinery and equipment.

(b) Eligible Investment Amount. — The eligible investment amount is the lesser of (i) the cost of the eligible machinery and equipment and (ii) the amount by which the cost of all of the taxpayer's eligible machinery and equipment that are in service in this State on the last day of the taxable year exceeds the cost of all of the taxpayer's eligible machinery and equipment that were in service in this State on the last day of the base year. The base year is that year, of the three immediately preceding taxable years, in which the taxpayer had the most eligible machinery and equipment in service in this State.

(c) **(See editor's note)** Threshold. — The applicable threshold is the appropriate amount set out in the following table based on the enterprise tier where the eligible machinery and equipment are placed in service during the taxable year. If the taxpayer places eligible machinery and equipment in service at more than one establishment in an enterprise tier during the taxable year, the threshold applies separately to the eligible machinery and equipment placed in service at each establishment. If the taxpayer places eligible machinery and equipment in service at an establishment over the course of a two-year period, the applicable threshold for the second taxable year is reduced by the eligible investment amount for the previous taxable year.

Area Enterprise Tier	*Threshold*
Tier One	$ -0-
Tier Two	100,000
Tier Three	200,000
Tier Four	1,000,000
Tier Five	2,000,000

(d) Expiration. — If, in one of the seven years in which the installment of a credit accrues, the machinery and equipment with respect to which the credit was claimed are disposed of, taken out of service, or moved out of State, the credit expires and the taxpayer may not take any remaining installment of the credit for that machinery and equipment unless the cost of that machinery and equipment is offset in the same taxable year by the taxpayer's new investment in eligible machinery and equipment placed in service in the same enterprise tier, as provided in this subsection. If, during the taxable year the taxpayer disposed of the machinery and equipment for which installments remain, there has been a net reduction in the cost of all the taxpayer's eligible machinery and equipment that are in service in the same enterprise tier as the machinery and equipment that were disposed of, and the amount of this reduction is greater than twenty percent (20%) of the cost of the machinery and equipment that were disposed of, then the taxpayer forfeits the remaining installments of the credit for the machinery and equipment that were disposed of. If the amount of the net reduction is equal to twenty percent (20%) or less of the cost of the machinery and equipment that were disposed of, or if there is no net reduction, then the taxpayer does not forfeit the remaining installments of the expired credit. In determining the amount of any net reduction during the taxable year, the cost of machinery and equipment the taxpayer placed in service during the taxable year and for which the taxpayer claims a credit under Article 3B of this Chapter may not be included in the cost of all the taxpayer's eligible machinery and equipment that are in service. If in a single taxable year machinery and equipment with respect to two or more credits in the same tier are disposed of, the net reduction in the cost of all the taxpayer's eligible machinery and

Article 3A has a delayed repeal date. See notes.

equipment that are in service in the same tier is compared to the total cost of all the machinery and equipment for which credits expired in order to determine whether the remaining installments of the credits are forfeited.

The expiration of a credit does not prevent the taxpayer from taking the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.5.

If, in one of the seven years in which the installment of a credit accrues, the machinery and equipment with respect to which the credit was claimed are moved to an area in a higher-numbered enterprise tier, or are moved from a development zone to an area that is not a development zone, the remaining installments of the credit are allowed only to the extent they would have been allowed if the machinery and equipment had been placed in service initially in the area to which they were moved.

(e) Planned Expansion. — A taxpayer that signs a letter of commitment with the Department of Commerce to place specific eligible machinery and equipment in service in an area within two years after the date the letter is signed may, in the year the eligible machinery and equipment are placed in service in that area, calculate the credit for which the taxpayer qualifies based on the area's enterprise tier and development zone designation for the year the letter was signed. In the case of an interstate air courier that has or is constructing a hub in this State, the applicable time period is seven years. All other conditions apply to the credit, but if the area has been redesignated to a higher-numbered enterprise tier or has lost its development zone designation after the year the letter of commitment was signed, the credit is allowed based on the area's enterprise tier and development zone designation for the year the letter was signed. If the taxpayer does not place part or all of the specified eligible machinery and equipment in service within the applicable period, the taxpayer does not qualify for the benefit of this subsection with respect to the machinery and equipment not placed in service within the applicable period. However, if the taxpayer qualifies for a credit in the year the eligible machinery and equipment are placed in service, the taxpayer may take the credit for that year as if no letter of commitment had been signed pursuant to this subsection. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, s. 1; 1998-55, s. 1; 1999-305, s. 1; 1999-360, ss. 1, 2; 2000-56, s. 8(b); 2000-140, s. 92.A(b); 2000-173, s. 1(a); 2001-476, s. 10(a); 2002-146, s. 7; 2002-172, s. 1.1.)

Cross References. — For delayed repeal of Article 3A, see G.S. 105-129.2A(a) and (a1).

Editor's Note. —

Session Laws 2002-72, s. 1, provides: "Notwithstanding the provisions of Article 3A of Chapter 105 of the General Statutes to the contrary, if during January or February 2002 a taxpayer signed a letter of commitment with the Department of Commerce under G.S. 105-129.8 to create new jobs at a location or a letter of commitment with the Department of Commerce under G.S. 105-129.9 to place specific machinery and equipment in service at a location, then the taxpayer may calculate the credit for which the taxpayer qualifies based on the location's enterprise tier designation and development zone designation for 2001."

Session Laws 2002-146, s. 9, provides: "It is the intent of the General Assembly that the provisions of this act not be expanded. If a court of competent jurisdiction holds any provision of this act invalid, the section containing that provision is repealed. The repeal of a section of this act under this section does not affect other provisions of this act that may be given affect without the invalid provision."

Session Laws 2002-172, s. 1.6, provides: "In addition to heightening the incentive effect of the William S. Lee Quality Jobs and Business Expansion Act in lower-tiered counties, the changes in Section 1.1 of this act [which amended G.S. 105-129.9(a) and (c)] are intended to reduce the cost of the Act and make more revenues available to the State of North Carolina in future years. It is the intent of the General Assembly in making these changes to provide a source of funds that could be used in future years to support other, more targeted economic development programs aimed at helping create new jobs in North Carolina."

Session Laws 2002-172, s. 1.7, provides in part: "Section 1.1 of this act is effective for taxable years beginning on or after January 1, 2003, and applies to business activities that occur on or after January 1, 2003, but does not apply to business activities that occur on or after January 1, 2003, that are subject to a letter of commitment signed under G.S. 105-129.9 before January 1, 2003."

Session Laws 2002-172, s. 7.1, contains a severability clause.

Effect of Amendments. —

Session Laws 2002-146, s. 7, effective for taxable years that begin on or after January 1, 2002, in subsection (e), inserted the second sentence, and substituted "applicable period" for "two-year period" in the third and fifth sentences.

Session Laws 2002-172, s. 1.1, in subsection (a), substituted "the applicable percentage" for "seven percent (7%)" in the first sentence, added "the applicable percentage is as follows:" and added the table at the end of the subsection; and substituted "1,000,000" for "500,000" and "2,000,000" for "1,000,000" in the table at subsection (c). See Editor's note for effective date and applicability.

§ 105-129.12A. (See Editor's note for repeal) Credit for substantial investment in other property.

(a) Credit. — If a taxpayer that has purchased or leased real property in an enterprise tier one or two area begins to use the property in an eligible business during the taxable year, the taxpayer is allowed a credit equal to thirty percent (30%) of the eligible investment amount if all of the eligibility requirements of G.S. 105-129.4 are met. For the purposes of this section, property is located in an enterprise tier one or two area if the area the property is located in was an enterprise tier one or two area at the time the taxpayer applied for the determination required under G.S. 105-129.4(b5). The eligible investment amount is the lesser of (i) the cost of the property and (ii) the amount by which the cost of all of the real property the taxpayer is using in this State in an eligible business on the last day of the taxable year exceeds the cost of all of the real property the taxpayer was using in this State in an eligible business on the last day of the base year. The base year is that year, of the three immediately preceding taxable years, in which the taxpayer was using the most real property in this State in an eligible business. In the case of property that is leased, the cost of the property is not determined as provided in G.S. 105-129.2 but is considered to be the taxpayer's lease payments over a seven-year period, plus any expenditures made by the taxpayer to improve the property before it is used by the taxpayer if the expenditures are not reimbursed or credited by the lessor. The entire credit may not be taken for the taxable year in which the property is first used in an eligible business but shall be taken in equal installments over the seven years following the taxable year in which the property is first used in an eligible business. When part of the property is first used in an eligible business in one year and part is first used in an eligible business in a later year, separate credits may be claimed for the amount of property first used in an eligible business in each year. The basis in any real property for which a credit is allowed under this section shall be reduced by the amount of credit allowable.

(b) Mixed Use Property. — If the taxpayer uses only part of the property in an eligible business, the amount of the credit allowed under this section is reduced by multiplying it by a fraction, the numerator of which is the square footage of the property used in an eligible business and the denominator of which is the total square footage of the property.

(c) Expiration. — If, in one of the seven years in which the installment of a credit accrues, the property with respect to which the credit was claimed is no longer used in an eligible business, the credit expires and the taxpayer may not take any remaining installment of the credit. If, in one of the seven years in which the installment of a credit accrues, part of the property with respect to which the credit was claimed is no longer used in an eligible business, the

Article 3A has a delayed repeal date. See notes.

remaining installments of the credit shall be reduced by multiplying it by the fraction described in subsection (b) of this section. If, in one of the years in which the installment of a credit accrues and by which the taxpayer is required to have created 200 new jobs at the property, the total number of employees the taxpayer employs at the property with respect to which the credit is claimed is less than 200, the credit expires and the taxpayer may not take any remaining installment of the credit.

In each of these cases, the taxpayer may nonetheless take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.5.

(d) No Double Credit. — A taxpayer may not claim a credit under this section with respect to real property for which a credit is claimed under G.S. 105-129.12. (2001-476, s. 13(a); 2002-72, s. 13.)

Cross References. — For delayed repeal of Article 3A, see G.S. 105-129.2A(a) and (a1).

Effect of Amendments. — Session Laws 2002-72, s. 13, effective August 12, 2002, substituted "determination required under G.S. 105-129.4(b5)" for "certification required under G.S. 105-129.4(b5)" in the second sentence of subsection (a).

Article 3B.

Business And Energy Tax Credits.

(See Editor's note for repeal of this Article)

§ 105-129.15. (See Editor's note for repeal) Definitions.

The following definitions apply in this Article:

(1) Business property. — Tangible personal property that is used by the taxpayer in connection with a business or for the production of income and is capitalized by the taxpayer for tax purposes under the Code. The term does not include, however, a luxury passenger automobile taxable under section 4001 of the Code or a watercraft used principally for entertainment and pleasure outings for which no admission is charged.

(2) Cost. — In the case of property owned by the taxpayer, cost is determined pursuant to regulations adopted under section 1012 of the Code, subject to the limitation on cost provided in section 179 of the Code. In the case of property the taxpayer leases from another, cost is value as determined pursuant to G.S. 105-130.4(j)(2).

(3) Recodified as § 105-129.15(5).

(4) Hydroelectric generator. — A machine that produces electricity by water power or by the friction of water or steam.

(4a) Repealed by Session Laws 2002-87, s. 3, effective August 22, 2002.

(5) Purchase. — Defined in section 179 of the Code.

(6) Renewable biomass resources. — Organic matter produced by terrestrial and aquatic plants and animals, such as standing vegetation, aquatic crops, forestry and agricultural residues, landfill wastes, and animal wastes.

(7) Renewable energy property. — Any of the following machinery and equipment or real property:

a. Biomass equipment that uses renewable biomass resources for biofuel production of ethanol, methanol, and biodiesel; anaerobic

Article 3B has a delayed repeal date. See notes.

biogas production of methane utilizing agricultural and animal waste or garbage; or commercial thermal or electrical generation from renewable energy crops or wood waste materials. The term also includes related devices for converting, conditioning, and storing the liquid fuels, gas, and electricity produced with biomass equipment.

b. Hydroelectric generators located at existing dams or in free-flowing waterways, and related devices for water supply and control, and converting, conditioning, and storing the electricity generated.

c. Solar energy equipment that uses solar radiation as a substitute for traditional energy for water heating, active space heating and cooling, passive heating, daylighting, generating electricity, distillation, desalination, detoxification, or the production of industrial or commercial process heat. The term also includes related devices necessary for collecting, storing, exchanging, conditioning, or converting solar energy to other useful forms of energy.

d. Wind equipment required to capture and convert wind energy into electricity or mechanical power, and related devices for converting, conditioning, and storing the electricity produced. (1996, 2nd Ex. Sess., c. 13, s. 3.12; 1997-277, s. 3; 1998-55, s. 2; 1999-342, s. 2; 1999-360, s. 1; 2000-173, s. 1(a); 2001-431, s. 1; 2002-87, s. 3.)

Article Has a Delayed Repeal Date. — For repeal of this Article, see G.S. 105-129.15A.

Effect of Amendments. — Session Laws 2002-87, s. 3, effective August 22, 2002, repealed former subsection (4a), which defined "pass-through entity."

§ 105-129.15A. Sunset.

G.S. 105-129.16 is repealed effective for business property placed in service on or after January 1, 2002. The remainder of this Article is repealed effective January 1, 2006. The repeal of G.S. 105-129.16A applies to renewable energy property placed in service on or after January 1, 2006. (2000-173, s. 1(d); 2002-87, s. 4.)

Effect of Amendments. — Session Laws 2002-87, s. 4, effective August 22, 2002, deleted the former last sentence, which read "The repeal of G.S. 105-129.16B applies to buildings to which federal credits are allocated on or after January 1, 2006."

§ 105-129.16. (See Editor's note for repeal) Credit for investing in business property.

(a) Credit. — If a taxpayer that has purchased or leased business property places it in service in this State during the taxable year, the taxpayer is allowed a credit equal to four and one-half percent (4.5%) of the cost of the property. The maximum credit allowed a taxpayer for property placed in service during a taxable year is four thousand five hundred dollars ($4,500). The entire credit may not be taken for the taxable year in which the property is placed in service but must be taken in five equal installments beginning with the taxable year in which the property is placed in service.

(b) Expiration. — If, in one of the five years in which the installment of a credit accrues, the business property with respect to which the credit was claimed is disposed of, taken out of service, or moved out of State, the credit expires and the taxpayer may not take any remaining installment of the credit.

Article 3B has a delayed repeal date. See notes.

The taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.17.

(c) No Double Credit. — A taxpayer that claims the credit allowed under Article 3A of this Chapter with respect to business property may not take the credit allowed in this section with respect to the same property. A taxpayer may not take the credit allowed in this section for business property the taxpayer leases from another unless the taxpayer obtains the lessor's written certification that the lessor will not capitalize the property for tax purposes under the Code and the lessor will not claim the credit allowed in this section with respect to the property. (1996, 2nd Ex. Sess., c. 13, s. 3.12; 1997-277, s. 3; 1999-360, s. 1; 2000-173, s. 1(a).)

Cross References. — For repeal of G.S. 105-129.16 effective for business property placed in service on or after January 1, 2002, see G.S. 105-129.15A.

§ 105-129.16B: Recodified as G.S. 105-129.41 by Session Laws 2002-87, s. 2, effective August 22, 2002, and applicable to credits for buildings that are awarded a federal credit allocation before January 1, 2003, and for which a federal tax credit is first claimed for a taxable year beginning on or after January 1, 2002.

§ 105-129.17. (See Editor's note for repeal) Tax election; cap.

(a) Tax Election. — The credits allowed in this Article are allowed against the franchise tax levied in Article 3 of this Chapter or the income taxes levied in Article 4 of this Chapter. The taxpayer must elect the tax against which a credit will be claimed when filing the return on which the first installment of the credit is claimed. This election is binding. Any carryforwards of a credit must be claimed against the same tax.

(b) Cap. — The credits allowed in this Article may not exceed fifty percent (50%) of the tax against which they are claimed for the taxable year, reduced by the sum of all other credits allowed against that tax, except tax payments made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of credit, including carryforwards, claimed by the taxpayer under this Article against each tax for the taxable year. Any unused portion of the credits may be carried forward for the succeeding five years. (1996, 2nd Ex. Sess., c. 13, s. 3.12; 1997-277, s. 3; 1999-342, s. 2; 1999-360, ss. 1, 13; 2000-140, ss. 63(a), 88; 2001-431, s. 3; 2002-87, s. 5.)

Cross References. — For delayed repeal of Article 3B, see G.S. 105-129.15A.

Effect of Amendments. — Session Laws 2002-87, s. 5, effective August 22, 2002, deleted the former second sentence in subsection (a), which read "In addition, the credit allowed under G.S. 105-129.16B is allowed against the gross premiums tax levied in Article 8B of this Chapter."

§ 105-129.19. (See Editor's note for repeal) Reports.

The Department of Revenue must report to the Revenue Laws Study Committee and to the Fiscal Research Division of the General Assembly by

Article 3B has a delayed repeal date. See notes.

May 1 of each year the following information for the 12-month period ending the preceding April 1:

(1) The number of taxpayers that claimed the credits allowed in this Article.

(2) The cost of business property and renewable energy property with respect to which credits were claimed.

(2a) Repealed by Session Laws 2002-87, s. 6, effective August 22, 2002.

(3) The total cost to the General Fund of the credits claimed. (1996, 2nd Ex. Sess., c. 13, s. 3.12; 1997-277, s. 3; 1999-342, s. 2; 1999-360, ss. 1, 15; 2000-140, ss. 63(c), 88; 2001-414, s. 10; 2002-87, s. 6.)

Cross References. — For delayed repeal of Article 3B, see G.S. 105-129.15A.

Effect of Amendments. —

Session Laws 2002-87, s. 6, effective August 22, 2002, repealed former subdivision (2a), relating to the location of each qualified low-income building.

Article 3D.

Historic Rehabilitation Tax Credits.

§ 105-129.36. Credit for rehabilitating nonincome-producing historic structure.

(a) Credit. — A taxpayer who is not allowed a federal income tax credit under section 47 of the Code and who makes rehabilitation expenses for a State-certified historic structure located in this State is allowed a credit equal to thirty percent (30%) of the rehabilitation expenses. To qualify for the credit, the taxpayer's rehabilitation expenses must exceed twenty-five thousand dollars ($25,000) within a 24-month period. To claim the credit allowed by this subsection, the taxpayer must attach to the return a copy of the certification obtained from the State Historic Preservation Officer verifying that the historic structure has been rehabilitated in accordance with this subsection.

(b) Definitions. — The following definitions apply in this section:

(1) Certified rehabilitation. — Repairs or alterations consistent with the Secretary of the Interior's Standards for Rehabilitation and certified as such by the State Historic Preservation Officer prior to the commencement of the work.

(2) Rehabilitation expenses. — Expenses incurred in the certified rehabilitation of a certified historic structure and added to the property's basis. The term does not include the cost of acquiring the property, the cost attributable to the enlargement of an existing building, the cost of sitework expenditures, or the cost of personal property.

(3) State-certified historic structure. — A structure that is individually listed in the National Register of Historic Places or is certified by the State Historic Preservation Officer as contributing to the historic significance of a National Register Historic District or a locally designated historic district certified by the United States Department of the Interior.

(4) State Historic Preservation Officer. — The Deputy Secretary of Archives and History or the Deputy Secretary's designee who acts to administer the historic preservation programs within the State.

(c) Rules. — The North Carolina Historical Commission, in consultation with the State Historic Preservation Officer, may adopt rules needed to

administer the certification process required by this section. (1993, c. 527, ss. 1, 2; 1997-139, ss. 1, 2; 1998-98, ss. 36, 69; 1999-389, ss. 3, 5, 6; 2002-159, s. 35(e).)

Effect of Amendments. — Session Laws 2002-159, s. 35(e), effective October 11, 2002, substituted "Deputy Secretary of Archives and History or the Deputy Secretary's designee" for "Director of the Division of Archives and History or the Director's designee" in subdivision (b)(4).

§§ 105-129.38, 105-129.39: Reserved for future codification purposes.

Article 3E.

Low-Income Housing Tax Credits.

(See Editor's note for repeal of this Article.)

§ 105-129.40. (See Editor's note for repeal) Definitions applicable to Article.

The definitions in section 42 of the Code and the following definitions apply in this Article:

(1) Housing Finance Agency. — The North Carolina Housing Finance Agency established in G.S. 122A-4.

(2) Pass-Through Entity. — Defined in G.S. 105-129.35. (2002-87, s. 1.)

Article Has a Delayed Repeal Date. — For repeal of this Article, see G.S. 105-129.45. Session Laws 2002-87, s. 10, made this Article effective August 22, 2002.

§ 105-129.41. (See Editor's note for repeal) Credit for low-income housing awarded a federal credit allocation before January 1, 2003.

(a) Credit. — A taxpayer that is allowed for the taxable year a federal income tax credit for low-income housing under section 42 of the Code with respect to a qualified North Carolina low-income building, is allowed a credit under this Article equal to a percentage of the total federal credit allowed with respect to that building. For the purposes of this section, the total federal credit allowed is the total allowed during the 10-year federal credit period plus the disallowed first-year credit allowed in the 11th year. For the purposes of this section, the total federal credit is calculated based on qualified basis as of the end of the first year of the credit period and is not recalculated to reflect subsequent increases in qualified basis. For buildings that meet condition (c)(1) or (c)(1a) of this section, the credit percentage is seventy-five percent (75%). For other buildings, the credit percentage is twenty-five percent (25%).

(a1) Tax Election. — The credit allowed in this section is allowed against the franchise tax levied in Article 3 of this Chapter, the income taxes levied in Article 4 of this Chapter, or the gross premiums tax levied in Article 8B of this Chapter. The taxpayer must elect the tax against which the credit will be claimed when filing the return on which the first installment of the credit is claimed. This election is binding. Any carryforwards of the credit must be claimed against the same tax.

(a2) Cap. — The credit allowed in this section may not exceed fifty percent (50%) of the tax against which it is claimed for the taxable year, reduced by the

Article 3E has a delayed repeal date. See note.

sum of all other credits made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of credit, including carryforwards, claimed by the taxpayer under this section against each tax for the taxable year. Any unused portion of the credit may be carried forward for the succeeding five years.

(b) Timing. — The credit must be taken in equal installments over the five years beginning in the first taxable year in which the federal credit is claimed for that building. During the first taxable year in which the credit allowed under this section may be taken with respect to a building, the amount of the installment must be multiplied by the applicable fraction under section 42(f)(2)(A) of the Code. Any reduction in the amount of the first installment as a result of this multiplication is carried forward and may be taken in the first taxable year after the fifth installment is allowed under this section.

(b1) Allocation. — Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this section may allocate the credit among any of its owners in its discretion as long as an owner's adjusted basis in the pass-through entity, as determined under the Code at the end of the taxable year in which the federal credit is first claimed, is at least forty percent (40%) of the amount of credit allocated to that owner. Owners to whom a credit is allocated are allowed the credit as if they had qualified for the credit directly. A pass-through entity and its owners must include with their tax returns for every taxable year in which an allocated credit is claimed a statement of the allocation made by the pass-through entity and the allocation that would have been required under G.S. 105-131.8 or G.S. 105-269.15.

(c) Qualifying Buildings. — As used in this section the term "qualified North Carolina low-income building" means a qualified low-income building that was allocated a federal credit under section 42(h)(1) of the Code, was not allowed a federal credit under section 42(h)(4) of the Code, and meets any of the following conditions:

(1) It is located in an area that, at the time the federal credit is allocated to the building, is a tier one or two enterprise area, as defined in G.S. 105-129.3.

(1a) **(Expires January 1, 2005)** It is located in a county that, at the time the federal credit is allocated to the building, has been designated as having sustained severe or moderate damage from a hurricane or a hurricane-related disaster, according to the Federal Emergency Management Agency impact map, revised on September 25, 1999. Those counties are Bertie, Beaufort, Bladen, Brunswick, Carteret, Columbus, Craven, Dare, Duplin, Edgecombe, Greene, Halifax, Hertford, Jones, Lenoir, Martin, Nash, New Hanover, Northampton, Onslow, Pasquotank, Pender, Pitt, Washington, Wayne, and Wilson Counties.

(2) It is located in an area that, at the time the federal credit is allocated to the building, is a tier three or four enterprise area, and forty percent (40%) of its residential units are both rent-restricted and occupied by individuals whose income is fifty percent (50%) or less of area median gross income as defined in the Code.

(3) It is located in an area that, at the time the federal credit is allocated to the building, is a tier five enterprise area, and forty percent (40%) of its residential units are both rent-restricted and occupied by individuals whose income is thirty-five percent (35%) or less of area median gross income as defined in the Code.

(d) Expiration. — If, in one of the five years in which an installment of the credit under this section accrues, the taxpayer is no longer eligible for the

Article 3E has a delayed repeal date. See note.

corresponding federal credit with respect to the same qualified North Carolina low-income building, then the credit under this section expires and the taxpayer may not take any remaining installment of the credit. If, in one of the five years in which an installment of the credit under this section accrues, the building no longer qualifies as a low-income building under subdivision (2) or (3) of subsection (c) of this section because less than forty percent (40%) of its residential units are both rent-restricted and occupied by individuals who meet the income requirements, then the credit under this section expires and the taxpayer may not take any remaining installments of the credit. The taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.17.

(e) Forfeiture for Disposition. — If the taxpayer is required under section 42(j) of the Code to recapture all or part of a federal credit under that section with respect to a qualified North Carolina low-income building, the taxpayer must report the recapture event to the Secretary and to the Housing Finance Agency. The taxpayer forfeits the corresponding part of the credit allowed under this section with respect to that qualified North Carolina low-income building. If the credit was allocated among the owners of a pass-through entity, the forfeiture applies to the owners in the same proportion that the credit was allocated. This subsection does not apply when the recapture of part or all of the federal credit is the result of an event that occurs after the credit period described in subsection (b) of this section.

(f) Forfeiture for Change in Ownership. — If an owner of a pass-through entity that has qualified for the credit allowed under this section disposes of all or a portion of the owner's interest in the pass-through entity within five years from the date the federal credit is first claimed and the owner's interest in the pass-through entity is reduced to less than two-thirds of the owner's interest in the pass-through entity at the time the federal credit is first claimed, the owner must report the change to the Secretary and to the Housing Finance Agency. The owner forfeits a portion of the credit. The amount forfeited is determined by multiplying the amount of credit by the percentage reduction in ownership and then multiplying that product by the forfeiture percentage. The forfeiture percentage equals the recapture percentage found in the table in section 50(a)(1)(B) of the Code. The remaining allowable credit is allocated equally among the five years in which the credit is claimed. Forfeiture as provided in this subsection is not required if the change in ownership is the result of any of the following:

(1) The death of the owner.

(2) A merger, consolidation, or similar transaction requiring approval by the shareholders, partners, or members of the taxpayer under applicable State law, to the extent the taxpayer does not receive cash or tangible property in the merger, consolidation, or other similar transaction.

(g) Liability From Forfeiture. — A taxpayer or an owner of a pass-through entity that forfeits a credit under this section is liable for all past taxes avoided as a result of the credit plus interest at the rate established under G.S. 105-241.1(i), computed from the date the taxes would have been due if the credit had not been allowed. The past taxes and interest are due 30 days after the date the credit is forfeited. A taxpayer or owner of a pass-through entity that fails to pay the taxes and interest by the due date is subject to the penalties provided in G.S. 105-236. (1999-360, s. 11; 2000-56, s. 7; 2000-140, s. 88; 2001-431, s. 2; 2002-87, s. 2.)

Cross References. — For delayed repeal of Article 3E, see G.S. 105-129.45.

Editor's Note. — Session Laws 1999-360, s. 33, as amended by Session Laws 2000-140, s. 88, made this section effective for taxable years beginning on or after January 1, 2000, and applicable to buildings to which federal credits are allocated on or after January 1, 2000.

The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1999-360, s. 11 having been G.S. 105-129.16A.

Session Laws 1999-360, s. 21 provides that this act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before the effective date of its amendment or repeal; nor does it affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal.

Session Laws 2000-56, s. 10(f), as amended by Session Laws 2002-126, s. 30H, makes the amendment to subsection (d) by s. 7 of the act effective for taxable years beginning on or after January 1, 2000, and makes the amendment to subsection (a) and the addition of subdivision (c)(1a) effective for taxable years beginning on or after January 1, 2001, and applicable to buildings to which federal credits are allocated on or after January 1, 2000. Session Laws 2000-56, s. 10(f) had provided for the expiration of the amendment to subsection (a) by that act, and for the expiration of subdivision (c)(1a) on January 1, 2005. However, Session Laws 2002-87, s. 2 apparently superseded the sunset date as to subsection (a) by striking through the statutory language of the second version, but in subdivision (c)(1a) simply deleted the editorially inserted parenthetical reflecting the sunset date. At the direction of the Revisor of Statutes, subdivision (c)(1a) is set out as above.

Session Laws 2002-87, s. 1, which enacted Article 3E, G.S. 105-129.40 et seq., originally designated this section as "Reserved."

Effect of Amendments. — Session Laws 2000-56, s. 7, effective for taxable years beginning on or after January 1, 2001, and applicable to buildings to which federal credits are allocated on or after January 1, 2000, in the last sentence of subsection (a), inserted "or (c)(1a)" following "condition (c)(1)"; and added subdivision (c)(1a).

Session Laws 2000-56, s. 7, effective for taxable years beginning on or after January 1, 2000, added the second sentence in subsection (d).

Session Laws 2001-431, s. 1, effective for taxable years beginning on or after January 1, 2001, and applicable to buildings that are placed in service on or after January 1, 2001, added subsection (b1); rewrote subsection (e); and added subsections (f) and (g).

Session Laws 2002-87, s. 2, effective August 22, 2002, and applicable to credits for buildings that are awarded a federal credit allocation before January 1, 2003, and for which a federal tax credit is first claimed for a taxable year beginning on or after January 1, 2002, recodified former G.S. 105-129.16B as this section and in the section, added "awarded a federal credit allocation before January 1, 2003" in the catchline; deleted the version of subsection (a) that would have gone into effect on January 1, 2005; added subsections (a1) and (a2); at the end of the first sentence of subsection (b1), substituted "an owner's adjusted basis in the pass-through entity ... credit allocated to that owner" for "the amount of credit allocated to an owner does not exceed the owner's adjusted basis in the pass-through entity, as determined under the Code, at the end of the taxable year in which the federal credit is first claimed"; substituted "Qualifying Buildings — As" for "Definitions — The definitions in section 42 of the Code apply to this section. In addition, as" at the beginning of subsection (c); deleted "(Expires January 1, 2005)" at the beginning of subdivision (c)(1a); in subsection (e), inserted "must report the recapture event to the Secretary and to the Housing Finance Agency. The taxpayer" and inserted the last sentence; and in subsection (f), inserted "must report the change to the Secretary and to the Housing Finance Agency. The owner." See editor's note.

§ 105-129.42. (See Editor's note for repeal) Credit for low-income housing awarded a federal credit allocation on or after January 1, 2003.

(a) Definitions. — The following definitions apply in this section:

(1) Qualified Allocation Plan. — The plan governing the allocation of federal low-income housing tax credits for a particular year, as approved by the Governor after a public hearing and publication in the North Carolina Register.

(2) Qualified North Carolina low-income housing development. — A qualified low-income project or building that is allocated a federal tax

Article 3E has a delayed repeal date. See notes.

credit under section 42(h)(1) of the Code and is described in subsection (c) of this section.

(3) Qualified Residential Unit. — A housing unit that meets the requirements of section 42 of the Code.

(b) Credit. — A taxpayer who is allocated a federal low-income housing tax credit under section 42 of the Code to construct or substantially rehabilitate a qualified North Carolina low-income housing development is allowed a credit equal to a percentage of the development's eligible basis, as determined pursuant to section 42(d) of the Code. For the purpose of this section, eligible basis is calculated based on the information contained in the carryover allocation and is not recalculated to reflect subsequent increases or decreases. No credit is allowed for a development that uses tax-exempt bond financing.

(c) Developments and Amounts. — The following table sets out the housing developments that are qualified North Carolina low-income housing developments and are allowed a credit under this section. The table also sets out the percentage of the development's eligible basis for which a credit is allowed. The designation of a county or city as Low Income, Moderate Income, or High Income and determinations of affordability are made by the Housing Finance Agency in accordance with the Qualified Allocation Plan in effect as of the time the federal credit is allocated. A change in the income designation of a county or city after a federal credit is allocated does not affect the percentage of the developer's eligible basis for which a credit is allowed. The affordability requirements set out in the chart apply for the duration of the federal tax credit compliance period. If in any year a taxpayer fails to meet these affordability requirements, the credit is forfeited under subsection (h) of this section.

Type of Development	Percentage of Basis for Which Credit is Allowed
Forty percent (40%) of the qualified residential units are affordable to households whose income is fifty percent (50%) or less of area median income and the units are in a Low-Income county or city.	Thirty percent (30%)
Fifty percent (50%) of the qualified residential units are affordable to households whose income is fifty percent (50%) or less of the area median income and the units are in a Moderate-Income county or city.	Twenty percent (20%)
Fifty percent (50%) of the qualified residential units are affordable to households whose income is forty percent (40%) or less of the area median income and the units are in a High-Income county or city.	Ten percent (10%)
Twenty-five percent (25%) of the qualified residential units are affordable to households whose income is thirty percent (30%) or less of the area median income and the units are in a High-Income county or city.	Ten percent (10%)

(d) Election. — When a taxpayer to whom a federal low-income housing credit is allocated submits to the Housing Finance Agency a request to receive a carryover allocation for that credit, the taxpayer must elect a method for receiving the tax credit allowed by this section. A taxpayer may elect to receive the credit in the form of either a direct tax refund or a loan generated by transferring the credit to the Housing Finance Agency. Neither a direct tax

Article 3E has a delayed repeal date. See notes.

refund nor a loan received as the result of the transfer of the credit is considered taxable income under this Chapter.

Under the direct tax refund method, a taxpayer elects to apply the credit allowed by this section to the taxpayer's liability under Article 4 of this Chapter. If the credit allowed by this section exceeds the amount of tax imposed by Article 4 for the taxable year, reduced by the sum of all other credits allowable, the Secretary must refund the excess. In computing the amount of tax against which multiple credits are allowed, nonrefundable credits are subtracted before this credit. The provisions that apply to an overpayment of tax apply to the refundable excess of a credit allowed under this section.

Under the loan method, a taxpayer elects to transfer the credit allowed by this section to the Housing Finance Agency and receive a loan from that Agency for the amount of the credit. The terms of the loan are specified by the Housing Finance Agency in accordance with the Qualified Allocation Plan.

(e) Exception When No Carryover. — If a taxpayer does not submit to the Housing Finance Agency a request to receive a carryover allocation, the taxpayer must elect the method for receiving the credit allowed by this section when the taxpayer submits to the Agency federal Form 8609. A taxpayer to whom this subsection applies claims the credit for the taxable year in which the taxpayer submits federal Form 8609.

(f) Pass-Through Entity. — Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this Article does not distribute the credit among any of its owners. The pass- through entity is considered the taxpayer for purposes of claiming the credit allowed by this Article. If a return filed by a pass-through entity indicates that the entity is paying tax on behalf of the owners of the entity, the credit allowed under this Article does not affect the entity's payment of tax on behalf of its owners.

(g) Return and Payment. — A taxpayer may claim the credit allowed by this section on a return filed for the taxable year in which the taxpayer receives a carryover allocation of a federal low-income housing credit. The return must state the name and location of the qualified low-income housing development for which the credit is claimed.

If a taxpayer chooses the loan method for receiving the credit allowed under this section, the Secretary must transfer to the Housing Finance Agency the amount of credit allowed the taxpayer. The Agency must loan the taxpayer the amount of the credit on terms consistent with the Qualified Allocation Plan. The Housing Finance Agency is not required to make a loan to a qualified North Carolina low-income housing development until the Secretary transfers the credit amount to the Agency.

If the taxpayer chooses the direct tax refund method for receiving the credit allowed under this section, the Secretary must transfer to the Housing Finance Agency the refundable excess of the credit allowed the taxpayer. The Agency holds the refund due the taxpayer in escrow, with no interest accruing to the taxpayer during the escrow period. The Agency must release the refund to the taxpayer upon the occurrence of the earlier of the following:

(1) The Agency determines that the taxpayer has complied with the Qualified Allocation Plan and has completed at least fifty percent (50%) of the activities included in the development's eligible basis.

(2) Within 30 days after the development is placed in service date.

(h) Forfeiture. — A taxpayer that receives a credit under this section must immediately report any recapture event under section 42 of the Code to the Housing Finance Agency. If the taxpayer or any of its owners are required

Article 3E has a delayed repeal date. See notes.

under section 42(j) of the Code to recapture all or part of a federal credit with respect to a qualified North Carolina low-income development, the taxpayer forfeits the corresponding part of the credit allowed under this section. This requirement does not apply in the following circumstances:

(1) When the recapture of part or all of the federal credit is the result of an event that occurs in the sixth or a subsequent calendar year after the calendar year in which the development was awarded a federal credit allocation.

(2) The taxpayer elected to transfer the credit allowed by this section to the Housing Finance Agency.

(i) Liability From Forfeiture. — A taxpayer that forfeits all or part of the credit allowed under this section is liable for all past taxes avoided and any refund claimed as a result of the credit plus interest at the rate established under G.S. 105-241.1(i). The interest rate is computed from the date the Secretary transferred the credit amount to the Housing Finance Agency. The past taxes, refund, and interest are due 30 days after the date the credit is forfeited. A taxpayer that fails to pay the taxes, refund, and interest by the due date is subject to the penalties provided in G.S. 105-236. (2002-87, s. 1.)

Cross References. — For delayed repeal of Article 3E, see G.S. 105-129.45.

§ 105-129.43. (See Editor's note for repeal) Substantiation.

A taxpayer allowed a credit under this Article must maintain and make available for inspection any information or records required by the Secretary of Revenue or the Housing Finance Agency. The burden of proving eligibility for a credit and the amount of the credit rests upon the taxpayer. (2002-87, s. 1.)

Cross References. — For delayed repeal of Article 3E, see G.S. 105-129.45.

§ 105-129.44. (See Editor's note for repeal) Report.

The Department of Revenue must report to the Revenue Laws Study Committee and the Fiscal Research Division of the General Assembly by May 1 of each year the following information for the 12-month period ending the preceding April 1:

(1) The number of taxpayers that claimed the credit allowed in this Article.

(2) The location of each qualified North Carolina low-income building or housing development for which a credit was claimed.

(3) The total cost to the General Fund of the credits claimed. (2002-87, s. 1.)

Cross References. — For delayed repeal of Article 3E, see G.S. 105-129.45.

§ 105-129.45. Sunset.

This Article is repealed effective January 1, 2006. The repeal applies to developments to which federal credits are allocated on or after January 1, 2006. (2002-87, s. 1.)

ARTICLE 4.

Income Tax.

Part 1. Corporation Income Tax.

§ 105-130.4. Allocation and apportionment of income for corporations.

(a) As used in this section, unless the context otherwise requires:

(1) "Business income" means all income that is apportionable under the United States Constitution.

(2) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(3) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(4) "Excluded corporation" means any corporation engaged in business as a building or construction contractor, a securities dealer, or a loan company or a corporation that receives more than fifty percent (50%) of its ordinary gross income from intangible property.

(5) "Nonbusiness income" means all income other than business income.

(6) "Public utility" means any corporation that is subject to control of one of more of the following entities: the North Carolina Utilities Commission, the Federal Communications Commission, the Interstate Commerce Commission, the Federal Power Commission, or the Federal Aviation Agency; and that owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications, the transportation of goods or persons, or the production, storage, transmission, sale, delivery or furnishing of electricity, water, steam, oil, oil products, or gas. The term also includes a motor carrier of property whose principal business activity is transporting property by motor vehicle for hire over the public highways of this State.

(7) "Sales" means all gross receipts of the corporation except for the following receipts:

a. Receipts from a casual sale of property.

b. Receipts allocated under subsections (c) through (h) of this section.

c. Receipts exempt from taxation.

d. The portion of receipts realized from the sale or maturity of securities or other obligations that represents a return of principal.

(8) "Casual sale of property" means the sale of any property which was not purchased, produced or acquired primarily for sale in the corporation's regular trade or business.

(9) "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

(b) A corporation having income from business activity which is taxable both within and without this State shall allocate and apportion its net income or net loss as provided in this section. For purposes of allocation and apportionment, a corporation is taxable in another state if (i) the corporation's business activity in that state subjects it to a net income tax or a tax measured by net income, or (ii) that state has jurisdiction based on the corporation's business activity in that state to subject the corporation to a tax measured by net income

regardless whether that state exercises its jurisdiction. For purposes of this section, "business activity" includes any activity by a corporation that would establish a taxable nexus pursuant to 15 United States Code section 381.

(c) Rents and royalties from real or tangible personal property, gains and losses, interest, dividends less the portion deductible under G.S. 105-130.7, patent and copyright royalties and other kinds of income, to the extent that they constitute nonbusiness income, less related expenses shall be allocated as provided in subsections (d) through (h) of this section.

(d)(1) Net rents and royalties from real property located in this State are allocable to this State.

(2) Net rents and royalties from tangible personal property are allocable to this State:

a. If and to the extent that the property is utilized in this State, or

b. In their entirety if the corporation's commercial domicile is in this State and the corporation is not organized under the laws of, or is not taxable in, the state in which the property is utilized.

(3) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the income year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the income year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the corporation, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.

(e)(1) Gains and losses from sales or other disposition of real property located in this State are allocable to this State.

(2) Gains and losses from sales or other disposition of tangible personal property are allocable to this State if

a. The property had a situs in this State at the time of the sale, or

b. The corporation's commercial domicile is in this State and the corporation is not taxable in the state in which the property has a situs.

(3) Gains and losses from sales or other disposition of intangible personal property are allocable to this State if the corporation's commercial domicile is in this State.

(f) Interest and net dividends are allocable to this State if the corporation's commercial domicile is in this State. For purposes of this section, the term "net dividends" means gross dividend income received less related expenses and less that portion of the dividends deductible under G.S. 105-130.7.

(g)(1) Royalties or similar income received from the use of patents, copyrights, secret processes and other similar intangible property are allocable to this State:

a. If and to the extent that the patent, copyright, secret process or other similar intangible property is utilized in this State, or

b. If and to the extent that the patent, copyright, secret process or other similar intangible property is utilized in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this State.

(2) A patent, secret process or other similar intangible property is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, processing, or other use in the state or to the extent that a patented product is produced in the state. If the basis of receipts from such intangible property does not permit allocation to

states or if the accounting procedures do not reflect states of utilization, the intangible property is utilized in the state in which the taxpayer's commercial domicile is located.

(3) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

(h) The income less related expenses from any other nonbusiness activities or investments not otherwise specified in this section is allocable to this State if the business situs of the activities or investments are located in this State.

(i) All business income of corporations other than public utilities and excluded corporations shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus twice the sales factor, and the denominator of which is four. Provided, that where the sales factor does not exist, the denominator of the fraction shall be the number of existing factors and where the sales factor exists but the payroll factor or the property factor does not exist, the denominator of the fraction shall be the number of existing factors plus one.

(j)(1) The property factor is a fraction, the numerator of which is the average value of the corporation's real and tangible personal property owned or rented and used in this State during the income year and the denominator of which is the average value of all the corporation's real and tangible personal property owned or rented and used during the income year.

(2) Property owned by the corporation is valued at its original cost. Property rented by the corporation is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the corporation less any annual rental rate received by the corporation from subrentals except that subrentals shall not be deducted when they constitute business income. Any property under construction and any property the income from which constitutes nonbusiness income shall be excluded in the computation of the property factor.

(3) The average value of property shall be determined by averaging the values at the beginning and end of the income year, but in all cases the Secretary of Revenue may require the averaging of monthly or other periodic values during the income year if reasonably required to reflect properly the average value of the corporation's property. A corporation that ceases its operations in this State before the end of its income year because of its intention to dissolve or to relinquish its certificate of authority, or because of a merger, conversion, or consolidation, or for any other reason whatsoever shall use the real estate and tangible personal property values as of the first day of the income year and the last day of its operations in this State in determining the average value of property, but the Secretary may require averaging of monthly or other periodic values during the income year if reasonably required to reflect properly the average value of the corporation's property.

(k)(1) The payroll factor is a fraction, the numerator of which is the total amount paid in this State during the income year by the corporation as compensation, and the denominator of which is the total compensation paid everywhere during the income year. All compensation paid to general executive officers and all compensation paid in connection with nonbusiness income shall be excluded in computing the payroll

factor. General executive officers shall include the chairman of the board, president, vice-presidents, secretary, treasurer, comptroller, and any other officers serving in similar capacities.

(2) Compensation is paid in this State if:

a. The individual's service is performed entirely within the State; or

b. The individual's service is performed both within and without the State, but the service performed without the State is incidental to the individual's service within the State; or

c. Some of the service is performed in this State and (i) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in this State, or (ii) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

(*l*)(1) The sales factor is a fraction, the numerator of which is the total sales of the corporation in this State during the income year, and the denominator of which is the total sales of the corporation everywhere during the income year. Notwithstanding any other provision under this Part, the receipts from any casual sale of property shall be excluded from both the numerator and the denominator of the sales factor. Where a corporation is not taxable in another state on its business income but is taxable in another state only because of nonbusiness income, all sales shall be treated as having been made in this State.

(2) Sales of tangible personal property are in this State if the property is received in this State by the purchaser. In the case of delivery of goods by common carrier or by other means of transportation, including transportation by the purchaser, the place at which the goods are ultimately received after all transportation has been completed shall be considered as the place at which the goods are received by the purchaser. Direct delivery into this State by the taxpayer to a person or firm designated by a purchaser from within or without the State shall constitute delivery to the purchaser in this State.

(3) Other sales are in this State if:

a. The receipts are from real or tangible personal property located in this State; or

b. The receipts are from intangible property and are received from sources within this State; or

c. The receipts are from services and the income-producing activities are in this State.

(m) All business income of a railroad company shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the "railway operating revenue" from business done within this State and the denominator of which is the "total railway operating revenue" from all business done by the company as shown by its records kept in accordance with the standard classification of accounts prescribed by the Interstate Commerce Commission.

"Railway operating revenue" from business done within this State shall mean "railway operating revenue" from business wholly within this State, plus the equal mileage proportion within this State of each item of "railway operating revenue" received from the interstate business of the company. "Equal mileage proportion" shall mean the proportion which the distance of movement of property and passengers over lines in this State bears to the total distance of movement of property and passengers over lines of the company receiving such revenue. "Interstate business" shall mean "railway operating

revenue" from the interstate transportation of persons or property into, out of, or through this State. If the Secretary of Revenue shall find, with respect to any particular company, that its accounting records are not kept so as to reflect with exact accuracy such division of revenue by State lines as to each transaction involving interstate revenue, the Secretary of Revenue may adopt such regulations, based upon averages, as will approximate with reasonable accuracy the proportion of interstate revenue actually earned upon lines in this State. Provided, that where a railroad is being operated by a partnership which is treated as a corporation for income tax purposes and pays a net income tax to this State, or if located in another state would be so treated and so pay as if located in this State, each partner's share of the net profits shall be considered as dividends paid by a corporation for purposes of this Part and shall be so treated for inclusion in gross income, deductibility, and separate allocation of dividend income.

(n) All business income of a telephone company shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is gross operating revenue from local service in this State plus gross operating revenue from toll services performed wholly within this State plus the proportion of revenue from interstate toll services attributable to this State as shown by the records of the company plus the gross operating revenue in North Carolina from other service less the uncollectible revenue in this State, and the denominator of which is the total gross operating revenue from all business done by the company everywhere less total uncollectible revenue. Provided, that where a telephone company is required to keep its records in accordance with the standard classification of accounts prescribed by the Federal Communications Commission the amounts in such accounts shall be used in computing the apportionment fraction as provided in this subsection.

(o) All business income of a motor carrier of property shall be apportioned by multiplying the income by a fraction, the numerator of which is the number of vehicle miles in this State and the denominator of which is the total number of vehicle miles of the company everywhere. The words "vehicle miles" shall mean miles traveled by vehicles owned or operated by the company hauling property for a charge or traveling on a scheduled route.

(p) All business income of a motor carrier of passengers shall be apportioned by multiplying the income by a fraction, the numerator of which is the number of vehicle miles in this State and the denominator of which is the total number of vehicle miles of the company everywhere. The words "vehicle miles" shall mean miles traveled by vehicles owned or operated by the company carrying passengers for a fare or traveling on a scheduled route.

(q) All business income of a telegraph company shall be apportioned by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor and the denominator of which is three.

The property factor shall be as defined in subsection (j) of this section, the payroll factor shall be as defined in subsection (k) of this section, and the sales factor shall be as defined in subsection (*l*) of this section.

(r) All business income of an excluded corporation and of all other public utilities shall be apportioned by multiplying the income by the sales factor as determined under subsection (*l*) of this section.

(s) All business income of an air or water transportation corporation shall be apportioned by a fraction, the numerator of which is the corporation's revenue ton miles in this State and the denominator of which is the corporation's revenue ton miles everywhere. The term "revenue ton mile" means one ton of passengers, freight, mail, or other cargo carried one mile. In making this computation, a passenger is considered to weigh two hundred pounds.

(t)(1) If any corporation believes that the method of allocation or apportionment as administered by the Secretary has operated or will so operate

as to subject it to taxation on a greater portion of its income than is reasonably attributable to business or earnings within the State, it may file with the Tax Review Board a petition setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. This petition shall be filed in such form and within such time as the Tax Review Board may prescribe. The Board shall grant a hearing on the petition. The time limitations set in G.S. 105-241.2 for the date of the hearing, notification to the taxpayer, and a decision following the hearing apply to a hearing held pursuant to this subsection. At least three members of the Tax Review Board shall attend any hearing pursuant to such petition. In such cases, the Tax Review Board's membership shall be augmented by the addition of the Secretary, who shall sit as a member of the Board with full power to participate in its deliberations and decisions with respect to petitions filed under the provisions of this subsection. An informal record containing in substance the evidence, contentions and arguments presented at the hearing shall be made. All members of the augmented Tax Review Board shall consider such evidence, contentions and arguments and the decisions thereon shall be made by a majority vote of the augmented Board.

(2) If the corporation employs in its books of account a detailed allocation of receipts and expenditures which reflects more clearly than the applicable allocation formula prescribed by this section the income attributable to the business within this State, application for permission to base the return upon the taxpayer's books of account shall be considered by the Tax Review Board. The Board may permit such separate accounting method in lieu of applying the applicable allocation formula if the Board finds that method best reflects the income and earnings attributable to this State.

(3) If the corporation shows that any other method of allocation than the applicable allocation formula prescribed by this section reflects more clearly the income attributable to the business within this State, application for permission to base the return upon such other method shall be considered by the Tax Review Board. The application shall be accompanied by a statement setting forth in detail, with full explanations, the method the corporation believes will more nearly reflect its income from business within this State. If the Board concludes that the allocation formula prescribed by this section allocates to this State a greater portion of the net income of the corporation than is reasonably attributable to business or earnings within this State, it shall determine the allocable net income by such other method as it finds best calculated to assign to this State for taxation the portion of the corporation's net income reasonably attributable to its business or earnings within this State.

(4) There shall be a presumption that the appropriate allocation formula reasonably attributes to this State the portion of the corporation's income earned in this State, and the burden shall rest upon the corporation to show the contrary. The relief herein authorized shall be granted by the Board only in cases of clear, cogent and convincing proof that the petitioning corporation is entitled thereto. No corporation shall use any alternative formula or method other than the applicable allocation formula provided by statute in making a report or return of its income to this State except upon order in writing of the Board, and any return in which any alternative formula or other method, other than the applicable allocation formula prescribed by statute, is used without permission of the Board shall not be a lawful return.

When the Board determines, pursuant to the provisions of this subsection, that an alternative formula or other method more accurately reflects the income allocable to North Carolina and renders its decision with regard thereto, the corporation shall allocate its net income for future years in accordance with such determination and decision of the Board so long as the conditions constituting the basis upon which the decision was made remain unchanged or until such time as the business method of operation of the corporation changes. Provided, however, that the Secretary may, with respect to any subsequent year, require the corporation to furnish information relating to its property, operations, and activities.

(5) A corporation which proposes to do business in this State may file a petition with the Board setting forth the facts upon which it contends that the applicable allocation formula will allocate a greater portion of the corporation's future income to North Carolina than will be reasonably attributable to its proposed business or contemplated earnings within the State. Upon a proper showing in accordance with the procedure described above for determinations by the Board, the Board may authorize such corporation to allocate income from its future business to North Carolina on the basis prescribed by the Board under the provisions of this section for such future years if the conditions constituting the basis upon which the Board's decision is made remain unchanged and the business operations of the corporation continue to conform to the statement of proposed methods of business operation presented by the corporation to the Board.

(6) When the Secretary asserts liability under the formula adjustment decision of the Tax Review Board, an aggrieved corporation may pay the tax and bring a civil action for recovery under the provisions of Article 9. (1939, c. 158, s. 311; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 752, s. 3; 1953, c. 1302, s. 4; 1955, c. 1350, s. 18; 1957, c. 1340, s. 4; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; c. 1186; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; c. 1287, s. 4; 1981 (Reg. Sess., 1982), c. 1212; 1987, c. 804, s. 2; 1987 (Reg. Sess., 1988), c. 994, s. 1; 1993, c. 532, s. 12; 1995, c. 350, s. 3; 1996, 2nd Ex. Sess., c. 14, s. 5; 1998-98, s. 69; 1999-369, s. 5.4; 2000-126, s. 5; 2001-327, s. 1(c); 2002-126, s. 30G.1(a).)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, s. 30G.1(a), effective for taxable years beginning on or after January 1, 2002, rewrote subdivision (a)(1), which formerly read: "'Business income' means income arising from transactions and activity in the regular course of the corporation's trade or business and includes income from tangible and intangible property if the acquisition, management, and/or disposition of the property constitute integral parts of the corporation's regular trade or business operations."

§ 105-130.5. Adjustments to federal taxable income in determining State net income.

(a) The following additions to federal taxable income shall be made in determining State net income:

(1) Taxes based on or measured by net income by whatever name called and excess profits taxes;

(2) Interest paid in connection with income exempt from taxation under this Part;

(3) The contributions deduction allowed by the Code;

(4) Interest income earned on bonds and other obligations of other states or their political subdivisions, less allowable amortization on any bond acquired on or after January 1, 1963;
(5) The amount by which gains have been offset by the capital loss carryover allowed under the Code. All gains recognized on the sale or other disposition of assets must be included in determining State net income or loss in the year of disposition;
(6) The net operating loss deduction allowed by the Code; and
(7) Repealed by Session Laws 2001-327, s. 3(a), effective for taxable years beginning on or after January 1, 2001.
(8) Repealed by Session Laws 1987, c. 778, s. 2.
(9) Payments to or charges by a parent, subsidiary or affiliated corporation in excess of fair compensation in all intercompany transactions of any kind whatsoever pursuant to the Revenue Laws of this State.
(10) The total amounts allowed under this Chapter during the taxable year as a credit against the taxpayer's income tax. A corporation that apportions part of its income to this State shall make the addition required by this subdivision after it determines the amount of its income that is apportioned and allocated to this State and shall not apply to a credit taken under this Chapter the apportionment factor used by it in determining the amount of its apportioned income.
(11) The amount by which the percentage depletion allowance allowed by sections 613 and 613A of the Code for mines, oil and gas wells, and other natural deposits exceeds the cost depletion allowance for these items under the Code, except as otherwise provided herein. This subdivision does not apply to depletion deductions for clay, gravel, phosphate rock, lime, shells, stone, sand, feldspar, gemstones, mica, talc, lithium compounds, tungsten, coal, peat, olivine, pyrophyllite, and other solid minerals or rare earths extracted from the soil or waters of this State. Corporations required to apportion income to North Carolina shall first add to federal taxable income the amount of all percentage depletion in excess of cost depletion that was subtracted from the corporation's gross income in computing its federal income taxes and shall then subtract from the taxable income apportioned to North Carolina the amount by which the percentage depletion allowance allowed by sections 613 and 613A of the Code for solid minerals or rare earths extracted from the soil or waters of this State exceeds the cost depletion allowance for these items.
(12) The amount allowed under the Code for depreciation or as an expense in lieu of depreciation for a utility plant acquired by a natural gas local distribution company, to the extent the plant is included in the company's rate base at zero cost in accordance with G.S. 62-158.
(13) Repealed by Session Laws 2001-427, s. 4(b), effective for taxable years beginning on or after January 1, 2002.
(14) Royalty payments required to be added by G.S. 105-130.7A, to the extent deducted in calculating federal taxable income.
(15) The applicable percentage of the amount allowed as a thirty percent (30%) accelerated depreciation deduction under section 168(k) or section 1400L of the Code, as set out in the table below. In addition, a taxpayer who was allowed a thirty percent (30%) accelerated depreciation deduction under section 168(k) or section 1400L of the Code in a taxable year beginning before January 1, 2002, and whose North Carolina taxable income in that earlier year reflected that accelerated depreciation deduction must add to federal taxable income in the taxpayer's first taxable year beginning on or after January 1, 2002, an amount equal to the amount of the deduction allowed in the earlier

taxable year. These adjustments do not result in a difference in basis of the affected assets for State and federal income tax purposes. The applicable percentage is as follows:

Taxable Year	Percentage
2002	100%
2003	70%
2004 and thereafter	0%

(b) The following deductions from federal taxable income shall be made in determining State net income:

(1) Interest upon the obligations of the United States or its possessions, to the extent included in federal taxable income: Provided, interest upon the obligations of the United States shall not be an allowable deduction unless interest upon obligations of the State of North Carolina or any of its political subdivisions is exempt from income taxes imposed by the United States.

(1a) Interest upon the obligations of any of the following, net of related expenses, to the extent included in federal taxable income:

a. This State, a political subdivision of this State, or a commission, an authority, or another agency of this State or of a political subdivision of this State.

b. A nonprofit educational institution organized or chartered under the laws of this State.

(2) Payments received from a parent, subsidiary or affiliated corporation in excess of fair compensation in intercompany transactions which in the determination of the net income or net loss of such corporation were not allowed as a deduction under the Revenue Laws of this State.

(3) The deductible portion of dividends from stock as provided under G.S. 105-130.7.

(3a) Dividends treated as received from sources outside the United States as determined under section 862 of the Code, net of related expenses, to the extent included in federal taxable income. Notwithstanding the proviso in subdivision (c)(3) of this section, the netting of related expenses shall be calculated in accordance with subdivision (c)(3) of this section and G.S. 105-130.6A.

(3b) Any amount included in federal taxable income under section 78 or section 951 of the Code, net of related expenses.

(4) Losses in the nature of net economic losses sustained by the corporation in any or all of the 15 preceding years pursuant to the provisions of G.S. 105-130.8. A corporation required to allocate and apportion its net income under the provisions of G.S. 105-130.4 shall deduct its allocable net economic loss only from total income allocable to this State pursuant to the provisions of G.S. 105-130.8.

(5) Contributions or gifts made by any corporation within the income year to the extent provided under G.S. 105-130.9.

(6) Amortization in excess of depreciation allowed under the Code on the cost of any sewage or waste treatment plant, and facilities or equipment used for purposes of recycling or resource recovery of or from solid waste, or for purposes of reducing the volume of hazardous waste generated as provided in G.S. 105-130.10.

(7) Depreciation of emergency facilities acquired prior to January 1, 1955. Any corporation shall be permitted to depreciate any emergency facility, as such is defined in section 168 of the Code, over its useful life, provided such facility was acquired prior to January 1, 1955, and

no amortization has been claimed on such facility for State income tax purposes.

(8) The amount of losses realized on the sale or other disposition of assets not allowed under section 1211(a) of the Code. All losses recognized on the sale or other disposition of assets must be included in determining State net income or loss in the year of disposition.

(9) With respect to a shareholder of a regulated investment company, the portion of undistributed capital gains of such regulated investment company included in such shareholder's federal taxable income and on which the federal tax paid by the regulated investment company is allowed as a credit or refund to the shareholder under section 852 of the Code.

(10) Repealed by Session Laws 1987, c. 778, s. 2.

(11) If a deduction for an ordinary and necessary business expense was required to be reduced or was not allowed under the Code because the corporation claimed a federal tax credit against its federal income tax liability for the income year in lieu of a deduction, the amount by which the deduction was reduced and the amount of the deduction that was disallowed.

(12) Reasonable expenses, in excess of deductions allowed under the Code, paid for reforestation and cultivation of commercially grown trees; provided, that this deduction shall be allowed only to those corporations in which the real owners of all the shares of such corporation are natural persons actively engaged in the commercial growing of trees, or the spouse, siblings, or parents of such persons. Provided, further, that in no case shall a corporation be allowed a deduction for the same reforestation or cultivation expenditure more than once.

(13) The eligible income of an international banking facility to the extent included in determining federal taxable income, determined as follows:

a. "International banking facility" shall have the same meaning as is set forth in the laws of the United States or regulations of the board of governors of the federal reserve system.

b. The eligible income of an international banking facility for the taxable year shall be an amount obtained by multiplying State taxable income as determined under G.S. 105-130.3 (determined without regard to eligible income of an international banking facility and allocation and apportionment, if applicable) for such year by a fraction, the denominator of which shall be the gross receipts for such year derived by the bank from all sources, and the numerator of which shall be the adjusted gross receipts for such year derived by the international banking facility from:

1. Making, arranging for, placing or servicing loans to foreign persons substantially all the proceeds of which are for use outside the United States;
2. Making or placing deposits with foreign persons which are banks or foreign branches of banks (including foreign subsidiaries or foreign branches of the taxpayer) or with other international banking facilities; or
3. Entering into foreign exchange trading or hedging transactions related to any of the transactions described in this paragraph.

c. The adjusted gross receipts shall be determined by multiplying the gross receipts of the international banking facility by a fraction the numerator of which is the average amount for the taxable

year of all assets of the international banking facility which are employed outside the United States and the denominator of which is the average amount for the taxable year of all assets of the international banking facility.

d. For the purposes of this subsection the term "foreign person" means:
   1. An individual who is not a resident of the United States;
   2. A foreign corporation, a foreign partnership or a foreign trust, as defined in section 7701 of the Code, other than a domestic branch thereof;
   3. A foreign branch of a domestic corporation (including the taxpayer);
   4. A foreign government or an international organization or an agency of either, or
   5. An international banking facility.

   For purposes of this paragraph, the terms "foreign" and "domestic" shall have the same meaning as set forth in section 7701 of the Code.

(14) The amount by which the basis of a depreciable asset is required to be reduced under the Code for federal tax purposes because of a tax credit allowed against the corporation's federal income tax liability. This deduction may be claimed only in the year in which the Code requires that the asset's basis be reduced. In computing gain or loss on the asset's disposition, this deduction shall be considered as depreciation.

(15) The amount paid during the income year, pursuant to 7 U.S.C. § 1445-2, as marketing assessments on tobacco grown by the corporation in North Carolina.

(16) The amount of natural gas expansion surcharges collected by a natural gas local distribution company under G.S. 62-158.

(17) To the extent included in federal taxable income, the following:
   a. The amount of 911 charges collected under G.S. 62A-5 and remitted to a local government under G.S. 62A-6.
   b. The amount of wireless Enhanced 911 service charges collected under G.S. 62A-23 and remitted to the Wireless Fund under G.S. 62A-24.

(18) Interest, investment earnings, and gains of a trust, the settlors of which are two or more manufacturers that signed a settlement agreement with this State to settle existing and potential claims of the State against the manufacturers for damages attributable to a product of the manufacturers, if the trust meets all of the following conditions:
   a. The purpose of the trust is to address adverse economic consequences resulting from a decline in demand of the manufactured product potentially expected to occur because of market restrictions and other provisions in the settlement agreement.
   b. A court of this State approves and retains jurisdiction over the trust.
   c. Certain portions of the distributions from the trust are made in accordance with certifications that meet the criteria in the agreement creating the trust and are provided by a nonprofit entity, the governing board of which includes State officials.

(19) To the extent included in federal taxable income, the amount paid to the taxpayer during the taxable year from the Hurricane Floyd Reserve Fund in the Office of State Budget and Management for hurricane relief or assistance, but not including payments for goods or services provided by the taxpayer.

(20) Royalty payments received from a related member who added the payments to income under G.S. 105-130.7A for the same taxable year.

(21) In each of the taxpayer's first five taxable years beginning on or after January 1, 2005, an amount equal to twenty percent (20%) of the amount added to taxable income in a previous year as accelerated depreciation under subdivision (a)(15) of this section.

(c) The following other adjustments to federal taxable income shall be made in determining State net income:

(1) In determining State net income, no deduction shall be allowed for annual amortization of bond premiums applicable to any bond acquired prior to January 1, 1963. The amount of premium paid on any such bond shall be deductible only in the year of sale or other disposition.

(2) Federal taxable income must be increased or decreased to account for any difference in the amount of depreciation, amortization, or gains or losses applicable to property which has been depreciated or amortized by use of a different basis or rate for State income tax purposes than used for federal income tax purposes prior to the effective date of this Part.

(3) No deduction is allowed for any direct or indirect expenses related to income not taxed under this Part; provided, no adjustment shall be made under this subsection for adjustments addressed in G.S. 105-130.5(a) and (b). G.S. 105-130.6A applies to the adjustment for expenses related to dividends received that are not taxed under this Part.

(4) The taxpayer shall add to federal taxable income the amount of any recovery during the taxable year not included in federal taxable income, to the extent the taxpayer's deduction of the recovered amount in a prior taxable year reduced the taxpayer's tax imposed by this Part but, due to differences between the Code and this Part, did not reduce the amount of the taxpayer's tax imposed by the Code. The taxpayer may deduct from federal taxable income the amount of any recovery during the taxable year included in federal taxable income under section 111 of the Code, to the extent the taxpayer's deduction of the recovered amount in a prior taxable year reduced the taxpayer's tax imposed by the Code but, due to differences between the Code and this Part, did not reduce the amount of the taxpayer's tax imposed by this Part.

(5) A savings and loan association may deduct interest earned on deposits at the Federal Home Loan Bank of Atlanta, or its successor, to the extent included in federal taxable income.

(d) Repealed by Session Laws 1987, c. 778, s. 3.

(e) Notwithstanding any other provision of this section, any recapture of depreciation required under the Code must be included in a corporation's State net income to the extent required for federal income tax purposes.

(f) Expired. (1967, c. 1110, s. 3; 1969, cc. 1113, 1124; 1971, c. 820, s. 1; c. 1206, s. 1; 1973, c. 1287, s. 4; 1975, c. 764, s. 4; 1977, 2nd Sess., c. 1200, s. 1; 1979, c. 179, s. 2; c. 801, s. 32; 1981, c. 704, s. 20; c. 855, s. 1; 1983, c. 61; c. 713, ss. 70-73, 82, 83; 1985, c. 720, s. 1; c. 791, s. 43; 1985 (Reg. Sess., 1986), c. 825; 1987, c. 89; c. 637, s. 1; c. 778, ss. 2, 3; c. 804, s. 3; 1991, c. 598, ss. 3, 10; 1991 (Reg. Sess., 1992), c. 857, s. 1; 1993 (Reg. Sess., 1994), c. 745, ss. 4, 5; 1995, c. 509, s. 50; 1996, 2nd Ex. Sess., c. 14, ss. 4, 10; 1997-439, s. 1; 1998-98, ss. 1(c), 4, 69; 1998-158, s. 5; 1998-171, s. 7; 1999-333, s. 2; 1999-337, s. 1; 1999-463, Ex. Sess., s. 4.6(b); 2000-140, s. 93.1(a); 2000-173, s. 19(c); 2001-327, ss. 1(d), (e), 3(a), (b); 2001-424, s. 12.2(b); 2001-427, ss. 4(b), 10(a); 2002-72, s. 14; 2002-126, ss. 30C.2(a), 30C.2(c); 2002-136, ss. 1, 4.)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-136, s. 5, provides: "It is the intent of the General Assembly that the provisions of this act are to remain in effect for taxable years beginning in 2001 and 2002. The Revenue Laws Study Committee shall study the treatment of expenses related to dividends received and other income not taxed and the taxation of affiliated corporations, of holding companies, and of financial institutions under current law. The Committee shall report to the 2003 General Assembly its recommendations for modifying the provisions of this act and other provisions of the taxes on corporations and businesses in order to provide for a more equitable and stable source of revenue. It is the intent of the General Assembly to address the issues raised by this act during the 2003 Regular Session and enact changes effective for taxable years beginning on or after January 1, 2003."

Session Laws 2002-136, s. 6(a)-(c), provides: "(a) If a taxpayer meets the condition set out in subsection (c) of this section [Session Laws 2002-136, s. 6(c)], then, notwithstanding G.S. 105-163.41, no addition to tax may be made under that statute for a taxable year beginning on or after January 1, 2002, and before January 1, 2003, with respect to an underpayment of corporate income tax to the extent the underpayment was created or increased by Section 3 of S.L. 2001-327. This subsection does not apply to any underpayment of an installment of estimated tax that is due more than 15 days after the date this act becomes law.

"(b) If a taxpayer meets the condition set out in subsection (c) of this section [Session Laws 2002-136, s. 6(c)], then, notwithstanding G.S. 105-236(4), the penalty under that statute for a taxable year beginning on or after January 1, 2001, and before January 1, 2002, is waived with respect to failure to pay an amount of corporate income tax due to the extent the amount of tax due was created by Section 3 of S.L. 2001-327. This subsection does not apply to any amount of corporate income tax that was due more than 15 days after the date this act becomes law.

"(c) In order to qualify for the benefit of this section [Session Laws 2002-136, s. 6], a taxpayer must pay within 15 days after the date this act becomes law all tax due by that date that was created or increased by Section 3 of S.L. 2001-327."

Effect of Amendments. —

Session Laws 2002-72, s. 14, effective August 12, 2002, rewrote subdivision (b)(17).

Session Laws 2002-126, ss. 30C.2(a) and 30C.2(c), effective for taxable years beginning on or after January 1, 2002, added subdivisions (a)(15) and (b)(21).

Session Laws 2002-136, ss. 1, 4, effective for taxable years beginning on or after January 1, 2001, added the second sentence in subdivision (b)(3a); and added the second sentence in subdivision (c)(3).

§ 105-130.6A. Adjustment for expenses related to dividends.

(a) Definitions. — The provisions of G.S. 105-130.6 govern the determination of whether a corporation is a subsidiary or an affiliate of another corporation. In addition, the following definitions apply in this section:

(1) Affiliated group. — A group that includes a corporation, all other corporations that are affiliates or subsidiaries of that corporation, and all other corporations that are affiliates or subsidiaries of another corporation in the group.

(2) Bank holding company. — A holding company with an affiliate that is subject to the privilege tax on banks levied in G.S. 105-102.3.

(3) Dividends. — Dividends received that are not taxed under this Part.

(4) Electric power holding company. — A holding company with an affiliate or a subsidiary that is subject to the franchise tax on electric power companies levied in G.S. 105-116.

(5) Expense adjustment. — The adjustment required by G.S. 105-130.5(c)(3) for expenses related to dividends not taxed under this Part.

(6) Holding company. — Defined in G.S. 105-120.2.

(b) General Rule. — For corporations other than bank holding companies and electric power holding companies, the adjustment under G.S. 105-130.5(c)(3) for expenses related to dividends not taxed under this Part may not exceed an amount equal to fifteen percent (15%) of the dividends.

(c) Bank Holding Companies. — For bank holding companies the adjustment under G.S. 105-130.5(c)(3) for expenses related to dividends not taxed under this Part may not exceed an amount equal to twenty percent (20%) of the dividends.

(d) Electric Power Holding Companies. — For electric power holding companies, the adjustment under G.S. 105-130.5(c)(3) for expenses related to dividends not taxed under this Part may not exceed an amount equal to fifteen percent (15%) of its total interest expenses.

(e) Cap for Bank Holding Companies. — After calculating the expense adjustment as provided in subsection (c) of this section, each bank holding company must calculate the amount of additional tax that results from the expense adjustments for the holding company and for every corporation in the holding company's affiliated group for the taxable year. If the expense adjustments result in additional tax exceeding eleven million dollars ($11,000,000) for a taxable year for the affiliated group, the affiliated group may reduce the amount of the expense adjustment so that the resulting additional tax does not exceed this maximum. This maximum applies once to each affiliated group each taxable year, whether or not the group includes more than one bank holding company.

The members of the affiliated group may allocate this reduction among themselves in their discretion. In order to take this reduction, each member of the affiliated group that is required to file a return under this Part and that has dividends for the taxable year must provide a schedule with its return that lists every member of the group that has dividends, the amount of the dividends, and whether the member is a bank holding company. In addition, the schedule must show the expense adjustments for those members whose additional tax as a result of the expense adjustment constitutes the maximum amount. In addition, each member must provide any other documentation required by the Secretary.

If the expense adjustment for an affiliated group is reduced under this subsection, and the return of a member of the group is later changed in a manner that reduces below the maximum the amount of additional tax for the group resulting from the expense adjustment, the Secretary may increase the expense adjustment for any member of the group in order to increase to the maximum the amount of additional tax for the group resulting from the expense adjustment. In this situation, the amount of the increase is considered a forfeited tax benefit with respect to the affiliated group for the purposes of G.S. 105-241.1(e). The date of the forfeiture is the date of the change that triggers the Secretary's authority to increase the expense adjustment. Any member whose expense adjustment the Secretary increases is liable for interest on the amount of the increase at the rate established under G.S. 105-241.1(i), computed from the date the taxes would have been due if the expense adjustment had been calculated correctly on the original return. The amount of the increase and the interest are due 60 days after the date of the forfeiture. A taxpayer that fails to pay the amount of the increase and interest by the due date is subject to the penalties provided in G.S. 105-236.

(f) Credits for Bank Holding Companies. — If the affiliated group of which a bank holding company is a member is eligible for the reduction provided in subsection (e) of this section for a taxable year, the affiliated group is also eligible for a credit equal to two million dollars ($2,000,000). If the affiliated group of which a bank holding company is a member is not eligible for the reduction provided in subsection (e) of this section for a taxable year, the affiliated group is eligible for a credit equal to the amount of additional tax that results from its expense adjustments in excess of the amount of additional tax that would result from the expense adjustments if the expense adjustment of any bank holding company in the group were equal to fifteen percent (15%) of the holding company's dividends for that taxable year.

A credit allowed by this subsection may be taken in four equal, annual installments beginning with the later of the following taxable year or the taxpayer's taxable year beginning in 2003. The members of the affiliated group may allocate a credit allowed by this subsection among themselves in their discretion.

(g) Credit for Electric Power Holding Companies. — After calculating the adjustment for expenses related to dividends under G.S. 105-130.5(c)(3), each electric power holding company must calculate the amount of additional tax under this Part that results from the expense adjustment for the taxable year. The electric power holding company is allowed a credit for the following taxable year equal to one-half of this amount of additional tax.

As an alternative to taking this credit against its own tax liability, an electric power holding company may elect to allocate the credit among the members of its affiliated group. In this case, the credit must be taken in four equal installments beginning in the later of the following taxable year or the taxable year for which the taxpayer's final return is due in 2004.

(h) Limitation on Credits. — The credits provided in this section are allowed against the tax levied in this Part and the franchise tax levied in Article 3 of this Chapter. A taxpayer may claim a credit against only one of the taxes against which it is allowed. Each taxpayer must elect the tax against which the credit will be taken when filing the return on which the first installment of the credit is claimed. This election is binding. All installments and carryforwards of the credit must be taken against the same tax.

In order for a member of an affiliated group to take a credit, each member of the affiliated group that is required to file a return under this Part or under Article 3 of this Chapter must attach a schedule to its return that shows for every member of the group the amount of the credit taken by it, the tax against which it is taken, and the amount of the resulting tax. In addition, each member must provide any other documentation required by the Secretary.

A credit allowed in this section may not exceed the amount of tax against which it is taken for the taxable year reduced by the sum of all credits allowable, except tax payments made by or on behalf of the taxpayer. Any unused portion of the credit may be carried forward to succeeding taxable years. (2002-136, s. 2.)

Editor's Note. — Session Laws 2002-136, s. 7, made this section effective for taxable years beginning on or after January 1, 2001.

Session Laws 2002-136, s. 5, provides: "It is the intent of the General Assembly that the provisions of this act are to remain in effect for taxable years beginning in 2001 and 2002. The Revenue Laws Study Committee shall study the treatment of expenses related to dividends received and other income not taxed and the taxation of affiliated corporations, of holding companies, and of financial institutions under current law. The Committee shall report to the 2003 General Assembly its recommendations for modifying the provisions of this act and other provisions of the taxes on corporations and businesses in order to provide for a more equitable and stable source of revenue. It is the intent of the General Assembly to address the issues raised by this act during the 2003 Regular Session and enact changes effective for taxable years beginning on or after January 1, 2003."

Session Laws 2002-136, s. 6(a)-(c), provides: "(a) If a taxpayer meets the condition set out in subsection (c) of this section [Session Laws 2002-136, s. 6(c)], then, notwithstanding G.S. 105-163.41, no addition to tax may be made under that statute for a taxable year beginning on or after January 1, 2002, and before January 1, 2003, with respect to an underpayment of corporate income tax to the extent the underpayment was created or increased by Section 3 of S.L. 2001-327. This subsection does not apply to any underpayment of an installment of estimated tax that is due more than 15 days after the date this act becomes law.

"(b) If a taxpayer meets the condition set out in subsection (c) of this section [Session Laws 2002-136, s. 6(c)], then, notwithstanding G.S. 105-236(4), the penalty under that statute for a taxable year beginning on or after January 1, 2001, and before January 1, 2002, is waived with respect to failure to pay an amount of corporate income tax due to the extent the amount of tax due was created by Section 3 of S.L. 2001-327. This subsection does not apply

to any amount of corporate income tax that was due more than 15 days after the date this act becomes law.

"(c) In order to qualify for the benefit of this section [Session Laws 2002-136, s. 6], a taxpayer must pay within 15 days after the date this act becomes law all tax due by that date that was created or increased by Section 3 of S.L. 2001-327."

§ 105-130.7. Deductible portion of dividends.

Editor's Note. —

Session Laws 2002-136, s. 6(a)-(c), provides: "(a) If a taxpayer meets the condition set out in subsection (c) of this section [Session Laws 2002-136, s. 6(c)], then, notwithstanding G.S. 105-163.41, no addition to tax may be made under that statute for a taxable year beginning on or after January 1, 2002, and before January 1, 2003, with respect to an underpayment of corporate income tax to the extent the underpayment was created or increased by Section 3 of S.L. 2001-327. This subsection does not apply to any underpayment of an installment of estimated tax that is due more than 15 days after the date this act becomes law.

"(b) If a taxpayer meets the condition set out in subsection (c) of this section [Session Laws 2002-136, s. 6(c)], then, notwithstanding G.S. 105-236(4), the penalty under that statute for a taxable year beginning on or after January 1, 2001, and before January 1, 2002, is waived with respect to failure to pay an amount of corporate income tax due to the extent the amount of tax due was created by Section 3 of S.L. 2001-327. This subsection does not apply to any amount of corporate income tax that was due more than 15 days after the date this act becomes law.

"(c) In order to qualify for the benefit of this section [Session Laws 2002-136, s. 6], a taxpayer must pay within 15 days after the date this act becomes law all tax due by that date that was created or increased by Section 3 of S.L. 2001-327."

§ 105-130.8. Net economic loss.

(a) Net economic losses sustained by a corporation in any or all of the 15 preceding income years shall be allowed as a deduction to the corporation subject to the following limitations:

(1) The purpose in allowing the deduction of a net economic loss of a prior year is to grant some measure of relief to the corporation that has incurred economic misfortune or is otherwise materially affected by strict adherence to the annual accounting rule in the determination of net income. The deduction allowed in this section does not authorize the carrying forward of any particular items or category of loss except to the extent that the loss results in the impairment of the net economic situation of the corporation so as to result in a net economic loss as defined in this section.

(2) The net economic loss for any year means the amount by which allowable deductions for the year other than prior year losses exceed income from all sources in the year including any income not taxable under this Part.

(3) Any net economic loss of prior years brought forward and claimed as a deduction in any income year may be deducted from net income of the year only to the extent that the loss carried forward from the prior years exceeds any income not taxable under this Part received in the same year in which the deduction is claimed, except that in the case of a corporation required to allocate and apportion to North Carolina its net income, only that proportionate part of the net economic loss of a prior year shall be deductible from total income allocable to this State as would be determined by the use of the allocation and apportionment provisions of G.S. 105-130.4 for the year of the loss.

(4) A net economic loss carried forward from any year shall first be applied to, or offset by, any income taxable or nontaxable of the next succeeding year before any portion of the loss may be carried forward to a succeeding year.

(5) For purposes of this section, any income item deductible in determining State net income under the provisions of G.S. 105-130.5 and any nonbusiness income not allocable to this State under the provisions of G.S. 105-130.4 shall be considered as income not taxable under this Part. The amount of the income item considered income not taxable under this Part is determined after subtracting related expenses for which a deduction was allowed under this Part.

(6) No loss shall either directly or indirectly be carried forward more than 15 years.

(b) A corporation claiming a deduction for a loss for the current year or carried forward from a prior year must maintain and make available for inspection by the Secretary all records necessary to determine and verify the amount of the deduction. The Secretary or the taxpayer may redetermine an item originating in a taxable year that is closed under the statute of limitations for the purpose of determining the amount of net economic loss that can be carried forward to a taxable year that remains open under the statute of limitations. (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3; 1951, c. 643, s. 4; c. 937, s. 4; 1953, c. 1031, s. 1; c. 1302, s. 4; 1955, c. 1100, s. 1; c. 1331, s. 1; cc. 1332, 1342; c. 1343, s. 1; 1957, c. 1340, ss. 4, 8; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, c. 1110, s. 3; 1998-98, s. 69; 1998-171, ss. 6, 8; 2002-136, s. 3.)

Editor's Note. —

Session Laws 2002-136, s. 5, provides: "It is the intent of the General Assembly that the provisions of this act are to remain in effect for taxable years beginning in 2001 and 2002. The Revenue Laws Study Committee shall study the treatment of expenses related to dividends received and other income not taxed and the taxation of affiliated corporations, of holding companies, and of financial institutions under current law. The Committee shall report to the 2003 General Assembly its recommendations for modifying the provisions of this act and other provisions of the taxes on corporations and businesses in order to provide for a more equitable and stable source of revenue. It is the intent of the General Assembly to address the issues raised by this act during the 2003 Regular Session and enact changes effective for taxable years beginning on or after January 1, 2003."

Session Laws 2002-136, s. 6(a)-(c), provides: "(a) If a taxpayer meets the condition set out in subsection (c) of this section [Session Laws 2002-136, s. 6(c)], then, notwithstanding G.S. 105-163.41, no addition to tax may be made under that statute for a taxable year beginning on or after January 1, 2002, and before January 1, 2003, with respect to an underpayment of corporate income tax to the extent the underpayment was created or increased by Section 3 of S.L. 2001-327. This subsection does not apply to any underpayment of an installment of estimated tax that is due more than 15 days after the date this act becomes law.

"(b) If a taxpayer meets the condition set out in subsection (c) of this section [Session Laws 2002-136, s. 6(c)], then, notwithstanding G.S. 105-236(4), the penalty under that statute for a taxable year beginning on or after January 1, 2001, and before January 1, 2002, is waived with respect to failure to pay an amount of corporate income tax due to the extent the amount of tax due was created by Section 3 of S.L. 2001-327. This subsection does not apply to any amount of corporate income tax that was due more than 15 days after the date this act becomes law.

"(c) In order to qualify for the benefit of this section [Session Laws 2002-136, s. 6], a taxpayer must pay within 15 days after the date this act becomes law all tax due by that date that was created or increased by Section 3 of S.L. 2001-327."

Effect of Amendments. —

Session Laws 2002-136, s. 3, effective for taxable years beginning on or after January 1, 2001, added the second sentence in subdivision (a)(5).

§ 105-130.34. Credit for certain real property donations.

(a) Any corporation that makes a qualified donation of an interest in real property located in North Carolina during the taxable year that is useful for public beach access or use, public access to public waters or trails, fish and

wildlife conservation, or other similar land conservation purposes is allowed a credit against the tax imposed by this Part equal to twenty-five percent (25%) of the fair market value of the donated property interest. To be eligible for this credit, the interest in real property must be donated in perpetuity to and accepted by the State, a local government, or a body that is both organized to receive and administer lands for conservation purposes and qualified to receive charitable contributions pursuant to G.S. 105-130.9. Lands required to be dedicated pursuant to local governmental regulation or ordinance and dedications made to increase building density levels permitted under a regulation or ordinance are not eligible for this credit. The credit allowed under this section may not exceed five hundred thousand dollars ($500,000). To support the credit allowed by this section, the taxpayer must file with its income tax return, for the taxable year in which the credit is claimed, a certification by the Department of Environment and Natural Resources that the property donated is suitable for one or more of the valid public benefits set forth in this subsection.

(b) The credit allowed by this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer.

(c) Any unused portion of this credit may be carried forward for the next succeeding five years.

(d) That portion of a qualifying donation that is the basis for a credit allowed under this section is not eligible for deduction as a charitable contribution under G.S. 105-130.9. (1983, c. 793, s. 1; 1989, c. 716, s. 1; c. 727, s. 218 (41); 1997-226, s. 1; 1997-443, s. 11A.119(a); 1998-98, s. 69; 1998-212, s. 29A.13(c); 2002-72, s. 15(a).)

Effect of Amendments. — Session Laws 2002-72, s. 15(a), effective August 12, 2002, substituted "donated in perpetuity to and accepted by the State" for "donated to and accepted by either the State" in the second sentence of subsection (a).

§ 105-130.41. (Effective for taxable years ending before January 1, 2004) Credit for North Carolina State Ports Authority wharfage, handling, and throughput charges.

(a) Credit. — A taxpayer whose waterborne cargo is loaded onto or unloaded from an ocean carrier calling at the State-owned port terminal at Wilmington or Morehead City, without consideration of the terms under which the cargo is moved, is allowed a credit against the tax imposed by this Part. The amount of credit allowed is equal to the excess of the wharfage, handling (in or out), and throughput charges assessed on the cargo for the current taxable year over an amount equal to the average of the charges for the current taxable year and the two preceding taxable years. The credit applies to forest products, break-bulk cargo and container cargo, including less-than-container-load cargo, that is loaded onto or unloaded from an ocean carrier calling at either the Wilmington or Morehead City port terminal and to bulk cargo that is loaded onto or unloaded from an ocean carrier calling at the Morehead City port terminal. To obtain the credit, taxpayers must provide to the Secretary a statement from the State Ports Authority certifying the amount of charges for which a credit is claimed and any other information required by the Secretary.

(b) Limitations. — This credit may not exceed fifty percent (50%) of the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except tax payments made by or on behalf of the corporation. Any unused portion of the credit may be carried forward for the

G.S. 105-130.41 has a postponed repeal date. See notes.

succeeding five years. The maximum cumulative credit that may be claimed by a corporation under this section is two million dollars ($2,000,000).

(c) Definitions. — For purposes of this section, the terms "handling" (in or out) and "wharfage" have the meanings provided in the State Ports Tariff Publications, "Wilmington Tariff, Terminal Tariff #6," and "Morehead City Tariff, Terminal Tariff #1." For purposes of this section, the term "throughput" has the same meaning as "wharfage" but applies only to bulk products, both dry and liquid.

(d) Sunset. — This section is repealed effective for taxable years beginning on or after January 1, 2004. (1991 (Reg. Sess., 1992), c. 977, s. 1; 1993 (Reg. Sess., 1994), c. 681, s. 1; 1995, c. 17, s. 17; c. 495, ss. 1, 3, 4; 1996, 2nd Ex. Sess., c. 18, s. 15.3(a); 1997-443, s. 29.1(a)-(c); 1998-98, s. 69; 2001-517, ss. 1, 2; 2002-99, s. 6(c).)

Editor's Note. — Session Laws 2002-99, s. 6(a), effective August 29, 2002, amended Session Laws 1991 (Reg. Sess., 1992), c. 977, s. 4, which, as amended by Session Laws 1995, c. 17, s. 17, by Session Laws 1995, c. 495, s. 3, by Session Laws 1997-443, s. 29.1(a), and by Session Laws 2001-517, s. 1, made this section effective for taxable years beginning on or after March 1, 1992, and provided for its expiration for taxable years beginning on or after January 1, 2003, by deleting the sunset provision. For sunset, see now subsection (d) of this section.

Session Laws 2002-99, s. 6(b), effective August 29, 2002, amended Session Laws 1993, c. 681, s. 4, which, as amended by Session Laws 1995, c. 17, s. 17, by Session Laws 1995, c. 495, s. 4, by Session Laws 1997-443, s. 29.1(b), and by Session Laws 2001-517, s. 2, made the amendments to this section by the 1993 act effective for taxable years beginning on or after January 1, 1994, by deleting the sunset provision. For sunset, see now subsection (d) of this section.

Effect of Amendments. —

Session Laws 2002-99, s. 6.(c), effective August 29, 2002, added subsection (d).

Part 2. Individual Income Tax.

§ 105-134.6. Adjustments to taxable income.

(a) S Corporations. — The pro rata share of each shareholder in the income attributable to the State of an S Corporation shall be adjusted as provided in G.S. 105-130.5. The pro rata share of each resident shareholder in the income not attributable to the State of an S Corporation shall be subject to the adjustments provided in subsections (b), (c), and (d) of this section.

(b) Deductions. — The following deductions from taxable income shall be made in calculating North Carolina taxable income, to the extent each item is included in taxable income:

(1) Interest upon the obligations of any of the following:
   a. The United States or its possessions.
   b. This State, a political subdivision of this State, or a commission, an authority, or another agency of this State or of a political subdivision of this State.
   c. A nonprofit educational institution organized or chartered under the laws of this State.

(2) Gain from the disposition of obligations issued before July 1, 1995, to the extent the gain is exempt from tax under the laws of this State.

(3) Benefits received under Title II of the Social Security Act and amounts received from retirement annuities or pensions paid under the provisions of the Railroad Retirement Act of 1937.

(4) Repealed by Session Laws 1989 (Reg. Sess., 1990), c. 1002, s. 2.

(5) Refunds of state, local, and foreign income taxes included in the taxpayer's gross income.

(5a) Reserved.

(5b) The amount received during the taxable year from one or more State, local, or federal government retirement plans to the extent the amount is exempt from tax under this Part pursuant to a court order in settlement of the following cases: Bailey v. State, 92 CVS 10221, 94 CVS 6904, 95 CVS 6625, 95 CVS 8230; Emory v. State, 98 CVS 0738; and Patton v. State, 95 CVS 04346. Amounts deducted under this subdivision may not also be deducted under subdivision (6) of this subsection.

(6)a. An amount, not to exceed four thousand dollars ($4,000), equal to the sum of the amount calculated in subparagraph b. plus the amount calculated in subparagraph c.

b. The amount calculated in this subparagraph is the amount received during the taxable year from one or more state, local, or federal government retirement plans.

c. The amount calculated in this subparagraph is the amount received during the taxable year from one or more retirement plans other than state, local, or federal government retirement plans, not to exceed a total of two thousand dollars ($2,000) in any taxable year.

d. In the case of a married couple filing a joint return where both spouses received retirement benefits during the taxable year, the maximum dollar amounts provided in this subdivision for various types of retirement benefits apply separately to each spouse's benefits.

(7) Recodified as G.S. 105-134.6(d)(1).

(8) Recodified as G.S. 105-134.6(d)(2).

(9) Income that is (i) earned or received by an enrolled member of a federally recognized Indian tribe and (ii) derived from activities on a federally recognized Indian reservation while the member resides on the reservation. Income from intangibles having a situs on the reservation and retirement income associated with activities on the reservation are considered income derived from activities on the reservation.

(10) The amount by which the basis of property under this Article exceeds the basis of the property under the Code, in the year the taxpayer disposes of the property.

(11) Severance wages received by a taxpayer from an employer as the result of the taxpayer's permanent, involuntary termination from employment through no fault of the employee. The amount of severance wages deducted as the result of the same termination may not exceed thirty-five thousand dollars ($35,000) for all taxable years in which the wages are received.

(12) Repealed by Session Laws 1998-171, s. 2, effective October 1, 1998.

(13) Repealed by Session Laws 2002-126, s. 30C.4, effective for taxable years beginning on or after January 1, 2002.

(14) The amount paid to the taxpayer by the State under G.S. 148-84 as compensation for pecuniary loss suffered by reason of erroneous conviction and imprisonment.

(15) Interest, investment earnings, and gains of a trust, the settlors of which are two or more manufacturers that signed a settlement agreement with this State to settle existing and potential claims of the State against the manufacturers for damages attributable to a product of the manufacturers, if the trust meets all of the following conditions:

a. The purpose of the trust is to address adverse economic consequences resulting from a decline in demand of the manufactured

product potentially expected to occur because of market restrictions and other provisions in the settlement agreement.

b. A court of this State approves and retains jurisdiction over the trust.

c. Certain portions of the distributions from the trust are made in accordance with certifications that meet the criteria in the agreement creating the trust and are provided by a nonprofit entity, the governing board of which includes State officials.

(16) The amount paid to the taxpayer during the taxable year from the Hurricane Floyd Reserve Fund in the Office of State Budget and Management for hurricane relief or assistance, but not including payments for goods or services provided by the taxpayer.

(17) In each of the taxpayer's first five taxable years beginning on or after January 1, 2005, an amount equal to twenty percent (20%) of the amount added to taxable income in a previous year as accelerated depreciation under subdivision (c)(8) of this section.

(c) Additions. — The following additions to taxable income shall be made in calculating North Carolina taxable income, to the extent each item is not included in taxable income:

(1) Interest upon the obligations of states other than this State, political subdivisions of those states, and agencies of those states and their political subdivisions.

(2) Any amount allowed as a deduction from gross income under the Code that is taxed under the Code by a separate tax other than the tax imposed in section 1 of the Code.

(3) Any amount deducted from gross income under section 164 of the Code as state, local, or foreign income tax to the extent that the taxpayer's total itemized deductions deducted under the Code for the taxable year exceed the standard deduction allowable to the taxpayer under the Code reduced by the amount the taxpayer is required to add to taxable income under subdivision (4) of this subsection.

(4) **(Effective until taxable years beginning on or after January 1, 2004)** The amount by which the taxpayer's additional standard deduction for aged and blind has been increased for inflation under section 63(c)(4)(A) of the Code plus the amount by which the taxpayer's basic standard deduction, including adjustments for inflation, under the Code exceeds the appropriate amount in the following chart based on the taxpayer's filing status:

Filing Status	Standard Deduction
Married filing jointly/Surviving Spouse	$5,500
Head of Household	4,400
Single	3,000
Married filing separately	2,750

(4) **(Effective for taxable years beginning on or after January 1, 2004)** The amount by which the taxpayer's additional standard deduction for aged and blind has been increased for inflation under section 63(c)(4)(A) of the Code plus the amount by which the taxpayer's basic standard deduction, including adjustments for inflation, under the Code exceeds the appropriate amount in the following chart based on the taxpayer's filing status:

Filing Status	Standard Deduction
Married filing jointly/Surviving Spouse	$6,000
Head of Household	4,400
Single	3,000
Married filing separately	3,000

(4a) The amount by which each of the taxpayer's personal exemptions has been increased for inflation under section 151(d)(4)(A) of the Code.

This amount is reduced by five hundred dollars ($500.00) for each personal exemption if the taxpayer's adjusted gross income (AGI), as calculated under the Code, is less than the following amounts:

Filing Status	AGI
Married, filing jointly	$100,000
Head of Household	80,000
Single	60,000
Married, filing separately	50,000.

For the purposes of this subdivision, if the taxpayer's personal exemptions have been reduced by the applicable percentage under section 151(d)(3) of the Code, the amount by which the personal exemptions have been increased for inflation is also reduced by the applicable percentage.

(5) The market price of the gleaned crop for which the taxpayer claims a credit for the taxable year under G.S. 105-151.14.

(6) The amount by which the basis of property under the Code exceeds the basis of the property under this Article, in the year the taxpayer disposes of the property.

(7) The amount of federal estate tax that is attributable to an item of income in respect of a decedent and is deducted from gross income under section 691(c) of the Code.

(8) The applicable percentage of the amount allowed as a thirty percent (30%) accelerated depreciation deduction under section 168(k) or section 1400L of the Code, as set out in the table below. In addition, a taxpayer who was allowed a thirty percent (30%) accelerated depreciation deduction under section 168(k) or section 1400L of the Code in a taxable year beginning before January 1, 2002, and whose North Carolina taxable income in that earlier year reflected that accelerated depreciation deduction must add to federal taxable income in the taxpayer's first taxable year beginning on or after January 1, 2002, an amount equal to the amount of the deduction allowed in the earlier taxable year. These adjustments do not result in a difference in basis of the affected assets for State and federal income tax purposes. The applicable percentage is as follows:

Taxable Year	Percentage
2002	100%
2003	70%
2004 and thereafter	0%

(d) Other Adjustments. — The following adjustments to taxable income shall be made in calculating North Carolina taxable income:

(1) The amount of inheritance or estate tax attributable to an item of income in respect of a decedent required to be included in gross income under the Code, adjusted as provided in G.S. 105-134.5, 105-134.6, and 105-134.7, may be deducted in the year the item of income is included. The amount of inheritance or estate tax attributable to an item of income in respect of a decedent is (i) the amount by which the inheritance or estate tax paid under Article 1 or 1A of this Chapter on property transferred to a beneficiary by a decedent exceeds the amount of the tax that would have been payable by the beneficiary if the item of income in respect of a decedent had not been included in the property transferred to the beneficiary by the decedent, (ii) multiplied by a fraction, the numerator of which is the amount required to be included in gross income for the taxable year under the Code, adjusted as provided in G.S. 105-134.5, 105-134.6,

and 105-134.7, and the denominator of which is the total amount of income in respect of a decedent transferred to the beneficiary by the decedent. For an estate or trust, the deduction allowed by this subdivision shall be computed by excluding from the gross income of the estate or trust the portion, if any, of the items of income in respect of a decedent that are properly paid, credited, or to be distributed to the beneficiaries during the taxable year.

The Secretary may provide to a beneficiary of an item of income in respect of a decedent any information contained on an inheritance or estate tax return that the beneficiary needs to compute the deduction allowed by this subdivision.

(2) The taxpayer may deduct the amount by which the taxpayer's deductions allowed under the Code were reduced, and the amount of the taxpayer's deductions that were not allowed, because the taxpayer elected a federal tax credit in lieu of a deduction. This deduction is allowed only to the extent that a similar credit is not allowed by this Part for the amount.

(3) The taxpayer shall add to taxable income the amount of any recovery during the taxable year not included in taxable income, to the extent the taxpayer's deduction of the recovered amount in a prior taxable year reduced the taxpayer's tax imposed by this Part but, due to differences between the Code and this Part, did not reduce the amount of the taxpayer's tax imposed by the Code. The taxpayer may deduct from taxable income the amount of any recovery during the taxable year included in taxable income under section 111 of the Code, to the extent the taxpayer's deduction of the recovered amount in a prior taxable year reduced the taxpayer's tax imposed by the Code but, due to differences between the Code and this Part, did not reduce the amount of the taxpayer's tax imposed by this Part. (1989, c. 718, s. 2; c. 728, s. 1.4; c. 770, ss. 41.2, 41.3; c. 792, s. 1.1; 1989 (Reg. Sess., 1990), c. 984, s. 4; c. 1002, s. 2; 1991, c. 45, s. 9; c. 453, s. 1; c. 689, ss. 253, 254; 1991 (Reg. Sess., 1992), c. 1007, s. 3; 1993, c. 12, s. 8; c. 443, s. 8; c. 485, s. 9; 1993 (Reg. Sess., 1994), c. 745, s. 7; 1995, c. 17, s. 5; c. 42, ss. 1, 2(a), (b); c. 46, s. 3; c. 370, s. 3; 1996, 2nd Ex. Sess., c. 13, s. 8.1; c. 14, s. 9; 1997-226, s. 3; 1997-328, s. 1; 1997-388, s. 4; 1997-525, s. 1; 1998-98, s. 69; 1998-171, ss. 2, 3; 1998-212, ss. 29A.2(c), 29A.13(a); 1999-333, s. 3; 1999-463, Ex Sess., s. 4.6 (a); 2000-140, ss. 65, 93.1(a); 2001-424, ss. 12.2(b), 34.19(a), (b); 2002-126, ss. 30B.1(a), 30B.1(b), 30C.2(b), 30C.2(d), 30C.4.)

Subdivision (c)(4) Set Out Twice. — The first version of subdivision (c)(4) set out above is effective for taxable years beginning on or after January 1, 2003 until taxable years beginning on or after January 1, 2004. The second version of subdivision (c)(4) set out above is effective for taxable years beginning on or after January 1, 2004.

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2001-424, s. 34.19(a), as amended by Session Laws 2002-126, s. 30B.1(a), effective for taxable years beginning on or after January 1, 2003, in subdivision (c)(3), substituted "the taxpayer is required to add to taxable income under subdivision (4) of this subsection" for "by which the taxpayer's allowable standard deduction has been increased under section 63(c)(4) of the Code," and in subdivision (c)(4), inserted "additional," "for aged and blind," and the language beginning "plus the amount by which," and added the table.

Session Laws 2001-424, s. 34.19(b), as amended by Session Laws 2002-126, s. 30B.1(b), effective for taxable years beginning on or after January 1, 2004, amended subdivision (c)(4), as amended by Session Laws 2001-424, s. 34.19(a), by changing the standard deduction for married filing jointly/surviving

spouse from $5,500 to $6,000 and for married filing separately from $2,750 to $3,000.

Session Laws 2002-126, ss. 30C.2(b), 30C.2(d), and 30C.4, effective for taxable years beginning on or after January 1, 2002, repealed subdivision (b)(13), relating to the amount distributed to a beneficiary of the Parental Savings Trust Fund, and added subdivisions (b)(17) and (c)(8).

§ 105-151.12. Credit for certain real property donations.

(a) A person who makes a qualified donation of an interest in real property located in North Carolina during the taxable year that is useful for (i) public beach access or use, (ii) public access to public waters or trails, (iii) fish and wildlife conservation, or (iv) other similar land conservation purposes is allowed a credit against the tax imposed by this Part equal to twenty-five percent (25%) of the fair market value of the donated property interest. To be eligible for this credit, the interest in property must be donated in perpetuity to and accepted by the State, a local government, or a body that is both organized to receive and administer lands for conservation purposes and qualified to receive charitable contributions under the Code. Lands required to be dedicated pursuant to local governmental regulation or ordinance and dedications made to increase building density levels permitted under a regulation or ordinance are not eligible for this credit. The credit allowed under this section may not exceed two hundred fifty thousand dollars ($250,000). To support the credit allowed by this section, the taxpayer must file with the income tax return for the taxable year in which the credit is claimed a certification by the Department of Environment and Natural Resources that the property donated is suitable for one or more of the valid public benefits set forth in this subsection.

(b) The credit allowed by this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer.

Any unused portion of this credit may be carried forward for the next succeeding five years.

(c) Repealed by Session Laws 1998-212, s. 29A.13(b).

(d) In the case of property owned by a married couple, if both spouses are required to file North Carolina income tax returns, the credit allowed by this section may be claimed only if the spouses file a joint return. If only one spouse is required to file a North Carolina income tax return, that spouse may claim the credit allowed by this section on a separate return.

(e) In the case of marshland for which a claim has been filed pursuant to G.S. 113-205, the offer of donation must be made before December 31, 2003 to qualify for the credit allowed by this section.

(f) **(Expires for taxable years ending on or after January 1, 2005)** Notwithstanding G.S. 105-269.15, the maximum dollar limit that applies in determining the amount of the credit applicable to a partnership that qualifies for the credit applies separately to each partner. (1983, c. 793, s. 3; 1985, c. 278, s. 2; 1989, c. 716, s. 2; c. 727, s. 218(43); c. 728, s. 1.17; 1989 (Reg. Sess., 1990), c. 869, s. 3; 1991, c. 45, s. 10; c. 453, ss. 2, 4; 1991 (Reg. Sess., 1992), c. 930, s. 21; 1993 (Reg. Sess., 1994), c. 717, s. 4; 1997-226, s. 2; 1997-443, s. 11A.119(a); 1998-98, s. 69; 1998-179, s. 2; 1998-212, s. 29A.13(b), (d); 2001-335, s. 2; 2002-72, s. 15(b).)

Effect of Amendments. —

Session Laws 2002-72, s. 15(b), effective August 12, 2002, substituted "donated in perpetuity to and accepted by the State" for "donated to and accepted by either the State" in the second sentence of subsection (a).

§ 105-151.22. (Effective for taxable years ending before January 1, 2004) Credit for North Carolina State Ports Authority wharfage, handling, and throughput charges.

(a) Credit. — A taxpayer whose waterborne cargo is loaded onto or unloaded from an ocean carrier calling at the State-owned port terminal at Wilmington or Morehead City, without consideration of the terms under which the cargo is moved, is allowed a credit against the tax imposed by this Part. The amount of credit allowed is equal to the excess of the wharfage, handling (in or out), and throughput charges assessed on the cargo for the current taxable year over an amount equal to the average of the charges for the current taxable year and the two preceding taxable years. The credit applies to forest products, break-bulk cargo and container cargo, including less-than-container-load cargo, that is loaded onto or unloaded from an ocean carrier calling at either the Wilmington or Morehead City port terminal and to bulk cargo that is loaded onto or unloaded from an ocean carrier calling at the Morehead City port terminal. To obtain the credit, taxpayers must provide to the Secretary a statement from the State Ports Authority certifying the amount of charges for which a credit is claimed and any other information required by the Secretary.

(b) Limitations. — This credit may not exceed fifty percent (50%) of the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except tax payments made by or on behalf of the taxpayer. Any unused portion of the credit may be carried forward for the succeeding five years. The maximum cumulative credit that may be claimed by a taxpayer under this section is two million dollars ($2,000,000).

(c) Definitions. — For purposes of this section, the terms "handling" (in or out) and "wharfage" have the meanings provided in the State Ports Tariff Publications, "Wilmington Tariff, Terminal Tariff #6," and "Morehead City Tariff, Terminal Tariff #1." For purposes of this section, the term "throughput" has the same meaning as "wharfage" but applies only to bulk products, both dry and liquid.

(d) Sunset. — This section is repealed effective for taxable years beginning on or after January 1, 2004. (1991 (Reg. Sess., 1992), c. 977, s. 2; 1993 (Reg. Sess., 1994), c. 681, s. 2; 1995, c. 17, s. 17; c. 495, ss. 2-4; 1996, 2nd Ex. Sess., c. 18, s. 15.3(b); 1997-443, s. 29.1 (a), (b), (d); 1998-98, s. 69; 2001-517, ss. 1, 2; 2002-99, s. 6(d).)

Editor's Note. — Session Laws 2002-99, s. 6(a), effective August 29, 2002, amended Session Laws 1991 (Reg. Sess., 1992), c. 977, s. 4, which, as amended by Session Laws 1995, c. 17, s. 17, by Session Laws 1995, c. 495, s. 3, by Session Laws 1997-443, s. 29.1(a), and by Session Laws 2001-517, s. 1, made this section effective for taxable years beginning on or after March 1, 1992, and provided for its expiration for taxable years beginning on or after January 1, 2003, by deleting the sunset provision. For sunset, see now subsection (d) of this section.

Session Laws 2002-99, s. 6(b), effective August 29, 2002, amended Session Laws 1993, c. 681, s. 4, which, as amended by Session Laws 1995, c. 17, s. 17, by Session Laws 1995, c. 495, s. 4, by Session Laws 1997-443, s. 29.1(b), and by Session Laws 2001-517, s. 2, made the amendments to this section by the 1993 act effective for taxable years beginning on or after January 1, 1994, by deleting the sunset provision. For sunset, see now subsection (d) of this section.

Effect of Amendments. —

Session Laws 2002-99, s. 6.(d), effective August 29, 2002, added subsection (d).

§ 105-151.24. (Effective for taxable years ending before January 1, 2004) Credit for children.

An individual whose adjusted gross income (AGI), as calculated under the Code, is less than the amount listed below is allowed a credit against the tax

G.S. 105-151.24 is set out twice. See notes.

imposed by this Part in an amount equal to seventy-five dollars ($75.00) for each dependent child for whom the individual was allowed to deduct a personal exemption under section 151(c)(1)(B) of the Code for the taxable year:

Filing Status	AGI
Married, filing jointly	$100,000
Head of Household	80,000
Single	60,000
Married, filing separately	50,000.

A nonresident or part-year resident who claims the credit allowed by this section shall reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate. The credit allowed under this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer. (1995, c. 42, s. 3; 1998-98, s. 69; 2001-424, s. 34.20(a); 2002-126, ss. 30B.2(a), 30B.2(b).)

Section Set Out Twice. — The section above is effective until taxable years ending before January 1, 2004. For the section as in effect for taxable years beginning on or after January 1, 2004, see the following section, also numbered G.S. 105-151.24.

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2001-424, 34.20(a), as amended by Session Laws 2002-126, s. 30B.2(a), effective for taxable years beginning on or after January 1, 2003, substituted "seventy-five dollars ($75.00)" for "sixty dollars ($60.00)" in the first paragraph.

§ 105-151.24. (Effective for taxable years beginning on or after January 1, 2004) Credit for children.

An individual whose adjusted gross income (AGI), as calculated under the Code, is less than the amount listed below is allowed a credit against the tax imposed by this Part in an amount equal to one hundred dollars ($100.00) for each dependent child for whom the individual was allowed to deduct a personal exemption under section 151(c)(1)(B) of the Code for the taxable year:

Filing Status	AGI
Married, filing jointly	$100,000
Head of Household	80,000
Single	60,000
Married, filing separately	50,000.

A nonresident or part-year resident who claims the credit allowed by this section shall reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate. The credit allowed under this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer. (1995, c. 42, s. 3; 1998-98, s. 69; 2001-424, s. 34.20(a), (b).)

Section Set Out Twice. — The section above is effective for taxable years beginning on or after January 1, 2004. For the section as in effect until January 1, 2004, see the preceding section, also numbered G.S. 105-151.24.

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2001-424, 34.20(b), as amended by Session

Laws 2002-126, s. 30B.2(b), in this section as amended by Session Laws 2001-424, s. 34.20(a), effective for taxable years beginning on or after January 1, 2004, substituted "one hundred dollars ($100.00)" for "seventy-five dollars ($75.00)" in the first paragraph.

§ 105-151.27: Repealed by Session Laws 2001-424, s. 34.21(a), effective for taxable years beginning on or after January 1, 2001.

§ 105-159.1. Designation of tax by individual to political party.

(a) Every individual whose income tax liability for the taxable year is one dollar ($1.00) or more may designate on his or her income tax return that one dollar ($1.00) of the tax shall be credited to the North Carolina Political Parties Financing Fund for the use of the political party designated by the taxpayer. In the case of a married couple filing a joint return whose income tax liability for the taxable year is two dollars ($2.00) or more, each spouse may designate on the income tax return that one dollar ($1.00) of the tax shall be credited to the North Carolina Political Parties Financing Fund for the use of the political party designated by the taxpayer. Amounts credited to the Fund shall be allocated among the political parties according to the designation of the taxpayer. Where any taxpayer elects to designate but does not specify a particular political party, those funds shall be distributed among the political parties on a pro rata basis according to their respective party voter registrations as determined by the most recent certification of the State Board of Elections. As used in this section, the term "political party" means one of the following that has at least one percent (1%) of the total number of registered voters in the State:

(1) A political party that at the last preceding general State election received at least ten percent (10%) of the entire vote cast in the State for Governor or for presidential electors.

(2) A group of voters who by July 1 of the preceding calendar year, by virtue of a petition as a new political party, had duly qualified as a new political party within the meaning of Chapter 163 of the General Statutes.

(b) Amounts designated under subsection (a) shall be credited to the North Carolina Political Parties Financing Fund on a quarterly basis. Interest earned by the Fund shall be credited to the Fund and shall be allocated among the political parties on the same basis as the principal of the Fund. The State Board of Elections, which administers the Fund, shall make a quarterly report to each State party chairman stating the amount of funds allocated to each party for that quarter, the cumulative total of funds allocated to each party to date for the year, and an estimate of the probable total amount to be collected and allocated to each party for that calendar year.

(c) Repealed by Session Laws 1983, c. 481.

(d) Return. — The first page of the income tax return must give an individual the opportunity to make the political contribution authorized in this section. The return or its accompanying explanatory instructions must readily indicate that a contribution neither increases nor decreases an individual's tax liability.

(e) An income tax return preparer may not designate on a return that the taxpayer does or does not desire to make the political contribution authorized in this section unless the taxpayer or the taxpayer's spouse has consented to the designation. (1977, 2nd Sess., c. 1298, s. 1; 1979, c. 801, s. 69; 1981, c. 963, s. 1; 1983, cc. 139, 480, 481; 1989, c. 37, s. 4; c. 713; c. 728, s. 1.32; c. 770, s. 41.1; 1991, c. 45, s. 13; c. 347, s. 3; c. 690, ss. 8, 9; 1997-515, s. 10(a); 1999-438, s. 3; 2002-106, s. 3.)

Effect of Amendments. —
Session Laws 2002-106, s. 3, effective December 1, 2002, and applicable to actions that are committed on or after that date, substituted "An income tax return preparer" for "A paid preparer of tax returns" in subdivision (e).

§ 105-159.2. Designation of tax to North Carolina Public Campaign Financing Fund.

(a) Allocation to the North Carolina Public Campaign Financing Fund. — To ensure the financial viability of the North Carolina Public Campaign Financing Fund established in Article 22D of Chapter 163 of the General Statutes, the Department must allocate to that Fund three dollars ($3.00) from the income taxes paid each year by each individual with an income tax liability of at least that amount, if the individual agrees. A taxpayer must be given the opportunity to indicate an agreement to that allocation in the manner described in subsection (b) of this section. In the case of a married couple filing a joint return, each individual must have the option of agreeing to the allocation. The amounts allocated under this subsection to the Fund must be credited to it on a quarterly basis.

(b) Returns. — Individual income tax returns must give an individual an opportunity to agree to the allocation of three dollars ($3.00) of the individual's tax liability to the North Carolina Public Campaign Financing Fund. The Department must make it clear to the taxpayer that the dollars will support a nonpartisan court system, that the dollars will go to the Fund if the taxpayer marks an agreement, and that allocation of the dollars neither increases nor decreases the individual's tax liability. The following statement satisfies the intent of this requirement: "Three dollars ($3.00) will go to the North Carolina Public Campaign Financing Fund to support a nonpartisan court system, if you agree. Your tax remains the same whether or not you agree." The Department must consult with the State Board of Elections to ensure that the information given to taxpayers complies with the intent of this section.

The Department must inform the entities it approves to reproduce the return of the requirements of this section and that a return may not reflect an agreement or objection unless the individual completing the return decided to agree or object after being presented with the information required by subsection (c) of this section. No software package used in preparing North Carolina income tax returns may default to an agreement or objection. A paid preparer of tax returns may not mark an agreement or objection for a taxpayer without the taxpayer's consent.

(c) Instructions. — The instruction for individual income tax returns must include the following explanatory statement: "The North Carolina Public Campaign Financing Fund provides campaign money to nonpartisan candidates for the North Carolina Supreme Court and Court of Appeals who voluntarily accept strict campaign spending and fund-raising limits. The Fund also helps finance educational materials about voter registration, the role of the appellate courts, and the candidates seeking election as appellate judges in North Carolina. Three dollars ($3.00) from the taxes you pay will go to the Fund if you mark an agreement. Regardless of what choice you make, your tax will not increase, nor will any refund you are entitled to be reduced." (2002-158, s. 4.)

Editor's Note. — Session Laws 2002-158, s. 16, made this section effective for taxable years beginning on or after January 1, 2003.

Session Laws 2002-158, s. 15, contains a severability clause.

Session Laws 2002-158, s. 15.1, provides that nothing in the act obligates the General Assembly to appropriate funds to implement the act now or in the future.

Part 5. Tax Credits for Qualified Business Investments.

(Repealed effective for investments made on or after January 1, 2004)

§ 105-163.010. (Repealed effective for investments made on or after January 1, 2004. See Editor's note) Definitions.

The following definitions apply in this Part:

(1) Affiliate. — An individual or business that controls, is controlled by, or is under common control with another individual or business.

(2) Business. — A corporation, partnership, limited liability company, association, or sole proprietorship operated for profit.

(3) Control. — A person controls an entity if the person owns, directly or indirectly, more than ten percent (10%) of the voting securities of that entity. As used in this subdivision, the term "voting security" means a security that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive upon its exercise, a security that confers such a right to vote. A general partnership interest is a voting security.

(4) Equity security. — Common stock, preferred stock, or an interest in a partnership, or subordinated debt that is convertible into, or entitles the holder to receive upon its exercise, common stock, preferred stock, or an interest in a partnership.

(5) 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, other than a small business investment company, whose net worth, when added to the net worth of all of its affiliates, is less than ten million dollars ($10,000,000). The term also does not include a business that does not generally market its services to the public and is controlled by a business that is not a financial institution.

(6) North Carolina Enterprise Corporation. — A corporation established in accordance with Article 3 of Chapter 53A of the General Statutes or a limited partnership in which a North Carolina Enterprise Corporation is the only general partner.

(7) Pass-through entity. — An entity or business, including a limited partnership, a general partnership, a joint venture, a Subchapter S Corporation, or a limited liability company, all of which is treated as owned by individuals or other entities under the federal tax laws, in which the owners report their share of the income, losses, and credits from the entity or business on their income tax returns filed with this State. For the purpose of this Part, an owner of a pass-through entity

Part 5 has a delayed repeal date. See notes.

is an individual or entity who is treated as an owner under the federal tax laws.

(8) Qualified business venture. — A business that (i) engages primarily in manufacturing, processing, warehousing, wholesaling, research and development, or a service-related industry, and (ii) is registered with the Secretary of State under G.S. 105-163.013.

(9) Qualified grantee business. — A business that (i) is registered with the Secretary of State under G.S. 105-163.013, and (ii) has received during the preceding three years a grant or other funding from a federal agency under the Small Business Innovation Research Program administered by the United States Small Business Administration or from an organization that meets any of the following qualifications:

a. It is a domestic or foreign corporation that (i) is tax-exempt pursuant to section 501(c)(3) of the Code, (ii) has as its principal purpose the stimulation of the development of the biotechnology industry, and in furtherance of that purpose has received, or is a successor in interest to an organization that has received, direct appropriations from the State in at least three fiscal years.

b. It is a domestic or foreign corporation that (i) is tax-exempt pursuant to section 501(c)(3) of the Code, (ii) has as its principal purpose the stimulation of the development of the microelectronics and communication industries, and (iii) in furtherance of that purpose has received, or is a successor in interest to an organization that has received, direct appropriations from the State in at least three fiscal years.

c. It is an institute that (i) is administratively located within a constituent institution of The University of North Carolina, (ii) is financed in part by a domestic or foreign corporation that is tax-exempt pursuant to section 501(c)(3) of the Code, (iii) has as a principal purpose the stimulation of economic development based on the advancement of science, engineering, and technology, and (iv) funds, either directly or in collaboration with other entities, small businesses engaging in developing technology.

(10) Real estate-related business. — A business that is involved in or related to the brokerage, selling, purchasing, leasing, operating, or managing of hotels, motels, nursing homes or other lodging facilities, golf courses, sports or social clubs, restaurants, storage facilities, or commercial or residential lots or buildings is a real estate-related business, except that a real estate-related business does not include (i) a business that purchases or leases real estate from others for the purpose of providing itself with facilities from which to conduct a business that is not itself a real estate-related business or (ii) a business that is not otherwise a real estate-related business but that leases, subleases, or otherwise provides to one or more other persons a number of square feet of space which in the aggregate does not exceed fifty percent (50%) of the number of square feet of space occupied by the business for its other activities.

(10a) Related person. — A person described in one of the relationships set forth in section 267(b) or 707(b) of the Code.

(11) Security. — A security as defined in Section 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1).

(12) Selling or leasing at retail. — A business is selling or leasing at retail if the business either (i) sells or leases any product or service of any

Part 5 has a delayed repeal date. See notes.

nature from a store or other location open to the public generally or (ii) sells or leases products or services of any nature by means other than to or through one or more other businesses.

(13) Service-related industry. — A business is engaged in a service-related industry, whether or not it also sells a product, if it provides services to customers or clients and does not as a substantial part of its business engage in a business described in G.S. 105-163.013(b)(4). A business is engaged as a substantial part of its business in an activity described in G.S. 105-163.013(b)(4) if (i) its gross revenues derived from all activities described in that subdivision exceed twenty-five percent (25%) of its gross revenues in any fiscal year or (ii) it is established as one of its primary purposes to engage in any activities described in that subdivision, whether or not its purposes were stated in its articles of incorporation or similar organization documents.

(14) Subordinated debt. — Indebtedness that is not secured and is subordinated to all other indebtedness of the issuer issued or to be issued to a financial institution other than a financial institution described in subdivisions (5)(ii) through (5)(v) of this section. Except as provided in G.S. 105-163.014(d1), any portion of indebtedness that matures earlier than five years after its issuance is not subordinated debt. (1987, c. 852, s. 1; 1987 (Reg. Sess., 1988), c. 882, s. 2; 1989 (Reg. Sess., 1990), c. 848, s. 2; 1991, c. 637, s. 1; 1993, c. 443, s. 1; 1996, 2nd Ex. Sess., c. 14, s. 7; 1997-6, s. 5; 1998-98, ss. 46, 69; 1998-212, ss. 29A.15(a), 29A.16(c), (d); 1999-369, s. 5.6; 2002-99, s. 3.)

Repeal of Part. — Session Laws 2001-99, s. 1, effective August 29, 2002, repealed Session Laws 1993, c. 443, s. 7, which, as amended by Session Laws 1998-212, s. 29A.15(a), would have repealed Part 5 of Article 4 of Chapter 105 effective for investments made on or after January 1, 2003. See G.S. 105-163.015 for current sunset date.

Session Laws 1993-443, s. 10, as amended by Session Laws 1998-212, s. 29A.15(b), and as amended by Session Laws 2002-99, s. 2, provides: "Section 6 of this act is effective upon ratification. The remainder of this act becomes effective for taxable years beginning on or after January 1, 1994.

"A business registered as a qualified business venture or a qualified grantee business before January 1, 1994, retains its registration until the renewal date for the registration of that business under Part 5 of Article 4 of Chapter 105 of the General Statutes as in effect before January 1, 1994. The Secretary of State shall not grant renewal of a registration as a qualified business venture or a qualified grantee business unless at the time of filing the renewal application, the business meets the requirements then in effect for a new registration.

"Notwithstanding the provisions of G.S. 105-163.014(a), as amended by this act, a credit under Part 5 of Article 4 of Chapter 105 of the General Statutes for an investment made before January 1, 1994, is not forfeited solely on the grounds that a sibling of the taxpayer provides services for compensation to the business in which the taxpayer invested.

"Notwithstanding the provisions of G.S. 105-163.014(d), as amended by this act, a credit under Part 5 of Article 4 of Chapter 105 of the General Statutes for an investment made before January 1, 1994, is not forfeited solely on the grounds that a redemption of the securities received in the investment is made within five years after the investment was made.

"The Secretary of State may require a qualified business venture or a qualified grantee business that is unable to renew its registration after January 1, 1994, to file reports the Secretary of State considers appropriate to determine the location of the headquarters and principal business operations of the business until three years after the date of the last investment in the business that qualified for the tax credit allowed under Part 5 of Article 4 of Chapter 105 of the General Statutes."

Session Laws 2002-99, s. 8, provides in part: "Notwithstanding the amendments to G.S. 105-163.010 and G.S. 105-163.013 in Sections 3 and 4 of this act, a business to which a grant or other funding was committed before January 1, 2003, by the North Carolina Technological Development Authority, the North Carolina Technological Development Authority, Inc., North Carolina First Flight, Inc., the North Carolina Biotechnology Center, the Microelectronics

Center of North Carolina, the Kenan Institute for Engineering, Technology and Science, or the Federal Small Business Innovation Research Program may still qualify as a qualified grantee business under the provisions of G.S. 105-163.010 and G.S. 105-163.013 as they existed before the enactment of this act."

Effect of Amendments. —

Session Laws 2002-99, s. 3, effective January 1,2003, rewrote subdivision (9).

§ 105-163.011. (Repealed effective for investments made on or after January 1, 2004. See Editor's note) Tax credits allowed.

Repeal of Part. — Session Laws 2002-99, s. 1, effective August 29, 2002, repealed Session Laws 1993, c. 443, s. 7, which, as amended by Session Laws 1998-212, s. 29A.15(a), would have repealed Part 5 of Article 4 of Chapter 105 effective for investments made on or after January 1, 2003. See G.S. 105-163.015 for current sunset date.

Session Laws 1993-443, s. 10, as amended by Session Laws 1998-212, s. 29A.15(b), and as amended by Session Laws 2002-99, s. 2, provides: "Section 6 of this act is effective upon ratification. The remainder of this act becomes effective for taxable years beginning on or after January 1, 1994.

"A business registered as a qualified business venture or a qualified grantee business before January 1, 1994, retains its registration until the renewal date for the registration of that business under Part 5 of Article 4 of Chapter 105 of the General Statutes as in effect before January 1, 1994. The Secretary of State shall not grant renewal of a registration as a qualified business venture or a qualified grantee business unless at the time of filing the renewal application, the business meets the requirements then in effect for a new registration.

"Notwithstanding the provisions of G.S. 105-163.014(a), as amended by this act, a credit under Part 5 of Article 4 of Chapter 105 of the General Statutes for an investment made before January 1, 1994, is not forfeited solely on the grounds that a sibling of the taxpayer provides services for compensation to the business in which the taxpayer invested.

"Notwithstanding the provisions of G.S. 105-163.014(d), as amended by this act, a credit under Part 5 of Article 4 of Chapter 105 of the General Statutes for an investment made before January 1, 1994, is not forfeited solely on the grounds that a redemption of the securities received in the investment is made within five years after the investment was made.

"The Secretary of State may require a qualified business venture or a qualified grantee business that is unable to renew its registration after January 1, 1994, to file reports the Secretary of State considers appropriate to determine the location of the headquarters and principal business operations of the business until three years after the date of the last investment in the business that qualified for the tax credit allowed under Part 5 of Article 4 of Chapter 105 of the General Statutes."

§ 105-163.012. (Repealed effective for investments made on or after January 1, 2004. See Editor's note) Limit; carry-over; ceiling; reduction in basis.

Repeal of Part. — Session Laws 2002-99, s. 1, effective August 29, 2002, repealed Session Laws 1993, c. 443, s. 7, which, as amended by Session Laws 1998-212, s. 29A.15(a), would have repealed Part 5 of Article 4 of Chapter 105 effective for investments made on or after January 1, 2003. See G.S. 105-163.015 for current sunset date.

Session Laws 1993-443, s. 10, as amended by Session Laws 1998-212, s. 29A.15(b), and as amended by Session Laws 2002-99, s. 2, provides: "Section 6 of this act is effective upon ratification. The remainder of this act becomes effective for taxable years beginning on or after January 1, 1994.

"A business registered as a qualified business venture or a qualified grantee business before January 1, 1994, retains its registration until the renewal date for the registration of that business under Part 5 of Article 4 of Chapter 105 of the General Statutes as in effect before January 1, 1994. The Secretary of State shall not grant renewal of a registration as a qualified business venture or a qualified grantee business unless at the time of filing the renewal application, the business meets the requirements then in effect for a new registration.

"Notwithstanding the provisions of G.S. 105-163.014(a), as amended by this act, a credit under Part 5 of Article 4 of Chapter 105 of the General Statutes for an investment made before January 1, 1994, is not forfeited solely on the grounds that a sibling of the taxpayer provides services for compensation to the business in which the taxpayer invested.

"Notwithstanding the provisions of G.S. 105-163.014(d), as amended by this act, a credit under Part 5 of Article 4 of Chapter 105 of the General Statutes for an investment made before January 1, 1994, is not forfeited solely on the grounds that a redemption of the securities received in the investment is made within five years after the investment was made.

"The Secretary of State may require a qualified business venture or a qualified grantee business that is unable to renew its registration after January 1, 1994, to file reports the Secretary of State considers appropriate to determine the location of the headquarters and principal business operations of the business until three years after the date of the last investment in the business that qualified for the tax credit allowed under Part 5 of Article 4 of Chapter 105 of the General Statutes."

§ 105-163.013. (Repealed effective for investments made on or after January 1, 2004. See Editor's note) Registration.

(a) Repealed by Session Laws 1993, c. 443, s. 4.

(b) Qualified Business Ventures. — In order to qualify as a qualified business venture under this Part, a business must be registered with the Securities Division of the Department of the Secretary of State. To register, the business must file with the Secretary of State an application and any supporting documents the Secretary of State may require from time to time to determine that the business meets the requirements for registration as a qualified business venture. A business meets the requirements for registration as a qualified business venture if all of the following are true as of the date the business files the required application:

(1) Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 7.

(1a) Reserved for future codification purposes.

(1b) Either (i) it was organized after January 1 of the calendar year in which its application is filed or (ii) during its most recent fiscal year before filing the application, it had gross revenues, as determined in accordance with generally accepted accounting principles, of five million dollars ($5,000,000) or less on a consolidated basis.

(2) Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 7.

(3) It is organized to engage primarily in manufacturing, processing, warehousing, wholesaling, research and development, or a service-related industry.

(4) It does not engage as a substantial part of its business in any of the following:

a. Providing a professional service as defined in Chapter 55B of the General Statutes.

b. Construction or contracting.

c. Selling or leasing at retail.

d. The purchase, sale, or development, or purchasing, selling, or holding for investment of commercial paper, notes, other indebtedness, financial instruments, securities, or real property, or otherwise make investments.

e. Providing personal grooming or cosmetics services.

f. Offering any form of entertainment, amusement, recreation, or athletic or fitness activity for which an admission or a membership is charged.

(5) It was not formed for the primary purpose of acquiring all or part of the stock or assets of one or more existing businesses.

(6) It is not a real estate-related business.

The effective date of registration for a qualified business venture whose application is accepted for registration is 60 days before the date its application is filed. No credit is allowed under this Part for an investment made before the effective date of the registration or after the registration is revoked. For the

Part 5 has a delayed repeal date. See notes.

purpose of this Article, if a taxpayer's investment is placed initially in escrow conditioned upon other investors' commitment of additional funds, the date of the investment is the date escrowed funds are transferred to the qualified business venture free of the condition.

To remain qualified as a qualified business venture, the business must renew its registration annually as prescribed by rule by filing a financial statement for the most recent fiscal year showing gross revenues, as determined in accordance with generally accepted accounting principles, of five million dollars ($5,000,000) or less on a consolidated basis and an application for renewal in which the business certifies the facts required in the original application.

Failure of a qualified business venture to renew its registration by the applicable deadline shall result in revocation of its registration effective as of the next day after the renewal deadline, but shall not result in forfeiture of tax credits previously allowed to taxpayers who invested in the business except as provided in G.S. 105-163.014. The Secretary of State shall send the qualified business venture notice of revocation within 60 days after the renewal deadline. A qualified business venture may apply to have its registration reinstated by the Secretary of State by filing an application for reinstatement, accompanied by the reinstatement application fee and a late filing penalty of one thousand dollars ($1,000), within 30 days after receipt of the revocation notice from the Secretary of State. A business that seeks approval of a new application for registration after its registration has been revoked must also pay a penalty of one thousand dollars ($1,000). A registration that has been reinstated is treated as if it had not been revoked.

If the gross revenues of a qualified business venture exceed five million dollars ($5,000,000) in a fiscal year, the business must notify the Secretary of State in writing of this fact by filing a financial statement showing the revenues of the business for that year.

(c) Qualified Grantee Businesses. — In order to qualify as a qualified grantee business under this Part, a business must be registered with the Securities Division of the Department of the Secretary of State. To register, the business must file with the Secretary of State an application and any supporting documents the Secretary of State may require from time to time to determine that the business meets the requirements for registration as a qualified grantee business. The requirements for registration as a qualified grantee business are set out in G.S. 105-163.010(9).

The effective date of registration for a qualified grantee business whose application is accepted for registration is the filing date of its application. No credit is allowed under this Part for an investment made before the effective date of the registration or after the registration is revoked.

To remain qualified as a qualified grantee business, the business must renew its registration annually as prescribed by rule by filing an application for renewal in which the business certifies the facts listed in this subsection.

(d) Application Forms; Rules; Fees. — Applications for registration, renewal of registration, and reinstatement of registration under this section shall be in the form required by the Secretary of State. The Secretary of State may, by rule, require applicants to furnish supporting information in addition to the information required by subsections (b) and (c) of this section. The Secretary of State may adopt rules in accordance with Chapter 150B of the General Statutes that are needed to carry out the Secretary's responsibilities under this Part. The Secretary of State shall prepare blank forms for the applications and shall distribute them throughout the State and furnish them on request. Each application shall be signed by the owners of the business or, in the case of a

Part 5 has a delayed repeal date. See notes.

corporation, by its president, vice-president, treasurer, or secretary. There shall be annexed to the application the affirmation of the person making the application in the following form: "Under penalties prescribed by law, I certify and affirm that to the best of my knowledge and belief this application is true and complete." A person who submits a false application is guilty of a Class 1 misdemeanor.

The fee for filing an application for registration under this section is one hundred dollars ($100.00). The fee for filing an application for renewal of registration under this section is fifty dollars ($50.00). The fee for filing an application for reinstatement of registration under this section is fifty dollars ($50.00).

An application for renewal of registration under this section shall indicate whether the applicant is a minority business, as defined in G.S. 143-128, and shall include a report of the number of jobs the business created during the preceding year that are attributable to investments that qualify under this section for a tax credit and the average wages paid by each job. An application that does not contain this information is incomplete and the applicant's registration may not be renewed until the information is provided.

(e) Revocation of Registration. — If the Securities Division of the Department of the Secretary of State finds that any of the information contained in an application of a business registered under this section is false, it shall revoke the registration of the business. The Secretary of State shall not revoke the registration of a business solely because it ceases business operations for an indefinite period of time, as long as the business renews its registration each year as required under G.S. 105-163.013.

(f) Transfer of Registration. — A registration as a qualified business venture or qualified grantee business may not be sold or otherwise transferred, except that if a qualified business venture or qualified grantee business enters into a merger, conversion, consolidation, or other similar transaction with another business and the surviving company would otherwise meet the criteria for being a qualified business venture or qualified grantee business, the surviving company retains the registration without further application to the Secretary of State. In such a case, the qualified business venture or qualified grantee business shall provide the Secretary of State with written notice of the merger, conversion, consolidation, or similar transaction and the name, address, and jurisdiction of incorporation or organization of the surviving company.

(g) Report by Secretary of State. — The Secretary of State shall report to the Revenue Laws Study Committee by October 1 of each year all of the businesses that have registered with the Secretary of State as qualified business ventures and qualified grantee businesses. The report shall include the name and address of each business, the location of its headquarters and principal place of business, a detailed description of the types of business in which it engages, whether the business is a minority business as defined in G.S. 143-128, the number of jobs created by the business during the period covered by the report, and the average wages paid by these jobs. (1987, c. 852, s. 1; 1991, c. 637, s. 4; 1993, c. 443, ss. 4, 9; c. 485, s. 12; c. 553, s. 80.1; 1994, Ex. Sess., c. 14, s. 50; 1993 (Reg. Sess., 1994), c. 745, ss. 9, 10; 1996, 2nd Ex. Sess., c. 14, s. 7; 1998-98, s. 69; 1998-212, ss. 29A.15(a), 29A.16(e); 1999-369, s. 5.7; 2001-414, s. 12; 2002-99, s. 4.)

Repeal of Part. — Session Laws 2002-99, s. 1, effective August 29, 2002, repealed Session Laws 1993, c. 443, s. 7, which, as amended by Session Laws 1998-212, s. 29A.15(a), would have repealed Part 5 of Article 4 of Chapter 105 effective for investments made on or after January 1, 2003. See G.S. 105-163.015 for current sunset date.

Session Laws 1993-443, s. 10, as amended by Session Laws 1998-212, s. 29A.15(b), and as

amended by Session Laws 2002-99, s. 2, provides: "Section 6 of this act is effective upon ratification. The remainder of this act becomes effective for taxable years beginning on or after January 1, 1994.

"A business registered as a qualified business venture or a qualified grantee business before January 1, 1994, retains its registration until the renewal date for the registration of that business under Part 5 of Article 4 of Chapter 105 of the General Statutes as in effect before January 1, 1994. The Secretary of State shall not grant renewal of a registration as a qualified business venture or a qualified grantee business unless at the time of filing the renewal application, the business meets the requirements then in effect for a new registration.

"Notwithstanding the provisions of G.S. 105-163.014(a), as amended by this act, a credit under Part 5 of Article 4 of Chapter 105 of the General Statutes for an investment made before January 1, 1994, is not forfeited solely on the grounds that a sibling of the taxpayer provides services for compensation to the business in which the taxpayer invested.

"Notwithstanding the provisions of G.S. 105-163.014(d), as amended by this act, a credit under Part 5 of Article 4 of Chapter 105 of the General Statutes for an investment made before January 1, 1994, is not forfeited solely on the grounds that a redemption of the securities received in the investment is made within five years after the investment was made.

"The Secretary of State may require a qualified business venture or a qualified grantee business that is unable to renew its registration after January 1, 1994, to file reports the Secretary of State considers appropriate to determine the location of the headquarters and principal business operations of the business until three years after the date of the last investment in the business that qualified for the tax credit allowed under Part 5 of Article 4 of Chapter 105 of the General Statutes."

Session Laws 2002-99, s. 8, provides in part: "Notwithstanding the amendments to G.S. 105-163.010 and G.S. 105-163.013 in Sections 3 and 4 of this act, a business to which a grant or other funding was committed before January 1, 2003, by the North Carolina Technological Development Authority, the North Carolina Technological Development Authority, Inc., North Carolina First Flight, Inc., the North Carolina Biotechnology Center, the Microelectronics Center of North Carolina, the Kenan Institute for Engineering, Technology and Science, or the Federal Small Business Innovation Research Program may still qualify as a qualified grantee business under the provisions of G.S. 105-163.010 and G.S. 105-163.013 as they existed before the enactment of this act."

Effect of Amendments. —

Session Laws 2002-99, s. 4, effective January 1, 2003, rewrote the last sentence of the first paragraph of subsection (c).

§ 105-163.014. (Repealed effective for investments made on or after January 1, 2004. See Editor's note) Forfeiture of credit.

Repeal of Part. — Session Laws 2002-99, s. 1, effective August 29, 2002, repealed Session Laws 1993, c. 443, s. 7, which, as amended by Session Laws 1998-212, s. 29A.15(a), would have repealed Part 5 of Article 4 of Chapter 105 effective for investments made on or after January 1, 2003. See G.S. 105-163.015 for current sunset date.

Session Laws 1993-443, s. 10, as amended by Session Laws 1998-212, s. 29A.15(b), and as amended by Session Laws 2002-99, s. 2, provides: "Section 6 of this act is effective upon ratification. The remainder of this act becomes effective for taxable years beginning on or after January 1, 1994.

"A business registered as a qualified business venture or a qualified grantee business before January 1, 1994, retains its registration until the renewal date for the registration of that business under Part 5 of Article 4 of Chapter 105 of the General Statutes as in effect before January 1, 1994. The Secretary of State shall not grant renewal of a registration as a qualified business venture or a qualified grantee business unless at the time of filing the renewal application, the business meets the requirements then in effect for a new registration.

"Notwithstanding the provisions of G.S. 105-163.014(a), as amended by this act, a credit under Part 5 of Article 4 of Chapter 105 of the General Statutes for an investment made before January 1, 1994, is not forfeited solely on the grounds that a sibling of the taxpayer provides services for compensation to the business in which the taxpayer invested.

"Notwithstanding the provisions of G.S. 105-163.014(d), as amended by this act, a credit under Part 5 of Article 4 of Chapter 105 of the General Statutes for an investment made before January 1, 1994, is not forfeited solely on the grounds that a redemption of the securities received in the investment is made within five years after the investment was made.

"The Secretary of State may require a qualified business venture or a qualified grantee business that is unable to renew its registration

after January 1, 1994, to file reports the Secretary of State considers appropriate to determine the location of the headquarters and principal business operations of the business until three years after the date of the last investment in the business that qualified for the tax credit allowed under Part 5 of Article 4 of Chapter 105 of the General Statutes."

§ 105-163.015. Sunset.

This Part is repealed effective for investments made on or after January 1, 2004. (2002-99, s. 5.)

Editor's Note. — Session Laws 2002-99, s. 8, made this section effective August 29, 2002.

ARTICLE 4A.

Withholding; Estimated Income Tax for Individuals.

§ 105-163.7. Statement to employees; information to Secretary.

(a) Every employer required to deduct and withhold from an employee's wages under G.S. 105-163.2 shall furnish to the employee in respect to the remuneration paid by the employer to such employee during the calendar year, on or before January 31 of the succeeding year, or, if the employment is terminated before the close of the calendar year, within 30 days after the date on which the last payment of remuneration is made, duplicate copies of a written statement showing the following:

(1) The employer's name, address, and taxpayer identification number.

(2) The employee's name and social security number.

(3) The total amount of wages.

(4) The total amount deducted and withheld under G.S. 105-163.2.

(b) The Secretary may require an employer to include information not listed in subsection (a) on the employer's written statement to an employee and to file the statement at a time not required by subsection (a). Every employer shall file an annual report with the Secretary that contains the information given on each of the employer's written statements to an employee and other information required by the Secretary. The annual report is due on the same date the employer's federal information return of federal income taxes withheld from wages is due under the Code. The report required by this subsection is in lieu of the report required by G.S. 105-154.

(c) Repealed by Session Laws 2002-72, s. 16, effective August 12, 2002. (1959, c. 1259, s. 1; 1973, c. 476, s. 193; 1989 (Reg. Sess., 1990), c. 945, s. 11; 1993 (Reg. Sess., 1994), c. 679, s. 8.3; 1997-109, s. 2; 2002-72, s. 16.)

Effect of Amendments. — Session Laws 2002-72, s. 16, effective August 12, 2002, repealed former subsection (c), relating to reporting of information.

§ 105-163.15. Failure by individual to pay estimated income tax; penalty.

Editor's Note. —

Session Laws 2002-126, s. 30I, provides: "Notwithstanding G.S. 105-163.15 and G.S. 105-163.41, no addition to tax may be made under those statutes for a taxable year beginning on or after January 1, 2002, and before January 1, 2003, with respect to an underpayment of corporate or individual income tax to the extent the underpayment was created or increased by this act."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Op-

erations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Article 4C.

Filing of Declarations of Estimated Income Tax and Installment Payments of Estimated Income Tax by Corporations.

§ 105-163.41. Penalty for underpayment.

Editor's Note. —

Session Laws 2002-126, s. 30I, provides: "Notwithstanding G.S. 105-163.15 and G.S. 105-163.41, no addition to tax may be made under those statutes for a taxable year beginning on or after January 1, 2002, and before January 1, 2003, with respect to an underpayment of corporate or individual income tax to the extent the underpayment was created or increased by this act."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-136, s. 6(a)-(c), provides: "(a) If a taxpayer meets the condition set out in subsection (c) of this section [Session Laws 2002-136, s. 6(c)], then, notwithstanding G.S. 105-163.41, no addition to tax may be made under that statute for a taxable year beginning on or after January 1, 2002, and before January 1, 2003, with respect to an underpayment of corporate income tax to the extent the underpayment was created or increased by Section 3 of S.L. 2001-327. This subsection does not apply to any underpayment of an installment of estimated tax that is due more than 15 days after the date this act becomes law.

"(b) If a taxpayer meets the condition set out in subsection (c) of this section [Session Laws 2002-136, s. 6(c)], then, notwithstanding G.S. 105-236(4), the penalty under that statute for a taxable year beginning on or after January 1, 2001, and before January 1, 2002, is waived with respect to failure to pay an amount of corporate income tax due to the extent the amount of tax due was created by Section 3 of S.L. 2001-327. This subsection does not apply to any amount of corporate income tax that was due more than 15 days after the date this act becomes law.

"(c) In order to qualify for the benefit of this section [Session Laws 2002-136, s. 6], a taxpayer must pay within 15 days after the date this act becomes law all tax due by that date that was created or increased by Section 3 of S.L. 2001-327."

Article 5.

Sales and Use Tax.

Part 1. Title, Purpose and Definitions.

§ 105-164.3. Definitions.

The following definitions apply in this Article:

(1) Business. — Includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, profit, benefit or

advantage, either direct or indirect. The term "business" shall not be construed in this Article to include occasional and isolated sales or transactions by a person who does not hold himself out as engaged in business.

(2) Candy. — A preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces that do not require refrigeration. The term does not include any preparation that contains flour.

(3) Clothing. — All human wearing apparel suitable for general use including coats, jackets, hats, hosiery, scarves, and shoes.

(4) Clothing accessories or equipment. — Incidental items worn on the person or in conjunction with clothing including jewelry, cosmetics, eyewear, wallets, and watches.

(5) Consumer. — Means and includes every person storing, using or otherwise consuming in this State tangible personal property purchased or received from a retailer either within or without this State.

(6) Delivery charges. — Charges imposed by the retailer for preparation and delivery of personal property or services to a location designated by the consumer.

(7) Dietary supplement. — A product that is intended to supplement the diet of humans and is required to be labeled as a dietary supplement under federal law, identifiable by the "Supplement Facts" box found on the label.

(8) Direct-to-home satellite service. — Programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground equipment or distribution equipment, except equipment at the subscribers' premises or the uplink process to the satellite.

(9) Engaged in business. — Maintaining, occupying or using permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business, for the selling or delivering of tangible personal property for storage, use or consumption in this State, or permanently or temporarily, directly or through a subsidiary, having any representative, agent, salesman, canvasser or solicitor operating in this State in such selling or delivering, and the fact that any corporate retailer, agent or subsidiary engaged in business in this State may not be legally domesticated or qualified to do business in this State is immaterial. It also means maintaining in this State, either permanently or temporarily, directly or through a subsidiary, tangible personal property for the purpose of lease or rental. It also means making a mail order sale, as defined in this section, if one of the conditions listed in G.S. 105-164.8(b) is met.

(10) Food. — Substances that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. The substances may be in liquid, concentrated, solid, frozen, dried, or dehydrated form. The term does not include tobacco products, as defined in G.S. 105-113.4.

(11) Food sold through a vending machine. — Food dispensed from a machine or another mechanical device that accepts payment.

(12) Gross sales. — The sum total of all retail sales of tangible personal property as defined herein, whether for cash or credit without allowance for cash discount and without any deduction on account of the cost of the property sold, the cost of materials used, labor or service costs, interest paid or any other expenses whatsoever and without any deductions of any kind or character except as provided in this Article.

(13) Hub. — Either of the following:
a. An interstate air courier's hub is the interstate air courier's principal airport within the State for sorting and distributing letters and packages and from which the interstate air courier has, or expects to have upon completion of construction, no less than 150 departures a month under normal operating conditions.
b. An interstate passenger air carrier's hub is the airport in this State that meets both of the following conditions:
1. The air carrier has allocated to the airport under G.S. 105-338 more than sixty percent (60%) of its aircraft value apportioned to this State.
2. The majority of the air carrier's passengers boarding at the airport are connecting from other airports rather than originating at that airport.

(14) In this (the) State. — Within the exterior limits of the State of North Carolina and includes all territory within such limits owned by or ceded to the United States of America.

(15) Interstate air courier. — A person whose primary business is the furnishing of air delivery of individually addressed letters and packages for compensation, in interstate commerce, except by the United States Postal Service.

(16) Interstate passenger air carrier. — A person whose primary business is scheduled passenger air transportation, as defined in the North American Industry Classification System adopted by the United States Office of Management and Budget, in interstate commerce.

(17) Lease or rental. — A transfer, for consideration, of the use but not the ownership of property to another for a period of time.

(18) Mail order sale. — A sale of tangible personal property, ordered by mail, telephone, computer link, or other similar method, to a purchaser who is in this State at the time the order is remitted, from a retailer who receives the order in another state and transports the property or causes it to be transported to a person in this State. It is presumed that a resident of this State who remits an order was in this State at the time the order was remitted.

(19) Major recycling facility. — Defined in G.S. 105-129.25.

(20) Manufactured home. — A structure that is designed to be used as a dwelling and that meets one of the following conditions:
a. Is manufactured in accordance with the specifications for manufactured homes issued by the United States Department of Housing and Urban Development.
b. Is manufactured in accordance with the specifications for modular homes under the North Carolina State Residential Building Code, is built on a permanent chassis, and is transportable in one or more sections.

(21) Mobile telecommunications service. — A radio communication service carried on between mobile stations or receivers and land stations and by mobile stations communicating among themselves and includes all of the following:
a. Both one-way and two-way radio communication services.
b. A mobile service that provides a regularly interacting group of base, mobile, portable, and associated control and relay stations for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation.
c. Any service for which a federal license is required in a personal communications service.

(22) Moped. — A vehicle that has two or three wheels, no external shifting device, and a motor that does not exceed 50 cubic centimeters piston

displacement and cannot propel the vehicle at a speed greater than 30 miles per hour on a level surface.

(23) Motor vehicle. — A vehicle that is designed primarily for use upon the highways and is either self-propelled or propelled by a self-propelled vehicle, but does not include:
a. A moped.
b. Special mobile equipment.
c. A tow dolly that is exempt from motor vehicle title and registration requirements under G.S. 20-51(10) or (11).
d. A farm tractor or other implement of husbandry.
e. A manufactured home, a mobile office, or a mobile classroom.
f. Road construction or road maintenance machinery or equipment.

(24) Net taxable sales. — Means and includes the gross retail sales of the business of the retailer taxed under this Article after deducting exempt sales and nontaxable sales.

(25) Nonresident retail or wholesale merchant. — A person who does not have a place of business in this State, is engaged in the business of acquiring, by purchase, consignment, or otherwise, tangible personal property and selling the property outside the State, and is registered for sales and use tax purposes in a taxing jurisdiction outside the State.

(26) Person. — The same meaning as in G.S. 105-228.90.

(26a) Place of primary use. — The street address representative of where the use of a customer's telecommunications service primarily occurs. The street address must be the customer's residential street address or primary business street address. For mobile telecommunications service, the street address must be within the licensed service area of the service provider. If the customer who contracted with the telecommunications provider for the telecommunications service is not the end user of the service, the end user is considered the customer for the purpose of determining the place of primary use.

(27) Prepaid telephone calling service. — A right that meets all of the following requirements:
a. Authorizes the exclusive purchase of telecommunications service.
b. Must be paid for in advance.
c. Enables the origination of calls by means of an access number, authorization code, or another similar means, regardless of whether the access number or authorization code is manually or electronically dialed.
d. Is sold in units or dollars whose number or dollar value declines with use and is known on a continuous basis.

(28) Prepared food. — Food that meets at least one of the following conditions:
a. It is sold in a heated state or it is heated by the retailer.
b. It consists of two or more foods mixed or combined by the retailer for sale as a single item.
c. It is sold with eating utensils provided by the retailer, such as plates, knives, forks, spoons, glasses, cups, napkins, and straws.

The term does not include food the retailer sliced, repackaged, or pasteurized but did not otherwise process.

(29) Prescription drug. — A drug that under federal law is required, prior to being dispensed or delivered, to be labeled with the following statement: "Caution: Federal law prohibits dispensing without prescription".

(30) Production company. — A person engaged in the business of making original motion picture, television, or radio images for theatrical, commercial, advertising, or educational purposes.

(31) Protective equipment. — Items for human wear and designed as protection of the wearer against injury or disease or as protection against damage or injury of other persons or property but not suitable for general use including breathing masks, face shields, hard hats, and tool belts.

(32) Purchase. — Acquired for a consideration whether

a. The acquisition was effected by a transfer of title or possession, or both, or a license to use or consume;

b. The transfer was absolute or conditional regardless of the means by which it was effected; and

c. The consideration is a price or rental in money or by way of exchange or barter.

It shall also include the procuring of a retailer to erect, install or apply tangible personal property for use in this State.

(33) Purchase price. — The term has the same meaning as the term "sales price" when applied to an item subject to use tax.

(34) Retail sale or sale at retail. — The sale, lease, or rental for any purpose other than for resale, sublease, or subrent.

(35) Retailer. — Means and includes every person engaged in the business of making sales of tangible personal property at retail, either within or without this State, or peddling the same or soliciting or taking orders for sales, whether for immediate or future delivery, for storage, use or consumption in this State and every manufacturer, producer or contractor engaged in business in this State and selling, delivering, erecting, installing or applying tangible personal property for use in this State notwithstanding that said property may be permanently affixed to a building or realty or other tangible personal property. "Retailer" also means a person who makes a mail order sale, as defined in this section, if one of the conditions listed in G.S. 105-164.8(b) is met. Provided, however, that when in the opinion of the Secretary it is necessary for the efficient administration of this Article to regard any salesmen, solicitors, representatives, consignees, peddlers, truckers or canvassers as agents of the dealers, distributors, consignors, supervisors, employers or persons under whom they operate or from whom they obtain the tangible personal property sold by them regardless of whether they are making sales on their own behalf or on behalf of such dealers, distributors, consignors, supervisors, employers or persons, the Secretary may so regard them and may regard the dealers, distributors, consignors, supervisors, employers or persons as "retailers" for the purpose of this Article.

(36) Sale or selling. — The transfer of title or possession of tangible personal property, conditional or otherwise, in any manner or by any means whatsoever, for a consideration paid or to be paid.

The term includes the fabrication of tangible personal property for consumers by persons engaged in business who furnish either directly or indirectly the materials used in the fabrication work. The term also includes the furnishing or preparing for a consideration of any tangible personal property consumed on the premises of the person furnishing or preparing the property or consumed at the place at which the property is furnished or prepared. The term also includes a transaction in which the possession of the property is transferred but the seller retains title or security for the payment of the consideration.

If a retailer engaged in the business of selling prepared food and drink for immediate or on-premises consumption also gives prepared food or drink to its patrons or employees free of charge, for the purposes of this Article the property given away is considered sold

along with the property sold. If a retailer gives an item of inventory to a customer free of charge on the condition that the customer purchase similar or related property, the item given away is considered sold along with the item sold. In all other cases, property given away or used by any retailer or wholesale merchant is not considered sold, whether or not the retailer or wholesale merchant recovers its cost of the property from sales of other property.

(37) Sales price. — The total amount or consideration for which personal property or services are sold, leased, or rented. The consideration may be in the form of cash, credit, property, or services. The sales price must be valued in money, regardless of whether it is received in money.

a. The term includes all of the following:
   1. The retailer's cost of the property sold.
   2. The cost of materials used, labor or service costs, interest, losses, all costs of transportation to the retailer, all taxes imposed on the retailer, and any other expense of the retailer.
   3. Charges by the retailer for any services necessary to complete the sale.
   4. Delivery charges.
   5. Installation charges.
   6. The value of exempt personal property given to the consumer when taxable and exempt personal property are bundled together and sold by the retailer as a single product or piece of merchandise.

b. The term does not include any of the following:
   1. Discounts, including cash, term, or coupons, that are not reimbursed by a third party, are allowed by the retailer, and are taken by a consumer on a sale.
   2. Interest, financing, and carrying charges from credit extended on the sale, if the amount is separately stated on the invoice, bill of sale, or a similar document given to the consumer.
   3. Any taxes imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the consumer.

(38) Secretary. — The Secretary of the North Carolina Department of Revenue.

(39) Repealed by Session Laws 2002-16, s. 3, effective August 1, 2002, and applicable to taxable services reflected on bills dated after August 1, 2002.

(40) Soft drink. — A nonalcoholic beverage that contains natural or artificial sweeteners. The term does not include beverages that contain one or more of the following:
   a. Milk or milk products.
   b. Soy, rice, or similar milk substitutes.
   c. More than fifty percent (50%) vegetable or fruit juice.

(41) Special mobile equipment. — Any of the following:
   a. A vehicle that has a permanently attached crane, mill, well-boring apparatus, ditch-digging apparatus, air compressor, electric welder, feed mixer, grinder, or other similar apparatus is driven on the highway only to get to and from a nonhighway job and is not designed or used primarily for the transportation of persons or property.
   b. A vehicle that has permanently attached special equipment and is used only for parade purposes.
   c. A vehicle that is privately owned, has permanently attached fire-fighting equipment, and is used only for fire-fighting purposes.

d. A vehicle that has permanently attached playground equipment and is used only for playground purposes.

(42) Sport or recreational equipment. — Items designed for human use and worn in conjunction with an athletic or recreational activity that are not suitable for general use including ballet shoes, cleated athletic shoes, shin guards, and ski boots.

(43) State agency. — A unit of the executive, legislative, or judicial branch of State government, such as a department, a commission, a board, a council, or The University of North Carolina. The term does not include a local board of education.

(44) Storage. — Means and includes any keeping or retention in this State for any purpose by the purchaser thereof, except sale in the regular course of business, of tangible personal property purchased from a retailer.

(45) Storage and Use; Exclusion. — "Storage" and "use" do not include the keeping, retaining or exercising of any right or power over tangible personal property by the purchaser thereof for the original purpose of subsequently transporting it outside the State for use by said purchaser thereafter solely outside the State and which purpose is consummated, or for the purpose of being processed, fabricated or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the State and thereafter used by the purchaser thereof solely outside the State.

(46) Tangible personal property. — Personal property that may be seen, weighed, measured, felt, or touched or is in any other manner perceptible to the senses. The term does not include stocks, bonds, notes, insurance, or other obligations or securities, nor does it include water delivered by or through main lines or pipes either for commercial or domestic use or consumption. The term includes computer software delivered on a storage medium, such as a cd rom, a disk, or a tape.

(47) Taxpayer. — Any person liable for taxes under this Article.

(48) Telecommunications service. — The transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points, by or through any electronic, radio, satellite, optical, microwave, or other medium, regardless of the protocol used for the transmission, conveyance, or routing. The term includes mobile telecommunications service and vertical services. Vertical services are switch-based services offered in connection with a telecommunications service, such as call forwarding services, caller ID services, and three-way calling services.

(49) Use. — Means and includes the exercise of any right or power or dominion whatsoever over tangible personal property by a purchaser thereof and includes, but is not limited to, any withdrawal from storage, distribution, installation, affixation to real or personal property, or exhaustion or consumption of tangible personal property by the owner or purchaser thereof, but does not include the sale of tangible personal property in the regular course of business.

(50) Use tax. — The tax imposed by Part 2 of this Article.

(51) Wholesale merchant. — Every person who engages in the business of buying or manufacturing any tangible personal property and selling same to registered retailers, wholesalers and nonresident retail or wholesale merchants for resale. It shall also include persons making sales of tangible personal property which are defined herein as wholesale sales. For the purposes of this Article any person, firm, corporation, estate or trust engaged in the business of manufacturing,

producing, processing or blending any articles of commerce and maintaining a store or stores, warehouse or warehouses, or any other place or places, separate and apart from the place of manufacture or production, for the sale or distribution of its products (other than bakery products) to other manufacturers or producers, wholesale or retail merchants, for the purpose of resale shall be deemed a "wholesale merchant."

(52) Wholesale sale. — A sale of tangible personal property by a wholesale merchant to a manufacturer, or registered jobber or dealer, or registered wholesale or retail merchant, for the purpose of resale but does not include a sale to users or consumers not for resale. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 1213, s. 1; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; c. 1287, s. 8; 1975, c. 104; c. 275, s. 6; 1979, c. 48, s. 2; c. 71; c. 801, s. 72; 1983, c. 713, ss. 87, 88; 1983 (Reg. Sess., 1984), c. 1097, ss. 4, 5; 1985, c. 23; 1987, c. 27; c. 557, s. 3.1; c. 854, ss. 2, 3; 1987 (Reg. Sess., 1988), c. 1044, s. 3; c. 1096, ss. 1-3; 1989, c. 692, s. 3.2; 1989 (Reg. Sess., 1990), c. 813, s. 13; 1991, c. 45, s. 15; c. 79, ss. 1, 3; c. 689, s. 190.1(a); 1991 (Reg. Sess., 1992), c. 949, s. 3; 1993, c. 354, s. 16; c. 484, s. 1; c. 507, s. 1; 1995 (Reg. Sess., 1996), c. 649, s. 2; 1996, 2nd Ex. Sess., c. 14, ss. 13, 14; 1997-6, s. 7; 1997-370, s. 1; 1997-426, s. 4; 1998-22, s. 4; 1998-55, ss. 7, 13; 1998-98, ss. 13.1(a), 106; 1999-337, s. 28(a), (b); 1999-360, s. 6(a)-(c); 1999-438, s. 4; 2000-153, s. 4; 2000-173, s. 9; 2001-347, ss. 2.1-2.7; 2001-414, s. 14; 2001-424, s. 34.17(b); 2001-430, ss. 1, 2; 2001-476, s. 18(a); 2001-489, s. 3(a); 2002-16, ss. 1, 2, 3; 2002-170, s. 6.)

Editor's Note. —

Session Laws 2002-146, s. 9, provides: "It is the intent of the General Assembly that the provisions of this act not be expanded. If a court of competent jurisdiction holds any provision of this act invalid, the section containing that provision is repealed. The repeal of a section of this act under this section does not affect other provisions of this act that may be given affect without the invalid provision."

Effect of Amendments. —

Session Laws 2001-16, ss. 1-3, effective August 1, 2002, and applicable to taxable services reflected on bills dated after August 1, 2002, added subdivision (26a); in subdivision (27), substituted "Prepaid telephone calling Service" for "Prepaid telephone calling arrangement"; and repealed former subdivision (39), defining "Service address".

Session Laws 2002-146, s. 1, effective October 1, 2002, and applicable to sales made on or after that date, rewrote subdivision (13)a; and rewrote subdivision (15).

Session Laws 2002-170, s. 6, effective October 23, 2002, substituted "30 miles per hour" for "20 miles per hour" in subdivision (22).

Part 2. Taxes Levied.

§ 105-164.4. Tax imposed on retailers.

(a) **(Effective until July 1, 2003)** A privilege tax is imposed on a retailer at the following percentage rates of the retailer's net taxable sales or gross receipts, as appropriate. The general rate of tax is four and one-half percent (4 ½%).

(a) **(Effective for sales on or after July 1, 2003)** A privilege tax is imposed on a retailer at the following percentage rates of the retailer's net taxable sales or gross receipts, as appropriate. The general rate of tax is four percent (4%).

(1) The general rate of tax applies to the sales price of each item or article of tangible personal property that is sold at retail and is not subject to tax under another subdivision in this section.

(1a) The rate of two percent (2%) applies to the sales price of each manufactured home sold at retail, including all accessories attached

to the manufactured home when it is delivered to the purchaser. The maximum tax is three hundred dollars ($300.00) per article. Each section of a manufactured home that is transported separately to the site where it is to be erected is a separate article.

(1b) The rate of three percent (3%) applies to the sales price of each aircraft, boat, railway car, or locomotive sold at retail, including all accessories attached to the item when it is delivered to the purchaser. The maximum tax is one thousand five hundred dollars ($1,500) per article.

(1c) The rate of one percent (1%) applies to the sales price of the following articles:

a. Horses or mules by whomsoever sold.

b. Semen to be used in the artificial insemination of animals.

c. Sales of fuel, other than electricity, to farmers to be used by them for any farm purposes other than preparing food, heating dwellings, and other household purposes. The quantity of fuel purchased or used at any one time shall not in any manner be a determinative factor as to whether any sale or use of fuel is or is not subject to the one percent (1%) rate of tax imposed by this subdivision.

d. Sales of fuel, other than electricity, to manufacturing industries and manufacturing plants for use in connection with the operation of such industries and plants other than sales of fuels to be used for residential heating purposes. The quantity of fuel purchased or used at any one time shall not in any manner be a determinative factor as to whether any sale or use of fuel is or is not subject to the rate of tax provided in this subdivision.

e. Sales of fuel, other than electricity, to commercial laundries or to pressing and dry-cleaning establishments for use in machinery used in the direct performance of the laundering or the pressing and cleaning service.

f. Sales to freezer locker plants of wrapping paper, cartons and supplies consumed directly in the operation of such plant.

(1d) The rate of one percent (1%) applies to the sales price of the articles listed in G.S. 105-164.4A. The maximum tax is eighty dollars ($80.00) per article. As used in G.S. 105-164.4A and G.S. 105-187.51, the term "accessories" does not include electricity.

a. through k. Recodified as § 105-164.4A by Session Laws 1999-360, s. 3(a), effective August 4, 1999.

(1e) The rate of three percent (3%) applies to the sales price of each mobile classroom or mobile office sold at retail, including all accessories attached to the mobile classroom or mobile office when it is delivered to the purchaser. The maximum tax is one thousand five hundred dollars ($1,500) per article. Each section of a mobile classroom or mobile office that is transported separately to the site where it is to be placed is a separate article.

(1f) The rate of two and eighty-three-hundredths percent (2.83%) applies to the sales price of electricity described in this subdivision and measured by a separate meter or another separate device:

a. Sales of electricity to farmers to be used by them for any farm purposes other than preparing food, heating dwellings, and other household purposes. The quantity of electricity or gas purchased or used at any one time shall not be a determinative factor as to whether its sale or use is or is not subject to the rate of tax provided in this subdivision.

b. Repealed by Session Laws 2001-476, s. 17(b), effective January 1, 2002, and applicable to sales made on or after that date.

c. Sales of electricity to commercial laundries or to pressing and dry-cleaning establishments for use in machinery used in the direct performance of the laundering or the pressing and cleaning service.

(1g) Electricity Sold to Manufacturers.

a. General. — Qualified electricity is taxable as provided in this subdivision. Qualified electricity is electricity that is measured by a separate meter or another separate measuring device and is sold to a manufacturing industry or manufacturing plant for use in connection with the operation of the industry or plant.

b. **(Effective until July 1, 2005)** Rates. — A single tax rate applies to all of the qualified electricity received by an industry or a plant in each fiscal year beginning July 1. That tax rate is determined based on the megawatt-hour volume of qualified electricity received by the industry or plant during the previous calendar year, in accordance with the following table. The rates set based on the table are subject to adjustment as provided in sub-subdivision f. of this subdivision.

Previous Year's Megawatt-Hours Received	**Rate for Fiscal Year**
900,000 or Less	2.83%
Over 900,000	0.17%

b. **(Effective July 1, 2005 and applicable to sales made on or after that date)** Rates. — A single tax rate applies to all of the qualified electricity received by an industry or a plant in each fiscal year beginning July 1. That tax rate is determined based on the megawatt hour volume of qualified electricity received by the industry or plant during the previous calendar year, in accordance with the following table. The rates set based on the table are subject to adjustment as provided in sub-subdivision f. of this subdivision.

Previous Year's Megawatt Hours Received	**Rate for Fiscal Year**
5,000 or Less	2.83%
Over 5,000 up to 250,000	2.25%
Over 250,000 up to 900,000	2%
Over 900,000	0.17%

c. Multiple Meters. — If the industry or plant receives qualified electricity that is metered through two or more separate measuring devices, the tax is calculated separately on the volume metered through each device rather than on the total volume metered through all measuring devices, unless the devices are located on the same premises and are part of the same billing account. In that circumstance, the tax is calculated on the total volume metered through the two or more separate measuring devices.

d. Procedure. — During the first five months of each calendar year, each retailer of qualified electricity must determine the annual volume of electricity it sold during the previous calendar year to each manufacturing industry and manufacturing plant. Based on this volume, the retailer must determine the tax rate that will apply to each industry and plant. If the applicable rate is different from the rate in effect for the previous fiscal year, the retailer must notify the taxpayer of the new rate on or before June 1 before it goes into effect.

e. New Manufacturers. — If a manufacturer begins business using qualified electricity, the retailer must establish a rate at the time the manufacturer first purchases qualified electricity. In this case, and in the case of a manufacturer that was not in business for the entire calendar year preceding the rate determination, the retailer must estimate the expected annual volume of qualified electricity it will sell to the plant or industry during its first twelve months of business and determine the applicable tax rate based on this estimate.

f. Adjustment. — If the actual volume of qualified electricity received by an industry or a plant during a fiscal year dictates a different tax rate from the rate charged for that fiscal year, the manufacturer is eligible for a refund of any excess or is liable for payment of any deficiency. A manufacturer who is eligible for a refund may apply to the Department and a manufacturer who is liable for a deficiency must report the liability to the Department.

(2) The applicable percentage rate applies to the gross receipts derived from the lease or rental of tangible personal property by a person who is engaged in the business of leasing or renting tangible personal property, or is a retailer and leases or rents property of the type sold by the retailer. The applicable percentage rate is the rate and the maximum tax, if any, that applies to a sale of the property that is leased or rented. A person who leases or rents property shall also collect the tax imposed by this section on the separate retail sale of the property.

(3) Operators of hotels, motels, tourist homes, tourist camps, and similar type businesses and persons who rent private residences and cottages to transients are considered retailers under this Article. A tax at the general rate of tax is levied on the gross receipts derived by these retailers from the rental of any rooms, lodgings, or accommodations furnished to transients for a consideration. This tax does not apply to any private residence or cottage that is rented for less than 15 days in a calendar year or to any room, lodging, or accommodation supplied to the same person for a period of 90 or more continuous days.

As used in this subdivision, the term "persons who rent to transients" means (i) owners of private residences and cottages who rent to transients and (ii) rental agents, including "real estate brokers" as defined in G.S. 93A-2, who rent private residences and cottages to transients on behalf of the owners. If a rental agent is liable for the tax imposed by this subdivision, the owner is not liable.

(4) Every person engaged in the business of operating a dry cleaning, pressing, or hat-blocking establishment, a laundry, or any similar business, engaged in the business of renting clean linen or towels or wearing apparel, or any similar business, or engaged in the business of soliciting cleaning, pressing, hat blocking, laundering or linen rental business for any of these businesses, is considered a retailer under this Article. A tax at the general rate of tax is levied on the gross receipts derived by these retailers from services rendered in engaging in any of the occupations or businesses named in this subdivision. The tax imposed by this subdivision does not apply to receipts derived from coin, token, or card-operated washing machines, extractors, and dryers. The tax imposed by this subdivision does not apply to gross receipts derived from services performed for resale by a retailer that pays the tax on the total gross receipts derived from the services.

(4a) The rate of three percent (3%) applies to the gross receipts derived from sales of electricity, other than sales of electricity subject to tax

under another subdivision in this section. A person who sells electricity is considered a retailer under this Article.

(4b) A person who sells tangible personal property at a specialty market, other than the person's own household personal property, is considered a retailer under this Article. A tax at the general rate of tax is levied on the sales price of each article sold by the retailer at the specialty market. The term "specialty market" has the same meaning as defined in G.S. 66-250.

(4c) The rate of six percent (6%) applies to the gross receipts derived from providing telecommunications service. A person who provides telecommunications service is considered a retailer under this Article. Telecommunications service is taxed in accordance with G.S. 105-164.4C.

(4d) The sale or recharge of prepaid telephone calling service is taxable at the general rate of tax. The tax applies regardless of whether tangible personal property, such as a card or a telephone, is transferred. Prepaid telephone calling service is taxable at the point of sale instead of at the point of use and is sourced in accordance with G.S. 105-164.4B. Prepaid telephone calling service taxed under this subdivision is not subject to tax as a telecommunications service.

(5) Repealed by Session Laws 1998-212, s. 29A.1(a), effective May 1, 1999.

(6) The rate of five percent (5%) applies to the gross receipts derived from providing direct-to-home satellite service to subscribers in this State. A person engaged in the business of providing direct-to-home satellite service is considered a retailer under this Article.

(7) The rate of six percent (6%) applies to the sales price of spirituous liquor other than mixed beverages. As used in this subdivision, the terms "spirituous liquor" and "mixed beverage" have the meanings provided in G.S. 18B-101.

(b) The tax levied in this section shall be collected from the retailer and paid by him at the time and in the manner as hereinafter provided. Provided, however, that any person engaging or continuing in business as a retailer shall pay the tax required on the net taxable sales of such business at the rates specified when proper books are kept showing separately the gross proceeds of taxable and nontaxable sales of tangible personal property in such form as may be accurately and conveniently checked by the Secretary or his duly authorized agent. If such records are not kept separately the tax shall be paid as a retailer on the gross sales of business and the exemptions and exclusions provided by this Article shall not be allowed. The tax levied in this section is in addition to all other taxes whether levied in the form of excise, license or privilege or other taxes.

(c) Certificate of Registration. — Before a person may engage in business as a retailer or a wholesale merchant, the person must obtain a certificate of registration from the Department in accordance with G.S. 105-164.29. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 826, s. 2; 1963, c. 1169, ss. 3, 11; 1967, c. 1110, s. 6; c. 1116; 1969, c. 1075, s. 5; 1971, c. 887, s. 1; 1973, c. 476, s. 193; c. 1287, s. 8; 1975, c. 752; 1977, c. 903; 1977, 2nd Sess., c. 1218; 1979, c. 17, s. 1; c. 22; c. 48, s. 1; c. 527, s. 1; c. 801, s. 73; 1981, c. 984, ss. 1, 2; 1981 (Reg. Sess., 1982), cc. 1207, 1273; 1983, c. 510; c. 713, ss. 89, 93; c. 805, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1065, ss. 1, 2, 4; c. 1097, ss. 6, 13; 1985, c. 704; 1985 (Reg. Sess., 1986), c. 925; c. 1005; 1987, c. 557, ss. 4, 5; c. 800, ss. 2, 3; c. 854, s. 1; 1987 (Reg. Sess., 1988), c. 1044, s. 4; 1989, c. 692, ss. 3.1, 3.3, 8.4(8); c. 770, s. 74.4; 1989 (Reg. Sess., 1990), c. 813, ss. 14, 15; 1991, c. 598, s. 5; c. 689, s. 311; c. 690, s. 1; 1993, c. 372, s. 1; c. 484, s. 2; 1995, c. 17, s. 6; c. 477, s. 1; 1996, 2nd Ex. Sess., c. 13, ss. 1.1, 9.1, 9.2; 1997-475, s. 1.1; 1998-22, s. 5; 1998-55, ss. 8, 14; 1998-98, ss. 13.2, 48(a), (b); 1998-121, ss. 3, 5; 1998-197, s. 1; 1998-212, s. 29A.1(a);

1999-337, ss. 29, 30; 1999-360, s. 3(a), (b); 1999-438, s. 1; 2000-140, s. 67(a); 2001-424, ss. 34.13(a), 34.17(a), 34.23(b), 34.25(a); 2001-430, ss. 3, 4, 5; 2001-476, ss. 17(b)-(d), (f); 2001-487, ss. 67(b), 122(a)-(c); 2002-16, s. 4.)

Effect of Amendments. — Session Laws 2002-16, s. 4, effective August 1, 2002, and applicable to taxable services reflected on bills dated after August 1, 2002, rewrote subsection (a)(4d).

§ 105-164.4B. Sales are sourced based on destination.

(a) Principles. — The following principles apply in determining where to source the sale of a product. These principles apply regardless of the nature of the product.

(1) Over-the-counter. — When a purchaser receives a product at a business location of the seller, the sale is sourced to that business location.

(2) Delivery to specified address. — When a purchaser receives a product at a location specified by the purchaser and the location is not a business location of the seller, the sale is sourced to the location where the purchaser receives the product.

(3) Delivery address unknown. — When a seller of a product does not know the address where a product is received, the sale is sourced to the first address or location listed in this subdivision that is known to the seller:

a. The business or home address of the purchaser.

b. The billing address of the purchaser or, if the product is a prepaid telephone calling service that authorizes the purchase of mobile telecommunications service, the location associated with the mobile telephone number.

c. The billing address of the purchaser.

(b) Exceptions. — This section does not apply to telecommunications services. (2001-347, s. 2.9; 2002-16, s. 5.)

Effect of Amendments. — Session Laws 2002-16, s. 5, effective August 1, 2002, and applicable to taxable services reflected on bills dated after August 1, 2002, rewrote subdivision (a)(3).

§ 105-164.4C. Tax on telecommunications.

(a) General. — The gross receipts derived from providing telecommunications service in this State are taxed at the rate set in G.S. 105-164.4(a)(4c). Telecommunications service is provided in this State if the service is sourced to this State under the sourcing principles set out in subsections (a1) and (a2) of this section. The definitions and provisions of the federal Mobile Telecommunications Sourcing Act apply to the sourcing and taxation of mobile telecommunications services.

(a1) General Sourcing Principles. — The following general sourcing principles apply to telecommunications services. If a service falls within one of the exceptions set out in subsection (a2) of this section, the service is sourced in accordance with the exception instead of the general principle.

(1) Flat rate. — A telecommunications service that is not sold on a call-by-call basis is sourced to this State if the place of primary use is in this State.

(2) General call-by-call. — A telecommunications service that is sold on a call-by-call basis and is not a postpaid calling service is sourced to this State in the following circumstances:

a. The call both originates and terminates in this State.

b. The call either originates or terminates in this State and the telecommunications equipment from which the call originates or terminates and to which the call is charged is located in this State. This applies regardless of where the call is billed or paid.

(3) **(Effective until January 1, 2004)** Postpaid. — A postpaid calling service is sourced in accordance with either of the following principles, at the election of the seller:

a. The principle set out in subdivision (a1)(2) of this section for call-by-call service.

b. The origination point of the telecommunications signal as first identified by either the seller's telecommunications system or, if the system used to transport the signal is not the seller's system, by information the seller receives from its service provider.

(3) **(Effective January 1, 2004)** Postpaid. — A postpaid calling service is sourced to the origination point of the telecommunications signal as first identified by either the seller's telecommunications system or, if the system used to transport the signal is not the seller's system, by information the seller receives from its service provider.

(a2) Sourcing Exceptions. — The following telecommunications services and products are sourced in accordance with the principles set out in this subsection:

(1) Mobile. — Mobile telecommunications service is sourced to the place of primary use, unless the service is authorized by a prepaid telephone calling service or is air-to-ground radiotelephone service. Air-to-ground radiotelephone service is a postpaid calling service that is offered by an aircraft common carrier to passengers on its aircraft and enables a telephone call to be made from the aircraft. The sourcing principle in this subdivision applies to a service provided as an adjunct to mobile telecommunications service if the charge for the service is included within the term 'charges for mobile telecommunications services' under the federal Mobile Telecommunications Sourcing Act.

(2) Prepaid. — Prepaid telephone calling service is sourced in accordance with G.S. 105-164.4B.

(3) Private. — Private telecommunications service is sourced in accordance with subsection (e) of this section.

(b) Included in Gross Receipts. — Gross receipts derived from telecommunications service include the following:

(1) Receipts from flat rate service, service provided on a call-by-call basis, mobile telecommunications service, and private telecommunications service.

(2) Charges for directory assistance, directory listing that is not yellow-page classified listing, call forwarding, call waiting, three-way calling, caller ID, and other similar services.

(3) Customer access line charges billed to subscribers for access to the intrastate or interstate interexchange network.

(4) Charges billed to a pay telephone provider who uses the telecommunications service to provide pay telephone service.

(c) Excluded From Gross Receipts. — Gross receipts derived from telecommunications service do not include any of the following:

(1) Charges for telecommunications services that are a component part of or are integrated into a telecommunications service that is resold. Examples of services that are resold include carrier charges for access to an intrastate or interstate interexchange network, interconnection charges paid by a provider of mobile telecommunications service, and charges for the sale of unbundled network elements. An unbundled

network element is a network element, as defined in 47 U.S.C. § 153(29), to which access is provided on an unbundled basis pursuant to 47 U.S.C. § 251(c)(3).

(2) Telecommunications services that are resold as part of a prepaid telephone calling service.

(3) 911 charges imposed under G.S. 62A-4 or G.S. 62A-23 and remitted to the Emergency Telephone System Fund under G.S. 62A-7 or the Wireless Fund under G.S. 62A-24.

(4) Allowable surcharges imposed to recoup assessments for the Universal Service Fund.

(5) Receipts of a pay telephone provider from the sale of pay telephone service.

(6) Charges for commercial, cable, mobile, broadcast, or satellite video or audio service unless the service provides two-way communication, other than the customer's interactive communication in connection with the customer's selection or use of the video or audio service.

(7) Paging service, unless the service provides two-way communication.

(8) Charges for telephone service made by a hotel, motel, or another entity whose gross receipts are taxable under G.S. 105-164.4(a)(3) when the charges are incidental to the occupancy of the entity's accommodations.

(9) Receipts from the sale, installation, maintenance, or repair of tangible personal property.

(10) Directory advertising and yellow-page classified listings.

(11) Voicemail services.

(12) Information services. — An information service is a service that can generate, acquire, store, transform, process, retrieve, use, or make available information through a communications service. Examples of an information service include an electronic publishing service and a web hosting service.

(13) Internet access service, electronic mail service, electronic bulletin board service, or similar on-line services.

(14) Billing and collection services.

(15) Charges for bad checks or late payments.

(16) Charges to a State agency or to a local unit of government for the North Carolina Information Highway and other data networks owned or leased by the State or unit of local government.

(d) Bundled Services. — When a taxable telecommunications service is bundled with a service that is not taxable, the tax applies to the gross receipts from the taxable service in the bundle as follows:

(1) If the service provider offers all the services in the bundle on an unbundled basis, tax is due on the unbundled price of the taxable service, less the discount resulting from the bundling. The discount for a service as the result of bundling is the proportionate price decrease of the service, determined on the basis of the total unbundled price of all the services in the bundle compared to the bundled price of the services.

(2) If the service provider does not offer one or more of the services in the bundle on an unbundled basis, tax is due on the taxable service based on a reasonable allocation of revenue to that service. If the service provider maintains an account for revenue from a taxable service, the service provider's allocation of revenue to that service for the purpose of determining the tax due on the service must reflect its accounting allocation of revenue to that service.

(e) Private Line. — The gross receipts derived from private telecommunications service are sourced as follows:

(1) If all the customer's channel termination points are located in this State, the service is sourced to this State.

(2) If all the customer's channel termination points are not located in this State and the service is billed on the basis of channel termination points, the charge for each channel termination point located in this State is sourced to this State.

(3) If all the customer's channel termination points are not located in this State and the service is billed on the basis of channel mileage, the following applies:

a. A charge for a channel segment between two channel termination points located in this State is sourced to this State.

b. Fifty percent (50%) of a charge for a channel segment between a channel termination point located in this State and a channel termination point located in another state is sourced to this State.

(4) **(Effective January 1, 2004)** If all the customer's channel termination points are not located in this State and the service is not billed on the basis of channel termination points or channel mileage, a percentage of the charge for the service is sourced to this State. The percentage is determined by dividing the number of channel termination points in this State by the total number of channel termination points.

(f) Call Center Cap. — The gross receipts tax on interstate telecommunications service that originates outside this State, terminates in this State, and is provided to a call center that has a direct pay permit issued by the Department under G.S. 105-164.27A may not exceed fifty thousand dollars ($50,000) a calendar year. This cap applies separately to each legal entity.

(g) Credit. — A taxpayer who pays a tax legally imposed by another state on a telecommunications service taxable under this section is allowed a credit against the tax imposed in this section.

(h) Definitions. — The following definitions apply in this section:

(1) Call-by-call basis. — A method of charging for a telecommunications service whereby the price of the service is measured by individual calls.

(2) Call center. — Defined in G.S. 105-164.27A.

(3) Mobile telecommunications service. — Defined in G.S. 105-164.3.

(4) Place of primary use. — Defined in G.S. 105-164.3.

(5) Postpaid calling service. — A telecommunications service that is charged on a call-by-call basis and is obtained by making payment at the time of the call either through the use of a credit or payment mechanism, such as a bank card, travel card, credit card, or debit card, or by charging the call to a telephone number that is not associated with the origination or termination of the telecommunications service. A postpaid calling service includes a service that meets all the requirements of a prepaid telephone calling service, except the exclusive use requirement.

(6) Prepaid telephone calling service. — Defined in G.S. 105-164.3.

(7) Private telecommunications service. — Telecommunications service that entitles a subscriber of the service to exclusive or priority use of a communications channel or group of channels.

(8) Telecommunications service. — Defined in G.S. 105-164.3. (2001-430, s. 6; 2001-487, ss. 67(a), (c), 69(b); 2002-16, ss. 6, 7, 8, 9, 11, 14.)

Subsection (a1)(3) set out twice. — The first version of subdivision (a1)(3) is effective until January 1, 2004. The second version of subdivision (a1)(3) is effective January 1, 2004, and is applicable to taxable services reflected on bills dated on or after January 1, 2004.

Editor's Note. —

Session Laws 2002-16, s. 16, provides: "G.S. 105-164.4C(e)(4), as enacted by Section 10 of this act, and Section 14 of this act become

effective January 1, 2004, and apply to taxable services reflected on bills dated on or after January 1, 2004. The remainder of this act becomes effective August 1, 2002, and applies to taxable services reflected on bills dated after August 1, 2002."

Effect of Amendments. —

Session Laws 2002-16, ss. 6-11, effective August 1, 2002, and applicable to taxable services reflected on bills dated after August 1, 2002, rewrote subsections (a), (b)(1), (e), and (h); in subsection (c)(2), substituted "prepaid telephone calling service" for "prepaid telephone calling arrangement"; and added subsections (a1) and (a2).

Session Laws 2002-16, ss. 10, 14, effective January 1, 2004, and applicable to taxable services reflected on bills dated on or after January 1, 2004, rewrote (a1)(3); and added (e)(4).

Part 3. Exemptions and Exclusions.

§ 105-164.13. Retail sales and use tax.

The sale at retail, the use, storage or consumption in this State of the following tangible personal property is specifically exempted from the tax imposed by this Article:

Agricultural Group.

(1) Commercial fertilizer, lime, land plaster, and seeds sold to a farmer for agricultural purposes.

(2) Repealed by Session Laws 2001, c. 514, s. 1, effective February 1, 2002.

(2a) Any of the following substances when purchased for use on animals or plants, as appropriate, held or produced for commercial purposes. This exemption does not apply to any equipment or devices used to administer, release, apply, or otherwise dispense these substances:

a. Remedies, vaccines, medications, litter materials, and feeds for animals.

b. Rodenticides, insecticides, herbicides, fungicides, and pesticides.

c. Defoliants for use on cotton or other crops.

d. Plant growth inhibitors, regulators, or stimulators, including systemic and contact or other sucker control agents for tobacco and other crops.

(3) Products of forests and mines in their original or unmanufactured state when such sales are made by the producer in the capacity of producer.

(4) Cotton, tobacco, peanuts or other farm products sold to manufacturers for further manufacturing or processing.

(4a) Baby chicks and poults sold for commercial poultry or egg production.

(4b) Products of a farm sold in their original state by the producer of the products if the producer is not primarily a retail merchant and ice used to preserve agriculture, aquaculture and commercial fishery products until the products are sold at retail.

(4c) Any of the following:

a. Commercially manufactured facilities to be used for commercial purposes for housing, raising, or feeding animals or for housing equipment necessary for these commercial activities.

b. Building materials, supplies, fixtures, and equipment that become a part of and are used in the construction, repair, or improvement of an enclosure or a structure specifically designed, constructed, and used for housing, raising, or feeding animals or for housing equipment necessary for one of these commercial activities.

c. Commercially manufactured equipment, and parts and accessories for the equipment, used in a facility that is exempt from tax under

this subdivision or in an enclosure or a structure whose building materials are exempt from tax under this subdivision.

(4d) The lease or rental of tobacco sheets used in handling tobacco in the warehouse and transporting tobacco to and from the warehouse.

Industrial Group.

(5) Manufactured products produced and sold by manufacturers or producers to other manufacturers, producers, or registered retailers or wholesale merchants, for the purpose of resale except as modified by G.S. 105-164.3(23). This exemption does not extend to or include retail sales to users or consumers not for resale.

(5a) **(Effective January 1, 2006)** Mill machinery and mill machinery parts and accessories that are subject to tax under Article 5F of this Chapter.

(6) Repealed by Session Laws 1989 (Regular Session, 1990), c. 1068, s. 1.

(7) Sales of products of waters in their original or unmanufactured state when such sales are made by the producer in the capacity of producer. Fish and seafoods are likewise exempt when sold by the fisherman in that capacity.

(8) Sales to a manufacturer of tangible personal property that enters into or becomes an ingredient or component part of tangible personal property that is manufactured. This exemption does not apply to sales of electricity.

(8a) Sales to a small power production facility, as defined in 16 U.S.C. § 796(17)(A), of fuel used by the facility to generate electricity.

(9) Sales of boats, fuel oil, lubricating oils, machinery, equipment, nets, rigging, paints, parts, accessories, and supplies to persons for use by them principally in commercial fishing operations within the meaning of G.S. 113-168, except when the property is for use by persons principally to take fish for recreation or personal use or consumption. As used in this subdivision, "fish" is defined as in G.S. 113-129(7).

(10) Sales to commercial laundries or to pressing and dry cleaning establishments of articles or materials used for the identification of garments being laundered or dry cleaned, wrapping paper, bags, hangers, starch, soaps, detergents, cleaning fluids and other compounds or chemicals applied directly to the garments in the direct performance of the laundering or the pressing and cleaning service.

Motor Fuels Group.

(10a) Sales to a major recycling facility of (i) lubricants and other additives for motor vehicles or machinery and equipment used at the facility and (ii) materials, supplies, parts, and accessories, other than machinery and equipment, that are not capitalized by the taxpayer and are used or consumed in the manufacturing and material handling processes at the facility.

(10b) Sales to a major recycling facility of electricity used at the facility.

(11) Any of the following fuel:

a. Motor fuel, as defined in G.S. 105-449.60, except motor fuel for which a refund of the per gallon excise tax is allowed under G.S. 105-449.105A or G.S. 105-449.107.

b. Alternative fuel taxed under Article 36D of this Chapter, unless a refund of that tax is allowed under G.S. 105-449.107.

(11a) Sales of diesel fuel to railroad companies for use in rolling stock other than motor vehicles. The definitions in G.S. 105-333 apply in this subdivision.

Medical Group.

(12) Sales of any of the following items:
a. Therapeutic, prosthetic, or artificial devices, such as pulmonary respirators or medical beds, that are designed for individual personal use to correct or alleviate physical illness, disease, or incapacity and that are sold on the written prescription of a physician, dentist, or other professional person licensed to prescribe.
b. Crutches, artificial limbs, artificial eyes, hearing aids, false teeth, eyeglasses ground on prescription of a physician or an optometrist.
c. Orthopedic appliances designed to be worn by the purchaser or user.
d. Durable medical equipment and related medical supplies that are covered under the Medicare or Medicaid program and are sold on either a certificate of medical necessity or a written prescription of a physician, dentist, or other professional person licensed to prescribe. This exemption applies whether or not the item is purchased by a Medicare or Medicaid beneficiary.

(13) All of the following drugs, including the constituent elements and ingredients used to produce the drugs, the packaging materials, and any instructions or information about the product included in the package with the drugs:
a. Prescription drugs.
b. Nonprescription drugs sold on prescription of physicians, dentists, or veterinarians.
c. Insulin.

(13a) Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 16.

(13b) Repealed by Session Laws 1999, c. 438, s. 7, effective October 1, 1999.

(13c) Nutritional supplements sold by a chiropractic physician at a chiropractic office to a patient as part of the patient's plan of treatment, as authorized by G.S. 90-151.1.

Printed Materials Group.

(14) Public school books on the adopted list, the selling price of which is fixed by State contract.

(14a) Recodified as subdivision (33a) by Session Laws 2000-120, s. 5, effective July 14, 2000.

Transactions Group.

(15) Accounts of purchasers, representing taxable sales, on which the tax imposed by this Article has been paid, that are found to be worthless and actually charged off for income tax purposes may, at corresponding periods, be deducted from gross sales, provided, however, they must be added to gross sales if afterwards collected.

(16) Sales of an article repossessed by the vendor if tax was paid on the sales price of the article.

Exempt Status Group.

(17) Sales which a state would be without power to tax under the limitations of the Constitution or laws of the United States or under the Constitution of this State.

Unclassified Group.

(18) Funeral expenses, including coffins and caskets, not to exceed one thousand five hundred dollars ($1,500). All other funeral expenses, including gross receipts for services rendered, shall be taxable at the general rate of tax set in G.S. 105-164.4. However, "services rendered" shall not include those services which have been taxed pursuant to G.S. 105-164.4(4), or to those services performed by any beautician, cosmetologist, hairdresser or barber employed by or at the specific direction of the family or personal representative of a deceased; and "funeral expenses" and "services rendered" shall not include death certificates procured by or at the specific direction of the family or personal representative of a deceased. Where coffins, caskets or vaults are purchased direct and a separate charge is paid for services, the provisions of this subdivision shall apply to the total for both.

(19) Repealed by Session Laws 1991, c. 618, s. 1.

(20) Sales by blind merchants operating under supervision of the Department of Health and Human Services.

(21) The lease or rental of motion picture films used for exhibition purposes where the lease or rental of such property is an established business or part of an established business or the same is incidental or germane to said business of the lessee.

(22) The lease or rental of films, motion picture films, transcriptions and recordings to radio stations and television stations operating under a certificate from the Federal Communications Commission.

(22a) Sales of audiovisual masters made or used by a production company in making visual and audio images for first generation reproduction. For the purpose of this subdivision, an "audiovisual master" is an audio or video film, tape, or disk or another audio or video storage device from which all other copies are made.

(23) Sales of the following packaging items:

a. Wrapping paper, labels, wrapping twine, paper, cloth, plastic bags, cartons, packages and containers, cores, cones or spools, wooden boxes, baskets, coops and barrels, including paper cups, napkins and drinking straws and like articles sold to manufacturers, producers and retailers, when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail and when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer.

b. A container that is used as packaging by the owner of the container or another person to enclose tangible personal property for delivery to a purchaser of the property and is required to be returned to its owner for reuse.

(24) Sales of fuel and other items of tangible personal property for use or consumption by or on ocean-going vessels which ply the high seas in interstate or foreign commerce in the transport of freight and/or passengers for hire exclusively, when delivered to an officer or agent of such vessel for the use of such vessel; provided, however, that sales of fuel and other items of tangible personal property made to officers, agents, members of the crew or passengers of such vessels for their personal use shall not be exempted from payment of the sales tax.

(25) Sales by merchants on the Cherokee Indian Reservation when such merchants are authorized to do business on the Reservation and are paying the tribal gross receipts levy to the Tribal Council.

(26) Food sold not for profit by public or private school cafeterias within school buildings during the regular school day.

(26a) Food sold not for profit by a public school cafeteria to a child care center that participates in the Child and Adult Care Food Program of the Department of Public Instruction.

(27) Meals and food products served to students in dining rooms regularly operated by State or private educational institutions or student organizations thereof.

(28) Sales of newspapers by newspaper street vendors, by newspaper carriers making door-to-door deliveries, and by means of vending machines and sales of magazines by magazine vendors making door-to-door sales.

(29) Sales to the North Carolina Museum of Art of paintings and other objects or works of art for public display, the purchases of which are financed in whole or in part by gifts or donations.

(29a) Repealed by Session Laws 1995 (Regular Session, 1996), c. 646, s. 5.

(30) Sales from vending machines when sold by the owner or lessee of said machines at a price of one cent (1¢) per sale.

(31) Sales of meals not for profit to elderly and incapacitated persons by charitable or religious organizations not operated for profit which are entitled to the refunds provided by G.S. 105-164.14(b), when such meals are delivered to the purchasers at their places of abode.

(31a) Food sold by a church or religious organization not operated for profit when the proceeds of the sales are actually used for religious activities.

(31b) Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 16.

(32) Sales of motor vehicles, the sale of a motor vehicle body to be mounted on a motor vehicle chassis when a certificate of title has not been issued for the chassis, and the sale of a motor vehicle body mounted on a motor vehicle chassis that temporarily enters the State so the manufacturer of the body can mount the body on the chassis.

(33) Tangible personal property purchased solely for the purpose of export to a foreign country for exclusive use or consumption in that or some other foreign country, either in the direct performance or rendition of professional or commercial services, or in the direct conduct or operation of a trade or business, all of which purposes are actually consummated, or purchased by the government of a foreign country for export which purpose is actually consummated. "Export" shall include the acts of possessing and marshalling such property, by either the seller or the purchaser, for transportation to a foreign country, but shall not include devoting such property to any other use in North Carolina or the United States. "Foreign country" shall not include any territory or possession of the United States.

In order to qualify for this exemption, an affidavit of export indicating compliance with the terms and conditions of this exemption, as prescribed by the Secretary of Revenue, must be submitted by the purchaser to the seller, and retained by the seller to evidence qualification for the exemption.

If the purposes qualifying the property for exemption are not consummated, the purchaser shall be liable for the tax which was avoided by the execution of the aforesaid affidavit as well as for applicable penalties and interest and the affidavit shall contain express provision that the purchaser has recognized and assumed such liability.

The principal purpose of this exemption is to encourage the flow of commerce through North Carolina ports that is now moving through out-of-state ports. However, it is not intended that property acquired for personal use or consumption by the purchaser, including gifts, shall be exempt hereunder.

(33a) Tangible personal property sold by a retailer to a purchaser within or without this State, when the property is delivered in this State to a common carrier or to the United States Postal Service for delivery to the purchaser or the purchaser's designees outside this State and the purchaser does not subsequently use the property in this State.

(34) Sales of items by a nonprofit civic, charitable, educational, scientific or literary organization when the net proceeds of the sales will be given or contributed to the State of North Carolina or to one or more of its agencies or instrumentalities, or to one or more nonprofit charitable organizations, one of whose purposes is to serve as a conduit through which such net proceeds will flow to the State or to one or more of its agencies or instrumentalities.

(35) Sales by a nonprofit civic, charitable, educational, scientific, literary, or fraternal organization when all of the following conditions are met:

a. The sales are conducted only upon an annual basis for the purpose of raising funds for the organization's activities.

b. The proceeds of the sale are actually used for the organization's activities.

c. The products sold are delivered to the purchaser within 60 days after the first solicitation of any sale made during the organization's annual sales period.

(36) Advertising supplements and any other printed matter ultimately to be distributed with or as part of a newspaper.

(37) Repealed by Session Laws 2001-424, s. 34.23(a), effective December 1, 2001, and applicable to sales made on or after that date.

(38) Food and other items lawfully purchased under the Food Stamp Program, 7 U.S.C. § 51, and supplemental foods lawfully purchased with a food instrument issued under the Special Supplemental Food Program, 42 U.S.C. § 1786, and supplemental foods purchased for direct distribution by the Special Supplemental Food Program.

(39) Repealed by Session Laws 1999-438, s. 10, effective October 1, 1999.

(40) Sales to the Department of Transportation.

(41) Sales of mobile classrooms to local boards of education or to local boards of trustees of community colleges.

(42) Tangible personal property that is purchased by a retailer for resale or is manufactured or purchased by a wholesale merchant for resale and then withdrawn from inventory and donated by the retailer or wholesale merchant to either a governmental entity or a nonprofit organization, contributions to which are deductible as charitable contributions for federal income tax purposes.

(43) Custom computer software. — "Custom computer software" is software written in accordance with the specifications of a specific customer. The term includes a user manual or other documentation that accompanies the sale of the software. The term does not include prewritten software that can be installed and executed with no changes to the software's source code other than changes made to configure hardware or software.

(44) Piped natural gas. — This item is exempt because it is taxed under Article 5E of this Chapter.

(45) Sales of the following items to an interstate passenger air carrier or an interstate air courier for use at its hub: aircraft lubricants, aircraft repair parts, and aircraft accessories.

(46) Sales of electricity by a municipality whose only wholesale supplier of electric power is a federal agency and who is required by a contract with that federal agency to make payments in lieu of taxes.

(47) An amount charged as a deposit on a beverage container that is returnable to the vendor for reuse when the amount is refundable or

creditable to the vendee, whether or not the deposit is separately charged.

(48) An amount charged as a deposit on an aeronautic, automotive, industrial, marine, or farm replacement part that is returnable to the vendor for rebuilding or remanufacturing when the amount is refundable or creditable to the vendee, whether or not the deposit is separately charged. This exemption does not include tires or batteries.

(49) Installation charges when the charges are separately stated.

(50) Fifty percent (50%) of the sales price of tangible personal property sold through a coin-operated vending machine, other than closed-container soft drinks and tobacco. (1957, c. 1340, s. 5; 1959, c. 670; c. 1259, s. 5; 1961, c. 826, s. 2; cc. 1103, 1163; 1963, c. 1169, ss. 7-9; 1965, c. 1041; 1967, c. 756; 1969, c. 907; 1971, c. 990; 1973, c. 476, s. 143; c. 708, s. 1; cc. 1064, 1076; c. 1287, s. 8; 1975, 2nd Sess., c. 982; 1977, c. 771, s. 4; 1977, 2nd Sess., c. 1219, s. 43.6; 1979, c. 46, ss. 1, 2; c. 156, s. 1; c. 201; c. 625, ss. 1, 2; c. 801, ss. 74, 75; 1979, 2nd Sess., c. 1099, s. 1; 1981, cc. 14, 207, 982; 1983, c. 156; c. 570, s. 21; c. 713, ss. 91, 92; c. 873; c. 887; 1983 (Reg. Sess., 1984), c. 1071, s. 1; 1985, c. 114, s. 4; c. 555; c. 656, ss. 24, 25; 1985 (Reg. Sess., 1986), c. 953; c. 973; c. 982, s. 2; 1987, c. 800, s. 1; 1987 (Reg. Sess., 1988), c. 937; 1989, c. 692, ss. 3.5, 3.6; c. 748, s. 1; 1989 (Reg. Sess., 1990), c. 989; c. 1060; c. 1068, ss. 1, 2; 1991, c. 45, s. 17; c. 79, s. 2; c. 618, s. 1; c. 689, s. 314; 1991 (Reg. Sess., 1992), c. 931, ss. 1, 2; c. 935, s. 1; c. 940, s. 1; c. 949, s. 1; c. 1007, s. 44; 1993, c. 484, s. 3; c. 513, s. 11; 1993 (Reg. Sess., 1994), c. 739, s. 1; 1995, c. 390, s. 14; c. 451, s. 1; c. 477, ss. 2, 3; 1995 (Reg. Sess., 1996), c. 646, ss. 4, 5; c. 649, s. 1; 1996, 2nd Ex. Sess., c. 14, ss. 15, 16; 1997-369, s. 2; 1997-370, s. 2; 1997-397, s. 1; 1997-423, s. 3; 1997-443, s. 11A.118(a); 1997-456, s. 27; 1997-506, s. 36; 1997-521, s. 1; 1998-22, s. 6; 1998-55, ss. 9, 15; 1998-98, ss. 14, 14.1, 49, 107; 1998-146, s. 9; 1998-171, s. 10(a), (b); 1998-225, s. 4.3; 1999-337, s. 31; 1999-360, s. 7(a)-(c); 1999-438, ss. 5-12; 2000-120, s. 5; 2000-153, s. 5; 2001-347, s. 2.12; 2001-424, s. 34.23(a); 2001-476, s. 17(e); 2001-509, s. 1; 2001-514, s. 1; 2002-184, s. 9.)

Effect of Amendments. — Session Laws 2002-184, s. 9, effective October 31, 2002, in the introductory language in subsection (2a), inserted "substances" and added the last sentence.

Part 4. Reporting and Payment.

§ 105-164.16. Returns and payment of taxes.

(a) General. — Sales and use taxes are payable quarterly, monthly, or semimonthly as specified in this section. A return is due quarterly or monthly as specified in this section. A return must be filed with the Secretary on a form prescribed by the Secretary and in the manner required by the Secretary. A return must be signed by the taxpayer or the taxpayer's agent.

A sales tax return must state the taxpayer's gross sales for the reporting period, the amount and type of sales made in the period that are exempt from tax under G.S. 105-164.13 or are elsewhere excluded from tax, the amount of tax due, and any other information required by the Secretary. A use tax return must state the purchase price of tangible personal property that was purchased or received during the reporting period and is subject to tax under G.S. 105-164.6, the amount of tax due, and any other information required by the Secretary. Returns that do not contain the required information will not be

accepted. When an unacceptable return is submitted, the Secretary will require a corrected return to be filed.

(b) Quarterly. — A taxpayer who is consistently liable for less than one hundred dollars ($100.00) a month in State and local sales and use taxes must file a return and pay the taxes due on a quarterly basis. A quarterly return covers a calendar quarter and is due by the last day of the month following the end of the quarter.

(b1) Monthly. — A taxpayer who is consistently liable for more than one hundred dollars ($100.00) but less than ten thousand dollars ($10,000) a month in State and local sales and use taxes must file a return and pay the taxes due on a monthly basis. A monthly return is due by the 15th day of the month following the calendar month covered by the return.

(b2) Semimonthly. — A taxpayer who is consistently liable for at least ten thousand dollars ($10,000) a month in State and local sales and use taxes must pay the tax twice a month and must file a return on a monthly basis. One semimonthly payment covers the period from the first day of the month through the 15th day of the month. The other semimonthly payment covers the period from the 16th day of the month through the last day of the month. The semimonthly payment for the period that ends on the 15th day of the month is due by the 25th day of that month. The semimonthly payment for the period that ends on the last day of the month is due by the 10th day of the following month.

A return covers both semimonthly payment periods. The return is due by the 20th day of the month following the month of the payment periods covered by the return. A taxpayer is not subject to interest on or penalties for an underpayment for a semimonthly payment period if the taxpayer timely pays at least ninety-five percent (95%) of the lesser of the following and includes the underpayment with the monthly return for those semimonthly payment periods:

(1) The amount due for each semimonthly payment period.

(2) The average semimonthly payment for the prior calendar year.

(b3) Category. — The Secretary must monitor the amount of State and local sales and use taxes paid by a taxpayer or estimate the amount of taxes to be paid by a new taxpayer and must direct each taxpayer to pay tax and file returns in accordance with the appropriate schedule. In determining the amount of taxes due from a taxpayer, the Secretary must consider the total amount due from all places of business owned or operated by the same person as the amount due from that person. A taxpayer must file a return and pay tax in accordance with the Secretary's direction until notified in writing to file and pay under a different schedule.

(c) Repealed by Session Laws 2001-427, s. 6(a), effective January 1, 2002, and applicable to taxes levied on or after that date.

(d) **(Effective until taxable years beginning on or after January 1, 2003)** Use Tax on Out-of-State Purchases. — Use tax payable by an individual who purchases tangible personal property outside the State for a nonbusiness purpose is due on an annual basis. For an individual who is not required to file an individual income tax return under Part 2 of Article 4 of this Chapter, the annual reporting period ends on the last day of the calendar year and a use tax return is due by the following April 15. For an individual who is required to file an individual income tax return, the annual reporting period ends on the last day of the individual's income tax year, and the use tax must be paid on the income tax return as provided in G.S. 105-269.14.

(d) **(Effective for taxable years beginning on or after January 1, 2003)** Use Tax on Out-of-State Purchases. — Notwithstanding subsection (b), an individual who purchases tangible personal property outside the State for a nonbusiness purpose shall file a use tax return on an annual basis. The annual reporting period ends on the last day of the calendar year. The return

G.S. 105-164.16(d) is set out twice. See note.

is due by the due date, including any approved extensions, for filing the individual's income tax return. (1957, c. 1340, s. 5; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; 1979, c. 801, s. 83; 1983 (Reg. Sess., 1984), c. 1097, s. 14; 1985, c. 656, s. 26; 1985 (Reg. Sess., 1986), c. 1007; 1987, c. 557, s. 6; 1989 (Reg. Sess., 1990), c. 945, s. 1; 1991, c. 690, s. 4; 1993, c. 450, s. 7; 1997-77, s. 1; 1998-121, s. 1; 1999-341, s. 1; 2000-120, s. 11; 2001-347, s. 2.14; 2001-414, s. 18; 2001-427, s. 6(a); 2001-430, s. 7; 2002-184, ss. 10, 11.)

Effect of Amendments. —

Session Laws 2002-184, s. 10, effective October 1, 2002, and applicable to taxes levied on or after that date, in subsection (b) substituted "last day" for "15th day."

Session Laws 2002-184, s. 11, effective October 1, 2002, and applicable to payments due on or after that date, in the second paragraph in subsection (b2), substituted "lesser of the following" for "amount due for each semimonthly payment period" and added subdivisions (b2)(1) and (2).

Part 5. Records Required to Be Kept.

§ 105-164.23. Consumer must keep records.

Every consumer shall keep such records, receipts, invoices and other pertinent papers in such form as may be required by the Secretary and all such books, invoices and other records shall be open for examination by the Department of Revenue. In the event the retailer, user or consumer has imported the tangible personal property and fails to produce an invoice showing the purchase price of the tangible personal property as defined in this Article which is subject to tax or the invoices do not reflect the true or actual cost as defined in this Article, then the Secretary shall ascertain in any manner feasible the true purchase price and assess and collect the tax with interest, plus penalties, if such have accrued, on the true purchase price as determined by the Secretary. (1957, c. 1340, s. 5; 1973, c. 476, s. 193; 2001-414, s. 19; 2002-72, s. 17.)

Effect of Amendments. —

Session Laws 2002-72, s. 17, effective August 12, 2002, substituted "examination by the Department of Revenue" for "examination by the Secretary or any of his duly authorized agents" in the first sentence; and substituted "as defined in this Article" for "as defined herein," and "true purchase price as determined by the Secretary" for "true cost price as determined by him" in the second sentence.

§ 105-164.27A. Direct pay permit.

(a) Tangible Personal Property. — A direct pay permit for tangible personal property authorizes its holder to purchase any tangible personal property without paying tax to the seller and authorizes the seller to not collect any tax on a sale to the permit holder. A person who purchases tangible personal property under a direct pay permit issued under this subsection is liable for use tax due on the purchase. The tax is payable when the property is placed in use. A direct pay permit issued under this subsection does not apply to taxes imposed under G.S. 105-164.4(a)(1f) or G.S. 105-164.4(a)(4a).

A person who purchases tangible personal property whose tax status cannot be determined at the time of the purchase because of one of the reasons listed below may apply to the Secretary for a direct pay permit for tangible personal property:

(1) The place of business where the property will be used is not known at the time of the purchase and a different tax consequence applies depending on where the property is used.

(2) The manner in which the property will be used is not known at the time of the purchase and one or more of the potential uses is taxable but others are not taxable.

(b) Telecommunications Service. — A direct pay permit for telecommunications service authorizes its holder to purchase telecommunications service without paying tax to the seller and authorizes the seller to not collect any tax on a sale to the permit holder. A person who purchases telecommunications service under a direct pay permit must file a return and pay the tax due monthly to the Secretary. A direct pay permit issued under this subsection does not apply to any tax other than the tax on telecommunications service.

A call center that purchases interstate telecommunications service that originates outside this State and terminates in this State may apply to the Secretary for a direct pay permit for telecommunications service. A call center is a business that is primarily engaged in providing support services to customers by telephone to support products or services of the business. A business is primarily engaged in providing support services by telephone if at least sixty percent (60%) of its calls are incoming.

(c) Application. — An application for a direct pay permit must be made on a form provided by the Secretary and contain the information required by the Secretary. The Secretary may grant the application if the Secretary finds that the applicant complies with the sales and use tax laws and that the applicant's compliance burden will be greatly reduced by use of the permit.

(d) Revocation. — A direct pay permit is valid until the holder returns it to the Secretary or the Secretary revokes it. The Secretary may revoke a direct pay permit if the holder of the permit does not file a sales and use tax return on time, does not pay sales and use tax on time, or otherwise fails to comply with the sales and use tax laws. (2000-120, s. 1; 2001-414, s. 20; 2001-430, s. 9; 2002-72, s. 18.)

Effect of Amendments. — Session Laws 2002-72, s. 18, effective August 12, 2002, deleted the sentence fragment "must be made on a form provided by the" at the end of subsection (b).

§ 105-164.28A. Other exemption certificates.

(a) Authorization. — The Secretary may require a person who purchases tangible personal property that is exempt from tax or is subject to a preferential rate of tax depending on the status of the purchaser or the intended use of the property to obtain an exemption certificate from the Department to receive the exemption or preferential rate. An exemption certificate authorizes a retailer to sell tangible personal property to the holder of the certificate and either collect tax at a preferential rate or not collect tax on the sale, as appropriate. A person who purchases tangible personal property under an exemption certificate is liable for any tax due on the sale if the Department determines that the person is not eligible for the certificate or the property was not used as intended.

(b) Scope. — This section does not apply to a direct pay permit or a certificate of resale. G.S. 105-164.27A addresses a direct pay permit, and G.S. 105-164.28 addresses a certificate of resale. (2002-184, s. 12.)

Editor's Note. — Session Laws 2002-184, s. 13, makes this section effective October 31, 2002.

Part 8. Administration and Enforcement.

§ 105-164.44C: Repealed by Session Laws 2001-424, s. 34.15(a)(1), as amended by Session Laws 2002-126, s. 30A.1, effective July 1, 2002.

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

§ 105-164.44F. Distribution of part of telecommunications taxes to cities.

(a) Amount. — The Secretary must distribute to the cities part of the taxes imposed by G.S. 105-164.4(a) (4c) on telecommunications service. The Secretary must make the distribution within 75 days after the end of each calendar quarter. The amount the Secretary must distribute is eighteen and twenty-six hundredths percent (18.26%) of the net proceeds of the taxes collected during the quarter, minus two million six hundred twenty thousand nine hundred forty-eight dollars ($2,620,948). This deduction is one-fourth of the annual amount by which the distribution to cities of the gross receipts franchise tax on telephone companies, imposed by former G.S. 105-120, was required to be reduced beginning in fiscal year 1995-96 as a result of the "freeze deduction." The Secretary must distribute the specified percentage of the proceeds, less the "freeze deduction" among the cities in accordance with this section.

(b) Share of Cities Incorporated on or After January 1, 2001. — The share of a city incorporated on or after January 1, 2001, is its per capita share of the amount to be distributed to all cities incorporated on or after this date. This amount is the proportion of the total to be distributed under this section that is the same as the proportion of the population of cities incorporated on or after January 1, 2001, compared to the population of all cities. In making the distribution under this subsection, the Secretary must use the most recent annual population estimates certified to the Secretary by the State Planning Officer.

(c) Share of Cities Incorporated Before January 1, 2001. — The share of a city incorporated before January 1, 2001, is its proportionate share of the amount to be distributed to all cities incorporated before this date. A city's proportionate share for a quarter is based on the amount of telephone gross receipts franchise taxes attributed to the city under G.S. 105-116.1 for the same quarter that was the last quarter in which taxes were imposed on telephone companies under repealed G.S. 105-120. The amount to be distributed to all cities incorporated before January 1, 2001, is the amount determined under subsection (a) of this section, minus the amount distributed under subsection (b) of this section.

The following changes apply when a city incorporated before January 1, 2001, alters its corporate structure. When a change described in subdivision (2) or (3) occurs, the resulting cities are considered to be cities incorporated before January 1, 2001, and the distribution method set out in this subsection rather than the method set out in subsection (b) of this section applies:

(1) If a city dissolves and is no longer incorporated, the proportional shares of the remaining cities incorporated before January 1, 2001, must be recalculated to adjust for the dissolution of that city.

(2) If two or more cities merge or otherwise consolidate, their proportional shares are combined.

(3) If a city divides into two or more cities, the proportional share of the city that divides is allocated among the new cities on a per capita basis.

(d) Share of Cities Served by a Telephone Membership Corporation. — The share of a city served by a telephone membership corporation, as described in Chapter 117 of the General Statutes, is computed as if the city was incorporated on or after January 1, 2001, under subsection (b) of this section. If a city is served by a telephone membership corporation and another provider, then its per capita share under this subsection applies only to the population of the area served by the telephone membership corporation.

(e) Ineligible Cities. — An ineligible city is disregarded for all purposes under this section. A city incorporated on or after January 1, 2000, is not eligible for a distribution under this section unless it meets both of the following requirements:

(1) It is eligible to receive funds under G.S. 136-41.2.

(2) A majority of the mileage of its streets are open to the public.

(f) Nature. — The General Assembly finds that the revenue distributed under this section is local revenue, not a State expenditure, for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold the distribution. (2001-424, s. 34.25(b); 2001-430, s. 10; 2001-487, s. 67(d); 2002-120, s. 4.)

Editor's Note. —

Session Laws 2002-120, s. 9, contains a severability clause.

Session Laws 2002-159, s. 65, effective October 11, 2002, provides: "It is the intent of the General Assembly that Sections 1 through 7 of S.L. 2002-120 shall be effective prospectively only and shall not apply to pending litigation or claims that accrued before the effective date of S.L. 2002-120. Nothing in Section 1 through 7 of S.L. 2002-120 shall be construed as a waiver of the sovereign immunity of the State or any other defenses as to any claim for damages, other recovery of funds, including attorneys' fees, or injunctive relief from the State by any unit of local government or political subdivision of the State."

Effect of Amendments. —

Session Laws 2002-120, s. 4, effective September 24, 2002, added subsection (f).

Article 5A.

North Carolina Highway Use Tax.

§ 105-187.1. Definitions.

The following definitions and the definitions in G.S. 105-164.3 apply to this Article:

(1) Commissioner. — The Commissioner of Motor Vehicles.

(2) Division. — The Division of Motor Vehicles, Department of Transportation.

(3) Long-term lease or rental. — A lease or rental made under a written agreement to lease or rent property to the same person for a period of at least 365 continuous days.

(4) Recreational vehicle. — Defined in G.S. 20-4.01.

(5) Rescue squad. — An organization that provides rescue services, emergency medical services, or both.

(6) Retailer. — A retailer as defined in G.S. 105-164.3 who is engaged in the business of selling, leasing, or renting motor vehicles.

(7) Short-term lease or rental. — A lease or rental that is not a long-term lease or rental. (1989, c. 692, s. 4.1; 1991, c. 79, s. 4; 2000-173, s. 10(a); 2001-424, s. 34.24(e); 2001-497, s. 2(b); 2002-72, s. 19(a).)

Effect of Amendments. —
Session Laws 2002-72, s. 19(a), effective August 12, 2002, rewrote subdivision (4).

§ 105-187.9. Disposition of tax proceeds.

Editor's Note. —
Session Laws 2002-126, s. 2.2(f), provides: "Notwithstanding G.S. 105-187.9(b)(1), the sum to be transferred under that subdivision for the 2002-2003 fiscal year and for the 2003-2004 fiscal year is two hundred fifty million dollars ($250,000,000)."

Session Laws 2002-126, s. 26.14, provides: "Any funds transferred from the Highway Trust Fund to the General Fund in addition to the transfer authorized by G.S. 105-187.9(b) shall be fully repaid to the Highway Trust Fund in five years beginning in the 2004-2005 fiscal year, using the sum of the digits formula, according to the following repayment schedule: FY 2004-2005 — 7%, FY 2005-2006 — 13%, FY 2006-2007 — 20%, FY 2007-2008 — 27%, and FY 2008-2009 — 33%. The repayment shall include interest at the net rate of return generated by the State Treasurer's Short Term Investment Fund."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Article 5B.

Scrap Tire Disposal Tax.

§ 105-187.16. Tax imposed.

(a) Levy. A privilege tax is imposed on a tire retailer at a percentage rate of the sales price of each new tire sold at retail by the retailer. A privilege tax is imposed on a tire retailer and on a tire wholesale merchant at a percentage rate of the sales price of each new tire sold by the retailer or wholesale merchant to a wholesale merchant or retailer for placement on a vehicle offered for sale, lease, or rental by the retailer or wholesale merchant. An excise tax is imposed on a new tire purchased for storage, use, or consumption in this State or for placement in this State on a vehicle offered for sale, lease, or rental. This excise tax is a percentage rate of the purchase price of the tire. These taxes are in addition to all other taxes.

(b) Rate. The percentage rate of the taxes imposed by subsection (a) of this section is set by the following table; the rate is based on the bead diameter of the new tire sold or purchased:

Bead Diameter of Tire	Percentage Rate
Less than 20 inches	2%
At least 20 inches	1%.

(1991, c. 221, s. 1; 1993, c. 548, s. 1; 1997-209, s. 1; 2001-414, s. 22; 2002-10, s. 1.)

Editor's Note. —
Session Laws 1993, c. 548, s. 9, provided that the amendment by c. 548, s. 1 would expire June 30, 1997. Session Laws 1997-209, s. 1, changed the expiration date to June 30, 2002. Session Laws 2002-10, s. 1, repealed the expiration provision for Section 1 of Session Laws 1993, c. 548.

Session Laws 1993, c. 548, s. 9, effective October 1, 1993, had provided that the expiration of the additional tax imposed by Section 1 of this act would not affect the rights or liabil-

ities of the State, a taxpayer, or another person that arise during the time the additional tax is in effect. This provision was deleted by Session Laws 2002-10, s. 1.

Effect of Amendments. — Session Laws 2001-414, s. 22, effective January 1, 2002, substituted "purchase price" for "cost price" in the final sentence of subsection (a).

Article 5E.

Piped Natural Gas Tax.

§ 105-187.44. Distribution of part of tax proceeds to cities.

(a) City Information. — A quarterly return filed under this Article must indicate the amount of tax attributable to the following:

(1) Piped natural gas delivered during the quarter to sales or transportation customers in each city in the State.

(2) Piped natural gas received during the quarter in each city in the State by persons who have direct access to an interstate gas pipeline and who receive the gas for their own consumption.

If a tax return does not state this information, the Secretary must determine how much of the tax proceeds are to be attributed to each city.

(b) Distribution. — Within 75 days after the end of each calendar quarter, the Secretary must distribute to the cities part of the tax proceeds collected under this Article during that quarter. The amount to be distributed to a city is one-half of the amount of tax attributable to that city for that quarter under subsection (a) of this section. The General Assembly finds that the revenue distributed under this section is local revenue, not a State expenditure, for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold the distribution. (1998-22, s. 1; 1998-217, s. 32(b); 1999-337, s. 32(b); 2002-120, s. 3.)

Editor's Note. —

Session Laws 2002-120, s. 9, contains a severability clause.

Session Laws 2002-159, s. 65, effective October 11, 2002, provides: "It is the intent of the General Assembly that Sections 1 through 7 of S.L. 2002-120 shall be effective prospectively only and shall not apply to pending litigation or claims that accrued before the effective date of S.L. 2002-120. Nothing in Section 1 through 7 of S.L. 2002-120 shall be construed as a waiver of the sovereign immunity of the State or any other defenses as to any claim for damages, other recovery of funds, including attorneys' fees, or injunctive relief from the State by any unit of local government or political subdivision of the State."

Effect of Amendments. —

Session Laws 2002-120, s. 3, effective September 24, 2002, added the last two sentences in subsection (b).

Article 6.

Gift Taxes.

§ 105-188. Gift taxes; classification of beneficiaries; exemptions; rates of tax.

(a) State gift taxes, as hereinafter prescribed, are hereby levied upon the shares of the respective beneficiaries in all property within the jurisdiction of this State, real, personal and mixed, and any interest therein which shall in any one calendar year pass by gift made after March 24, 1939.

(b) The taxes shall apply whether the gift is in trust or otherwise and whether the gift is direct or indirect. In the case of a gift made by a nonresident, the taxes shall apply only if the property is within the jurisdiction of this State. The taxes shall not apply to gifts made prior to March 24, 1939.

(c) The tax shall not apply to the passage of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a passage from the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a passage by donor of such income by gift.

(d) Annual Exclusion. — The annual exclusion amount is equal to the federal inflation-adjusted exclusion amount provided in section 2503(b) of the Code. Gifts not exceeding a total value equal to the annual exclusion amount made to any one donee in a calendar year are not taxable under this Article. When gifts exceeding a total value equal to the annual exclusion amount are made to any one donee in a calendar year, only the portion of the gifts exceeding the annual exclusion amount in value is taxable under this Article. This exclusion does not apply to gifts of future interests in property. For the purposes of determining the annual exclusion, no part of a gift to an individual, or in trust for an individual, who has not attained the age of 21 years on the date of the transfer is considered a gift of a future interest in property if the property and the income therefrom meet all of the following conditions: (i) they may be expended by, or for the benefit of, the donee before the donee reaches the age of 21 years; (ii) they will to the extent not so expended pass to the donee when the donee reaches the age of 21 years; and (iii) they will, in the event the donee dies before reaching that age, be payable to the estate of the donee or as the donee may appoint under a general power of appointment.

When a gift is made by one spouse to a person other than the donor's spouse, the donor may claim both the donor's annual exclusion and the spouse's annual exclusion if both spouses consent and both spouses are residents of this State when the gift is made. Consent to share annual gift tax exclusions must be made in writing on a timely filed gift tax return. Once given, consent to share annual exclusions is irrevocable.

(e) The tax shall be based on the aggregate sum of the net gifts made by the donor to the same donee, and shall be computed as follows:

(1) Determine the aggregate sum of the net gifts to the donee for the calendar year and the net gifts to the same donee for each of the preceding calendar years since January 1, 1948.

(2) Compute the tax upon said aggregate sum by applying the rates hereinafter set out.

(3) From the tax thus computed, deduct the total gift tax, if any, computed with respect to gifts to the same donee in any prior year or years since January 1, 1948. The sum thus ascertained shall be the gift tax due.

The term "net gifts" shall mean the sum of the gifts made by a donor to the same donee during any stated period of time in excess of the annual exclusion and the applicable specific exemption.

(f) The rates of tax, which are based on the relationship between the donor and the donee, shall be as follows:

(1) Where the donee is the lineal issue, lineal ancestor, adopted child, or stepchild of the donor (for each one hundred dollars ($100.00) or fraction thereof):

First $	10,000	above exemption	.....	1 percent
Over $	10,000	and to $ 25,000	.....	2 percent
Over $	25,000	and to $ 50,000	.....	3 percent
Over $	50,000	and to $ 100,000	.....	4 percent
Over $	100,000	and to $ 200,000	.....	5 percent
Over $	200,000	and to $ 500,000	.....	6 percent

Over $ 500,000 and to $1,000,000	7 percent
Over $1,000,000 and to $1,500,000	8 percent
Over $1,500,000 and to $2,000,000	9 percent
Over $2,000,000 and to $2,500,000	10 percent
Over $2,500,000 and to $3,000,000	11 percent
Over $3,000,000	12 percent

(2) Where the donee is the brother or sister, or descendant of the brother or sister, or is the uncle or aunt by blood of the donor (for each one hundred dollars ($100.00) or fraction thereof):

First $ 5,000	4 percent
Over $ 5,000 and to $ 10,000	5 percent
Over $ 10,000 and to $ 25,000	6 percent
Over $ 25,000 and to $ 50,000	7 percent
Over $ 50,000 and to $ 100,000	8 percent
Over $ 100,000 and to $ 250,000	10 percent
Over $ 250,000 and to $ 500,000	11 percent
Over $ 500,000 and to $1,000,000	12 percent
Over $1,000,000 and to $1,500,000	13 percent
Over $1,500,000 and to $2,000,000	14 percent
Over $2,000,000 and to $3,000,000	15 percent
Over $3,000,000	16 percent

(3) Where the donee is in any other degree of relationship than is hereinbefore stated, or shall be a stranger in blood to the donor, or shall be a body politic or corporate (for each one hundred dollars ($100.00) or fraction thereof):

First $ 10,000	8 percent
Over $ 10,000 and to $ 25,000	9 percent
Over $ 25,000 and to $ 50,000	10 percent
Over $ 50,000 and to $ 100,000	11 percent
Over $ 100,000 and to $ 250,000	12 percent
Over $ 250,000 and to $ 500,000	13 percent
Over $ 500,000 and to $1,000,000	14 percent
Over $1,000,000 and to $1,500,000	15 percent
Over $1,500,000 and to $2,500,000	16 percent
Over $2,500,000	17 percent

(g) A donor is entitled to a total exemption of one hundred thousand dollars ($100,000) to be deducted from gifts made to donees named in subdivision (f)(1), less the sum of amounts claimed and allowed as an exemption in prior calendar years. The exemption, at the option of the donor, may be taken in its entirety in a single year or may be spread over a period of years. When this exemption has been exhausted, no further exemption is allowable. When the exemption or any part of the exemption is applied to gifts to more than one donee in any one calendar year, the exemption shall be apportioned against the gifts in the same ratio as the gross value of the gifts to each donee is to the total value of all the gifts made in the calendar year. No exemption is allowed a donor for gifts made to donees named in subdivision (f)(2) or (f)(3).

(h) It is expressly provided, however, that the tax levied in this Article shall not apply to so much of said property as shall so pass exclusively:

(1) For state, county or municipal purposes within this State;

(2) To or for the exclusive benefit of charitable, educational, or religious organizations located within this State, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(3) To or for the exclusive benefit of charitable, religious and educational corporations, foundations and trusts, not conducted for profit, incorporated or created or administered under the laws of any other state, when such other state levies no gift taxes upon property similarly

passing from residents of such state to charitable, educational or religious corporations, foundations and trusts incorporated or created or administered under the laws of this State, or when such corporation, foundation or trust receives and disburses funds donated in this State for religious, charitable and educational purposes; or

(4) To one spouse from the other spouse.

(i) The tax does not apply to tuition payments made on behalf of an individual to an educational institution or to medical payments made on behalf of an individual to a provider of medical care, as defined in the Code for the care of that individual. The term "educational institution" includes only those institutions that normally maintain a regular faculty and curriculum and normally have a regularly organized body of students in attendance where the educational activities are conducted.

(j) The tax does not apply to property transferred to a spouse when the transfer of the property is exempt from federal estate and gift taxes under section 2523(f) of the Code because it is considered qualified terminable interest property.

(k) Qualified Tuition Programs. — The provisions of section 529(c)(2) and (5) of the Code apply to this Article. If a donor elects to take a contribution into account ratably over a five-year period as provided in section 529(c)(2) of the Code, that election applies for the purposes of this Article. (1939, c. 158, s. 600; 1943, c. 400, s. 7; 1945, c. 708, s. 7; 1947, c. 501, s. 6; 1957, c. 1340, s. 6; 1973, c. 505; c. 1287, s. 9; 1983, c. 685, s. 1; 1983 (Reg. Sess., 1984), c. 1023, s. 1; c. 1024; 1985, c. 86; c. 656, ss. 4-6; 1989 (Reg. Sess., 1990), c. 814, s. 24; 1991 (Reg. Sess., 1992), c. 1007, s. 5; 1996, 2nd Ex. Sess., c. 13, s. 6.3; 1998-98, s. 63; 1998-171, s. 4; 2002-126, s. 30C.5(a).)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 30C.5(a), effective January 1, 2002, and applicable to gifts made on or after that date, rewrote subsection (d).

Article 9.

General Administration; Penalties and Remedies.

§ 105-228.90. Scope and definitions.

(a) Scope. — This Article applies to Subchapters I, V, and VIII of this Chapter, to the annual report filing requirements of G.S. 55-16-22, to the primary forest product assessment levied under Article 12 of Chapter 113A of the General Statutes, and to inspection taxes levied under Article 3 of Chapter 119 of the General Statutes.

(b) Definitions. — The following definitions apply in this Article:

(1) Charter school. — A nonprofit corporation that has a charter under G.S. 115C-238.29D to operate a charter school.

(1a) City. — A city as defined by G.S. 160A-1(2). The term also includes an urban service district defined by the governing board of a consolidated city-county, as defined by G.S. 160B-2(1).

(1b) **(See Editor's Note)** Code. — The Internal Revenue Code as enacted as of May 1, 2002, including any provisions enacted as of that date which become effective either before or after that date.

(1c) County. — Any one of the counties listed in G.S. 153A-10. The term also includes a consolidated city-county as defined by G.S. 160B-2(1).

(2) Department. — The Department of Revenue.

(3) Electronic Funds Transfer. — A transfer of funds initiated by using an electronic terminal, a telephone, a computer, or magnetic tape to instruct or authorize a financial institution or its agent to credit or debit an account.

(4) Income tax return preparer. — Any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by Article 4 of this Chapter or any claim for refund of tax imposed by Article 4 of this Chapter. For purposes of this definition, the completion of a substantial portion of a return or claim for refund is treated as the preparation of the return or claim for refund. The term does not include a person merely because the person (i) furnishes typing, reproducing, or other mechanical assistance, (ii) prepares a return or claim for refund of the employer, or an officer or employee of the employer, by whom the person is regularly and continuously employed, (iii) prepares as a fiduciary a return or claim for refund for any person, or (iv) represents a taxpayer in a hearing regarding a proposed assessment.

(5) Person. — An individual, a fiduciary, a firm, an association, a partnership, a limited liability company, a corporation, a unit of government, or another group acting as a unit. The term includes an officer or employee of a corporation, a member, a manager, or an employee of a limited liability company, and a member or employee of a partnership who, as officer, employee, member, or manager, is under a duty to perform an act in meeting the requirements of Subchapter I, V, or VIII of this Chapter, of G.S. 55-16-22, of Article 12 of Chapter 113A of the General Statutes, or of Article 3 of Chapter 119 of the General Statutes.

(6) Secretary. — The Secretary of Revenue.

(7) Tax. — A tax levied under Subchapter I, V, or VIII of this Chapter, the primary forest product assessment levied under Article 12 of Chapter 113A of the General Statutes, or an inspection tax levied under Article 3 of Chapter 119 of the General Statutes. Unless the context clearly requires otherwise, the terms "tax" and "additional tax" include penalties and interest as well as the principal amount.

(8) Taxpayer. — A person subject to the tax or reporting requirements of Subchapter I, V, or VIII of this Chapter, of Article 12 of Chapter 113A of the General Statutes, or of Article 3 of Chapter 119 of the General Statutes. (1991 (Reg. Sess., 1992), c. 930, s. 13; 1993, c. 12, s. 1; c. 354, s. 18; c. 450, s. 1; 1993 (Reg. Sess., 1994), c. 662, s. 1; c. 745, s. 13; 1995, c. 17, s. 9; c. 461, s. 14; 1995 (Reg. Sess., 1996), c. 664, s. 1; 1997-55, s. 1; 1997-475, s. 6.9; 1998-171, s. 1; 1999-415, s. 1; 2000-72, s. 1; 2000-126, s. 1; 2000-140, s. 69; 2001-414, s. 23; 2001-427, s. 4(a); 2002-106, s. 1; 2002-126, s. 30C.1(a).)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 30C.1(b), provides: "Notwithstanding subsection (a) of this section [which amended subdivision (b)(1b)], any amendments to the Internal Revenue Code enacted in 2001 that increase North Carolina taxable income for the 2001 taxable year become effective for taxable years beginning on or after January 1, 2002."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-106, s. 1, effective December 1, 2002, and applicable to actions that are

committed on or after that date, added subdivision (b)(4), which had formerly been reserved.

Session Laws 2002-126, s. 30C.1(a), effective July 1, 2002, substituted "May 1, 2002" for "January 1, 2001" in subdivision (b)(1b).

§ 105-236. Penalties.

Penalties assessed by the Secretary under this Subchapter are assessed as an additional tax. Except as otherwise provided by law, and subject to the provisions of G.S. 105-237, the following penalties shall be applicable:

(1) Penalty for Bad Checks. — When the bank upon which any uncertified check tendered to the Department of Revenue in payment of any obligation due to the Department returns the check because of insufficient funds or the nonexistence of an account of the drawer, the Secretary shall assess a penalty equal to ten percent (10%) of the check, subject to a minimum of one dollar ($1.00) and a maximum of one thousand dollars ($1,000). This penalty does not apply if the Secretary finds that, when the check was presented for payment, the drawer of the check had sufficient funds in an account at a financial institution in this State to pay the check and, by inadvertence, the drawer of the check failed to draw the check on the account that had sufficient funds.

(1a) Penalty for Bad Electronic Funds Transfer. — When an electronic funds transfer cannot be completed due to insufficient funds or the nonexistence of an account of the transferor, the Secretary shall assess a penalty equal to ten percent (10%) of the amount of the transfer, subject to a minimum of one dollar ($1.00) and a maximum of one thousand dollars ($1,000). This penalty may be waived by the Secretary in accordance with G.S. 105-237.

(1b) Making Payment in Wrong Form. — For making a payment of tax in a form other than the form required by the Secretary pursuant to G.S. 105-241(a), the Secretary shall assess a penalty equal to five percent (5%) of the amount of the tax, subject to a minimum of one dollar ($1.00) and a maximum of one thousand dollars ($1,000). This penalty may be waived by the Secretary in accordance with G.S. 105-237.

(2) Failure to Obtain a License. — For failure to obtain a license before engaging in a business, trade or profession for which a license is required, the Secretary shall assess a penalty equal to five percent (5%) of the amount prescribed for the license per month or fraction thereof until paid, not to exceed twenty-five percent (25%) of the amount so prescribed, but in any event shall not be less than five dollars ($5.00).

(3) Failure to File Return. — In case of failure to file any return on the date it is due, determined with regard to any extension of time for filing, the Secretary shall assess a penalty equal to five percent (5%) of the amount of the tax if the failure is for not more than one month, with an additional five percent (5%) for each additional month, or fraction thereof, during which the failure continues, not exceeding twenty-five percent (25%) in the aggregate, or five dollars ($5.00), whichever is the greater.

(4) Failure to Pay Tax When Due. — In the case of failure to pay any tax when due, without intent to evade the tax, the Secretary shall assess a penalty equal to ten percent (10%) of the tax, except that the penalty shall in no event be less than five dollars ($5.00). This penalty does not apply in any of the following circumstances:

a. When the amount of tax shown as due on an amended return is paid when the return is filed.

b. When a tax due but not shown on a return is assessed by the Secretary and is paid within 30 days after the date of the proposed notice of assessment of the tax.

(5) Negligence. —

a. Finding of negligence. — For negligent failure to comply with any of the provisions to which this Article applies, or rules issued pursuant thereto, without intent to defraud, the Secretary shall assess a penalty equal to ten percent (10%) of the deficiency due to the negligence.

b. Large individual income tax deficiency. — In the case of individual income tax, if a taxpayer understates taxable income, by any means, by an amount equal to twenty-five percent (25%) or more of gross income, the Secretary shall assess a penalty equal to twenty-five percent (25%) of the deficiency. For purposes of this subdivision, "gross income" means gross income as defined in section 61 of the Code.

c. Other large tax deficiency. — In the case of a tax other than individual income tax, if a taxpayer understates tax liability by twenty-five percent (25%) or more, the Secretary shall assess a penalty equal to twenty-five percent (25%) of the deficiency.

d. No double penalty. — If a penalty is assessed under subdivision (6) of this section, no additional penalty for negligence shall be assessed with respect to the same deficiency.

e. Inheritance and gift tax deficiencies. — This subdivision does not apply to inheritance, estate, and gift tax deficiencies that are the result of valuation understatements.

(5a) Misuse of Exemption Certificate. — For misuse of an exemption certificate by a purchaser, the Secretary shall assess a penalty equal to two hundred fifty dollars ($250.00). An exemption certificate is a certificate issued by the Secretary that authorizes a retailer to sell tangible personal property to the holder of the certificate and either collect tax at a preferential rate or not collect tax on the sale. Examples of an exemption certificate include a certificate of resale, a direct pay certificate, and a farmer's certificate.

(5b) Road Tax Understatement. — If a motor carrier understates its liability for the road tax imposed by Article 36B of this Chapter by twenty-five percent (25%) or more, the Secretary shall assess the motor carrier a penalty in an amount equal to two times the amount of the deficiency.

(6) Fraud. — If there is a deficiency or delinquency in payment of any tax because of fraud with intent to evade the tax, the Secretary shall assess a penalty equal to fifty percent (50%) of the total deficiency.

(7) Attempt to Evade or Defeat Tax. — Any person who willfully attempts, or any person who aids or abets any person to attempt in any manner to evade or defeat a tax or its payment, shall, in addition to other penalties provided by law, be guilty of a Class H felony.

(8) Willful Failure to Collect, Withhold, or Pay Over Tax. — Any person required to collect, withhold, account for, and pay over any tax who willfully fails to collect or truthfully account for and pay over the tax shall, in addition to other penalties provided by law, be guilty of a Class 1 misdemeanor. Notwithstanding any other provision of law, no prosecution for a violation brought under this subdivision shall be barred before the expiration of six years after the date of the violation.

(9) Willful Failure to File Return, Supply Information, or Pay Tax. — Any person required to pay any tax, to make a return, to keep any records, or to supply any information, who willfully fails to pay the tax, make

the return, keep the records, or supply the information, at the time or times required by law, or rules issued pursuant thereto, shall, in addition to other penalties provided by law, be guilty of a Class 1 misdemeanor. Notwithstanding any other provision of law, no prosecution for a violation brought under this subdivision shall be barred before the expiration of six years after the date of the violation.

(9a) Aid or Assistance. — Any person, pursuant to or in connection with the revenue laws, who willfully aids, assists in, procures, counsels, or advises the preparation, presentation, or filing of a return, affidavit, claim, or any other document that the person knows is fraudulent or false as to any material matter, whether or not the falsity or fraud is with the knowledge or consent of the person authorized or required to present or file the return, affidavit, claim, or other document, is guilty of a felony as follows:

a. If the person who commits an offense under this subdivision is an income tax return preparer and the amount of all taxes fraudulently evaded on returns filed in one taxable year is one hundred thousand dollars ($100,000) or more, the person is guilty of a Class C felony.

b. If the person who commits an offense under this subdivision is an income tax return preparer and the amount of all taxes fraudulently evaded on returns filed in one taxable year is less than one hundred thousand dollars ($100,000) , the person is guilty of a Class F felony.

c. If the person who commits an offense under this subdivision is not covered under sub-subdivision a. or b. of this subdivision, the person is guilty of a Class H felony.

(10) Failure to File Informational Returns. —

a. Repealed by Session Laws 1998-212, s. 29A.14(m), effective January 1, 1999.

b. The Secretary may request a person who fails to file timely statements of payment to another person with respect to wages, dividends, rents, or interest paid to that person to file the statements by a certain date. If the payer fails to file the statements by that date, the amounts claimed on the payer's income tax return as deductions for salaries and wages, or rents or interest shall be disallowed to the extent that the payer failed to comply with the Secretary's request with respect to the statements.

c. For failure to file an informational return required by Article 36C or 36D of this Chapter by the date the return is due, there shall be assessed a penalty of fifty dollars ($50.00).

(10a) Filing a Frivolous Return. — If a taxpayer files a frivolous return under Part 2 of Article 4 of this Chapter, the Secretary shall assess a penalty in the amount of up to five hundred dollars ($500.00). A frivolous return is a return that meets both of the following requirements:

a. It fails to provide sufficient information to permit a determination that the return is correct or contains information which positively indicates the return is incorrect, and

b. It evidences an intention to delay, impede or negate the revenue laws of this State or purports to adopt a position that is lacking in seriousness.

(10b) Misrepresentation Concerning Payment. — A person who receives money from a taxpayer with the understanding that the money is to be remitted to the Secretary for application to the taxpayer's tax

liability and who willfully fails to remit the money to the Secretary is guilty of a Class F felony.

(11) Any violation of Subchapter I, V, or VIII of this Chapter or of Article 3 of Chapter 119 of the General Statutes is considered an act committed in part at the office of the Secretary in Raleigh. The certificate of the Secretary that a tax has not been paid, a return has not been filed, or information has not been supplied, as required by law, is prima facie evidence that the tax has not been paid, the return has not been filed, or the information has not been supplied.

(12) Repealed by Session Laws 1991, c. 45, s. 27. (1939, c. 158, s. 907; 1953, c. 1302, s. 7; 1959, c. 1259, s. 8; 1963, c. 1169, s. 6; 1967, c. 1110, s. 9; 1973, c. 476, s. 193; c. 1287, s. 13; 1979, c. 156, s. 2; 1985, c. 114, s. 11; 1985 (Reg. Sess., 1986), c. 983; 1987 (Reg. Sess., 1988), c. 1076; 1989, c. 557, ss. 7 to 10; 1989 (Reg. Sess., 1990), c. 1005, s. 9; 1991, c. 45, s. 27; 1991 (Reg. Sess., 1992), c. 914, s. 2; c. 1007, s. 10; 1993, c. 354, s. 22; c. 450, s. 10; c. 539, ss. 709, 710, 1292, 1293; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 390, s. 36; 1995 (Reg. Sess., 1996), c. 646, s. 10; c. 647, s. 51; c. 696, s. 1; 1997-6, s. 8; 1997-109, s. 3; 1998-178, ss. 1, 2; 1998-212, s. 29A.14(m); 1999-415, ss. 2, 3; 1999-438, ss. 15, 16; 2000-119, s. 2; 2000-120, s. 7; 2000-140, s. 70; 2002-106, ss. 2, 4.)

Editor's Note. —

Session Laws 2002-136, s. 6(a)-(c), provides: "(a) If a taxpayer meets the condition set out in subsection (c) of this section [Session Laws 2002-136, s. 6(c)], then, notwithstanding G.S. 105-163.41, no addition to tax may be made under that statute for a taxable year beginning on or after January 1, 2002, and before January 1, 2003, with respect to an underpayment of corporate income tax to the extent the underpayment was created or increased by Section 3 of S.L. 2001-327. This subsection does not apply to any underpayment of an installment of estimated tax that is due more than 15 days after the date this act becomes law.

"(b) If a taxpayer meets the condition set out in subsection (c) of this section [Session Laws 2002-136, s. 6(c)], then, notwithstanding G.S. 105-236(4), the penalty under that statute for a taxable year beginning on or after January 1, 2001, and before January 1, 2002, is waived with respect to failure to pay an amount of corporate income tax due to the extent the amount of tax due was created by Section 3 of S.L. 2001-327. This subsection does not apply to any amount of corporate income tax that was due more than 15 days after the date this act becomes law.

"(c) In order to qualify for the benefit of this section [Session Laws 2002-136, s. 6], a taxpayer must pay within 15 days after the date this act becomes law all tax due by that date that was created or increased by Section 3 of S.L. 2001-327."

Effect of Amendments. —

Session Laws 2002-106, ss. 2 and 4, effective December 1, 2002, and applicable to actions that are committed on or after that date, in subdivision (9a), substituted "felony as follows" for "Class H felony" at the end of the introductory paragraph, and added paragraphs a, b and c; and added subdivision (10b).

§ 105-243.1. Collection of tax debts.

(a) Definitions.— The following definitions apply in this section:

(1) Overdue tax debt.— Any part of a tax debt that remains unpaid 90 days or more after the notice of final assessment was mailed to the taxpayer. The term does not include a tax debt, however, if the taxpayer entered into an installment agreement for the tax debt under G.S. 105-237 within 90 days after the notice of final assessment was mailed and has not failed to make any payments due under the installment agreement.

(2) Tax debt.— The total amount of tax, penalty, and interest due for which a notice of final assessment has been mailed to a taxpayer after the taxpayer no longer has the right to contest the debt.

(b) **(Effective until October 1, 2003)** Outsourcing.— The Secretary may contract for the collection of tax debts. At least 30 days before the Department

G.S. 105-243.1(b) is set out twice. See note.

submits a tax debt to a contractor for collection, the Department must notify the taxpayer by mail that the debt may be submitted for collection if payment is not received within 30 days after the notice was mailed.

(b) **(Effective October 1, 2003)** Outsourcing.— The Secretary may contract for the collection of tax debts owed by nonresidents and foreign entities. At least 30 days before the Department submits a tax debt to a contractor for collection, the Department must notify the taxpayer by mail that the debt may be submitted for collection if payment is not received within 30 days after the notice was mailed.

(c) Secrecy.— A contract for the collection of tax debts is conditioned on compliance with G.S. 105-259. If a contractor violates G.S. 105-259, the contract is terminated, and the Secretary must notify the contractor of the termination. A contractor whose contract is terminated for violation of G.S. 105-259 is not eligible for an award of another contract under this section for a period of five years from the termination. These sanctions are in addition to the criminal penalties set out in G.S. 105-259.

(d) Fee.— A collection assistance fee is imposed on an overdue tax debt that remains unpaid 30 days or more after the fee notice required by this subsection is mailed to the taxpayer. In order to impose a collection assistance fee on a tax debt, the Department must notify the taxpayer that the fee will be imposed if the tax debt is not paid in full within 30 days after the date the fee notice was mailed to the taxpayer. The Department may not mail the fee notice earlier than 60 days after the notice of final assessment for the tax debt was mailed to the taxpayer. The fee is collectible as part of the debt. The Secretary may waive the fee pursuant to G.S. 105-237 to the same extent as if it were a penalty.

The amount of the collection assistance fee is twenty percent (20%) of the amount of the overdue tax debt. If a taxpayer pays only part of an overdue tax debt, the payment is credited proportionally to fee revenue and tax revenue.

(e) Use.— The fee is a receipt of the Department and must be applied to the costs of collecting overdue tax debts. The proceeds of the fee must be credited to a special account within the Department and may be expended only as provided in this subsection. The Department may apply the proceeds of the fee to pay contractors for collecting tax debts under subsection (b) of this section and to pay the fee the United States Department of the Treasury charges for setoff to recover tax owed to North Carolina. The remaining proceeds of the fee may be spent only pursuant to appropriation by the General Assembly. The fee proceeds do not revert but remain in the special account until spent for the costs of collecting overdue tax debts.

(f) Reports. — The Department must report to the Joint Legislative Commission on Governmental Operations and to the Revenue Laws Study Committee on its efforts to collect tax debts. Reports must be submitted quarterly beginning November 1, 2001, through June 30, 2005, and semiannually thereafter. Each report must include a breakdown of the amount and age of tax debts collected by collection agencies on contract, the amount and age of tax debts collected by the Department through warning letters, and the amount and age of tax debts otherwise collected by Department personnel. The report must itemize collections by type of tax. Each report must also include a long-term collection plan, a timeline for implementing each step of the plan, a summary of steps taken since the last report and their results, and any other data requested by the Commission or the Committee. (2001-380, ss. 2, 8; 2002-126, s. 22.2.)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until October 1, 2003. The second version of (b) set out above is effective October 1, 2003.

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 22.4, provides: "The Department of Revenue may use up to six hundred thousand dollars ($600,000) during the 2002-2003 fiscal year from the collection assistance fee account created in G.S. 105-243.1 to be allocated as follows:

"(1) Two hundred thousand dollars ($200,000) for contractual services related to system changes for managing and filing bankruptcies.

"(2) Four hundred thousand dollars ($400,000) for identifying delinquent taxpayers."

Session Laws 2002-126, ss. 22.6(a) to (c), provide: "(a) The Department of Revenue may draw up to three million dollars ($3,000,000) through June 30, 2004, from the collection assistance fee account created in G.S. 105-243.1 in order to pay for the costs of establishing and equipping a central taxpayer telecommunications service center for collections and assistance and for the costs associated with aligning local field offices with the new center.

"(b) The Secretary of Revenue shall consult with the Joint Legislative Commission on Governmental Operations on a detailed plan with proposed costs before any funds may be expended for these purposes. This plan must be presented by October 31, 2002.

"(c) Beginning January 1, 2003, and ending on the second quarter following completion of the projects described in subsection (a) of this section, the Department of Revenue must report quarterly to the Joint Legislative Commission on Governmental Operations on the use of the funds and the progress of establishing the new center."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, s. 22.2, effective July 1, 2002, in subsection (f), substituted "June 30, 2005" for "November 1, 2002" in the first sentence, and added the next-to-last sentence.

§ 105-256. Reports prepared by Secretary of Revenue.

(a) Reports. — The Secretary shall prepare and publish the following:

(1) At least every two years, statistics concerning taxes imposed by this Chapter, including amounts collected, classifications of taxpayers, geographic distribution of taxes, and other facts considered pertinent and valuable.

(2) At least every two years, a tax expenditure report that lists the tax expenditures made by a provision in this Chapter, other than a provision in Subchapter II, and gives an estimate of the amount by which revenue is reduced by each tax expenditure. A "tax expenditure" is an exemption, an exclusion, a deduction, an allowance, a credit, a refund, a preferential tax rate, or another device that reduces the amount of tax revenue that would otherwise be available to the State. An estimate of the amount by which revenue is reduced by a tax expenditure may be stated as ranging between two amounts if the Department does not have sufficient data to make a more specific estimate.

(3) As often as required, a report that is not listed in this subsection but is required by another law.

(4) As often as the Secretary determines is needed, other reports concerning taxes imposed by this Chapter.

(5) At least once a year, a statement of the taxpayer's bill of rights, which sets forth in simple and nontechnical terms the following:

a. The taxpayer's right to have the taxpayer's tax information kept confidential.

b. The rights of a taxpayer and the obligations of the Department during an audit.

c. The procedure for a taxpayer to appeal an adverse decision of the Department at each level of determination.
d. The procedure for a taxpayer to claim a refund for an alleged overpayment.
e. The procedure for a taxpayer to request information, assistance, and interpretations or to make complaints.
f. Penalties and interest that may apply and the basis for requesting waiver of a penalty.
g. The procedures the Department may use to enforce the collection of a tax, including assessment, jeopardy assessment, enforcement of liens, and garnishment and attachment.

(6) On an annual basis, a report on the quality of services provided to taxpayers, including telephone and walk-in assistance and taxpayer education. The report must be submitted to the Joint Legislative Commission on Governmental Operations.

(7) The reports required under G.S. 105-129.19 and G.S. 105-129.44.

(b) Information. — The Secretary may require a unit of State or local government to furnish the Secretary statistical information the Secretary needs to prepare a report under this section. Upon request of the Secretary, a unit of government shall submit statistical information on one or more forms provided by the Secretary.

(c) Distribution. — The Secretary shall distribute reports prepared by the Secretary as follows without charge:

(1) Five copies to the Division of State Library of the Department of Cultural Resources, as required by G.S. 125-11.7.

(2) Five copies to the Legislative Services Commission for the use of the General Assembly.

(3) Upon request, one copy to each entity and official to which a copy of the reports of the Appellate Division of the General Court of Justice is furnished under G.S. 7A-343.1.

(4) One copy of the tax expenditure report to each member of the General Assembly and, upon request, one copy of any other report to each member of the General Assembly.

(5) One copy of the taxpayer's bill of rights to each taxpayer the Department contacts regarding determination or collection of a tax, other than by providing a tax form.

(6) Upon request, one copy of the taxpayer's bill of rights to each taxpayer.

The Secretary may charge a person not listed in this subsection a fee for a report prepared by the Secretary in an amount that covers publication or copying costs and mailing costs.

(d) Other Requirements. — The following requirements apply to the Secretary:

(1) Video Poker. — G.S. 14-306.1(j) requires the Department to provide summary reports quarterly to the Joint Legislative Commission on Governmental Operations.

(2) Escheats. — G.S. 116B-60(g) requires the Secretary to furnish information to the Escheat Fund on October 1 of each year.

(e) Local Tax Administration Expenses. — The Secretary must report quarterly to the chairs of the Appropriations Committees and Finance Committees of each house of the General Assembly and to the Fiscal Research Division on the Department's expenditures of funds withheld from distributions to local governments to cover its costs of administering local taxes and local programs. The report must itemize expenditures for personnel, operating expenses, and nonrecurring expenses by division and must specify the source of the withheld funds in each case. The report is due 20 days after the end of each quarter. (1939, c. 158, s. 926; 1955, c. 1350, s. 8; 1973, c. 476, s. 193; 1991, c. 10, s. 1; 1991 (Reg. Sess., 1992), c. 1007, s. 16; 1993, c. 433, s. 1; c. 532, s. 6; 2001-414, ss. 25, 26; 2002-87, s. 8; 2002-126, s. 22.5.)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-87, s. 8, effective August 22, 2002, added subdivision (a)(7).

Session Laws 2002-126, s. 22.5, effective July 1, 2002, added subsection (e).

§ 105-259. Secrecy required of officials; penalty for violation.

(a) Definitions. — The following definitions apply in this section:

(1) Employee or officer. — The term includes a former employee, a former officer, and a current or former member of a State board or commission.

(2) Tax information. — Any information from any source concerning the liability of a taxpayer for a tax, as defined in G.S. 105-228.90. The term includes the following:

a. Information contained on a tax return, a tax report, or an application for a license for which a tax is imposed.

b. Information obtained through an audit of a taxpayer or by correspondence with a taxpayer.

c. Information on whether a taxpayer has filed a tax return or a tax report.

d. A list or other compilation of the names, addresses, social security numbers, or similar information concerning taxpayers.

The term does not include (i) statistics classified so that information about specific taxpayers cannot be identified, (ii) an annual report required to be filed under G.S. 55-16-22 or (iii) information submitted to the Business License Information Office of the Department of Secretary of State on a master application form for various business licenses.

(b) Disclosure Prohibited. — An officer, an employee, or an agent of the State who has access to tax information in the course of service to or employment by the State 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) Review by a tax official of another jurisdiction to aid the jurisdiction in collecting a tax imposed by this State or the other jurisdiction if the laws of the other jurisdiction allow it to provide similar tax information to a representative of this State.

(4) To provide a governmental agency or an officer of an organized association of taxpayers with a list of taxpayers who have paid a privilege license tax under Article 2 of this Chapter.

(5) To furnish to the chair of a board of county commissioners information on the county sales and use tax.

(5a) Reserved.

(5b) To furnish to the finance officials of a city a list of the utility taxable gross receipts and piped natural gas tax revenues attributable to the city under G.S. 105-116.1 and G.S. 105-187.44 or under former G.S. 105-116 and G.S. 105-120.

(5c) To provide the following information to 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 on an annual basis, when the information is needed to enable the authority to administer its tax laws:

a. The name, address, and identification number of retailers who collect the tax on leased vehicles imposed by G.S. 105-187.5.
b. The name, address, and identification number of a retailer audited by the Department of Revenue regarding the tax on leased vehicles imposed by G.S. 105-187.5, when the Department determines that the audit results may be of interest to the authority.

(5d) To provide the following information to a county or city on an annual basis, when the county or city needs the information for the administration of its local tax on prepared food and beverages:
a. The name, address, and identification number of retailers who collect the sales and use taxes imposed under Article 5 of this Chapter and may be engaged in the business of selling prepared food and beverages.
b. The name, address, and identification number of a retailer audited by the Department of Revenue regarding the sales and use taxes imposed under Article 5 of this Chapter, when the Department determines that the audit results may be of interest to the county or city in the administration of its local tax on prepared food and beverages.

(6) To sort, process, or deliver tax information on behalf of the Department of Revenue.

(6a) To furnish the county official designated under G.S. 105-164.14(f) a list of claimants that have received a refund of the county sales or use tax to the extent authorized in G.S. 105-164.14(f).

(7) To exchange information with the Division of Motor Vehicles of the Department of Transportation or the International Fuel Tax Association, Inc., when the information is needed to fulfill a duty imposed on the Department of Revenue or the Division of Motor Vehicles.

(7a) To furnish the name and identifying information of motor carriers whose licenses have been revoked to the administrator of a national criminal justice system database that makes the information available only to criminal justice agencies and public safety organizations.

(8) To furnish to the Department of State Treasurer, upon request, the name, address, and account and identification numbers of a taxpayer who may be entitled to property held in the Escheat Fund.

(9) To furnish to the Employment Security Commission the name, address, and account and identification numbers of a taxpayer when the information is requested by the Commission in order to fulfill a duty imposed under Article 2 of Chapter 96 of the General Statutes.

(9a) To furnish information to the Employment Security Commission to the extent required for its NC WORKS study of the working poor pursuant to G.S. 108A-29(r). The Employment Security Commission shall use information furnished to it under this subdivision only in a nonidentifying form for statistical and analytical purposes related to its NC WORKS study. The information that may be furnished under this subdivision is the following with respect to individual income taxpayers, as shown on the North Carolina income tax forms:
a. Name, social security number, spouse's name, spouse's social security number, and county of residence.
b. Filing status and federal personal exemptions.
c. Federal taxable income, additions to federal taxable income, and total of federal taxable income plus additional income.
d. Income while a North Carolina resident, total income from North Carolina sources while a nonresident, and total income from all sources.
e. Exemption for children, nonresidents' and part-year residents' exemption for children, and credit for children.

f. Expenses for child and dependent care, portion of expenses paid while a resident of North Carolina, portion of expenses paid while a resident of North Carolina that was incurred for dependents who were under the age of seven and dependents who were physically or mentally incapable of caring for themselves, credit for child and dependent care expenses, other qualifying expenses, credit for other qualifying expenses, total credit for child and dependent care expenses.

(10) Review by the State Auditor to the extent authorized in G.S. 147-64.7.

(11) To give a spouse who elects to file a joint tax return a copy of the return or information contained on the return.

(11a) To provide a copy of a return to the taxpayer who filed the return.

(11b) In the case of a return filed by a corporation, a partnership, a trust, or an estate, to provide a copy of the return or information on the return to a person who has a material interest in the return if, under the circumstances, section 6103(e)(1) of the Code would require disclosure to that person of any corresponding federal return or information.

(11c) In the case of a return of an individual who is legally incompetent or deceased, to provide a copy of the return to the legal representative of the estate of the incompetent individual or decedent.

(12) To contract with a financial institution for the receipt of withheld income tax payments under G.S. 105-163.6 or for the transmittal of payments by electronic funds transfer.

(13) To furnish the Fiscal Research Division of the General Assembly, upon request, a sample, suitable in character, composition, and size for statistical analyses, of tax returns or other tax information from which taxpayers' names and identification numbers have been removed.

(14) To exchange information concerning a tax imposed by Subchapter V of this Chapter with the Standards Division of the Department of Agriculture and Consumer Services when the information is needed to administer the Gasoline and Oil Inspection Act, Article 3 of Chapter 119 of the General Statutes.

(15) To exchange information concerning a tax imposed by Articles 2A, 2C, or 2D of this Chapter with one of the following agencies when the information is needed to fulfill a duty imposed on the Department or the agency:

a. The North Carolina Alcoholic Beverage Control Commission.

b. The Division of Alcohol Law Enforcement of the Department of Crime Control and Public Safety.

c. The Bureau of Alcohol, Tobacco, and Firearms of the United States Treasury Department.

d. Law enforcement agencies.

e. The Division of Community Corrections of the Department of Correction.

(15a) To furnish to the head of the appropriate State or federal law enforcement agency information concerning the commission of an offense under the jurisdiction of that agency discovered by the Department during a criminal investigation of the taxpayer.

(16) To furnish to the Department of Secretary of State the name, address, tax year end, and account and identification numbers of a corporation liable for corporate income or franchise taxes or of a limited liability company liable for a corporate or a partnership tax return to enable the Secretary of State to notify the corporation or the limited liability

company of the annual report filing requirement or that its articles of incorporation or articles of organization or its certificate of authority has been suspended.

(16a) To provide the North Carolina Self-Insurance Guaranty Association information on self-insurers' premiums as determined under G.S. 105-228.5(b), (b1), and (c) for the purpose of collecting the assessments authorized in G.S. 97-133(a).

(17) To inform the Business License Information Office of the Department of Secretary of State of the status of an application for a license for which a tax is imposed and of any information needed to process the application.

(18) To furnish to the Office of the State Controller the name, address, and account and identification numbers of a taxpayer upon request to enable the State Controller to verify statewide vendor files or track debtors of the State.

(19) To furnish to the North Carolina Industrial Commission information concerning workers' compensation reported to the Secretary under G.S. 105-163.7.

(20) **(Repealed effective January 1, 2012)** To furnish to the Environmental Management Commission information concerning whether a person who is requesting certification of a dry-cleaning facility or wholesale distribution facility from the Commission is liable for privilege tax under Article 5D of this Chapter.

(21) To exchange information concerning the tax on piped natural gas imposed by Article 5E of this Chapter with the North Carolina Utilities Commission or the Public Staff of that Commission.

(22) To provide the Secretary of Administration pursuant to G.S. 143-59.1 a list of vendors and their affiliates who meet one or more of the conditions of G.S. 105-164.8(b) but refuse to collect the use tax levied under Article 5 of this Chapter on their sales delivered to North Carolina.

(23) To provide public access to a database containing the names and account numbers of taxpayers who are not required to pay sales and use taxes under Article 5 of this Chapter to a retailer because of an exemption or because they are authorized to pay the tax directly to the Department of Revenue.

(24) To furnish the Department of Commerce and the Employment Security Commission a copy of the qualifying information required in G.S. 105-129.7(b).

(25) To provide public access to a database containing the names of retailers who are registered to collect sales and use taxes under Article 5 of this Chapter.

(26) To contract for the collection of tax debts pursuant to G.S. 105-243.1.

(27) To publish the information required under G.S. 105-129.6.

(28) To exchange information concerning a tax credit claimed under Article 3E of this Chapter with the North Carolina Housing Finance Agency.

(29) To provide to the Economic Investment Committee established pursuant to G.S. 143B-437.48 information necessary to implement Part 2F of Article 10 of Chapter 143B of the General Statutes.

(c) 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. (1939, c. 158, s. 928; 1951, c. 190, s. 2; 1973, c. 476, s. 193; c. 903, s. 4; c. 1287, s. 13; 1975, c. 19, s. 29; c. 275, s. 7; 1977, c. 657, s. 6; 1979,

c. 495; 1983, c. 7; 1983 (Reg. Sess., 1984), c. 1004, s. 3; c. 1034, s. 125; 1987, c. 440, s. 4; 1989, c. 628; c. 728, s. 1.47; 1989 (Reg. Sess., 1990), c. 945, s. 15; 1993, c. 485, s. 31; c. 539, s. 712; 1994, Ex. Sess., c. 14, s. 51; c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 679, s. 8.4; 1995, c. 17, s. 11; c. 21, s. 2; 1997-118, s. 6; 1997-261, s. 14; 1997-340, s. 2; 1997-392, s. 4.1; 1997-475, s. 6.11; 1998-22, ss. 10, 11; 1998-98, ss. 13.1(b), 20; 1998-139, s. 1; 1998-212, s. 12.27A(o); 1999-219, s. 7.1; 1999-340, s. 8; 1999-341, s. 8; 1999-360, s. 2.1; 1999-438, s. 18; 1999-452, s. 28.1; 2000-120, s. 8; 2000-173, s. 11; 2001-205, s. 1; 2001-380, s. 5; 2001-476, s. 8(b); 2001-487, ss. 47(d), 123; 2002-87, s. 7; 2002-106, s. 5; 2002-172, s. 2.3.)

Editor's Note. —

Session Laws 2002-172, s. 7.1, contains a severability clause.

Effect of Amendments. —

Session Laws 2002-87, s. 7, effective August 22, 2002, added subdivision (b)(28).

Session Laws 2002-106, s. 5, effective September 6, 2002, added subdivision (b)(15a).

Session Laws 2002-172, s. 2.3, effective October 31, 2002, added subivision (b)(29) to this section, as amended by Session Laws 2002-87.

§ 105-269.3. Enforcement of Subchapter V and fuel inspection tax.

The State Highway Patrol and law enforcement officers and other appropriate personnel in the Department of Crime Control and Public Safety may assist the Department of Revenue in enforcing Subchapter V of this Chapter and Article 3 of Chapter 119 of the General Statutes. The State Highway Patrol and law enforcement officers of the Department of Crime Control and Public Safety have the power of peace officers in matters concerning the enforcement of Subchapter V of this Chapter and Article 3 of Chapter 119 of the General Statutes. (1963, c. 1169, s. 6; 1991, c. 42, s. 16; 1991 (Reg. Sess., 1992), c. 1007, s. 17; 1993, c. 485, s. 15; 1993 (Reg. Sess., 1994), c. 745, s. 19; 2002-159, s. 31.5(b); 2002-190, s. 2.)

Editor's Note. — Session Laws 2002-190, s. 17, provides: "The Governor shall resolve any dispute between the Department of Transportation and the Department of Crime Control and Public Safety concerning the implementation of this act."

Effect of Amendments. — Session Laws 2002-190, s. 2, as amended by Session Laws 2002-159, s. 31.5(b), effective January 1, 2003, substituted "Department of Crime Control and Public Safety" for "Division of Motor Vehicles of the Department of Transportation" in the first sentence and for "Division of Motor Vehicles" in the second sentence.

§ 105-269.6: Repealed by Session Laws 2002-158, s. 6(a), effective for taxable years beginning on or after January 1, 2003.

For this section as in effect for taxable years beginning prior to January 1, 2003, see the main volume.

Editor's Note. — Session Laws 2002-158, s. 6(b), provides: "In order to pay for its costs for the 2002-2003 fiscal year of programming, design, printing, and other expenses associated with implementing this act, the Secretary of Revenue may draw funds not to exceed one hundred seventy-eight thousand six hundred dollars ($178,600) from the North Carolina Candidates Financing Fund. After drawing those funds, the Secretary of Revenue shall transfer immediately to the North Carolina Public Campaign Financing Fund any remaining funds that were contributed to the North Carolina Candidates Financing Fund pursuant to G.S. 105-269.6 before its repeal by this section. Funds the Secretary of Revenue withdraws but then determines are not needed shall also be transferred to the North Carolina Public Campaign Financing Fund."

Editor's Note. — Session Laws 2002-158, s. 15.1, provides that nothing in the act obligates the General Assembly to appropriate funds to implement the act now or in the future.

Session Laws 2002-158, s. 15, contains a severability clause.

§ 105-269.14. (Repealed effective for taxable years beginning on or after January 1, 2003) Payment of use tax with individual income tax.

(a) Requirement. — An individual who owes use tax that is payable on an annual basis pursuant to G.S. 105-164.16(d) and who is required to file an individual income tax return under Part 2 of Article 4 of this Chapter must pay the use tax with the individual income tax return for the taxable year. The Secretary must provide appropriate space and information on the individual income tax form and instructions. The information must include the following:

(1) An explanation of an individual's obligation to pay use tax on items purchased from mail order, Internet, or other sellers that do not collect State and local sales and use taxes on the items.

(2) A method to help an individual determine the amount of use tax the individual owes. The method must list categories of items, such as personal computers and clothing, that are commonly sold by mail order or Internet and must include a table that gives the average amounts of use tax payable by taxpayers in various income ranges.

(b) Distribution. — The Secretary must distribute a portion of the net use tax proceeds collected under this section to counties and cities. The portion to be distributed to all counties and cities is the total net use tax proceeds collected under this section multiplied by a fraction. The numerator of the fraction is the local use tax proceeds collected under this section. The denominator of the fraction is the total use tax proceeds collected under this section. The Secretary must distribute this portion to the counties and cities in proportion to their total distributions under Articles 39, 40, 42, 43, and 44 of this Chapter and Chapter 1096 of the 1967 Session Laws for the most recent period for which data are available. The provisions of G.S. 105-472, 105-486, and 105-501 do not apply to tax proceeds distributed under this section. (1999-341, s. 2; 2000-120, s. 10; 2002-72, s. 20.)

Section Repealed Effective for Taxable Years Beginning on or after January 1, 2003. — This section is repealed, effective for taxable years beginning on or after January 1, 2003, by Session Laws 2000-120, s. 10.

Effect of Amendments. — Session Laws 2002-72, s. 20, effective August 12, 2002, rewrote subsection (b).

OPINIONS OF ATTORNEY GENERAL

Validity of Statute. — The federal Internet Tax Freedom Act does not prohibit a state from bundling payment of use taxes with payment for income taxes and, therefore, does not invalidate this section. See opinion of Attorney General to Representative Cary D. Allred, 2000 N.C. AG LEXIS 22 (3/6/2000).

SUBCHAPTER II. LISTING, APPRAISAL, AND ASSESSMENT OF PROPERTY AND COLLECTION OF TAXES ON PROPERTY.

ARTICLE 11.

Short Title, Purpose, and Definitions.

§ 105-271. Official title.

Cross References. — As to the use and confidential nature of actual addresses of Address Confidentiality Program participants by boards of elections for election-related purposes, see G.S. 15C-8.

§ 105-273. Definitions.

When used in this Subchapter (unless the context requires a different meaning):

(1) "Abstract" means the document on which the property of a taxpayer is listed for ad valorem taxation and on which the appraised and assessed values of the property are recorded.

(2) "Appraisal" means both the true value of property and the process by which true value is ascertained.

(3) "Assessment" means both the tax value of property and the process by which the assessment is determined.

(4) Repealed by Session Laws 1973, c. 695, s. 15, effective January 1, 1974.

(4a) "Code" [is] defined in G.S. 105-228.90.

(5) "Collector" or "tax collector" means any person charged with the duty of collecting taxes for a county or municipality.

(5a) "Contractor" means a taxpayer who is regularly engaged in building, installing, repairing, or improving real property.

(6) "Corporation" includes nonprofit corporation and every type of organization having capital stock represented by shares.

(6a) "Discovered property" includes all of the following:

a. Property that was not listed during a listing period.

b. Property that was listed but the listing included a substantial understatement.

c. Property that has been granted an exemption or exclusion and does not qualify for the exemption or exclusion.

(6b) "To discover property" means to determine any of the following:

a. Property has not been listed during a listing period.

b. A taxpayer made a substantial understatement of listed property.

c. Property was granted an exemption or exclusion and the property does not qualify for an exemption or exclusion.

(7) "Document" includes book, paper, record, statement, account, map, plat, film, picture, tape, object, instrument, and any other thing conveying information.

(7a) "Failure to list property" includes all of the following:

a. Failure to list property during a listing period.

b. A substantial understatement of listed property.

c. Failure to notify the assessor that property granted an exemption or exclusion under an application for exemption or exclusion does not qualify for the exemption or exclusion.

(8) "Intangible personal property" means patents, copyrights, secret processes, formulae, good will, trademarks, trade brands, franchises, stocks, bonds, cash, bank deposits, notes, evidences of debt, leasehold interests in exempted real property, bills and accounts receivable, and other like property.

(8a) "Inventories" means (i) goods held for sale in the regular course of business by manufacturers, retail and wholesale merchants, and contractors, and (ii) goods held by contractors to be furnished in the course of building, installing, repairing, or improving real property. As to manufacturers, the term includes raw materials, goods in process, and finished goods, as well as other materials or supplies that are consumed in manufacturing or processing, or that accompany and become a part of the sale of the property being sold. The term also includes crops, livestock, poultry, feed used in the production of livestock and poultry, and other agricultural or horticultural products held for sale, whether in process or ready for sale. The term does not

include fuel used in manufacturing or processing, nor does it include materials or supplies not used directly in manufacturing or processing. As to retail and wholesale merchants and contractors, the term includes, in addition to articles held for sale, packaging materials that accompany and become a part of the sale of the property being sold.

(9) "List" or "listing," when used as a noun, means abstract.

(10) Repealed by Session Laws 1987, c. 43, s. 1.

(10a) "Local tax official" includes a county assessor, an assistant county assessor, a member of a county board of commissioners, a member of a county board of equalization and review, a county tax collector, and the municipal equivalents of these officials.

(10b) "Manufacturer" means a taxpayer who is regularly engaged in the mechanical or chemical conversion or transformation of materials or substances into new products for sale or in the growth, breeding, raising, or other production of new products for sale. The term does not include delicatessens, cafes, cafeterias, restaurants, and other similar retailers that are principally engaged in the retail sale of foods prepared by them for consumption on or off their premises.

(11) "Municipal corporation" and "municipality" mean city, town, incorporated village, sanitary district, rural fire protection district, rural recreation district, mosquito control district, hospital district, metropolitan sewerage district, watershed improvement district, or other district or unit of local government by or for which ad valorem taxes are levied. The terms also include a consolidated city-county as defined by G.S. 160B-2(1).

(12) "Person" and "he" include any individual, trustee, executor, administrator, other fiduciary, corporation, limited liability company, unincorporated association, partnership, sole proprietorship, company, firm, or other legal entity.

(13) **(Effective for taxable years ending before July 1, 2003)** "Real property," "real estate," and "land" mean not only the land itself, but also buildings, structures, improvements, and permanent fixtures thereon, and all rights and privileges belonging or in any wise appertaining thereto. These terms also mean a manufactured home as defined in G.S. 143-143.9(6) if it is a multi-section residential structure (consisting of two or more sections); has the moving hitch, wheels, and axles removed; and is placed upon a permanent enclosed foundation on land owned by the owner of the manufactured home.

(13) **(Effective for taxable years beginning on or after July 1, 2003)** "Real property," "real estate," and "land" mean not only the land itself, but also buildings, structures, improvements, and permanent fixtures on the land, and all rights and privileges belonging or in any way appertaining to the property. These terms also mean a manufactured home as defined in G.S. 143-143.9(6) if it is a residential structure; has the moving hitch, wheels, and axles removed; and is placed upon a permanent foundation on land owned by the owner of the manufactured home. A manufactured home as defined in G.S. 143-143.9(6) that does not meet all of these conditions is considered tangible personal property.

(13a) "Retail Merchant" means a taxpayer who is regularly engaged in the sale of tangible personal property, acquired by a means other than manufacture, processing, or producing by the merchant, to users or consumers.

(13b) "Substantial understatement" means the omission of a material portion of the value, quantity, or other measurement of taxable property. The determination of materiality in each case shall be made

by the assessor, subject to the taxpayer's right to review of the determination by the county board of equalization and review or board of commissioners and appeal to the Property Tax Commission.

(14) "Tangible personal property" means all personal property that is not intangible and that is not permanently affixed to real property.

(15) "Tax" and "taxes" include the principal amount of any tax, costs, penalties, and interest imposed upon property tax or dog license tax.

(16) "Taxing unit" means a county or municipality authorized to levy ad valorem property taxes.

(17) "Taxpayer" means any person whose property is subject to ad valorem property taxation by any county or municipality and any person who, under the terms of this Subchapter, has a duty to list property for taxation.

(18) "Valuation" means appraisal and assessment.

(19) "Wholesale Merchant" means a taxpayer who is regularly engaged in the sale of tangible personal property, acquired by a means other than manufacture, processing, or producing by the merchant, to other retail or wholesale merchants for resale or to manufacturers for use as ingredient or component parts of articles being manufactured for sale. (1939, c. 310, s. 2; 1971, c. 806, s. 1; 1973, c. 695, ss. 14, 15; 1985, c. 656, s. 20; 1985 (Reg. Sess., 1986), c. 947, ss. 3, 4; 1987, c. 43, s. 1; c. 440, s. 2; c. 805, s. 3; c. 813, ss. 1-4; 1991, c. 34, s. 3; 1991 (Reg. Sess., 1992), c. 975, s. 1; c. 1004, s. 1; 1993, c. 354, s. 23; c. 459, s. 1; 1995, c. 461, s. 15; 1998-212, s. 29A.18(c); 2001-506, s. 1; 2002-156, s. 4.)

Subdivision (13) Set Out Twice. — The first version of subdivision (13) set out above is effective for taxable years ending before July 1, 2003. The second version of subdivision (13) set out above is effective for taxable years beginning on or after July 1, 2003.

Effect of Amendments. — Session Laws 2001-506, s. 1, as amended by Session Laws 2002-156, s.4, effective for taxes imposed for taxable years beginning on or after July 1, 2003, rewrote subdivision (13).

OPINIONS OF ATTORNEY GENERAL

Discovered Property. — Where a town simply possessed a leasehold interest, the real estate was not exempt as property belonging to a municipality; therefore, the county properly discovered the land leased to the town. See opinion of Attorney General to Huey Marshall, County Attorney, 2000 N.C. AG LEXIS 1 (3/28/2000).

Article 12.

Property Subject to Taxation.

§ 105-275. Property classified and excluded from the tax base.

The following classes of property are hereby designated special classes under authority of Article V, Sec. 2(2), of the North Carolina Constitution and shall not be listed, appraised, assessed, or taxed:

(1) Repealed by Session Laws 1987, c. 813, s. 5.

(2) Tangible personal property that has been imported from a foreign country through a North Carolina seaport terminal and which is stored at such a terminal while awaiting further shipment for the first 12 months of such storage. (The purpose of this classification is to encourage the development of the ports of this State.)

(3) Real and personal property owned by nonprofit water or nonprofit sewer associations or corporations.

(4) Repealed by Session Laws 1987, c. 813, s. 5.

(5) Vehicles that the United States government gives to veterans on account of disabilities they suffered in World War II, the Korean Conflict, or the Vietnam Era so long as they are owned by:

a. A person to whom a vehicle has been given by the United States government or

b. Another person who is entitled to receive such a gift under Title 38, section 252, United States Code Annotated.

(5a) A motor vehicle owned by a disabled veteran that is altered with special equipment to accommodate a service-connected disability. As used in this section, disabled veteran means a person as defined in 38 U.S.C. § 101(2) who is entitled to special automotive equipment for a service-connected disability, as provided in 38 U.S.C. § 3901.

(6) Special nuclear materials held for or in the process of manufacture, processing, or delivery by the manufacturer or processor thereof, regardless whether the manufacturer or processor owns the special nuclear materials. The terms "manufacture" and "processing" do not include the use of special nuclear materials as fuel. The term "special nuclear materials" includes (i) uranium 233, uranium enriched in the isotope 233 or in the isotope 235; and (ii) any material artificially enriched by any of the foregoing, but not including source material. "Source material" means any material except special nuclear material which contains by weight one twentieth of one percent (0.05%) or more of (i) uranium, (ii) thorium, or (iii) any combination thereof. Provided however, that to qualify for this exemption no such nuclear materials shall be discharged into any river, creek or stream in North Carolina. The classification and exclusion provided for herein shall be denied to any manufacturer, fabricator or processor who permits burial of such material in North Carolina or who permits the discharge of such nuclear materials into the air or into any river, creek or stream in North Carolina if such discharge would contravene in any way the applicable health and safety standards established and enforced by the Department of Environment and Natural Resources or the Nuclear Regulatory Commission. The most stringent of these standards shall govern.

(7) Real and personal property that is:

a. Owned either by a nonprofit corporation formed under the provisions of Chapter 55A of the General Statutes or by a bona fide charitable organization, and either operated by such owning organization or leased to another such nonprofit corporation or charitable organization, and

b. Appropriated exclusively for public parks and drives.

(8)a. Real and personal property that is used or, if under construction, is to be used exclusively for air cleaning or waste disposal or to abate, reduce, or prevent the pollution of air or water (including, but not limited to, waste lagoons and facilities owned by public or private utilities built and installed primarily for the purpose of providing sewer service to areas that are predominantly residential in character or areas that lie outside territory already having sewer service), if the Department of Environment and Natural Resources or a local air pollution control program for air-cleaning devices located in an area where the Environmental Management Commission has certified a local air pollution control program pursuant to G.S. 143-215.112 furnishes a certificate to the tax supervisor of the county in which the property is situated or to be situated stating that the Environmental Management Commis-

sion or local air pollution control program has found that the described property:

1. Has been or will be constructed or installed;
2. Complies with or that plans therefor which have been submitted to the Environmental Management Commission or local air pollution control program indicate that it will comply with the requirements of the Environmental Management Commission or local air pollution control program;
3. Is being effectively operated or will, when completed, be required to operate in accordance with the terms and conditions of the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission or local air pollution control program; and
4. Has or, when completed, will have as its primary rather than incidental purpose the reduction of water pollution resulting from the discharge of sewage and waste or the reduction of air pollution resulting from the emission of air contaminants.

a1. Sub-subdivision a. of this subdivision shall not apply to an animal waste management system, as defined in G.S. 143-215.10B, unless the Environmental Management Commission determines that the animal waste management system will accomplish all of the following:

1. Eliminate the discharge of animal waste to surface waters and groundwater through direct discharge, seepage, or runoff.
2. Substantially eliminate atmospheric emissions of ammonia.
3. Substantially eliminate the emission of odor that is detectable beyond the boundaries of the parcel or tract of land on which the farm is located.
4. Substantially eliminate the release of disease-transmitting vectors and airborne pathogens.
5. Substantially eliminate nutrient and heavy metal contamination of soil and groundwater.

b. Real or personal property that is used or, if under construction, is to be used exclusively for recycling or resource recovering of or from solid waste, if the Department of Environment and Natural Resources furnishes a certificate to the tax supervisor of the county in which the property is situated stating the Department of Environment and Natural Resources has found that the described property has been or will be constructed or installed, complies or will comply with the rules of the Department of Environment and Natural Resources, and has, or will have as its primary purpose recycling or resource recovering of or from solid waste.

c. Tangible personal property that is used exclusively, or if being installed, is to be used exclusively, for the prevention or reduction of cotton dust inside a textile plant for the protection of the health of the employees of the plant, in accordance with occupational safety and health standards adopted by the State of North Carolina pursuant to Article 16 of G.S. Chapter 95. The Department of Revenue shall adopt guidelines to assist the tax supervisors in administering this exclusion.

d. Real or personal property that is used or, if under construction, is to be used by a major recycling facility as defined in G.S. 105-129.25 predominantly for recycling or resource recovering of or from solid waste, if the Department of Environment and Natural Resources furnishes a certificate to the tax supervisor of

the county in which the property is situated stating the Department of Environment and Natural Resources has found that the described property has been or will be constructed or installed for use by a major recycling facility, complies or will comply with the rules of the Department of Environment and Natural Resources, and has, or will have as a purpose recycling or resource recovering of or from solid waste.

(9) through (11) Repealed by Session Laws 1987, c. 813, s. 5.

(12) Real property owned by a nonprofit corporation or association exclusively held and used by its owner for educational and scientific purposes as a protected natural area. (For purposes of this subdivision, the term "protected natural area" means a nature reserve or park in which all types of wild nature, flora and fauna, and biotic communities are preserved for observation and study.)

(13) Repealed by Session Laws 1973, c. 904.

(14) Motor vehicles chassis belonging to nonresidents, which chassis temporarily enters the State for the purpose of having a body mounted thereon.

(15) Upon the date on which each county's next general reappraisal of real property under the provisions of G.S. 105-286(a) becomes effective, standing timber, pulpwood, seedlings, saplings, and other forest growth. (The purpose of this classification is to encourage proper forest management practices and to develop and maintain the forest resources of the State.)

(16) Non-business Property. — As used in this subdivision, the term "non-business property" means personal property that is used by the owner of the property for a purpose other than the production of income and is not used in connection with a business. The term includes household furnishings, clothing, pets, lawn tools, and lawn equipment. The term does not include motor vehicles, mobile homes, aircraft, watercraft, or engines for watercraft.

(17) Real and personal property belonging to the American Legion, Veterans of Foreign Wars, Disabled American Veterans, or to any similar veterans organizations chartered by the Congress of the United States or organized and operated on a statewide or nationwide basis, and any post or local organization thereof, when used exclusively for meeting or lodge purposes by said organization, together with such additional adjacent real property as may be necessary for the convenient and normal use of the buildings thereon. Notwithstanding the exclusive-use requirement hereinabove established, if a part of a property that otherwise meets this subdivision's requirements is used for a purpose that would require that it not be listed, appraised, assessed or taxed if the entire property were so used, that part, according to its value, shall not be listed, appraised, assessed or taxed. The fact that a building or facility is incidentally available to and patronized by the general public, so far as there is no material amount of business or patronage with the general public, shall not defeat the classification granted by this section.

(18) Real and personal property belonging to the Grand Lodge of Ancient, Free and Accepted Masons of North Carolina, the Prince Hall Masonic Grand Lodge of North Carolina, their subordinate lodges and appendant bodies including the Ancient and Arabic Order Nobles of the Mystic Shrine, and the Ancient Egyptian Order Nobles of the Mystic Shrine, when used exclusively for meeting or lodge purposes by said organization, together with such additional adjacent real property as may be necessary for the convenient normal use of the

buildings thereon. Notwithstanding the exclusive-use requirement hereinabove established, if a part of a property that otherwise meets this subdivision's requirements is used for a purpose that would require that it not be listed, appraised, assessed or taxed if the entire property were so used, that part, according to its value, shall not be listed, appraised, assessed or taxed. The fact that a building or facility is incidentally available to and patronized by the general public, so far as there is no material amount of business or patronage with the general public, shall not defeat the classification granted by this section.

(19) Real and personal property belonging to the Loyal Order of Moose, the Benevolent and Protective Order of Elks, the Knights of Pythias, the Odd Fellows, the Woodmen of the World, and similar fraternal or civic orders and organizations operated for nonprofit benevolent, patriotic, historical, charitable, or civic purposes, when used exclusively for meeting or lodge purposes by the organization, together with as much additional adjacent real property as may be necessary for the convenient normal use of the buildings. Notwithstanding the exclusive-use requirement of this subdivision, if a part of a property that otherwise meets this subdivision's requirements is used for a purpose that would require that it not be listed, appraised, assessed, or taxed if the entire property were so used, that part, according to its value, shall not be listed, appraised, assessed, or taxed. The fact that a building or facility is incidentally available to and patronized by the general public, so far as there is no material amount of business or patronage with the general public, shall not defeat the classification granted by this section. Nothing in this subdivision shall be construed so as to include social fraternities, sororities, and similar college, university, or high school organizations in the classification for exclusion from ad valorem taxes.

(20) Real and personal property belonging to Goodwill Industries and other charitable organizations organized for the training and rehabilitation of disabled persons when used exclusively for training and rehabilitation, including commercial activities directly related to such training and rehabilitation.

(21) The first thirty-eight thousand dollars ($38,000) in assessed value of housing together with the necessary land therefor, owned and used as a residence by a disabled veteran who receives benefits under 38 U.S.C. § 2101. This exclusion shall be the total amount of the exclusion applicable to such property.

(22) Repealed by Session Laws 1987, c. 813, s. 5.

(23) Tangible personal property imported from outside the United States and held in a Foreign Trade Zone for the purpose of sale, manufacture, processing, assembly, grading, cleaning, mixing or display and tangible personal property produced in the United States and held in a Foreign Trade Zone for exportation, either in its original form or as altered by any of the above processes.

(24) Cargo containers and container chassis used for the transportation of cargo by vessels in ocean commerce.

The term "container" applies to those nondisposable receptacles of a permanent character and strong enough for repeated use and specially designed to facilitate the carriage of goods, by one or more modes of transport, one of which shall be by ocean vessels, without intermediate reloadings and fitted with devices permitting its ready handling particularly in the transfer from one transport mode to another.

(24a) Aircraft that is owned or leased by an interstate air courier, is apportioned under G.S. 105-337 to the air courier's hub in this State, and is used in the air courier's operations in this State. For the purpose of this subdivision, the terms "interstate air courier" and "hub" have the meanings provided in G.S. 105-164.3.

(25) Tangible personal property shipped into this State for the purpose of repair, alteration, maintenance or servicing and reshipment to the owner outside this State.

(26) For the tax year immediately following transfer of title, tangible personal property manufactured in this State for the account of a nonresident customer and held by the manufacturer for shipment. For the purpose of this subdivision, the term "nonresident" means a taxpayer having no place of business in North Carolina.

(27), (28) Repealed by Session Laws 1983, c. 643, s. 1.

(29) Real property and easements wholly and exclusively held and used for nonprofit historic preservation purposes by a nonprofit historical association or institution, including real property owned by a nonprofit corporation organized for historic preservation purposes and held by its owner exclusively for sale under an historic preservation agreement prepared and recorded under the provisions of the Conservation and Historic Preservation Agreements Act, Article 4, Chapter 121 of the General Statutes of North Carolina.

(29a) Land within an historic district held, by a nonprofit corporation organized for historic preservation purposes, for use as a future site for an historic structure that is to be moved to the site from another location. Property may be classified under this subdivision for no more than five years. The taxes that would otherwise be due on land classified under this subdivision shall be a lien on the real property of the taxpayer as provided in G.S. 105-355(a). The taxes shall be carried forward in the records of the taxing unit or units as deferred taxes and shall be payable five years from the fiscal year the exclusion is first claimed unless an historic structure is moved onto the site during that time. If an historic structure has not been moved to the site within five years, then deferred taxes for the preceding five fiscal years shall immediately be payable, together with interest as provided in G.S. 105-360 for unpaid taxes that shall accrue on the deferred taxes as if they had been payable on the dates on which they would originally become due. All liens arising under this subdivision are extinguished upon either the payment of any deferred taxes under this subdivision or the location of an historic structure on the site within the five-year period allowed under this subdivision.

(30) Repealed by Session Laws 1987, c. 813, s. 5.

(31) Intangible personal property other than leasehold interests in exempted real property. This subdivision does not affect the taxation of software not otherwise excluded by subdivision (40) of this section.

(31a) through (31d) Repealed by Session Laws 1997-23, s. 3.

(32) **(See editor's note)** Recodified as § 105-278.6A by Session Laws 1998-212, s. 29A.18(a), effective for taxes imposed for taxable years beginning on or after July 1, 1998.

(32a) Inventories owned by contractors.

(33) Inventories owned by manufacturers.

(34) Inventories owned by retail and wholesale merchants.

(35) Severable development rights, as defined in G.S. 136-66.11(a), when severed and evidenced by a deed recorded in the office of the register of deeds pursuant to G.S. 136-66.11(c).

(36) Repealed by Session Laws 2001-474, s. 8, effective November 29, 2001.

(37) Poultry and livestock and feed used in the production of poultry and livestock.

(38) Repealed by Session Laws 2001-474, s. 8, effective November 29, 2001.

(39) Real and personal property that is: (i) owned by a nonprofit corporation organized upon the request of a State or local government unit for the sole purpose of financing projects for public use, (ii) leased to a unit of State or local government whose property is exempt from taxation under G.S. 105-278.1, and (iii) used in whole or in part for a public purpose by the unit of State or local government. If only part of the property is used for a public purpose, only that part is excluded from the tax. This subdivision does not apply if any distributions are made to members, officers, or directors of the nonprofit corporation.

(39a) A correctional facility, including construction in progress, that is located on land owned by the State and is constructed pursuant to a contract with the State, and any leasehold interest in the land owned by the State upon which the correctional facility is located.

(40) Computer software and any documentation related to the computer software. As used in this subdivision, the term "computer software" means any program or routine used to cause a computer to perform a specific task or set of tasks. The term includes system and application programs and database storage and management programs.

The exclusion established by this subdivision does not apply to computer software and its related documentation if the computer software meets one or more of the following descriptions:

a. It is embedded software. "Embedded software" means computer instructions, known as microcode, that reside permanently in the internal memory of a computer system or other equipment and are not intended to be removed without terminating the operation of the computer system or equipment and removing a computer chip, a circuit, or another mechanical device.

b. It is purchased or licensed from a person who is unrelated to the taxpayer and it is capitalized on the books of the taxpayer in accordance with generally accepted accounting principles, including financial accounting standards issued by the Financial Accounting Standards Board. A person is unrelated to a taxpayer if (i) the taxpayer and the person are not subject to any common ownership, either directly or indirectly, and (ii) neither the taxpayer nor the person has any ownership interest, either directly or indirectly, in the other.

This subdivision does not affect the value or taxable status of any property that is otherwise subject to taxation under this Subchapter.

The provisions of the exclusion established by this subdivision are not severable. If any provision of this subdivision or its application is held invalid, the entire subdivision is repealed.

(41) Objects of art held by the North Carolina Art Society, Incorporated.

(42) A vehicle that is offered at retail for short-term lease or rental and is owned or leased by an entity engaged in the business of leasing or renting vehicles to the general public for short-term lease or rental. For the purposes of this subdivision, the term "short-term lease or rental" shall have the same meaning as in G.S. 105-187.1, and the term "vehicle" shall have the same meaning as in G.S. 153A-156(e) and G.S. 160A-215.1(e). A gross receipts tax as set forth by G.S. 153A-156 and G.S. 160A-215.1 is substituted for and replaces the ad valorem tax previously levied on these vehicles. (1939, c. 310, s. 303; 1961, c. 1169, s. 8; 1967, c. 1185; 1971, c. 806, s. 1; c. 1121, s. 3; 1973,

cc. 290, 451; c. 476, s. 128; c. 484; c. 695, s. 1; c. 790, s. 1; cc. 904, 962, 1028, 1034, 1077; c. 1262, s. 23; c. 1264, s. 1; 1975, cc. 566, 755; c. 764, s. 6; 1977, c. 771, s. 4; c. 782, s. 2; c. 1001, ss. 1, 2; 1977, 2nd Sess., c. 1200, s. 4; 1979, c. 200, s. 1; 1979, 2nd Sess., c. 1092; 1981, c. 86, s. 1; 1981 (Reg. Sess., 1982), c. 1244, ss. 1, 2; 1983, c. 643, ss. 1, 2; c. 693; 1983 (Reg. Sess., 1984), c. 1060; 1985, c. 510, s. 1; c. 656, s. 37; 1985 (Reg. Sess., 1986), c. 982, s. 18; 1987, c. 356; c. 622, s. 2; c. 747, s. 8; c. 777, s. 6; c. 813, ss. 5, 6, 22; c. 850, s. 17; 1987 (Reg. Sess., 1988), c. 1041, s. 1.1; 1989, c. 148, s. 4; c. 168, s. 6; c. 705; c. 723, s. 1; c. 727, ss. 28, 29; 1991, c. 717, s. 1; 1991 (Reg. Sess., 1992), c. 975, s. 2; 1993, c. 459, s. 2; 1993 (Reg. Sess., 1994), c. 745, s. 39; 1995, c. 41, s. 2; c. 509, s. 51; 1995 (Reg. Sess., 1996), c. 646, s. 12; 1997-23, ss. 1, 3, 9; 1997-443, s. 11A.119(a); 1997-456, s. 27; 1998-55, ss. 10, 18; 1998-212, s. 29A.18(a); 1999-337, s. 35(a); 2000-2, s. 1; 2000-18, s. 1, 2000-140, ss. 71, 72(a); 2001-84, s. 3; 2001-427, s. 15(a); 2001-474, s. 8; 2002-104, s. 1.)

Editor's Note. —

Session Laws 2002-104, s. 2, provides: "The Revenue Laws Study Committee shall study issues related to the application of G.S. 105-275(8). The Committee shall consider whether the tax exclusion should be limited to real or personal property that is subject to or is part of a facility that is subject to an individual permit issued by the Environmental Management Commission. The Committee shall also consider whether the tax exclusion should be phased out for certain types of real or personal property. In conducting this study, the Committee shall consult with the North Carolina Association of County Commissioners and the North Carolina League of Municipalities. The Committee shall report its findings and recommendations, including legislative proposals, if any, to the 2003 General Assembly."

Effect of Amendments. —

Session Laws 2002-104, s. 1, effective September 6, 2002, and applicable to taxes imposed for taxable years beginning on or after July 1, 2002, added sub-subdivision (8)a1.

§ 105-275.1: Repealed by Session Laws 2001-424, s. 34.15, as amended by Session Laws 2002-126, 30A.1, effective July 1, 2002.

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

§ 105-275.2: Repealed by Session Laws 2001-424, s. 34.15, as amended by Session Laws 2002-126, 30A.1, effective July 1, 2002.

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

§ 105-277.001: Repealed by Session Laws 2001-424, s. 34.15, as amended by Session Laws 2002-126, 30A.1, effective July 1, 2002.

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

§ 105-277.1A: Repealed by Session Laws 2001-424, s. 34.15, as amended by Session Laws 2002-126, 30A.1, effective July 1, 2002.

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

§ 105-277.2. (Effective for taxes imposed for taxable years beginning prior to July 1, 2003) Agricultural, horticultural, and forestland — Definitions.

CASE NOTES

Commonality Among Land Tracts Is Required To Be Part of a Farm Unit. — In complying with the statutory requirements of G.S. 105-277.2, 105-277.3(a)(1) of the North Carolina Machinery Act, G.S. 105-277.2 et seq., for qualifying as agricultural land for taxing purposes, land tracts should at least have a rational relationship with each other in order to comprise a tract within a farm unit; there must be a reasonable amount of commonality so as to qualify a land tract as being a part of the whole. In re Frizzelle, — N.C. App. —, 566 S.E.2d 506, 2002 N.C. App. LEXIS 770 (2002).

Commercial production. — Taxpayers' production of hay from their former dairy farm was sufficient to meet the statutory requirement for an agricultural land present-use classification that the land was actively engaged in the commercial production of crops during the tax year. In re Briarfield Farms, 147 N.C. App. 208, 555 S.E.2d 621, 2001 N.C. App. LEXIS 1132 (2001), cert. denied, 355 N.C. 211, 559 S.E.2d 798 (2002).

Sound management program. — Taxpayers were not required to have experience in the operation of a farm, to have training in agricultural science, or to seek advice from the county extension office before they could be considered to be operating their property under a sound management program. In re Briarfield Farms, 147 N.C. App. 208, 555 S.E.2d 621, 2001 N.C. App. LEXIS 1132 (2001), cert. denied, 355 N.C. 211, 559 S.E.2d 798 (2002).

Agricultural Classification Was Properly Denied. — Although appellant taxpayer asserted that the taxpayer's 7.66-acre land tract should have been given the present-use value classification, agricultural, under G.S. 105-277.3(a)(1) of the North Carolina Machinery Act, G.S. 105-277.2 et seq., because it was allegedly part of a farm unit involving over 100 acres in another county, the Property Tax Commission reasonably concluded that the land tract was not part of a farm unit for purposes of G.S. 105-277.2 and refused to apply the agricultural classification where the tract was over 100 miles from the taxpayer's farm land in the other county and only a fraction of the 7.66-acre tract was used for growing crops. In re Frizzelle, — N.C. App. —, 566 S.E.2d 506, 2002 N.C. App. LEXIS 770 (2002).

§ 105-277.2. (Effective for taxes imposed for taxable years beginning on or after July 1, 2003) Agricultural, horticultural, and forestland — Definitions.

The following definitions apply in G.S. 105-277.3 through G.S. 105-277.7:

(1) Agricultural land. — Land that is a part of a farm unit that is actively engaged in the commercial production or growing of crops, plants, or animals under a sound management program. Agricultural land includes woodland and wasteland that is a part of the farm unit, but the woodland and wasteland included in the unit must be appraised under the use-value schedules as woodland or wasteland. A farm unit may consist of more than one tract of agricultural land, but at least one of the tracts must meet the requirements in G.S. 105-277.3(a)(1), and each tract must be under a sound management program. If the agricultural land includes less than 20 acres of woodland, then the woodland portion is not required to be under a sound management program. Also, woodland is not required to be under a sound management program if it is determined that the highest and best use of the woodland is to diminish wind erosion of adjacent agricultural land,

G.S. 105-277.2 is set out twice. See notes.

protect water quality of adjacent agricultural land, or serve as buffers for adjacent livestock or poultry operations.

(1a) Business entity. — A corporation, a general partnership, a limited partnership, or a limited liability company.

(2) Forestland. — Land that is a part of a forest unit that is actively engaged in the commercial growing of trees under a sound management program. Forestland includes wasteland that is a part of the forest unit, but the wasteland included in the unit must be appraised under the use-value schedules as wasteland. A forest unit may consist of more than one tract of forestland, but at least one of the tracts must meet the requirements in G.S. 105-277.3(a)(3), and each tract must be under a sound management program.

(3) Horticultural land. — Land that is a part of a horticultural unit that is actively engaged in the commercial production or growing of fruits or vegetables or nursery or floral products under a sound management program. Horticultural land includes woodland and wasteland that is a part of the horticultural unit, but the woodland and wasteland included in the unit must be appraised under the use-value schedules as woodland or wasteland. A horticultural unit may consist of more than one tract of horticultural land, but at least one of the tracts must meet the requirements in G.S. 105-277.3(a)(2), and each tract must be under a sound management program. If the horticultural land includes less than 20 acres of woodland, then the woodland portion is not required to be under a sound management program. Also, woodland is not required to be under a sound management program if it is determined that the highest and best use of the woodland is to diminish wind erosion of adjacent horticultural land or protect water quality of adjacent horticultural land.

(4) Individually owned. — Owned by one of the following:

a. A natural person. For the purpose of this section, a natural person who is an income beneficiary of a trust that owns land may elect to treat the person's beneficial share of the land as owned by that person. If the person's beneficial interest is not an identifiable share of land but can be established as a proportional interest in the trust income, the person's beneficial share of land is a percentage of the land owned by the trust that corresponds to the beneficiary's proportional interest in the trust income. For the purpose of this section, a natural person who is a member of a business entity, other than a corporation, that owns land may elect to treat the person's share of the land as owned by that person. The person's share is a percentage of the land owned by the business entity that corresponds to the person's percentage of ownership in the entity.

b. A business entity having as its principal business one of the activities described in subdivisions (1), (2), and (3) and whose members are all natural persons who meet one or more of the following conditions:

1. The member is actively engaged in the business of the entity.
2. The member is a relative of a member who is actively engaged in the business of the entity.
3. The member is a relative of, and inherited the membership interest from, a decedent who met one or both of the preceding conditions after the land qualified for classification in the hands of the business entity.

G.S. 105-277.2 is set out twice. See notes.

c. A trust that was created by a natural person who transferred the land to the trust and each of whose beneficiaries who is currently entitled to receive income or principal meets one of the following conditions:
1. Is the creator of the trust or the creator's relative.
2. Is a second trust whose beneficiaries who are currently entitled to receive income or principal are all either the creator of the first trust or the creator's relatives.

d. A testamentary trust that meets all of the following conditions:
1. It was created by a natural person who transferred to the trust land that qualified in that person's hands for classification under G.S. 105-277.3.
2. At the time of the creator's death, the creator had no relatives as defined in this section as of the date of death.
3. The trust income, less reasonable administrative expenses, is used exclusively for educational, scientific, literary, cultural, charitable, or religious purposes as defined in G.S. 105-278.3(d).

e. Tenants in common, if each tenant is either a natural person or a business entity described in sub-subdivision b. of this subdivision. Tenants in common may elect to treat their individual shares as owned by them individually in accordance with G.S. 105-302(c)(9). The ownership requirements of G.S. 105-277.3(b) apply to each tenant in common who is a natural person, and the ownership requirements of G.S. 105-277.3(b1) apply to each tenant in common who is a business entity.

(4a) Member. — A shareholder of a corporation, a partner of a general or limited partnership, or a member of a limited liability company.

(5) Present-use value. — The value of land in its current use as agricultural land, horticultural land, or forestland, based solely on its ability to produce income and assuming an average level of management. A rate of nine percent (9%) shall be used to capitalize the expected net income of forestland. The capitalization rate for agricultural land and horticultural land is to be determined by the Use-Value Advisory Board as provided in G.S. 105-277.7.

(5a) Relative. — Any of the following:
a. A spouse or the spouse's lineal ancestor or descendant.
b. A lineal ancestor or a lineal descendant.
c. A brother or sister, or the lineal descendant of a brother or sister. For the purposes of this sub-subdivision, the term brother or sister includes stepbrother or stepsister.
d. An aunt or an uncle.
e. A spouse of a person listed in paragraphs a. through d.

For the purpose of this subdivision, an adoptive or adopted relative is a relative and the term "spouse" includes a surviving spouse.

(6) Sound management program. — A program of production designed to obtain the greatest net return from the land consistent with its conservation and long-term improvement.

(7) Unit. — One or more tracts of agricultural land, horticultural land, or forestland. Multiple tracts must be under the same ownership. If the multiple tracts are located within different counties, they must be within 50 miles of a tract qualifying under G.S. 105-277.3(a) and share one of the following characteristics:
a. Type of classification.

G.S. 105-277.2 is set out twice. See notes.

b. Use of the same equipment or labor force. (1973, c. 709, s. 1; 1975, c. 746, s. 1; 1985, c. 628, s. 1; c. 667, ss. 1, 4; 1987, c. 698, s. 1; 1995, c. 454, s. 1; 1995 (Reg. Sess., 1996), c. 646, s. 17; 1998-98, s. 24; 2002-184, s. 1.)

For this section as in effect for taxes imposed for taxable years beginning prior to July 1, 2003, see the main volume.

Effect of Amendments. — Session Laws 2002-184, s. 1, effective for taxes imposed for taxable years beginning on or after July 1, 2003, added the last two sentences in subdivisions (1) and (3); added paragraph (4)e; rewrote subdivision (5); added subdivision (7); and substituted "must" for "shall" in subdivisions (1), (2), and (3).

§ 105-277.3. (Effective for taxes imposed for taxable years beginning prior to July 1, 2003) Agricultural, horticultural, and forestland — Classifications.

CASE NOTES

Commonality Among Land Tracts Is Required To Be Part of a Farm Unit. — In complying with the statutory requirements of G.S. 105-277.2, 105-277.3(a)(1) of the North Carolina Machinery Act, G.S. 105-277.2 et seq., for qualifying as agricultural land for taxing purposes, land tracts should at least have a rational relationship with each other in order to comprise a tract within a farm unit; there must be a reasonable amount of commonality so as to qualify a land tract as being a part of the whole. In re Frizzelle, — N.C. App. —, 566 S.E.2d 506, 2002 N.C. App. LEXIS 770 (2002).

Agricultural Classification Was Properly Denied. — Although appellant taxpayer asserted that the taxpayer's 7.66-acre land tract should have been given the present-use value classification, agricultural, under G.S. 105-277.3(a)(1) of the North Carolina Machinery Act, G.S. 105-277.2 et seq., because it was allegedly part of a farm unit involving over 100 acres in another county, the Property Tax Commission reasonably concluded that the land tract was not part of a farm unit for purposes of G.S. 105-277.2 and refused to apply the agricultural classification where the tract was over 100 miles from the taxpayer's farm land in the other county and only a fraction of the 7.66-acre tract was used for growing crops. In re Frizzelle, — N.C. App. —, 566 S.E.2d 506, 2002 N.C. App. LEXIS 770 (2002).

Income requirement. — Requirement that property produce at least $1,000 in income in a tax year in order to qualify for a farm-use classification applied to the entire property, and not to each 10-acre division of the property. In re Briarfield Farms, 147 N.C. App. 208, 555 S.E.2d 621, 2001 N.C. App. LEXIS 1132 (2001), cert. denied, 355 N.C. 211, 559 S.E.2d 798 (2002).

§ 105-277.3. (Effective for taxes imposed for taxable years beginning on or after July 1, 2003) Agricultural, horticultural, and forestland — Classifications.

(a) Classes Defined. — The following classes of property are designated special classes of property under authority of Section 2(2) of Article V of the North Carolina Constitution and must be appraised, assessed, and taxed as provided in G.S. 105-277.2 through G.S. 105-277.7.

(1) Agricultural land. — Individually owned agricultural land consisting of one or more tracts, one of which consists of at least 10 acres that are in actual production and that, for the three years preceding January 1 of the year for which the benefit of this section is claimed, have produced an average gross income of at least one thousand dollars ($1,000). Gross income includes income from the sale of the agricul-

G.S. 105-277.3 is set out twice. See notes.

tural products produced from the land and any payments received under a governmental soil conservation or land retirement program. Land in actual production includes land under improvements used in the commercial production or growing of crops, plants, or animals.

(2) Horticultural land. — Individually owned horticultural land consisting of one or more tracts, one of which consists of at least five acres that are in actual production and that, for the three years preceding January 1 of the year for which the benefit of this section is claimed, have met the applicable minimum gross income requirement. Land in actual production includes land under improvements used in the commercial production or growing of fruits or vegetables or nursery or floral products. Land that has been used to produce evergreens intended for use as Christmas trees must have met the minimum gross income requirements established by the Department of Revenue for the land. All other horticultural land must have produced an average gross income of at least one thousand dollars ($1,000). Gross income includes income from the sale of the horticultural products produced from the land and any payments received under a governmental soil conservation or land retirement program.

(3) Forestland. — Individually owned forestland consisting of one or more tracts, one of which consists of at least 20 acres that are in actual production and are not included in a farm unit.

(b) Natural Person Ownership Requirements. — In order to come within a classification described in subsection (a) of this section, the land must, if owned by a natural person, also satisfy one of the following conditions:

(1) It is the owner's place of residence.

(2) It has been owned by the current owner or a relative of the current owner for the four years preceding January 1 of the year for which the benefit of this section is claimed.

(3) At the time of transfer to the current owner, it qualified for classification in the hands of a business entity or trust that transferred the land to the current owner who was a member of the business entity or a beneficiary of the trust, as appropriate.

(b1) Entity Ownership Requirements. — In order to come within a classification described in subsection (a) of this section, the land must, if owned by a business entity or trust, have been owned by the business entity or trust or by one or more of its members or creators, respectively, for the four years immediately preceding January 1 of the year for which the benefit of this section is claimed.

(b2) Exception to Ownership Requirements. — Notwithstanding the provisions of subsections (b) and (b1) of this section, land may qualify for classification in the hands of the new owner if all of the conditions listed in this subsection are met, even if the new owner does not meet all of the ownership requirements of subsections (b) and (b1) of this section with respect to the land. If the land qualifies for classification in the hands of the new owner under the provisions of this subsection, then the deferred taxes remain a lien on the land under G.S. 105-277.4(c), the new owner becomes liable for the deferred taxes, and the deferred taxes become payable if the land fails to meet any other condition or requirement for classification.

(1) The land was appraised at its present use value or was eligible for appraisal at its present use value at the time title to the land passed to the new owner.

(2) At the time title to the land passed to the new owner, the new owner acquires the land for the purposes of and continues to use the land for

G.S. 105-277.3 is set out twice. See notes.

the purposes it was classified under subsection (a) of this section while under previous ownership.

(3) The new owner has timely filed an application as required by G.S. 105-277.4(a) and has certified that the new owner accepts liability for the deferred taxes and intends to continue the present use of the land.

(c) Repealed by Session Laws 1995, c. 454, s. 2.

(d) Exception for Conservation Reserve Program. — Land enrolled in the federal Conservation Reserve Program authorized by 16 U.S.C. Chapter 58 is considered to be in actual production, and income derived from participation in the federal Conservation Reserve Program may be used in meeting the minimum gross income requirements of this section either separately or in combination with income from actual production. Land enrolled in the federal Conservation Reserve Program must be assessed as agricultural land if it is planted in vegetation other than trees, or as forestland if it is planted in trees.

(d1) Exception for Easements on Qualified Conservation Lands Previously Appraised at Use Value. — Property that is appraised at its present-use value under G.S. 105-277.4(b) shall continue to qualify for appraisal, assessment, and taxation as provided in G.S. 105-277.2 through G.S. 105-277.7 as long as the property is subject to an enforceable conservation easement that would qualify for the conservation tax credit provided in G.S. 105-130.34 and G.S. 105-151.12, without regard to actual production or income requirements of this section. Notwithstanding G.S. 105-277.3(b) and (b1), subsequent transfer of the property does not extinguish its present-use value eligibility as long as the property remains subject to an enforceable conservation easement that qualifies for the conservation tax credit provided in G.S. 105-130.34 and G.S. 105-151.12. The exception provided in this subsection applies only to that part of the property that is subject to the easement.

(e) Exception for Turkey Disease. — Agricultural land that meets all of the following conditions is considered to be in actual production and to meet the minimum gross income requirements:

(1) The land was in actual production in turkey growing within the preceding two years and qualified for present use value treatment while it was in actual production.

(2) The land was taken out of actual production in turkey growing solely for health and safety considerations due to the presence of Poult Enteritis Mortality Syndrome among turkeys in the same county or a neighboring county.

(3) The land is otherwise eligible for present use value treatment.

(f) Sound Management Program for Agricultural Land and Horticultural Land. — If the property owner demonstrates any one of the following factors with respect to agricultural land or horticultural land, then the land is operated under a sound management program:

(1) Enrollment in and compliance with an agency-administered and approved farm management plan.

(2) Compliance with a set of best management practices.

(3) Compliance with a minimum gross income per acre test.

(4) Evidence of net income from the farm operation.

(5) Evidence that farming is the farm operator's principal source of income.

(6) Certification by a recognized agricultural or horticultural agency within the county that the land is operated under a sound management program.

Operation under a sound management program may also be demonstrated by evidence of other similar factors. As long as a farm operator meets the sound

G.S. 105-277.3 is set out twice. See notes.

management requirements, it is irrelevant whether the property owner received income or rent from the farm operator.

(g) Sound Management Program for Forestland. — If the owner of forestland demonstrates that the forestland complies with a written sound forest management plan for the production and sale of forest products, then the forestland is operated under a sound management program. (1973, c. 709, s. 1; 1975, c. 746, s. 2; 1983, c. 821; c. 826; 1985, c. 667, ss. 2, 3, 6.1; 1987, c. 698, ss. 2-5; 1987 (Reg. Sess., 1988), c. 1044, s. 13.1; 1989, cc. 99, 736, s. 1; 1989 (Reg. Sess., 1990), c. 814, s. 29; 1995, c. 454, s. 2; 1997-272, s. 1; 1998-98, s. 22; 2001-499, s. 1; 2002-184, s. 2.)

For this section as in effect for taxes imposed for taxable years beginning prior to July 1, 2003, see the main volume.

Effect of Amendments. — Session Laws 2002-184, s. 2, effective for taxes imposed for taxable years beginning on or after July 1, 2003, substituted "must" for "shall" in the introductory paragraph of subsection (a); rewrote the first paragraph in subsection (b2); added subdivision (b2)(3); and added subsections (d1), (f), and (g).

§ 105-277.4. (Effective for taxes imposed for taxable years beginning prior to July 1, 2003) Agricultural, horticultural and forestland — Application; appraisal at use value; appeal; deferred taxes.

OPINIONS OF ATTORNEY GENERAL

Computation of Deferred Taxes Upon Disqualification for Present-Use Valuation. — Applying this section sequentially, current taxes for the fiscal year payable in the calendar year in which eligibility is lost are computed without benefit of the preferential classification; then, any liens carried forward from previous tax years for which present use status was allowed, not to exceed three years, become immediately collectible. See opinion of Attorney General to Representative Julia C. Howard, 2000 N.C. AG LEXIS 36 (3/22/2000).

§ 105-277.4. (Effective for taxes imposed for taxable years beginning on or after July 1, 2003) Agricultural, horticultural and forestland — Application; appraisal at use value; appeal; deferred taxes.

(a) Application. — Property coming within one of the classes defined in G.S. 105-277.3 is eligible for taxation on the basis of the value of the property in its present use if a timely and proper application is filed with the assessor of the county in which the property is located. The application must clearly show that the property comes within one of the classes and must also contain any other relevant information required by the assessor to properly appraise the property at its present-use value. An initial application must be filed during the regular listing period of the year for which the benefit of this classification is first claimed, or within 30 days of the date shown on a notice of a change in valuation made pursuant to G.S. 105-286 or G.S. 105-287. A new application is not required to be submitted unless the property is transferred or becomes ineligible for use-value appraisal because of a change in use or acreage. An application required due to transfer of the land may be submitted at any time during the calendar year but must be submitted within 60 days of the date of the property's transfer.

G.S. 105-277.4 is set out twice. See notes.

(b) Appraisal at Present-use Value. — Upon receipt of a properly executed application, the assessor must appraise the property at its present-use value as established in the schedule prepared pursuant to G.S. 105-317. In appraising the property at its present-use value, the assessor must appraise the improvements located on qualifying land according to the schedules and standards used in appraising other similar improvements in the county. If all or any part of a qualifying tract of land is located within the limits of an incorporated city or town, or is property annexed subject to G.S. 160A-37(f1) or G.S. 160A-49(f1), the assessor must furnish a copy of the property record showing both the present-use appraisal and the valuation upon which the property would have been taxed in the absence of this classification to the collector of the city or town. The assessor must also notify the tax collector of any changes in the appraisals or in the eligibility of the property for the benefit of this classification. Upon a request for a certification pursuant to G.S. 160A-37(f1) or G.S.160A-49(f1), or any change in the certification, the assessor for the county where the land subject to the annexation is located must, within 30 days, determine if the land meets the requirements of G.S. 160A-37(f1)(2) or G.S. 160A-49(f1)(2) and report the results of its findings to the city.

(b1) Appeal. — Decisions of the assessor regarding the qualification or appraisal of property under this section may be appealed to the county board of equalization and review or, if that board is not in session, to the board of county commissioners. Decisions of the county board may be appealed to the Property Tax Commission.

(c) Deferred Taxes. — Land meeting the conditions for classification under G.S. 105-277.3 must be taxed on the basis of the value of the land for its present use. The difference between the taxes due on the present-use basis and the taxes that would have been payable in the absence of this classification, together with any interest, penalties, or costs that may accrue thereon, are a lien on the real property of the taxpayer as provided in G.S. 105-355(a). The difference in taxes must be carried forward in the records of the taxing unit or units as deferred taxes. The taxes become due and payable when the land fails to meet any condition or requirement for classification. Failure to have an application approved is ground for disqualification. The tax for the fiscal year that opens in the calendar year in which deferred taxes become due is computed as if the land had not been classified for that year, and taxes for the preceding three fiscal years that have been deferred are immediately payable, together with interest as provided in G.S. 105-360 for unpaid taxes. Interest accrues on the deferred taxes due as if they had been payable on the dates on which they originally became due. If only a part of the qualifying tract of land fails to meet a condition or requirement for classification, the assessor must determine the amount of deferred taxes applicable to that part and that amount becomes payable with interest as provided above. Upon the payment of any taxes deferred in accordance with this section for the three years immediately preceding a disqualification, all liens arising under this subsection are extinguished. The deferred taxes for any given year may be paid in that year without the qualifying tract of land becoming ineligible for deferred status.

(d) Exceptions. — Notwithstanding the provisions of subsection (c) of this section, if property loses its eligibility for present use value classification solely due to one of the following reasons, no deferred taxes are due and the lien for the deferred taxes is extinguished:

(1) There is a change in income caused by enrollment of the property in the federal conservation reserve program established under 16 U.S.C. Chapter 58.

G.S. 105-277.4 is set out twice. See notes.

(2) The property is conveyed by gift to a nonprofit organization and qualifies for exclusion from the tax base pursuant to G.S. 105-275(12) or G.S. 105-275(29).

(3) The property is conveyed by gift to the State, a political subdivision of the State, or the United States.

(e) Repealed by Session Laws 1997-270, s. 3, effective July 3, 1997. (1973, c. 709, s. 1; c. 905; c. 906, ss. 1, 2; 1975, c. 62; c. 746, ss. 3-7; 1981, c. 835; 1985, c. 518, s. 1; c. 667, ss. 5, 6; 1987, c. 45, s. 1; c. 295, s. 5; c. 698, s. 6; 1987 (Reg. Sess., 1988), c. 1044, s. 13.2; 1995, c. 443, s. 4; c. 454, s. 3; 1997-270, s. 3; 1998-98, s. 23; 1998-150, s. 1; 2001-499, s. 2; 2002-184, s. 3.)

For this section as in effect for taxes imposed for taxable years beginning prior to July 1, 2003, see the main volume.

Effect of Amendments. — Session Laws 2002-184, s. 1, effective for taxes imposed for taxable years beginning on or after July 1, 2003, in subsection (a), substituted "is" for "shall be" and added the last sentence; added the fifth sentence in subsection (c); substituted "must" for "shall" and made related changes throughout; and substituted gender-neutral terms.

§ 105-277.5. Agricultural, horticultural and forestland — Notice of change in use.

CASE NOTES

Notice of change in use not required. — When the taxpayers transitioned the use of their property from a dairy farm to the cultivation of ground crops, they were not required to notify the county of this change, as both uses qualified their property as agricultural land farm-use property; so the property's status never changed. In re Briarfield Farms, 147 N.C. App. 208, 555 S.E.2d 621, 2001 N.C. App. LEXIS 1132 (2001), cert. denied, 355 N.C. 211, 559 S.E.2d 798 (2002).

§ 105-277.7. (Effective for taxes imposed for taxable years beginning on or after July 1, 2003) Use-Value Advisory Board.

(a) Creation and Membership. — The Use-Value Advisory Board is established under the supervision of the Agricultural Extension Service of North Carolina State University. The Director of the Agricultural Extension Service of North Carolina State University shall serve as the chair of the Board. The Board shall consist of the following additional members, to serve ex officio:

(1) A representative of the Department of Agriculture and Consumer Services, designated by the Commissioner of Agriculture.

(2) A representative of the Forest Resources Division of the Department of Environment and Natural Resources, designated by the Director of that Division.

(3) A representative of the Agricultural Extension Service at North Carolina Agricultural and Technical State University, designated by the Director of the Extension Service.

(4) A representative of the North Carolina Farm Bureau, designated by the President of the Bureau.

(5) A representative of the North Carolina Association of Assessing Officers, designated by the President of the Association.

(6) The Director of the Property Tax Division of the North Carolina Department of Revenue or the Director's designee.

(7) A representative of the North Carolina Association of County Commissioners, designated by the President of the Association.

(8) A representative of the North Carolina Forestry Association, designated by the President of the Association.

(b) Staff. — The Agricultural Extension Service at North Carolina State University must provide clerical assistance to the Board.

(c) Duties. — The Board must annually submit to the Department of Revenue a recommended use-value manual. In developing the manual, the Board may consult with federal and State agencies as needed. The manual must contain all of the following:

(1) The estimated cash rental rates for agricultural lands and horticultural lands for the various classes of soils found in the State. The rental rates must recognize the productivity levels by class of soil or geographic area. The rental rates must be based on the rental value of the land to be used for agricultural or horticultural purposes when those uses are presumed to be the highest and best use of the land. The recommended rental rates may be established from individual county studies or from contracts with federal or State agencies as needed.

(2) The recommended net income ranges for forestland furnished to the Board by the Forestry Section of the North Carolina Cooperative Extension Service. These net income ranges may be based on up to six classes of land within each Major Land Resource Area designated by the United States Soil Conservation Service. In developing these ranges, the Forestry Section must consider the soil productivity and indicator tree species or stand type, the average stand establishment and annual management costs, the average rotation length and timber yield, and the average timber stumpage prices.

(3) The capitalization rates adopted by the Board prior to February 1 for use in capitalizing incomes into values. The capitalization rate for forestland shall be nine percent (9%). The capitalization rate for agricultural land and horticultural land must be no less than six percent (6%) and no more than seven percent (7%). The incomes must be in the form of cash rents for agricultural lands and horticultural lands and net incomes for forestlands.

(4) The value per acre adopted by the Board for the best agricultural land. The value may not exceed one thousand two hundred dollars ($1,200).

(5) Recommendations concerning any changes to the capitalization rate for agricultural land and horticultural land and to the maximum value per acre for the best agricultural land based on a calculation to be determined by the Board. The Board shall annually report these recommendations to the Revenue Laws Study Committee and to the President Pro Tempore of the Senate and the Speaker of the House of Representatives.

(6) Recommendations concerning requirements for horticultural land used to produce evergreens intended for use as Christmas trees when requested to do so by the Department. (1973, c. 709, s. 1; 1975, c. 746, s. 11; 1985, c. 628, s. 2; 1989, c. 727, s. 218(44); c. 736, s. 2; 1997-261, s. 109; 1997-443, s. 11A.119(a); 2002-184, s. 4.)

For this section as in effect for taxes imposed for taxable years beginning prior to July 1, 2003, see the main volume.

Effect of Amendments. — Session Laws 2002-184, s. 4, effective for taxes imposed for taxable years beginning on or after July 1, 2003, rewrote the section, adding subsection designations, adding members to the Board, and expanding the duties with regard to developing the recommended use-value manual.

§ 105-278.1. Exemption of real and personal property owned by units of government.

OPINIONS OF ATTORNEY GENERAL

Real estate leased by a town was not exempt as property belonging to a municipality. See opinion of Attorney General to Huey Marshall, County Attorney, 2000 N.C. AG LEXIS 1 (3/28/2000).

§ 105-278.3. Real and personal property used for religious purposes.

CASE NOTES

Cited in In re Master's Mission, — N.C. App. —, 568 S.E.2d 208, 2002 N.C. App. LEXIS 964 (2002).

§ 105-278.4. Real and personal property used for educational purposes.

CASE NOTES

Exemption Upheld. —

North Carolina Tax Commission's decision that spiritual center where meditation was taught and practiced was not entitled to a tax exemption on property it owned, pursuant to G.S. 105-278.4, was not supported by substantial evidence in view of the entire record. In re Maharishi Spiritual Ctr. of Am., — N.C. App. —, 569 S.E.2d 3, 2002 N.C. App. LEXIS 918 (2002).

Exemption Denied. —

Taxpayer that sent missionaries to different parts of the world did not prove entitlement to additional tax exemption where buildings were used to house owner, for guest lodging, and for storage, as the buildings were not used wholly and exclusively for educational purposes; the taxpayer bore the burden of proving that its property was entitled to an exemption under the law, which it failed to do. In re Master's Mission, — N.C. App. —, 568 S.E.2d 208, 2002 N.C. App. LEXIS 964 (2002).

§ 105-278.6. Real and personal property used for charitable purposes.

CASE NOTES

Cited in In re Master's Mission, — N.C. App. —, 568 S.E.2d 208, 2002 N.C. App. LEXIS 964 (2002).

§ 105-278.7. Real and personal property used for educational, scientific, literary, or charitable purposes.

OPINIONS OF ATTORNEY GENERAL

Property was not entitled to charitable exemption. — Property owned by the Charlotte/Mecklenburg Development Corporation was not entitled to a charitable exemption pursuant to the statute where the corporation's goal was to demolish the buildings on the property, to undertake environmental clean up and site development for commercial purposes

and to then sell parcels of the property to at least 10 businesses. See opinion of Attorney General to Mr. Hamlin L. Wade, Mecklenburg County Tax Attorney, 2002 N.C. AG LEXIS 1 (2/5/02).

Article 13.

Standards for Appraisal and Assessment.

§ 105-283. Uniform appraisal standards.

CASE NOTES

Appraisal Rebutted. —
Where the county's valuation of the taxpayer's property was significantly greater than the valuation offered by the taxpayer's expert witness, the tax commission did not err by failing to afford a presumption of correctness to the county's valuation using the comparable sales method of assessment, as the county did not offer additional evidence to meet its burden to show that its valuation was the true value. In re Lane Company-Hickory Chair Div., — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 1083 (Sept. 17, 2002).

Article 14.

Time for Listing and Appraising Property for Taxation.

§ 105-285. Date as of which property is to be listed and appraised.

CASE NOTES

Cited in Helton v. Good, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 12436 (W.D.N.C. July 5, 2002).

§ 105-287. Changing appraised value of real property in years in which general reappraisal or horizontal adjustment is not made.

CASE NOTES

Permissible Method of Valuation. — Where provisions of this section were triggered, it necessarily followed that the only statutorily permissible method of valuation was through the application of the county's schedules, standards and rules. In re Corbett, 355 N.C. 181, 558 S.E.2d 82, 2002 N.C. LEXIS 20 (2002).

There was a statutory mandate for an assessor to reappraise the property where circumstances caused an increase or decrease in valuation that was not specifically excluded from reappraisal as a result of being listed in this section. In re Corbett, 355 N.C. 181, 558 S.E.2d 82, 2002 N.C. LEXIS 20 (2002).

Nothing in this section's language made a distinction between an occurrence within the control of the owner and an occurrence outside the control of the owner; therefore, factors which allowed for an increase or decrease in the appraised value of real property in non-general reappraisal or horizontal adjustment years were not limited to occurrences affecting the specific property which fell outside the control of the owner. In re Corbett, 355 N.C. 181, 558 S.E.2d 82, 2002 N.C. LEXIS 20 (2002).

Article 15.

Duties of Department and Property Tax Commission as to Assessments.

§ 105-289. Duties of Department of Revenue.

(a) **(Effective for taxes imposed for taxable years beginning prior to July 1, 2003)** It shall be the duty of the Department of Revenue:

(1) To discharge the duties prescribed by law and to enforce the provisions of this Subchapter.

(2) To exercise general and specific supervision over the valuation and taxation of property by taxing units throughout the State.

(3) To appraise the property of public service companies.

(4) To keep full and accurate records of the Commission's official proceedings.

(5) To prepare and distribute annually to each assessor a manual that establishes five expected net income per acre ranges for agricultural land, horticultural land, and forestland, and establishes a method for appraising nonproductive land as a percentage of the lowest use-value established for productive land. The high and low net income amount in each range may differ by no more than fifteen dollars ($15.00). The basis for establishing each range shall be soil productivity.

For agricultural land, the expected net income per acre ranges shall be based on the actual yields and prices of corn and soybeans over a period of at least the five previous years, and the actual fixed and variable costs, including an imputed management cost, incurred in growing corn and soybeans over the same period of time. The manual shall contain recommended adjustments to the net income per acre ranges for the growing of crops subject to acreage or poundage allotments.

Expected net income per acre ranges shall be similarly established for horticultural land and forestland, using typical horticultural or forest products in various growing regions of the State instead of corn and soybeans.

(6) To establish requirements for horticultural land, used to produce evergreens intended for use as Christmas trees, in lieu of a gross income requirement until evergreens are harvested from the land, and to establish a gross income requirement for this type horticultural land, that differs from the income requirement for other horticultural land, when evergreens are harvested from the land.

(a) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2003)** It is the duty of the Department of Revenue:

(1) To discharge the duties prescribed by law and to enforce the provisions of this Subchapter.

(2) To exercise general and specific supervision over the valuation and taxation of property by taxing units throughout the State.

(3) To appraise the property of public service companies.

(4) To keep full and accurate records of the Commission's official proceedings.

(5) To prepare and distribute annually to each assessor the manual developed by the Use-Value Advisory Board under G.S. 105-277.7 that establishes the cash rental rates for agricultural lands and horticultural lands and the net income ranges for forestland.

(6) To establish requirements for horticultural land, used to produce evergreens intended for use as Christmas trees, in lieu of a gross

income requirement until evergreens are harvested from the land, and to establish a gross income requirement for this type horticultural land, that differs from the income requirement for other horticultural land, when evergreens are harvested from the land.

(7) To conduct studies of the cash rents for agricultural lands on a county or a regional basis, such as the Major Land Resource Area map designated and developed by the U.S. Department of Agriculture. The results of the studies must be furnished to the North Carolina Use-Value Advisory Board. The studies may be conducted on any reasonable basis and timetable that will be reflective of rents and values for each local area based on the productivity of the land.

(b), (c) Repealed by Session Laws 1973, c. 476, s. 193.

(d) In exercising general and specific supervision over the valuation and taxation of property, the Department shall provide the following:

(1) A continuing program of education and training for local tax officials in the conduct of their duties;

(2) A program for testing the qualifications of an assessor and other persons engaged in the appraisal of property for a county or municipality;

(3) A certification program for an assessor and other persons engaged in the appraisal of property for a county or municipality; and

(4) Assistance to the county and/or the county attorney in developing the specifications for the proposed contract sent to the Department for review pursuant to G.S. 105-299.

The Department shall promulgate regulations to carry out its duties under this subsection.

(e) The Department of Revenue may furnish the following information to a local tax official:

(1) Information contained in a report to it or to any other State department; and

(2) Information the Department has in its possession that may assist a local tax official in securing complete tax listings, appraising or assessing taxable property, collecting taxes, or presenting information in administrative or judicial proceedings involving the listing, appraisal, or assessment of property.

A local tax official may use information obtained from the Department under this subsection only for the purposes stated in subdivision (2). A local tax official may not divulge or make public this information except as required in administrative or judicial proceedings under this Subchapter. A local tax official who makes improper use of or discloses information obtained from the Department under this subsection is punishable as provided in G.S. 153A-148.1 or G.S. 160A-208.1, as appropriate.

The Department may not furnish information to a local tax official pursuant to this subsection unless it has obtained a written certification from the official stating that the official is familiar with the provisions of this subsection and G.S. 153A-148.1 or G.S. 160A-208.1, as appropriate, and that information obtained from the Department under this subsection will be used only for the purposes stated in subdivision (2).

(f) To advise local tax officials of their duties concerning the listing, appraisal, and assessment of property and the levy and collection of property taxes.

(g) To see that proper proceedings are brought to enforce the statutes pertaining to taxation and the collection of penalties and liabilities imposed by law upon public officers, officers of corporations, and individuals who fail, refuse, or neglect to comply with the provisions of this Subchapter and other laws with respect to the taxation of property, and to call upon the Attorney

General of this State or any prosecuting attorney of this State to assist in the execution of the powers conferred by the laws of this State with respect to the taxation of property.

(h) To make annual studies of the ratio of the appraised value of real property to its true value and to establish for each county the median ratio as determined by the studies for each calendar year. The studies for each calendar year shall be completed by April 15 of the following calendar year. The studies shall be conducted in accordance with generally accepted principles and procedures for sales assessment ratio studies.

(i) To maintain a register of appraisal firms, mapping firms and other persons or firms having expertise in one or more of the duties of the assessor; to review the qualifications and work of such persons or firms; and to advise county officials as to the professional and financial capabilities of such persons or firms to assist the assessor in carrying out his duties under this Subchapter. The register shall include a copy of the report filed by the counties pursuant to G.S. 105-322(g)(4). It shall also include the average median sales assessment ratio and the coefficient of dispersion achieved in each county for the first two years following the county's effective date of revaluation. To be registered with the Department of Revenue, such persons or firms shall annually file a report with the Department setting forth the following information:

(1) A statement of the firm's ownership,
(2) A statement of the firm's financial condition,
(3) A list of the firm's principal officers with a statement of their qualifications and experience,
(4) A list of the firm's employees with a statement of their education, training and experience, and
(5) A full and complete resume of each employee which the firm proposes to place in a supervisory position in any mapping or revaluation project for a county in this State. (1939, c. 310, s. 202; 1955, c. 1350, s. 10; 1967, c. 1196, s. 3; 1969, c. 7, s. 1; 1971, c. 806, s. 1; 1973, c. 47, s. 2; c. 476, s. 193; 1975, c. 275, s. 9; c. 508, s. 1; 1981, c. 387, ss. 1, 2; 1983, c. 813, s. 1; 1985, c. 601, s. 3; c. 628, s. 3; 1987, c. 45, s. 1; c. 46, s. 1; c. 440, s. 1; c. 830, s. 84(a); 1987 (Reg. Sess., 1988), c. 1052, s. 1; 1989, c. 79, ss. 2, 4; c. 736, s. 3; 1991, c. 110, s. 2; 1993, c. 485, s. 35; 2002-184, s. 5.)

Subsection (a) Set Out Twice. — The first version of subection (a) set out above is effective for taxes imposed for taxable years beginning prior to July 1, 2003. The second version of subsection (a) set out above is effective for taxes imposed for taxable years beginning on or after July 1, 2003.

Effect of Amendments. — Session Laws 2002-184, s. 5, effective for taxes imposed for taxable years beginning on or after July 1, 2003, rewrote subdivision (a)(5), added subdivision (a)(7), and substituted "is" for "shall be" in the introductory language of subsection (a).

Article 16.

County Listing, Appraisal, and Assessing Officials.

§ 105-296. Powers and duties of assessor.

(a) The county assessor shall have general charge of the listing, appraisal, and assessment of all property in the county in accordance with the provisions of law. He shall perform the duties imposed upon him by law, and he shall have and exercise all powers reasonably necessary in the performance of his duties not inconsistent with the Constitution or the laws of this State.

(b) Within budgeted appropriations, he shall employ listers, appraisers, and clerical assistants necessary to carry out the listing, appraisal, assessing, and

billing functions required by law. The assessor may allocate responsibility among such employees by territory, by subject matter, or on any other reasonable basis. Each person employed by the assessor as a real property appraiser or personal property appraiser shall during the first year of employment and at least every other year thereafter attend a course of instruction in his area of work. At the end of the first year of their employment, such persons shall also achieve a passing score on a comprehensive examination in property tax administration conducted by the Department of Revenue.

(c) At least 10 days before the date as of which property is to be listed, he shall advertise in a newspaper having general circulation in the county and post in at least five public places in each township in the county a notice containing at least the following:

(1) The date as of which property is to be listed.
(2) The date on which listing will begin.
(3) The date on which listing will end.
(4) The times between the date mentioned in subdivision (c)(2), above, and the date mentioned in subdivision (c)(3), above, during which lists will be accepted.
(5) The place or places at which lists will be accepted at the times established under subdivision (c)(4), above.
(6) A statement that all persons who, on the date as of which property is to be listed, own property subject to taxation must list such property within the period set forth in the notice and that any person who fails to do so will be subject to the penalties prescribed by law.

If the listing period is extended in any county by the board of county commissioners, the assessor shall advertise in the newspaper in which the original notice was published and post in the same places a notice of the extension and of the times during which and the place or places at which lists will be accepted during the extended period.

(d) through (f) Repealed by Session Laws 1987, c. 43, s. 2.

(g) He shall have power to subpoena any person for examination under oath and to subpoena documents whenever he has reasonable grounds for the belief that such person has knowledge or that such documents contain information that is pertinent to the discovery or valuation of any property subject to taxation in the county or that is necessary for compliance with the requirements as to what the tax list shall contain. The subpoena shall be signed by the chairman of the board of equalization and review if that board is in session; otherwise, it shall be signed by the chairman of the board of county commissioners. It shall be served by an officer qualified to serve subpoenas. Any person who shall wilfully fail or refuse to appear, produce subpoenaed documents, or testify concerning the subject of the inquiry shall be guilty of a Class 1 misdemeanor.

(h) Only after the abstract has been carefully reviewed can the assessor require any person operating a business enterprise in the county to submit a detailed inventory, statement of assets and liabilities, or other similar information pertinent to the discovery or appraisal of property taxable in the county. Inventories, statements of assets and liabilities, or other information secured by the assessor under the terms of this subsection, but not expressly required by this Subchapter to be shown on the abstract itself, shall not be open to public inspection but shall be made available, upon request, to representatives of the Department of Revenue or of the Employment Security Commission. Any assessor or other official or employee disclosing information so obtained, except as may be necessary in listing or appraising property in the performance of official duties, or in the administrative or judicial proceedings relating to listing, appraising, or other official duties, shall be guilty of a Class 3 misdemeanor and punishable only by a fine not exceeding fifty dollars ($50.00).

(i) Prior to the first meeting of the board of equalization and review, the assessor may, for good cause, change the appraisal of any property subject to assessment for the current year. Written notice of a change in assessment shall be given to the taxpayer at his last known address prior to the first meeting of the board of equalization and review.

(j) **(Effective for taxes imposed for taxable years beginning prior to July 1, 2003)** The assessor shall annually review one eighth of the parcels in the county classified for taxation at present-use value to verify that these parcels qualify for the classification. By this method, the assessor shall review the eligibility of all parcels classified for taxation at present-use value in an eight-year period. The assessor may require the owner of classified property to submit any information needed by the assessor to verify that the property continues to qualify for present-use value taxation. The owner has 60 days from the date a written request for the information is made to submit the information to the assessor. If the assessor determines the owner failed to make the information requested available in the time required without good cause, the property loses its present-use value classification and the property's deferred taxes become due and payable as provided in G.S. 105-277.4(c). The assessor must reinstate the property's present-use value classification when the owner submits the requested information unless the information discloses that the property no longer qualifies for present-use value classification. When a property's present-use value classification is reinstated, it is reinstated retroactive to the date the classification was revoked and any deferred taxes that were paid as a result of the revocation must be refunded to the property owner.

(j) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2003)** The assessor must annually review at least one eighth of the parcels in the county classified for taxation at present-use value to verify that these parcels qualify for the classification. By this method, the assessor must review the eligibility of all parcels classified for taxation at present-use value in an eight-year period. The period of the review process is based on the average of the preceding three years' data. The assessor may request assistance from the Farm Service Agency, the Cooperative Extension Service, the Forest Resources Division of the Department of Environment and Natural Resources, or other similar organizations.

The assessor may require the owner of classified property to submit any information, including sound management plans for forestland, needed by the assessor to verify that the property continues to qualify for present-use value taxation. The owner has 60 days from the date a written request for the information is made to submit the information to the assessor. If the assessor determines the owner failed to make the information requested available in the time required without good cause, the property loses its present-use value classification and the property's deferred taxes become due and payable as provided in G.S. 105-277.4(c). The assessor must reinstate the property's present-use value classification when the owner submits the requested information unless the information discloses that the property no longer qualifies for present-use value classification. When a property's present-use value classification is reinstated, it is reinstated retroactive to the date the classification was revoked and any deferred taxes that were paid as a result of the revocation must be refunded to the property owner.

In determining whether property is operating under a sound management program, the assessor must consider any weather conditions or other acts of nature that prevent the growing or harvesting of crops or the realization of income from cattle, swine, or poultry operations. The assessor must also allow the property owner to submit additional information before making this determination.

(k) He shall furnish information to the Department of Revenue as required by the Department to conduct studies in accordance with G.S. 105-289(h).

(*l*) The assessor shall annually review at least one-eighth of the parcels in the county exempted or excluded from taxation to verify that these parcels qualify for the exemption or exclusion. By this method, the assessor shall review the eligibility of all parcels exempted or excluded from taxation in an eight-year period. The assessor may require the owner of exempt or excluded property to make available for inspection any information reasonably needed by the assessor to verify that the property continues to qualify for the exemption or exclusion. The owner has 60 days from the date a written request for the information is made to submit the information to the assessor. If the assessor determines that the owner failed to make the information requested available in the time required without good cause, then the property loses its exemption or exclusion. The assessor must reinstate the property's exemption or exclusion when the owner makes the requested information available unless the information discloses that the property is no longer eligible for the exemption or exclusion.

(m) The assessor shall annually review the transportation corridor official maps and amendments to them filed with the register of deeds pursuant to Article 2E of Chapter 136 of the General Statutes. The assessor must indicate on all tax maps maintained by the county or city that portion of the properties embraced within a transportation corridor and must note any variance granted for the property for such period as the designation remains in effect. The assessor must tax the property within a transportation corridor as required under G.S. 105-277.9. (1939, c. 310, ss. 403, 404; 1953, c. 970, s. 3; 1955, c. 1012, s. 1; 1957, c. 202; 1959, c. 740, s. 3; 1963, c. 302; 1971, c. 806, s. 1; 1973, c. 560; 1983, c. 813, s. 3; 1985, c. 518, s. 2; 1987, c. 43, s. 2; c. 45, ss. 1, 2; c. 830, s. 84(b); 1987 (Reg. Sess., 1988), c. 1044, s. 13; 1991, c. 34, s. 2; c. 77, s. 1; 1993, c. 539, ss. 715, 716; 1994, Ex. Sess., c. 24, s. 14(c); 2001-139, ss. 3-5; 2002-184, s. 6.)

Subsection (j) Set Out Twice. — The first version of subection (j) set out above is effective for taxes imposed for taxable years beginning prior to July 1, 2003. The second version of subsection (j) set out above is effective for taxes imposed for taxable years beginning on or after July 1, 2003.

Effect of Amendments. —

Session Laws 2002-184, s. 6, effective for taxes imposed for taxable years beginning on or after July 1, 2003, divided subsection (j) into paragraphs, and in the first paragraph, inserted "at least" in the first sentence, added the last two sentences, and substituted "must" for "shall" twice; inserted "including sound management plans for forestland" in the second paragraph; and added the last paragraph.

§ 105-299. (Effective for taxes imposed for taxable years beginning on or after July 1, 2003) Employment of experts.

The board of county commissioners may employ appraisal firms, mapping firms or other persons or firms having expertise in one or more of the duties of the assessor to assist the assessor in the performance of these duties. The county may also assign to county agencies, or contract with State or federal agencies, for any duties involved with the approval or auditing of use-value accounts. The county may make available to these persons any information it has that will facilitate the performance of a contract entered into pursuant to this section. Persons receiving this information are subject to the provisions of G.S. 105-289(e) and G.S. 105-259 regarding the use and disclosure of information provided to them by the county. Any person employed by an appraisal firm whose duties include the appraisal of property for the county must be required

to demonstrate that he or she is qualified to carry out these duties by achieving a passing grade on a comprehensive examination in the appraisal of property administered by the Department of Revenue. In the employment of these firms, primary consideration must be given to the firms registered with the Department of Revenue pursuant to G.S. 105-289(i). A copy of the specifications to be submitted to potential bidders and a copy of the proposed contract may be sent by the board to the Department of Revenue for review before the invitation or acceptance of any bids. Contracts for the employment of these firms or persons are contracts for personal services and are not subject to the provisions of Article 8, Chapter 143, of the General Statutes. (1939, c. 310, s. 408; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1975, c. 508, s. 2; 1983, c. 813, s. 4; 1985, c. 601, s. 2; 1989, c. 79; 2002-184, s. 7.)

For this section as in effect for taxes imposed for taxable years beginning prior to July 1, 2003, see the main volume.

Effect of Amendments. — Session Laws 2002-184, s. 7, effective for taxes imposed for taxable years beginning on or after July 1, 2003, added the second sentence, substituted "must" for "shall" and "are" for "shall be" throughout, and made stylistic changes.

Article 17.

Administration of Listing.

§ 105-304. Place for listing tangible personal property.

OPINIONS OF ATTORNEY GENERAL

Ferries owned by a corporation were properly taxed in the village listed as the corporation's principal place of business, notwithstanding that they were docked each night in a different village from which their first runs in the morning originated, and that other village could not also tax the ferries. See opinion of Attorney General to Michael R. Isenburg, Fairley, Jess, Isenberg & Green, 2001 N.C. AG LEXIS 27 (11/9/01).

§ 105-312. Discovered property; appraisal; penalty.

OPINIONS OF ATTORNEY GENERAL

County May Not Impose Late Payment Penalty or Administrative Fee Upon Delinquent Property Tax Accounts. — Because the statutes authorizing property taxes provide for interest and/or penalties, a county may not, by ordinance, impose a late payment penalty or administrative fee upon delinquent property tax accounts. See opinion of Attorney General to Lloyd C. Smith, Jr., Pritchett & Burch, PLLC, 2001 N.C. AG LEXIS 6 (3/6/2001).

Article 19.

Administration of Real and Personal Property Appraisal.

§ 105-317.1. Appraisal of personal property; elements to be considered.

(a) Whenever any personal property is appraised it shall be the duty of the persons making appraisals to consider the following as to each item (or lot of similar items):

(1) The replacement cost of the property;

(2) The sale price of similar property;
(3) The age of the property;
(4) The physical condition of the property;
(5) The productivity of the property;
(6) The remaining life of the property;
(7) The effect of obsolescence on the property;
(8) The economic utility of the property, that is, its usability and adaptability for industrial, commercial, or other purposes; and
(9) Any other factor that may affect the value of the property.

(b) In determining the true value of taxable tangible personal property held and used in connection with the mercantile, manufacturing, producing, processing, or other business enterprise of any taxpayer, the persons making the appraisal shall consider any information as reflected by the taxpayer's records and as reported by the taxpayer to the North Carolina Department of Revenue and to the Internal Revenue Service for income tax purposes, taking into account the accuracy of the taxpayer's records, the taxpayer's method of accounting, and the level of trade at which the taxpayer does business.

(c) **(Effective for taxes imposed for taxable years beginning on or after July 1, 2003)** A taxpayer who owns personal property taxable in the county may appeal the value, situs, or taxability of the property within 30 days after the date of the initial notice of value. If the assessor does not give separate written notice of the value to the taxpayer at the taxpayer's last known address, then the tax bill serves as notice of the value of the personal property. The notice must contain a statement that the taxpayer may appeal the value, situs, or taxability of the property within 30 days after the date of the notice. Upon receipt of a timely appeal, the assessor must arrange a conference with the taxpayer to afford the taxpayer the opportunity to present any evidence or argument regarding the value, situs, or taxability of the property. Within 30 days after the conference, the assessor must give written notice to the taxpayer of the assessor's final decision. Written notice of the decision is not required if the taxpayer signs an agreement accepting the value, situs, or taxability of the property. If an agreement is not reached, the taxpayer has 30 days from the date of the notice of the assessor's final decision to request review of that decision by the board of equalization and review or, if that board is not in session, by the board of county commissioners. Unless the request for review is given at the conference, it must be made in writing to the assessor. Upon receipt of a timely request for review, the provisions of G.S. 105-322 or G.S. 105-325, as appropriate, must be followed. (1971, c. 806, s. 1; 1987, c. 813, s. 15; 2002-156, s. 2.)

Effect of Amendments. — Session Laws 2002-156, s. 2, effective for taxes imposed for taxable years beginning on or after July 1, 2003, added subsection (c).

Article 21.

Review and Appeals of Listings and Valuations.

§ 105-322. County board of equalization and review.

(a) Personnel. — Except as otherwise provided herein, the board of equalization and review of each county shall be composed of the members of the board of county commissioners.

Upon the adoption of a resolution so providing, the board of commissioners is authorized to appoint a special board of equalization and review to carry out the duties imposed under this section. The resolution shall provide for the membership, qualifications, terms of office and the filling of vacancies on the

board. The board of commissioners shall also designate the chairman of the special board. The resolution may also authorize a taxpayer to appeal a decision of the special board with respect to the listing or appraisal of his property or the property of others to the board of county commissioners. The resolution shall be adopted not later than the first Monday in March of the year for which it is to be effective and shall continue in effect until revised or rescinded. It shall be entered in the minutes of the meeting of the board of commissioners and a copy thereof shall be forwarded to the Department of Revenue within 15 days after its adoption.

Nothing in this subsection (a) shall be construed as repealing any law creating a special board of equalization and review or creating any board charged with the duties of a board of equalization and review in any county.

(b) Compensation. — The board of county commissioners shall fix the compensation and allowances to be paid members of the board of equalization and review for their services and expenses.

(c) Oath. — Each member of the board of equalization and review shall take the oath required by Article VI, § 7 of the North Carolina Constitution with the following phrase added to it: "that I will not allow my actions as a member of the board of equalization and review to be influenced by personal or political friendships or obligations,". The oath must be filed with the clerk of the board of county commissioners.

(d) Clerk and Minutes. — The assessor shall serve as clerk to the board of equalization and review, shall be present at all meetings, shall maintain accurate minutes of the actions of the board, and shall give to the board such information as he may have or can obtain with respect to the listing and valuation of taxable property in the county.

(e) Time of Meeting. — Each year the board of equalization and review shall hold its first meeting not earlier than the first Monday in April and not later than the first Monday in May. In years in which a county does not conduct a real property revaluation, the board shall complete its duties on or before the third Monday following its first meeting unless, in its opinion, a longer period of time is necessary or expedient to a proper execution of its responsibilities. Except as provided in subdivision (g)(5) of this section, the board may not sit later than July 1 except to hear and determine requests made under the provisions of subdivision (g)(2), below, when such requests are made within the time prescribed by law. In the year in which a county conducts a real property revaluation, the board shall complete its duties on or before December 1, except that it may sit after that date to hear and determine requests made under the provisions of subdivision (g)(2), below, when such requests are made within the time prescribed by law. From the time of its first meeting until its adjournment, the board shall meet at such times as it deems reasonably necessary to perform its statutory duties and to receive requests and hear the appeals of taxpayers under the provisions of subdivision (g)(2), below.

(f) Notice of Meetings and Adjournment. — A notice of the date, hours, place, and purpose of the first meeting of the board of equalization and review shall be published at least three times in some newspaper having general circulation in the county, the first publication to be at least 10 days prior to the first meeting. The notice shall also state the dates and hours on which the board will meet following its first meeting and the date on which it expects to adjourn; it shall also carry a statement that in the event of earlier or later adjournment, notice to that effect will be published in the same newspaper. Should a notice be required on account of earlier adjournment, it shall be published at least once in the newspaper in which the first notice was published, such publication to be at least five days prior to the date fixed for adjournment. Should a notice be required on account of later adjournment, it shall be published at least once in the newspaper in which the first notice was

published, such publication to be prior to the date first announced for adjournment.

(g) Powers and Duties. — The board of equalization and review has the following powers and duties:

(1) Duty to Review Tax Lists. — The board shall examine and review the tax lists of the county for the current year to the end that all taxable property shall be listed on the abstracts and tax records of the county and appraised according to the standard required by G.S. 105-283, and the board shall correct the abstracts and tax records to conform to the provisions of this Subchapter. In carrying out its responsibilities under this subdivision (g)(1), the board, on its own motion or on sufficient cause shown by any person, shall:

a. List, appraise, and assess any taxable real or personal property that has been omitted from the tax lists.

b. Correct all errors in the names of persons and in the description of properties subject to taxation.

c. Increase or reduce the appraised value of any property that, in the board's opinion, has been listed and appraised at a figure that is below or above the appraisal required by G.S. 105-283; however, the board shall not change the appraised value of any real property from that at which it was appraised for the preceding year except in accordance with the terms of G.S. 105-286 and 105-287.

d. Cause to be done whatever else is necessary to make the lists and tax records comply with the provisions of this Subchapter.

e. Embody actions taken under the provisions of subdivisions (g)(1)a through (g)(1)d, above, in appropriate orders and have the orders entered in the minutes of the board.

f. Give written notice to the taxpayer at the taxpayer's last known address in the event the board, by appropriate order, increases the appraisal of any property or lists for taxation any property omitted from the tax lists under the provisions of this subdivision (g)(1).

(2) Duty to Hear Taxpayer Appeals. — On request, the board of equalization and review shall hear any taxpayer who owns or controls property taxable in the county with respect to the listing or appraisal of the taxpayer's property or the property of others.

a. A request for a hearing under this subdivision (g)(2) shall be made in writing to or by personal appearance before the board prior to its adjournment. However, if the taxpayer requests review of a decision made by the board under the provisions of subdivision (g)(1), above, notice of which was mailed fewer than 15 days prior to the board's adjournment, the request for a hearing thereon may be made within 15 days after the notice of the board's decision was mailed.

b. Taxpayers may file separate or joint requests for hearings under the provisions of this subdivision (g)(2) at their election.

c. At a hearing under provisions of this subdivision (g)(2), the board, in addition to the powers it may exercise under the provisions of subdivision (g)(3), below, shall hear any evidence offered by the appellant, the assessor, and other county officials that is pertinent to the decision of the appeal. Upon the request of an appellant, the board shall subpoena witnesses or documents if there is a reasonable basis for believing that the witnesses have or the documents contain information pertinent to the decision of the appeal.

d. On the basis of its decision after any hearing conducted under this subdivision (g)(2), the board shall adopt and have entered in its minutes an order reducing, increasing, or confirming the appraisal appealed or listing or removing from the tax lists the property whose omission or listing has been appealed. The board shall notify the appellant by mail as to the action taken on the taxpayer's appeal not later than 30 days after the board's adjournment.

(3) Powers in Carrying Out Duties. — In the performance of its duties under subdivisions (g)(1) and (g)(2), above, the board of equalization and review may exercise the following powers:

a. It may appoint committees composed of its own members or other persons to assist it in making investigations necessary to its work. It may also employ expert appraisers in its discretion. The expense of the employment of committees or appraisers shall be borne by the county. The board may, in its discretion, require the taxpayer to reimburse the county for the cost of any appraisal by experts demanded by the taxpayer if the appraisal does not result in material reduction of the valuation of the property appraised and if the appraisal is not subsequently reduced materially by the board or by the Department of Revenue.

b. The board, in its discretion, may examine any witnesses and documents. It may place any witnesses under oath administered by any member of the board. It may subpoena witnesses or documents on its own motion, and it must do so when a request is made under the provisions of subdivision (g)(2)c, above.

A subpoena issued by the board shall be signed by the chair of the board, directed to the witness or to the person having custody of the document, and served by an officer authorized to serve subpoenas. Any person who willfully fails to appear or to produce documents in response to a subpoena or to testify when appearing in response to a subpoena shall be guilty of a Class 1 misdemeanor.

(4) Power to Submit Reports. — Upon the completion of its other duties, the board may submit to the Department of Revenue a report outlining the quality of the reappraisal, any problems it encountered in the reappraisal process, the number of appeals submitted to the board and to the Property Tax Commission, the success rate of the appeals submitted, and the name of the firm that conducted the reappraisal. A copy of the report should be sent by the board to the firm that conducted the reappraisal.

(5) Duty to Change Abstracts and Records After Adjournment. — Following adjournment upon completion of its duties under subdivisions (g)(1) and (g)(2) of this subsection, the board may continue to meet to carry out the following duties:

a. To hear and decide all appeals relating to discovered property under G.S. 105-312(d) and (k).

b. To hear and decide all appeals relating to the appraisal, situs, and taxability of classified motor vehicles under G.S. 105-330.2(b).

c. To hear and decide all appeals relating to audits conducted under G.S. 105-296(j) and relating to audits conducted under G.S. 105-296(j) and *(l)* of property classified at present-use value and property exempted or excluded from taxation.

d. **(Effective for taxes imposed for taxable years beginning on or after July 1, 2003)** To hear and decide all appeals relating to personal property under G.S. 105-317.1(c). (1939, c. 310, s. 1105;

1965, c. 191; 1967, c. 1196, s. 6; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1977, c. 863; 1987, c. 45, s. 1; 1989, c. 79, s. 3; c. 176, s. 1; c. 196; 1991, c. 110, s. 5; 1991 (Reg. Sess., 1992), c. 1007, s. 22; 1993, c. 539, s. 720; 1994, Ex. Sess., c. 24, s. 14(c); 2001-139, ss. 6, 7; 2002-156, s. 3.)

Effect of Amendments. — Session Laws 2002-156, s. 2, effective for taxes imposed for taxable years beginning on or after July 1, 2003, added subdivision (g)(5)d.

Article 22A.

Motor Vehicles.

§ 105-330. Definitions.

Cross References. — As to the use and confidential nature of actual addresses of Address Confidentiality Program participants by boards of elections for election-related purposes, see G.S. 15C-8.

§ 105-330.4. Due date, interest, and enforcement remedies.

OPINIONS OF ATTORNEY GENERAL

County May Not Impose Late Payment Penalty or Administrative Fee Upon Delinquent Property Tax Accounts. — Because the statutes authorizing property taxes provide for interest and/or penalties, a county may not, by ordinance, impose a late payment penalty or administrative fee upon delinquent property tax accounts. See opinion of Attorney General to Lloyd C. Smith, Jr., Pritchett & Burch, PLLC, 2001 N.C. AG LEXIS 6 (3/6/2001).

Article 24.

Review and Enforcement of Orders.

§ 105-345.2. Record on appeal; extent of review.

CASE NOTES

Commission's Valuation Not Upheld. — North Carolina Property Tax Commission's valuation of a rent-restricted, low-income, apartment complex was illegal because it did not take into account the restriction on the complex's income imposed by federal statute. In re Greens of Pine Glen Ltd., 147 N.C. App. 221, 555 S.E.2d 612, 2001 N.C. App. LEXIS 1139 (2001).

Educational purpose not shown. — Taxpayer that sent missionaries to different parts of the world did not prove entitlement to additional tax exemption where buildings were used to house owner, for guest lodging, and for storage, as the buildings were not used wholly and exclusively for educational purposes; the taxpayer bore the burden of proving that its property was entitled to an exemption under the law, which it failed to do. In re Master's Mission, — N.C. App. —, 568 S.E.2d 208, 2002 N.C. App. LEXIS 964 (2002).

Cited in In re Frizzelle, — N.C. App. —, 566 S.E.2d 506, 2002 N.C. App. LEXIS 770 (2002); In re Maharishi Spiritual Ctr. of Am., — N.C. App. —, 569 S.E.2d 3, 2002 N.C. App. LEXIS 918 (2002); In re Master's Mission, — N.C. App. —, 568 S.E.2d 208, 2002 N.C. App. LEXIS 964 (2002).

ARTICLE 26.

Collection and Foreclosure of Taxes.

§ 105-349. Appointment, term, qualifications, and bond of tax collectors and deputies.

Local Modification. — Bald Head Island: 1997, c. 324, s. 1; Havelock: 1995 (Reg. Sess., 1996), c. 619, s. 1; New Hanover (As to subsection (a)): 1971, c. 928; Roanoke Rapids: 1995, c. 34, s. 5.3; city of Elizabeth City: 2001, c. 227, s.1; city of Mount Airy: 1989, c. 416, s. 1; town of Carthage: 1999-239, s. 1; town of China Grove: 2002-42, s. 1; town of Laurel Park: 2000-8, s. 1; town of Plymouth: 1995, c. 325; town of Tarboro: 1995, c. 73, s. 5.3.

§ 105-355. Creation of tax lien; date as of which lien attaches.

OPINIONS OF ATTORNEY GENERAL

County May Not Impose Late Payment Penalty or Administrative Fee Upon Delinquent Property Tax Accounts. — Because the statutes authorizing property taxes provide for interest and/or penalties, a county may not, by ordinance, impose a late payment penalty or administrative fee upon delinquent property tax accounts. See opinion of Attorney General to Lloyd C. Smith, Jr., Pritchett & Burch, PLLC, 2001 N.C. AG LEXIS 6 (3/6/2001).

§ 105-357. Payment of taxes.

(a) Medium of Payment. — Taxes shall be payable in existing national currency. Deeds to real property, notes of the taxpayer or others, bonds or notes of the taxing unit, and payments in kind shall not be accepted in payment of taxes, nor shall any taxing unit permit the payment of taxes by offset of any bill, claim, judgment, or other obligation owed to the taxpayer by the taxing unit.

(b) Acceptance of Checks and Electronic Payment. — The tax collector may accept checks and electronic payments, as defined in G.S. 147-86.20, in payment of taxes, as authorized by G.S. 159-32.1. Acceptance of a check or electronic payment is at the tax collector's own risk. A tax collector who accepts electronic payment of taxes may add a fee to each electronic payment transaction to offset the service charge the taxing unit pays for electronic payment service. A tax collector who accepts electronic payment or check in payment of taxes may issue the tax receipt immediately or withhold the receipt until the check has been collected or the electronic payment invoice has been honored by the issuer.

If a tax collector accepts a check or an electronic payment and issues a tax receipt and the check is returned unpaid (without negligence on the part of the tax collector in presenting the check for payment) or the electronic payment invoice is not honored by the issuer, the taxes for which the check or electronic payment was given shall be deemed unpaid; the tax collector shall immediately correct the copy of the tax receipt and other appropriate records to show the fact of nonpayment, and shall give written notice by certified or registered mail to the person to whom the tax receipt was issued to return it to the tax collector. After correcting the records to show the fact of nonpayment, the tax collector shall proceed to collect the taxes by the use of any remedies allowed for the collection of taxes or by bringing a civil action on the check or electronic payment.

A financial institution with which a taxing unit has contracted for receipt of payment of taxes may accept a check in payment of taxes. If the check is honored, the financial institution shall so notify the tax collector, who shall, upon request of the taxpayer, issue a receipt for payment of the taxes. If the check is returned unpaid, the financial institution shall so notify the tax collector, who shall proceed to collect the taxes by use of any remedy allowed for collection of taxes or by bringing a civil action on the check.

(1) Effect on Tax Lien. — If the tax collector accepts a check or electronic payment in payment of taxes on real property and issues the receipt, and the check is later returned unpaid or the electronic payment invoice is not honored by the issuer, the taxing unit's lien for taxes on the real property shall be inferior to the rights of purchasers for value and of persons acquiring liens of record for value if the purchasers or lienholders acquire their rights in good faith and without actual knowledge that the check has not been collected or the electronic payment invoice has not been honored, after examination of the copy of the tax receipt in the tax collector's office during the time that record showed the taxes as paid or after examination of the official receipt issued to the taxpayer prior to the date on which the tax collector notified the taxpayer to return the receipt.

(2) Penalty. — In addition to interest for nonpayment of taxes provided by G.S. 105-360 and in addition to any criminal penalties provided by law for the giving of worthless checks, the penalty for giving in payment of taxes a check that is returned because of insufficient funds or nonexistence of an account of the drawer is twenty-five dollars ($25.00) or ten percent (10%) of the amount of the check, whichever is greater, subject to a maximum of one thousand dollars ($1,000). This penalty does not apply if the tax collector finds that, when the check was presented for payment, the drawer of the check had sufficient funds in an account at a financial institution in this State to pay the check and, by inadvertence, the drawer of the check failed to draw the check on the account that had sufficient funds. This penalty shall be added to and collected in the same manner as the taxes for which the check was given.

(c) Small Underpayments and Overpayments. — The governing body of a taxing unit may, by resolution, permit its tax collector to treat small underpayments of taxes as fully paid and to not refund small overpayments of taxes unless the taxpayer requests a refund before the end of the fiscal year in which the small overpayment is made. A "small underpayment" is a payment made, other than in person, that is no more than one dollar ($1.00) less than the taxes due on a tax receipt. A "small overpayment" is a payment made, other than in person, that is no more than one dollar ($1.00) greater than the taxes due on a tax receipt.

The tax collector shall keep records of all underpayments and overpayments of taxes by receipt number and amount and shall report these payments to the governing body as part of his settlement.

A resolution authorizing adjustments of underpayments and overpayments as provided in this subsection shall:

(1) Be adopted on or before June 15 of the year to which it is to apply;

(2) Apply to taxes levied for all previous fiscal years; and

(3) Continue in effect until repealed or amended by resolution of the taxing unit. (1939, c. 310, s. 1710; 1971, c. 806, s. 1; 1987, c. 661; 1989, c. 578, s. 3; 1989 (Reg. Sess., 1990), c. 1005, s. 8; 1991, c. 584, s. 2; 1999-434, s. 6; 2001-487, s. 25; 2002-156, s. 1.)

Effect of Amendments. —
Session Laws 2002-156, s. 1, effective October 9, 2002, in the first sentence of subdivision (b)(2), substituted "twenty-five dollars ($25.00) or ten percent (10%)" for "ten percent (10%)," inserted "whichever is greater" following "amount of the check," and deleted "minimum of one dollar ($1.00) and a" preceding "maximum of."

§ 105-358. Waiver of penalties; partial payments.

(a) Waiver. — A tax collector may, upon making a record of the reasons therefor, reduce or waive the ten percent (10%) penalty imposed on giving a worthless check under G.S. 105-357(b)(2).

(b) Partial Payments. — Unless otherwise directed by the governing body, the tax collector shall accept partial payments on taxes and issue partial payment receipts therefor.

When a payment is made on the tax for any year or on any installment, it shall first be applied to accrued penalties, interest, and costs and then to the principal amount of the tax or installment. In its discretion, the governing body may prescribe by uniform regulation the minimum amount or percentage of tax liability that may be accepted as a partial payment. (1939, c. 310, ss. 1708, 1709; 1971, c. 806, s. 1; 2002-156, s. 1.2.)

Effect of Amendments. — Session Laws 2002-156, s. 1.2, effective October 9, 2002, added "Waiver of penalties" in the section catchline, and in the text added subsection (a) and added "(b) Partial Payments."

§ 105-360. Due date; interest for nonpayment of taxes; discounts for prepayment.

Local Modification. — Brunswick: 1979, c. 439; Cabarrus: 1983, c. 823; Lincoln: 1981 (Reg. Sess., 1982), c. 1171, 1983 (Reg. Sess., 1984), c. 958; Stokes and municipalities located therein (for taxes paid prior to November 1, 2002): 2002-51, s. 2; Surry: 1991, c. 148; 1983, c. 241; town of Duck: 2001, c. 394, s.1 (for fiscal year 2002-2003); town of Midland (for fiscal year 2000-01, contingent on passage of local referendum): 2000-91, s. 2; town of Red Cross: 2002-56, s. 2 (for fiscal year 2002-2003); village of Chimney Rock: 1991, c. 444, s. 3 (for fiscal year 1991-92); village of Wesley Chapel: 1998-43, s. 2 (for fiscal years 1997-98 and 1998-99).

OPINIONS OF ATTORNEY GENERAL

County May Not Impose Late Payment Penalty or Administrative Fee Upon Delinquent Property Tax Accounts. — Because the statutes authorizing property taxes provide for interest and/or penalties, a county may not, by ordinance, impose a late payment penalty or administrative fee upon delinquent property tax accounts. See opinion of Attorney General to Lloyd C. Smith, Jr., Pritchett & Burch, PLLC, 2001 N.C. AG LEXIS 6 (3/6/2001).

SUBCHAPTER V. MOTOR FUEL TAXES.

ARTICLE 36B.

Tax on Carriers Using Fuel Purchased Outside State.

§ 105-449.41: Repealed by Session Laws 2002-108, s. 2, effective January 1, 2003.

§ 105-449.47. Registration of vehicles.

(a) Requirement. — A motor carrier that is subject to the International Fuel Tax Agreement may not operate or cause to be operated in this State any vehicle listed in the definition of motor vehicle unless both the motor carrier and the motor vehicle are registered with the motor carrier's base state jurisdiction. A motor carrier that is not subject to the International Fuel Tax Agreement may not operate or cause to be operated in this State any vehicle listed in the definition of motor vehicle unless both the motor carrier and the motor vehicle are registered with the Secretary for purposes of the tax imposed by this Article.

(a1) Registration and Identification Marker. — When the Secretary registers a motor carrier, the Secretary must issue at least one identification marker for each motor vehicle operated by the motor carrier. A motor carrier must keep records of identification markers issued to it and must be able to account for all identification markers it receives from the Secretary. Registrations and identification markers issued by the Secretary are for a calendar year. The Secretary may renew a registration or an identification marker without issuing a new registration or identification marker. All identification markers issued by the Secretary remain the property of the State. The Secretary may withhold or revoke a registration or an identification marker when a motor carrier fails to comply with this Article, former Article 36 or 36A of this Subchapter, or Article 36C or 36D of this Subchapter.

A motor carrier must carry a copy of its registration in each motor vehicle operated by the motor carrier when the vehicle is in this State. A motor vehicle must clearly display an identification marker at all times. The identification marker must be affixed to the vehicle for which it was issued in the place and manner designated by the authority that issued it.

(b) Exemption. — This section does not apply to the operation of a vehicle that is registered in another state and is operated temporarily in this State by a public utility, a governmental or cooperative provider of utility services, or a contractor for one of these entities for the purpose of restoring utility services in an emergency outage. (1955, c. 823, s. 11; 1973, c. 746, s. 193; 1983, c. 713, s. 56; 1985 (Reg. Sess., 1986), c. 937, s. 20; 1989, c. 692, s. 6.2; 1991, c. 487, s. 6; 1995, c. 50, s. 5; c. 390, s. 18; 1999-337, s. 41; 2002-108, s. 3.)

Effect of Amendments. — Session Laws 2002-108, s. 3, effective January 1, 2003, redesignated the former second and third paragraphs of subsection (a) as present subsection (a1); and in subsection (a1), inserted "Registration and Identification Marker" at the beginning, and inserted the second sentence.

§ 105-449.52. Civil penalties applicable to motor carriers.

(a) Penalty. — A motor carrier who does any of the following is subject to a civil penalty:

(1) Operates in this State or causes to be operated in this State a motor vehicle that does not carry the registration card required by this Article or does not display an identification marker in accordance with this Article. The amount of the penalty is one hundred dollars ($100.00).

(2) Is unable to account for identification markers the Secretary issues the motor carrier, as required by G.S. 105-449.47. The amount of the penalty is one hundred dollars ($100.00) for each identification marker the carrier is unable to account for.

(3) Displays an identification marker on a motor vehicle operated by a motor carrier that was not issued to the carrier by the Secretary under G.S. 105-449.47. The amount of the penalty is one thousand dollars

($1,000) for each identification marker unlawfully obtained. Both the licensed motor carrier to whom the Secretary issued the identification marker and the motor carrier displaying the unlawfully obtained identification marker are jointly and severally liable for the penalty under this subdivision.

A penalty imposed under this section is payable to the Department of Revenue or the Division of Motor Vehicles. When a motor vehicle is found to be operating without a registration card or an identification marker or with an identification marker the Secretary did not issue for the vehicle, the motor vehicle may not be driven for a purpose other than to park the motor vehicle until the penalty imposed under this section is paid unless the officer that imposes the penalty determines that operation of the motor vehicle will not jeopardize collection of the penalty.

(b) Hearing. — The procedure set out in G.S. 105-449.119 for protesting a penalty imposed under Article 36C, Part 6, of this Chapter applies to a penalty imposed under this section. (1955, c. 823, s. 16; 1957, c. 948; 1973, c. 476, s. 193; 1975, c. 716, s. 5; 1981, c. 690, s. 18; 1983, c. 713, s. 60; 1991, c. 42, s. 14; 1991 (Reg. Sess., 1992), c. 913, s. 11; 1998-146, s. 2; 1999-337, s. 43; 2002-108, s. 4.)

Effect of Amendments. — Session Laws 2002-108, s. 4, effective January 1, 2003, rewrote the section heading and subsection (a).

Article 36C.

Gasoline, Diesel, and Blends.

Part 1. General Provisions.

§ 105-449.60. Definitions.

The following definitions apply in this Article:

(1) Biodiesel. — Any fuel or mixture of fuels derived in whole or in part from agricultural products or animal fats or wastes from these products or fats.

(1a) Biodiesel provider. — A person who does any of the following:

a. Produces an average of no more than 500,000 gallons of biodiesel per month during a calendar year. A person who produces more than this amount is a refiner.

b. Imports biodiesel outside the terminal transfer system by means of a marine vessel, a transport truck, a railroad tank car, or a tank wagon.

(1b) to (1d) Reserved for future codification purposes.

(1e) Blended fuel. — A mixture composed of gasoline or diesel fuel and another liquid, other than a de minimus amount of a product such as carburetor detergent or oxidation inhibitor, that can be used as a fuel in a highway vehicle.

(2) Blender. — A person who produces blended fuel outside the terminal transfer system.

(3) Bulk-end user. — A person who maintains storage facilities for motor fuel and uses part or all of the stored fuel to operate a highway vehicle.

(4) Bulk plant. — A motor fuel storage and distribution facility that is not a terminal and from which motor fuel may be removed at a rack.

(5) Code. — Defined in G.S. 105-228.90.

(6) Destination state. — The state, territory, or foreign country to which motor fuel is directed for delivery into a storage facility, a receptacle,

a container, or a type of transportation equipment for the purpose of resale or use.

(7) Diesel fuel. — Any liquid, other than gasoline, that is suitable for use as a fuel in a diesel-powered highway vehicle. The term includes kerosene and biodiesel. The term does not include jet fuel sold to a buyer who is certified to purchase jet fuel under the Code.

(8) Distributor. — A person who acquires motor fuel from a supplier or from another distributor for subsequent sale.

(9) Dyed diesel fuel. — Diesel fuel that meets the dyeing and marking requirements of § 4082 of the Code.

(10) Elective supplier. — A supplier that is required to be licensed in this State and that elects to collect the excise tax due this State on motor fuel that is removed by the supplier at a terminal located in another state and has this State as its destination state.

(11) Export. — To obtain motor fuel in this State for sale or other distribution in another state. In applying this definition, motor fuel delivered out-of-state by or for the seller constitutes an export by the seller and motor fuel delivered out-of-state by or for the purchaser constitutes an export by the purchaser.

(12) Fuel alcohol. — Alcohol, methanol, or fuel grade ethanol.

(13) Fuel alcohol provider. — A person who does any of the following:

a. Produces an average of no more than 500,000 gallons of fuel alcohol per month during a calendar year. A person who produces more than this amount is a refiner.

b. Imports fuel alcohol outside the terminal transfer system by means of a marine vessel, a transport truck, a railroad tank car, or a tank wagon.

(14) Gasohol. — A blended fuel composed of gasoline and fuel grade ethanol.

(15) Gasoline. — Any of the following:

a. All products that are commonly or commercially known or sold as gasoline and are suitable for use as a fuel in a highway vehicle, other than products that have an American Society for Testing Materials octane number of less than 75 as determined by the motor method.

b. A petroleum product component of gasoline, such as naptha, reformate, or toluene.

c. Gasohol.

d. Fuel alcohol.

The term does not include aviation gasoline sold for use in an aircraft motor. "Aviation gasoline" is gasoline that is designed for use in an aircraft motor and is not adapted for use in an ordinary highway vehicle.

(16) Gross gallons. — The total amount of motor fuel measured in gallons, exclusive of any temperature, pressure, or other adjustments.

(17) Highway. — Defined in G.S. 20-4.01(13).

(18) Highway vehicle. — A self-propelled vehicle that is designed for use on a highway.

(19) Import. — To bring motor fuel into this State by any means of conveyance other than in the fuel supply tank of a highway vehicle. In applying this definition, motor fuel delivered into this State from out-of-state by or for the seller constitutes an import by the seller, and motor fuel delivered into this State from out-of-state by or for the purchaser constitutes an import by the purchaser.

(19a) In-State-only supplier. — Either of the following:

a. A supplier that is required to have a license and elects not to collect the excise tax due this State on motor fuel that is removed by the

supplier at a terminal located in another state and has this State as its destination state.

b. A supplier that does business only in this State.

(20) Motor fuel. — Gasoline, diesel fuel, and blended fuel.

(21) Motor fuel rate. — The rate of tax set in G.S. 105-449.80.

(22) Motor fuel transporter. — A person who transports motor fuel by pipeline or who transports motor fuel outside the terminal transfer system by means of a transport truck, a railroad tank car, or a marine vessel.

(23) Net gallons. — The amount of motor fuel measured in gallons when corrected to a temperature of 60 degrees Fahrenheit and a pressure of 14 7/10 pounds per square inch.

(24) Permissive supplier. — An out-of-state supplier that elects, but is not required, to have a supplier's license under this Article.

(25) Person. — Defined in G.S. 105-228.90.

(26) Position holder. — The person who holds the inventory position in motor fuel in a terminal, as reflected on the records of the terminal operator. A person holds the inventory position in motor fuel when that person has a contract with the terminal operator for the use of storage facilities and terminaling services for fuel at the terminal. The term includes a terminal operator who owns fuel in the terminal.

(27) Rack. — A mechanism for delivering motor fuel from a refinery, a terminal, or a bulk plant into a transport truck, a railroad tank car, or another means of transfer that is outside the terminal transfer system.

(27a) Refiner. — A person who owns, operates, or controls a refinery. The term includes a person who produces an average of more than 500,000 gallons of fuel alcohol or biodiesel a month during a calendar year.

(27b) Refinery. — A facility used to process crude oil, unfinished oils, natural gas liquids, or other hydrocarbons into motor fuel and from which fuel may be removed by pipeline or vessel or at a rack. The term does not include a facility that produces only blended fuel or gasohol.

(28) Removal. — A physical transfer other than by evaporation, loss, or destruction. A physical transfer to a transport truck or another means of conveyance outside the terminal transfer system is complete upon delivery into the means of conveyance.

(29) Retailer. — A person who maintains storage facilities for motor fuel and who sells the fuel at retail or dispenses the fuel at a retail location.

(30) Secretary. — Defined in G.S. 105-228.90.

(31) Supplier. — Any of the following:

a. A position holder or a person who receives motor fuel pursuant to a two-party exchange.

b. A fuel alcohol provider.

c. A biodiesel provider.

d. A refiner.

(32) System transfer. — Either of the following:

a. A transfer of motor fuel within the terminal transfer system.

b. A transfer, by transport truck or railroad tank car, of fuel grade ethanol.

(33) Tank wagon. — A truck that is not a transport truck and has a compartment designed or used to carry at least 1,000 gallons of motor fuel.

(33a) Tax. — An inspection or other excise tax on motor fuel and any other fee or charge imposed on motor fuel on a per-gallon basis.

(34) Terminal. — A motor fuel storage and distribution facility that has been assigned a terminal control number by the Internal Revenue

Service, is supplied by pipeline or marine vessel, and from which motor fuel may be removed at a rack.

(35) Terminal operator. — A person who owns, operates, or otherwise controls a terminal.

(36) Terminal transfer system. — The motor fuel distribution system consisting of refineries, pipelines, marine vessels, and terminals. The term has the same meaning as "bulk transfer/terminal system" under 26 C.F.R. § 48.4081-1.

(37) Transmix. — Either of the following:

a. The buffer or interface between two different products in a pipeline shipment.

b. A mix of two different products within a refinery or terminal that results in an off-grade mixture.

(38) Transport truck. — A semitrailer combination rig designed or used to transport loads of motor fuel over a highway.

(39) Trustee. — A person who is licensed as a supplier, an elective supplier, or a permissive supplier and who receives tax payments from and on behalf of a licensed distributor.

(40) Two-party exchange. — A transaction in which motor fuel is transferred from one licensed supplier to another licensed supplier pursuant to an exchange agreement under which the supplier that is the position holder agrees to deliver motor fuel to the other supplier or the other supplier's customer at the rack of the terminal at which the delivering supplier is the position holder.

(41) User. — A person who owns or operates a licensed highway vehicle that has a registered gross vehicle weight of at least 10,001 pounds and who does not maintain storage facilities for motor fuel. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, ss. 1, 2; 1998-146, s. 3; 2000-173, ss. 13(a), 14(a); 2001-414, s. 27; 2002-108, ss. 5, 6.)

Effect of Amendments. —

Session Laws 2002-108, ss. 5 and 6, effective January 1, 2003, recodified former subdivision (1) as subdivision (1e); added subdivisions (1), (1a), (27a), and (27b); added "and biodiesel" in subdivision (7); added "alcohol" in subdivision (12); rewrote subdivision (13); substituted "alcohol" for "grade ethanol" in paragraph (15)d; inserted "by pipeline or who transports motor fuel" in subdivision (22); added paragraphs (31)c and (31)d; and rewrote subdivision (33).

Part 2. Licensing.

§ 105-449.72. Bond or letter of credit required as a condition of obtaining and keeping certain licenses or of applying for certain refunds.

(a) Initial Bond. — An applicant for a license as a refiner, a terminal operator, a supplier, an importer, a blender, a permissive supplier, or a distributor must file with the Secretary a bond or an irrevocable letter of credit. A bond must be conditioned upon compliance with the requirements of this Article, be payable to the State, and be in the form required by the Secretary. The amount of the bond or irrevocable letter of credit is determined as follows:

(1) For an applicant for a license as any of the following, the amount is two million dollars ($2,000,000):

a. A refiner.

b. A terminal operator.

c. A supplier that is a position holder or a person that receives motor fuel pursuant to a two-party exchange.

d. A bonded importer.

e. A permissive supplier.

(2) For an applicant for a license as any of the following, the amount is two times the applicant's average expected monthly tax liability under this Article, as determined by the Secretary. The amount may not be less than two thousand dollars ($2,000) and may not be more than two hundred fifty thousand dollars ($250,000):

a. A supplier that is a fuel alcohol provider or a biodiesel provider but is neither a position holder nor a person that receives motor fuel pursuant to a two-party exchange.

b. An occasional importer.

c. A tank wagon importer.

d. A distributor.

e. Repealed by Session Laws 1997-60, s. 5, effective October 5, 1997.

(3) For an applicant for a license as a blender, a bond is required only if the applicant's average expected annual tax liability under this Article, as determined by the Secretary, is at least two thousand dollars ($2,000). When a bond is required, the bond amount is the same as under subdivision (2) of this subsection.

(b) Multiple Activity. — An applicant for a license as a distributor and as a bonded importer must file only the bond required of a bonded importer. An applicant for two or more of the licenses listed in subdivision (a)(2) or (a)(3) of this section may file one bond that covers the combined liabilities of the applicant under all the activities. A bond for these combined activities may not exceed the maximum amount set in subdivision (a)(2) of this subsection.

(c) Adjustment to Bond. — When notified to do so by the Secretary, a person that has filed a bond or an irrevocable letter of credit and that holds a license listed in subdivision (a)(2) of this section must file an additional bond or irrevocable letter of credit in the amount requested by the Secretary. The person must file the additional bond or irrevocable letter of credit within 30 days after receiving the notice from the Secretary. The amount of the initial bond or irrevocable letter of credit and any additional bond or irrevocable letter of credit filed by the license holder, however, may not exceed the limits set in subdivision (a)(2) of this section.

(d) Replacements. — When a license holder files a bond or an irrevocable letter of credit as a replacement for a previously filed bond or letter of credit and the license holder has paid all taxes and penalties due under this Article, the Secretary must take one of the following actions:

(1) Return the previously filed bond or letter of credit.

(2) Notify the person liable on the previously filed bond that the person is released from liability on the bond.

(e) Credit Card Companies. — The Secretary may require a credit card company to file with the Secretary a bond if the company applies for a refund under G.S. 105-449.105(a) and the Secretary determines after an audit that a bond is needed to protect the State from loss in collecting any additional tax due pursuant to the audit. The bond must be conditioned upon compliance with the requirements of this Article, be payable to the State, and be in the form required by the Secretary. The amount of a bond required under this subsection is two times the average monthly refund due, subject to the minimum and maximum amounts provided in subdivision (a)(2) of this section. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 10; 1997-60, s. 5; 1998-146, s. 4; 2001-205, s. 5; 2002-108, ss. 7, 8.)

Effect of Amendments. — Session Laws 2002-108, ss. 7 and 8, effective January 1, 2003, in subdivision (a)(2)a, inserted "or a biodiesel provider"; and in subdivision (d)(2), deleted "and the license holder" following "previously filed bond."

§ 105-449.77. Records and lists of license applicants and license holders.

(a) Records. — The Secretary must keep a record of the following:
(1) Applicants for a license under this Article.
(2) Persons to whom a license has been issued under this Article.
(3) Persons that hold a current license issued under this Article, by license category.

(b) Lists. — The Secretary must annually give a list to each license holder of all the license holders under this Article. The list must state the name, account number, and business address of each license holder on the list. The Secretary must send a monthly update of the list to each licensed refiner or licensed supplier and to any other license holder that requests a copy of the list.

(c) Repealed by Session Laws 2002-108, s. 9, effective January 1, 2003. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 12; 1997-60, s. 6; 2002-108, s. 9.)

Effect of Amendments. — Session Laws 2002-108, s. 9, effective January 1, 2003, rewrote subsection (b); and repealed subsection (c) relating to transporter lists.

Part 3. Tax and Liability.

§ 105-449.87. Backup tax and liability for the tax.

(a) Tax. — An excise tax at the motor fuel rate is imposed on the following:
(1) Dyed diesel fuel that is used to operate a highway vehicle for a use that is not a nontaxable use under § 4082(b) of the Code.
(2) Motor fuel that was allowed an exemption from the motor fuel tax and was then used for a taxable purpose.
(3) Motor fuel that is used to operate a highway vehicle after an application for a refund of tax paid on the motor fuel is made or allowed under G.S. 105-449.107(a) on the basis that the motor fuel was used for an off-highway purpose.
(4) Repealed by Session Laws 1995 (Regular Session, 1996), c. 647, s. 19.
(5) Motor fuel that, based on its shipping document, is destined for delivery to another state and is then diverted and delivered in this State.

(b) General Liability. — The operator of a highway vehicle that uses motor fuel that is taxable under subdivisions (a)(1) through (a)(3) of this section is liable for the tax. If the highway vehicle that uses the fuel is owned by or leased to a motor carrier, the motor carrier is jointly and severally liable for the tax. If the end seller of motor fuel taxable under this section knew or had reason to know that the motor fuel would be used for a purpose that is taxable under this section, the end seller is jointly and severally liable for the tax. If the Secretary determines that a bulk-end user or retailer used or sold untaxed dyed diesel fuel to operate a highway vehicle when the fuel is dispensed from a storage facility or through a meter marked for nonhighway use, all fuel delivered into that storage facility is presumed to have been used to operate a highway vehicle. An end seller of dyed diesel fuel is considered to have known or had reason to know that the fuel would be used for a purpose that is taxable under this section if the end seller delivered the fuel into a storage facility that was not marked as required by G.S. 105-449.123.

(c) Diverted Fuel. — The person who authorizes a change in the destination state of motor fuel from the state given on the fuel's shipping document to North Carolina is liable for the tax due on the motor fuel. If motor fuel is

diverted from North Carolina to another state, only the person who authorized the fuel to be diverted is eligible for a refund of the amount of tax paid on the fuel. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 19; 1997-60, s. 8; 1998-146, s. 5; 1999-438, s. 22; 2002-108, s. 10.)

Effect of Amendments. —
Session Laws 2002-108, s. 10, effective January 1, 2003, deleted the second sentence of subdivision (a)(1), relating to dyed diesel fuel; added subdivision (a)(5); in subsection (b), added "General" preceding "Liability," inserted "subdivisions (a)(1) through (a)(3) of" in the first sentence, and added the last sentence; and rewrote subsection (c).

§ 105-449.88. Exemptions from the excise tax.

The excise tax on motor fuel does not apply to the following:

(1) Motor fuel removed, by transport truck or another means of transfer outside the terminal transfer system, from a terminal for export, if the motor fuel is removed by a licensed distributor or a licensed exporter and the supplier of the motor fuel collects tax on it at the rate of the motor fuel's destination state.

(1a) Motor fuel removed by transport truck from a terminal for export if the motor fuel is removed by a licensed distributor or licensed exporter, the supplier that is the position holder for the motor fuel sells the motor fuel to another supplier as the motor fuel crosses the terminal rack, the purchasing supplier or its customer receives the motor fuel at the terminal rack for export, and the supplier that is the position holder collects tax on the motor fuel at the rate of the motor fuel's destination state.

(2) Motor fuel sold to the federal government for its use.

(3) Motor fuel sold to the State for its use.

(4) Motor fuel sold to a local board of education for use in the public school system.

(5) Diesel that is kerosene and is sold to an airport.

(6) Motor fuel sold to a charter school for use for charter school purposes.

(7) Motor fuel sold to a community college for use for community college purposes.

(8) Motor fuel sold to a county or a municipal corporation for its use. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, ss. 20, 21; 1998-98, s. 28; 1998-146, s. 6; 2000-72, s. 2; 2000-173, ss. 13(b), 15; 2001-427, s. 9(a); 2002-108, s. 11.)

Effect of Amendments. —
Session Laws 2002-108, s. 11, effective January 1, 2003, added subdivision (8).

Part 4. Payment and Reporting.

§ 105-449.101. Motor fuel transporter to file informational return showing deliveries of imported or exported motor fuel.

(a) Requirement. — A motor fuel transporter that imports motor fuel into this State or exports motor fuel from this State must file a monthly informational return with the Secretary that shows motor fuel received or delivered for import or export by the transporter during the month. This requirement does not apply to a distributor that is not required to be licensed as a motor fuel transporter.

(b) Content. — The return required by this section is due by the 25th day of the month following the month covered by the return. The return must contain the following information and any other information required by the Secretary:

(1) The name and address of each person from whom the transporter received motor fuel outside the State for delivery in the State, the amount of motor fuel received, the date the motor fuel was received, and the destination state of the fuel.

(2) The name and address of each person from whom the transporter received motor fuel in the State for delivery outside the State, the amount of motor fuel delivered, the date the motor fuel was delivered, and the destination state of the fuel. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 35; 2002-108, s. 12.)

Effect of Amendments. — Session Laws 2002-108, s. 12, effective January 1, 2003, substituted "motor fuel transporter ... from this State" for "person that transports, by pipeline, marine vessel, railroad tank car, or transport truck, motor fuel that is being imported into this State or exported from this State" in the first sentence in subsection (a).

Part 5. Refunds.

§ 105-449.106. Quarterly refunds for certain local governmental entities, nonprofit organizations, taxicabs, and special mobile equipment.

(a) Nonprofits. — A nonprofit organization listed below that purchases and uses motor fuel may receive a quarterly refund, for the excise tax paid during the preceding quarter, at a rate equal to the amount of the flat cents-per-gallon rate plus the variable cents-per-gallon rate in effect during the quarter for which the refund is claimed, less one cent (1¢) per gallon.

An application for a refund allowed under this subsection must be made in accordance with this Part and must be signed by the chief executive officer of the organization. The chief executive officer of a nonprofit organization is the president of the organization or another officer of the organization designated in the charter or bylaws of the organization.

Any of the following entities may receive a refund under this subsection:

(1) Repealed by Session Laws 2002-108, s. 13, effective January 1, 2003.

(2) A private, nonprofit organization that transports passengers under contract with or at the express designation of a unit of local government.

(3) A volunteer fire department.

(4) A volunteer rescue squad.

(5) A sheltered workshop recognized by the Department of Health and Human Services.

(b) Taxi. — A person who purchases and uses motor fuel in a taxicab, as defined in G.S. 20-87(1), while the taxicab is engaged in transporting passengers for hire, or in a bus operated as part of a city transit system that is exempt from regulation by the North Carolina Utilities Commission under G.S. 62-260(a)(8), may receive a quarterly refund, for the excise tax paid during the preceding quarter, at a rate equal to the flat cents-per-gallon rate plus the variable cents-per-gallon rate in effect during the quarter for which the refund is claimed, less one cent (1¢) per gallon. An application for a refund must be made in accordance with this Part.

(c) Special Mobile Equipment. — A person who purchases and uses motor fuel to operate special mobile equipment off-highway may receive a quarterly refund, for the excise tax paid during the preceding quarter, at a rate equal to

the flat cents-per-gallon rate plus the variable cents-per-gallon rate in effect during the quarter for which the refund is claimed, less the amount of sales and use tax due on the fuel under this Chapter, as determined in accordance with G.S. 105-449.107(c). An application for a refund must be made in accordance with this Part. (1995, c. 390, s. 3; 1997-6, s. 13; 1997-443, s. 11A.118(a); 1999-438, s. 24; 2002-108, s. 13.)

Effect of Amendments. — Session Laws 2002-108, s. 13, effective January 1, 2003, in subsection (a), deleted "Government and" preceding "Nonprofits" at the beginning of the first paragraph, deleted "local governmental entity or a" preceding "nonprofit" in the first sentence of the first paragraph, substituted "organization" for "entity" in the first sentence of the second paragraph, and repealed subdivision (a)(1).

§ 105-449.114. Authority for agreement with Eastern Band of Cherokee Indians.

(a) By virtue of an Act of June 4, 1924, Pub. L. No. 68-191, Ch. 253, 43 Stat. 370, Congress and the United States courts have recognized the Eastern Band of Cherokee Indians as possessing sovereign legal rights over their members and their trust lands.

(b) The following definitions apply in this act:

(1) Chief. — The Principal Chief of the Eastern Band of the Cherokee Indians.

(2) Council. — The Tribal Council of the Eastern Band of the Cherokee Indians.

(3) Tribe. — The Eastern Band of the Cherokee Indians.

(c) Notwithstanding any other provision of law concerning refunds of motor fuels and alternative fuels taxes, the Department of Revenue may enter into a memorandum of understanding or an agreement with the Eastern Band of Cherokee Indians to make refunds of motor fuels and alternative fuels taxes to the Tribe in its collective capacity on behalf of its members who reside on or engage in otherwise taxable transactions within Cherokee trust lands. The memorandum or agreement shall be approved by the Council and signed by the Chief on behalf of the Tribe and shall be signed by the Secretary of Revenue on behalf of Department of Revenue. The memorandum or agreement may not affect the right of an individual member of the Tribe to a refund and shall provide for deduction of amounts refunded to individual members of the Tribe from the amounts to be refunded to the Tribe on behalf of all members. The memorandum or agreement may be effective for a definite or indefinite period, as specified in the agreement. (1989, c. 753, ss. 1-3; 1991, c. 193, s. 6; 2002-108, s. 14.)

Effect of Amendments. — Session Laws 2002-108, s. 14, effective January 1, 2003, substituted "alternative" for "special" twice in subsection (c).

Part 6. Enforcement and Administration.

§ 105-449.115. Shipping document required to transport motor fuel by railroad tank car or transport truck.

(a) Issuance. — A person may not transport motor fuel by railroad tank car or transport truck unless the person has a shipping document for its transportation that complies with this section. A terminal operator and the operator of a bulk plant must give a shipping document to the person who operates a

railroad tank car or a transport truck into which motor fuel is loaded at the terminal rack or bulk plant rack.

(b) Content. — A shipping document issued by a terminal operator or the operator of a bulk plant must be machine-printed and must contain the following information and any other information required by the Secretary:

(1) Identification, including address, of the terminal or bulk plant from which the motor fuel was received.
(2) The date the motor fuel was loaded.
(3) The gross gallons loaded.
(4) The destination state of the motor fuel, as represented by the purchaser of the motor fuel or the purchaser's agent.
(5) If the document is issued by a terminal operator, the following information:
    a. The net gallons loaded.
    b. A tax responsibility statement indicating the name of the supplier that is responsible for the tax due on the motor fuel.

(c) Reliance. — A terminal operator or bulk plant operator may rely on the representation made by the purchaser of motor fuel or the purchaser's agent concerning the destination state of the motor fuel. A purchaser is liable for any tax due as a result of the purchaser's diversion of fuel from the represented destination state.

(d) Duties of Transporter. — A person to whom a shipping document was issued must do all of the following:

(1) Carry the shipping document in the conveyance for which it was issued when transporting the motor fuel described in it.
(2) Show the shipping document to a law enforcement officer upon request when transporting the motor fuel described in it.
(3) Deliver motor fuel described in the shipping document to the destination state printed on it unless the person does all of the following:
    a. Notifies the Secretary before transporting the motor fuel into a state other than the printed destination state that the person has received instructions since the shipping document was issued to deliver the motor fuel to a different destination state.
    b. Receives from the Secretary a confirmation number authorizing the diversion.
    c. Writes on the shipping document the change in destination state and the confirmation number for the diversion.
(4) Give a copy of the shipping document to the distributor or other person to whom the motor fuel is delivered.

(e) Duties of Person Receiving Shipment. — A person to whom motor fuel is delivered by railroad tank car or transport truck may not accept delivery of the motor fuel if the destination state shown on the shipping document for the motor fuel is a state other than North Carolina. To determine if the shipping document shows North Carolina as the destination state, the person to whom the fuel is delivered must examine the shipping document and must keep a copy of the shipping document. The person must keep a copy at the place of business where the motor fuel was delivered for 90 days from the date of delivery and must keep it at that place or another place for at least three years from the date of delivery. A person who accepts delivery of motor fuel in violation of this subsection is jointly and severally liable for any tax due on the fuel.

(f) Sanctions Against Transporter. — The following acts are grounds for a civil penalty payable to the Department of Transportation, Division of Motor Vehicles, or the Department of Revenue:

(1) Transporting motor fuel in a railroad tank car or transport truck without a shipping document or with a false or an incomplete shipping document.

(2) Delivering motor fuel to a destination state other than that shown on the shipping document.

The penalty imposed under this subsection is payable by the person in whose name the conveyance is registered, if the conveyance is a transport truck, and is payable by the person responsible for the movement of motor fuel in the conveyance, if the conveyance is a railroad tank car. The amount of the penalty is five thousand dollars ($5,000). A penalty imposed under this subsection is in addition to any motor fuel tax assessed. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, ss. 39, 40; 2002-108, s. 15.)

Effect of Amendments. — Session Laws 2002-108, s. 15, effective January 1, 2003, rewrote the last paragraph in subsection (f).

§ 105-449.115A. Shipping document required to transport fuel by tank wagon.

(a) Issuance. — A person may not transport motor fuel by tank wagon unless that person has an invoice, bill of sale, or shipping document containing the following information and any other information required by the Secretary:

(1) The name and address of the person from whom the motor fuel was received.
(2) The date the fuel was loaded.
(3) The type of fuel.
(4) The gross number of gallons loaded.

(b) Duties of Transporter. — A person to whom an invoice, bill of sale, or shipping document was issued must do all of the following:

(1) Carry the invoice, bill of sale, or shipping document in the conveyance for which it is issued when transporting the motor fuel described in it.
(2) Show the invoice, bill of sale, or shipping document upon request when transporting the motor fuel described in it.

(c) Sanctions. — Transporting motor fuel in a tank wagon without an invoice, bill of sale, or shipping document containing the information required by this section is grounds for a civil penalty payable to the Department of Transportation, Division of Motor Vehicles, or the Department of Revenue. The penalty imposed under this subsection is payable by the person in whose name the tank wagon is registered. The amount of the penalty is one thousand dollars ($1,000). A penalty imposed under this subsection is in addition to any motor fuel tax assessed. (2002-108, s. 16.)

Editor's Note. — Session Laws 2002-108, s. 18(b), made this section effective January 1, 2003.

§ 105-449.118. Civil penalty for buying or selling non-tax-paid motor fuel.

A person who dispenses non-tax-paid motor fuel into the supply tank of a highway vehicle or who allows non-tax-paid motor fuel to be dispensed into the supply tank of a highway vehicle is subject to a civil penalty of two hundred fifty dollars ($250.00) per occurrence.

The penalty is payable to the Department of Transportation, Division of Motor Vehicles, or the Department of Revenue. Failure to pay a penalty imposed under this section is grounds under G.S. 20-88.01(b) to withhold or revoke the registration plate of the motor vehicle into which the motor fuel was dispensed. (1995, c. 390, s. 3; 2002-108, s. 17.)

Effect of Amendments. — Session Laws 2002-108, s. 17, effective January 1, 2003, in the first paragraph, added "of two hundred fifty dollars ($250.00) per occurrence" at the end of the first sentence, and deleted the second sentence, reading "The penalty is based on the amount of motor fuel dispensed and is set at the following amounts," along with the table showing the penalty per number of gallons dispensed.

SUBCHAPTER VIII. LOCAL GOVERNMENT SALES AND USE TAX.

ARTICLE 39.

First One-Cent (1¢) Local Government Sales and Use Tax.

§ 105-463. Short title.

This Article shall be known as the First One-Cent (1¢) Local Government Sales and Use Tax Act. (1971, c. 77, s. 2; 2002-123, s. 7(b).)

Editor's Note. —
Session Laws 2002-123, s. 7(a) added "First One-Cent (1¢)" in the Article 39 head.

Effect of Amendments. — Session Laws 2002-123, s. 7(b), effective September 26, 2002, inserted "First One-Cent (1¢)" preceding "Local Government Sales and Use Tax Act."

§ 105-466. Levy of tax.

Editor's Note. —
Session Laws 2001-424, s. 34.14(b), as amended by Session Laws 2002-123, s. 3, provides: "Notwithstanding the provisions of G.S. 105-466(c), a tax levied under Article 44 of Chapter 105 of the General Statutes, as enacted by this act, may become effective on December 1,2002. Notwithstanding the provisions of G.S. 105-466(c), if a county levies a tax under Article 44 of Chapter 105 of the General Statutes, as enacted by this act, that is to become effective on or before January 1, 2003, the county is required to give the Secretary of Revenue only 30 days' advance notice of the tax levy. For taxes that are to become effective after January 1, 2003, the provisions of G.S. 105-466(c) apply."

§ 105-467. Scope of sales tax.

(a) Sales Tax. — The sales tax that may be imposed under this Article is limited to a tax at the rate of one percent (1%) of the transactions listed in this subsection. The sales tax authorized by this Article does not apply to sales that are taxable by the State under G.S. 105-164.4 but are not specifically included in this subsection.

(1) The sales price of tangible personal property subject to the general rate of sales tax imposed by the State under G.S. 105-164.4(a)(1) and (a)(4b).

(2) The gross receipts derived from the lease or rental of tangible personal property when the lease or rental of the property is subject to the general rate of sales tax imposed by the State under G.S. 105-164.4(a)(2).

(3) The gross receipts derived from the rental of any room or other accommodations subject to the general rate of sales tax imposed by the State under G.S. 105-164.4(a)(3).

(4) The gross receipts derived from services rendered by laundries, dry cleaners, and other businesses subject to the general rate of sales tax imposed by the State under G.S. 105-164.4(a)(4).

(5) The sales price of food that is not otherwise exempt from tax pursuant to G.S. 105-164.13 but is exempt from the State sales and use tax pursuant to G.S. 105-164.13B.

(6) The sales price of prepaid telephone calling service taxed as tangible personal property under G.S. 105-164.4(a)(4d).

(b) Exemptions and Refunds. — The State exemptions and exclusions contained in G.S. 105-164.13, the State sales and use tax holiday contained in G.S. 105-164.13C, and the State refund provisions contained in G.S. 105-164.14 apply to the local sales and use tax authorized to be levied and imposed under this Article. A taxing county may not allow an exemption, exclusion, or refund that is not allowed under the State sales and use tax.

(c) Sourcing. — The local sales tax authorized to be imposed and levied under this Article applies to taxable transactions by retailers whose place of business is located within the taxing county. The sourcing principles in G.S. 105-164.4B apply in determining whether the local sales tax applies to a transaction. (1971, c. 77, s. 2; 1983 (Reg. Sess., 1984), c. 1097, s. 9; 1987, c. 557, s. 7; c. 832, s. 4; 1989, c. 692, s. 3.7; 1991, c. 689, s. 316; 1996, 2nd Ex. Sess., c. 13, s. 1.3; 1998-98, s. 30.1; 1998-171, s. 9; 2001-347, s. 2.15; 2001-414, s. 29; 2001-424, s. 34.16(b); 2001-430, s. 13; 2001-487, s. 67(e); 2002-16, s. 12; 2002-159, s. 61.)

Effect of Amendments. — Session Laws 2002-16, s. 12, as amended by Session Laws 2002-159, s. 61, effective August 1, 2002, and applicable to taxable services reflected on bills dated after August 1, 2002, substituted "service" for "arrangements" in subsection (a)(6).

§ 105-472. (Effective July 1, 2003) Disposition and distribution of taxes collected.

Effect of Amendments. — Session Laws 2002-72, s. 5, effective August 12, 2002, substituted "105-472" for "105-472(a)" in the introductory language of Session Laws 2001-427, s. 13(a), which amends this section effective July 1, 2003.

ARTICLE 40.

First One-Half Cent (½¢) Local Government Sales and Use Tax.

§ 105-480. Short title.

This Article shall be known as the First One-Half Cent (½¢) Local Government Sales and Use Tax Act. (1983, c. 908, s. 1; 2002-123, s. 8(b).)

Editor's Note. — Session Laws 2002-123, s. 8(a), substituted "First One-Half Cent (½¢)" for "Supplemental" and "Tax" for "Taxes" in the Article 40 head.

Effect of Amendments. — Session Laws 2002-123, s. 8(b), effective September 26, 2002, substituted "First One-Half Cent (½¢) Local Government Sales and Use Tax Act" for "Supplemental Local Government Sales and Use Tax Act."

Article 42.

Second One-Half Cent (½¢) Local Government Sales and Use Tax.

§ 105-495. Short title.

This Article shall be known as the Second One-Half Cent (½¢) Local Government Sales and Use Tax Act. (1985 (Reg. Sess., 1986), c. 906, s. 1; 2002-123, s. 9(b).)

Editor's Note. — Session Laws 2002-123, s. 9(a), substituted "Second One-Half Cent (½¢)" for "Additional Supplemental" and "Tax" for "Taxes" in the Article 42 head.

Effect of Amendments. — Session Laws 2002-123, s. 9(b)4, effective September 26, 2002, substituted "Second One-Half Cent (½¢) Local Government Sales and Use Tax Act" for "Additional Supplemental Local Government Sales and Use Tax Act."

§ 105-501. (Effective until July 1, 2003) Distribution of additional taxes.

The Secretary shall, on a quarterly basis, allocate the net proceeds of the additional one-half percent (½%) sales and use taxes levied under this Article to the taxing counties on a per capita basis according to the most recent annual population estimates certified to the Secretary by the State Budget Officer. The Secretary shall then adjust the amount allocated to each county as provided in G.S. 105-486(b). The amount allocated to each taxing county shall then be divided among the county and the municipalities located in the county in accordance with the method by which the one percent (1%) sales and use taxes levied in that county pursuant to Article 39 of this Chapter or Chapter 1096 of the 1967 Session Laws are distributed. No municipality may receive any funds under this section if it was incorporated with an effective date of on or after January 1, 2000, and is disqualified from receiving funds under G.S. 136-41.2. No municipality may receive any funds under this section, incorporated with an effective date on or after January 1, 2000, unless a majority of the mileage of its streets are open to the public. The previous sentence becomes effective with respect to distribution of funds on or after July 1, 1999.

If any taxes levied under this Article by a county have not been collected in that county for a full quarter because of the levy or repeal of the taxes, the Secretary shall distribute a pro rata share to that county for that quarter based on the number of months the taxes were collected in that county during the quarter.

In determining the net proceeds of the tax to be distributed, the Secretary shall deduct from the collections to be allocated an amount equal to one-fourth of the costs during the preceding fiscal year of:

(1) The Department of Revenue in performing the duties imposed by G.S. 105-275.2 and by Article 15 of this Chapter.

(1a) Seventy percent (70%) of the expenses of the Department of Revenue in performing the duties imposed by Article 2D of this Chapter.

(2) The Property Tax Commission.

(3) The Institute of Government in operating a training program in property tax appraisal and assessment.

(4) The personnel and operations provided by the Department of State Treasurer for the Local Government Commission. (1985 (Reg. Sess., 1986), c. 906, s. 1; 1987, c. 832, s. 8; 1987 (Reg. Sess., 1988), c. 1082, s. 4; 1995, c. 41, s. 4; c. 370, s. 1; 1999-458, s. 9; 2002-126, s. 30D(a).)

Section Set Out Twice. — The section above is in effect until July 1, 2003. For this section as effective July 1, 2003, see the following section, also numbered G.S. 105-501.

Editor's Note. —

Section 105-275.2, referred to in subdivision (1), was repealed effective July 1, 2002.

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, s. 30D(a), effective June 30, 2002, added subdivision (1a).

§ 105-501. (Effective July 1, 2003) Distribution of additional taxes.

The Secretary shall, on a monthly basis, allocate the net proceeds of the additional one-half percent (½%) sales and use taxes levied under this Article to the taxing counties on a per capita basis according to the most recent annual population estimates certified to the Secretary by the State Budget Officer. The Secretary shall then adjust the amount allocated to each county as provided in G.S. 105-486(b). The amount allocated to each taxing county shall then be divided among the county and the municipalities located in the county in accordance with the method by which the one percent (1%) sales and use taxes levied in that county pursuant to Article 39 of this Chapter or Chapter 1096 of the 1967 Session Laws are distributed. No municipality may receive any funds under this section if it was incorporated with an effective date of on or after January 1, 2000, and is disqualified from receiving funds under G.S. 136-41.2. No municipality may receive any funds under this section, incorporated with an effective date on or after January 1, 2000, unless a majority of the mileage of its streets are open to the public. The previous sentence becomes effective with respect to distribution of funds on or after July 1, 1999.

In determining the net proceeds of the tax to be distributed, the Secretary shall deduct from the collections to be allocated an amount equal to one-twelfth of the costs during the preceding fiscal year of:

(1) The Department of Revenue in performing the duties imposed by G.S. 105-275.2 and by Article 15 of this Chapter.

(1a) Seventy percent (70%) of the expenses of the Department of Revenue in performing the duties imposed by Article 2D of this Chapter.

(2) The Property Tax Commission.

(3) The Institute of Government in operating a training program in property tax appraisal and assessment.

(4) The personnel and operations provided by the Department of State Treasurer for the Local Government Commission. (1985 (Reg. Sess., 1986), c. 906, s. 1; 1987, c. 832, s. 8; 1987 (Reg. Sess., 1988), c. 1082, s. 4; 1995, c. 41, s. 4; c. 370, s. 1; 1999-458, s. 9; 2001-427, s. 13(d); 2002-126, s. 30D(a).)

Section Set Out Twice. — The section above is effective July 1, 2003. For this section as in effect until July 1, 2003, see the preceding session, also numbered G.S. 105-501.

Editor's Note. — Section 105-275.2, referred to in subdivision (1), was repealed effective July 1, 2002.

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, s. 30D(a), effective June 30, 2002, added subdivision (1a).

Article 44.

Third One-Half Cent (½¢) Local Government Sales and Use Tax.

§ 105-515. Short title.

Editor's Note. — Session Laws 2001-424, s. 34.14(b), as amended by Session Laws 2002-123, s. 3, provides: "Notwithstanding the provisions of G.S. 105-466(c), a tax levied under Article 44 of Chapter 105 of the General Statutes, as enacted by this act, may become effective on December 1,2002. Notwithstanding the provisions of G.S. 105-466(c), if a county levies a tax under Article 44 of Chapter 105 of the General Statutes, as enacted by this act, that is to become effective on or before January 1, 2003, the county is required to give the Secretary of Revenue only 30 days' advance notice of the tax levy. For taxes that are to become effective after January 1, 2003, the provisions of G.S. 105-466(c) apply."

Session Laws 2002-123, ss. 4 to 6, provide: "4. To the extent the Department of Revenue's nonrecurring costs of implementing and administering Article 44 of Chapter 105 of the General Statutes, as amended, exceed funds available in its budget for the 2002-2003 fiscal year, the Department may pay the excess cost by withholding up to two hundred seventy-five thousand dollars ($275,000) from collections under Subchapter VIII of Chapter 105 of the General Statutes.

"5. The Department of Revenue may contract for supplies, materials, equipment, and contractual services related to the provision of notice, the creation of tax forms and instructions, and the development of computer software necessitated by the amendments in this act without being subject to the requirements of Article 3 or Article 8 of Chapter 143 of the General Statutes.

"6. Notwithstanding any other provision of law, a retailer is not liable for the additional one-half percent (½%) tax levied by counties effective December 1, 2002, that it fails to collect from purchasers due to an inadvertent error during the month of December 2002, if the retailer can demonstrate to the Secretary the reason for the inadvertent error. An example of an inadvertent error is a delay in reprogramming point-of-sale equipment."

§ 105-517. Levy.

(a) After Vote. — If a majority of those voting in a special election held pursuant to this Article vote for the levy of the taxes in a county, the board of commissioners of a county may, by resolution, levy one-half percent (½%) local sales and use taxes in addition to any other State and local sales and use taxes levied pursuant to law.

(b) Without Vote. — If the question of whether to levy taxes under this Article has not been defeated in a special election held in the county within two years, the board of commissioners of a county may, by resolution, levy one-half percent (½%) local sales and use taxes in addition to any other State and local sales and use taxes levied pursuant to law. Before adopting a resolution under this subsection, the board of commissioners must give at least 10 days' public notice of its intent to adopt the resolution and must hold a public hearing on the issue of adopting the resolution.

(c) Effective Date. — A tax levied under this Article may not become effective before December 1, 2002. (2001-424, s. 34.14(a); 2002-123, s. 1.)

Editor's Note. — Session Laws 2002-123, s. 10, provides: "Notwithstanding the provisions of G.S. 105-517(b), a county may levy a tax by resolution that becomes effective on or before January 1, 2003, under Article 44 of Chapter 105 of the General Statutes by giving at least 48 hours notice of its intent to adopt the resolution, as provided under G.S. 143-318.12(b)(2)."

Effect of Amendments. — Session Laws 2002-123, s. 1, effective September 26, 2002, substituted "December 1, 2002" for "July 1, 2003" in subsection (c).

§ 105-518. County election on adoption of tax.

(a) Resolution. — The board of commissioners of a county may direct the county board of elections to conduct a special election on the question of whether to levy local one-half percent (½%) sales and use taxes in the county as provided in this Article. The election must be held on a date jointly agreed upon by the two boards and must be held in accordance with the procedures of G.S. 163-287.

(b) Ballot Question. — The question to be presented on a ballot for a special election concerning the levy of the taxes authorized by this Article must be in the following form:

[ ] FOR [ ] AGAINST
one-half percent (½%) local sales and use taxes, in addition to all current State and local sales and use taxes.

(2001-424, s. 34.14(a); 2002-123, s. 2.)

Effect of Amendments. — Session Laws 2002-123, s. 2, effective September 26, 2002, substituted "in addition to all current State and local sales and use taxes" for "to replace the current one-half percent (½%) State sales and use taxes that end July 1, 2003" in subsection (b).

§ 105-521. Transitional local government hold harmless.

Editor's Note. — Sections 105-164.44C, 105-275.1, 105-275.2, 105-277.001, and 105-277.1A, referred to in subdivision (a)(3), were repealed effective July 1, 2002.

SUBCHAPTER IX. MULTICOUNTY TAXES.

ARTICLE 50.

Regional Transit Authority Vehicle Rental Tax.

§ 105-551. Tax on gross receipts authorized.

OPINIONS OF ATTORNEY GENERAL

Board of County Commissioners has no authority to amend request to levy the five percent tax on rental vehicles. — In pursuance of implementing a tax under the statute, the Board of County Commissioners does not have authority to add provisions or amend in any way the request that may come to them from a regional transportation authority to levy the five percent tax on rental vehicles. See opinion of Attorney General to Commissioner Trudy Wade, Guilford Board of County Commissioners, 2002 N.C. AG LEXIS 9 (1/17/02).

Chapter 105A.

Setoff Debt Collection Act.

Article 1.

In General.

§ 105A-2. Definitions.

The following definitions apply in this Chapter:

(1) Claimant agency. — Either of the following:
  a. A State agency.
  b. A local agency acting through a clearinghouse or an organization pursuant to G.S. 105A-3(b1).

(2) Debt. — Any of the following:
  a. A sum owed to a claimant agency that has accrued through contract, subrogation, tort, operation of law, or any other legal theory regardless of whether there is an outstanding judgment for the sum.
  b. A sum a claimant agency is authorized or required by law to collect, such as child support payments collectible under Title IV, Part D of the Social Security Act.
  c. A sum owed as a result of an intentional program violation or a violation due to inadvertent household error under the Food Stamp Program enabled by Chapter 108A, Article 2, Part 5.
  d. Reserved for future codification purposes.
  e. A sum owed as a result of having obtained public assistance payments under any of the following programs through an intentional false statement, intentional misrepresentation, intentional failure to disclose a material fact, or inadvertent household error:
    1. The Work First Program provided in Article 2 of Chapter 108A of the General Statutes.
    2. The State-County Special Assistance for Adults Program enabled by Part 3 of Article 2 of Chapter 108A of the General Statutes.
    3. A successor program of one of these programs.

(3) Debtor. — An individual who owes a debt.

(4) Department. — The Department of Revenue.

(5) Reserved.

(6) Local agency. — A county, to the extent it is not considered a State agency, or a municipality.

(7) Net proceeds collected. — Gross proceeds collected through setoff against a debtor's refund minus the collection assistance fees provided in G.S. 105A-13.

(8) Refund. — An individual's North Carolina income tax refund.

(9) State agency. — Any of the following:

a. A unit of the executive, legislative, or judicial branch of State government.

b. A county, to the extent it administers a program supervised by the Department of Health and Human Services or it operates a Child Support Enforcement Program, enabled by Chapter 110, Article 9, and Title IV, Part D of the Social Security Act. (1979, c. 801, s. 94; 1981, c. 724; 1983, c. 922, s. 21.11; 1983 (Reg. Sess., 1984), c. 1034, s. 10.2; 1985, c. 589, s. 33; c. 649, s. 6; c. 747; 1985 (Reg. Sess., 1986), c. 1014, s. 63(e), (f); 1987, c. 564, s. 18; c. 578, ss. 1, 2; c. 856, s. 12; 1989, c. 141, s. 2; c. 539, s. 1; c. 699; c. 727, s. 30; c. 770, s. 75.2; 1993 (Reg. Sess., 1994), c. 735, s. 1; 1995, c. 227, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 24.30(d); 1997-433, ss. 3.3, 11.3; 1997-443, ss. 11A.118(a), 11A.119(a), 11A.122, 12.26; 1997-490, s. 1; 1998-17, s. 1; 1998-98, s. 38(a); 2002-156, s. 5(a).)

Effect of Amendments. — Session Laws 2002-156, s. 5(a), effective January 1, 2003, substituted "fees provided in G.S. 105A-13" for "fee retained by the Department" in subdivision (7).

§ 105A-5. Local agency notice, hearing, and decision.

(a) Prerequisite. — A local agency may not submit a debt for collection under this Chapter until it has given the notice required by this section and the claim has been finally determined as provided in this section.

(b) Notice. — A local agency must send written notice to a debtor that the agency intends to submit the debt owed by the debtor for collection by setoff. The notice must explain the basis for the agency's claim to the debt, that the agency intends to apply the debtor's refund against the debt, and that a collection assistance fee of fifteen dollars ($15.00) will be added to the debt if it is submitted for setoff. The notice must also inform the debtor that the debtor has the right to contest the matter by filing a request for a hearing with the local agency, must state the time limits and procedure for requesting the hearing, and must state that failure to request a hearing within the required time will result in setoff of the debt.

(c) Administrative Review. — A debtor who decides to contest a proposed setoff must file a written request for a hearing with the local agency within 30 days after the date the local agency mails a notice of the proposed action to the debtor. A request for a hearing is considered to be filed when it is delivered for mailing with postage prepaid and properly addressed. The governing body of the local agency or a person designated by the governing body must hold the hearing.

If the debtor disagrees with the decision of the governing body or the person designated by the governing body, the debtor may file a petition for a contested case under Article 3 of Chapter 150B of the General Statutes. The petition must be filed within 30 days after the debtor receives a copy of the local decision. Notwithstanding the provisions of G.S. 150B-2, a local agency is considered an agency for purposes of contested cases and appeals under this Chapter.

In a hearing under this section, an issue that has previously been litigated in a court proceeding cannot be considered.

(d) Decision. — A decision made after a hearing under this section must determine whether a debt is owed to the local agency and the amount of the debt.

(e) Return of Amount Set Off. — If a local agency submits a debt for collection under this Chapter without sending the notice required by subsection (b) of this section, the agency must send the taxpayer the entire amount set off plus the collection assistance fees provided in G.S. 105A-13. Similarly, if a local agency submits a debt for collection under this Chapter after sending

the required notice but before final determination of the debt and a decision finds that the local agency is not entitled to any part of the amount set off, the agency must send the taxpayer the entire amount set off plus the collection assistance fees provided in G.S. 105A-13. That portion of the amount returned that reflects the collection assistance fees must be paid from the local agency's funds.

If a local agency submits a debt for collection under this Chapter after sending the required notice and the net proceeds collected that are credited to the local agency for the debt exceed the amount of the debt, the local agency must send the balance to the debtor. No part of the collection assistance fees provided in G.S. 105A-13 may be returned when a notice was sent and a debt is owed but the debt is less than the amount set off.

Interest accrues on the amount of a refund returned to a taxpayer under this subsection in accordance with G.S. 105-266. A local agency that returns a refund to a taxpayer under this subsection must pay from the local agency's funds any interest that has accrued since the fifth day after the Department mailed the notice of setoff to the taxpayer. (1979, c. 801, s. 94; 1997-490, s. 1; 2002-156, s. 5(b).)

Effect of Amendments. — Session Laws 2002-156, s. 5(b), effective January 1, 2003, rewrote the second sentence in subsection (b); and in subsection (e), substituted "assistance fees provided in G.S. 105A-13" for "assistance fee retained by the Department" three times, and substituted "fees" for "fee" near the end of the first paragraph.

§ 105A-13. Collection assistance fees.

(a) State Setoff. — To recover the costs incurred by the Department in collecting debts under this Chapter, a collection assistance fee of no more than fifteen dollars ($15.00) is imposed on each debt collected through setoff. The Department must collect this fee as part of the debt and retain it. The Department must set the amount of the collection assistance fee based on its actual cost of collection under this Chapter for the immediately preceding year. The collection assistance fee shall not be added to child support debts or collected as part of child support debts. Instead, the Department shall retain from collections under Division II of Article 4 of Chapter 105 of the General Statutes the cost of collecting child support debts under this Chapter.

(b) Repealed by Session Laws 2001-380, s. 3, effective November 1, 2001.

(c) Local Debts. — To recover the costs incurred by local agencies in submitting debts for collection under this Chapter, a local collection assistance fee of fifteen dollars ($15.00) is imposed on each local agency debt submitted under G.S. 105A-3(b1) and collected through setoff. The Department must collect this fee as part of the debt and remit it to the clearinghouse that submitted the debt. The local collection assistance fee does not apply to child support debts.

(d) Priority. — If the Department is able to collect only part of a debt through setoff, the collection assistance fee provided in subsection (a) of this section has priority over the local collection assistance fee and over the remainder of the debt. The local collection assistance fee has priority over the remainder of the debt. (1979, c. 801, s. 94; 1989 (Reg. Sess., 1990), c. 946, s. 3; 1995, c. 360, s. 4(a); 1997-490, s. 1; 2000-126, s. 6; 2001-380, s. 3; 2002-156, s. 5(c).)

Effect of Amendments. —

Session Laws 2002-156, s. 5(c), effective January 1, 2003, deleted the former fourth sentence of subsection (a), which read: "If the Department is able to collect only part of a debt through setoff, the collection assistance fee has priority over the remainder of the debt"; and added subsections (c) and (d).

Chapter 106.

Agriculture.

Article 1.

Department of Agriculture and Consumer Services.

Part 5. Cooperation Between Department and United States Department of Agriculture, and County Commissioners.

§ 106-24.1. Confidentiality of information collected and published.

All information published by the Department of Agriculture and Consumer Services pursuant to this Part shall be classified so as to prevent the identification of information received from individual farm operators. All information received pursuant to this Part from individual farm operators shall be held confidential by the Department and its employees. Information collected by the Department from individual farm operators for the purposes of its animal health programs may be disclosed by the State Veterinarian when, in his judgment, the disclosure will assist in the implementation of these programs. Animal disease diagnostic tests that identify the owner of the animal shall not be disclosed without the permission of the owner unless the State Veterinarian determines that disclosure is necessary to prevent the spread of an animal disease or to protect the public health. (1979, c. 228, s. 3; 1993, c. 5, s. 1; 1997-261, s. 26; 2002-179, s. 8.)

Effect of Amendments. — Session Laws 2002-179, s. 8, effective October 1, 2002, added the last sentence.

Article 4C.

Structural Pest Control Act.

§ 106-65.26. Qualifications for certified applicator and licensee; applicants for certified applicator's identification card and license.

(a) An applicant for a certified applicator's identification card or license must present satisfactory evidence to the Committee concerning his qualifications for such card or license.

(b) Certified Applicator. — Each applicant for a certified applicator's identification card must demonstrate that he possesses a practical knowledge of the pest problems and pest control practices associated with the phase or phases of structural pest control for which he is seeking certification.

(c) Licensee. — The basic qualifications for a license shall be:

(1) Qualify as a certified applicator for the phase or phases of structural pest control for which he is making application; and

(2) Two years as an employee or owner-operator in the field of structural pest control, control of wood-destroying organisms or fumigation, for which license is applied; or

(3) One or more years' training in specialized pest control, control of wood-destroying organisms or fumigation under university or college supervision may be substituted for practical experience. Each year of such training may be substituted for one year of practical experience; provided, however, if applicant has had less than 12 months' practical experience, the Committee is authorized to determine whether said applicant has had sufficient experience to take the examination; or

(4) A degree from a recognized college or university with training in entomology, sanitary or public health engineering, or related subjects; provided, however, if applicant has had less than 12 months' practical experience, the Committee is authorized to determine whether said applicant has had sufficient experience to take the examination.

(d) All applicants for license must have practical experience and knowledge of practical and scientific facts underlying the practice of structural pest control, control of wood-destroying organisms, or fumigation. No applicant is entitled to take an examination for the issuance of a license pursuant to this Article who has within five years of the date of application been convicted, entered a plea of guilty or of nolo contendre, or forfeited bond in any State or federal court for a violation of G.S. 106-65.25(b), any felony, or any crime involving moral turpitude.

(e) The Department of Justice may provide a criminal record check to the Committee for a person who has applied for a new or renewal license through the Committee. The Committee shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Committee shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection. (1955, c. 1017; 1967, c. 1184, s. 5; 1973, c. 556, s. 4; 1975, c. 570, s. 6; 1999-381, s. 4; 2002-147, s. 13.)

Editor's Note. — Session Laws 2002-147, s. 15, provides: "If the Private Security Officer Employment Standards Act of 2002 [S. 2238, 107th Cong. (2002)] is enacted by the United States Congress, the State of North Carolina declines to participate in the background check system authorized by that act as a result of the enactment of this act."

Effect of Amendments. — Session Laws 2002-147, s. 13, effective October 9, 2002, added subsection (e).

Article 34.

Animal Diseases.

Part 1. Quarantine and Miscellaneous Provisions.

§ 106-307.2. Reports of infectious disease in livestock and poultry to State Veterinarian.

(a) All persons practicing veterinary medicine in North Carolina shall report promptly to the State Veterinarian the existence of any reportable contagious or infectious disease in livestock and poultry. The Board of Agriculture shall establish by rule a list of animal diseases and conditions to be reported and the time and manner of reporting.

(b) The State Veterinarian shall notify the State Health Director and the Director of the Division of Environmental Health in the Department of Environment and Natural Resources when the State Veterinarian receives a report indicating an occurrence or potential outbreak of anthrax, arboviral infections, brucellosis, epidemic typhus, hantavirus infections, murine typhus, plague, psittacosis, Q fever, hemorrhagic fever, virus infections, and any other disease or condition transmissible to humans that the State Veterinarian determines may have been caused by a terrorist act. (1943, c. 640, s. 2; 1969, c. 606, s. 1; 2002-179, s. 9.)

Effect of Amendments. — Session Laws 2002-179, s. 9, effective October 1, 2002, rewrote the section.

Article 45.

Agricultural Societies and Fairs.

Part 1. State Fair.

§ 106-503. Board of Agriculture to operate fair.

OPINIONS OF ATTORNEY GENERAL

The Department of Agriculture and Consumer Services Has Authority to Operate and Manage the North Carolina State Fair. — The Department of Agriculture and Consumer Services, rather than the Board of Agriculture, has the authority to select the midway operator, execute contracts and operate and manage the North Carolina State Fair.

See opinion of Attorney General to The Honorable Eric Miller Reeves, The North Carolina General Assembly, and The Honorable Alice Graham Underhill, The North Carolina General Assembly, 2002 N.C. AG LEXIS 6 (1/24/02).

§ 106-503.1. Board authorized to construct and finance facilities and improvements for fair.

OPINIONS OF ATTORNEY GENERAL

The Department of Agriculture and Consumer Services Has Authority to Operate and Manage the North Carolina State Fair. — The Department of Agriculture and Consumer Services, rather than the Board of Agriculture, has the authority to select the midway operator, execute contracts and operate and manage the North Carolina State Fair. See opinion of Attorney General to The Honorable Eric Miller Reeves, The North Carolina General Assembly, and The Honorable Alice Graham Underhill, The North Carolina General Assembly, 2002 N.C. AG LEXIS 6 (1/24/02).

Article 61.

Preservation of Farmland.

§ 106-744. Purchase of agricultural conservation easements.

Editor's Note. —

Session Laws 2002-126, s. 11.6, provides: "Notwithstanding the provisions of G.S. 106-744(b), funds appropriated in this act to the Department of Agriculture and Consumer Services for the Farmland Preservation Trust Fund for the 2002-2003 fiscal year shall be used for the purchase of agricultural conservation easements that are perpetual in duration and that shall not be reconveyed under any circumstances."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Article 67.

Swine Farms.

§ 106-800. Title.

CASE NOTES

Construction with Local Laws. —

Swine Farm Siting Act indicated the general assembly's intent to establish a comprehensive state-wide system for regulating swine farms, so there was no room for a county's attempt to do the same. Craig v. County of Chatham, 356 N.C. 40, 565 S.E.2d 172, 2002 N.C. LEXIS 539 (2002).

§ 106-801. Purpose.

CASE NOTES

Statutory Intent. — Swine Farm Siting Act's statement of purpose indicated the general assembly's intent to establish a comprehensive state-wide system for regulating swine farms, so there was no room for a county's attempt to do the same. Craig v. County of Chatham, 356 N.C. 40, 565 S.E.2d 172, 2002 N.C. LEXIS 539 (2002).

§ 106-802. Definitions.

CASE NOTES

Cited in Craig v. County of Chatham, 356 N.C. 40, 565 S.E.2d 172, 2002 N.C. LEXIS 539 (2002).

§ 106-803. Siting requirements for swine houses, lagoons, and land areas onto which waste is applied at swine farms.

CASE NOTES

Applied in Craig v. County of Chatham, 356 N.C. 40, 565 S.E.2d 172, 2002 N.C. LEXIS 539 (2002).

§ 106-804. Enforcement.

CASE NOTES

Applied in Craig v. County of Chatham, 356 N.C. 40, 565 S.E.2d 172, 2002 N.C. LEXIS 539 (2002).

§ 106-805. Written notice of swine farms.

CASE NOTES

Applied in Craig v. County of Chatham, 356 N.C. 40, 565 S.E.2d 172, 2002 N.C. LEXIS 539 (2002).

Chapter 108A.

Social Services.

Article 2.

Programs of Public Assistance.

Part 2. Work First Program.

§ 108A-27.11. Work First Program funding.

(a) County block grants, except funds for Work First Family Assistance, shall be computed based on the percentage of each county's total AFDC (including AFDC-EA) and JOBS expenditures, except expenditures for cash assistance, to statewide actual expenditures for those programs in fiscal year 1995-96. The resulting percentage shall be applied to the State's total certified budget enacted by the General Assembly for each fiscal year, except for State funds budgeted for State and county demonstration projects authorized by the General Assembly and for Work First Family Assistance payments.

(b) The following shall apply to funding for Standard Program Counties:

(1) The Department shall make payments of Work First Family Assistance and Work First Diversion Assistance subject to the availability of federal, State, and county funds.

(2) The Department shall reimburse counties for county expenditures under the Work First Program subject to the availability of federal, State, and county funds.

(c) Each Electing County's allocation for Work First Family Assistance shall be computed based on the percentage of each Electing County's total expenditures for cash assistance to statewide actual expenditures for cash assistance in 1995-96. The resulting percentage shall be applied to the federal TANF block grant funds appropriated for cash assistance by the General Assembly each fiscal year. The Department shall transmit the federal funds contained in the county block grants to Electing Counties as soon as practicable after they become available to the State and in accordance with federal cash management laws and regulations. The Department shall transmit one-fourth of the State funds contained in county block grants to Electing Counties at the beginning of each quarter. (1997-443, s. 12.6; 1998-212, s. 12.27A(i); 1999-359, s. 3; 2002-126, s. 10.37.)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 10.37, effective July 1, 2002, deleted the last sentence of subsection (c), which read: "Once paid, the county block grant funds shall not revert."

Part 6. Medical Assistance Program.

§ 108A-54. Authorization of Medical Assistance Program.

CASE NOTES

Cited in Strawser v. Atkins, 290 F.3d 720, 2002 U.S. App. LEXIS 9648 (4th Cir. 2002).

§ 108A-57. Subrogation rights; withholding of information a misdemeanor.

CASE NOTES

Cited in Strawser v. Atkins, 290 F.3d 720, 2002 U.S. App. LEXIS 9648 (4th Cir. 2002).

§ 108A-59. Acceptance of medical assistance constitutes assignment to the State of right to third party benefits; recovery procedure.

CASE NOTES

Cited in Strawser v. Atkins, 290 F.3d 720, 2002 U.S. App. LEXIS 9648 (4th Cir. 2002).

§ 108A-70.5. Medicaid Estate Recovery Plan.

(a) There is established in the Department of Health and Human Services, the Medicaid Estate Recovery Plan, as required by the Omnibus Budget Reconciliation Act of 1993, to recover from the estates of recipients of medical assistance an equitable amount of the State and federal shares of the cost paid the recipient. The Department shall administer the program in accordance with applicable federal law and regulations, including those under Title XIX of the Social Security Act, 42 U.S.C. § 1396(p).

(b) As used in this section:

(1) "Medical assistance" means medical care services paid for by the North Carolina Medicaid Program on behalf of the recipient:

a. If the recipient is receiving these medical care services as an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, and cannot reasonably be expected to be discharged to return home; or

b. If the recipient is 55 years of age or older and is receiving these medical care services, including related hospital care and prescription drugs, for nursing facility services, personal care services, or home- and community-based services.

(2) "Estate" means all the real and personal property considered assets of the estate available for the discharge of debt pursuant to G.S. 28A-15-1.

(c) The amount the Department recovers from the estate of any recipient shall not exceed the amount of medical assistance made on behalf of the recipient and shall be recoverable only for medical care services prescribed in subsection (b) of this section. The Department is a fifth-class creditor, as prescribed in G.S. 28A-19-6, for purposes of determining the order of claims against an estate; provided, however, that judgments in favor of other fifth-class creditors docketed and in force before the Department seeks recovery for medical assistance shall be paid prior to recovery by the Department.

(d) The Department of Health and Human Services shall adopt rules pursuant to Chapter 150B of the General Statutes to implement the Plan, including rules to waive whole or partial recovery when this recovery would be inequitable because it would work an undue hardship or because it would not be administratively cost-effective and rules to ensure that all recipients are notified that their estates are subject to recovery at the time they become eligible to receive medical assistance.

(e) Regarding trusts that contain the assets of an individual who is disabled as defined in Title 19 of Section 1014(a)(3) of the Social Security Act, as amended, if the trust is established and managed by a nonprofit association, to the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the nonprofit association, the trust pays to the Department from these remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the North Carolina Medicaid Program. (1993 (Reg. Sess., 1994), c. 769, s. 25.47(a); 1997-443, s. 11A.118(a); 2002-126, s. 10.11(b).)

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 10.11(b), effective not earlier than January 1, 2003, inserted "personal care services" in subdivision (b)(1)b.

Part 8. Health Insurance Program for Children.

§ 108A-70.21. Program eligibility; benefits; enrollment fee and other cost-sharing; coverage from private plans; purchase of extended coverage.

(a) Eligibility. — The Department may enroll eligible children based on availability of funds. Following are eligibility and other requirements for participation in the Program:

(1) Children must:

a. Be under the age of 19;

b. Be ineligible for Medicaid, Medicare, or other federal government-sponsored health insurance;

c. Be uninsured;

d. Be in a family that meets the following family income requirements:

1. Infants under the age of one year whose family income is from one hundred eighty-five percent (185%) through two hundred percent (200%) of the federal poverty level;

2. Children age one year through five years whose family income is above one hundred thirty-three percent (133%) through two hundred percent (200%) of the federal poverty level; and

3. Children age six years through eighteen years whose family income is above one hundred percent (100%) through two hundred percent (200%) of the federal poverty level;

e. Be a resident of this State and eligible under federal law; and

f. Have paid the Program enrollment fee required under this Part.

(2) Proof of family income and residency and declaration of uninsured status shall be provided by the applicant at the time of application for Program coverage. The family member who is legally responsible for the children enrolled in the Program has a duty to report any change in the enrollee's status within 60 days of the change of status.

(3) If a responsible parent is under a court order to provide or maintain health insurance for a child and has failed to comply with the court order, then the child is deemed uninsured for purposes of determining eligibility for Program benefits if at the time of application the custodial parent shows proof of agreement to notify and cooperate with the child support enforcement agency in enforcing the order.

If health insurance other than under the Program is provided to the child after enrollment and prior to the expiration of the eligibility period for which the child is enrolled in the Program, then the child is deemed to be insured and ineligible for continued coverage under the Program. The custodial parent has a duty to notify the Department within 10 days of receipt of the other health insurance, and the Department, upon receipt of notice, shall disenroll the child from the Program. As used in this paragraph, the term "responsible parent" means a person who is under a court order to pay child support.

(4) Except as otherwise provided in this section, enrollment shall be continuous for one year. At the end of each year, applicants may reapply for Program benefits.

(b) Benefits. — Except as otherwise provided for eligibility, fees, deductibles, copayments, and other cost-sharing charges, health benefits coverage provided to children eligible under the Program shall be equivalent to coverage provided for dependents under the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan, including optional prepaid plans. Prescription drug providers shall accept as payment in full, for outpatient prescriptions filled, ninety percent (90%) of the average wholesale price for the prescription drug or the amounts published by the Centers for Medicare and Medicaid Services plus a dispensing fee of five dollars and sixty cents ($5.60) per prescription for generic drugs and four dollars ($4.00) per prescription for brand name drugs. All other health care providers providing services to Program enrollees shall accept as payment in full for services rendered the maximum allowable charges under the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan for services less any copayments assessed to enrollees under this Part. No child enrolled in the Plan's self-insured indemnity program shall be required by the Plan to change health care providers as a result of being enrolled in the Program.

In addition to the benefits provided under the Plan, the following services and supplies are covered under the Health Insurance Program for Children established under this Part:

(1) Dental: Oral examinations, teeth cleaning, and scaling twice during a 12-month period, full mouth X rays once every 60 months, supplemental bitewing X rays showing the back of the teeth once during a 12-month period, fluoride applications twice during a 12-month period, sealants, simple extractions, therapeutic pulpotomies, prefabricated stainless steel crowns, and routine fillings of amalgam or other tooth-colored filling material to restore diseased teeth. No benefits are to be provided for services under this subsection that are not per-

formed by or upon the direction of a dentist, doctor, or other professional provider approved by the Plan nor for services and materials that do not meet the standards accepted by the American Dental Association.

(2) Vision: Scheduled routine eye examinations once every 12 months, eyeglass lenses or contact lenses once every 12 months, routine replacement of eyeglass frames once every 24 months, and optical supplies and solutions when needed. Optical services, supplies, and solutions must be obtained from licensed or certified opthamologists, optometrists, or optical dispensing laboratories. Eyeglass lenses are limited to single vision, bifocal, trifocal, or other complex lenses necessary for a Plan enrollee's visual welfare. Coverage for oversized lenses and frames, designer frames, photosensitive lenses, tinted contact lenses, blended lenses, progressive multifocal lenses, coated lenses, and laminated lenses is limited to the coverage for single vision, bifocal, trifocal, or other complex lenses provided by this subsection. Eyeglass frames are limited to those made of zylonite, metal, or a combination of zylonite and metal. All visual aids covered by this subsection require prior approval of the Plan. Upon prior approval by the Plan, refractions may be covered more often than once every 12 months.

(3) Hearing: Auditory diagnostic testing services and hearing aids and accessories when provided by a licensed or certified audiologist, otolaryngologist, or other hearing aid specialist approved by the Plan. Prior approval of the Plan is required for hearing aids, accessories, earmolds, repairs, loaners, and rental aids.

(c) Annual Enrollment Fee. — There shall be no enrollment fee for Program coverage for enrollees whose family income is at or below one hundred fifty percent (150%) of the federal poverty level. The enrollment fee for Program coverage for enrollees whose family income is above one hundred fifty percent (150%) of the federal poverty level shall be fifty dollars ($50.00) per year per child with a maximum annual enrollment fee of one hundred dollars ($100.00) for two or more children. The enrollment fee shall be collected by the county department of social services and retained to cover the cost of determining eligibility for services under the Program. County departments of social services shall establish procedures for the collection of enrollment fees.

(d) Cost-Sharing. — There shall be no deductibles, copayments, or other cost-sharing charges for families covered under the Program whose family income is at or below one hundred fifty percent (150%) of the federal poverty level. Families covered under the Program whose family income is above one hundred fifty percent (150%) of the federal poverty level shall be responsible for copayments to providers as follows:

(1) Five dollars ($5.00) per child for each visit to a provider, except that there shall be no copayment required for well-baby, well-child, or age-appropriate immunization services;

(2) Five dollars ($5.00) per child for each outpatient hospital visit;

(3) A six-dollar ($6.00) fee for each outpatient prescription drug purchased;

(4) Twenty dollars ($20.00) for each emergency room visit unless:

a. The child is admitted to the hospital, or

b. No other reasonable care was available as determined by the Claims Processing Contractor of the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan.

Copayments required under this subsection for prescription drugs apply only to prescription drugs prescribed on an outpatient basis.

(e) Cost-Sharing Limitations. — The total annual aggregate cost-sharing, including fees, with respect to all children in a family receiving Program benefits under this Part shall not exceed five percent (5%) of the family's

income for the year involved. To assist the Department in monitoring and ensuring that the limitations of this subsection are not exceeded, the Executive Administrator and Board of Trustees of the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan shall provide data to the Department showing cost-sharing paid by Program enrollees.

(f) Coverage From Private Plans. — The Department shall, from funds available for the Program, pay the cost for dependent coverage provided under a private insurance plan for persons eligible for coverage under the Program if all of the following conditions are met:

(1) The person eligible for Program coverage requests to obtain dependent coverage from a private insurer in lieu of coverage under the Program and shows proof that coverage under the private plan selected meets the requirements of this subsection;

(2) The dependent coverage under the private plan is actuarially equivalent to the coverage provided under the Program and the private plan does not engage in the exclusive enrollment of children with favorable health care risks;

(3) The cost of dependent coverage under the private plan is the same as or less than the cost of coverage under the Program; and

(4) The total annual aggregate cost-sharing, including fees, paid by the enrollee under the private plan for all dependents covered by the plan, do not exceed five percent (5%) of the enrollee's family income for the year involved.

The Department may reimburse an enrollee for private coverage under this subsection upon a showing of proof that the dependent coverage is in effect for the period for which the enrollee is eligible for the Program.

(g) Purchase of Extended Coverage. — An enrollee in the Program who loses eligibility due to an increase in family income above two hundred percent (200%) of the federal poverty level and up to and including two hundred twenty-five percent (225%) of the federal poverty level may purchase at full premium cost continued coverage under the Program for a period not to exceed one year beginning on the date the enrollee becomes ineligible under the income requirements for the Program. The same benefits, copayments, and other conditions of enrollment under the Program shall apply to extended coverage purchased under this subsection.

(h) No State Funds for Voluntary Participation. — No State or federal funds shall be used to cover, subsidize, or otherwise offset the cost of coverage obtained under subsection (g) of this section. (1998-1, s. 1; 1999-237, s. 11.9; 2002-126, s. 10.20(a).)

Editor's Note. — Session Laws 2002-100, s. 1, effective August 29, 2002, provides: "The Department of Health and Human Services shall manage NC Health Choice program enrollment. In the current State fiscal year, one-time matching funds not to exceed five million dollars ($5,000,000) may be transferred to support State fiscal year 2002-2003 program expenditures that are attributable to excess program enrollment."

Session Laws 2002-126, s. 10.20(b), provides: "The dispensing fee for prescription drugs required under G.S. 108A-70.21(b), as enacted by this section, shall become effective not later than January 1, 2003."

Session Laws 2002-126, s. 10.20(c), provides: "It is the intent of the General Assembly to consider the recommendations of the Institute of Medicine study in determining whether Medicaid rates or some other rates should apply to Program services."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 10.20(a), effective July 1, 2002, in the second sentence of subsection (b), substituted "Centers for Medicare and Medicaid Services plus dispensing fee of five dollars and sixty cents ($5.60) per prescription for generic drugs and four dollars ($4.00) per prescription for brand name drugs" for "Health Care Financing Administration plus a fee established by the provider not to exceed the amount authorized under subdivision (d)(3) of this section."

§ 108A-70.23. Services for children with special needs established; definition; eligibility; services; limitation; recommendations; no entitlement.

Editor's Note. —

Session Laws 2002-126, s. 6.13, effective July 1, 2002, provides: "Whereas, Representative Ruth M. Easterling has served as an advocate for the children of the State for over 25 years as a member of the General Assembly, there is established the 'Ruth M. Easterling Trust Fund for Children With Special Needs.' The purpose of the Trust Fund is to fund services for children with special needs that are not currently provided with State funds. The Trust Fund shall be used to:

"(1) Provide respite services for adoptive children, for children in foster care, and for other children with special needs at risk of out-of-home placement.

"(2) Pay for special services to, and special equipment for, children with special needs when there is no other source for payment, including, but not limited to, surgical repair of congenital anomalies and the purchase of mobility equipment.

"(3) Provide training to parents and caregivers in the unique care needs of children with special needs.

"The Secretary of Health and Human Services shall adopt rules to implement this section. By March 1, 2003, the Secretary shall report to the Chairs of the House of Representatives Appropriations Subcommittee on Health and Human Services and the Senate Appropriations Committee on Health and Human Services on the use of the Trust Fund."

§ 108A-70.25. State Plan for Health Insurance Program for Children.

Editor's Note. — Session Laws 2002-126, s. 10.21, provides: "The Department of Health and Human Services may rewrite and submit to the federal government the State Plan for the North Carolina Health Choice Program solely for the purpose of incorporating amendments enacted by the 1997 General Assembly, Regular Session 1998, the 1999 General Assembly, and the 2001 General Assembly, and to otherwise comply with applicable federal requirements. Nothing in this section authorizes the Department to make amendments to the State Plan for the North Carolina Health Choice Program not otherwise authorized by the General Assembly. Amendments to the State Plan required by the federal government to be implemented after the effective date of this section, other than those authorized by this section, shall comply with G.S. 108A-70.25."

Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Chapter 110.
Child Welfare.

Article 7.

Child Care Facilities.

Article 7.
Child Care Facilities.

§ 110-85. Legislative intent and purpose.

Early Childhood Education and Development Initiatives. — Session Laws 2001-424, ss. 21.72(a) to (e), as amended by Session Laws 2002-126, s. 10.55(f), 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. For the purposes of this subsection, administrative costs shall include costs associated with partnership oversight, business and financial management, general accounting, human resources, budgeting, purchasing contracting, and information systems management.

"(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.

"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."

Payments for Purchase of Child Care Service. — Session Laws 2001-424, ss. 21.73(e) to (h) and (j), as amended by Session Laws 2002-126, s. 10.57, provides: "(e) On or before September 30, 2001, payments for the purchase of child care services for low-income children shall be the same as would have resulted under Section 11.27 of S.L. 2000-67. Effective October 1, 2001, payments for the purchase of child care services for low-income children shall be in accordance with the following requirements:

"(1) Religious-sponsored child care facilities operating pursuant to G.S. 110-106 and licensed child care centers and homes that meet the minimum licensing standards that are participating in the subsidized child care program shall be paid the one-star county market rate or the rate they charge privately paying parents, whichever is lower.

"(2) Religious-sponsored child care facilities operating pursuant to G.S. 110-106 and licensed child care centers and homes that are receiving a higher rate than the market rates that will be implemented with this provision shall continue to receive that higher rate until September 30, 2002.

"(3) Licensed child care centers and homes with two or more stars shall receive the market rate for that rated license level for that age group or the rate they charge privately paying parents, whichever is lower.

"(4) Nonlicensed homes shall receive fifty percent (50%) of the county market rate or the rate they charge privately paying parents, whichever is lower.

"(5) Maximum payment rates shall also be calculated periodically by the Division of Child Development for transportation to and from child care provided by the child care provider, individual transporter, or transportation agency, and for fees charged by providers to parents. These payment rates shall be based upon information collected by market rate surveys.

"(f) Provision of payment rates for child care providers in counties that do not have at least 50 children in each age group for center-based and home-based care are as follows:

"(1) Payment rates may be set at the statewide or regional market rate for licensed child care centers and homes.

"(2) If it can be demonstrated that the application of the statewide or regional market rate to a county with fewer than 50 children in each age group is lower than the county market rate and would inhibit the ability of the county to purchase child care for low-income children, then the county market rate may be applied.

"(g) A market rate shall be calculated for child care centers and homes at each rated license level for each county and for each age group or age category of enrollees and shall be representative of fees charged to unsubsidized privately paying parents for each age group of enrollees within the county. The Division of Child Development shall also calculate a statewide rate and regional market rates for each rated license level for each age category.

"(h) Facilities licensed pursuant to Article 7 of Chapter 110 of the General Statutes and facilities operated pursuant to G.S. 110-106 may participate in the program that provides for the purchase of care in child care facilities for minor children of needy families. No sepa-

rate licensing requirements shall be used to select facilities to participate. In addition, child care facilities shall be required to meet any additional applicable requirements of federal law or regulations. Child care arrangements exempt from State regulation pursuant to Article 7 of Chapter 110 of the General Statutes shall meet the requirements established by other State law and by the Social Services Commission.

"County departments of social services or other local contracting agencies shall not use a provider's failure to comply with requirements in addition to those specified in this subsection as a condition for reducing the provider's subsidized child care rate.

"(j) Noncitizen families who reside in this State legally shall be eligible for child care subsidies if all other conditions of eligibility are met. If all other conditions of eligibility are met, noncitizen families who reside in this State illegally shall be eligible for child care subsidies only if at least one of the following conditions is met:

"(1) The child for whom a child care subsidy is sought is receiving child protective services or foster care services.

"(2) The child for whom a child care subsidy is sought is developmentally delayed or at risk of being developmentally delayed.

"(3) The child for whom a child care subsidy is sought is a citizen of the United States."

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

§ 110-90.2. Mandatory child care providers' criminal history checks.

Legal Periodicals. — For article, "The Emperor's New Clothes: "But the Emperor Has Nothing On!" G.S. 110-90.2's Invisible Protection of Children and Vexatious Impact on Citizens," see 24 N.C. Cent. L.J. 103 (2001).

§ 110-108: Repealed by Session Laws 2002-126, s. 10.58, effective July 1, 2002.

Editor's Note. — Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Article 9.

Child Support.

§ 110-132. Affidavit of parentage and agreement to support.

CASE NOTES

Legitimation, Not Acknowledgment, Necessary to Rebut Presumption in Favor of Mother. — There are significant differences between the procedures outlined for acknowledgment of paternity in an agreement to provide child support and those governing legitimation of a child; where child's father had not taken any steps to legitimate the child, by statute or judicial determination, his execution of an acknowledgment of paternity did not erase the common law presumption in favor of the mother's custody of the child. Rosero v. Blake, 150 N.C. App. 250, 563 S.E.2d 248, 2002 N.C. App. LEXIS 509 (2002), cert. granted, 356 N.C. 166, — S.E.2d — (2002).

§ 110-136.5. Implementation of withholding in non-IV-D cases.

CASE NOTES

Order to Remain Employed. — Where the trial court acceded to an obligor father's request to withhold his child support obligation from his income, the trial court was within its prerogative to order the father to remain gainfully employed to ensure payment of his child support obligation, absent proof that the father had any other income from which his obligation could be met. Miller v. Miller, — N.C. App. —, 568 S.E.2d 914, 2002 N.C. App. LEXIS 1070 (2002).

Cited in Miller v. Miller, — N.C. App. —, 568 S.E.2d 914, 2002 N.C. App. LEXIS 1070 (2002).

§ 110-141. Effectuation of intent of Article.

Editor's Note. — Session Laws 2002-126, s. 10.41C, provides: "Notwithstanding G.S. 110-141, a board of county commissioners that desires to assume responsibility for the administration of the Child Support Program beginning with the 2003-2004 fiscal year must notify the Department of Health and Human Services of its intent no later than December 1, 2002. The obligation of the board of county commissioners to assume responsibility for the administration of the Program does not commence prior to July 1, 2003. Until July 1, 2003, the Department of Health and Human Services shall continue the administration of the Program for that county."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Chapter 113.

Conservation and Development.

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1A.

Special Peace Officers.

§ 113-28.2A. Cooperation between law enforcement agencies.

Special peace officers employed by the Department of Environment and Natural Resources are officers of a "law enforcement agency" for purposes of G.S. 160A-288, and the Department shall have the same authority as a city or county governing body to approve cooperation between law enforcement agencies under that section. (2002-111, s. 1.)

Cross References. — As to cooperation between municipal law-enforcement agencies, see G.S. 160A-288.

Editor's Note. — Session Laws 2002-111, s. 2, made this section effective September 6, 2002.

SUBCHAPTER II. STATE FORESTS AND PARKS.

ARTICLE 2.

Acquisition and Control of State Forests and Parks.

§ 113-36. Applications of proceeds from sale of products.

Editor's Note. — Session Laws 2002-126, s. 2.2(c), provides: "Notwithstanding G.S. 113-36(d), two hundred twenty thousand dollars ($220,000) of the cash balance remaining in the Bladen Lakes State Forest Fund (Budget Code 24300, Fund Code 2221) on July 1, 2002, shall be transferred to the State Controller to be deposited in Nontax Budget Code 19978 (Intra State Transfers). An additional two hundred twenty thousand dollars ($220,000) shall be

transferred on April 1, 2003. These funds shall be used to support General Fund appropriations for the 2002-2003 fiscal year."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Article 2C.

State Parks Act.

§ 113-44.14. Additions to and deletions from the State Parks System.

Editor's Note. —

Session Laws 2002-89, ss. 1 and 2, effective August 22, 2002, authorize the Department of Environment and Natural Resources to add Elk Knob State Natural Area and Beech Creek Bog State Natural Area to the State Parks System as provided in G.S. 113-44.14(b).

Session Laws 2002-149, s. 2, effective October 9, 2002, provides: "Boone's Cave State Natural Area is deleted from the State Parks System pursuant to G.S. 113-44.14. The State may transfer this property to Davidson County for management as a park. The instrument transferring this property shall provide that the State retains a possibility of reverter and shall provide that, in the event that Davidson County ceases to manage the property as a park, the property shall revert to the State. The State may not otherwise sell or exchange the property."

Article 4C.

Regulation of Open Fires.

§ 113-60.23. High hazard counties; permits required; standards.

(a) The provisions of this section apply only to the counties of Beaufort, Bladen, Brunswick, Camden, Carteret, Chowan, Craven, Currituck, Dare, Duplin, Gates, Hyde, Jones, Onslow, Pamlico, Pasquotank, Perquimans, Tyrrell, and Washington which are classified as high hazard counties in accordance with G.S. 113-60.21.

(b) It is unlawful for any person to willfully start or cause to be started any fire in any woodland under the protection of the Department or within 500 feet of any such woodland without first having obtained a permit from the Department. Permits for starting fires may be obtained from forest rangers or other agents authorized by the county forest ranger to issue such permits in the county in which the fire is to be started. Such permits shall be issued by the ranger or other agent unless permits for the area in question have been prohibited or cancelled in accordance with G.S. 113-60.25 or 113-60.27.

(c) It is unlawful for any person to willfully burn any debris, stumps, brush or other flammable materials resulting from ground clearing activities and involving more than five contiguous acres, regardless of the proximity of the burning to woodland and on which such materials are placed in piles or windrows without first having obtained a special permit from the Department. Areas less than five acres in size will require a regular permit in accordance with G.S. 113-60.23(b).

(1) Prevailing winds at the time of ignition must be away from any city, town, development, major highway, or other populated area, the

ambient air of which may be significantly affected by smoke, fly ash, or other air contaminates from the burning.

(2) The location of the burning must be at least 1,000 feet from any dwelling or structure located in a predominately residential area other than a dwelling or structure located on the property on which the burning is conducted unless permission is granted by the occupants.

(3) The amount of dirt or organic soil on or in the material to be burned must be minimized and the material arranged in a way suitable to facilitate rapid burning.

(4) Burning may not be initiated when it is determined by a forest ranger, based on information supplied by a competent authority that stagnant air conditions or inversions exist or that such conditions may occur during the duration of the burn.

(5) Heavy oils, asphaltic material, or items containing natural or synthetic rubber may not be used to ignite the material to be burned or to promote the burning of such material.

(6) Initial burning may be commenced only between the hours of 9:00 A.M. and 3:00 P.M. and no combustible material may be added to the fire between 3:00 P.M. on one day and 9:00 A.M. on the following day, except that when favorable meteorological conditions exist, any forest ranger authorized to issue the permit may authorize in writing a deviation from the restrictions. (1981, c. 1100, s. 2; 1981 (Reg. Sess., 1982), c. 1165; c. 1385, s. 2; 2002-132, s. 1.)

Effect of Amendments. — Session Laws 2002-132, s. 1, effective December 1, 2002, and applicable to offenses committed on or after that date, added Brunswick County to the list of high hazard counties in subsection (a) to which the provisions of the section apply.

SUBCHAPTER IV. CONSERVATION OF MARINE AND ESTUARINE AND WILDLIFE RESOURCES.

ARTICLE 13A.

Clean Water Management Trust Fund.

§ 113-145.6A. Clean Water Management Trust Fund: reporting requirement.

The Chair of the Board of Trustees shall report each year by 1 December to the Joint Legislative Commission on Governmental Operations, the Environmental Review Commission, the Subcommittees on Natural and Economic Resources of the House of Representatives and Senate Appropriations Committees, and the Fiscal Research Division of the General Assembly regarding the implementation of this Article. The report shall include a list of the projects awarded grants from the Fund for the previous 12-month period. The list shall include for each project a description of the project, the amount of the grant awarded for the project, and the total cost of the project. (1997-443, s. 7.10; 2002-148, s. 3.)

Effect of Amendments. — Session Laws 2002-148, s. 3, effective October 9, 2002, rewrote the section.

Article 16.

Cultivation of Shellfish.

§ 113-202. New and renewal leases for shellfish cultivation; termination of leases issued prior to January 1, 1966.

Local Modification. — Brunswick: 1967, c. 876, s. 2; Carteret (Moratorium as to Portsmouth Island, Core Banks): 1995, c. 547, s. 1; Carteret (Moratorium as to Core Sound, expiring July 1, 2003): 1995 (Reg. Sess., 1996), c. 547, s. 3; c. 633, s. 1(b); 1996, 2nd Ex. Sess., c. 18, s. 27.33; 1997-256, s. 12; 1997-347, s. 8; 1997-400, s. 6.14; 1997-401, s. 8; 1998-23, s. 15; 1998-56; 1999-209, s. 1; 2001-213, s. 4; 2002-15, s. 1.

Editor's Note. —

Session Laws 2002-15, ss. 2 and 3, provide: "The Joint Legislative Commission on Seafood and Aquaculture shall review the statutory changes recommended by the Marine Fisheries Commission in the August 2001, Hard Clam Fishery Management Plan and the August 2001, Oyster Fishery Management Plan. The Joint Legislative Commission on Seafood and Aquaculture shall report its findings and recommendations, if any, including any legislative proposals, to the 2003 General Assembly.

"The Joint Legislative Commission on Seafood and Aquaculture shall review recommendations of the Marine Fisheries Commission regarding the moratorium on issuing new shellfish cultivation leases in Core Sound and the shellfish cultivation program. The Joint Legislative Commission on Seafood and Aquaculture shall report its findings and recommendations, if any, including any legislative proposals, to the 2003 General Assembly."

Article 17.

Administrative Provisions; Regulatory Authority of Marine Fisheries Commission and Department.

§ 113-229. Permits to dredge or fill in or about estuarine waters or State-owned lakes.

(a) Except as hereinafter provided before any excavation or filling project is begun in any estuarine waters, tidelands, marshlands, or State-owned lakes, the party or parties desiring to do such shall first obtain a permit from the Department. Granting of the State permit shall not relieve any party from the necessity of obtaining a permit from the United States Army Corps of Engineers for work in navigable waters, if the same is required. The Department shall continue to coordinate projects pertaining to navigation with the United States Army Corps of Engineers.

(b) All applications for such permits shall include a plat of the areas in which the proposed work will take place, indicating the location, width, depth and length of any proposed channel, the disposal area, and a copy of the deed or other instrument under which the applicant claims title to the property adjoining the waters in question, (or any land covered by waters), tidelands, or marshlands, or if the applicant is not the owner, then a copy of the deed or other instrument under which the owner claims title plus written permission from the owner to carry out the project on his land.

(c) In lieu of a deed or other instrument referred to in subsection (b) of this section, the agency authorized to issue such permits may accept some other reasonable evidence of ownership of the property in question or other lawful authority to make use of the property.

(c1) The Coastal Resources Commission may, by rule, designate certain classes of major and minor development for which a general or blanket permit

may be issued. In developing these rules, the Commission shall consider all of the following:

(1) The size of the development.
(2) The impact of the development on areas of environmental concern.
(3) How often the class of development is carried out.
(4) The need for on-site oversight of the development.
(5) The need for public review and comment on individual development projects.

(c2) General permits may be issued by the Commission as rules under the provisions of G.S. 113A-118.1. Individual development carried out under the provisions of general permits shall not be subject to the mandatory notice provisions of this section. The Commission may impose reasonable notice provisions and other appropriate conditions and safeguards on any general permit it issues. The variance, appeals, and enforcement provisions of this Article shall apply to any individual development projects undertaken under a general permit.

(d) An applicant for a permit, other than an emergency permit, shall send a copy of his application to the owner of each tract of riparian property that adjoins that of the applicant. The copy shall be served by certified mail or, if the owner's address is unknown and cannot be ascertained with due diligence or if a diligent but unsuccessful effort has been made to serve the copy by certified mail, by publication in accordance with the rules of the Commission. An owner may file written objections to the permit with the Department for 30 days after he is served with a copy of the application. In the case of a special emergency dredge or fill permit the applicant must certify that he took all reasonable steps to notify adjacent riparian owners of the application for a special emergency dredge and fill permit prior to submission of the application. Upon receipt of this certification, the Secretary shall issue or deny the permit within the time period specified in (e) of this section, upon the express understanding from the applicant that he will be entirely liable and hold the State harmless for all damage to adjacent riparian landowners directly and proximately caused by the dredging or filling for which approval may be given.

(e) Applications for permits except special emergency permit applications shall be circulated by the Department among all State agencies and, in the discretion of the Secretary, appropriate federal agencies having jurisdiction over the subject matter which might be affected by the project so that such agencies will have an opportunity to raise any objections they might have. The Department may deny an application for a dredge or fill permit upon finding: (1) that there will be significant adverse effect of the proposed dredging and filling on the use of the water by the public; or (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners; or (3) that there will be significant adverse effect on public health, safety, and welfare; or (4) that there will be significant adverse effect on the conservation of public and private water supplies; or (5) that there will be significant adverse effect on wildlife or fresh water, estuarine or marine fisheries. In the absence of such findings, a permit shall be granted. Such permit may be conditioned upon the applicant amending his proposal to take whatever measures are reasonably necessary to protect the public interest with respect to the factors enumerated in this subsection. Permits may allow for projects granted a permit the right to maintain such project for a period of up to 10 years. The right to maintain such project shall be granted subject to such conditions as may be reasonably necessary to protect the public interest. The Coastal Resources Commission shall coordinate the issuance of permits under this section and G.S. 113A-118 and the granting of variances under this section and G.S. 113A-120.1 to avoid duplication and to create a single, expedited permitting process. The Coastal Resources Commission may adopt

rules interpreting and applying the provisions of this section and rules specifying the procedures for obtaining a permit under this section. Maintenance work as defined in this subsection shall be limited to such activities as are required to maintain the project dimensions as found in the permit granted. The Department shall act on an application for permit within 75 days after the completed application is filed, provided the Department may extend such deadline by not more than an additional 75 days if necessary properly to consider the application, except for applications for a special emergency permit, in which case the Department shall act within two working days after an application is filed, and failure to so act shall automatically approve the application.

(e1) The Secretary is empowered to issue special emergency dredge or fill permits upon application. Emergency permits may be issued only when life or structural property is in imminent danger as a result of rapid recent erosion or sudden failure of a man-made structure. The Coastal Resources Commission may elaborate by rule upon what conditions the Secretary may issue a special emergency dredge or fill permit. The Secretary may condition the emergency permit upon any reasonable conditions, consistent with the emergency situation, he feels are necessary to reasonably protect the public interest. Where an application for a special emergency permit includes work beyond which the Secretary, in his discretion, feels necessary to reduce imminent dangers to life or property he shall issue the emergency permit only for that part of the proposed work necessary to reasonably reduce the imminent danger. All further work must be applied for by application for an ordinary dredge or fill permit. The Secretary shall deny an application for a special dredge or fill permit upon a finding that the detriment to the public which would occur on issuance of the permit measured by the five factors in G.S. 113-229(e) clearly outweighs the detriment to the applicant if such permit application should be denied.

(f) A permit applicant who is dissatisfied with a decision on his application may file a petition for a contested case hearing under G.S. 150B-23 within 20 days after the decision is made. Any other person who is dissatisfied with a decision to deny or grant a permit may file a petition for a contested case hearing only if the Coastal Resources Commission determines, in accordance with G.S. 113A-121.1(c), that a hearing is appropriate. A permit is suspended from the time a person seeks administrative review of the decision concerning the permit until the Commission determines that the person seeking the review cannot commence a contested case or the Commission makes a final decision in a contested case, as appropriate, and no action may be taken during that time that would be unlawful in the absence of the permit.

(g) G.S. 113A-122 applies to an appeal of a permit decision under subsection (f).

(h) Repealed by Session Laws 1987, c. 827, s. 105.

(h1) Except as provided in subsection (h2) of this section, all construction and maintenance dredgings of beach-quality sand may be placed on the affected downdrift ocean beaches or, if placed elsewhere, an equivalent quality and quantity of sand from another location shall be placed on the downdrift ocean beaches.

(h2) Clean, beach quality material dredged from navigational channels within the active nearshore, beach or inlet shoal systems shall not be removed permanently from the active nearshore, beach or inlet shoal system. This dredged material shall be disposed of on the ocean beach or shallow active nearshore area where it is environmentally acceptable and compatible with other uses of the beach.

(i) Subject to subsections (h1) and (h2) of this section, all materials excavated pursuant to such permit, regardless of where placed, shall be encased or

entrapped in such a manner as to minimize their moving back into the affected water.

(j) 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.

(k) Any person, firm, or corporation violating the provisions of this section shall be guilty of a Class 2 misdemeanor. Each day's continued operation after notice by the Department to cease shall constitute a separate offense. A notice to cease shall be served personally or by certified mail.

(*l*) The Secretary may, either before or after the institution of proceedings under subsection (k) of this section, institute a civil action in the superior court in the name of the State upon the relation of the Secretary, for damages, and injunctive relief, and for such other and further relief in the premises as said court may deem proper, to prevent or recover for any damage to any lands or property which the State holds in the public trust, and to restrain any violation of this section or of any provision of a dredging or filling permit issued under this section. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this section for any violation of the same.

(m) This section shall apply to all persons, firms, or corporations, their employees, agents, or contractors proposing excavation or filling work in the estuarine waters, tidelands, marshlands and State-owned lakes within the State, and the work to be performed by the State government or local governments. Provided, however, the provisions of this section shall not apply to the activities and functions of the Department and local health departments that are engaged in mosquito control for the protection of the health and welfare of the people of the coastal area of North Carolina as provided under G.S. 130A-346 through G.S. 130A-349. Provided, further, this section shall not impair the riparian right of ingress and egress to navigable waters.

(n) Within the meaning of this section:

(1) "State-owned lakes" include man-made as well as natural lakes.

(2) "Estuarine waters" means all the waters of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers, and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters agreed upon by the Department and the Wildlife Resources Commission, within the meaning of G.S. 113-129.

(3) "Marshland" means any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides (whether or not the tidewaters reach the marshland areas through natural or artificial watercourses), provided this shall not include hurricane or tropical storm tides. Salt marshland or other marsh shall be those areas upon which grow some, but not necessarily all, of the following salt marsh and marsh plant species: Smooth or salt water Cordgrass *(Spartina alterniflora)*, Black Needlerush *(Juncus roemerianus)*, Glasswort *(Salicornia spp.)*, Salt Grass *(Distichlis spicata)*, Sea Lavender *(Limonium spp.)*, Bulrush *(Scirpus spp.)*, Saw Grass *(Cladium jamaicense)*, Cattail *(Typha spp.)*, Salt-Meadow Grass *(Spartina patens)*, and Salt Reed-Grass *(Spartina cynosuroides)*. (1969, c. 791, s. 1; 1971, c. 1159, s. 6; 1973, c. 476, s. 128; c. 1262, ss. 28, 86; c. 1331, s. 3; 1975, c. 456, ss. 1-7; 1977, c. 771, s. 4; 1979, c. 253, ss. 1, 2; 1983, c. 258, ss. 1-3; c. 442, s. 2; 1987, c. 827, s. 105; 1989, c. 727, s. 107; 1993, c. 539, s. 844; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 777, s. 6(a), (b); 1995, c. 509, s. 55.1(a)-(c); 2000-172, ss. 3.1, 3.2; 2002-126, ss. 29.2(h)-(j).)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. —

Session Laws 2002-126, ss. 29.2(h) to (j), effective September 30, 2002, rewrote subsection (h1); added subsection (h2); and substituted "subsections (h1) and (h2)" for "subsection (h1)" in subsection (i).

Legal Periodicals. —

For article, "Now Open for Development?: The Present State of Regulation of Activities in North Carolina Wetlands," see 79 N.C.L. Rev. 1667 (2001).

§ 113-230. Orders to control activities in coastal wetlands.

Legal Periodicals. — For article, "Now Open for Development?: The Present State of Regulation of Activities in North Carolina Wetlands," see 79 N.C.L. Rev. 1667 (2001).

Article 22.

Regulation of Wildlife.

§ 113-291.10. Beaver Damage Control Advisory Board.

Editor's Note. — Session Laws 2001-424, s. 19.1, as amended by Session Laws 2002-126, s. 12.2, provides: "Of the funds appropriated in this act [Session Laws 2001-424] to the Wildlife Resources Commission, the sum of five hundred thousand dollars ($500,000) for the 2001-2002 fiscal year and the sum of four hundred forty-nine thousand dollars ($449,000) for the 2002-2003 fiscal year shall be used to provide the State share necessary to support the beaver damage control program established in G.S. 113-291.10, provided the sum of at least twenty-five thousand dollars ($25,000) in federal funds is available each fiscal year of the biennium to provide the federal share."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Chapter 113A.

Pollution Control and Environment.

Article 1.

Environmental Policy Act.

§ 113A-4. Cooperation of agencies; reports; availability of information.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in DOT v. Blue, 147 N.C. App. 596, 556 S.E.2d 609, 2001 N.C. App. LEXIS 1235 (2001).

§ 113A-13. Administrative and judicial review.

CASE NOTES

Review Not Allowed. — While condemned land owners were entitled to a review of whether the state transportation agency's condemnation action was arbitrary and capricious, they could not obtain judicial review of the environmental documents created during the planning and selection of the proposed highway route as part of the judicial review of the condemnation. DOT v. Blue, 147 N.C. App. 596, 556 S.E.2d 609, 2001 N.C. App. LEXIS 1235 (2001).

Applied in DOT v. Blue, 147 N.C. App. 596, 556 S.E.2d 609, 2001 N.C. App. LEXIS 1235 (2001).

ARTICLE 4.

Sedimentation Pollution Control Act of 1973.

§ 113A-54. Powers and duties of the Commission.

(a) The Commission shall, in cooperation with the Secretary of Transportation and other appropriate State and federal agencies, develop, promulgate, publicize, and administer a comprehensive State erosion and sedimentation control program.

(b) The Commission shall develop and adopt and shall revise as necessary from time to time, rules and regulations for the control of erosion and sedimentation resulting from land-disturbing activities. The Commission shall adopt or revise its rules and regulations in accordance with Chapter 150B of the General Statutes.

(c) The rules and regulations adopted pursuant to G.S. 113A-54(b) for carrying out the erosion and sedimentation control program shall:

(1) Be based upon relevant physical and developmental information concerning the watershed and drainage basins of the State, including, but not limited to, data relating to land use, soils, hydrology, geology, grading, ground cover, size of land area being disturbed, proximate water bodies and their characteristics, transportation, and public facilities and services;

(2) Include such survey of lands and waters as may be deemed appropriate by the Commission or required by any applicable laws to identify those areas, including multijurisdictional and watershed areas, with critical erosion and sedimentation problems; and

(3) Contain conservation standards for various types of soils and land uses, which standards shall include criteria and alternative techniques and methods for the control of erosion and sedimentation resulting from land-disturbing activities.

(d) In implementing the erosion and sedimentation control program, the Commission shall:

(1) Assist and encourage local governments in developing erosion and sedimentation control programs and, as a part of this assistance, the Commission shall develop a model local erosion and sedimentation control ordinance. The Commission shall approve, approve as modified, or disapprove local programs submitted to it pursuant to G.S. 113A-60.

(2) Assist and encourage other State agencies in developing erosion and sedimentation control programs to be administered in their jurisdictions. The Commission shall approve, approve as modified, or disapprove programs submitted pursuant to G.S. 113A-56 and from time to time shall review these programs for compliance with rules adopted by the Commission and for adequate enforcement.

(3) Develop recommended methods of control of sedimentation and prepare and make available for distribution publications and other materials dealing with sedimentation control techniques appropriate for use by persons engaged in land-disturbing activities, general educational materials on erosion and sedimentation control, and instructional materials for persons involved in the enforcement of this Article and erosion and sedimentation control rules, ordinances, regulations, and plans.

(4) Require submission of erosion and sedimentation control plans by those responsible for initiating land-disturbing activities for approval prior to commencement of the activities.

(e) To assist it in developing the erosion and sedimentation control program required by this Article, the Commission is authorized to appoint an advisory committee consisting of technical experts in the fields of water resources, soil science, engineering, and landscape architecture.

(f) Repealed by Session Laws 1987, c. 827, s. 10, effective August 13, 1987. (1973, c. 392, s. 5; c. 1331, s. 3; c. 1417, s. 6; 1975, 2nd Sess., c. 983, s. 74; 1977, c. 464, s. 35; 1979, c. 922, s. 2; 1983 (Reg. Sess., 1984), c. 1014, ss. 1, 2; 1987, c. 827, s. 10; 1987 (Reg. Sess., 1988), c. 1000, s. 3; 1989, c. 676, s. 1; 1993 (Reg. Sess., 1994), c. 776, s. 3; 2002-165, ss. 2.2, 2.3.)

Effect of Amendments. — Session Laws 2002-165, ss. 2.2 and 2.3, effective October 23, 2002, substituted "sedimentation" for "sediment" in subdivision (c)(3); substituted "erosion and sedimentation control programs" for "erosion and sediment control programs" near the beginning of subdivision (d)(1); and substituted "erosion and sedimentation control" for "erosion control" in subdivisions (d)(1), (d)(3) and (d)(4).

§ 113A-54.2. Approval Fees.

(a) The Commission may establish a fee schedule for the review and approval of erosion and sedimentation control plans under this Article. In establishing the fee schedule, the Commission shall consider the administrative and personnel costs incurred by the Department for reviewing the plans and for related compliance activities. An application fee may not exceed fifty dollars ($50.00) per acre of disturbed land shown on an erosion and sedimentation control plan or of land actually disturbed during the life of the project.

(b) The Sedimentation Account is established as a nonreverting account within the Department. Fees collected under this section shall be credited to the Account and shall be applied to the costs of administering this Article.

(c) Repealed by Session Laws 1991 (Reg. Sess., 1992), c. 1039, s. 3.

(d) This section may not limit the existing authority of local programs approved pursuant to this Article to assess fees for the approval of erosion and sedimentation control plans. (1989 (Reg. Sess., 1990), c. 906, s. 1; 1991 (Reg. Sess., 1992), c. 1039, s. 3; 1993 (Reg. Sess., 1994), c. 776, s. 5; 1999-379, s. 5; 2002-165, s. 2.4.)

Effect of Amendments. — Session Laws 2002-165, s. 2.4, effective October 23, 2002, substituted "erosion and sedimentation control" for "erosion control" twice in subsection (a) and once in subsection (d).

§ 113A-56. Jurisdiction of the Commission.

(a) The Commission shall have jurisdiction, to the exclusion of local governments, to adopt rules concerning land-disturbing activities that are:

(1) Conducted by the State;
(2) Conducted by the United States;
(3) Conducted by persons having the power of eminent domain;
(4) Conducted by local governments; or
(5) Funded in whole or in part by the State or the United States.

(b) The Commission may delegate the jurisdiction conferred by G.S. 113A-56(a), in whole or in part, to any other State agency that has submitted an erosion and sedimentation control program to be administered by it, if the program has been approved by the Commission as being in conformity with the general State program.

(c) The Commission shall have concurrent jurisdiction with local governments over all other land-disturbing activities. (1973, c. 392, s. 7; c. 1417, s. 4; 1987, c. 827, s. 130; 1987 (Reg. Sess., 1988), c. 1000, s. 4; 2002-165, s. 2.5.)

Effect of Amendments. — Session Laws 2002-165, s. 2.5, effective October 23, 2002, in subsection (b), substituted "erosion and sedimentation control" for "erosion control," and substituted "the program" for "such program."

§ 113A-57. Mandatory standards for land-disturbing activity.

No land-disturbing activity subject to this Article shall be undertaken except in accordance with the following mandatory requirements:

(1) No land-disturbing activity during periods of construction or improvement to land shall be permitted in proximity to a lake or natural watercourse unless a buffer zone is provided along the margin of the watercourse of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity. Waters that have been classified as trout waters by the Environmental Management Commission shall have an undisturbed buffer zone 25 feet wide or of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity, whichever is greater. Provided, however, that the Sedimentation Control Commission may approve plans which include land-disturbing activity along trout waters when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal. This subdivision shall not apply to a land-disturbing activity in connection with the construction of facilities to be located on, over, or under a lake or natural watercourse.

(2) The angle for graded slopes and fills shall be no greater than the angle which can be retained by vegetative cover or other adequate erosion-control devices or structures. In any event, slopes left exposed will, within 15 working days or 30 calendar days of completion of any phase of grading, whichever period is shorter, be planted or otherwise provided with ground cover, devices, or structures sufficient to restrain erosion.

(3) Whenever land-disturbing activity is undertaken on a tract comprising more than one acre, if more than one acre is uncovered, the person conducting the land-disturbing activity shall install erosion and sedimentation control devices and practices that are sufficient to retain the sediment generated by the land-disturbing activity within the boundaries of the tract during construction upon and development of the tract, and shall plant or otherwise provide a permanent ground cover sufficient to restrain erosion after completion of construction or development within a time period to be specified by rule of the Commission.

(4) No person shall initiate any land-disturbing activity on a tract if more than one acre is to be uncovered unless, 30 or more days prior to initiating the activity, an erosion and sedimentation control plan for such activity is filed with the agency having jurisdiction. The agency having jurisdiction shall forward to the Director of the Division of Water Quality a copy of each erosion and sedimentation control plan for a land-disturbing activity that involves the utilization of ditches for the purpose of de-watering or lowering the water table of the tract. (1973, c. 392, s. 8; c. 1417, s. 5; 1975, c. 647, s. 2; 1979, c. 564; 1983 (Reg. Sess., 1984), c. 1014, s. 3; 1987, c. 827, s. 131; 1989, c. 676, s. 3; 1991, c. 275, s. 2; 1998-99, s. 1; 1999-379, s. 2; 2002-165, s. 2.6.)

Effect of Amendments. — Session Laws 2002-165, s. 2.6, effective October 23, 2002, in subdivision (3), substituted "install erosion and sedimentation control devices" for "install such

sedimentation and erosion control devices," "practices that are" for "practices as are," and "the tract" for "said tract."

§ 113A-58. Enforcement authority of the Commission.

In implementing the provisions of this Article the Commission is authorized and directed to:

(1) Inspect or cause to be inspected the sites of land-disturbing activities to determine whether applicable laws, regulations or erosion and sedimentation control plans are being complied with;

(2) Make requests, or delegate to the Secretary authority to make requests, of the Attorney General or solicitors for prosecutions of violations of this Article. (1973, c. 392, s. 9; 2002-165, s. 2.7.)

Effect of Amendments. — Session Laws 2002-165, s. 2.7, effective October 23, 2002, substituted "erosion and sedimentation control" for "erosion control" in subdivision (1).

§ 113A-60. Local erosion and sedimentation control programs.

(a) A local government may submit to the Commission for its approval an erosion and sedimentation control program for its jurisdiction, and to this end local governments are authorized to adopt ordinances and regulations necessary to establish and enforce erosion and sedimentation control programs. Local governments are authorized to create or designate agencies or subdivisions of local government to administer and enforce the programs. An ordinance adopted by a local government shall at least meet and may exceed the minimum requirements of this Article and the rules adopted pursuant to this Article. Two or more units of local government are authorized to establish a joint program and to enter into any agreements that are necessary for the proper administration and enforcement of the program. The resolutions establishing any joint program must be duly recorded in the minutes of the governing body of each unit of local government participating in the program, and a certified copy of each resolution must be filed with the Commission.

(b) The Commission shall review each program submitted and within 90 days of receipt thereof shall notify the local government submitting the program that it has been approved, approved with modifications, or disapproved. The Commission shall only approve a program upon determining that its standards equal or exceed those of this Article and rules adopted pursuant to this Article.

(c) If the Commission determines that any local government is failing to administer or enforce an approved erosion and sedimentation control program, it shall notify the local government in writing and shall specify the deficiencies of administration and enforcement. If the local government has not taken corrective action within 30 days of receipt of notification from the Commission, the Commission shall assume administration and enforcement of the program until such time as the local government indicates its willingness and ability to resume administration and enforcement of the program. (1973, c. 392, s. 11; 1993 (Reg. Sess., 1994), c. 776, s. 7; 2002-165, s. 2.8.)

Effect of Amendments. — Session Laws 2002-165, s. 2.8, effective October 23, 2002, substituted "erosion and sedimentation control" for "erosion control" in the section heading and throughout the section; in subsection (a), substituted "A local government" for "Any local government"; and in subsection (c), substituted "shall assume administration and enforcement" for "shall assume enforcement."

§ 113A-61. Local approval of erosion and sedimentation control plans.

(a) For those land-disturbing activities for which prior approval of an erosion and sedimentation control plan is required, the Commission may require that a local government that administers an erosion and sedimentation control program approved under G.S. 113A-60 require the applicant to submit a copy of the erosion and sedimentation control plan to the appropriate soil and water conservation district or districts at the same time the applicant submits the erosion and sedimentation control plan to the local government for approval. The soil and water conservation district or districts shall review the plan and submit any comments and recommendations to the local government within 20 days after the soil and water conservation district received the erosion and sedimentation control plan or within any shorter period of time as may be agreed upon by the soil and water conservation district and the local government. Failure of a soil and water conservation district to submit comments and recommendations within 20 days or within agreed upon shorter period of time shall not delay final action on the proposed plan by the local government.

(b) Local governments shall review each erosion and sedimentation control plan submitted to them and within 30 days of receipt thereof shall notify the person submitting the plan that it has been approved, approved with modifications, or disapproved. A local government shall only approve a plan upon determining that it complies with all applicable State and local regulations for erosion and sedimentation control.

(b1) A local government shall condition approval of a draft erosion and sedimentation control plan upon the applicant's compliance with federal and State water quality laws, regulations, and rules. A local government shall disapprove an erosion and sedimentation control plan if implementation of the plan would result in a violation of rules adopted by the Environmental Management Commission to protect riparian buffers along surface waters. A local government may disapprove an erosion and sedimentation control plan upon finding that an applicant or a parent, subsidiary, or other affiliate of the applicant:

(1) Is conducting or has conducted land-disturbing activity without an approved plan, or has received notice of violation of a plan previously approved by the Commission or a local government pursuant to this Article and has not complied with the notice within the time specified in the notice.

(2) Has failed to pay a civil penalty assessed pursuant to this Article or a local ordinance adopted pursuant to this Article by the time the payment is due.

(3) Has been convicted of a misdemeanor pursuant to G.S. 113A-64(b) or any criminal provision of a local ordinance adopted pursuant to this Article.

(4) Has failed to substantially comply with State rules or local ordinances and regulations adopted pursuant to this Article.

(b2) In the event that an erosion and sedimentation control plan is disapproved by a local government pursuant to subsection (b1) of this section, the local government shall so notify the Director of the Division of Land Resources within 10 days of the disapproval. The local government shall advise the applicant and the Director in writing as to the specific reasons that the plan was disapproved. Notwithstanding the provisions of subsection (c) of this section, the applicant may appeal the local government's disapproval of the plan directly to the Commission. For purposes of this subsection and subsection (b1) of this section, an applicant's record may be considered for only the two years prior to the application date.

(c) The disapproval or modification of any proposed erosion and sedimentation control plan by a local government shall entitle the person submitting the plan to a public hearing if the person submits written demand for a hearing within 15 days after receipt of written notice of the disapproval or modification. The hearings shall be conducted pursuant to procedures adopted by the local government. If the local government upholds the disapproval or modification of a proposed erosion and sedimentation control plan following the public hearing, the person submitting the erosion and sedimentation control plan is entitled to appeal the local government's action disapproving or modifying the plan to the Commission. The Commission, by regulation, shall direct the Secretary to appoint such employees of the Department as may be necessary to hear appeals from the disapproval or modification of erosion and sedimentation control plans by local governments. In addition to providing for the appeal of local government decisions disapproving or modifying erosion and sedimentation control plans to designated employees of the Department, the Commission shall designate an erosion and sedimentation control plan review committee consisting of three members of the Commission. The person submitting the erosion and sedimentation control plan may appeal the decision of an employee of the Department who has heard an appeal of a local government action disapproving or modifying an erosion and sedimentation control plan to the erosion and sedimentation control plan review committee of the Commission. Judicial review of the final action of the erosion and sedimentation control plan review committee of the Commission may be had in the superior court of the county in which the local government is situated.

(d) Repealed by Session Laws 1989, c. 676, s. 4. (1973, c. 392, s. 12; 1979, c. 922, s. 1; 1989, c. 676, s. 4; 1993 (Reg. Sess., 1994), c. 776, ss. 8, 9; 1998-221, s. 1.11(b); 1999-379, s. 3; 2002-165, s. 2.9.)

Effect of Amendments. — Session Laws 2002-165, s. 2.9, effective October 23, 2002, substituted "erosion and sedimentation control" for "erosion control" in the section heading and throughout the section; and made minor stylistic and punctuation changes.

§ 113A-61.1. Inspection of land-disturbing activity; notice of violation.

(a) The Commission, a local government that administers an erosion and sedimentation control program approved under G.S. 113A-60, or other approving authority shall provide for inspection of land-disturbing activities to ensure compliance with this Article and to determine whether the measures required in an erosion and sedimentation control plan are effective in controlling erosion and sedimentation resulting from the land-disturbing activity. Notice of this right of inspection shall be included in the certificate of approval of each erosion and sedimentation control plan.

(b) No person shall willfully resist, delay, or obstruct an authorized representative of the Commission, an authorized representative of a local government, or an employee or an agent of the Department while the representative, employee, or agent is inspecting or attempting to inspect a land-disturbing activity under this section.

(c) If the Secretary, a local government that administers an erosion and sedimentation control program approved under G.S. 113A-60, or other approving authority determines that the person engaged in the land-disturbing activity has failed to comply with this Article, the Secretary, local government, or other approving authority shall immediately serve a notice of violation upon that person. The notice may be served by any means authorized under G.S. 1A-1, Rule 4. A notice of violation shall specify a date by which the person must comply with this Article and inform the person of the actions that need to be

taken to comply with this Article. Any person who fails to comply within the time specified is subject to additional civil and criminal penalties for a continuing violation as provided in G.S. 113A-64. (1989, c. 676, s. 5; 1993 (Reg. Sess., 1994), c. 776, s. 10; 1999-379, s. 6; 2002-165, s. 2.10.)

Effect of Amendments. — Session Laws 2002-165, s. 2.10, effective October 23, 2002, substituted "sedimentation" for "sediment" twice in subsection (a) and once in subsection (c); and substituted "erosion and sedimentation control" for "erosion control" twice in subsection (a).

§ 113A-62. Cooperation with the United States.

The Commission is authorized to cooperate and enter into agreements with any agency of the United States government in connection with plans for erosion and sedimentation control with respect to land-disturbing activities on lands that are under the jurisdiction of such agency. (1973, c. 392, s. 13; 2002-165, s. 2.11.)

Effect of Amendments. — Session Laws 2002-165, s. 2.11, effective October 23, 2002, substituted "erosion and sedimentation control" for "erosion control."

§ 113A-64. Penalties.

(a) Civil Penalties. —

(1) Any person who violates any of the provisions of this Article or any ordinance, rule, or order adopted or issued pursuant to this Article by the Commission or by a local government, or who initiates or continues a land-disturbing activity for which an erosion and sedimentation control plan is required except in accordance with the terms, conditions, and provisions of an approved plan, is subject to a civil penalty. The maximum civil penalty for a violation is five thousand dollars ($5,000). A civil penalty may be assessed from the date of the violation. Each day of a continuing violation shall constitute a separate violation.

(2) The Secretary or a local government that administers an erosion and sedimentation control program approved under G.S. 113A-60 shall determine the amount of the civil penalty and shall notify the person who is assessed the civil penalty of the amount of the penalty and the reason for assessing the penalty. The notice of assessment shall be served by any means authorized under G.S. 1A-1, Rule 4, and shall direct the violator to either pay the assessment or contest the assessment within 30 days by filing a petition for a contested case under Article 3 of Chapter 150B of the General Statutes. If a violator does not pay a civil penalty assessed by the Secretary within 30 days after it is due, the Department shall request the Attorney General to institute a civil action to recover the amount of the assessment. If a violator does not pay a civil penalty assessed by a local government within 30 days after it is due, the local government may institute a civil action to recover the amount of the assessment. The civil action may be brought in the superior court of any county where the violation occurred or the violator's residence or principal place of business is located. A civil action must be filed within three years of the date the assessment was due. An assessment that is not contested is due when the violator is served with a notice of assessment. An assessment that is contested is due at the conclusion of the administrative and judicial review of the assessment.

(3) In determining the amount of the penalty, the Secretary shall consider the degree and extent of harm caused by the violation, the cost of rectifying the damage, the amount of money the violator saved by noncompliance, whether the violation was committed willfully and the prior record of the violator in complying or failing to comply with this Article.

(4) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 776, s. 11.

(5) The clear proceeds of civil penalties collected by the Department or other State agency under this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Civil penalties collected by a local government under this subsection shall be credited to the general fund of the local government as nontax revenue.

(b) Criminal Penalties. — Any person who knowingly or willfully violates any provision of this Article or any ordinance, rule, regulation, or order duly adopted or issued by the Commission or a local government, or who knowingly or willfully initiates or continues a land-disturbing activity for which an erosion and sedimentation control plan is required, except in accordance with the terms, conditions, and provisions of an approved plan, shall be guilty of a Class 2 misdemeanor that may include a fine not to exceed five thousand dollars ($5,000). (1973, c. 392, s. 15; 1977, c. 852; 1987, c. 246, s. 3; 1987 (Reg. Sess., 1988), c. 1000, s. 5; 1989, c. 676, s. 6; 1991, c. 412, s. 2; c. 725, s. 5; 1993, c. 539, s. 873; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 776, s. 11; 1998-215, s. 52; 1999-379, s. 4; 2002-165, s. 2.12.)

Effect of Amendments. — Session Laws 2002-165, s. 2.12, effective October 23, 2002, substituted "erosion and sedimentation control" for "erosion control" in subdivision (a)(1) and in subsection (b); substituted "sedimentation control" for "sediment control" in subdivision (a)(2); and substituted "misdemeanor that may include" for "misdemeanor which may include" in subsection (b).

§ 113A-64.1. Restoration of areas affected by failure to comply.

The Secretary or a local government that administers a local erosion and sedimentation control program approved under G.S. 113A-60 may require a person who engaged in a land-disturbing activity and failed to retain sediment generated by the activity, as required by G.S. 113A-57(3), to restore the waters and land affected by the failure so as to minimize the detrimental effects of the resulting pollution by sedimentation. This authority is in addition to any other civil or criminal penalty or injunctive relief authorized under this Article. (1993 (Reg. Sess., 1994), c. 776, s. 12; 2002-165, s. 2.13.)

Effect of Amendments. — Session Laws 2002-165, s. 2.13, effective October 23, 2002, substituted "erosion and sedimentation control" for "erosion control."

§ 113A-65. Injunctive relief.

(a) Violation of State Program. — Whenever the Secretary has reasonable cause to believe that any person is violating or is threatening to violate the requirements of this Article he may, either before or after the institution of any other action or proceeding authorized by this Article, institute a civil action for injunctive relief to restrain the violation or threatened violation. The action shall be brought in the superior court of the county in which the violation or threatened violation is occurring or about to occur, and shall be in the name of the State upon the relation of the Secretary.

(b) Violation of Local Program. — Whenever the governing body of a local government having jurisdiction has reasonable cause to believe that any person is violating or is threatening to violate any ordinance, rule, regulation, or order adopted or issued by the local government pursuant to this Article, or any term, condition or provision of an erosion and sedimentation control plan over which it has jurisdiction, may, either before or after the institution of any other action or proceeding authorized by this Article, institute a civil action in the name of the local government for injunctive relief to restrain the violation or threatened violation. The action shall be brought in the superior court of the county in which the violation is occurring or is threatened.

(c) Abatement, etc., of Violation. — Upon determination by a court that an alleged violation is occurring or is threatened, the court shall enter any order or judgment that is necessary to abate the violation, to ensure that restoration is performed, or to prevent the threatened violation. The institution of an action for injunctive relief under subsections (a) or (b) of this section shall not relieve any party to the proceeding from any civil or criminal penalty prescribed for violations of this Article. (1973, c. 392, s. 16; 1993 (Reg. Sess., 1994), c. 776, s. 13; 2002-165, s. 2.14.)

Effect of Amendments. — Session Laws 2002-165, s. 2.14, effective October 23, 2002, substituted "erosion and sedimentation control" for "erosion control" in subsection (b).

§ 113A-66. Civil relief.

(a) Any person injured by a violation of this Article or any ordinance, rule, or order duly adopted by the Secretary or a local government, or by the initiation or continuation of a land-disturbing activity for which an erosion and sedimentation control plan is required other than in accordance with the terms, conditions, and provisions of an approved plan, may bring a civil action against the person alleged to be in violation (including the State and any local government). The action may seek any of the following:

(1) Injunctive relief.

(2) An order enforcing the law, rule, ordinance, order, or erosion and sedimentation control plan violated.

(3) Damages caused by the violation.

(4) Repealed by Session Laws 2002-165, s. 2.15, effective October 23, 2002.

If the amount of actual damages as found by the court or jury in suits brought under this subsection is five thousand dollars ($5,000) or less, the plaintiff shall be awarded costs of litigation including reasonable attorneys fees and expert witness fees.

(b) Civil actions under this section shall be brought in the superior court of the county in which the alleged violations occurred.

(c) The court, in issuing any final order in any action brought pursuant to this section may award costs of litigation (including reasonable attorney and expert-witness fees) to any party, whenever it determines that such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require, the filing of a bond or equivalent security, the amount of such bond or security to be determined by the court.

(d) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek injunctive or other relief. (1973, c. 392, s. 17; 1987 (Reg. Sess., 1988), c. 1000, s. 6; 2002-165, s. 2.15.)

Effect of Amendments. — Session Laws 2002-165, s. 2.15, effective October 23, 2002, in subsection (a), substituted "erosion and sedimentation control" for "erosion control" twice,

added "any of the following" to the end of the introductory paragraph, deleted "or" following subdivision (3), repealed former subdivision (4), which read: "Both damages and an enforcement order," and made minor punctuation changes.

Article 7.

Coastal Area Management.

Part 1. Organization and Goals.

§ 113A-100. Short title.

Legal Periodicals. —

For article, "The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina," see 78 N.C.L. Rev. 1869 (2000).

For article, "Now Open for Development?: The Present State of Regulation of Activities in North Carolina Wetlands," see 79 N.C.L. Rev. 1667 (2001).

Part 2. Planning Processes.

§ 113A-107. State guidelines for the coastal area.

Editor's Note. — Session Laws 2002-116, s. 1, effective September 17, 2002, provides: "Pursuant to G.S. 150B-21.3(b), the amendment to 15A NCAC 07H.0309 (Use Standards for Ocean Hazard Areas: Exceptions), as adopted by the Coastal Resources Commission and approved by the Rules Review Commission on 15 November 2001, by which subdivision '(9) swimming pools;' would be deleted from subsection (a) of the rule is disapproved and shall not become effective. The remainder of the amendments to 15A NCAC 7H.0309, as adopted by the Coastal Resources Commission and approved by the Rules Review Commission on 15 November 2001, shall become effective on 1 August 2002."

Part 4. Permit Letting and Enforcement.

§ 113A-118.1. General permits.

(a) The Commission may, by rule, designate certain classes of major and minor development for which a general or blanket permit may be issued. In developing these rules, the Commission shall consider:

(1) The size of the development;
(2) The impact of the development on areas of environmental concern;
(3) How often the class of development is carried out;
(4) The need for onsite oversight of the development; and
(5) The need for public review and comment on individual development projects.

(b) General permits may be issued by the Commission. Individual developments carried out under the provisions of general permits shall not be subject to the mandatory notice provisions of G.S. 113A-119.

(c) The Commission may impose reasonable notice provisions and other appropriate conditions and safeguards on any general permit it issues.

(d) The variance, appeals, and enforcement provisions of this Article shall apply to any individual development projects undertaken under a general permit.

(e) The Commission shall allow the use of riprap in the construction of groins in estuarine and public trust waters on the same basis as the Commission allows the use of wood. (1983, c. 171; c. 442, s. 1; 1987, c. 827, s. 137; 2002-126, s. 29.2(f).)

Editor's Note. — Session Laws 2002-126, s. 29.2(g), provides: "The Coastal Resources Commission shall not enforce any provision of any rule that is inconsistent with G.S. 113A-118.1(e), as enacted by this act, and the Commission shall amend its rules as may be required to conform with G.S. 113A-118.1(e), as enacted by this act."

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2002-2003 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2002-2003 fiscal year. For example, uncodified provisions of this act relating to the Medicaid program apply only to the 2002-2003 fiscal year."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 29.2(f), effective September 30, 2002, added subsection (e).

§ 113A-120.1. Variances.

(a) Any person may petition the Commission for a variance granting permission to use the person's land in a manner otherwise prohibited by rules or standards prescribed by the Commission, or orders issued by the Commission, pursuant to this Article. To qualify for a variance, the petitioner must show all of the following:

(1) Unnecessary hardships would result from strict application of the rules, standards, or orders.

(2) The hardships result from conditions that are peculiar to the property, such as the location, size, or topography of the property.

(3) The hardships did not result from actions taken by the petitioner.

(4) The requested variance is consistent with the spirit, purpose, and intent of the rules, standards, or orders; will secure public safety and welfare; and will preserve substantial justice.

(b) The Commission may impose reasonable and appropriate conditions and safeguards upon any variance it grants. (1989, c. 676, s. 8; 2002-68, s. 1.)

Effect of Amendments. — Session Laws 2002-68, s. 1, effective August 8, 2002, rewrote the section.

§ 113A-125. Transitional provisions.

(a) Existing regulatory permits shall continue to be administered within the coastal area by the agencies presently responsible for their administration until a date (not later than 44 months after July 1, 1974), to be designated by the Secretary of Natural and Economic Resources as the permit changeover date. Said designation shall be effective from and after its filing with the Secretary of State.

(b) From and after the "permit changeover date," all existing regulatory permits within the coastal area shall be administered in coordination and consultation with (but not subject to the veto of) the Commission. No such existing permit within the coastal area shall be issued, modified, renewed or terminated except after consultation with the Commission. The provisions of this subsection concerning consultation and coordination shall not be interpreted to authorize or require the extension of any deadline established by this Article or any other law for completion of any permit, licensing, certification or other regulatory proceedings.

(c) Within the meaning of this section, "existing regulatory permits" include dredge and fill permits issued pursuant to G.S. 113-229; sand dune permits issued pursuant to G.S. 104B-4; air pollution control and water pollution control permits, special orders or certificates issued pursuant to G.S. 143-215.1

and 143-215.2, or any other permits, licenses, authorizations, approvals or certificates issued by the Board of Water and Air Resources pursuant to Chapter 143; capacity use area permits issued pursuant to G.S. 143-215.15; final approval of dams pursuant to G.S. 143-215.30; floodway permits issued pursuant to G.S. 143-215.54; water diversion authorizations issued pursuant to G.S. 143-354(c); oil refinery permits issued pursuant to G.S. 143-215.99; mining operating permits issued pursuant to G.S. 74-51; permissions for construction of wells issued pursuant to G.S. 87-88; and rules concerning pesticide application within the coastal area issued pursuant to G.S. 143-458; approvals by the Department of Health and Human Services of plans for water supply, drainage or sewerage, pursuant to G.S. 130-161.1 and 130-161.2; standards and approvals for solid waste disposal sites and facilities, adopted by the Department of Health and Human Services pursuant to Chapter 130, Article 13B; permits relating to sanitation of shellfish, crustacea or scallops issued pursuant to Chapter 130, Articles 14A or 14B; permits, approvals, authorizations and rules issued by the Department of Health and Human Services pursuant to Articles 23 or 24 of Chapter 130 with reference to mosquito control programs or districts; any permits, licenses, authorizations, rules, approvals or certificates issued by the Department of Health and Human Services relating to septic tanks or water wells; oil or gas well rules and orders issued for the protection of environmental values or resources pursuant to G.S. 113-391; a certificate of public convenience and necessity issued by the State Utilities Commission pursuant to Chapter 62 for any public utility plant or system, other than a carrier of persons or property; permits, licenses, leases, options, authorization or approvals relating to the use of State forestlands, State parks or other state-owned land issued by the State Department of Administration, the State Department of Natural and Economic Resources or any other State department, agency or institution; any approvals of erosion and sedimentation control plans that may be issued by the North Carolina Sedimentation Control Commission pursuant to G.S. 113A-60 or 113A-61; and any permits, licenses, authorizations, rules, approvals or certificates issued by any State agency pursuant to any environmental protection legislation not specified in this subsection that may be enacted prior to the permit changeover date.

(d) The Commission shall conduct continuing studies addressed to developing a better coordinated and more unified system of environmental and land-use permits in the coastal area, and shall report its recommendations thereon from time to time to the General Assembly. (1973, c. 1284, s. 1; 1975, c. 452, ss. 4, 5; 1979, c. 299; 1981, c. 932, s. 2.1; 1987, c. 827, ss. 125, 142; 1997-443, s. 11A.122; 2002-165, s. 2.16.)

Effect of Amendments. — Session Laws 2002-165, s. 2.16, effective October 23, 2002, substituted "erosion and sedimentation control" for "erosion control" near the end of subsection (c).

Article 16.

Conservation Easements Program.

§ 113A-231. Program to accomplish conservation purposes.

The Department of Environment and Natural Resources shall develop a nonregulatory program that uses conservation tax credits as a prominent tool to accomplish conservation purposes, including the maintenance of ecological systems. As a part of this program, the Department shall exercise its powers to

protect real property and interests in real property: donated for tax credit under G.S. 105-130.34 or G.S. 105-151.12; conserved with the use of other financial incentives; or, conserved through nonregulatory programs. The Department shall call upon the Attorney General for legal assistance in developing and implementing the program. (1997-226, s. 6; 1997-443, s. 11A.119(b); 2002-155, s. 1.)

Effect of Amendments. — Session Laws 2002-155, s. 1, effective October 9, 2002, added the second and third sentences.

§ 113A-232. Conservation Grant Fund.

(a) Fund Created. — The Conservation Grant Fund is created within the Department of Environment and Natural Resources. The Fund shall be administered by that Department. The purpose of the Fund is to stimulate the use of conservation easements and conservation tax credits, to improve the capacity of private nonprofit land trust [organizations] to successfully accomplish conservation projects, to better equip real estate related professionals to pursue opportunities for conservation, to increase landowner participation in land and water conservation, and to provide an opportunity to leverage private and other public monies for conservation easements.

(b) Fund Sources. — The Conservation Grant Fund shall consist of any monies appropriated to it by the General Assembly and any monies received from public or private sources. Unexpended monies in the Fund that were appropriated from the General Fund by the General Assembly shall revert at the end of the fiscal year unless the General Assembly otherwise provides. Unexpended monies in the Fund from other sources shall not revert and shall remain available for expenditure in accordance with this Article.

(c) Property Eligibility. — In order for real property or an interest in real property to be the subject of a grant under this Article, the real property or interest in real property must possess or have a high potential to possess ecological value, must be reasonably restorable, and must qualify for tax credits under G.S. 105-130.34 or G.S. 105-151.12.

(c1) Grant Eligibility. — State conservation land management agencies, local government conservation land management agencies, and private nonprofit land trust organizations are eligible to receive grants from the Conservation Grant Fund. Private nonprofit land trust organizations must be qualified pursuant to G.S. 105-130.34 and G.S. 105-151.12 and must be certified under section 501(c)(3) of the Internal Revenue Code.

(d) Use of Revenue. — Revenue in the Conservation Grant Fund may be used only for the following purposes:

(1) The administrative costs of the Department in administering the Fund.
(2) Conservation grants made in accordance with this Article.
(3) To establish an endowment account, the interest from which will be used for a purpose described in G.S. 113A-233(a). (1997-226, s. 6; 1997-443, s. 11A.119(b); 2002-155, s. 2.)

Editor's Note. — This section was amended by Session Laws 2002-155, s. 2 in the coded bill drafting format provided by G.S. 120-20.1. Subsection (a) has been set out in the form above at the direction of the Revisor of Statutes. The bracketed word was added by S.L. 2002-155, but was not underlined per code drafting guidelines.

Effect of Amendments. — Session Laws 2002-155, s. 2, effective October 9, 2002, rewrote the section.

§ 113A-233. Uses of a grant from the Conservation Grant Fund.

(a) Allowable Uses. — A grant from the Conservation Grant Fund may be used only to pay for one or more of the following costs:

(1) Reimbursement for total or partial transaction costs for a donation of real property or an interest in real property from an individual or corporation satisfying either of the following:
   a. Insufficient financial ability to pay all costs or insufficient taxable income to allow these costs to be included in the donated value.
   b. Insufficient tax burdens to allow these costs to be offset by the value of tax credits under G.S. 105-130.34 or G.S. 105-151.12 or by charitable deductions.

(2) Management support, including initial baseline inventory and planning.

(3) Monitoring compliance with conservation easements, the related use of riparian buffers, natural areas, and greenways, and the presence of ecological integrity.

(4) Education on conservation, including information materials intended for landowners and education for staff and volunteers.

(5) Stewardship of land.

(6) Transaction costs for recipients, including legal expenses, closing and title costs, and unusual direct costs, such as overnight travel.

(7) Administrative costs for short-term growth or for building capacity.

(b) Prohibition. — The Fund shall not be used to pay the purchase price of real property or an interest in real property. (1997-226, s. 6; 2002-155, s. 3.)

Effect of Amendments. — Session Laws 2002-155, s. 3, effective October 9, 2002, substituted "a donation of real property or an interest in real property from an individual or corporation" for "donations from individuals or corporations" in subdivision (a)(1); inserted "for recipients" following "Transaction costs" in subdivision (a)(6); and substituted "purchase price of real property or an interest in real property" for "purchase price for any interest in land" in subsection (b).

§ 113A-234. Administration of grants.

(a) Grant Procedures and Criteria. — The Secretary of Environment and Natural Resources shall establish the procedures and criteria for awarding grants from the Conservation Grant Fund. The criteria shall focus grants on those areas, approaches, and techniques that are likely to provide the optimum positive effect on environmental protection. The Secretary shall make the final decision on the award of grants and shall announce the award publicly in a timely manner.

(b) Grant Administration. — The Secretary may administer the grants under this Article or may contract for selected activities under this Article. If administrative services are contracted, the Department shall establish guidance and criteria for its operation and contract with a statewide nonprofit land trust service organization. (1997-226, s. 6; 1997-443, s. 11A.119(b); 2002-155, s. 4.)

Effect of Amendments. — Session Laws 2002-155, s. 4, effective October 9, 2002, added the subsection (a) and (b) designations and subsection catchlines to the previously undesignated paragraphs.

§ 113A-235. Conservation easements.

(a) Acquisition and Protection of Conservation Easements. — Ecological systems and appropriate public use of these systems may be protected through conservation easements, including conservation agreements under Article 4 of Chapter 121 of the General Statutes, the Conservation and Historic Preservation Agreements Act, and conservation easements under the Conservation Reserve Enhancement Program. The Department of Environment and Natural Resources shall work cooperatively with State and local agencies and qualified nonprofit organizations to monitor compliance with conservation easements and conservation agreements and to ensure the continued viability of the protected ecosystems. Soil and water conservation districts established under Chapter 139 of the General Statutes may acquire easements under the Conservation Reserve Enhancement Program by purchase or gift.

(b) Conveyance of Conservation Lands. — The Department may convey real property or an interest in real property that has been acquired for conservation in perpetuity to a federal agency, State agency, a local government, or a private nonprofit conservation organization in accordance with State law governing the conveyance of real property. The grantee of real property or an interest in real property shall manage and maintain the real property or interest in real property for the purposes set out in subsection (a) of this section. When conveying real property or an interest in real property under this subsection, the Department shall retain a possibility of reverter, a right of entry, or other appropriate property interest to ensure that the real property or interest in real property will continue to be managed and maintained in a manner that protects ecological systems and the appropriate public use of these systems.

(c) Report. — The Department shall report on the implementation of this Article to the Environmental Review Commission no later than 1 November of each year. The Department shall maintain an inventory of all conservation easements held by the Department. The inventory shall be included in the report required by this subsection. (1997-226, s. 6; 1997-443, s. 11A.119(b); 1999-329, s. 6.3; 2002-155, s. 5.)

Effect of Amendments. — Session Laws 2002-155, s. 5, effective October 9, 2002, rewrote the section.

Chapter 114.

Department of Justice.

Article 1.

Attorney General.

§ 114-4.2G: Repealed by Session Laws 2002-168, s. 6, effective October 1, 2002.

Cross References. — As to retention of private counsel by the North Carolina Board of Landscape Architects, see § 89A-3.1(14).

Article 3.

Division of Criminal Statistics.

§ 114-10. Division of Criminal Statistics.

The Attorney General shall set up in the Department of Justice a division to be designated as the Division of Criminal Statistics. There shall be assigned to this Division by the Attorney General duties as follows:

(1) To collect and correlate information in criminal law administration, including crimes committed, arrests made, dispositions on preliminary hearings, prosecutions, convictions, acquittals, punishment, appeals, together with the age, race, and sex of the offender, the necessary data to make a trace regarding all firearms seized, forfeited, found, or otherwise coming into the possession of any State or local law enforcement agency of the State that are believed to have been used in the commission of a crime, and such other information concerning crime and criminals as may appear significant or helpful. To correlate such information with the operations of agencies and institutions charged with the supervision of offenders on probation, in penal and correctional institutions, on parole and pardon, so as to show the volume, variety and tendencies of crime and criminals and the workings of successive links in the machinery set up for the administration of the criminal law in connection with the arrests, trial, punishment, probation, prison parole and pardon of all criminals in North Carolina.

(2) To collect, correlate, and maintain access to information that will assist in the performance of duties required in the administration of

criminal justice throughout the State. This information may include, but is not limited to, motor vehicle registration, drivers' licenses, wanted and missing persons, stolen property, warrants, stolen vehicles, firearms registration, sexual offender registration as provided under Article 27A of Chapter 14 of the General Statutes, drugs, drug users and parole and probation histories. In performing this function, the Division may arrange to use information available in other agencies and units of State, local and federal government, but shall provide security measures to insure that such information shall be made available only to those whose duties, relating to the administration of justice, require such information.

(2a) Recodified as G.S. 114-10.1 by Session Laws 2002-159, s. 18(a).

(3) To make scientific study, analysis and comparison from the information so collected and correlated with similar information gathered by federal agencies, and to provide the Governor and the General Assembly with the information so collected biennially, or more often if required by the Governor.

(4) To perform all the duties heretofore imposed by law upon the Attorney General with respect to criminal statistics.

(5) To perform such other duties as may be from time to time prescribed by the Attorney General.

(6) To promulgate rules and regulations for the administration of this Article. (1939, c. 315, s. 2; 1955, c. 1257, ss. 1, 2; 1969, c. 1267, s. 1; 1995, c. 545, s. 2; 1999-26, s. 1; 1999-225, s. 1; 2000-67, s. 17.2(a); 2001-424, s. 23.7(a); 2002-159, s. 18(a).)

Effect of Amendments. — Session Laws 2002-159, s. 18(a), effective October 11, 2002, recodified former subdivision (2a) as G.S. 114-10.01.

OPINIONS OF ATTORNEY GENERAL

Traffic Stop Information as Public Record. — The identity of a state law enforcement officer making a traffic stop is not a public record, but the location of a traffic stop is a public record. See opinion of Attorney General to Mr. Joseph P. Dugdale, General Counsel, Department of Crime Control & Public Safety, 2000 N.C. AG LEXIS 37 (7/20/2000).

§ 114-10.01. Collection of traffic law enforcement statistics.

(a) In addition to the duties set forth in G.S. 114-10, the Division of Criminal Statistics shall collect, correlate, and maintain the following information regarding traffic law enforcement by law enforcement officers:

(1) The number of drivers stopped for routine traffic enforcement by law enforcement officers, the officer making each stop, the date each stop was made, the agency of the officer making each stop, and whether or not a citation or warning was issued.

(2) Identifying characteristics of the drivers stopped, including the race or ethnicity, approximate age, and gender.

(3) The alleged traffic violation that led to the stop.

(4) Whether a search was instituted as a result of the stop.

(5) Whether the vehicle, personal effects, driver, or passenger or passengers were searched, and the race or ethnicity, approximate age, and gender of each person searched.

(6) Whether the search was conducted pursuant to consent, probable cause, or reasonable suspicion to suspect a crime, including the basis

for the request for consent, or the circumstances establishing probable cause or reasonable suspicion.

(7) Whether any contraband was found and the type and amount of any such contraband.

(8) Whether any written citation or any oral or written warning was issued as a result of the stop.

(9) Whether an arrest was made as a result of either the stop or the search.

(10) Whether any property was seized, with a description of that property.

(11) Whether the officers making the stop encountered any physical resistance from the driver or passenger or passengers.

(12) Whether the officers making the stop engaged in the use of force against the driver, passenger, or passengers for any reason.

(13) Whether any injuries resulted from the stop.

(14) Whether the circumstances surrounding the stop were the subject of any investigation, and the results of that investigation.

(15) The geographic location of the stop; if the officer making the stop is a member of the State Highway Patrol, the location shall be the Highway Patrol District in which the stop was made; for all other law enforcement officers, the location shall be the city or county in which the stop was made.

(b) For purposes of this section, "law enforcement officer" means any of the following:

(1) All State law enforcement officers.

(2) Law enforcement officers employed by county sheriffs or county police departments.

(3) Law enforcement officers employed by police departments in municipalities with a population of 10,000 or more persons.

(4) Law enforcement officers employed by police departments in municipalities employing five or more full-time sworn officers for every 1,000 in population, as calculated by the Division for the calendar year in which the stop was made.

(c) The information required by this section need not be collected in connection with impaired driving checks under G.S. 20-16.3A or other types of roadblocks, vehicle checks, or checkpoints that are consistent with the laws of this State and with the State and federal constitutions, except when those stops result in a warning, search, seizure, arrest, or any of the other activity described in subdivisions (4) through (14) of subsection (a) of this section.

(d) The identity of the law enforcement officer making the stop required by subdivision (1) of subsection (a) of this section may be accomplished by assigning anonymous identification numbers to each officer in an agency. The correlation between the identification numbers and the names of the officers shall not be a public record, and shall not be disclosed by the agency except when required by order of a court of competent jurisdiction to resolve a claim or defense properly before the court.

(e) The Division shall publish and distribute by December 1 of each year a list indicating the law enforcement officers that will be subject to the provisions of this section during the calendar year commencing on the following January 1. (1939, c. 315, s. 2; 1955, c. 1257, ss. 1, 2; 1969, c. 1267, s. 1; 1995, c. 545, s. 2; 1999-26, s. 1; 1999-225, s. 1; 2000-67, s. 17.2(a); 2001-424, s. 23.7(a); 2002-159, s. 18(a), (b).)

Effect of Amendments. — Session Laws 2002-159, ss. 18(a) and (b), effective October 11, 2002, recodified former G.S. 114-10(2a) as this section; added the section heading; and rewrote the section.

ARTICLE 4.

State Bureau of Investigation.

§ 114-12. Bureau of Investigation created; powers and duties.

OPINIONS OF ATTORNEY GENERAL

Chapter 17C Does Not Apply to Director of State Bureau of Investigation. — The Director of the State Bureau of Investigation is legally eligible to take the oath of office reserved to a North Carolina Criminal Justice Officer, even where the director has not met the Chapter 17C education and training requirements, because Chapter 17C does not apply to the Director. See opinion of Attorney General to The Honorable John Glenn, Chairman, The North Carolina Criminal Justice Education and Training Standards Commission, 1999 N.C. AG LEXIS 30 (12/1/99).

§ 114-14. General powers and duties of Director and assistants.

OPINIONS OF ATTORNEY GENERAL

Chapter 17C Does Not Apply to Director of State Bureau of Investigation. — The Director of the State Bureau of Investigation is legally eligible to take the oath of office reserved to a North Carolina Criminal Justice Officer, even where the director has not met the Chapter 17C education and training requirements, because Chapter 17C does not apply to the Director. See opinion of Attorney General to The Honorable John Glenn, Chairman, The North Carolina Criminal Justice Education and Training Standards Commission, 1999 N.C. AG LEXIS 30 (12/1/99).

§ 114-19.1. Criminal history background investigations; fees.

(a) When the Department of Justice determines that any person is entitled by law to receive information, including criminal records, from the State Bureau of Investigation, for any purpose other than the administration of criminal justice, the State Bureau of Investigation shall charge the recipient of such information a reasonable fee for retrieving such information. The fee authorized by this section shall not exceed the actual cost of locating, editing, researching and retrieving the information, and may be budgeted for the support of the State Bureau of Investigation.

(b) As used in this section, "administration of criminal justice" means the performance of any of the following activities: the detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of persons suspected of, accused of or convicted of a criminal offense. The term also includes screening for suitability for employment, appointment or retention of a person as a law enforcement or criminal justice officer or for suitability for appointment of a person who must be appointed or confirmed by the General Assembly, the Senate, or the House of Representatives.

(c) In providing criminal history record checks, the Department of Justice shall process requests in the following priority order:

(1) Administration of criminal justice record checks,

(2) Mandatory noncriminal justice criminal history record checks,

(3) Voluntary noncriminal justice criminal history record checks.

(d) Nothing in this section shall be construed as enlarging any right to receive any record of the State Bureau of Investigation. Such rights are and shall be controlled by G.S. 114-15, G.S. 114-19, G.S. 120-19.4A, and other applicable statutes. (1979, c. 816; 1981, c. 832, s. 1; 1987, c. 867, s. 1; 1995 (Reg. Sess., 1996), c. 606, s. 4; 2002-126, s. 29A.12(a).)

Editor's Note. —

Session Laws 2002-126, s. 1.2, provides: "This act shall be known as 'The Current Operations, Capital Improvements, and Finance Act of 2002'."

Session Laws 2002-126, s. 31.6 is a severability clause.

Effect of Amendments. — Session Laws 2002-126, s. 29A.12(a), effective October 1, 2002, deleted "or as an officer of the court" following "criminal justice officer" in the last sentence of subsection (b).

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